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Notes and Comments

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Accountants—Unauthorized Practice of Law in Federal Tax Matters

A recent California lower court decision, *Agran v. Shapiro*,[1] has rekindled the dispute between lawyers and accountants as to what constitutes the unauthorized practice of law[2] in the federal taxation field, and the issues involved have not yet been settled.[3] These issues are relatively new because of the increasing complexity of federal tax problems in recent years.[4] Although efforts have been made by the lawyers and accountants to settle their disputes,[5] these efforts have been nullified to some extend by such cases as *Agran*, in which the two professions have filed *amicus curiae* briefs.

In order to understand the issues in the *Agran* case, it is necessary to refer to some of the related cases for background purposes. Many cases, concerning laymen, including accountants, in the unauthorized practice controversy, have involved advertising in one form or another,[6] and the courts, especially where the layman has designated himself as a "tax expert" or the like,[7] have prohibited such advertising. This seems to be a fair result since the general practitioner of law cannot advertise or hold himself out to the public as a specialist.[8] Moreover,

[1] Agran v. Shapiro, 273 P. 2d 619 (Cal. App. Dep't 1954). According to 40 A.B.A.J. 775n. (1954), judgment was stayed pending application to the U. S. Supreme Court.

[2] The practice of law embraces conveyancing, the preparation of pleadings and other papers incident to actions and special proceedings, the management of such action and proceeding on behalf of clients before judges and courts, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law. People *ex rel.* Courtney v. Ass'n of Real Estate Taxpayers of Illinois, 354 Ill. 102, 109, 187 N. E. 823, 826 (1933).

[3] The judge, writing the *Agran* opinion, said that the avenue is open for review by the Supreme Court because of the federal constitutional question. Apparently, this question arises because of the conflict between state law and certain federal regulations: 26 U. S. C. A. § 1111, Rule 2 (Supp. 1953), which applies to practice before the Tax Court; and 31 CODE FED. REGS. § 10.2 (f) (1949), which applies to practice before the Treasury Department.

[4] 1 MERTENS, LAW OF FEDERAL INCOME TAXATION iii (1942).

[5] *Statement of Principles Relating to Practice in the Field of Federal Taxation*, 37 A. B. A. J. 517 (1951).

[6] Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N. E. 2d 27 (1943); Gardner v. Conway, 234 Minn. 468, 48 N. W. 2d 788 (1951); Rhode Island Bar Ass'n v. Libutti, 100 A. 2d 406 (R. I. 1953); Chicago Bar Ass'n v. United Taxpayers of America, 312 Ill. App. 243, 38 N. E. 2d 349 (1941).

[7] Lowell Bar Ass'n v. Loeb, *supra* note 6; Chicago Bar Ass'n v. United Taxpayers of America, *supra* note 6; Gardner v. Conway, *supra* note 6.

[8] Mandelbaum v. Gilbert & Barker Mfg. Co., 169 Misc. 656, 290 N. Y. Supp. 462 (N. Y. City Ct. 1936); Gardner v. Conway, *supra* note 6; THE CANONS OF PROFESSIONAL ETHICS OF THE AMERICAN BAR ASSOCIATION, §§ 27, 45 (1954).

the members of the American Institute of Accountants do not contest these rulings.[9]

Also closely allied to the main issues in the principal dispute are those cases where laymen, not necessarily within the three classes of accountants,[10] and corporations have participated in the adjustment of state or municipal tax assessments. Thus, where a layman or a corporation attempted to reduce property tax assessments,[11] to reduce sales taxes,[12] to recover illegally collected occupation taxes,[13] or to advise in a tax foreclosure suit,[14] the courts have held that these laymen and corporations were practicing law and as a result have declared their contracts void for illegality,[15] have held these laymen in contempt of court,[16] have enjoined such practices,[17] and have found them guilty of a misdemeanor.[18]

Where laymen are permitted to represent their clients under the rules of certain state administrative boards,[19] some courts have held that it does not matter whether the unauthorized practice was done in the office, before a court, or before an administrative tribunal. The real test, according to these courts, is "the character of the act done, and not the place where it is committed."[20] The fact that the administrative tribunals permit laymen to practice before them is of no avail according to these courts, because it is the inherent power of the judiciary to define and regulate the practice of law; and the legislature

[9] *Statement of Principles Relating to Practice in the Field of Federal Taxation*, 37 A. B. A. J. 517 (1951); BY-LAWS, NORTH CAROLINA ASS'N OF CERTIFIED PUBLIC ACCOUNTANTS, INC., Art. XVII, § 2 (1952).

[10] These classes are: (a) certified public accountants (authorized by law to use their title to certify financial statements); (b) public accountants; and (c) bookkeepers and others. 17 UNAUTHORIZED PRACTICE NEWS 3 (Dec. 1951).

[11] Bump v. District Court of Polk County, 232 Iowa 623, 5 N. W. 2d 914 (1942); Stack v. P. G. Garage, Inc., 7 N. J. 118, 80 A. 2d 545 (1951); Kountz v. Rowlands, 46 Pa. D. & C. 461 (1943); People *ex rel.* Courtney v. Ass'n of Real Estate Taxpayers of Illinois, 354 Ill. 102, 187 N. E. 823 (1933).

[12] Mandelbaum v. Gilbert & Barker Mfg. Co., 160 Misc. 656, 290 N. Y. Supp. 462 (N. Y. City Ct. 1936).

[13] Chicago Bar Ass'n v. United Taxpayers of America, 312 Ill. App. 243, 38 N. E. 2d 349 (1941).

[14] State *ex rel.* Hunter v. Daugherty, 136 Neb. 490, 286 N. W. 783 (1939).

[15] Mandelbaum v. Gilbert & Barker Mfg. Co., 160 Misc. 656, 290 N. Y. Supp. 462 (N. Y. City Ct. 1936); Stack v. P. G. Garage, Inc., 7 N. J. 118, 80 A. 2d 545 (1951).

[16] Bump v. District Court of Polk County, 232 Iowa 623, 5 N. W. 2d 914 (1942); State *ex rel.* Hunter v. Daugherty, 136 Neb. 490, 286 N. W. 783 (1939); People *ex rel.* Courtney v. Ass'n of Real Estate Taxpayers of Illinois, 354 Ill. 102, 187 N. E. 823 (1933).

[17] Kountz v. Rowlands, 46 Pa. D. & C. 461 (1943); Chicago Bar Ass'n v. United Taxpayers of America, 312 Ill. App. 243, 38 N. E. 2d 349 (1941).

[18] Stack v. P. G. Garage, Inc., 7 N. J. 118, 80 A. 2d 545 (1951).

[19] People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N. E. 2d 941 (1937) (industrial commission); Chicago Bar Ass'n v. United Taxpayers of America, 312 Ill. App. 243, 38 N. E. 2d 349 (1941) (department of finance).

[20] People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 357, 8 N. E. 2d 941, 947 (1937).

can only make provisions to punish those acts which the judiciary has found to constitute the unauthorized practice of law.[21] However, other cases hold that since the legislature cannot tell the judiciary who shall be attorneys, the courts cannot tell the administrative boards whom they shall receive before them when these boards have the power to formulate their own rules.[22]

In the field of federal taxation the problem of what constitutes the unauthorized practice of law becomes more complicated. "The ascertainment of probable tax effects of transactions frequently is within the function of either a certified public accountant or a lawyer."[23] Apparently the two professions were in accord that when these ascertainments raise uncertainties over the interpretation of tax or general law, the accountant should advise his client to enlist the aid of a lawyer.[24] However, a sharp line cannot be drawn here because the accountant, in order to work effectively with figures, must have an adequate acquaintance with departmental rulings and judicial decisions which federal taxation has produced.[25]

The state courts have gone so far as to permit the accountant or layman to fill out simple income tax returns.[26] However, where the layman, incidental to the preparation of the return, solved "knotty questions of law," such as deciding whether a man could file a joint return with his common-law wife and whether she could be a partner in his trucking business when he had control but shared the profits,[27] advised as to the tax advantages and disadvantages of corporations and partnerships, merger and dissolution of corporations, and the increase and decrease of capital stock,[28] advised modification of contracts, interpreted laws, and gave opinions to effect compliance with the tax laws,[29] the state courts have held this to be the unauthorized practice of law.

The *Agran* case followed the "knotty question of law" test. The plaintiff, who was the auditor and accountant for a corporation owned

[21] *In re* Opinion of the Justices, 289 Mass. 607, 194 N. E. 313 (1935); *See* People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 352, 8 N. E. 2d 941, 947 (1937).

[22] Eagle Indemnity Co. v. Industrial Accident Commission of California, 217 Cal. 244, 18 P. 2d 341 (1933); Comment, 35 MICH. L. REV. 442 (1937); *accord,* Rhode Island Bar Ass'n v. Libutti, 100 A. 2d 406 (R. I. 1953).

[23] *Statement of Principles Relating to Practice in the Field of Federal Taxation,* 37 A. B. A. J. 517, 537 (1951).

[24] *Ibid.*

[25] *See* Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 183, 52 N. E. 2d 27, 32 (1943).

[26] Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N. E. 2d 27 (1943); Blair v. Motor Carriers Service Bureau, Inc., 40 Pa. D. & C. 413 (1939).

[27] Gardner v. Conway, 234 Minn. 468, 48 N. W. 2d 788 (1951).

[28] Blair v. Motor Carriers Service Bureau, Inc., 40 Pa. D. & C. 413 (1939).

[29] Application of New York County Lawyers Ass'n *In re* Standard Tax & Management Corp., 43 N. Y. S. 2d 479 (Sup. Ct. 1943).

by the defendant, prepared the defendant's individual tax returns. He sued the defendant for the services rendered to him as an individual,[30] which services consisted of advising the defendant on certain carry-back losses and subsequent conferences with revenue agents which ultimately led to a reduction of the amount due the government by the defendant. The court held the contract void for illegality on the ground that the advice involved the question whether the loss could be carried back, and this in turn depended on whether it was a loss attributable to the operation of a trade or business regularly carried on by the taxpayer within the meaning of that phrase as used in the Internal Revenue Code.

The *Agran* decision and the *Gardner v. Conway*[31] decision, by their holdings and dicta, rejected the "incidental" test which was used by an intermediate New York court. The New York court held Bercu, a certified public accountant, guilty of contempt of court when he advised a corporation that it could take certain unpaid 1935-1937 city taxes as deductions if paid in 1943 even though the company was on the accrual basis.[32] The court, basing its decision on the necessity of protecting the public against incompetent legal service, held that since Bercu was not the company's regular auditor, he could not be called in for a fee to interpret the law. However, the court implied that if Bercu had been the company's regular auditor, he could have solved this question as an incident of that regular job without being in contempt of court.

The *Agran, Bercu,* and *Gardner* cases by necessity deal directly or indirectly with federal administrative rules in the federal tax field. The Federal Administrative Procedure Act does not "grant or deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding,"[33] but specific statutes[34] give the Tax Court and the Treasury Department the right to make their own rules of procedure. The Tax Court permits laymen to argue before it on the conditions that they be of good moral character and pass a written and sometimes oral examination, while a lawyer is automatically admitted if he is a member in good standing of the bar of the highest court in his state or the Supreme Court of the United

[30] Agran v. Shapiro, 273 P. 2d 619 (Cal. App. Dep't 1954). Plaintiff sued for $2,000.00. The court reversed and remanded, saying that the plaintiff could not recover for services which were illegal but that he could recover the value of the services which were legal.

[31] Gardner v. Conway, 234 Minn. 468, 48 N. W. 2d 788 (1951).

[32] Application of New York County Lawyers Ass'n *In re* Bercu, 273 App. Div. 524, 78 N. Y. S. 2d (1st Dep't 1948), *aff'd without opinion,* 299 N. Y. 728, 87 N. E. 2d 451 (1949).

[33] 60 STAT. 237 (1946), 5 U. S. C. § 1005a (1952).

[34] 53 STAT. 159 (1939), 26 U. S. C. § 1111 (1952) (Tax Court); 23 STAT. 258 (1884), 5 U. S. C. § 261 (1952) (Treasury Department).

States.[35] The latter Court has upheld the power of the Tax Court to make such a rule.[36] The rule of the Treasury Department gives any properly enrolled agent, including accountants, the same rights, powers and privileges that enrolled lawyers have before the Department. However, enrolled agents cannot prepare any instrument which transfers title to personal or real property for the purpose of affecting federal taxes, "nor shall such enrolled agent advise a client as to the legal sufficiency of such an instrument or its legal effect upon the federal taxes of such client: and provided further, that nothing in the regulation in this part shall be construed as authorizing persons not members of the bar to practice law."[37] Relying on the last phrase, the court in the *Agran* case held the contract void for illegality.

The most important issue between the lawyers and the accountants is whether the federal administrative rules are binding on the state courts. The Florida court has held that a person who was admitted to practice before the Tax Court, the Treasury Department, and the Supreme Court of the United States could not practice as a federal tax counsel in Florida unless he was a member of the Florida bar, even though the federal agencies before which he intended to practice permitted him to do so.[38] The Missouri court, on the other hand, held that a layman, who was permitted to practice before the Interstate Commerce Commission under the rules of that agency, could collect for services rendered to his client even though such a contract was void under the state's public policy protecting the public against incompetent legal service. The court said that the contract was made legal by federal law, and if the court declared the contract void for illegality, it would be interfering with a federal function.[39]

The Supreme Court of the United States, if and when it decides the issues presented in such cases as *Agran,* will be faced with the problem of whether states, by court action, can interpret federal administrative regulations so as to deprive the accountants of their federal right to advise their clients in federal tax matters. Sooner or later, the Supreme Court will be faced with a case where the accountant is admitted to practice before the Tax Court, but who has been barred from that practice by a state court, even though the rules of the Tax Court do not contain a clause saying that nothing shall be construed

[35] 26 U. S. C. A. § 1111, Rule 2 (Supp. 1953).

[36] Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117 (1926), where the plaintiff sought a writ of mandamus to compel defendant to admit him to practice before the defendant, whose rules, at that time gave the Board discretion to refuse any certified public accountant the right to practice before it.

[37] 31 CODE FED. REGS. § 10.2 (f) (1949).

[38] Petition of Kearney, 63 So. 2d 630 (Fla. 1953).

[39] De Pass v. Harris Wool Co., 346 Mo. 1038, 144 S. W. 2d 146 (1940); *In re* Lyon, 301 Mass. 30, 16 N. E. 2d 74 (1938); *accord,* Brooks v. Mandel-White Co., 54 F. 2d 992 (2nd Cir. 1932).

to permit a person not a member of the bar to practice law. Then the Court will have to decide whether the federal regulations are superior to state public policy.

If the Supreme Court hears the *Agran* case, it could follow the *Bercu* test and hold that since Agran was the defendant's regular accountant, he could solve legal problems incidental to the preparing of the defendant's return. If the Court rejects the *Bercu* test it could hold with *Agran's* "knotty question of law" test, but would have to interpret the regulations involved. The difficult question, as related to the *Agran* case, is whether the Treasury Department rule which says "that nothing in the regulation . . . shall be construed as authorizing persons not members of the bar to practice law" forbids Agran to give the type of advice he gave. The state courts by their interpretation of this clause, have practically limited the accountant to filling out simple income tax returns. The Court could find that by such an interpretation the rights and privileges granted to laymen under the regulation are practically nullified because it is rare that a taxpayer, who files a simple income tax return, would need representation of any kind before the Treasury Department.

Furthermore, if the issues presented in the *Agran* case are ever argued before the Court, it will undoubtedly uphold the right of the Tax Court and the Treasury Department to make their own rules, and it would seem that the Court would also say that the federal law in this field is superior to state public policy because the representation of federal taxpayers must be free from state interference.

Public policy prohibition of incompetent legal service is the basis upon which the state courts have refused to allow the accountants to interpret "questions of law" in the federal income tax field; but as a practical matter taxable business income is, to a large extent, determined by such accounting factors as inventory pricing, capital transactions, prepaid income and expenses, depreciation and bad debt write-offs. The protection of the public is, indeed, a very important consideration in these cases; consequently, the courts should consider the dual cost to the taxpayer of paying an accountant and a lawyer for advice that is not exclusively of a legal nature.[40] A bill[41] has been submitted to Congress, which if passed, would alleviate this problem by allowing properly enrolled accountants to engage in the settlement of

[40] According to the American Institute of Accountants, 55,960,236 income tax returns were filed during the fiscal year of 1952. Out of this number, 9,400 cases required discussion for settlement at upper levels of the Revenue Service, 1,200 cases were decided in the Tax Court, and only 636 were decided in courts of law.

[41] H. R. 9922, 83rd Cong., 2nd Sess. (1954).

their clients' tax liability with the Internal Revenue Service on a more extensive basis than the state courts now permit.

HERBERT S. FALK, JR.

Constitutional Law—Due Process—State Jurisdiction over Foreign Corporations for Collection of Use Taxes

Defendant, a Delaware corporation, occasionally sold furniture to Maryland residents who came to defendant's Delaware store to make purchases. Some of the purchases were consigned to Maryland addresses and shipped by common carrier, while others were delivered directly to Maryland customers by defendant's truck. Defendant was not qualified or registered to do business in Maryland, maintained no branch office or agencies there, and solicited no orders from Maryland residents through traveling salesmen, mail or telephone. The Maryland Court of Appeals ruled that the Delaware corporation was engaged in business in the state within the meaning of the Maryland use tax statute,[1] and consequently liable for the collection of the use tax[2] from its Maryland customers.[3] In reversing the Maryland court, the United States Supreme Court (four justices dissenting) held that Maryland had no jurisdiction over defendant corporation, and, therefore, to require it to collect a use tax was a violation of due process.[4]

In previous cases, the Supreme Court has ruled that a state may

[1] MD. ANN. CODE, art. 81 § 371 (1951) provides: "Every vendor engaged in business in this state and making sales of tangible personal property for use, storage or consumption in this state which are taxable under the provisions of this subtitle, at the time of making such sales, or if the use, storage or consumption becomes taxable hereunder, shall collect the tax imposed by this sub-title from the purchaser." 368(k) of the same act defines the term "engaged in business in this state" as selling or delivering in the state, or any activity in connection therewith, tangible personal property for use, storage or consumption within the state.

[2] The purpose of the use tax is to complement and support the sales tax, usually in two respects. First, it protects state merchants from competition with out-of-state merchants whose sales are not taxed, and second, it prevents the loss of state revenue by removing from its residents the advantage of non-taxed out-of-state purchases.

[3] Miller Brothers v. State of Maryland, 201 Md. 535, 95 A 2d 286 (1953). Maryland entered suit against defendant to recover use taxes assessed by the state comptroller and attached a station wagon belonging to defendant. Defendant filed a petition to quash the writ of attachment on the grounds that the assessment was unconstitutional. In holding that the defendant was subject to the use tax statute the court relied on the fact that it delivered merchandise to purchasers in Maryland. Other factors advanced on argument for holding defendant liable were as follows: (a) Defendant delivered some purchases to common carriers consigned to Maryland addresses. (b) It occasionally mailed sales circulars to all former customers, including Maryland customers. (c) It advertised with Delaware papers and radio stations knowing that such advertisements would reach Maryland inhabitants.

[4] Miller Brothers v. State of Maryland, 347 U. S. 340, 342 (1954): "Seizure of property by the state under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law."

require a foreign corporation to collect a use tax on goods destined for the use of residents of the taxing state, where the vendor shipped to an agent in the state for delivery,[5] engaged in intrastate business as well as interstate activities there,[6] rented offices for general agents within the state,[7] or merely dispatched soliciting agents thereto.[8]

Likewise, the Court has sustained statutes making foreign corporations liable for the collection of a sales tax where they maintained offices in the taxing state.[9] But the Court reached a different conclusion as to a sales tax in *McLeod v. Dilworth*,[10] the apparent distinction

[5] Monomotor Oil Co. v. Johnson, 292 U. S. 86 (1934).

[6] Nelson v. Sears Roebuck & Co., 312 U. S. 359 (1941); Nelson v. Montgomery Ward & Co., 312 U. S. 373 (1941). The question in these cases was whether Iowa could require the companies involved to collect a use tax on orders sent directly from Iowa customers to out-of-state mail order houses and filled by shipment direct to those purchasers by mail or common carrier. In holding that the state could do so, the Court took the view that the mail order business was a general business being done as a whole through the companies' local stores and otherwise in the state; and also, since the sellers were doing business in the state, they were subject to its territorial jurisdiction.

[7] Felt and Tarrent Mfg. Co. v. Gallagher, 306 U. S. 62 (1939). Agents in this case had the exclusive right to solicit orders in California, and had authority to employ sub-agents. Sometimes orders were filled by shipment from the out-of-state office directly to the customer, and at other times shipment was made to the agents for subsequent delivery.

[8] General Trading Co. v. State Tax Comm'n of Iowa, 322 U. S. 335 (1944). Defendant was not qualified to do business in Iowa and maintained no office or permanent agents therein. The extent of its activity consisted of sending traveling salesmen from Minnesota into Iowa where they solicited orders subject to acceptance or rejection at the Minnesota office. Orders were filled by shipping merchandise to Iowa customers by common carrier or mail. This case is generally regarded as the Supreme Court's most liberal extension of the power of a state over an out-of-state corporation with respect to making it a collector of the use tax. For a discussion of the case see, Note, 57 HARV. L. REV. 1086 (1944) and Roesken, *State Jurisdiction over Foreign Corporations for Collection of Use Taxes*, 22 TAXES 296 (1944). To date, at least two states have indicated reluctance to follow the *General Trading Co.* case: In Creamery Package Mfg. Co. v. State Board of Equilization, 62 Wyo. 265, 166 P. 2d 952 (1946), the Wyoming court distinguished a similar fact situation in finding that the Wyoming use tax statute did not define "retailers doing business within the state" to include foreign corporations dispatching agents into the state; and in Richmond Crosby Co. v. Stone, 204 Miss. 122, 37 So. 2d 22 (1948), the Mississippi court held that the procedural rule that a corporation must be doing business within the state for the purpose of service of process, prevented the state from having jurisdiction over the plaintiff corporation, the reasoning being that Mississippi decisions do not consider that the mere presence of soliciting agents within a state constitutes doing business within the procedural rule. But for an indication that the procedural rule may be losing force, see Travelers Health Association v. Virginia, 339 U. S. 643 (1950); International Shoe Co. v. Washington, 326 U. S. 311 (1945); Johns v. Bay State Abrasive Product Co., 89 F. Supp. 654 (1950); Compania de Astral, S. A. v. Boston Metals Co., 107 A. 2d 357 (Md. 1954); Kneeland v. Ethicon Suture Labs., 257 P. 2d 727 (Cal. App. 1st Dist. 1953); Jeter v Austin Trailer Equip. Co., 265 P. 2d 130 (Cal. App. 2d Dist. 1954). *The General Trading Co.* case was applied favorably in People v. West Pub. Co., 35 Cal. 2d 80, 216 P. 2d 441 (1950).

[9] McGoldrick v. Berwind White Coal Mining Co., 309 U. S. 33 (1940); McGoldrick v. Felt and Tarrant Mfg. Co., 309 U. S. 70 (1940).

[10] 322 U. S. 327 (1944). The only differenuce between the facts of this case and those of General Trading Co. v. State Tax Comm'n of Iowa, 322 U. S.

being that in the former cases the transfer of title and consummation of sale took place within the taxing state; whereas, in the latter case, title was found to pass upon delivery to the carrier in the vendor's state.

In addition to the due process problem, a major barrier which the states had to overcome in all of these cases was the question of the effect of the statutes with respect to the commerce clause. The general rule is that a state must not impose an undue burden on interstate commerce.[11] Thus, among other things, a state is prevented from singling out interstate commerce for special tax burdens;[12] subjecting it to cumulative taxes of similar nature;[13] taxing the privilege of engaging in interstate commerce;[14] and discriminating against interstate commerce in favor of its local trade.[15]

A tax may fall if it affects interstate commerce in any of the above mentioned ways, even when there is sufficient contact between the taxed incident and the taxing state to satisfy the due process requirement.

335 (1944), is that the tax involved in the *General Trading Co.* case was a use tax, while here the tax involved was a sales tax. Obviously, it is a case where the Court looked more at the labels than the economic incidents of the two taxes. *See* McLeod v. Dilworth, 322 U. S. 327, 332 (1944) (dissenting opinion); McLeod v. Dilworth, 322 U. S. 327, 349 (1944) (Mr. Justice Rutledge combines dissenting opinion in the *Dilworth* case and concurring opinion in the *General Trading Co.* case.)

[11] "Despite mechanical or artificial distinctions sometimes taken between the taxes deemed permissible and those condemned, the decisions appear to be predicated on a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage." Galveston, H. & S. A. R. R. v. Texas, 210 U. S. 217, 227 (1908) (dissenting opinion).

[12] McGoldrick v. Berwind White Coal Mining Co., 309 U. S. 33 (1940).

[13] International Paper Co. v. Massachusetts, 246 U. S. 135 (1918); Looney v. Crane, 245 U. S. 178 (1917); Atchison, T. & S. F. R. R. v. O'Connor, 223 U. S. 280 (1911); Western Union Tel. Co. v. Kansas, 216 U. S. 1 (1909). In these cases the Court held that a license fee based on a percentage of the entire capital stock of a corporation engaged in interstate commerce was an undue burden, since each state in which the corporation did business could impose a tax measured by all of its interstate business. The Court has also struck down taxes on gross receipts derived from interstate business on the theory that every state in which the corporation engaged in business could similarly tax its gross receipts. Gwin, White, & Prince v. Hennefore, 305 U. S. 434 (1939); J. F. Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938); Galveston, H. & S. A. R. R. v. Texas, 210 U. S. 217 (1908); Philadelphia & S. M. Steamship Co. v. Pennsylvania, 122 U. S. 326 (1887); Fargo v. Michigan, 121 U. S. 230 (1887). But taxes have been sustained when apportioned to capital resulting from intrastate business. Ford Motor Co. v. Beauchamp, 308 U. S. 331 (1939); International Shoe Co. v. Shartel, 279 U. S. 429 (1929); National Leather Co. v. Massachusetts, 277 U. S. 413 (1928). In International Harvester Co. v. Dep't of Treasury, 322 U. S. 340 (1944), and Dep't of Treasury v. Wood Preserving Co., 313 U. S. 62 (1941), the Court refused to consider the problem of cumulative taxation in holding that a state could tax gross receipts from interstate transactions taking place within its borders.

