UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 33 | Number 4 Article 3

6-1-1955

Notes and Comments

North Carolina Law Review

NOTES AND COMMENTS

Bills and Notes—Finance Companies—Holders in Due Course

The Negotiable Instruments Law expressly sets out the requirements which one must meet in order to become a holder in due course of a negotiable instrument. N. I. L. § 52 provides: "a holder in due course is a holder who has taken the instrument under the following conditions: . . . (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." The last of these requirements is given fuller meaning by N. I. L. § 56 which provides: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

In spite of the definiteness with which these requirements are set out, the courts have experienced considerable difficulty, especially in recent years, in applying them to a particular class of holders—finance companies. This difficulty, and a resulting inconsistency in the decisions, is not without cause. A brief analysis of the factual situation out of which these cases arise and of several of the cases themselves will show the source of this conflict.

The notes on which the finance companies seek to recover arise out of a tri-partite transaction in which the buyer purchases certain goods on credit from a dealer, executing his note and a conditional sales contract to the dealer. The dealer, in accordance with previous arrangements, immediately transfers the note and the conditional sales contract to the finance company. As a part of this arrangement, the finance company usually furnishes the dealer with blank forms for the notes and the contracts, with tables from which to compute the amount of installment and interest payments, and in other ways participates in the transaction in varying degrees.

The problem resulting from the above course of dealings between the finance company and the dealer was clearly pointed out by the Maryland court in *Griffin v. Baltimore Federal Savings & Loan Ass'n*,[1] where the court said: "The conflict between the desire on the one hand to protect the conditional vendee from abusive practices and the neces-

[1] 204 Md. 154, 159, 102 A. 2d 804, 806 (1954).

sity on the other hand of preserving the free negotiability of commercial paper has given rise to a divergence of opinion on this point. . . ."[2] In approaching this problem, courts have taken different positions with respect to the conflict.

One view which denies the finance company the status of a holder in due course and which seems to be gaining more support from the courts is very strongly expressed in *Buffalo Industrial Bank v. De Marzio*.[3] There the New York court said that the finance companies have become de facto departments of the businesses without which these businesses could not operate, and that any idea of their being separate organizations was a mere fiction. The court added: "To pretend that they are separate and distinct enterprises is to draw the veil of fiction over the face of fact."[4] The more typical statement of this view is that the finance company is so closely connected with the transaction that it will not be heard to say that it is a holder in due course.

Probably the most influential case espousing this view is *Commercial Credit Co. v. Childs*.[5] In this case the note was attached to the con-

[2] It was unnecessary for this court to indicate its view as to the proper solution of the conflict because of a Maryland statute which provides that when a note is given as a part of an installment transaction, it is to refer to the agreement out of which it arose and, in the hands of any subsequent holder, is to be subject to the same defenses that the buyer could assert against the seller. Another case in which a statutory provision was construed to prevent the finance company from being a holder in due course is General Electric Contracts Corp. v. Heimstra, 69 S. D. 78, 6 N. W. 2d 445 (1942), where the statute defined "seller" as any person who sells goods or "any legal successor in interest" of such person. These statutes seem to represent a retreat from the strict "actual notice" and bad faith requirements of the N. I. L. Also, it is interesting to note that the Uniform Commercial Code has adopted less stringent requirements, under which these same results could possibly be reached. It provides:

"Section 1-201. General Definitions.

(19) 'Good faith' means honesty in fact in the conduct or transaction concerned.

(25) A person has 'notice' of a fact when

(a) he has actual knowledge of it; or

(b) he has received a notice or notification of it; or

(c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

"Section 3-302. Holder in Due Course.

(1) A holder in due course is a holder who takes the instrument

(b) in good faith including observance of the reasonable commercial standards of any business in which the holder may be engaged; and

(c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person."

The above provisions would replace N. I. L. § 52 and N. I. L. § 56. The "has reason to know" and "reasonable commercial standards" provisions of the above sections would, seemingly, enable the courts more readily to deny the finance company the position of a holder in due course. For a discussion of these provisions and the "good faith rule" generally, see Note, 30 N. C. L. REV. 395 (1952).

[3] 162 Misc. 742, 296 N. Y. Supp. 783 (City Ct. Buffalo 1937), *rev'd on other grounds*, 6 N. Y. S. 2d 568 (Sup. Ct. 1937).