[14] Pacific Tel. & Tel. Co. v. Tax Comm'n of Washington, 297 U. S. 403 (1936).

[15] Voight v. Wright, 141 U. S. 62 (1891).

So, though somewhat overlapping, the questions of due process and the commerce clause are not identical.[16]

In the instant case, the Court did not rule on the commerce question, but based the decision on its opinion that the conduct of the Delaware corporation was not of such character as to bring it within Maryland's taxing power. In dissenting, Mr. Justice Douglas (The Chief Justice, Mr. Justice Black and Mr. Justice Clark concurring) urged that the defendant's frequent delivery of goods into Maryland, its knowledge as to the destination of goods shipped by common carrier, and its regular injection of advertising into media reaching Maryland residents established sufficient contact with the state to form a basis for requiring the defendant to collect the tax.

The principle that in such case there must be some intrastate activity on the part of the foreign vendor appears fundamental. But the members of the Court disagree as to the degree of activity necessary, and decisions to date fail to establish any clear-cut formula for determining when intrastate activities are sufficient for jurisdictional purposes.[17] Perhaps, in speaking of the lack of invasion and exploitation of the consumer market in the instant case, Mr. Justice Jackson gives some indication as to a very important part of the test,[18] and it may well be that some form of aggressive, active competition with the local market, coupled with an entry such as in the instant case, would establish the necessary jurisdiction. Such a test is consistent with previous decisions,[19] and might be justified on the theory that the state is entitled to compensation for furnishing a market in which the out-of-

[16] McLeod v. Dilworth, 322 U. S. 327, 349, 353 (1944) (Mr. Justice Rutledge combines dissenting opinion in the Dilworth case and concurring opinion in the *General Trading Co.* case).

[17] It should be noted that discussion here is limited to activities which bring a foreign corporation within a state's jurisdiction with respect to collecting the use tax. For a discussion of intrastate activities sufficient to require a foreign corporation to domesticate as compared with those sufficient for service of process, see Note, 45 MICH. L. REV. 218 (1946). Recent Supreme Court extensions of the procedural rule that a foreign corporation must be doing business within a state for purpose of service of process are discussed in Note, 7 ARK. L. REV. 403 (1953); Note, 64 HARV. L. REV. 500 (1951).

[18] In distinguishing *General Trading Co.*, where soliciting agents were sent into the taxing state, Mr. Justice Jackson said, "The Court could properly approve the state's decision to regard such rivalry with its local merchants as equivalent to being a local merchant. But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than incidental effects of general advertising. Here was no invasion or exploitation of the consumer market in Maryland. On the contrary, these sales resulted from purchasers traveling from Maryland to Delaware to exploit its less tax-burdened selling market." Miller Brothers v. Maryland, 347 U. S. 340, 347 (1954).

[19] In all cases cited in footnotes 4 through 7, there was local solicitation in some form.

state corporation receives the same benefits and protection as intrastate vendors.[20]

If such an analysis is correct, the decision should have little practical effect upon the present administration and collection of use taxes,[21] because the way will have been left open to impose tax collecting obligations on foreign corporations which make deliveries into a taxing state after encroaching upon its markets by inducing (e.g., by direct advertising, mail and telephone solicitation, etc.) its customers to cross the state line for tax-saving purposes. On the other hand, if this decision means that such corporations may now escape liability, its effect will no doubt be to increase the number of merchants seeking to capitalize on the sales tax of neighboring states at the expense of the local market, thereby further increasing the difficulties of administration and collection of the use tax.

WILLIAM E. GRAHAM, JR.

Constitutional Law—Equal Protection Clause—Exclusion of a Class from Jury Service

Twenty years ago the United States Supreme Court decided that discrimination of a nature prohibited by the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution[1] occurs when it is shown by a Negro defendant that for a generation or longer no person of African descent has been called for jury service although qualified Negroes are available within the county wherein the trial is held.[2] The rule is sometimes referred to as the "Norris" rule.

Recently in *Hernandez v. Texas*,[3] the Court was faced with the

[20] In People v. West Pub. Co., 35 Cal. 2d 80, 91, 216 P. 2d 441, 448 (1950), the California Supreme Court held the defendant publishing company liable for the collection of the use tax where it maintained offices and soliciting agents within the state. In so holding, the court used the following language: "The state provided a market in which appellant operated in competition with local law book publishers, and its salesmen received the same protection and other benefits from the state as salesmen carrying on business activities for a company engaged in intrastate business."

[21] Of course, the decision might have some effect because the collection of the use tax through the vendor is the most effective method of enforcing the tax and the decision exempts one class of foreign vendors from that responsibility. However, at present few state statutes are as broad as the Maryland statute in defining companies "engaged in business within the state," but they are, for the most part, directed at foreign corporations maintaining places of business within the state or engaging in some form of local solicitation or advertising.

[1] U. S. CONST. AMEND. XIV, § 1. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[2] Norris v. Alabama, 294 U. S. 587 (1935). No Negro had served on the jury within the memory of witnesses who had lived in the county for life. The pronounced rule is one of presumption, and may be overcome by a sufficient showing of facts by the state.

[3] 74 Sup. Ct. 667 (1954).

question of whether the rule should be extended to cover nationalities as well as races.

In this case the defendant, an American citizen of Mexican descent, was indicted for murder, tried and convicted. In his appeal to the Texas Court of Criminal Appeals he stated that no person of Mexican extraction had served on a county grand jury or petit jury for the past twenty-five years, although qualified persons of Mexican descent resided within the county. Though unable to prove actual discrimination, the defendant insisted that the "Norris" test should be applied to prove his allegations. Countering, the state maintained that the rule applied only to members of different races, and that since persons of Mexican descent are primarily members of the white race no presumption of discrimination should be found. The defendant's conviction was affirmed,[4] and the United States Supreme Court granted certiorari.[5]

Mr. Chief Justice Warren, speaking for a unanimous Court, reversed the conviction, holding: (1) that the state court erred in limiting the application of the Equal Protection Clause of the Fourteenth Amendment to the white and Negro races; (2) that the "Norris" rule applied; and (3) that the state had failed to rebut the prima facie showing of discrimination.

By way of background, the Supreme Court has long held that a state may not pass a law prohibiting Negroes from serving on juries.[6] "Whenever by any action of a state, whether through its legislature, through its courts or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as . . . jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him. . . ."[7]

The list of persons from which the jury is to be drawn must contain a cross-section of the defendant's community.[8] However, there is no

[4] Hernandez v. Texas, 251 S. W. 2d 531 (Tex. Crim. App. 1952).
[5] Hernandez v. Texas, 346 U. S. 811 (1953).
[6] Bush v. Kentucky, 107 U. S. 110 (1882). Neal v. Delaware, 103 U. S. 370 (1880), involved a statute whereby qualified voters could serve as jurors, and by the Delaware Constitution only whites could vote. Strouder v. West Virginia, 100 U. S. 303 (1879).
[7] Carter v. Texas, 177 U. S. 442,447 (1900). Here the trial court refused to hear witnesses offered by the defendant to prove his allegation of discrimination. In Rogers v. Alabama, 192 U. S. 226, 231 (1904), the court refused to pass on the question of the defendant's rights under the Alabama Constitution on a motion to quash the indictment. Gibson v. Mississippi, 162 U. S. 565 (1896), involved the Mississippi constitutional provision that no person could be a juror unless a qualified voter, able to read and write. See also Neal v. Delaware, *supra* note 6.
[8] Thiel v. Southern Pacific Co., 328 U. S. 217, 220 (1946). "The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community."

guaranty to him of a jury composed entirely of members of his own race,[9] nor even a mixed jury.[10] But jury commissioners may not limit those from whom juries are selected to persons of their own personal acquaintance, for "if there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand."[11] It is a commissioner's duty to familiarize himself "with the qualifications of the eligible jurors of the county without regard to race or color."[12]

Where the evidence introduced by the defendant shows only that no Negro served on the grand jury that indicted and the petit jury that tried him, a motion to quash the indictment based on alleged discrimination is properly denied.[13] But a prima facie case is made out upon a showing of long continued, systematic exclusion of Negroes.[14] Uncontroverted affidavits are sufficient to show a systematic and arbitrary exclusion because of race or color.[15] And, where white and yellow tickets were used by jury commissioners, for the white and Negro races respectively, and no Negro appeared on the jury panel, though qualified members of that race resided in the county, a prima facie case of discrimination was established.[16]

Discrimination against members of a defendant's political party has been held unconstitutional.[17] So too, where there was deliberate and

[9] Preleau v. United States, 271 Fed. 361 (D. C. Cir. 1921).

[10] Akins v. Texas, 325 U. S. 398 (1945); Martin v. Texas, 200 U. S. 316 (1906) (the defendant demanded a mixed jury as a matter of right); Virginia v. Rives, 100 U. S. 313 (1879) (the defendant moved that the venire, which was composed entirely of whites, be modified so as to allow one third thereof to be composed of Negroes.).

[11] Smith v. Texas, 311 U. S. 128, 132 (1940). Jury commissioners testified that the reason they failed to select Negroes was that they did not know the names of any who were qualified.

[12] Cassell v. Texas, 339 U. S. 283, 289 (1950).

[13] Smith v. Mississippi, 162 U. S. 592 (1896). See Thomas v. Texas, 212 U. S. 278 (1909); Martin v. Texas, 200 U. S. 316 (1906).

[14] Norris v. Alabama, 294 U. S. 587 (1935); Cassell v. Texas, 339 U. S. 282 (1950) (out of twenty-one grand juries, only a few contained one Negro, while seven per cent of the eligible voters were Negroes); Patton v. Mississippi, 332 U. S. 463 (1947) (one third of the population was Negro, but none had served on the grand jury for thirty years); Hill v. Texas, 316 U. S. 400 (1942) (8,000 of the 66,000 poll tax payers in the county were Negroes); Smith v. Texas, 311 U. S. 128 (1940) (for seven years, during which time thirty-two grand juries had been called, only five Negroes served, while twenty per cent of the population was Negro). See Pierre v. Louisiana, 306 U. S. 345 (1939).

[15] Hale v. Kentucky, 303 U. S. 613, 616 (1938).

[16] Avery v. Georgia, 345 U. S. 559 (1953). The Court made no mention of the rule that there has to be shown a systematic exclusion.

[17] Kentucky v. Powers, 139 Fed. 452 (C. C. E. D. Ky. 1905), *rev'd on other grounds*, 201 U. S. 1 (1906). The defendant, a Republican, was charged with the crime of being an accessory before the fact to murder. He had been convicted by the trial court three times, and on each occasion the appellate court sent the case back for a new trial due to error. He petitioned for removal to the federal court, on the ground that he had a right to be tried by jurors without discrimination against those who belonged to the same political class to which he belonged, to wit, Republican, and that members of that class had been excluded,

systematic exclusion of members of a particular religious faith,[18] and where wage earners were arbitrarily excluded from service on a jury panel,[19] discrimination was found. The systematic and intentional exclusion of women from grand or petit jury panels in a federal district court was held to warrant a dismissal of an indictment against a woman charged with a federal offense.[20] The Constitution, however, does not prohibit a state from excluding from jury service certain occupational groups,[21] and the use of a special or "Blue Ribbon" jury in counties of one million or more people in certain classes of cases does not on its face deny equal protection of the laws.[22]

As to procedural aspects, one who wishes to avail himself of the defense that there was discrimination in the selection of the jurors who indicted or tried him should raise the constitutional question in the state court during the trial, and if overruled should appeal to the highest state court. If he fails to do so, he cannot have the adverse decision reviewed by a federal court.[23] Generally a challenge to the array before trial is used to quash the indictment,[24] or a motion is

denying him his right to the equal protection of the laws guaranteed by the Fourteenth Amendment. The petition was denied and the case came before the federal court on a motion for habeas corpus to remove him from the custody of the state and put him in the custody of the United States. In granting the motion the federal court stated that the defendant was entitled to such removal upon a showing of such discrimination.

[18] Juarez v. State, 102 Tex. Crim. App. 297, 277 S. W. 1091 (1925). (Criminal prosecution for selling liquor, in a state court, and the defendant petitioned to have the indictment set aside because Roman Catholics had been excluded from jury service, and that he was a member of that denomination, and that such exclusion denied him his equal rights under the Fourteenth Amendment. Held: it was the duty of the court to hear the evidence and if such discrimination were found the indictment should have been set aside.)

[19] Thiel v. Southern Pacific Co., 328 U. S. 217 (1946). This was a civil action brought in a federal court under the Federal Employers Liability Act. The exclusion of daily wage earners from the jury panel was held to be reversible error, not on constitutional grounds, but on the ground of improper administration of the jury system in the federal courts.

[20] Ballard v. United States, 329 U. S. 187, 195 (1946). The woman had violated a federal criminal statute and the Court said that in a state where women are permitted to serve as jurors under local law, a federal jury panel from which women are intentionally and systematically excluded is not properly constituted and the Court will exercise its power of supervision over the administration of justice in the federal courts to correct the error. The Court was upholding the tradition that trial by jury contemplates an impartial jury from a cross-section of the community.

[21] Rowlings v. Georgia, 201 U. S. 638 (1906). If the exclusion of the class is for the good of the community, then the law is proper. (Statute excluded from jury service lawyers, ministers, preachers, doctors, dentists, railroad firemen and engineers).

[22] Fay v. New York, 332 U. S. 261, 271 (1947). "In a metropolis with notoriously congested court calendars we cannot find it constitutionally forbidden to set up procedures in advance of trial to eliminate from the jury panel those who, in a large proportion of cases, would be rejected by the court after its time had been taken in examination to ascertain their disqualifications."

[23] *In re* Wood, 140 U. S. 278 (1891).

[24] Hill v. Texas, 316 U. S. 400, 406 (1942); Smith v. Texas, 311 U. S. 128, 130 (1940); Gibson v. Mississippi, 162 U. S. 565, 584 (1896).

made to quash the trial jury panel. There is a possible alternative procedure: a defendant who is denied or cannot enforce in a state court any law providing for the equal civil rights of United States citizens may have the case removed to a federal district court.[25]

Apparently no state court has held, as did the Supreme Court in the principal case, that systematic exclusion of a nationality from jury service violates the Equal Protection Clause of the Fourteenth Amendment as to a defendant descended from that nationality, but there are dicta to that effect.[26] Language used by the Texas court itself in several cases denotes a belief that exclusion of citizens of a particular nationality from jury service is a denial of equal protection of the laws where there is proof of actual discrimination.[27] In fact, when the instant case was before the state court, it was stated that "it cannot be said, *in the absence of proof of actual discrimination,* that appellant has been discriminated against in the organization of such juries. . . ."[28] (Emphasis supplied). In *Juarez v. Texas,*[29] the systematic exclusion of Catholics from jury service was held to be violative of the Fourteenth Amendment. So it appears that the Texas court has had no trouble applying the "Norris" rule to classes other than white or Negro, except where the question presented involved the exclusion of persons of Mexican descent, and even there it intimated that the rule should be applied to the latter group if actual discrimination were shown against the defendant. No valid reason was given for the distinction.

The decision in the principal case extends the "Norris" rule for the first time. That the Court ruled correctly is manifest from the trend established in the prior decisions. It is equally manifest that the Court will continue to expand the application of the rule if the occasions arise. The Fourteenth Amendment, though enacted and ratified because of fear of discrimination against a particular race, is

[25] 16 STAT. 144 (1870), 28 U. S. C. 1443 (1952). "Any of the following actions or criminal prosecutions, commenced in a state court may be removed by the defendant to the district court of the United States for the district and division embracing wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof; . . . ." Apparently Strouder v. West Virginia, 100 U. S. 303 (1879) restricts this to cases where the discrimination is by the constitution or laws of a state.

[26] State v. Brown, 233 N. C. 202, 205, 63 S. E. 2d 99, 101 (1950). "It has been the consistent holding of this jurisdiction . . . that the intentional, arbitrary and systematic exclusion of any portion of the population from jury service, grand or petit, on account of race, color, creed, or national origin, is at variance with the fundamental law and cannot stand." See Richards v. State, 144 Fla. 177, 181, 197 So. 772, 774 (1940).

[27] Sanchez v. State, 147 Tex. Crim. Rep. 463, 181 S. W. 2d 87 (1944); Carrasco v. State, 130 Tex. Crim. Rep. 659, 95 S. W. 2d 433 (1936); Ramirez v. State, 119 Tex. Crim. Rep. 362, 40 S. W. 2d 138 (1931).

[28] Hernandez v. State, 251 S. W. 2d 531, 536 (Tex. Crim. App. 1952).

[29] 102 Tex. Crim. App. 297, 277 S. W. 1091 (1925).

not restricted in its application to members of that race. Its protection is also available "when the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification."[30]

CHARLES KIVETT.

Criminal Law—Premeditation and Deliberation—Jury Instructions—Brutality of the Killing as Affecting

It is proper in North Carolina in a first degree murder trial for the question of the defendant's premeditation and deliberation to go to the jury with the instructions that the jury may use the conduct of the accused before and after the crime, along with other attendant circumstances, in deciding whether the elements of premeditation and deliberation were present.[1] Our court has held to be admissible as evidence of the defendant's premeditation and deliberation: absence of quarrels between the accused and the deceased,[2] previous threats,[3] preparations made for the crime,[4] absence of provocation,[5] declarations made by the accused,[6] and subsequent acts of the accused,[7] other than flight.[8]

But there is some uncertainty in the holdings of the court as to the exact circumstances in which the jury should consider the subsequent acts of the accused in determining premeditation and deliberation. This uncertainty arises when cases approving an unqualified in-

[30] Hernandez v. Texas, 74 Sup. Ct. 667, 670 (1954).

[1] State v. Lamn, 232 N. C. 402, 61 S. E. 2d 188 (1950); State v. Chavis, 231 N. C. 307, 56 S. E. 2d 678 (1949); State v. Harris, 223 N. C. 697, 38 S. E. 2d 29 (1943); State v. Evans, 198 N. C. 82, 150 S. E. 678 (1929).

[2] State v. Watson, 222 N. C. 672, 24 S. E. 2d 540 (1943); State v. Baity, 180 N. C. 722, 105 S. E. 149 (1920). It is interesting to note that while the absence of quarrels between the accused and the deceased has been held to be evidence from which the jury could infer premeditation and deliberation, the presence of quarrels between the accused and the deceased has only been held by our court to be evidence from which the jury may infer malice and ill-feeling.

[3] State v. Hawkins, 214 N. C. 326, 199 S. E. 284 (1938); State v. Bowner, 214 N. C. 249, 199 S. E. 31 (1938); State v. Payne, 213 N. C. 719, 197 S. E. 573 (1938); State v. Grainger, 157 N. C. 628, 73 S. E. 149 (1911).

[4] State v. Baity, 180 N. C. 722, 105 S. E. 200 (1920); State v. Daniels, 164 N. C. 464, 79 S. E. 953 (1913).

[5] State v. Stewart, 226 N. C. 299, 38 S. E. 2d 29 (1946); State v. Cain, 178 N. C. 724, 100 S. E. 884 (1919).

[6] State v. Johnson, 172 N. C. 920, 90 S. E. 426 (1916).

[7] State v. Westmoreland, 181 N. C. 590, 107 S. E. 438 (1921).

[8] State v. Blanks, 230 N. C. 501, 53 S. E. 2d 452 (1949); State v. Evans, 198 N. C. 82, 50 S. E. 2d 678 (1929); State v. Steele, 190 N. C. 506, 130 S. E. 308 (1925). The reason for not holding flight as evidence from which the jury might infer premeditation and deliberation is that flight from a crime might just as easily result from a fear of guilty circumstances as from a guilty conscience.

struction to the jury that they may consider evidence of the defendant's conduct before and after the crime in determining premeditation and deliberation,[9] are contrasted with the case of *State v. Westmoreland*,[10] which would seem to require a qualification of the instructions. In that case the court considered in detail the effect of subsequent acts of the accused. The court cited authority which it noted might indicate, depending on the circumstances of the case, that any unseemly conduct toward the corpse of the person slain, any indignity offered it by the slayer, or the concealment of the body might be evidence of express malice and of premeditation and deliberation in the killing. A close examination of the only North Carolina case[11] cited in this authority reveals that the court was saying that these acts of the accused should be considered in determining malice, and that it did not consider the issue of premeditation and deliberation. It was the conclusion of the *Westmoreland* case that the better rule is that acts subsequent to the crime should be considered in determining whether there was premeditation and deliberation only when those acts were of the type which show a preconceived plan,[12] which continues to completion after the commission of the crime. The court felt that this should be the criterion used by the jury in inferring premeditation and deliberation from the subsequent acts of the accused. So the present position of the North Carolina Supreme Court is probably that subsequent acts of the accused should be considered to determine premeditation and deliberation only when the subsequent acts of the accused are in furtherance of an obviously preconceived plan on the part of the accused to take the life of the deceased.

This is further accentuated by those cases holding that acts by the accused subsequent to the crime are evidence only of the general guilt of the accused as opposed to the specific elements of premeditation and deliberation.[13] Against this background, the court is now allowing the question of the defendant's premeditation and deliberation to go to the jury with the unqualified instruction that they may use the defendant's conduct after the crime in determining premeditation and

[9] State v. Lamn, 232 N. C. 402, 61 S. E. 2d 188 (1950); State v. Chavis, 231 N. C. 307, 56 S. E. 2d 678 (1949); State v. Harris, 223 N. C. 697, 38 S. E. 2d 29 (1943); State v. Evans, 198 N. C. 82, 150 S. E. 678 (1929).

[10] 181 N. C. 590, 107 S. E. 438 (1921).

[11] State v. Robertson, 166 N. C. 356, 81 S. E. 689 (1914).

[12] In the *Westmoreland* case, the defendant, immediately after the killing began to dispose of the body of the deceased. He secretly concealed it in an old well, and his attempt to dispose of it was accompanied with such precision and certainty that it was obvious that it was a part of his preconceived plan to kill the deceased. His actions after the killing were only in completion of this preconceived plan.

[13] State v. Steele, 190 N. C. 506, 130 S. E. 308 (1925); State v. Atwood, 176 N. C. 704, 97 S. E. 12 (1918).

deliberation.[14] This is probably being understood by juries to mean that the conduct after the crime may be considered in finding premeditation and deliberation of the defendant without considering whether this conduct is a part of the preconceived plan of the defendant to take the life of the deceased. This seems to be contrary to the previous holdings of the court that these subsequent acts of the defendant are to be considered only a evidence of guilt generally, and not of premeditation and deliberation.

In further examining the wide discretion of the jury in considering the circumstances of the crime in its determination of premeditation and deliberation, it becomes obvious that the discretion is the same if the killing is done methodically without violence, as when it is accomplished in a brutal and ferocious manner. However, in a case of the latter type, should the jury be allowed to infer premeditation and deliberation from the brutal manner of the killing alone?

While this question has not been directly decided by the North Carolina Supreme Court, it has said in *State v. Stanley*,[15] "The vicious, ferocious, and brutal manner of the slaying by two slashes of the razor which almost decapitated the victim engenders an inference of premeditation and deliberation distinct from the presumption of second degree murder by the intentional use of a deadly weapon and merged therein." The other evidences of premeditation and deliberation in this case were strong and no doubt conclusive. However, the court's language on the aspect of brutality may show a tendency to misconstrue the early cases in such a manner as to destroy the conventional distinction between malice and premeditation and deliberation.[16] Simi-

[14] State v. Lamn, 232 N. C. 402, 61 S. E. 2d 188 (1950); State v. Chavis, 231 N. C. 307, 56 S. E. 2d 678 (1949); State v. Harris, 233 N. C. 697, 38 S. E. 2d 29 (1943); State v. Evans, 198 N. C. 82, 150 S. E. 678 (1929).

[15] 227 N. C. 650, 654, 44 S. E. 2d 196, 199 (1947); *accord,* State v. Bynum, 175 N. C. 777, 782, 95 S. E. 101, 103 (1918), where this language was used: "There was an absence of any altercation or quarrel which might point to a killing without malice and without a deliberate intent to kill. The manner of the killing, cutting the throat from ear to ear, the beating up of the head and the breaking in of the nose would indicate or at least was evidence from which the jury could infer that the killing was not merely from malice which would make it murder in the second degree but was a deliberate intent to kill in order to conceal this crime or his intent to commit crime against the person of the victim. These were matters for the jury." The evidence here would have heavily favored a verdict of first degree murder occurring in an attmpt to commit rape.

[16] Under the common law the court several times held that the brutality of the killing would permit an inference of malice. State v. Hill, 20 N. C. 629 (1839); State v. Chavis, 80 N. C. 364 (1879); State v. Boon, 82 N. C. 879, 19 S. E. 705 (1894). Under statutory murder, however, the court was to determine whether all the evidence which allowed a permissible inference of malice at common law would permit the additional inference of premeditation and deliberation. Despite the language of the *Stanley* case, 227 N. C. 650, 654, 44 S. E. 2d 196, 199 (1947), it is believed that in the cases there relied on the court has fallen more in line with the common law cases and held brutality

larly, the court has allowed the brutality of the killing to affect its disposition on the question of legal provocation.[17]

Definitions of premeditation and deliberation as expounded by the court have varied little. To premeditate is to think beforehand, the length of time being immaterial; to deliberate is to form an intention to kill, which intent is executed in a cool state of blood in furtherance of a fixed design to accomplish the unlawful purpose of taking the life of another.[18] Deliberation connotes weighing the thought of the killing with some semblance of reason, if only for a brief moment. Ferocity and brutality in a killing do not logically seem to result in an inference of premeditation and deliberation, since it does not seem that the killing would be more deliberately and coolly executed because it was accomplished in a brutal and vicious manner. Psychologically, extreme violence usually suggests thoughtlessness, passion, and even insanity, and while psychological tests may not always be applied to the realm of the law, they may have much significance here.[19]

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of the killing as an inference of malice rather than premeditation and deliberation. In State v. Hunt, 134 N. C. 684, 47 S. E. 49 (1904), the court held that the brutality of the crime would be attributed to a malicious disposition. In State v. Robertson, 166 N. C. 356, 81 S. E. 189 (1914), the court cited the common law case of State v. Jarratt, 23 N. C. 76 (1840), in saying that the manner of the killing was evidence of express malice. In State v. Bynum, 175 N. C. 777, 95 S. E. 101 (1918), the court again considered the brutality of the killing. It held that the brutality of the killing was evidence from which the jury could infer premeditation and deliberation, but it is believed that the jury considered that the brutality of the killing was done to cover up the crime of rape or an assault with intent to commit rape on the deceased, and that the brutal manner of the killing was to be considered in that aspect in determining premeditation and deliberation in the case. Thus, in an examination of the traditional use of drawing an inference of malice from the manner of the killing, it is uncertain whether the court would actually want to draw an inference of premeditation and deliberation from the brutal manner of the killing standing alone, although the dictum in the *Stanley* case does seem to support such a conclusion.

[17] In at least two cases the North Carolina Supreme Court has left the impression that there can be no provocation sufficient to justify a killing in a brutal manner, and that when there is such a killing that there can be no such thing as a sufficient legal provocation. In State v. Hunt, 134 N. C. 684, 689, 47 S. E. 49, 51 (1904), the court's language was that when the killing is done in a brutal and ferocious manner it "will be attributed to a malicious disposition and not to a provocation." *Accord,* State v. Bynum, 175 N. C. 777, 782, 95 S. E. 101, 103 (1918), where the court used these words: "There could hardly have been any provocation to cause the beating up of a woman and cutting her throat from ear to ear but the deliberate intent to kill." *Quaere* as to whether the brutality of a killing should entirely negative a legal provocation, though the possibility of a provocation sufficient to justify such a brutal killing might seem remote.

[18] State v. Lamn, 232 N. C. 402, 61 S. E. 2d 188 (1950); State v. Wise, 225 N. C. 746, 36 S. E. 2d 230 (1945); State v. French, 225 N. C. 276, 34 S. E. 2d 157 (1945); State v. Hawkins, 214 N. C. 326, 199 S. E. 284 (1938); State v. Payne, 213 N. C. 719, 197 S. E. 573 (1938); State v. Evans, 198 N. C. 82, 150 S. E. 678 (1929).

[19] Premeditation and deliberation are mental elements connected with thought. Since, of necessity, they must be determined by circumstances, if the circumstances suggest absence of thought they could be helpful in determining the mental attitude of the accused.

Before the Act of 1893,[20] which divided the crime of murder into first and second degree, malice was presumed from the fact of the killing, and the killing having been shown, the offense was murder unless the contrary appeared from circumstances of justification, alleviation, or excuse. Such a killing was the present equivalent, in effect, of murder in the first degree.[21] With the enactment of the statute, the elements of premeditation and deliberation were added to malice to constitute the elements of the crime of first degree murder.[22] As the court differentiated between these two degrees and the elements necessary to establish them, it allowed an inference of malice from such general states of mind as hate, spite, and a general design to effect harm, or to take life without just cause,[23] while proof of premeditation and deliberation same to require some evidence of thought.[24] Therefore, in examining the elements that constitute first degree and second degree murder it would seem to be more logical to make the legal effect of brutality in a killing a permissible inference of malice rather than of premeditation and deliberation.

This is not meant to intimate that the circumstances surrounding the killing should not be used to determine the presence of the elements of premeditation and deliberation, but that the brutality and viciousness of the actual killing would not be a true test of the mental attitude of the killer. A circle might be drawn around the time of the killing at a point which did not take from the jury consideration of the circumstances leading up to and after the killing. Within this circle the jury should be instructed concerning permissible consideration of the bru-

[20] N. C. PUB. LAWS, 1893, cc. 85, 281; Now codified as N. C. GEN. STAT. § 14-17 (1953).

[21] State v. Hicks, 125 N. C. 636, 34 S. E. 247 (1899); State v. Johnson, 48 N. C. 266 (1855).

[22] N. C. GEN. STAT. § 14-17 (1953).

[23] State v. Benson, 183 N. C. 795, 799, 111 S. E. 869, 871 (1922), Chief Justice Stacy, speaking for the court said: "Malice is not only hatred, ill-will or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause or justification. It may be shown by evidence of hatred, ill-will, or dislike, and it is implied in law from the killing with a deadly weapon." *Accord,* State v. Williams, 185 N. C. 643, 666, 116 S. E. 570, 582 (1923): "Malice may arise from personal ill-will or grudge, but it may also be said to exist (in a legal sense) wherever there has been a wrongful or intentional killing of another, without lawful excuse or mitigating circumstances. This is implied or legal malice."

[24] State v. Lamn, 232 N. C. 402, 61 S. E. 2d 188 (1950); State v. Chavis, 231 N. C. 307, 56 S. E. 2d 678 (1949); State v. Brown, 218 N. C. 415, 11 S. E. 2d 321 (1940); State v. Hawkins, 214 N. C. 326, 199 S. E. 284 (1938); State v. Bowser, 214 N. C. 249, 199 S. E. 31 (1938); State v. Payne, 213 N. C. 719, 197 S. E. 573 (1938). Some of the cases have held that if the circumstances show a formed design to take life, this is murder in the first degree. However, this formed design to take life must have in it the elements of premeditation and deliberation to comply with the statutory requirements. See State v. Stewart, 226 N. C. 299, 38 S. E. 2d 29 (1946).

tality of the killing in determining premeditation and deliberation, to prevent confusing those elements with malice.

North Carolina and other jurisdictions are in accord in sending the issue of the premeditation and deliberation of the defendant to the jury with the instruction to consider all attendant circumstances of the crime.[25] Some jurisdictions seem to lean toward an attitude which would allow the brutality of the killing alone to be evidence from which the jury could infer premeditation and deliberation.[26] Though no trend can be shown, primarily because the courts have not considered whether premeditation and deliberation could be inferred from the brutality of the killing alone, there is a probability that they are allowing the traditional differences between malice and premeditation and deliberation to be confused, by not instructing the jury specifically on the legal effect of a killing accomplished in a brutal manner.

In determining the presence of premeditation and deliberation, it is generally true that there are several factors involved, with the jury weighing all of them at the same time. What weight they give to each factor is not ascertainable. Of course, the brutal manner of a killing cannot be entirely disregarded where a jury is attempting to determine the elements of premeditation and deliberation. It probably always plays an uninvited role since a brutal manner of killing will naturally have more effect on the emotions of the jurors than the situations in which this element is lacking. Nor would it be advisable to minimize those aspects of brutality and atrocity that might really aid in determining whether premeditation and deliberation were present. This situation might occur where there was an extension of brutality into such a period of time that it bordered on torture, or where the circumstances of brutality and atrocity which lead up to the crime are such as obviously indicate plan or design. However, evidences of brutality in the actual killing would ordinarily seem to be no evidence of premeditation and deliberation.

A ghastly murder makes objective determination of the facts difficult under any circumstances. The aim of the court is to have the jury consider the circumstances of the case in its most reasonable and thoughtful state of mind. With this in view the trial judge may, in his discretion, refuse to allow the jury to see horrible and ghastly photo-

[25] Bramlett v. State, 202 Ark. 1165, 156 S. W. 2d 226 (1941); Craig v. State, 205 Ark. 1100, 172 S. W. 2d 256 (1943); Robinson v. State, 69 Fla. 521, 68 So. 649 (1915); State v. Cox, 128 N. J. L. 108, 23 A. 2d 555 (1942); State v. Leakey, 44 Mont. 354, 120 Pac. 234 (1911); State v. Fitch, 65 Nev. 668, 200 P. 2d 991 (1948); State v. Davis, 6 Wash. 2d 696, 108 P. 2d 641 (1941).

[26] Craig v. State, 205 Ark. 1100, 172 S. W. 2d 356 (1943); People v. Sanducci, 195 N. Y. 361, 88 N. E. 385 (1909); Commonwealth v. Gelfi, 282 Pa. 434, 128 Atl. 77 (1925). *But cf.* People v. Heslen, 27 Cal. 520, 163 P. 2d 21 (1945); State v. Porello, 33 N. E. 2d 23 (Ohio 1940).

graphs of the crime if no purpose would be served other than to excite the emotions of the jury.[27] As a parallel to this commendable limitation on the use of photographs, it would be desirable to limit the permissible inference which can be drawn from the brutality of the killing to malice rather than premeditation and deliberation, with the exceptions stated previously. When the fact of brutality is brought to the attention of the jury without specific instructions concerning its consideration, the jury is left with absolute freedom to give whatever weight, emotional or otherwise, to the brutal manner of the killing. Thus, it is very possible that the brutality connected with the actual killing is affecting the juries of North Carolina, as well as other jurisdictions, in a very persuasive manner on the issue of the premeditation and deliberation of the accused. Such reasoning could be very injurious to justice in a particular case, and it would appear that the dicta of the North Carolina Supreme Court would tend to condone such a result, if reached.[28]

The law should deal with the shrewd, the calm, the butcher, and the madman in the same manner. By no other procedure can it truly adhere to those rules of reason which we call our law. The trial judge can, with more discriminatory instructions, better guide the jury in rendering a verdict which is not tainted with uncertainty as to the true state of the law, and that is more in accordance with legally sanctioned interpretations of premeditation and deliberation. By so doing he will aid in limiting the use by the jury of emotions which have arisen because of the brutal manner of the killing.

WILLIAM C. BREWER, JR.

Evidence—Hearsay—Admissibility of Evidence of Speeding Violations Obtained by Use of Radar

Increasing use of the electronic speed meter, or "whammy"[1] as it is more generally known, by law enforcing agencies in an effort to

[27] STANSBURY, NORTH CAROLINA EVIDENCE, § 118 (1947).
[28] State v. Stanley, 227 N. C. 650, 654, 44 S. E. 2d 196, 199 (1947).

[1] The electronic radar speed meter, or "whammy" as it is generally known, is one of the latest mechanisms by which state and local officials are combating highway speed violations. The operation of the instrument requires the use of two automobiles placed approximately one-quarter of a mile apart along a highway. Each automobile is equipped with a radio so that the radar-patrol car team is able to communicate with one another. One automobile contains a radar transmitter, receiver, and recording dial. The transmitter casts an electronic beam across the highway and when a vehicle passes through the beam, energy is reflected to the receiver, converted into "miles per hour," recorded on a tape, and indicated on a dial. If the speed is excessive, the "interceptor car," or other member of the team, is contacted by radio, given the speed and description of the automobile, and the violator is arrested by the interceptor. See the discussion in People v. Offerman, 204 Misc. 769, 125 N. Y. S. 2d 179 (Sup. Ct. 1953).

control excessive highway speeds has raised the issue of admissibility in evidence of the findings of such devices. The primary objection to such evidence has been that the radar speed meter, as a scientific apparatus, has never been judicially recognized as being a reliable instrument for recording the speed of a vehicle on the highway.[2] Since it is a scientific apparatus which has not been so recognized, certain facts must be shown before the evidence can be admitted.[3] It must be shown (1) that the apparatus is scientifically sound as an instrument for measuring speed, (2) that the particular piece of equipment used is of a standard make and was in reliable condition when used, and (3) that the testifying witnesses who used it are qualified in its use.[4]

In one[5] of the four reported cases concerning the use of radar evidence, there was no objection to the introduction of evidence of the expert, the testing[6] of the device, or the qualifications of the operators, and a conviction was sustained based on radar evidence only. In another case,[7] the evidence of the expert and radar-patrol car team as to the testing of the instrument was admitted over objection, and the conviction of the lower court was sustained based on radar evidence only. Another case[8] held that the evidence of the testing of the speed meter by the radar-patrol car team was inadmissible as hearsay and reversed a conviction on that and other grounds. The fourth case[9] was decided on other grounds.

A careful comparison of *People v. Offerman,*[10] which held such evidence inadmissible as hearsay, with *State v. Dantonio,*[11] which admitted the evidence over a hearsay objection, would indicate that the reason for the variance in the holdings of the courts was due to the manner in which the evidence was presented.

[2] State v. Moffitt, 100 A. 2d 778 (Del. Super Ct. 1953).
[3] *Ibid.* [4] *Ibid.* [5] *Ibid.*
[6] The testing of the apparatus each time it is set up consists of "zeroing," or calibrating the electrical and mechanical equipment so that each piece of equipment is set exactly alike and records the speed of oncoming cars alike. After the power supply is connected to the radar equipment and the tubes are heated the tests begin. Test cars are run through the operating area at varying speeds and on each run the operator of the test car notes the speed of the car as registered by his speedometer. At the same time the radar operator notes the speed of the test car as registered on his radar speed dial. Adjustments are made in the radar device until each instrument records exactly the same speed on several given runs. When all devices record the same speed, radar operations commence. See discussion in State v. Dantonio, 31 N. J. Super 105, 105 A. 2d 918, 920 (1954).
[7] State v. Dantonio, 31 N. J. Super. 105, 105 A. 2d 918 (1954).
[8] People v. Offerman, 204 Misc. 769, 125 N. Y. S. 2d 179 (Sup. Ct. 1953).
[9] People of City of Buffalo v. Beck, 130 N. Y. S. 2d 354 (Sup. Ct. 1954). The trial court took judicial notice of the operation and accuracy of the radar device and was reversed for that reason.
[10] 204 Misc. 769, 125 N. Y. S. 2d 179 (Sup. Ct. 1953).
[11] 31 N. J. Super. 105, 105 A. 2d 918 (1954).

In the *Offerman* case, Officer *A* of the testing team testified that several times earlier, on the day of the arrest, the test car had been driven by him through the radar area and at these times he had reported by radio to Officer *B,* who was operating the radar set the speed of the test car as recorded by its speedometer. He also testified over objection that the speed of the test car agreed with the reading on the radar dial as radioed to him by Officer *B.* Then Officer *B.* testified that he observed the radar dial and found that in each instance the reading of the dial agreed with the reading of the speedometer of the test car as reported by Officer *A.* Counsel for the defendant argued that the testimony of each was hearsay as Officer *B* could not have known the reading on the speedometer of the car except as told to him by Officer *A,* and that Officer *A* could not have known of the reading on the radar dial except as told to him by Officer *B.* The court stated that it seemed clear that each officer, in giving his testimony, relied upon what the other had told him by radio; therefore, it was hearsay.[12]

Deft handling of the witnesses in the *Dantonio* case permitted the court to reject the contention that the evidence was hearsay. The test car operator testified that he passed through the operating zone several times at certain varying speeds, and the radar operator testified that he observed the test car and recorded the speed on each run. The test car operator thereby established the fact that his car passed through the operating zone at various speeds, while the radar operator established the fact that at the same time and place a car, identified as the test car, passed through the operating area, the same speeds being indicted on the radar speed dial. Thus each has testified as to independent facts, and little reference, if any, need be made to the radio communication between the two witnesses. Any reference to the conversation would be incidental to the independently established facts.

Even as presented in the *Offerman* case the evidence could very well have been admitted, in spite of the hearsay objection, as the conversations were not necessary to prove the facts intended to be proved. The hearsay rule excludes extrajudicial utterances only when offered as evidence of the truth of the matter asserted.[13] Evidence of oral statements of others, which would otherwise be termed hearsay, can be used to explain or throw light on the subsequent actions or conduct of the person to whom they were made.[14] It could have been con-

[12] People v. Offerman, 204 Misc. 769, 125 N. Y. S. 2d 179, 182 (Sup. Ct. 1953).
[13] State v. Black, 230 N. C. 448, 43 S. E. 2d 443 (1949).
[14] Terry v. United States, 51 F. 2d 49 (4th Cir. 1931).

tended in the *Offerman* case that the evidence of the conversation between the two officers was necessary to show how the tests were performed, and not to prove that the same speeds were registered by each of the two devices. The witnesses' independent testimony as to what they actually observed could be used to prove the speeds as indicated by the speed meter and the speedometer.

North Carolina has still another basis upon which such evidence could be admitted. The peculiar rule in North Carolina which permits a corroborating witness to relate past conversations with the first testifying witness would allow this type of evidence, if used for corroboration only and not as evidence of the truth of the matter asserted.[15] Each officer could "corroborate" the other as to the conversation between the two. As this peculiar rule is already overworked and has been criticized,[16] this method of getting the evidence before the court is not recommended.

While there have been no reported decisions in North Carolina concerning the admissibility of evidence obtained by use of the "whammy," there is no reason why such evidence should not be admitted if it is properly presented. To prevent any possible contention that the evidence of the radar-patrol car team is hearsay, it is suggested that the procedure by which the evidence was presented in the *Dantonio* case be followed.

MICHAEL P. MCLEOD.

Federal Jurisdiction—The Sovereign Immunity Doctrine—Actions Against Federal Officials—Equitable Relief and Mandamus

The doctrine of the sovereign's immunity from suit has been a part of our jurisprudence at least since the days of Edward I of England.[1] It is elementary that the sovereign is not amenable to suit in his courts unless he has consented to be sued. Amendment XI of the Constitution of the United States expressly grants to states in the union immunity from suits brought in the federal courts by citizens of other states or by citizens or subjects of any foreign state;[2] however, the doctrine of the immunity of the federal government from suit is judge-made.[3]

[15] Burnett v. Wilmington, New Bern and Norfolk Ry., 120 N. C. 517, 26 S. E. 819 (1896).

[16] State v. Parrish, 79 N. C. 610 (1878).

[1] United States v. Lee, 106 U. S. 196, 205 (1882).

[2] By judicial construction, the Amendment extends to suits against a state brought by a citizen of that state. Hans v. Louisiana, 134 U. S. 1 (1890). Furthermore, foreign states cannot sue one of the United States without its consent. Principality of Monaco v. Mississippi, 292 U. S. 313 (1934).

[3] Justice Frankfurter has said, "As to the states, legal irresponsibility was written into the Constitution by the Eleventh Amendment; as to the United

The United States cannot be sued without its consent, and any person who seeks to assert a claim against the United States can do so only within the limits of federal statutes granting jurisdiction of suits against the United States to the district courts and the Court of Claims.[4] Although the federal government has consented to be sued for damages in actions involving contracts, it has long been established that the United States has not consented to suits for specific performance of contracts to which it is a party.[5] With certain enumerated exceptions, the federal government is now subject to suit in tort for damages inflicted by its agents,[6] but no statute consents to suits

States, it is derived by implication." Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682, 708 (1949).

The legal issues involved are the same whether a state or a federal official is involved, and the same rules are applied to determine if a suit against an official of either government is in reality a suit against the government which employs him, a suit which cannot be maintained absent consent of that government. Great Northern Life Ins. Co. v. Read, 322 U. S. 47 (1944); *In re* Ayers, 123 U. S. 443 (1887).

The suability of a governmental corporation depends upon the terms of the statute creating it. Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381 (1939).

If the defendant is a governmental agency, the tests to be applied to determine if the action is in effect one against the sovereign without its consent are the same as with individual defendant officials. Reconstruction Finance Corp. v. MacArthur Mining Co., Inc., 184 F. 2d 913 (8th Cir. 1950), *cert. denied,* 340 U. S. 943 (1951).

[4] The Court of Claims, established in 1855, has jurisdiction over claims against the United States founded upon the Constitution, any Act of Congress, any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. 28 U. S. C. § 1491 *et seq.* (1952). The Court of Claims has appellate jurisdiction of final judgments of the district courts arising under the Tort Claims Act, if all of the appellees consent. 28 U. S. C. § 1504 (1952).

The district courts have original jurisdiction of petitions for partition of lands wherein the United States has an interest as tenant in common or as joint tenant. 28 U. S. C. § 1347 (1948). Since 1946 the district courts have had exclusive jurisdiction of tort claims against the United States. 28 U. S. C. § 1346(b) (1952). Since 1887 the district courts have had original jurisdiction, concurrent with the Court of Claims, of claims not exceeding $10,000 founded upon the Constitution, any Act of Congress, an executive department regulation, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. 28 U. S. C. § 1346(a)(2) (1952).

[5] United States v. Jones, 131 U. S. 1 (1888) (Although the plaintiff's claim may be based on some equitable interest or on equitable grounds, money damages only are allowed under what is now 28 U. S. C. § 1346(a) (1952) and 28 U. S. C. § 1491 (1952).)

The United States does not waive its immunity by instituting an action against those who seek to assert a counterclaim against it which could not have been asserted in an original action, if that counterclaim would not be a defense against the original action as between private litigants. United States v. Patterson, 206 F. 2d 345 (5th Cir. 1953).

[6] 28 U. S. C. § 1346(b) (1952). Customs officers are answerable personally for their torts. 28 U. S. C. § 2680(c) (1952); Nakasheff v. Continental Ins. Co., 89 F. Supp. 87 (S. D. N. Y. 1950).

in equity against the United States for relief controlling the tortious activity.

Undoubtedly it is this unavailability of specific performance against the United States and the freedom of the sovereign from equitable decrees curbing tortious activity which have given rise to the complex development of the doctrine of sovereign immunity in suits against federal officials. Courts of equity generally allow specific relief between private parties whenever money damages are inadequate or the plaintiff makes a showing of need; in many situations such relief is also desirable in suits against the United States, but the only possible way to obtain it is to seek a decree against the individual officials involved.

If the court holds that the suit is in effect one against the federal government, it must dismiss the complaint for lack of jurisdiction. This is illustrated in the leading case of *Larson v. Domestic & Foreign Commerce Corp.*[7] In this case the plaintiff contracted with the Regional Director of the War Assets Administration to buy surplus coal. The plaintiff arranged an irrevocable letter of credit payable to the War Assets Administration in spite of the Regional Director's insistence that under the terms of the contract the plaintiff was to deposit cash with a named bank. The Director cancelled the contract and arranged to sell the coal to another party. The plaintiff proceeded against the War Assets Administrator, contending that title to the coal had passed to it, that the defendant was acting "illegally," and that his refusal to effect a delivery of the coal was "unauthorized," and prayed that the defendant be enjoined from selling or delivering the coal to anyone other than the plaintiff. The Supreme Court held that the plaintiff was asking relief against the United States, for the reason that the Regional Director had authority to construe the sales contract whether or not he had actually made an error in construction, and that the complaint must therefore be dismissed for lack of jurisdiction.

The significance of this and other cases dealing with suits against federal officials can be more readily ascertained by dividing the subject matter into several categories.

1. *Suits involving official action in excess of valid authority or pursuant to invalid authority.* An official's actions are his individual acts and not those of the sovereign if he acts in excess of or without authority, or if the grant of authority itself is unconstitutional,[8] and he may be sued.[9] The language of the court in the *Domestic & Foreign* case re-

[7] 337 U. S. 682 (1949).

[8] Philadelphia Co. v. Stimson, 223 U. S. 605, 620 (1912); *Ex parte* Young, 209 U. S. 123 (1908) (state official).

[9] Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 (1952); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 (1951); Lincoln

affirmed this rule and emphasized that a mere showing that the defendant official made an error in the interpretation or application of his authority did not meet the requirements for jurisdiction.[10] Even when it was contended that the officer had made an error so gross as to amount to total lack of authority, the rule has been applied.[11]

2. *Suits to prevent wrongful withholding or unconstitutional taking of plaintiff's property.* Many cases proceed upon the basis of the right under general law to recover specific property wrongfully withheld.[12] Several early cases allowed suits for specific relief against federal officers to prevent a wrongful taking without careful examination of whether the officials were acting for the United States pursuant to authority granted or were acting only as individuals.[13] In *Land v. Dollar,*[14] decided shortly before *Domestic & Foreign,* the Maritime Commission contracted with stockholders in a financially weak corporation to grant it an operating subsidy, release certain obligations, loan it money, and procure a loan for it from the Reconstruction Finance Corporation, all for a delivery of the stockholders' shares indorsed in blank to the Commission. When the debtor corporation's

Electric Co. v. Forrestal, 334 U. S. 841 (1948); Mine Safety Appliances Co. v. Forrestal, 326 U. S. 371 (1945); Work v. Louisiana, 269 U. S. 250 (1925); Philadelphia Co. v. Stimson, 223 U. S. 605 (1912); Harper v. Jones, 195 F. 2d 705 (10th Cir.), *cert. denied,* 344 U. S. 821 (1952); Noce v. Edward E. Morgan Co., Inc., 106 F. 2d 746 (8th Cir. 1939); Ferris v. Wilbur, 27 F. 2d 262 (4th Cir. 1928).

[10] Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682, 695 (1949). The Court rejected the contention that an officer given the power to make decisions is authorized only to decide correctly. *Id.* at 695. This strict rule is a departure from earlier cases. Payne v. Central Pacific R. R., 255 U. S. 228 (1921).

[11] Rogers v. Skinner, 201 F. 2d 521 (5th Cir. 1953); American Dredging Co. v. Cochrane, 190 F. 2d 106 (D. C. Cir. 1951); Metropolitan Training Center v. Gray, 188 F. 2d 28 (D. C. Cir. 1951); Fay v. Miller, 183 F. 2d 986 (D. C. Cir. 1950). *Contra:* Farrell v. Moomau, 85 F. Supp. 125 (N. D. Cal. 1949) (court decided that officials did not strictly adhere to provisions of the Veteran's Preference Act of 1944 in discharging the plaintiff, thereby acting in excess of statutory authority, and distinguished the *Domestic & Foreign* decision as dependent upon the sovereign property therein involved).

[12] Land v. Dollar, 330 U. S. 731 (1947).