[4] Buffalo Industrial Bank v. De Marzio, 296 N. Y. Supp. 783, 785-786 (City Ct. Buffalo 1937).

[5] 199 Ark. 1073, 137 S. W. 2d 260 (1940). This case is discussed in Notes, 53 HARV. L. REV. 1200 (1940), 20 U. OF CIN. L. REV. 123 (1951). Also see Note, 128 A. L. R. 729 (1940).

tract, both were executed at the same time, and on the back of each was a printed assignment to the finance company. Immediately after the instruments were executed they were assigned to the finance company. The Arkansas court held that the finance company was so closely connected with the transaction that it could not maintain that it was a holder in due course; that for all intents and purposes the finance company was a party to the instrument from the beginning.[6]

Another case attracting considerable attention is *Commercial Credit Corp. v. Orange County Machine Works.*[7] There the facts were similar to those in the *Childs* case, but there was also evidence that the finance company had been twice consulted by telephone as to the details of the transactions. The California court in holding that the finance company was not a holder in due course said that it had actively participated in the transaction from its inception.

In *Mutual Finance Co. v. Martin,*[8] in addition to the facts that were present in the *Childs* case, these further facts appeared: the finance company's name was in bold print at the top and throughout the body of the contract and the note, and its office was designated as the place of payment. On the day before the sale took place, the finance company investigated the buyer's credit standing, approved the terms of both instruments, and agreed to purchase them as soon as the transaction was consummated. The Florida court also relied on the "close connection" between the finance company and the dealer to deny the finance company the position of a holder in due course.[9]

Another group of cases appear to be distinguishable from those just considered in that they find an agency relationship to exist between the finance company and the dealer, impute the agent's knowledge to the principal, and thereby hold that the finance company is not a holder in due course. Actually, however, in many of these cases this distinction appears to be one of labeling only, as the courts rely on the same factors on which the cases previously considered relied, and place con-

[6] Here the finance company brought an action to recover possession of the goods. It is usually held that in a suit to recover the goods, the buyer may assert any defense that he has against the seller, even against the seller's transferee. 2 WILLISTON, SALES § 332 (Rev. ed. 1948). This possible distinction has apparently been ignored by the courts following the *Childs* case. See Note, 152 A. L. R. 1222 (1944), where the writer attempts to weave a pattern of consistency into the cases on the basis of this distinction.

[7] 34 Cal. 2d 766, 214 P. 2d 819 (1950). This case is discussed in Notes, 28 NOTRE DAME LAW. 257 (1952), 23 So. CALIF. L. REV. 580 (1950).

[8] 63 So. 2d 649 (Fla. 1953).

[9] Other cases denying the finance company the status of a holder in due course because of the close relationship between it and the dealer are Schuck v. Murdock Acceptance Corp., 220 Ark. 56, 247 S. W. 2d 1 (1952); International Harvester Co. of America v. Watkins, 127 Kan. 50, 272 P. 139 (1928); C. I. T. Corp. v. Emmons, 197 So. 662 (La. 1940); General Motors Acceptance Corp. v. Swain, 176 So. 636 (La. 1937); Taylor v. Atlas Security Co., 213 Mo. App. 282, 249 S. W. 746 (1923).

siderable weight on the *Childs* case. Typical of this group of cases is *Palmer v. Associate Discount Corp.*,[10] where the United States Court of Appeals for the District of Columbia Circuit, in reaching the above result, relied heavily on the printed forms used in carrying out the transaction. It pointed out that the name of the finance company appeared on the face of these forms in large type and that under five different types of assignments, printed on the back, the dealer assumed the obligation of repurchasing the automobile in case of default. These assignments incorporated various agreements ranging from a full repurchase to the payment of a certain sum for a release. The court said that the forms clearly showed that they were prepared for use in the financing of automobile installment sales, that they revealed the dealer and the finance company to be closely associated in the business, and that the provisions in the printed assignments were particularly suggestive of a close relationship between the dealer and the company. The finance company, the court concluded, was acting as the dealer's agent in demanding payment on the note.[11]

The above cases illustrate that the courts have come to use "closely connected," "active participation," or similar terms in describing varying degrees of *actual* participation by the finance company in the original transaction between the dealer and the purchaser. Some of these courts, in so doing, have failed to examine the facts to determine whether there was "actual notice" or bad faith as required by the N. I. L., but have relied on this "closeness" in itself to infer such notice or bad faith. Further, it appears that some of these courts have used this as a device to arrive at results that are somewhat doubtful[12] under the N. I. L., as they, in justifying the results reached, look beyond the N. I. L. to policy considerations.[13]

[10] 124 F. 2d 225 (D. C. Cir. 1941).