[13] Ickes v. Fox, 300 U. S. 82 (1937) (wrongful invasion of property rights is enjoinable); Goltra v. Weeks, 271 U. S. 536 (1926) (wrongful trespass against personal property is enjoinable); Lane v. Watts, 235 U. S. 525 (1913) (plaintiff can restrain Secretary of Interior and subordinates from acts which would cast a cloud upon plaintiff's title, even though such acts were under color of office); United States v. Lee, 106 U. S. 196 (1882) (officials can be ejected from plaintiff's land to prevent an unconstitutional taking). *Cf.* Perkins v. Lukens Steel Co., 310 U. S. 112 (1940) (Court found that defendant acted pursuant to valid authority and rejected plaintiff's contention that there was a tortious invasion of private rights); Philadelphia Co. v. Stimson, 223 U. S. 605 (1912) (courts have jurisdiction of actions to prevent wrongful invasions of property rights, but plaintiff loses on the merits if official was acting pursuant to a valid grant of authority); Naganab v. Hitchcock, 202 U. S. 473 (1906) (contention rejected that sale of Indian lands pursuant to Act of Congress would be an unconstitutional taking from the tribe).

[14] 330 U. S. 731 (1947).

successor corporation had fully paid all its debts to the United States the members of the Maritime Commission refused to return the shares, contending that the stock had been transferred outright, not pledged as collateral.[15] The stockholders instituted proceedings against the members of the Commission to compel return of the stock, alleging that it had been merely pledged and that the defendants were unlawfully in possession and wrongfully withholding the shares, or, even if the stock had been transferred outright, the defendants were exceeding their authority[16] which allowed the Commission to receive only property pledged as collateral. The Supreme Court held that if the shares were pledged the defendants could be sued to compel a return to the rightful owners; therefore, since the jurisdictional issue depended upon a decision on the merits, the district court had jurisdiction to determine its jurisdiction. Subsequently the Court of Appeals for the District of Columbia decided that there had been only a pledge of the shares and granted coercive relief to compel their return.[17]

After stating that the two major categories of cases where there will be jurisdiction are (a) where the officer acts in excess of his authority and (b) where his authority is unconstitutional, the *Domestic & Foreign* opinion emphatically rejects the contention that there is a third category in which official action may be directed or restrained—the category of cases which proceeds upon the theory that the official is "wrongfully" or "illegally" withholding the property of the plaintiff.[18] The Court states that such a theory is erroneous in that it confuses the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action.[19] The argument that the sovereign cannot authorize the commission of a tort is also rejected as the Court points out that under agency law the fact that the agent acts tortiously does not mean that *ipso facto* he has exceeded his authority, to the extent that he would be acting for himself alone and not for his principal.[20] The Court uses broad language to the effect that specific relief compelling the return of property tortiously taken or withheld cannot be had against a government officer unless his acts conflict with the terms of a valid grant of authority and would not be

[15] Subsequently, the members of the Commission voted the stock at the corporation's annual meeting and participated in the conduct of corporate affairs. Land v. Dollar, 190 F. 2d 366, 369 (D. C. Cir. 1951).

[16] 49 STAT. § 1988 (1936), as amended, 46 U. S. C. § 1117 (1952).

[17] Dollar v. Land, 184 F. 2d 245 (D. C. Cir.), *cert. denied*, 340 U. S. 884 (1950). For subsequent developments in the *Dollar* litigation see Land v. Dollar, 190 F. 2d 366 (D. C. Cir. 1951); Sawyer v. Dollar, 190 F. 2d 623 (D. C. Cir. 1951); United States v. Dollar, 188 F. 2d 629 (D. C. Cir. 1951); Sawyer v. Dollar, 344 U. S. 806 (1952) (dismissed as moot).

[18] Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682, 692 (1949).

[19] *Id.* at 693.

[20] *Id.* at 695.

regarded under the law of agency as the actions of the principal.[21] A government, like a corporation, can act only through its agents; therefore, to hold that an action will be entertained against an official who is acting within the scope of his authority for and on behalf of the sovereign merely because the officer is withholding property "wrongfully" would amount to a rejection of the doctrine of sovereign immunity. The Court distinguished earlier cases which ostensibly allowed tortious withholding of property as being hinged upon unconstitutional action or lack of authority.[22]

The language used in *Domestic & Foreign* would seem to be a repudiation of all that *Land v. Dollar* stands for, but the Court did not overrule the latter case. The Court explained the case[23] on which *Land v. Dollar* principally relied as one involving an unconstitutional taking of property, and stated that *Land v. Dollar* itself proceeded upon allegations in the complaint that the members of the Maritime Commission were acting without authority.[24] The two cases cannot easily be reconciled. Jurisdiction of the action against the members of the Maritime Commission was entertained even though the shares of stock were only pledged, which was exactly the security transaction allowed by the statute.[25] If the Commissioners in *Land v. Dollar* had received an outright transfer of the shares, *then* their acts would have conflicted with their statutory authority. If the *Domestic & Foreign* majority meant by their explanation[26] of *Land v. Dollar* that jurisdiction there depended upon whether the Maritime Commissioners were authorized to commit the tort of retaining the shares after the principal debt had been discharged, this would be inconsistent with the Court's attempt to focus attention in all cases to an examination of the official's grant of authority, whether he had exceeded it or merely made an erroneous interpretation, and whether as a matter of agency law the official's acts were attributable to his principal.[27] In almost any case it would seem that the plaintiff could show that there was no specific authority to retain the tortiously withheld property.[28]

The courts have not decided whether a tortious or wrongful with-

[21] *Id.* at 695.

[22] Goltra v. Weeks, 271 U. S. 536 (1926); Philadelphia Co. v. Stimson, 223 U. S. 605 (1912); United States v. Lee, 106 U. S. 196 (1882).

[23] United States v. Lee, 106 U. S. 196 (1882).

[24] Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682, 702 n. 26 (1949). The footnote states that the complaint in *Land v. Dollar* alleged that any acquisition by the Commission which was not a mere pledge of collateral would violate its statutory authority; therefore, the complaint alleged that the defendants acted in excess of statutory authority.

[25] See note 16 *supra.*

[26] See note 24 *supra.*

[27] Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682, 695 (1949).

[28] No court has explained the *Dollar* case as involving an unconstitutional taking.

holding would also be unconstitutional so as to allow jurisdiction whether or not the officer's activities conflicted with the terms of his grant of authority. A taking of property pursuant to an invalid grant of authority may be enjoined;[29] however, a grant of authority otherwise valid would probably not be held unconstitutional merely because it allows government officials tortiously to withhold property belonging to private persons.[30] In situations involving government property, recent cases where the plaintiffs proceeded upon a theory of wrongful taking or withholding of their property have not met with success;[31] for instance, if plaintiff seeks an order compelling the defendant official to release irrigation waters in which plaintiff has vested rights, relief will be denied if it requires operation of federal dams and the release of federally owned water impounded behind them.[32]

Under the language employed by the Supreme Court in *Domestic & Foreign* it seems certain that if allegations are made that the officer is withholding plaintiff's property without authority, or in such a manner as to amount to an unconstitutional taking, if not frivolous,[33] will entitle the plaintiff to affirmative relief if he proves the allegations, even though he might also have an action for money damages under the Federal Tort Claims Act.[34]

3. *Suits involving the sovereign's property.* It was well established that relief which sought to control the disposition of sovereign property would usually be denied. This result was reached either on the theory that the action was in effect one against the sovereign, or because the United States would have to be joined as party defendant.[35] However,

[29] Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 (1952).

[30] Hudspeth County Conservation & Reclamation Dist. No. 1 v. Robbins, 213 F. 2d 425 (5th Cir. 1954).

[31] Stack v. Strang, 94 F. Supp. 54 (S. D. N. Y. 1950), *rev'd on other grounds*, 191 F. 2d 106 (2d Cir. 1951) (dispute over possession of gold coin of the United States).

In Story v. Snyder, 184 F. 2d 454 (D. C. Cir.), *cert. denied*, 340 U. S. 866 (1950), plaintiff sued trustees of Library of Congress Trust Fund to recover a sum for services due, contending that the defendants held his money as constructive trustees, citing Land v. Dollar, 330 U. S. 731 (1947), as supporting his claim for relief. The court rejected his contentions, pointing out that the defendants in the *Dollar* litigation were *tortfeasors.*

[32] Hudspeth County Conservation & Reclamation Dist. No. 1 v. Robbins, 213 F. 2d 425 (5th Cir. 1954).

[33] West Coast Exploration Co. v. McKay, 213 F. 2d 582 (D. C. Cir.), *cert. denied*, 347 U. S. 988 (1954).

[34] For the magic effect of the allegation "unconstitutional" see Doehla Greeting Cards, Inc. v. Summerfield, 116 F. Supp. 68 (D. C. 1953) (although officer had authority to make an incorrect decision, plaintiff was entitled to his day in court on basis of allegations that defendant acted arbitrarily and capriciously so as to deprive plaintiff of property without due process of law).

[35] Mine Safety Appliances Co. v. Forrestal, 326 U. S. 371 (1945) (action to compel official to cease withholding payments due held to be an action designed to reach money owned by the United States); Maricopa County, Arizona v. Valley Nat. Bank of Phoenix, 318 U. S. 357 (1943) (national bank stock in possession of the Reconstruction Finance Corporation); Minnesota v. United

if the plaintiff had acquired title to what had formerly been sovereign property, federal officers could be restrained from wrongfully interfering with plaintiff's property rights.[36]

Domestic & Foreign contains no language which could be construed to relax the established rule where disposition of sovereign property is sought;[37] moreover, most recent decisions have reaffirmed that doctrine.[38] However, in this connection *West Coast Exploration Co. v. McKay*[39] should be noted. There the plaintiff owned certificates, called "scrip" which gave the owner the right to select public lands for entry. The Director of the Bureau of Land Management with the concurrence of the Secretary of the Interior rejected plaintiff's application for a certain location on the ground that the land sought was mineral land, not subject to selection and entry by any "scrip" holder. The relief sought was a decree compelling approval of plaintiff's application and issuance of a patent to the land, based upon the defendant Secretary of the Interior's alleged lack of authority in rejecting the

States, 305 U. S. 382 (1938) (attempt by state to condemn land held in trust by the United States for Indians); New Mexico v. Lane, 243 U. S. 52 (1917) (where dispute is over title to public lands, the United States is entitled to be heard); United States *ex rel.* Goldberg v. Daniels, 231 U. S. 218 (1913) (bidder cannot compel delivery of surplus warship owned by the United States Navy); Naganab v. Hitchcock, 202 U. S. 473 (1906) (action to restrain sale by official of lands held by the United States in trust); Oregon v. Hitchcock, 202 U. S. 60 (1906) (action to restrain officials from alienating Indian lands); Young v. Anderson, 160 F. 2d 225 (D. C. Cir.), *cert. denied,* 331 U. S. 824 (1947) (action to restrain official from leasing lands of the United States).

But a suit to restrain the Secretary of the Interior from placing the burden upon the states to show that swamp lands are non-mineral in character in order to acquire title is not a suit against the United States, even if the disposition of sovereign property might ultimately be affected, where the Secretary acted in excess of his authority. Work v. Louisiana, 269 U. S. 250 (1925).

[36] Ickes v. Fox, 300 U. S. 82 (1937); Lane v. Watts, 234 U. S. 525 (1913).

[37] Vinson, C. J., in the majority opinion stated, "In a suit against the officer to recover damages for the agent's personal actions that question is easily answered. The judgment sought will not require action by the sovereign or disturb the sovereign's property." Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682, 687 (1949). "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. . . ." *Id.* at 691 n. 11

[38] New Haven Public Schools v. General Services Administration, 214 F. 2d 592 (7th Cir. 1954) (public land); New Mexico v. Backer, 199 F. 2d 426 (10th Cir. 1952) (Bureau of Reclamation and Development dam); American Dredging Co. v. Cochrane, 190 F. 2d 106 (D. C. Cir. 1951) (United States' barge); Stack v. Strang, 94 F. Supp. 54 (S. D. N. Y. 1950), *rev'd on other grounds,* 191 F. 2d 106 (2d Cir. 1951) (gold coin of the United States). *Accord:* Seiden v. Larson, 188 F. 2d 661 (D. C. Cir. 1951), *overruled by* West Coast Exploration Co. v. McKay, 213 F. 2d 582 (D. C. Cir.), *cert. denied,* 347 U. S. 988 (1954) insofar as it held that a suit could not be maintained against a federal officer where government property was involved even if the official acted without statutory authority.

[39] 213 F. 2d 582 (D. C. Cir.), *cert. denied,* 347 U. S. 988 (1954).

application and alleged clear duty to issue the patent. Even though there was a dictum in *Domestic & Foreign* that there would be no jurisdiction of an action against a federal official which would require disposition of sovereign property despite claims that the officer acted in excess of statutory authority,[40] the Court of Appeals for the District of Columbia stated that it would be proper to entertain the action if the Secretary had in fact acted without authority, and then proceeded to the merits to the extent necessary to decide the question of authority.[41]

4. *Suits turning on the necessity of joining the United States as party defendant.* Some of the earlier cases turned on consideration of the indispensability of or the necessity of naming the United States as party defendant.[42] Of course if the United States must be joined this cannot be done without its consent, and the whole action is dismissed. This would seem to be merely a shorthand way of deciding whether the original action is in fact one against the United States, but a dismissal for failure to join a necessary or indispensable party is not technically a dismissal for lack of jurisdiction.[43] The use of this technique often

[40] Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682, 691 n. 11 (1949). See note 37 *supra*. The Court of Appeals pointed out that a homesteader or the locator of a mining claim satisfying requirements under the law could be arbitrarily denied patents and have absolutely no recourse in the courts, just because sovereign property was involved, if the dictum in the *Domestic & Foreign* opinion were followed. West Coast Exploration Co. v. McKay, 213 F. 2d 582 (D. C. Cir.), *cert. denied*, 347 U. S. 988 (1954). Apparently the court felt that the Supreme Court did not intend to preclude relief in the nature of mandamus, where the plaintiff was otherwise entitled to it, solely because government property was involved.

[41] The court came to the conclusion that the Secretary of the Interior was authorized to make the decision he made, and remanded the case with directions to dismiss for lack of jurisdiction. West Coast Exploration Co. v. McKay, 213 F. 2d 582, 610 (D. C. Cir.), *cert. denied*, 347 U. S. 988 (1954). Other federal courts have been more strict in allowing jurisdiction when government property is involved. In New Haven Public Schools v. General Services Administration, 214 F. 2d 592 (7th Cir. 1954), plaintiff was seeking a decree compelling conveyance of public land, and he alleged that the official was acting wrongfully in privately contracting to sell the land. The court readily affirmed a dismissal by the district court; however, in this case dismissal could have been for failure to state a claim for relief. In Stack v. Strang, 94 F. Supp. 54 (S. D. N. Y. 1950), *rev'd on other grounds*, 191 F. 2d 106 (2d Cir. 1951), it was claimed that the defendant Secret Service agent took a gold coin of the United States from the plaintiff while acting wrongfully and without authority. The action was dismissed. See Seiden v. Larson, note 38 *supra*.

[42] Minnesota v. United States, 305 U. S. 382 (1938) (proceeding against property in which the United States has an interest); Wells v. Roper, 246 U. S. 335 (1918) (action to restrain Assistant Postmaster General from cancelling mail carrying contract and from putting new plan into effect); United States *ex rel.* Goldberg v. Daniels, 231 U. S. 218 (1913) (bidder for surplus warship sought to compel delivery of the craft by Navy Secretary); Young v. Anderson, 160 F. 2d 225 (D. C. Cir.), *cert. denied*, 331 U. S. 824 (1947) (action to restrain Secretary of Agriculture from leasing government land). *Cf.* Goltra v. Weeks, 271 U. S. 536 (1926) (United States not a necessary party in action to enjoin Secretary of War from unauthorized seizure of plaintiff's barges).

[43] Block, *Suits Against Government Officers and The Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946).

avoids consideration of the basic questions whether the relief asked would interfere with the administration of governmental affairs,[44] or whether the acts complained of were in fact the acts of the sovereign because the official was acting within the scope of his authority. *Domestic & Foreign* does not attempt to alter this approach to the basic immunity question, but it is encouraging to note that recent cases have met the issue of sovereign immunity squarely and have not approached the issue from the standpoint of whether the United States is an indispensable or necessary party.[45]

5. *Suits where official action is necessary to effectuate the relief asked.* Although the claim for relief is based upon allegations that the official acted as an individual in injuring the plaintiff's legally protected interest, an issue which might affect the availability of relief in every case is whether the relief sought would require action by the defendant in his official capacity. Seemingly there would be very strong reasons for refusing to entertain an action which seeks to control or direct the official activities of members of the executive branch,[46] but the courts have never refused relief on this ground alone; rather, they seem to use this factor only as a make-weight.[47] Indeed, any

[44] Cases recognizing the importance of the effects of the action upon governmental affairs: Perkins v. Lukens Steel Co., 310 U. S. 113 (1940) (many suits had frustrated the policies of the Public Contracts Act and had tied up its administration for more than a year); Wells v. Roper, 246 U. S. 335 (1918) (an intolerable interference with governmental processes to seek to compel Assistant Postmaster General to retain old-fashioned methods of mail delivery); Louisiana v. McAdoo, 234 U. S. 627 (1913) (suit would disturb the whole revenue system and affect the revenue to be anticipated if defendant were ordered to revise tariff rates).

[45] Two exceptions: Aktiebolaget Bofors v. United States, 194 F. 2d 145 (D. C. Cir. 1951); Jackson v. Sims, 201 F. 2d 259 (10th Cir. 1953).

The complaint may be dismissed for failure to name another official as defendant. Snyder v. Buck, 340 U. S. 15 (1950) (successor in office not joined in time); Cha-toine Hotel Apartments Building Corp. v. Shogren, 204 F. 2d 256 (7th Cir. 1953) (failure to join Federal Housing Administrator); Payne v. Fite, 184 F. 2d 977 (5th Cir. 1950); N. Y. Technical Institute of Maryland, Inc. v. Limburg, 87 F. Supp. 308 (D. Md. 1949). *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569 (D. C.), *aff'd*, 342 U. S. 820 (1952) (President of United States not necessary or indispensable party when Commerce Secretary being sued for proceeding under invalid grant of authority).

[46] Wells v. Roper, 246 U. S. 335 (1918).

[47] Codray v. Brownell, 207 F. 2d 610 (D. C. Cir. 1953), *cert. denied*, 347 U. S. 903 (1954) (prayer that defendant be ordered to issue license authorizing payment of plaintiff's claim, or pay the plaintiff out of seized assets of alien corporation; controlling reasons for denying relief: official discretion involved, and failure to join Alien Property Custodian); American Dredging Co. v. Cochrane, 190 F. 2d 106 (D. C. Cir. 1951) (plaintiff sought to compel return of surplus barge formerly owned by it; controlling reasons for dismissal: defendants acting pursuant to authority, sovereign property involved, and no purely ministerial duty to deliver the barge to plaintiff); Payne v. Fite, 184 F. 2d 977 (5th Cir. 1950) (prayer that postmaster be ordered to deliver mail three times daily instead of only once; controlling reasons for denying jurisdiction: official discretion involved, failure to join Postmaster General). *Cf.* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 (1951); United States *ex rel.* Goldberg v. Daniels, 231 U. S. 218 (1913).

suit for specific relief against a government official wherein the doctrine of sovereign immunity might have application necessarily involves the official capacity of the defendant. He is sued only because he holds an office; the relief sought of necessity would restrain official action or require affirmative official action.[48] If the officer has acted without authority or unconstitutionally the jurisdictional question should not hinge upon whether an order rectifying damage done to the plaintiff requires action or inaction in some official capacity.[49] If the jurisdiction of the courts depended upon whether the relief asked would control official action, federal officials would be absolutely immune from suit.[50] The very fact that official activity can be directed and controlled by court decree in itself shows that there is more fiction than fact to the theory that there will be jurisdiction if the official acted in an "individual" capacity rather than as an agent of the sovereign.

6. *Suits against officials to compel payment of money due under contract.* The rule remains unchanged by *Domestic & Foreign* that an action against an official which has as its object the payment of money pursuant to the terms of a contract made with the defendant in his official capacity, or which prays for money damages because of breach of such a contract, cannot be maintained.[51] The only course

In Sawyer v. Dollar, 190 F. 2d 623 (D. C. Cir. 1951) the Secretary of Commerce had been ordered to indorse and return certain shares of stock to the plaintiffs; the Secretary contended that he could not be required to act in an official capacity, *i.e.*, indorsing the stock as Secretary of Commerce. The Court of Appeals held that since it had been decided that the defendant had possession of the stock as an individual, he could be required by court decree to yield whatever possession he had, with appropriate indorsements.

[48] Plaintiffs proceeding against government officials for affirmative relief invariably substitute defendant's successor in office as party defendant, in case of death or retirement. Substitution is governed by FED. R. CIV. P. 25(d).

[49] In Doehla Greeting Cards, Inc. v. Summerfield, 116 F. Supp. 68 (D. C. 1953) the court states by way of footnote, "This court interprets the reference in Larson v. Domestic & Foreign Commerce Corp., . . . to a 'suit for specific relief against the officer as an individual' to mean a suit against the individual officer in his official capacity where necessary to effect the relief sought, as distinguished from a suit against the officer which is in effect a suit against the United States." *Id.* at 76n.

[50] That they should not be so immune: West Coast Exploration Co. v. McKay, 213 F. 2d 582, 596 (D. C. Cir. 1954), and Sawyer v. Dollar, 190 F. 2d 623 (D. C. Cir. 1951).

[51] Mine Safety Appliances Co. v. Forrestal, 326 U. S. 371 (1945); Nimro v. Davis, 204 F. 2d 734 (D. C. Cir. 1953); Burkley v. United States, 185 F. 2d 267 (7th Cir. 1950); Reconstruction Finance Corp. v. MacArthur Mining Co., Inc., 184 F. 2d 913 (8th Cir. 1950).

There is no jurisdiction to entertain such actions even under the theory of Land v. Dollar, 330 U. S. 731 (1947), to the effect that the plaintiff owns the money and the defendants wrongfully withhold it from him. Story v. Snyder, 184 F. 2d 454 (D. C. Cir. 1950) (plaintiff contended that defendants held the money in trust for him).

open to the complaining party is to proceed against the United States for damages in the district courts or in the Court of Claims.[52]

7. Suits to compel performance of purely ministerial duties. The *Domestic & Foreign* opinion also leaves substantially unchanged the availability of relief in the nature of mandamus against an officer to compel performance of a clear legal duty.[53] It had never been held that an action to compel the performance of a purely ministerial duty is in effect a suit against the United States or one requiring the joinder of the United States as a party defendant.[54] On the other hand, if the action is to compel performance of an official duty which involves the exercise of discretion it is a suit against the United States if that exercise is pursuant to the terms of a grant of authority.[55] If the question of clear legal duty turns on the authority of the defendant to refuse to release the property the plaintiff is seeking, then the *Domestic & Foreign* rule that the defendant's acts must conflict with the terms of the grant of authority comes into play.[56] This illustrates the close interrelationship and interplay of established rules in every suit against federal officers.

Although many actions against federal officers might be disposed of on non-jurisdictional grounds such as failure to exhaust available remedies before seeking equitable relief,[57] it is desirable that the jurisdic-

[52] Aktiebolaget Bofors v. United States, 194 F. 2d 145 (D. C. Cir. 1951); see note 4 *supra.*

[53] Chapman v. El Paso Natural Gas Co., 204 F. 2d 46 (D. C. Cir. 1953).

Although FED. R. CIV. P. 81(b) abolishes the writ of mandamus, the remedy itself is still available and may be obtained by appropriate action or motion. Hammond v. Hull, 131 F. 2d 23 (D. C. Cir. 1942). The general principles governing its use are: (1) the duty should be clearly defined and the obligation to act peremptory; (2) the party seeking relief must show that defendant has breached his duty; (3) the courts have no general supervisory power over the executive branch; (4) if the defendant's duty requires an interpretation of the law governing that duty, it will not be interfered with absent arbitrariness or capriciousness on the part of the official; (5) generally, the party seeking this relief must exhaust any administrative remedies available. Hammond v. Hull, 131 F. 2d 23 (D. C. Cir. 1942).

[54] Miguel v. McCarl, 291 U. S. 442 (1934); Houston v. Ormes, 252 U. S. 469 (1920); Smith v. Jackson, 246 U. S. 388 (1918).

[55] Wells v. Roper, 246 U. S. 335 (1918).

[56] West Coast Exploration Co. v. McKay, 213 F. 2d 582 (D. C. Cir.), *cert. denied,* 347 U. S. 988 (1954); Codray v. Brownell, 207 F. 2d 610 (D. C. Cir. 1953), *cert. denied,* 347 U. S. 903 (1954); American Dredging Co. v. Cochrane, 190 F. 2d 106 (D. C. Cir. 1951).

[57] Franklin v. Jonco Aircraft Corp., 346 U. S. 868 (1953); Rogers v. Skinner, 201 F. 2d 521 (5th Cir. 1953). One district court has stated that if the threat of irreparable injury is serious or if the officer is allegedly acting without authority or unconstitutionally, other remedies need not be exhausted. Parker v. Lester, 98 F. Supp. 300, 307 (N. D. Cal.), *appeal dismissed,* 191 F. 2d 1020 (9th Cir. 1951); Farrell v. Moomau, 85 F. Supp. 125, 127 (N. D. Cal. 1949).

Cases which could have been disposed of on the ground that plaintiff had suffered no injury to a legally protected interest: New Haven Public Schools v. General Services Administration, 214 F. 2d 592 (7th Cir. 1954); Guiberson v. Reconstruction Finance Corp., 196 F. 2d 154 (5th Cir. 1952). In some cases this was the reason for dismissal. Perkins v. Lukens Steel Co., 310 U. S. 113

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, boathouses, bulkheads or other structures located over or partially over water and the property therein or thereon."

[2] Jordan 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).

[3] Pearson 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."

[4] Bogalusa 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).

[5] Atlas 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 windstorm, 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]

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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 *concurs* 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.

appears to indicate that by not participating actively in the trial after testifying for his client, an attorney would be complying with the canon, even though his partner conducted the remainder of the trial.[4] On the other hand, "a lawyer should avoid testifying in court in behalf of his *client*" (italics added), seems technically to indicate that a mere withdrawal from active conduct of the trial would not be sufficient, but that the relationship between the client and the testifying attorney should be completely dissolved. While no court has specifically mentioned this distinction, a review of the cases shows that both meanings have been recognized.

The language of the *Millican* case, although not completely clear, tends toward the strict interpretation of "withdrawal."[5] If the Florida court actually adopted this view, then, on the basis of the cases surveyed, it seems to stand as the only American court committed to enforcing the canon on such a strict basis. There are some courts which indicate that they will "look the other way" when there is a violation of Canon 19 if the testifying attorney withdraws from active conduct of the trial, but that they might enforce the canon if there

[4] For a discussion of such a situation see Erwin M. Jennings Co. v. Di Genova, 107 Conn. 491, 496-501, 141 Atl. 866, 867-869 (1928), in which the court says there should be no ethical difference between a sole attorney's testifying for his client and one attorney of a partnership testifying while his partner actively conducts the case. However, the opinions of the American Bar Association Committee on Ethics no longer take such a strict view. Opinion 33 (1931) said that relations between partners of a law firm are so close that no member of a firm should take a case which any one member is prohibited from taking. In Opinion 50 (1931), the Committee stated broadly that an attorney should not accept a case in which he has reason to believe that he or any of his partners will be a material witness and should withdraw when and if such becomes apparent. Opinion 185 (1938) held that it was improper for a lawyer to accept employment in a case where it would be his duty to attack the essential testimony to be given by his partner on behalf of the other side. But in Opinion 220 (1941), the Committee says that the aforementioned opinions are too rigid and comes to the conclusion that it is not always improper for an attorney to appear in a case in which his partner is a material witness. The opinion says that the propriety of a lawyer's appearance in such a situation should depend on the particular facts of the case, and then suggests the advisability of the following addition to Canon 19: "It is improper for an attorney to act as counsel in a matter as to which he or his partner has testified or will be required to testify, except by special permission of the tribunal in which he is to appear as counsel."

[5] "The purpose of [the rule] is to inhibit a lawyer from testifying in his client's case except as to matters specified therein. If the urgency to testify arises after trial starts, other counsel should take charge or if that cannot be done with convenience to the parties, a continuance should be granted after a full disclosure to the court unless it is shown that prejudice and injustice can be avoided. If counsel is aware of the necessity for his testimony before the trial begins, he should discuss the matter with his client and decide whether other counsel should be substituted or if he should retire from the case. The rule on the point is so clear that counsel should anticipate the reason and effect of his testimony beforehand and if it goes beyond formal matters he should advise his client and make proper arrangements for other counsel to handle the trial." Millican v. Hunter, 73 So. 2d 58, 60 (Fla. 1954).

is not a withdrawal at least to that extent.[6] However, in most states in which this question has arisen, it is held that, despite the serious breach of professional ethics involved, an attorney may testify for his client without ceasing to take an active part in the conduct of the trial,[7] and though no emergency has arisen which would make his

[6] In Christensen v. United States, 90 F. 2d 152 (7th Cir. 1937), it was held error to exclude attorney's testimony, but it was said that the trial court would have been justified in excluding him from further participation in the trial. In Nye Odorless Incinerator Corp. v. Felton, 35 Del. 236, 162 Atl. 504 (1931), the testimony of defendant's attorney was upheld, but the court indicated that this was because it related only to formal matters. In Storbeck v. Fridley, 240 Iowa 879, 38 N. W. 2d 163 (1949), where defendant's attorney testified over objection *after* withdrawing from the case, the court upheld the testimony, but indicated that it did so only because the attorney withdrew. (*Query:* Does this indicate that the Iowa court intends to take a stricter view than that taken by the older cases cited in note 7, *infra*?) Cox v. Kee, 107 Neb. 587, 186 N. W. 974 (1922), was a case in which the refusal of the trial court to let plaintiff's attorney testify without withdrawing was affirmed. But, the court indicated that it required only a withdrawal from active participation: "[The propriety of withdrawing holds] especially true where, as in the instant case, other capable attorneys are associated and the interests of the litigant will not be jeopardized. . . ." *Id.* at 590, 186 N. W. at 975. Weil v. Weil, 125 N. Y. S. 2d 368 (1st Dep't 1953), was a divorce case based on adultery, where the husband's attorney, who had made the pretrial investigation, repeatedly referred to his presence at events he investigated, vouched for the truthfulness of his witnesses, and testified for his client. The court said this conduct alone *might* have been ground for reversal, but reversed for other reasons. Other cases in the same general tenor are: Hagerty v. Radle, 228 Minn. 487, 37 N. W. 2d 819 (1949); Callen v. Gill, 7 N. J. 312, 81 A. 2d 495 (1951); Security Trust Co. v. Stapp, 332 Pa. 9, 1 A. 2d 236 (1938); Carey v. Powell, 32 Wash. 2d 761, 204 P. 2d 193 (1949).

[7] Ford v. District of Columbia, 96 A. 2d 277 (D. C. Munic. Ct. App. 1953) (error where trial court refused to allow defendant's attorney to testify as to contradictory statements made by complaining witness at preliminary hearing before another judge unless he withdrew); Miller v. Urban, 123 Conn. 331, 195 Atl. 193 (1937) (Plaintiff's objection to defendant's attorney's testimony on grounds that he was defendant's only attorney of record and had participated in the conduct of the trial was sustained by the trial court. The court said that "the offer to testify was ethically improper, but the exclusion of the testimony, on that ground, was legally erroneous." *Id.* at 335, 195 Atl. at 195.); Swaringen v. Swanstrom, 67 Idaho 245, 175 P. 2d 692 (1946); Shlensky v. Shlensky, 369 Ill. 179, 15 N. E. 2d 694 (1938); Reisch v. Bowie, 367 Ill. 126, 10 N. E. 2d 663 (1937); Waterman v. Bryson, 178 Iowa 35, 158 N. W. 466 (1916) (Appellant contended that there had been no fair and impartial trial because plaintiff's attorney testified and then commented on his testimony in his summation to the jury. The court said, "it is not error for an attorney to testify, though he remain in the case. . . ." *Id.* at 39, 158 N. W. at 467.); McLaren v. Gillispie, 19 Utah 137, 56 Pac. 680 (1899) (error where trial court refused to allow defendant's sole attorney to testify unless he withdrew from the case).

In Sengebush v. Edgerton, 120 Conn. 367, 180 Atl. 694 (1935), it was held error for the trial court not to allow defendant's sole attorney to testify on hearing of a motion for a new trial in regard to alleged newly discovered evidence. "When the attorney in this case offered to testify, the court could not treat him as disqualified, but the most it could do would be to remind him of the impropriety of his conduct." *Id.* at 370, 180 Atl. at 696. However, the error was held harmless because of the cumulative and corroborative nature of the proposed new evidence.

In these cases attorneys were allowed to testify, but they had not participated actively in the conduct of the trial, although they had assisted in prepara-

testimony necessary to prevent injustice.[8]

Of course, where an attorney is himself a party in an action and chooses to conduct his own case, he may take the witness stand to testify for himself.[9]

The position of the federal courts on forcing an attorney to withdraw from the litigation if he testifies for his client as to a material matter is not quite clear. While, as in the vast majority of states,[10] it is well settled that a lawyer is a competent witness for his client,[11] it appears that whether he must withdraw is left to the discretion of the trial court.[12]

In North Carolina the question of the enforceability of this canon[13] has not been answered, although it is settled that a lawyer is competent to testify for his client.[14]

When an ethical standard is stated with enough clarity to make it undoubtedly a violation for an attorney to testify for his client without at least withdrawing from active participation in the trial, it may be asked what justification the courts can give for failing, in most cases, to enforce it. The reason most generally advanced is that it would be unfair to penalize the client for an ethical violation committed by his attorney.[15] Whatever validity this argument might have in relation

tion and received fees: Erwin M. Jennings Co. v. Di Genova, 107 Conn. 491, 141 Atl. 866 (1928); Barto v. Kellogg, 289 Ill. 528, 124 N. E. 633 (1919).

[8] In these cases the courts upheld the trial courts' permitting of attorneys to testify without withdrawing, but justified on the ground that from the record it seemed possible that the testimony was necessary to prevent injustice: Kintz v. R. J. Menz Lumber Co., 47 Ind. App. 475, 94 N. E. 802 (1911); Burgdorf v. Keeven, 351 Mo. 1003, 174 S. W. 2d 816 (1943).

For dicta indicating that it should be within the discretion of the trial court to determine whether an attorney's testimony is necessary to prevent injustice, *see:* Holbrook v. Seagrove, 228 Mass. 26, 29, 116 N. E. 889, 890 (1917); Hagerty v. Radle, 228 Minn. 487, 506, 37 N. W. 2d 819, 830 (1949); Security Trust Co. v. Stapp, 232 Pa. 9, 14, 1 A. 2d 236, 238 (1938).

[9] Kaeser v. Bloomer, 85 Conn. 209, 82 Atl. 112 (1912).

[10] "The overwhelming weight of authority supports the view that, although it is a grave breach of professional ethics for an attorney of a party to testify as to anything other than matters of a formal nature without withdrawing from the litigation, he is not incompetent so to testify, and his testimony is clearly admissable, if otherwise competent." Annotation, 118 A. L. R. 954 (1939); WIGMORE, EVIDENCE § 1911 (3d ed. 1940).

[11] French v. Hall, 119 U. S. 152 (1886); Steiner v. United States, 134 F. 2d 931 (5th Cir. 1943); Modern Woodmen of America v. Watkins, 132 F. 2d 352 (5th Cir. 1942); Christensen v. United States, 90 F. 2d 152 (7th Cir. 1937); Baldwin v. National Hedge & Wire-Fence Co., 73 Fed. 574 (3d Cir. 1896).

[12] Christensen v. United States, 90 F. 2d 152, 154 (7th Cir. 1937) (It was error to exclude testimony of defendant's attorney, though the trial court would have been justified in excluding him from further participation in the trial.).

[13] See note 1 *supra.*

[14] *In re* Will of Kemp, 236 N. C. 680, 684, 73 S. E. 2d 906, 910 (1953); County Trustee of Brunswick v. Woodside, 31 N. C. 496, 502 (1849); Slocum v. Newby, 5 N. C. 423 (1810); STANSBURY, NORTH CAROLINA EVIDENCE § 62 (1946).

[15] *E.g.,* Paine v. People, 106 Colo. 258, 264, 103 P. 2d 686, 689 (1940); Cuve-

to appellate courts' refusals to reverse for violations of the canon, it does not excuse the trial court for allowing the violation in the first place.

On the other hand, there are sound reasons which can be advanced for not allowing an attorney to testify for his client. Professor Wigmore says that the most persuasive argument "is concerned with the dangerous effects of the practice upon the public mind. In short, it does not fear that lawyers may as witnesses distort the truth in favor of the client, but it fears that the public will *think* that they may, and that the respect for the profession and confidence in it will be effectively diminished. This is at once the most potent and most common reason judicially advanced."[16]

As it now stands, Canon 19 does not prohibit the testimony of attorneys in two situations: first, it permits lawyers to testify in behalf of their clients concerning formal matters, such testimony generally being of minor significance; and second, it permits lawyers to testify without withdrawing where the testimony is concerned with matters of very great significance, where the exclusion of the testimony would defeat the ends of justice. Therefore, it can be argued that even if Canon 19 were enforced strictly, there would still be only a limited middle area of testimony for which the testifying lawyer would be required to withdraw. This situation gives rise to the question of whether it might not be better to replace Canon 19 with a clearer and stricter canon which would, under no circumstances, allow an attorney to testify for his client without withdrawing from further participation in the trial.

However, if the present canon is not replaced, the following plan would seem to make its meaning clearer and its enforcement more certain, while providing some degree of protection for both the profession and the client:

(1) Leave to the discretion of the trial judge the questions of whether the testimony the lawyer desires to give for the client is

lier v. Town of Dumont, 221 Iowa 1016, 1021, 266 N. W. 517, 520 (1936); Waterman v. Bryson, 178 Iowa 35, 39, 158 N. W. 466, 467 (1916).

[16] 6 WIGMORE, EVIDENCE § 1911 (3d ed. 1940). This argument is discussed at some length in Erwin M. Jennings Co. v. Di Genova, 107 Conn. 491, 496-501, 141 Atl. 866, 867-869 (1928). Other reasons given are: (1) Disqualification by interest, due to the general partisan relationship existing in favor of the client, regardless of any specific interest in the cause, such as money or prestige. This argument, says Prof. Wigmore, had considerable force when pecuniary interest was a disqualification in general, but the old cases refusing to allow lawyers to testify on these grounds have no present significance. (2) A rarely advanced argument that the testimony under oath of the attorney and his other statements during the course of the trial might be intermingled in the minds of the jurors, so that they unconsciously give the weight of the testimony under oath to all that he says.

of a formal nature or so significant that it is essential to the ends of justice.

(2) If the testimony is determined by the trial judge to fit either of these two categories, then the attorney should be allowed to testify for his client without withdrawing from the case.

(3) If the testimony is determined by the trial judge not to fit either of these categories, then the attorney should not be permitted to testify for his client unless he withdraws completely as counsel.

(4) If, however, a trial judge should allow an attorney to testify for his client without first determining the nature of the proposed testimony, and it is found on appeal that the testimony fits neither of the permitted categories and should not have been admitted without the withdrawal of the testifying attorney, then the appellate court should not reverse at the expense of the client.

(5) Rather, in such a situation, a stated and suitable punishment for the offending attorney should be incorporated into the rules and regulations of the state bar association, the enforcement procedure being handled by the regular enforcement machinery for such regulations.

WILLIAM E. ZIMTBAUM.

Pleadings—Last Clear Chance—North Carolina Requirements

Last clear chance in North Carolina, as a substantive doctrine, can be defined in terms which have been consistently repeated and approved since the introduction of the concept late in the last century.[1] A typical definition would be that the "contributory negligence of the plaintiff does not preclude a recovery where it is made to appear that the defendant, by exercising reasonable care and prudence, might have avoided the injurious consequences to the plaintiff, notwithstanding plaintiff's negligence; that is, that by the exercise of reasonable care defendant might have discovered the perilous position of the party injured or killed and have avoided the injury, but failed to do so."[2] Our inquiry here is to determine what allegations, if any, are required in the plaintiff's pleadings before a trial court in North Carolina should submit to the jury the issue of last clear chance.

The most recent declaration by the North Carolina Supreme Court concerning methods by which a plaintiff may avail himself of the doctrine of last clear chance was *Collas v. Regan*,[3] which held that he was

[1] Gunter v. Wicker, 85 N. C. 310 (1881).
[2] Ingram v. Smoky Mt. Stages, Inc., 225 N. C. 444, 447, 35 S. E. 2d 337, 339 (1945).
[3] 240 N. C. 472, 82 S. E. 2d 215 (1954).

not entitled to have the jury consider the doctrine because his pleadings had not sufficiently raised the issue. The court said of the appellant's contention that the trial judge erred in refusing to submit the issue that it could not now overrule past decisions holding that last clear chance must be pleaded, and added that, in any event, the evidence on the point was insufficient to support the submission of the issue.[4] As precedent for its position, the court cited two cases which it characterized as "practical applications of the basic rule that a plaintiff can recover only on the case made by his pleadings."[5]

The earlier of the two cited cases, *Hudson v. Norfolk Southern Railroad Co.*,[6] held that a judgment on the verdict for the plaintiff must be reversed because of the trial judge's error in instructing the jury that the burden of proof on the issue of last clear chance was on the defendant. Then, the court quoted from 11 *Corpus Juris* 282 in reference to the burden of *both* pleading and proof, and stated: "In order to invoke the 'last clear chance' doctrine, plaintiff must plead and prove that the defendant, after perceiving the danger, and in time to avoid it, negligently refused to do so."[7]

On this near-dictum was built the second cited case, *Bailey and King v. North Carolina Railroad.*[8] The facts there were as follows: the plaintiffs' intestates, while riding in a truck in the City of Durham, approached the defendant's track where the view was unobstructed for several hundred yards, and then attempted to cross in front of an oncoming passenger train, which was approximately 400 yards from the crossing, traveling at a rate in excess of the speed limit and sounding neither bell nor whistle. When on the track, the truck stalled, and as the plaintiffs' witness described it, "the truck looked like it was trying to get off, kinder moved back and forth and settled down at the time the train hit it,"[9] killing both occupants. In affirming a judgment of non-suit, granted on defendant's motion at the close of the plaintiffs' evidence, the court held that the testimony introduced by the plaintiffs conclusively proved their intestates' own negligence, and then stated: "Furthermore, the plaintiffs do not plead the last clear chance, which is required before such doctrine is available, paragraph 8(f) of the complaint not being susceptible of such construction."[10] At that

[4] *Ibid.* The evidence showed that the plaintiff was struck by the defendant's automobile as he was crossing the street at night, while carrying a bag of groceries. *The only allegation of negligence appearing in the plaintiff's complaint was that the defendant failed to maintain a proper lookout.* See Transcript of Record.

[5] *Id.* at 473, 82 S. E. 2d at 216.

[6] 190 N. C. 116, 129 S. E. 146 (1925).

[7] *Id.* at 119, 129 S. E. at 147.

[8] 223 N. C. 244, 25 S. E. 2d 833 (1943).

[9] *Id.* at 246, 25 S. E. 2d at 835.

[10] *Id.* at 248, 25 S. E. 2d at 835.

point the court again quoted the above-mentioned passage from *Corpus Juris* and cited *Hudson v. Norfolk Southern Railroad* as authority for its conclusion.

A look at the appeal record reveals that the plaintiffs, in paragraphs 8(a) through 8(e) of their complaint, alleged specific acts of negligence, *i.e.*, excessive speed, failure to keep a proper lookout, unsafe condition of the crossing; and then in paragraph 8(f) alleged that "had the operators of said passenger train been operating said train at a reasonable rate of speed, used due care and kept a proper lookout that it would have discovered the said Chevrolet truck and its two occupants upon said crossing as they had a clear view of at least 350 to 400 yards and recognized their position of peril and could have stopped said train in ample time to have avoided the collision and the death of the plaintiff's intestate."[11]

It seems fairly apparent, to this writer at least, that while the plaintiffs' actual allegations do not explicitly parrot the *Corpus Juris* phraseology suggested by the court as an acceptable standard for pleading last clear chance, the allegations do attempt to emphasize the intestates' position of peril or danger, which seems to be a key substantive element, and one which was missing from the *Collas* pleadings.[12] If, as suggested in the *Collas* case, *Bailey and King v. North Carolina Railroad* stands as a definitive expression of the North Carolina view on pleading last clear chance, what is its full significance and what procedural lessons can be learned from it? A review of some general pleading problems and an inspection of the North Carolina judicial history on pleading last clear chance will be of some help.

The effect of procedural law on the application of the doctrine of last clear chance varies considerably among the states.[13] Some states consider the doctrine to be essentially one of evidence and not of pleading.[14] McIntosh apparently conceived North Carolina to be in a somewhat comparable position, as he briefly stated that when "the defendant pleads contributory negligence, it is deemed to be denied without reply, and the plaintiff may also take advantage of the last clear chance or plead it especially in reply."[15] For his authority he cited *Nathan v. Charlotte St. Ry.*[16] where, in response to the defend-

[11] Transcript of Record, p. 7, Bailey and King v. North Carolina Railroad, 223 N. C. 244, 25 S. E. 2d 833 (1943).

[12] See note 4 *supra*.

[13] See annotation, 25 A. L. R. 2d 257 (1952).

[14] Pfisterer v. Key, 218 Ind. 521, 33 N. E. 2d 330 (1941); Nielson v. Richman, 68 S. D. 104, 299 N. W. 74 (1941); Masso v. E. H. Stanton Co., 75 Wash. 220, 134 Pac. 941 (1913).

[15] McIntosh, North Carolina Practice and Procedure § 478 (1929).

[16] 118 N. C. 1066, 24 S. E. 511 (1896). The allegations in the complaint were that the plaintiff paid his fare to ride the defendant's streetcar. While being conveyed to his destination, he was thrown to the tracks and struck by

ant's objection that the issue of last clear chance was improperly submitted to the jury because it was not raised in the complaint, the court stated: "In contemplation of law, the injury is not attributed to the wrongful act unless it is shown to be the immediate and proximate cause. So that, the allegation by the plaintiff that the injury was due to the defendant's carelessness, and the denial of that, coupled with the averment by the defendant that the contributory negligence of the plaintiff was the cause, *necessarily* involves the question of whether the defendant negligently omitted to avail itself of the last clear chance to avoid the accident by the performance of a legal duty" (italics added).[17] The court then affirmed its position in an earlier case[18] and held that if by refusing to submit the issue of last clear chance the trial court had prevented the plaintiff from presenting to the jury the law applicable to the evidence, "then it would be no longer discretionary with the judge whether he would permit it to be passed upon, but would become the right of the plaintiff to demand that it should be."[19]

This idea was reinforced in a later case where a similar objection was raised by the defendant that the trial court erred in submitting the issue of last clear chance and in refusing a request for binding instructions in his favor should the jury find the plaintiff guilty of negligence. The court answered defendant's exception by pointing out that the trial court may not properly instruct the jury that the proximate cause of the injury was the plaintiff's negligence when the evidence indicates that the "negligence may have been concurrent, or the last negligence may have been the plaintiff's, or notwithstanding the negligence of the plaintiff, the defendant could, with the exercise of ordinary care have prevented his horse striking, and his conveyance running over, the plaintiff. The jury and jury alone were competent to determine the fact, for there was evidence for their consideration."[20]

In contrasting the *Bailey* with the *Nathan* case, the impression is received that the North Carolina requirements for pleading facts which permit recovery on the theory of last clear chance have been stiffened in favor of the defendant. Yet it is difficult to determine from the language of the *Bailey* decision whether, in fact, its apparent conflict

another of the defendant's cars, all of which was caused by the negligent, careless and wrongful operation of its streetcars by the defendant. See Transcript of Record.

[17] *Id.* at 1069, 24 S. E. at 511.

[18] Baker v. Wilmington and Weldon R. R., 118 N. C. 1015, 1023, 24 S. E. 415, 417 (1896).

[19] Nathan v. Charlotte St. Ry., 118 N. C. 1066, 1069, 24 S. E. 511 (1896).

[20] Wheeler v. Gibbon, 126 N. C. 811, 36 S. E. 277 (1900).

with the *Nathan* case may not largely be due to a substantive rather than a procedural difference.

Since the adoption of the Code of Civil Procedure, North Carolina has not required explicit characterization or labeling of the theory under which the plaintiff expects to recover,[21] but, quite the contrary, asks only for a clear, concise statement of the facts which show a cause of action under any theory.[22] Although it is true that the plaintiff's pleadings must properly apprise the defendant of the alleged cause of action so that he may prepare his defense,[23] the court has stated that the complaint should not anticipate a possible defense in the answer.[24] Therefore, in spite of the fact that the doctrine of last clear chance does not begin to operate unless the plaintiff is guilty of negligence,[25] it is unlikely that the *Bailey* case means to impose upon plaintiffs the burden of initially confessing their own negligence.

In the scope of this note, it would be impossible even to attempt to span the substantive law of last clear chance in North Carolina with its endless shadings and distinctions;[26] nevertheless, some mention of it is necessary at this point. The court has held that the doctrine of last clear chance does not apply to situations where the defendant's train has struck a pedestrian plaintiff, who as a licensee or trespasser, was on the defendant's track and apparently in full command of his faculties. Railroads, in such instances, have been absolved on the theory that the engineer is entitled to expect up to the moment of impact that the pedestrian will remove himself;[27] therefore, any negligent failure by the defendant to keep a proper lookout or to give warning of its approach would merge with the concurring negligence of the plaintiff and bar recovery. An essential substantive element here seems to be the "condition" of the plaintiff, *i.e.*, whether his position was such that the defendant was put on notice of the plaintiff's inability to escape.[28] Unless such notice of disability appears, the defendant has no later chance to avoid the collision than does the plaintiff.

The *Bailey* case, although clearly distinguishable on its facts from the pedestrian cases, follows their reasoning rather closely by holding,

[21] Thomas v. Atlantic and North Carolina R. R., 218 N. C. 292, 10 S. E. 2d 722 (1940).

[22] N. C. GEN. STAT. § 1-122 (1953); Hill v. Buxton, 88 N. C. 27 (1883).

[23] Hussey v. Norfolk Southern R. R., 98 N. C. 34, 3 S. E. 923 (1887).

[24] Joyner v. P. L. Woodward & Co., 201 N. C. 315, 160 S. E. 288 (1931). By way of dictum the court added that if a defense is anticipated and not negatived in the complaint it is subject to demurrer.

[25] Redmon v. Southern Ry., 195 N. C. 762, 143 S. E. 829 (1928).

[26] For an interesting discussion of the substantive aspect, see Note, 33 N. C. L. REV. 138 (1954).

[27] Beach v. Southern Ry., 148 N. C. 153, 61 S. E. 664 (1908).

[28] Neal v. Carolina Central R. R., 126 N. C. 634, 36 S. E. 117 (1900).

in effect, that the intestates themselves had the last clear chance to avoid the collision, in spite of the obvious differences in maneuverability between pedestrians and occupants of stalled vehicles. If such is the substantive law of last clear chance as applied to vehicle-train collisions, allegations based on similar facts will not permit consideration of last clear chance because the proof could not satisfy the legal definition which the court has placed on the words "peril" or "danger."[29] Therefore, the fault would lie not with the pleading form, but with a failure of plaintiff's proof to avoid a finding that his negligence was concurrent, or "contributory" as a matter of law. The *Bailey* case might easily have been decided without reference to the pleading form, thereby preventing some of the precedural mystery of its holding.

Regardless of whether the court considers the doctrine of last clear chance to be a theory alternate to and distinct from ordinary negligence, or as merely a facet of the over-all inquiry into the proximate cause of the injury, the results are the same. A plaintiff hoping to take advantage of the doctrine is evidently no longer permitted to rely on the ordinary allegations of negligence with the privilege of getting special instructions to the jury on the issue should the evidence produce a case where the last clear chance doctrine would be applicable. The recent North Carolina decisions seem to mean that specific facts which would give rise to the operation of the doctrine should be pleaded in the complaint on an alternative basis in a separate count, or included by way of reply[30] to an answer which sets up a defense of contributory negligence.

ROBERT B. MILLMAN, JR.

Taxation—Ad Valorem Tax on Flight Equipment of Interstate Airlines

Interstate business must pay its way[1] and its "way" may properly be regarded as the protection, services, and other benefits afforded by those authorities through whose jurisdictions such business operates.[2] By daily use of airports, the aircraft of interstate carriers directly receive a major part of the services and other benefits furnished by the taxpayers of the jurisdiction in which the airports are located. It would seem to follow that such aircraft properly may be the subject of ad valorem property taxes.

[29] Dowdy and Burns v. Southern Ry., 237 N. C. 519, 75 S. E. 2d 639 (1953).
[30] See Redwine v. Bass, 215 N. C. 467, 2 S. E. 2d 362 (1939).

[1] Postal Telegraph-Cable Co. v. City of Richmond, 249 U. S. 252, 259 (1919).
[2] *Ibid.* Braniff Airways, Inc. v. Nebraska State Board, 347 U. S. 590, 606 (1954); Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169, 174 (1949); Curry v. McCanless, 307 U. S. 357, 364 (1939).

In *Braniff Airways, Inc. v. Nebraska State Board*[3] the Supreme Court of the United States for the first time considered and upheld a state tax upon the flight equipment of an interstate carrier doing business within the state but incorporated in another state. The Court held against the airline's principal argument that its aircraft "never attained a taxable situs within Nebraska"[4] and said that eighteen stops per day in that state are "sufficient to establish Nebraska's power to tax even though the same aircraft do not land every day and even though none of the aircraft is continuously within the State."[5] It seems clear that this decision means that the aircraft of interstate airlines are within the tax jurisdiction of each state in which they make daily stops.

It would seem that similar property in North Carolina is taxable, since "all property, real and personal, within the jurisdiction of the State, not especially exempt, shall be subject to taxation."[6] The flight equipment of foreign commercial airlines is not exempt from taxation under the North Carolina Constitution or tax laws.[7]

Property taxable by the state is taxable by the subdivisions thereof through delegation of power.[8] In North Carolina, property taxation by local authorities is provided for in the Machinery Act.[9] At least as late as 1944, North Carolina tax administrators had found a sufficient degree of uncertainty regarding the application of the Machinery Act to the aircraft of interstate airlines to deter them from attempting to list, value, and collect a tax on such property.[10] The purpose of this note is to examine some of the problems giving rise to this uncertainty. The sections of the Machinery Act discussed in this note have not been amended so as to change the problems which existed in 1944 as regards air commerce.[11]

[3] 347 U. S. 590 (1954).

[4] Braniff Airways, Inc. v. Nebraska State Board, 347 U. S. 590, 598 (1954).

[5] *Id.* at 601. In so holding, the Supreme Court for the first time applied to aircraft the traditional "doctrine of apportionment, as the basis of property taxation," *i.e.*, that "a State may levy an ad valorem tax on the basis of a showing that the total time spent in a State by different units of a carrier's property is such that a certain proportion of that property may be said to have a permanent location in that State." Braniff Airways, Inc. v. Nebraska State Board, 347 U. S. 590, 607 (1954) (dissenting opinion). The court has previously applied this doctrine to railroad cars, Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18 (1891), and to barges, Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169 (1949).

[6] N. C. GEN. STAT. § 105-281 (1950).

[7] N. C. CONST. Art. V, §§ 3, 5; N. C. GEN. STAT. §§ 105-297, 105-396 (1950).

[8] 64 C. J. S., *Municipal Corporations* § 2000 (1950).

[9] N. C. GEN. STAT. § 105-271 *et seq.* (1950). *Preamble:* "An act to provide for the listing and valuing of all property, real, personal and mixed, at its true value in money, and to provide for the taxation thereof by counties, municipalities and other local tax authorities upon a uniform ad valorem basis."

[10] H. R. Doc. No. 141, 79th Cong., 1st Sess., *Multiple Taxation of Air Commerce* 19 n. 11 (1945).

[11] See N. C. SESS. LAWS 1945, c. 973; N. C. SESS. LAWS 1947, c. 836; N. C. SESS. LAWS 1951, c. 728; N. C. SESS. LAWS 1951, c. 1102.

Section 800 (1) of the Machinery Act[12] provides for the listing of all tangible property at the "residence" of the owner, defining the "residence" of a foreign or domestic corporation as its "principal office" within North Carolina. The Machinery Act furnishes neither a definition of "principal office" nor a criterion for determining its location. The corporation domestication statute,[13] however, provides that every foreign corporation, "before being permitted to do business in this state," shall file in the office of the Secretary of State of North Carolina an attested statement setting forth, among other things, its "principal office" in North Carolina.[14] The Secretary of State is directed by the statute to require every foreign corporation doing business in North Carolina fully to comply with this provision.[15] Thus it appears that the principal office of a foreign airline lawfully doing business in North Carolina must be recorded in the office of the Secretary of State. It seems a logical conclusion that such principal office is the one at which the property of a foreign corporation shall be listed for taxation under Section 800 (1) of the Machinery Act. Although this analysis furnishes no satisfactory definition of "principal office," it establishes an element of certainty for tax listing purposes.

Section 800 (1) further provides, "if a corporation . . . has no principal office in this State" it may list its tangible personal property "at any place at which said property is situated." Under the preceding analysis, a foreign corporation lawfully doing business in North Carolina must have a principal office in this state, therefore it would seem clear that this provision of Section 800 (1) does not apply to such corporations.[16] However, this provision does not specifically exclude foreign corporations from its application. Furthermore, Section 800 (4)[17] provides that "tangible personal property shall be listed at the place where such property is situated, rather than at the residence[18] of the owner if the owner or person having control thereof hires or occupies [among other things, an] office . . . therein for use in connection with such property." Thus, a significant question of construction appears unavoidable: Where would the flight equipment of a foreign airline doing business in North Carolina be "situated" for tax listing purposes?

[12] N. C. GEN. STAT. § 105-302 (1) (Supp. 1953).
[13] N. C. GEN. STAT. § 55-117 *et seq.* (1950).
[14] N. C. GEN. STAT. § 55-118 (1950; Supp. 1953).
[15] N. C. GEN. STAT. § 55-120 (1950).
[16] Presumably, this provision was enacted to encompass the property of domestic corporations and that of foreign corporations having property in North Carolina but doing no business in the state, *e.g.*, a tract of timber purchased but left standing by a foreign lumber company.
[17] N. C. GEN. STAT. § 105-302 (4) (1950).
[18] *I.e.*, "principal office" in the case of foreign corporations. See Machinery Act § 800 (1), discussed in the text, *supra.*

The North Carolina court has recognized that there is "no decision in this jurisdiction establishing any practical criterion for determining when a specific chattel is situated in a particular place."[19] In other cases, our court has relied upon the definition, "having a site, situation or location permanently fixed; located."[20] This seems to be the definition adopted in a wide variety of contexts by many courts throughout the United States.[21] Although ordinary words of a statute must be given their natural, approved and recognized meaning,[22] it seems apparent that the usual meaning of "situated" is inappropriate to apply a tax on instrumentalities of interstate carriers which make only brief stops within any given jurisdiction.

Even if a satisfactory meaning of "situated" could be determined within the context of Section 800 (4), as applied to foreign air carriers, there might be some doubt that this provision applies to such corporations at all. At first blush, it might seem apparent that every major airline would hire or occupy an office at each major airport through which it operates for use in connection with its flight equipment. However, it is believed that the common practice is for agents to "hire or occupy" desk and advertising space at such airports. Even if such space were deemed an "office" for the purposes of Section 800 (4), a mere ticket agent is obviously not the owner of airline flight equipment, and it seems clear that such an agent has no control over such aircraft, but merely furthers his principal's business in relation to the public.

The last sentence of Section 800 (4) provides, "When tangible personal property which may be used by the public generally . . . is placed at or on a location outside of the county of the owner or lessor, such tangible personal property shall be listed for taxation in the county where located." Since our court has defined "situated" as meaning "located"[23] familiar problems once more arise. It would seem that the instrumentalities of common carriers, whether motor vehicles or aircraft, may properly be classed as "tangible personal property which may be used by the public generally." Such property is certainly "placed at or on a location outside of the county of the owner" when employed in interstate commerce. Does this provision of Section 800 (4) apply only to domestic corporations? There is nothing in the Act which so limits its application. Is the county of the owner

[19] Montague Bros. v. W. C. Shepherd Co., 231 N. C. 551, 554, 58 S. E. 2d 118, 121 (1950).
[20] *Ibid.* Universal C. I. T. Credit Corp. v. Walters, 230 N. C. 443, 446, 53 S. E. 2d 520, 522 (1949).
[21] 39 WORDS & PHRASES 463 (Perm. Ed. 1953).
[22] Watson Industries v. Shaw, 235 N. C. 203, 69 S. E. 2d 505 (1952); Victory Cab Co. v. Charlotte, 234 N. C. 572, 68 S. E. 2d 433 (1951).
[23] See note 20 *supra.*

that of the owner's principal office, where the owner is a foreign corporation? That would seem a reasonable construction,[24] but if so held by the court, then the problems regarding the location of that office, as discussed in connection with Section 800 (1), *supra,* again arise.

A more difficult problem, underlying those already considered, remains to be examined. The Machinery Act, Section 302,[25] provides that "All property, real and personal, shall be listed . . . in accordance with ownership and value as of the first day of January each year." Even if this were interpreted to mean that each aircraft which landed in a particular jurisdiction on January first could be listed for taxation, there would be unlimited opportunity for tax avoidance by merely eliminating New Year's Day flights in North Carolina, or by reducing the number of stops within the state on that day. Even if these devices were not resorted to, the various local authorities concerned would be deprived of the tax revenue from aircraft landing within their jurisdiction during the other 364 days of the year. Apparently the North Carolina Legislature recognized this problem when it provided for state assessment and certification of apportioned value to local units for taxation of public service companies and all other companies exercising the right of eminent domain.[26] Unfortunately, no such provisions exist which are applicable to interstate air carriers.[27]

It seems apparent, therefore, that the Machinery Act does not provide for taxation of the flight equipment of interstate airlines doing business in North Carolina. A valuable source of revenue[28] is thereby lost. What might be done to make this revenue available? There appear to be three major possibilities:

FIRST: The wording of the Machinery Act sections considered in this note might be amended to provide specifically for the listing and assessing of transient property of interstate carriers.

SECOND: The list of public service companies contained in Article

[24] The phrase was so construed for purposes of the venue statute, N. C. GEN. STAT. § 1-79 (1953), in Roberson v. Lumber Co., 153 N. C. 120, 68 S. E. 1064 (1910).

[25] N. C. GEN. STAT. § 105-280 (1950).

[26] MACHINERY ACT Art. XVI, § 1600 *et seq.,* N. C. GEN. STAT. § 105-350 *et seq.* (1950).

[27] Even if commercial airlines are public service corporations, they are not included in the list of such companies provided for in Art. XVI of the Machinery Act, *supra* note 26, nor do they have the power of eminent domain in this state, N. C. GEN. STAT. § 40-2 (Supp. 1953).

[28] H. R. Doc. No. 141, 79th Cong., 1st Sess., *Multiple Taxation of Air Commerce* 76 (1945). Table II. State and local property taxes paid by domestic air carriers operating in the United States, by States, 1939-43.

[Selected] States	1939	1940	1941	1942	1943
California	$31,033	$29,599	$21,809	$34,949	$35,973
Illinois	24,569	26,977	32,512	40,617	45,409
Minnesota	31,749	37,263	46,442	40,376	30,280
North Carolina	——	3	5	37	29

XVI, Section 1600 *et seq.* of the Machinery Act[29] might be amended to include airlines, so as to allow state assessment and certification of apportioned value to local units for taxation.

THIRD: A special statute might be enacted specifically to encompass the flight equipment of airlines operating in and through North Carolina.[30] Such a statute should (1) require central assessment by a state board or agency, (2) include a formula by which to determine apportioned value allocable to this state, and (3) provide for central collection of taxes and distribution thereof to local authorities. The Nebraska statute[31] would be a valuable model for such an act because it is relatively simple and concise and because it has the sanction of the United States Supreme Court in the *Braniff* case.

ROYAL G. SHANNONHOUSE.

Taxation—Effects of Federal Taxes on Partnership "Buy and Sell" Agreements Funded by Life Insurance

In these days of high corporate taxes, many small and medium sized businesses prefer to operate as partnerships, thus avoiding the consequences of double taxation which are felt by closely held and small family corporations. In assuming the partnership form, the business associates are confronted with a problem with which corporate organizations are not concerned. That is that under the general law, upon the death of a partner, the partnership is automatically dissolved, unless otherwise provided for in the partnership agreement.[1] In case of dissolution, the surviving partners are trustees for the decedent's partnership interests and are accountable to his estate. This involves a valuation of the business and a possible sale of part or all of the assets in order to pay the estate its due. Even if provisions were made for continuance of the partnership, undoubtedly many a profitable business would be wrecked by the incompatible interests of the surviving partners and the decedent's representatives.

In order to solve this problem many partners have entered into "buy and sell," or "survivor purchase," agreements during their life-

[29] N. C. GEN. STAT. § 105-350 *et seq.* (1950).

[30] There is no apparent reason why such a statute should not include the trucks and busses of earth-bound carriers as well. Since the Machinery Act does not provide specially for such property, it would seem that the sections of that Act discussed in this note would be applicable to that property. Furthermore, in view of the number of highway carriers operating in this state, the need for a special tax provision regarding such carriers seems even greater than the need for such a provision applicable to airlines. However, the problems involved in the taxation of highway carriers are beyond the scope of this note.

[31] NEB. REV. STAT. §§ 77-1244 through 77-1250 (1950). See also ARIZ. CODE § 73-2001 *et seq.* (Supp. 1952); MINN. STAT. ANN. § 270.071 *et seq.* (1947).

[1] UNIFORM PARTNERSHIP ACT, § 31; N. C. GEN. STAT. § 59-61 (1943).

times, thereby assuring the survivor or survivors that they will acquire the decedent's interest, and that the business will be carried on under their control. Estate and income taxes cannot be ignored in drawing up such an agreement, and care taken in drafting the instrument may save the estate or the surviving partners many dollars in taxes. Another purpose which the agreement should serve is to give the decedent's interest a definite valuation, either by fixing a specific sum of money or by setting out the method by which the interest is to be evaluated.[2] This will avoid any subsequent dispute between the survivors and the decedent's executor and in addition may avoid protracted and costly litigation with the government, by pegging the valuation for estate tax purposes. Of course, the problem of valuation would not arise if a partner sold his interest during his lifetime.

One problem which arises immediately is: How will the survivor finance the purchase of the decedent's interest at the price agreed upon? Because of present high rates of personal income taxes, it is difficult for most individuals to accumulate and have on hand sufficient ready cash to enable them to purchase a partner's interest. Therefore, other methods of supplying purchase money must be found. It is here that insurance on the partners' lives has come into frequent use in the last thirty years. It provides the surviving partner a large sum of ready cash tax free. In turn this cash may be urgently needed by the decedent's personal representative to settle the estate, thus avoiding sale of non-liquid assets. It is universally recognized that a partner has an insurable interest in the life of a co-partner for this purpose, and some states have passed statutes expressly so providing.[3] Several plans and their variations are in use by partnerships, and all involve the following common elements: (1) policies of life insurance will be taken out on the partners' lives, the proceeds to be used for purchasing the deceased partner's interest; (2) the agreement will limit the value of the partner's interest; (3) an agreement is made by each partner not to sell his partnership interest during his lifetime except to the other partner or partners; (4) the agreement should be a bona fide business transaction; and (5) the deceased partner's estate is legally bound to sell the decedent's interest to the surviving partners.[4]

[2] For an excellent article on the different methods of valuation, see Forster, *Valuing a Business Interest for the Purposes of a Purchase and Sale Agreement*, 4 STAN. L. REV. 325 (1952).

[3] *E.g.*, N. C. GEN. STAT. § 58-204.2 (Supp. 1953).

[4] Under Section 1014 of the Internal Revenue Code of 1954, no capital gain results to the decedent's estate upon the transfer of his interest under a binding agreement because, upon death, the basis is changed from cost to fair market value at the time of death. If the decedent's estate under the agreement gets more than the fair market value of his interest, it is conceivable that it would have to pay a capital gains tax on the excess.

The value of the decedent's interest in the partnership for estate tax purposes is limited to the value specified in the agreement, whether it be a stated sum, book value at the time of death, or an amount reached by any other method of valuation,[5] but the interest is includible in his gross estate only to the extent it exceeds the sum received as proceeds from the insurance policy.[6] Had there been no binding agreement not to sell during decedent's lifetime, then the full value of his interest would be includible, but in any case that value is reducible by the amount of insurance proceeds received. The transaction must also be a bona fide business arrangement, not made with testamentary intent to give some favored friend or relative the decedent's interest at a cost below the fair market value. Thus in *Claire Gianini Hoffman v. Commissioner*[7] the decedent had given his brother a unilateral option to acquire his partnership interest upon his death at twenty per cent of its value, but reserved the right to dispose of his interest during his life. This option was assigned to the petitioner, the optionee's sister. The petitioner contended that the value of the interest was limited by the option agreement, but the Tax Court upheld the Commissioner in including the full value of the interest in decedent's gross estate, saying:

> "We are of the opinion that while a bona fide contract, based upon adequate consideration, to sell property for less than its value may fix the value of the property for purposes of the estate tax, a mere gratuitous promise to permit some favored individual, particularly the natural object of the bounty of the promisor, to purchase it at a grossly inadequate price can have no such effect."[8]

Where the taxpayer can successfully carry the burden of proving the transaction was bona fide and at arm's length, the court has disregarded the fact that the optionee or survivor who is receiving the interest at a price below the market value is a natural object of decedent's bounty.[9] In any case where a bona fide transaction is found to exist, the adequacy of the consideration must be measured at the time the con-

[5] Since the contract among the partners is specifically enforceable, the courts have recognized that the mutual agreements are determinative of value, as market value can be no more than the agreed price specifically enforceable by the agreement. See Helvering v. Salvage, 297 U. S. 106 (1935); Estate of Lionel Weil, 22 T. C. No. 158 (1954).

[6] The courts have held in many cases that it would be double taxation to tax both the value of decedent's partnership interest and the consideration paid for it. See Estate of Tompkins v. Commissioner, 13 T. C. 1054 (1949).

[7] 2 T. C. 1160 (1943). See also Estate of Mathews v. Commissioner, 3 T. C. 525 (1944).

[8] Claire Gianini Hoffman v. Commissioner, 2 T. C. 1160, 1179 (1943).

[9] See Bensel v. Commissioner, 36 B. T. A. 246 (1937), *aff'd*, 100 F. 2d 639 (3d Cir. 1938).

tract was entered into rather than the time the option was exercised.[10]

Each plan has different tax consequences and this note proposes to explain the operation and the tax results of the most common of these plans.[11] The applicable provisions of the Internal Revenue Code of 1954 are:

(1) the provisions of Section 2031, which deal generally with what property is includible in a decedent's gross estate;

(2) the specific provisions of Section 2042, dealing with the inclusion of life insurance proceeds in decedent's gross estate when they are payable to his estate or to other beneficiaries, if the decedent possessed any of the incidents of ownership;

(3) the provisions of Section 2043(a), covering transfers for insufficient consideration;

(4) the provisions of Section 101 and its subsections which concern the treatment of life insurance proceeds in the income tax field, where the deceased partner's estate has sold to the survivors the policies the decedent held on their lives.

The first plan we shall consider is the type in which the partnership applies for the policies and pays for the premiums out of partnership funds, but the insured in each case designates the first beneficiary and reserves the right to change the beneficiary or any other right incident to ownership of an insurance policy.[12] In this case the proceeds of the life insurance would be included in decedent's gross estate under Section 2042(2) of the Internal Revenue Code of 1954, which says that the proceeds of those policies, "with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with another person," are includible in his gross estate. But, as has been noted, his interest in the partnership is not includible except as to the excess of its value over the amount received as insurance.[13]

Under this first type of plan, there is a possible trap into which the unwary partners may fall. In *Legallet v. Commissioner*[14] the partnership paid the premiums on policies of insurance on the lives of the two partners and charged their cost to the individuals equally. There

[10] *Ibid.*

[11] While this note deals with partnership interests, similar arrangements may exist in the case of stockholders of closely held corporations, and the discussions regarding the effects of such transactions are to a large extent applicable to both situations. See Ness, *Federal Estate Tax Consequences of Agreements and Options to Purchase Stock on Death*, 49 COL. L. REV. 796 (1949).

[12] A slight variation of this plan, with the same results, would be one in which the partners individually apply for the insurance, but the premiums are paid for with partnership funds.

[13] See note 6 *supra*.

[14] 41 B. T. A. 294 (1940).

was a binding agreement to the effect that the survivor would purchase the interest of the one first to die, the proceeds from the insurance policy to be applied to the purchase price by the decedent's estate. One partner designated his widow as the beneficiary of the proceeds from the policy on his life, and upon his death she received these proceeds from the insurance company. They went to her as part payment of decedent's partnership interest, the survivor, Legallet, giving his notes for the balance. Upon a subsequent sale of some of the merchandise and accounts receivable of the partnership, Legallet tried to include in his cost basis for income tax purposes the amount which the beneficiary received as life insurance. The Tax Court agreed with the Commissioner that Legallet had not paid for the insurance, the premium payments by the partnership being attributed to the decedent on the *alter ego* theory. Therefore, the survivor's basis was only the actual amount he had paid in notes. But the court admitted that had the survivor received the insurance proceeds himself, as beneficiary, and then turned them over to the decedent's estate, the result would have been different. Some writers, however, argue that the same result would not be reached by the court today if the partnership agreement clearly showed that it was a business arrangement, and that the proceeds were intended to be part of the purchase price *paid by the survivor*.[15] Others say that the partnership entity plan of purchasing insurance should be used when there are more than two partners because it is simpler, and the *Legallet* case would apply only if and when a partner sells his partnership interest during his lifetime.[16]

The second type of plan to be considered is also one in which the partnership applies for and takes out the insurance policy on each partner's life and pays all premiums out of partnership funds, but differs from the first plan in that the partnership designates itself as the beneficiary—the partners as individuals having no right to change the beneficiary, nor other incidents of ownership. The value of decedent's interest is limited here also by the agreement if it is found to be a bona fide transaction and if he was prohibited from selling to outsiders during his lifetime. The difference between this plan and the first plan is that here the insurance proceeds are not includible in decedent's gross estate as such. They are only considered as a factor which increases the value of his partnership interest, since in a similar case, *Atkins v. Commissioner*,[17] it was held that the policies belonged to the

[15] For some interesting arguments in favor of the entity approach to partnership insurance in certain situations, see Forster, *Entity Approach to Partnership Insurance*, 90 TRUSTS AND ESTATES 752 (1951).

[16] See BOWE, LIFE INSURANCE AND ESTATE TAX PLANNING 62-66 (Nashville: Vanderbilt University Press, 1952).

[17] 2 T. C. 332 (1943); *cf.* Doerken v. Commissioner, 46 B. T. A. 809 (1942).

partnership, and, therefore, the proceeds became an asset before they were turned over to decedent's estate. Under the Regulations[18] if the decedent paid the premiums directly or *indirectly,* whether or not he had any of the incidents of ownership, the proceeds are includible in his gross estate. Although the decisions[19] up to the present have held that decedent did not pay for the insurance indirectly when the partnership paid the premiums, it is possible that a contrary decision will be arrived at in the future under the *alter ego* theory. Such a decision would be particularly applicable in a case where the decedent owned substantially all the partnership.[20] In this situation both the insurance proceeds and the value of decedent's interest would be includible in his gross estate, in which case the court's avowed policy of not taxing both the interest and the consideration given for it would seem not applicable since the decedent, being considered to have paid for the insurance himself, the proceeds would not be consideration flowing from the surviving partners. The dangers of the *Legallet* case discussed above are also present in this second plan.

The third and last type of plan to be considered is perhaps the best for most partnerships under the present code and regulations.[21] Under this plan each partner applies for and takes out a policy on the life of every other partner, pays the premiums out of his own pocket, and reserves to himself all incidents of ownership, instead of having the partnership entity do these things as in the second plan. The major question presented under this "cross-insurance" plan is: Who should be made the beneficiary of the policy? There are several possibilities, and each presents its own peculiar problems.

If the estate of the decedent is made the beneficiary, the proceeds will be includible in the gross estate under Section 2042(1) of the Internal Revenue Code of 1954, and since the value of decedents' interest is limited according to the agreement, no additional estate tax problems would be presented. The possible application of the rule of the *Legallet* case should be forestalled, though, by the terms of a prior written agreement which clearly states that each partner, not the partnership, will pay the premiums on the policies he owns. Further, some provision should be made which will bind the decedent's personal representative to the purchase agreement. The terms of the

[18] U. S. Treasury Regulations 105, § 81.27(a)(1)(1954).

[19] Atkins v. Commissioner, 2 T. C. 332 (1943); Estate of Tompkins v. Commissioner, 13 T. C. 1054 (1949).

[20] "A decedent similarly pays the premiums or other consideration if payment is made by a corporation which is his alter ego or by a trust whose income is taxable to him, as, for example, a funded insurance trust." U. S. Treasury Regulation 105, § 81.27(a)(2) (1954).

[21] For a contrary argument in the case of a partnership consisting of many members see Forster, *Entity Approach to Partnership Insurance, supra* note 15.

original agreement or a clause in the decedent's will directing his executor to carry out the agreement should accomplish this.

Another possible beneficiary is the wife of the decedent. Since her husband did not pay for the insurance, and he had no incidents of ownership, the proceeds are not includible in his gross estate unless the Commissioner changes his position in the future concerning application of the *Lehman* cross transaction doctrine to partnership buy and sell agreements.[22] The full value of decedent's partnership interest as limited by the prior agreement is includible in his gross estate. The unpleasant possibility again arises that this arrangement may result in the same income tax problem as was presented in the *Legallet* case, although it could again probably be avoided by the terms of the binding prior agreement as above suggested. The *Legallet* case should be distinguished on the ground that there was personal insurance, instead of true business insurance. If it seems desirable to the partners, the widow can be paid the proceeds in installments, instead of in one lump sum. Each partner should retain the right, in the policy or policies which he owns, to determine settlement options and beneficiaries, but as a safeguard the policy should contain the provision that the owner cannot change the settlement plan or beneficiary unless he notifies his partners.[23] This provision gives the partners a check on each other and will not allow a plan to be defeated by a survivor. Care should be exercised, though, not to give the husband of the beneficiary any control or incidents of ownership in the policy. The hazards of these settlement plans where decedent's wife is made the beneficiary are that the decedent's executor may not be able to convey to the surviving partner without running the risk of having unsatisfied creditors or pretermitted heirs of the decedent surcharge him. There is also the possibility of litigation over the sale price if it is not expressly and clearly set out in the prior agreement. These pitfalls may be avoided by having the survivor retain the right to withdraw from the proceeds any amount required to satisfy the claims against decedent's estate. After the time has run within which creditors can file claims against

[22] In Lehman v. Commissioner, 109 F. 2d 99 (2d Cir. 1940), two brothers set up identical trusts for each other, neither one reserving any rights to himself, but each giving the beneficiary the right to withdraw a certain amount from the corpus during his lifetime. One of them died and the court upheld the Commissioner in including the corpus in his gross estate, saying that the person who furnishes the consideration for the creation of a trust is the settlor, even though in form the trust is created by another. In a special ruling made in 1947 the Commissioner said this did not apply to survivor-purchase agreements. See 5 P-H 1947 FED. TAX SERV. ¶ 76,311 (1947).

[23] Such a provision might raise the question whether the insured partner has an incident of ownership by indirect control of the policy on his life. Such control could arise by the threat of possible retaliation by the insured in changing the beneficiary in the policy he owns on his partner's life.

the estate, and the personal representative has made a satisfactory conveyance of decedent's interest to the survivor, then the survivor can assign his right of distribution under the policy to the wife. The only trouble with this method is that while the proceeds are in the survivor's hands, they are liable for his debts. An alternative would be to give the same rights to a trustee, and let him handle the transaction. In any case, the use of settlement options should not interfere with the basic plan.

Where the partnership is made the beneficiary and the agreement provides that the proceeds will be used to purchase decedent's interest, the payment to the estate will be included in decedent's gross estate up to the value of the business interest purchased. As has been said before, the fair market value of the business interest controls for estate tax purposes, but if under a bona fide business agreement a lesser amount were paid, this should be binding upon the Commissioner.[24] The only danger of making the partnership the beneficiary is that the rule of *Atkins v. Commissioner*[25] may be applied, to increase the value of decedent's interest. In that case it was held that the policies belonged to the partnership, and therefore, the proceeds became an asset before they were turned over to decedent's estate.

Another possible beneficiary is a trust, with an agreement that the trustee should use the proceeds to purchase decedent's share of the business from the estate. The tax consequences are the same as if the partnership were made the beneficiary, but possible advantages are (1) that the *Atkins* case would probably not be applied, and (2) that if the proceeds were unconditionally paid to the trustee for the purpose of paying the estate, they would never have become a part of the partnership assets and thus would not be subject to the claims of any partnership creditors. To insure this result, the trustee should never be one of the surviving partners.

The last, and probably the safest, beneficiary taxwise is the surviving partner who owns the policy as an individual. He can use the money to purchase decedent's interest according to the agreement, has no income tax on the proceeds,[26] and can include the proceeds in

[24] See note 5 *supra*. But in Estate of Trammell v. Commissioner, 18 T. C. 662 (1952), and Estate of Gannon v. Commissioner, 21 T. C. No. 121 (1954), the court said that although the agreement may be binding on the partners, it was not binding on the Commissioner in fixing valuation of the estate for estate tax purposes. In the Trammell case there was no binding agreement that the decedent would not sell during his lifetime, but this provision did exist in *Gannon v. Commissioner*. In both instances the surviving partner or partners were given the option to purchase decedent's interest at a specified valuation. Although the court made no mention of it, one reason for the decisions might be the fact that in both cases the survivors were closely related to decedent; his wife in one, and his brothers in the other.

[25] 2 T. C. 332 (1943).

[26] INT. REV. CODE § 101(a)(1).

his cost basis, thus avoiding the result of the *Legallet* case. This method would also avoid the possible application of the *Atkins* case, but again there is the danger that the proceeds in the survivor's hands will be subject to the claims of his creditors.

Under the cross-insurance plan, the decedent's estate will be left with policies which the decedent owned on the lives of the survivors. Provision should be made in the agreement for their disposition to the insured at the accrued cash value, or for their retention by the estate, in which case they will be valued at their surrender or accrued cash value. Under Section 22(b)(2) of the 1939 Internal Revenue Code, if the policies were sold to the insured, the proceeds received by the beneficiary less the purchase price and subsequently paid premiums would have been subject to income tax. This has been changed by Section 101(a)(2)(B) of the Internal Revenue Code of 1954, which in such situations excludes from gross income the entire amount of proceeds if the transfer of the policy is to the insured, to a partner of the insured, to a partnership in which the insured is a partner, or to a corporation in which the insured is a shareholder or officer.

The partners can set up a cross-insurance plan also by transferring to each other or to the partnership policies which they already hold on their own lives, and under this new Code provision no taxation of the proceeds will later result. This arrangement could save the parties a large amount of money because they can take advantage of the old premium rates, instead of having to take out new policies at higher rates. Any inequities which might arise from the difference in costs of the different premiums could be remedied by the partners in the distribution of profits or in any other manner they saw fit.[27] If the policies contain double indemnity clauses, provision should also be made for the disposition of the added proceeds in case the clause comes into effect. This will avoid possible litigation between the decedent's estate and the survivors.[28]

No matter what type of buy and sell agreement is used, if it is funded by life insurance the agreement should not provide that a higher price will be paid for a partner's interest upon his death than upon a termination of his interest during life, as this would be an admission that the parties are not actually agreeing to the true value of the business interest, and are carrying personal life insurance under the name of business life insurance.

[27] In case one or more partner is not insurable, some plan may be worked out whereby his estate or beneficiary will get the proceeds from an annuity, or annuities paid for by the other partners, or by the partnership.

[28] See Tompkins v. Commissioner, 13 T. C. 1054 (1949), where no provision was made for disposition of the added proceeds, but possible litigation was avoided by the survivor when he paid them to decedent's estate.

In a personal service partnership where the tangible assets are limited, the members may wish to provide for the decedent's estate by an agreement under which the estate is to receive a part of the partnership income for a stated period, instead of one lump sum. It is important that this agreement be written clearly so that it will be understood that the decedent's estate is sharing in the partnership income as a member,[29] and that the payments do not constitute a purchase of decedent's interest. If the latter situation is found to exist, the entire income of the partnership will be taxed to the survivors,[30] whereas a finding to the effect that the estate is sharing in the income as a partner will allow the survivor to exclude from his gross income the payments made to the estate. The estate in turn can take advantage of Section 691(c) of the Internal Revenue Code of 1954 which allows as a deduction from gross income the amount paid in estate taxes because of the inclusion of the right to the income in the estate. The agreement should provide that payments to the estate be in the form of a percentage of current profits in order to strengthen the idea that the payments are "income" to the estate. A plan under which the estate is to receive a predetermined lump sum payment, or a certain specified amount in each payment without regard to what the actual partnership income amounts to may raise the suspicion of a purchase.[31] These arrangements should be drawn with great care in order to reduce the danger of an adverse construction by the courts.[32]

In drafting these agreements, there are five basic rules which, if followed in planning a partnership buy and sell agreement, should give the desired tax results:

[29] Coates v. Commissioner, 7 T. C. 125 (1946).
[30] Wilkins v. Commissioner, 7 T. C. 519 (1946).
[31] Compare the cases in notes 29 and 30, *supra*.
[32] In a note in 47 COL. L. REV. 289 (1947), the author suggests that the following provisions be included in the agreement for clarity:
(1) Recite clearly that the agreement is a substitution of the payments for a precise accounting on uncollected fees, unfinished work, etc., in which the deceased partner had an actual interest.
(2) If the state partnership laws permit, recite in the agreement that the estate of the deceased partner is considered a partner; otherwise that the payments over the period fixed are the equivalent of a formal winding up of the partnership.
(3) Provide that the estate will share losses as well as profits.
(4) Avoid such terms as "sale," "purchase," "interest," "assets," and "payment for good will"; conversely, use words like "profit," "share," and "gain and loss."
(5) Make the amount payable contingent—a percentage of prospective profits and losses.
(6) If the enterprise requires substantial capital, separate the capital account and make it subject to a separate accounting. (The author seems to have digressed from personal service partnerships in this suggestion.)
(7) After the death of the partner obtain a statement from his personal representative that the amount which is paid is considered by him as income to the estate.

1. Although mutual options may be given the partners to purchase or to liquidate upon the death of a partner, preferably the agreement should bind the decedent's estate to sell, and the survivor to purchase.
2. The agreement should provide a clear and definite basis for evaluating the decedent's interest.
3. The sale of the decedent's business interest should be restricted to the other partners during life as well as at death.
4. The agreement must preclude the sale of any partner's interest during lifetime at a price higher than that payable at death. It should not be a substitute for testamentary disposition.
5. The agreement should reflect a "business purpose."
6. The wills of the partners should be consistent with the agreement and should direct the executors to carry out its terms.

JOHN J. DORTCH.

Torts—Application of Emergency Doctrine in North Carolina

The following charge by the trial court as it related to the application of the doctrine of "sudden emergency" was approved by the North Carolina Supreme Court in a recent case:[1]

> "The Court instructs you that a person confronted with a sudden emergency is not held by law to the same degree of care as in ordinary circumstances, but only to that degree of care which an ordinarily prudent person would use under similar circumstances. The standard of conduct required in an emergency, as elsewhere, is that of a prudent person.
>
> The Court further instructs you that this principle is not available to one who by his own negligence, brought about or contributed to the emergency. That means, in simple language, that a person who creates an emergency, or contributes to it, cannot take advantage of the principle.
>
> The Court further instructs you that one who is required to act in an emergency is not held by law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence similarly situated would have made."

The purpose of the doctrine of sudden emergency has been well stated by the West Virginia court:[2]

> "The general principles which require one to act in such a manner as to avoid injury to himself, and to take such steps to

[1] Barnes v. Caulbourne, 240 N. C. 721, 724, —— S. E. 2d —— (1954).
[2] Oldfield v. Woodall, 113 W. Va. 35, 37, 166 S. E. 691, 692 (1932).

> avoid accidents as would be taken by a reasonably prudent person under like circumstances, are not enforced in all their rigor as to situations of sudden danger. This is a recognition of the fallibility of human nature in sudden crises and the greater probability of errors of judgment occurring when a danger is eminent and where a person is compelled instantly, without delaying for deliberation, to adopt some course of conduct to avoid injury."

The purpose of this note is to discuss the application of the doctrine of emergency in North Carolina from three aspects, namely:

(1) What is the nature of the peril necessary to invoke the doctrine?

(2) Is the availability of the doctrine affected by how or by whom the emergency was created?

(3) Is it a question of law for the court or fact for the jury as to whether the doctrine of emergency is available, and as to whether the person invoking the doctrine acted so as to free himself of negligence?

Nature of the Peril

Authorities seem to be split on the question of whether the danger necessary to invoke the doctrine of emergency be real[3] or only apparent to the person so imperiled.[4] The North Carolina Supreme Court has never decided the question directly.[5] However, in two cases, the court quoted with approval a Massachusetts case which applied the apparent peril test in determining whether the doctrine of emergency was available. As thus applied, the test is:

[3] Horton Motor Lines v. Currie, 92 F. 2d 164 (4th Cir. 1937); McLaren v. F. Bird Inc., 296 Ill. App. 345, 15 N. E. 2d 993 (1938); Trudeau v. Sina Contracting Co., —— Minn. ——, 62 N. W. 2d 492 (1954); Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491 (1948); Lubliner v. Ruge, 21 Wash. 2d 881, 153 P. 2d 694 (1944); Hill v. Walters, 55 Wyo. 334, 100 P. 2d 98 (1940).

[4] Palma v. Moren, 44 F. Supp. 704 (M. D. Pa. 1942); Hooper v. Bronson, 123 Cal. App. 2d 243, 266 P. 2d 590 (1954); Budds v. Keeshin Motor Express Co., 326 Ill. App. 59, 61 N. E. 2d 579 (1945). The above cases apply the subjective test in determining whether there was an apparent danger. The following cases apply the objective test and hold that the apparent danger must be a reasonable one: Southwestern Freight Lines v. Floyd, 58 Ariz. 249, 119 P. 2d 120 (1941); Hedgecock v. Orlosky, 220 Ind. 390, 44 N. E. 2d 93 (1942) (reasonably well founded); Allen v. Pearce Dental Supply Co., 149 Kan. 549, 88 P. 2d 1057 (1939) (reasonable to a person ordinarily prudent); Higgins v. Terminal Ry. Association of St. Louis, 231 Mo. App. 837, 97 S. W. 2d 892 (1936) (reasonably well founded); Helvich v. George A. Rutherford Co., 114 N. E. 2d 514 (Ohio App. 1953), *appeal dismissed* 160 Ohio St. 571, 117 N. E. 2d 439 (1954) (reasonable apprehension).

[5] In Jernigan v. Jernigan, 207 N. C. 831, 838, 178 S. E. 587, 591 (1935), the court approved a charge in which the trial court charged the jury using the term "apparent peril." It is noted, however, that this point in the charge was not the one to which exception was taken on appeal, so the case is probably not authority for saying that North Carolina recognizes the apparent peril doctrine.

> "If the peril seemed imminent, more hasty and violent action was to be expected than would be natural at quieter moments, and such conduct is to be judged with reference to the stress of appearances at the time, and not by the cool estimate of the actual danger formed by outsiders after the event."[6]

It would seem, therefore, that if the question were ever squarely up for decision, the North Carolina Supreme Court would probably decide that apparent danger is sufficient to allow the invoking of the doctrine. It also seems that the court would require that this apparent peril must be a reasonable one. It is not enough if the person attempting to invoke the doctrine of emergency thought he was in an emergency when a reasonably prudent person so situated would not have thought so. The requirement that the apprehension be a reasonable one has been applied in North Carolina in the field of assault.[7] It should be equally applicable here, for it would prevent false claims of emergency by one attempting to overcome the charge of negligence.

Cause of the Emergency

There is also a split of authority as to the origin of the emergency necessary to allow the doctrine to be invoked. Some jurisdictions hold that in order for the plaintiff to take advantage of the doctrine, the emergency must be created by the wrongful conduct of the defendant.[8] Other jurisdictions hold that the doctrine is not available to one who creates the emergency,[9] whereas the majority hold that it is available unless the emergency is negligently or willfully created by the one invoking it.[10]

[6] Gannon v. R. R., 173 Mass. 40, 41, 52 N. E. 1075 (1899), quoted with approval in Mills v. Waters, 235 N. C. 424, 426, 70 S. E. 2d 11, 12-13 (1952), and Ingle v. Cassiday, 208 N. C. 497, 499, 181 S. E. 562, 563 (1935).

[7] State v. Williams, 186 N. C. 627, 120 S. E. 224 (1923). The test as applied is that if a person, by a display of force, causes another to *reasonably apprehend* imminent danger, and thereby forces him to do otherwise than he would have done, he commits an assault.

[8] Hedgecock v. Orlosky, 220 Ind. 390, 44 N. E. 2d 93 (1942); Lee v. City Ice Co., 64 S. W. 2d 736 (Mo. App. 1933); Helvich v. George A. Rutherford Co., 114 N. E. 2d 514 (Ohio App. 1953) *appeal dismissed* 160 Ohio St. 571, 117 N. E. 2d 439 (1954). The above cases hold that the emergency must be created by the negligence of the defendant in order for the plaintiff to invoke the doctrine; but the doctrine should be even more applicable if the conduct creating the emergency was willful.

[9] C. J. Peck Oil Co. v. Diamond, 204 F. 2d 179 (5th Cir. 1953); Fagan Elevator Co. v. Pfiester, 244 Iowa 633, 56 N. W. 2d 577 (1953); Metzinger v. Subera, 175 Kan. 542, 266 P. 2d 287 (1954); Meistinsky v. City of New York, 128 N. Y. S. 2d 483 (1954).

[10] Kisor v. Tulsa Refining Co., 113 F. Supp. 10 (W. D. Ark. 1953) (negligently created); Leo v. Dunham, 41 Cal. 2d 712, 264 P. 2d 1 (1953) (negligently created); Puza v. Hamway, 123 Conn. 205, 193 A. 776 (1937) (negligently created); Wallace v. Kramer, 296 Mich. 680, 296 N. W. 838 (1941) (negligently created); Trudeau v. Sina Contracting Co., —— Minn. ——, 62 N. W. 2d 492 (1954) (failure to use ordinary care); Spalt v. Eaton, 118 N. J. Law. 327,

The last view seems to adopt the better reasoning, since the purpose of the doctrine is to make allowances for one who is momentarily incapable of deliberation. Therefore, it is only the incapacity to deliberate which should be considered, not its origin, unless this incapacity was negligently or willfully produced in whole or in part by the person attempting to profit by it. North Carolina, in applying the doctrine, takes the majority view, for it has prohibited the application of the doctrine only in those cases where the party who seeks to invoke it has negligently or willfully contributed in bringing it about.[11] In *Atlantic Coast Line R. R. v. McLean Trucking Co.*,[12] the court held that the benefit of sudden emergency is available to the defendant unless the emergency is produced or contributed to by his negligence. It seems to follow that the doctrine would be available if the emergency were created by some outside force, or by a third party. North Carolina so held in *Goode v. Barton*.[13]

It is noted that the charge of the trial judge in the principal case first correctly stated the law to be that the doctrine of emergency is not available to one who negligently contributed to it. He then, in attempting to explain, further said:

> "That means, in simple language, that a person who creates an emergency or contributes to it, cannot take advantage of the principle."[14]

The latter part of this charge seems to be in error, for one may create an emergency and still avail himself of the doctrine if the creation were not negligent or willful. The North Carolina Supreme Court apparently concluded that the jury was not misled by the latter phrase, and that the doctrine had been sufficiently explained to them.

Fact or Law

The majority view in this country is that whether an emergency existed is ordinarily a question of fact for the jury,[15] but if the facts

192 A. 576 (Sup. Ct. 1937) (tortious); Feuquay v. Echer, 195 Okla. 285, 157 P. 2d 745 (1945) (negligently created); Moore v. Meyer and Power Co., 347 Pa. 152, 31 A. 2d 721 (1943) (negligently created); Stevens v. Nurenburg, 117 Vt. 525, 97 A. 2d 250 (1953) (at fault).

[11] Atlantic Coast Line R. R. v. McLean Trucking Co., 238 N. C. 422, 78 S. E. 2d 159 (1953); Powell v. Lloyd, 234 N. C. 481, 67 S. E. 2d 664 (1951); Sparks v. Willis, 228 N. C. 25, 44 S. E. 2d 343 (1947); Hoke v. Greyhound Co., 227 N. C. 412, 42 S. E. 2d 593 (1947). In Powell v. Lloyd, *supra* at 488, 67 S. E. 2d at 668, the dissenting justice said: "The rule of sudden emergency cannot be invoked by one who has brought that emergency upon himself by his own wrong or who has not used due care to avoid it."

[12] 238 N. C. 422, 78 S. E. 2d 159 (1953).

[13] 238 N. C. 492, 78 S. E. 2d 398 (1953). In this case the emergency was created by a severe ice and snow storm.

[14] Barnes v. Caulbourne, 240 N. C. 721, 724, —— S. E. 2d —— (1954).

[15] DePonce v. System Freight Service, 66 Cal. App. 2d 295, 152 P. 2d 234 (1941); Pollard v. Weeks, 60 Ga. App. 644, 4 S. E. 2d 722 (1939); Hedgecock

are not in dispute, it becomes a question of law for the court.[16] Whether a person acting in the emergency was acting as a reasonably prudent person would have acted under the same or similar circumstances is likewise for the jury.[17] The North Carolina Supreme Court early applied the doctrine that the question of negligence in an emergency is one for the jury.[18] It would appear that such a rule might be applied with reasonable consistency, but a brief review of several cases will show the inconsistency with which the doctrine has been applied in North Carolina.

In *Ingle v. Cassiday,*[19] the court, in upholding an involuntary nonsuit, held as a matter of law that an emergency faced the defendant, and that he acted as a person of ordinary care and prudence, similarly situated, would have acted. This case was decided over the vigorous dissent of Mr. Justice Clarkson.[20] The case marked the beginning of decisions in which the court has seemingly abandoned the principle that the determination of the existence of an emergency, and the determination of whether there was negligence under the doctrine, are questions for the jury.

In *Mills v. Waters,*[21] the court upheld a nonsuit by holding, as a matter of law, that the defendant was faced with an emergency and that he acted prudently thereunder. It seems that in this case there was sufficient evidence to go to the jury had the court not entered

v. Orlosky, 220 Ind. 390, 44 N. E. 2d 93 (1942); Baker v. Shettle, 194 Md. 666, 72 A. 2d 30 (1950); Kinder v. Erie R. Co., 109 N. J. Law. 469, 162 A. 387 (1932); Helvic v. George A. Rutherford Co., 114 N. E. 2d 514 (Ohio App. 1953), *appeal dismissed* 160 Ohio St. 571, 117 N. E. 2d 439 (1954); Vogreg v. Shepard Ambulance Service, —— Wash. ——, 268 P. 2d 642 (1954). In Baker v. Shettle, *supra* at 671, 172 A. 2d at 32, the court said, "It is held by the weight of authority, that if there is evidence in a case legally sufficient to show that an emergency existed, it becomes a question of fact for the jury."

[16] Helvich v. George A. Rutherford Co., *supra* note 15.

[17] Kirk v. Los Angeles Ry. Corp., 26 Cal. 2d 833, 161 P. 2d 673, 164 A. L. R. 1 (1945); Schultz v. Chicago, R. I. and P. R. Co., 167 Kan. 228, 205 P. 2d 965 (1949); Pampu v. City of Detroit, 315 Mich. 618, 24 N. W. 2d 588 (1946); St. Johnsburg Trucking Co. v. Rollins, 145 Me. 217, 74 A. 2d 465 (1950); Schultz v. Meyerholtz, 91 Ohio App. 566, 109 N. E. 2d 35 (1951); Litz v. Zoeller, 365 Pa. 45, 73 A. 2d 387 (1950); Reddick v. Longacre, 228 S. W. 2d 264 (Tex. Civ. App. 1950); Frenier v. Brown, 116 Vt. 538, 80 A. 2d 524 (1951); American Products Co. v. Villwock, 7 Wash. 2d 246, 109 P. 2d 570, 132 A. L. R. 1010 (1941).

[18] Bullock v. Williams, 212 N. C. 113, 193 S. E. 170 (1937); Jernigan v. Jernigan, 207 N. C. 831, 178 S. E. 587 (1935); Smith v. Atlantic and Yadkin Ry. Co., 200 N. C. 177, 156 S. E. 508 (1931); Luttrell v. Hardin, 193 N. C. 266, 136 S. E. 726 (1927); Clark v. Wilmington and Weldon R. R. Co., 109 N. C. 430, 14 S. E. 43 (1891). In Bullock v. Williams, *supra* at 117, 193 S. E. at 172, the court approved the charge of the trial judge that the determination is ordinarily one for the jury.

[19] 208 N. C. 497, 181 S. E. 562 (1935).

[20] Mr. Justice Clarkson in his dissent in Ingle v. Cassiday, *supra* note 19, at page 500, 181 S. E. at 564, stated that "the defense of sudden emergency is one for the jury. This is the universal holding among American courts."

[21] 235 N. C. 424, 70 S. E. 2d 11 (1952).

a nonsuit under the emergency doctrine.[22] Here the court said that it gave due consideration to the cases holding that weight and sufficiency of the evidence are for the jury.

In *Henderson v. Henderson*,[23] the court said:

> "Viewing the circumstances in the light most favorable to the plaintiff, as required in passing upon a motion for judgment of involuntary nonsuit, the defendant was confronted suddenly by an emergency caused solely by the gross negligence of (third party). . . .
>
> . . .
>
> . . . and his failure to anticipate the unforeseeable when confronted by a sudden emergency caused by no fault of his own cannot be deemed a basis of actionable negligence."

In this case, the court affirmed a dismissal of the suit at the conclusion of the plaintiff's evidence.

The practice of upholding nonsuits on the ground that the defendant was under an emergency and acted prudently thereunder as a matter of law is not unusual in North Carolina.[24] The cases in which the court has applied the majority view and allowed the jury alone to decide these issues seem to be in the minority.[25] The court has also reversed nonsuits against the plaintiff on the ground that the evidence indicated the plaintiff to be acting in an emergency.[26]

In spite of the apparent failure of the North Carolina Supreme Court to follow consistently any rule as to whether the questions relating to an emergency should go to the jury, it is still possible to make several observations which may be of some help to attorneys in unravelling this dilemma.

(1) Is seems evident that if the person attempting to invoke the doctrine wins a jury verdict, this verdict will probably not be disturbed on appeal on the ground either that he was not faced with an emergency, or if an emergency, that he was negligent. In other words,

[22] In this case the defendant attempted to sweep spilled gasoline out of a service station. During the sweeping motion, some of the gasoline came in contact with an open stove, whereby the plaintiff was burned.

[23] 239 N. C. 487, 492, 80 S. E. 2d 383, 386 (1954).

[24] Henderson v. Henderson, *supra* note 23; Morgan v. Saunders, 236 N. C. 162, 72 S. E. 2d 411 (1952); Mills v. Waters, 235 N. C. 424, 70 S. E. 2d 11 (1952); Ingle v. Cassiday, 208 N. C. 497, 181 S. E. 562 (1935). In Patterson v. Ritchie, 202 N. C. 725, 164 S. E. 117 (1932), the court went to the extreme by reversing a jury verdict for the plaintiff on the ground that the defendant was confronted by a situation in which he had to act quickly, and under the circumstances he was not negligent, but rather acted prudently.

[25] Smith v. Carolina Coach Co., 214 N. C. 314, 199 S. E. 90 (1938); Jernigan v. Jernigan, 207 N. C. 831, 178 S. E. 587 (1935).

[26] Powell v. Lloyd, 234 N. C. 481, 67 S. E. 2d 664 (1951); Wall v. Bain, 222 N. C. 375, 23 S. E. 2d 330 (1942); Harper v. Construction Co., 200 N. C. 47, 156 S. E. 137 (1930).

the court probably would not reverse a jury verdict by holding as a matter of law that there was no emergency, or that the party did not act prudently in the emergency.

(2) If the defendant invokes the doctrine as a defense to a charge of negligence, and the trial court nonsuits the plaintiff on the ground that there was an emergency, and that the defendant was not negligent under the emergency as a matter of law, the chances are very strong that the nonsuit will be affirmed on appeal.

(3) If the defendant invokes the doctrine, and the case goes to the jury which decides for the plaintiff, the supreme court may sustain or reverse, depending on whether it thinks, as a matter of law, that the defendant's actions were prudent under the emergency.

Conclusion

It would seem that the most logical way to apply the doctrine of emergency would be:

(1) If there is any evidence that would support a finding that an emergency existed, then the question of the existence of the emergency should be determined by the jury.

(2) If it is determined that an emergency did exist, the question of whether a person acted during the emergency as a reasonably prudent person similarly situated would act should *always* be submitted to the jury. It is submitted that the amount of care required in an emergency is never a question of law. To determine the amount of care required to find one free of negligence, it is first necessary to determine how great an emergency existed, and to what extent the emergency destroyed the prudence which would otherwise be displayed by the person involved or by the reasonably prudent person. The determination of these questions in themselves, under any conditions, is a determination as to which reasonable men may differ, therefore requiring submission to the jury.

Thus, under the above, a nonsuit could never be predicated or sustained on the ground that the defendant was faced with an emergency and acted prudently thereunder. Nor could a jury verdict be upset on the basis of an emergency, because it would have to be assumed that the jury considered the emergency question in reaching its verdict.

It is submitted that the application of the above conclusions would help to alleviate the inconsistencies which are now present in the application of this phase of the law of negligence in North Carolina.

ROBERT C. BRYAN.

Trial and Appellate Practice—Improper Comment by Solicitor in Argument to Jury

What result should follow where on appeal defendant assigns as error improper comment[1] of a prejudicial nature by the solicitor in his argument to the jury, to which defendant has failed to object until after verdict?

The North Carolina Supreme Court recently[2] re-examined this problem of trial and appellate procedure and reached a decision which invites examination and comment not only as an example of the court's avoidance of an undesirable result, but because of questions raised by the decision as to future appeals under like circumstances.

In the instant case defendant appealed a conviction under the "drunken driving" statute[3] and assigned as error improper comment by the solicitor in his argument. The tenor of the comments was to the effect that the defendant was a wealthy intruder, this status being contrasted with the supposed menial station of the jurors. Further remarks were purely speculative, unfounded, not based on evidence introduced at the trial, and clearly outside the limits of proper summation.[4] There was no objection made at the time, but after the verdict was rendered defendant moved to set it aside because of the prejudicial remarks of the solicitor. The motion was refused, the trial judge asserting that he had endeavored to impress on the jury that it was their duty to give a man from Texas as fair a trial as a man from North Carolina and to give a man of means as fair a trial as a man of no means. The supreme court held that although the defendant's assignment of error could not be sustained because it was based on an exception not taken in apt time, "to sustain this trial below would be a manifest injustice to the defendant's right to a fair

[1] Speaking of the statute of 1844 which expanded the privilege of counsel to allow argument of law as well as of fact to the jury, [now N. C. GEN. STAT. § 84-14 (1950)], Brogden, J. said, "The declaration is broad and comprehensive and early lent itself to a construction by the profession that the field of jury argument was unlimited and boundless. Hence, in the course of time it became necessary for the courts to fence in the field by imposing certain restrictions upon counsel in presenting causes to the jury. These restrictions are reflected in certain legal inhibitions imposed by the courts." Conn v. Seaboard Airline R. R., 201 N. C. 157, 159, 159 S. E. 331, 333 (1931). There is a classification of these restrictions in the *Conn* case. See also Note, 4 N. C. L. REV. 132 (1926); Note, 28 N. C. L. REV. 342 (1949); *Survey of Decisions of North Carolina Supreme Court*, 32 N. C. L. REV. 380, 438 (1954); Notes, 39 VA. L. REV. 85 (1954), 10 LA. L. REV. 486 (1950).

[2] State v. Smith, 240 N. C. 631, 83 S. E. 2d 656 (1954).

[3] N. C. GEN. STAT. § 20-138 (1953).

[4] An example of the statements made is: "Just because he is a man of property and can afford a Lincoln car, are you going to allow him to drive through here and run down your little daughter, or your little son, or your's or your's, or your's? I say, No! You must find him guilty." State v. Smith, 240 N. C. 631, 633, 83 S. E. 2d 656, 657 (1954).

and impartial trial."[5] Accordingly, defendant was awarded a new trial, the court invoking its constitutional power[6] to supervise and control proceedings in the inferior courts.

It is the general rule that objection to improper comment of counsel must be made at some time before verdict in order that it be assigned as error,[7] and the objection if not made is deemed waived and is lost. The rule requiring objection before verdict is grounded in the consideration that objection will call the attention of the presiding judge to the remark and enable him to instruct the jury to disregard the remarks by either interrupting counsel at the time or, in his discretion, by including this instruction in the charge to the jury.[8] To this extent at least, objection after verdict would be superfluous. Another reason usually strongly asserted is that the rule removes the possibility that counsel might speculate on defendant's chances with the jury in contemplation of later assignment of the remarks as error on appeal.[9] The lone exception to this rule recognized in prior decisions applies to those cases wherein the death penalty

[5] State v. Smith, 240 N. C. 631, 636, 83 S. E. 2d 656, 659 (1954).

[6] N. C. CONSTITUTION Art. IV § 8.

[7] State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953); State v. Lea, 203 N. C. 13, 164 S. E. 737 (1932); Perry v. Western N. C. R. R., 128 N. C. 471, 39 S. E. 27 (1901); Holly v. Holly, 94 N. C. 96 (1886). For citations to other cases see State v. Davenport, 156 N. C. 596, 72 S. E. 7 (1911) and State v. Tyson, 133 N. C. 192, 45 S. E. 838 (1903). The exception must also be made in a regular manner. In State v. Wilson, 158 N. C. 599, 73 S. E. 812 (1912), the trial judge permitted the exception to be made in stating the case, although no exception was noted at the time. The court held that this was too late and that the judge should not permit it to be made in stating the case. *But cf.* Perry v. Western N. C. R. R., 128 N. C. 471, 39 S. E. 27 (1901), where the court considered an exception which had not been clearly made below but allowed by the trial court stating that as the trial court had allowed the exception evidently for the purpose of giving the defendant the fullest opportunity of appeal, the court would examine it in the same spirit in which it was allowed. In the capital cases the remarks may be considered by the court *ex mero motu*, whether presented to it as an exceptive assignment of error or not. State v. Dockery, 238 N. C. 222, 77 S. E. 2d 623 (1953) and cases cited therein. See comment on the *Dockery* case in *Survey of Decisions of North Carolina Supreme Court*, 32 N. C. L. REV. 380, 438 (1954). Where the solicitor agrees that the exception made after verdict and the assignment of error based thereon shall constitute the case on appeal, this meets the requirements of Rule 21, Rules of Practice of Supreme Court, 221 N. C. 544 (1942). State v. Hawley, 229 N. C. 167, 48 S. E. 2d 35 (1948) (capital case).

[8] State v. Suggs, 89 N. C. 527 (1883).

[9] "A party will not be permitted to treat with indifference anything said or done during the trial that may injuriously affect his interests, thus taking the chance of a favorable verdict, and afterwards, when he has lost, assert for the first time that he has been prejudiced by what occurred. His silence will be taken as tacit admission that at the time he thought he was suffering no harm, but perhaps gaining an advantage, and consequently it will be regarded as a waiver of his right afterwards to object. Having been silent when he should have spoken, we will not permit him to speak when by every consideration of fairness he should be silent. We will not give him two chances. The law helps those who are vigilant—not those who sleep upon their rights. He who would save his rights must be prompt in asserting them." State v. Tyson, 133 N. C. 692, 699, 45 S. E. 838, 840 (1903).

may be imposed.[10] In those cases it must appear that the prejudice arising from the remarks of the solicitor is such that its effect could not have been removed from the minds of the jurors by any instruction that the trial judge might have given.[11]

The corollary to these rules is also discussed in the instant case, *e.g.*, the duty of the trial judge where counsel in his argument to the jury exceeds the bounds of propriety.

Even where there is no objection, it is the right and duty of the trial judge to interfere *sua sponte* where counsel's comments are beyond the bounds of propriety and calculated to prejudice the jury.[12] This duty is not absolute, however, and failure to interfere even where the abuse is gross is not reversible error.[13] Here again there is an exception to this general rule in those cases where the death penalty may be imposed.[14] Once objection is made, the duty to interfere may or may not be absolute depending on the nature of the improper comment. It is consistently said that the decision as to whether he will interfere upon objection to the improper remark, or wait and instruct the jury at the time of the charge to disregard the remark is a matter in the discretion of the trial judge.[15] If the comment is mere "cross firing with small shot"[16] or "harmless,"[17] there is discretion as to when the trial judge will interfere. However, if the comment is held to be a "gross abuse of the privilege of counsel and manifestly calculated to prejudice the jury"[18] there is a duty resting on the trial judge to interfere at once when objection is made, stop counsel immediately, and instruct the jury to disregard the remark.[19] Failure to interfere in the latter instance is reversible error, but in the former it is not.[20] It would then appear that where the comment is a gross abuse there is

[10] State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953) and cases cited therein. *But cf.* State v. Evans, 177 N. C. 564, 98 S. E. 788 (1919).

[11] See note 10 *supra.*

[12] Cuthrell v. Greene, 229 N. C. 475, 50 S. E. 2d 525 (1948); Lamborn v. Hollingsworth, 195 N. C. 350, 142 S. E. 19 (1928); Forbes v. Harrison, 181 N. C. 461, 107 S. E. 19 (1921); State v. Davenport, 156 N. C. 596, 72 S. E. 7 (1910); Cawfield v. The Asheville Street R. R., 111 N. C. 597, 16 S. E. 703 (1892).

[13] See note 12 *supra.*

[14] State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953) and cases cited therein.

[15] State v. Bowen, 230 N. C. 710, 55 S. E. 2d 466 (1949); State v. Brackett, 218 N. C. 369, 11 S. E. 2d 146 (1940); State v. Tucker, 190 N. C. 708, 130 S. E. 72 (1925); State v. Davenport, 156 N. C. 596, 72 S. E. 7 (1911); State v. Tyson, 133 N. C. 192, 45 S. E. 838 (1903).

[16] State v. Underwood, 77 N. C. 502, 504 (1877).

[17] State v. Compo, 233 N. C. 79, 62 S. E. 2d 632 (1953).

[18] State v. Tyson, 133 N. C. 192, 194, 45 S. E. 838, 839 (1903).

[19] State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953); State v. Tucker, 190 N. C. 708, 130 S. E. 721 (1925); State v. Peterson, 149 N. C. 533, 63 S. E. 87 (1908); Jenkins v. The North Carolina Ore Dressing Co., 65 N. C. 563 (1871).

[20] See note 19 *supra.*

no discretion,[21] and further, that when the court decides that the comment is not prejudicial but harmless, failure of the trial judge to act at any time is not reversible error.[22] The amount of interference necessary upon objection will vary with the nature of the remark.[23]

The burden resting on defendant's counsel to protect and preserve the legal rights of his client is shifted upon objection to the trial judge,[24] whose duty it then becomes to protect the defendant or the prejudiced party. This protection is ostensibly available whether objection is made or not, as there is a right and duty resting in the trial judge to interfere at any time counsel "travels outside the record"[25] or makes unfair comment which is prejudicial. As has been said, however, it is discretionary with the trial judge as to whether he chooses to assert this right or exercise this duty without objection. But, might failure to interfere without objection be reversible error? Except in the death cases the court has not laid down any tests for deciding this question but has made only general statements of a prospective nature.[26] Assuming that objectionable comment inconsistent with orderly justice would be subject to the trial judge's immediate interference and expurgation, it becomes apparent that the area of

[21] See note 19 *supra.*

[22] State v. Bowen, 230 N. C. 710, 55 S. E. 2d 466 (1949); Maney v. Greenwood, 182 N. C. 579, 109 S. E. 636 (1921).

[23] Ordinarily the degree of interference rests in the discretion of the court. Maney v. Greenwood, 182 N. C. 579, 109 S. E. 636 (1921); State v. Underwood, 77 N. C. 302 (1877). Where the remark is harmless or not prejudicial under the circumstances, interference sufficient to satisfy the requirement may be minimal. State v. Underwood, 77 N. C. 302 (1877) (The court said it was not clear from the record what the trial judge said or whether it was heard by the jury, but there was no prejudice at any rate). It may amount to no more than merely stopping counsel. State v. McCourry, 128 N. C. 594, 38 S. E. 883 (1901) (statement by trial judge that he did not remember any such evidence). See also State v. Rogers, 94 N. C. 860 (1886); Cannon v. Morris, 81 N. C. 139 (1879). *Cf.* State v. Russell, 233 N. C. 487, 64 S. E. 2d 579 (1951); State v. Compo, 233 N. C. 79, 62 S. E. 2d 579 (1951); State v. Correll, 229 N. C. 640, 50 S. E. 2d 117 (1948); State v. Brackett, 218 N. C. 369, 11 S. E. 2d 146 (1940). Where the abuse is gross, stronger interference is required. The language should be explicit, positive, and peremptory. Massey v. Alston, 173 N. C. 215, 91 S. E. 964 (1917); State v. Thompson, 217 N. C. 698, 9 S. E. 2d 375 (1948) (Trial judge told jury that he had no recollection of evidence commented upon by counsel but that the jury would have to depend on their own recollection. *Held* insufficient). Nor is explanation by the solicitor sufficient. State v. Buchanan, 216 N. C. 709, 6 S. E. 2d 497 (1939). *Cf.* State v. Pfifer, 197 N. C. 729, 150 S. E. 353 (1920).

[24] State v. Green, 197 N. C. 624, 150 S. E. 18 (1929); Lamborn v. Hollingsworth, 195 N. C. 350, 142 S. E. 19 (1928); Massey v. Alston, 173 N. C. 215, 91 S. E. 964 (1917).

[25] Cuthrell v. Greene, 229 N. C. 475, 481, 50 S. E. 2d 525, 529 (1948).

[26] "There may be cases where it would be the duty of the judge to stop the counsel, when his remarks and conduct are in violation of all rules of decorum and propriety that should be observed in the administration of justice when nothing the judge could say in his charge to the jury could rectify the wrong or efface the prejudice produced." Holly v. Holly, 94 N. C. 96, 98 (1886). *Cf.* State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953).

inquiry is not well defined and the distinguishing line between what is prejudicial and merely harmless is wavering and at times indistinguishable.[27] The remark may be prejudicial on its face but allowable within the framework of the case.[28] Accordingly, the nature of the wrong for which the defendant is being prosecuted and his apparent guilt or innocence may affect the evaluation of the comment,[29] as may factors most apparent to the trial judge at the time.[30] It would seem that the trial judge is in the best position properly to make this evaluation but the conclusion is easily drawn that the evaluation is actually made after the appeal when the court sitting in calm review decides whether the comment was gross, or whether the trial judge has sufficiently removed the effect of the prejudicial remark. The court has assumed the responsibility for making the evaluation through the rule that failure of the trial judge to interfere at once upon objection is reversible error where the abuse of counsel is gross.[31] There is no discretion in the trial judge unless the comment is clearly harmless.[32] Thus, there would seem to be no real importance attached to the discretion, as error in its exercise is not reversible error. Whatever the operation of the rule, however, it cannot be denied that it affords the defendant or prejudiced party the maximum protection of the court.

The court in avoiding the general rule as to objection before verdict in the instant case has deviated from a clear line of authority.[33]

[27] *Compare* Devries v. Phillips, 63 N. C. 54 (1868) *with* Maney v. Greenwood, 182 N. C. 579, 109 S. E. 636 (1921).

[28] "Gentlemen, you are dealing with a small time racketeering gangster" held not prejudicial in State v. Correll, 229 N. C. 640, 642, 50 S. E. 2d 717, 718 (1948). "The time has come when the decent people in North Carolina must stand up and defend the virtue and integrity of the fireside, and home against the vicious assaults of human vultures and wolves" held not prejudicial in State v. Meares, 182 N. C. 809, 811, 108 S. E. 477, 479 (1921). See also State v. Steele, 190 N. C. 507, 130 S. E. 308 (1925).

[29] *Compare* State v. McNair, 204 N. C. 106, 169 S. E. 184 (1933); State v. Lea, 203 N. C. 13, 184 S. E. 737 (1932); State v. Ballard, 191 N. C. 122, 131 S. E. 370 (1925); State v. Saleeby, 183 N. C. 740, 110 S. E. 844 (1922). Also see cases cited in footnote 24 and contrast these cases and the cases cited above with State v. Thompson, 217 N. C. 698, 9 S. E. 2d 375 (1940); State v. Pfifer, 197 N. C. 729, 150 S. E. 353 (1929); State v. Tucker, 190 N. C. 708, 130 S. E. 720 (1925).

[30] Factors apparent to the trial judge: (1) Did defendant "open the door" to the argument complained of by the opposing counsel? (2) Did the prosecutor or counsel making the comment "have" the jury at the time? (3) What was the appearance and manner of the offending counsel when the statement was made? (4) Tone of voice. (5) Prior conduct of prosecution and defense in examination and argument. (6) Quality of the jury.

[31] State v. Bowen, 230 N. C. 710, 55 S. E. 2d 466 (1949); State v. Brackett, 218 N. C. 369, 11 S. E. 2d 146 (1940); State v. Tucker, 190 N. C. 708, 130 S. E. 72 (1925); State v. Davenport, 156 N. C. 596, 72 S. E. 7 (1911); State v. Tyson, 133 N. C. 192, 45 S. E. 838 (1903).

[32] State v. Compo, 233 N. C. 79, 62 S. E. 2d 632 (1953); State v. Underwood, 77 N. C. 502 (1877).

[33] State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953); State v. Lea,

This rule was applied indiscriminately in the capital and non-capital cases before the exception in the latter cases was recognized.[34] Whether the court in recognizing this error *ex mero motu* intended to extend the rule as applied in the capital cases to the non-capital cases is questionable. There is no rational basis for assuming this to be true on the authority of this decision alone, and those cases where the court has indicated that it will recognize the defect *ex mero motu* do not afford a basis for reaching that conclusion.[35] In the capital cases as indicated *supra,* the reason for the exception to the general rule is that there is serious doubt that the prejudice could be removed even if the jurors were instructed to disregard the extraneous remarks. This would not seem to be the case in the decision under consideration and no use was made of the test. It might well be inferred, however, from the fact that the court felt that the instruction here was insufficient,[36] in the light of the instruction given, that such was the case. There is no reason why the jurors might not be as strongly prejudiced in a non-capital as a capital case, but the positive pronouncement in the latter is in accord with the rigid scrutiny applied in capital cases where the decision is cloaked with such finality. Here the error seems to be that the trial judge, having recognized the error, did not take sufficient action to remove it, the charge not going far enough in the opinion of the court. Earlier cases make it clear that the sufficiency of the corrective action is also within the discretion of the trial court.[37] The inference could be drawn that there had been an abuse of discretion by the trial judge, but this discretion is not reviewed, apparently for the reason that the trial judge acted without objection to the improper comments.

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203 N. C. 13, 164 S. E. 737 (1932); Perry v. Western N. C. R. R., 128 N. C. 471, 39 S. E. 27 (1901); Holly v. Holly, 94 N. C. 96 (1886). For citations to other cases see State v. Davenport, 156 N. C. 596, 72 S. E. 7 (1911); and State v. Tyson, 133 N. C. 192, 45 S. E. 838 (1903).

[34] *Compare* State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953) *with* State v. Steele, 190 N. C. 507, 130 S. E. 308 (1925).

[35] State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953); State v. Hawley, 229 N. C. 167, 48 S. E. 2d 35 (1948); State v. Little, 228 N. C. 417, 45 S. E. 2d 542 (1947); State v. Isaacs, 225 N. C. 310, 34 S. E. 2d 410 (1945).

[36] There were two dissents in the instant case on the point that the charge of the trial judge was sufficient to allay any prejudice which might have been roused by the remarks of the solicitor. Bobbitt, J., wrote the dissenting opinion in which Johnson, J., concurred, arguing strongly that conceding the rules in the majority opinion were correct, this was not a case for the application of the remedy applied as the charge to the jury was sufficient. Higgins, J., dissented on the point that the case was within the general rule and that the exception came too late. Compare with the charge given in the instant case those approved in State v. Brackett, 218 N. C. 369, 11 S. E. 2d 146 (1940); State v. McNair, 204 N. C. 106, 169 S. E. 184 (1933); State v. Murdock, 183 N. C. 779, 1 S. E. 610 (1922).

[37] Maney v. Greenwood, 182 N. C. 579, 109 S. E. 636 (1921); State v. Underwood, 77 N. C. 302 (1877).

Attempting to reason from the rule applied in those cases where the trial judge charges the jury *ex mero motu,* but where there is reversible error in the charge, throws no light on this matter.[38] An instruction to the jury to disregard the comment of counsel where there is no abuse must be specially requested regardless of whether there is or is not objection at the time.[39] This would indicate that improper comment is not a matter of substance for which error might be assigned if the charge were insufficient, but this particular point has not been presented to the court for decision.

It would seem that the defendant in the instant case was extremely fortunate in having appealed with a favorable set of circumstances. The examination of the assignment of error was precluded under the general rule, as the exception came after verdict. On the other hand, the comment had been recognized below and an attempt made to remove its effect. It was also manifest that the remarks were improper, and obviously prejudicial. The result would seem to indicate a balancing of a desire for the maintainance of regularity of procedural rules against circumstances which the court felt required rectification, although prevented from doing so directly by procedural considerations. In this situation the court resorted to the broader constitutional remedy in the interest of a fair trial.[40]

[38] There is error in failing to charge on a substantial feature of the case regardless of whether a request is made for special instructions. State v. Puckett, 211 N. C. 66, 189 S. E. 183 (1937); State v. Ellis, 203 N. C. 836, 167 S. E. 67 (1933). The rule is generally stated that failure to charge on substantive features of the case arising on the evidence is prejudicial even in the absence of request for special instructions. But if subordinate elaboration is desired, and the instruction is proper as far as it goes, a party deeming more specific instruction necessary must request it. Thus, failure to charge on matters which the court would consider subordinate elaboration would not be error. State v. Ardrey, 232 N. C. 721, 62 S. E. 2d 53 (1950); McCall v. Glouster Lumber Co., 196 N. C. 597, 146 S. E. 579 (1929). This would seem to indicate that, excluding the capital cases, if counsel fails to object to the improper remark, the trial judge would not be under a duty to charge the jury and the failure to do so would not be reversible error. Upon objection, where the abuse is gross and manifestly calculated to prejudice the jury there is no necessity that the trial judge charge on the matter, having already instructed the jury to disregard the statement. If the trial judge, therefore, attempted to charge the jury *ex mero motu,* and the charge were insufficient, no error would be apparent as there is no substantial matter, but subordinate elaboration. *Cf.* State v. Steele, 190 N. C. 507, 130 S. E. 308 (1925); State v. O'Neal, 29 N. C. 251 (1847).

[39] See note 38 *supra.*

[40] "The Supreme Court shall have jurisdiction to review upon appeal, any decision of the courts below, upon any matter of law or legal inference. . . , and the court shall have the power to issue any remedial writ necessary to give it general supervision and control over the proceedings in the inferior courts." N. C. CONSTITUTION Art. IV § 8. This power, as applied in the instant case, has been rarely invoked, and those instances in which it was invoked seemed to present situations where all other legal mechanics were unavailable to rectify the conflict in opposing rules to the detriment of the party clearly entitled to relief. In State v. Cochran, 230 N. C. 523, 53 S. E. 2d 663 (1949), the defendant was clearly innocent of any violation of the law. This case is

As to the weight counsel might give this case in appealing under like circumstances, it would seem that there would have to be an extreme abuse of the privilege of counsel in order to elicit this same response from the court.

The field for speculation is narrow and marked by many obstacles, and counsel who takes the risk of not interposing objection in apt time is toying with his client's chances of receiving a favorable jury verdict, as well as waiving his right to appeal on the basis of the remarks if the verdict is an adverse one.

WALTER LEE HORTON, JR.

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cited by the court in the instant case. See also Elledge v. Welch, 238 N. C. 61, 76 S. E. 2d 340 (1953) (Error appeared as to one defendant who had not appealed. Nevertheless, since the record showed that she was incompetent, her rights were committed to the care of the court. In the exercise of the supervisory power, the court took jurisdiction in her behalf). In Ange v. Ange, 235 N. C. 506, 71 S. E. 2d 19 (1952) even though the appeal under consideration was subject to dismissal, the court took jurisdiction to correct error in the judgment. In the following cases, however, the court refused to alter decisions, stating that it would only consider questions of law or legal inference, although it would appear that these cases present as strong a situation for the exercise of the supervisory power as the instant case: Alston v. Southern Ry. Co., 207 N. C. 114, 176 S. E. 922 (1934) (Refused to alter decision where plaintiff's attorney had signed a release to the defendant without authority); State v. Lawrence, 199 N. C. 481, 154 S. E. 741 (1930) (no review of trial judge's discretion in allowing guards to be stationed outside the courtroom while the trial was in progress).