[11] Other cases where an agency relationship was found to exist are United States v. Schaffer, 33 F. Supp. 547 (D. Md. 1940); Bastian-Blessing Co. v. Stroope, 203 Ark. 116, 155 S. W. 2d 892 (1941); International Harvester Co. v. Carruth, 23 So. 2d 473 (La. 1945).

[12] In many of these cases there is nothing to indicate that such facts were present as to charge the finance company with "actual notice" or bad faith, and the courts relied on this "closeness" alone to deny the finance company the status of a holder in due course.

[13] These policy considerations relate mostly to the inequality in the bargaining positions of the finance company and the buyer and the ability of the finance company to bear more readily any resulting loss. It is also contended that marketability is not seriously affected as the notes retain their negotiable quality in the hands of persons beyond the finance company. This contention seems to ignore the practical consideration that there must be some large primary market, as finance companies, for these papers which are executed on a mass scale today, and that by denying the finance companies the protection of being holders in due course, the existence of such a market would be adversely affected. There would probably be a reduction in the size of the market and an increase in the amount of financing charges, both of which would limit the accessibility of this market to the public.

A recent case[14] taking a more discriminating approach to the problem deserves attention. There the finance company was founded by certain dealers for the express purpose of providing financing services solely to the members of a dealer association of which some of them were members. The finance company, which had purchased notes from a particular dealer over a four year period, supplied blank forms containing a printed assignment, furnished financial statement forms, and purchased the instruments immediately upon the completion of the transaction. The defendant purchaser contended that the finance company was so closely associated with the transaction as to make it an original party. In rejecting this contention the Wisconsin court expressly refused to follow the *Childs* and *Martin* cases, which, according to the court, held that the supplying of forms by the finance company to the dealer tended to establish direct participation by the finance company in the transaction between the dealer and the purchaser.

The court then pointed out the following: a large segment of our economy is dependent upon this source of credit. For the finance company to purchase these instruments executed on forms with which it is not familiar necessitates either the delay of an investigation or the taking of considerable risk by the finance company, either of which could seriously impair the usefulness of this method of financing. By furnishing its own forms the finance company avoids both of these dangers. The court concluded that it could see no reason why finance companies supplying such forms should be held thereby to have made the dealers their agents or to have participated in the sale.

Another case, in which the Louisiana court approaches the problem with considerable frankness, is *White System of New Orleans v. Hall.*[15] Here again the finance company furnished forms and installment tables and agreed in advance to purchase the notes as soon as the sale was completed. The court, in finding that the finance company was a holder in due course, recognized that there was some justification in the view that the finance company was using the N. I. L. as a shield to get an unfair advantage over the purchaser, but said that steps to correct this would have to be taken by the legislature and not by the courts in view of the clear provisions of the Negotiable Instruments Law.[16]

[14] Implement Credit Corp. v. Elsinger, 268 Wis. 143, 66 N. W. 2d 657 (1954), *rehearing denied*, 67 N. W. 2d 873 (1953).

[15] 219 La. 440, 53 So. 2d 227 (1951).

[16] Other cases holding that the course of dealings between the finance company and the dealer did not prevent the finance company from being a holder in due course are Citizens & Southern National Bank v. Stepp, 126 F. Supp. 744 (N. D. Fla. 1954) (The court distinguished this case from the *Martin* case, *supra* note 8, in that here the name of the finance company did not appear in the forms furnished; other finance companies, as well as the plaintiff purchased these instruments; and there was no participation in the transaction by the finance company.); Allied Building Credits, Inc. v. Mathewson, 335 Mich. 270, 55 N. W. 2d 826 (1952); Mayer v. American Finance Corp. 172 Okla. 419, 45 P. 2d 497 (1935).

If, in fact, there is present a situation so fraught with the possibility of fraud or unfairness that the statutory provisions of the N. I. L. are not adequate, then it seems that legislation is the only sound solution. Nothing but uncertainty can arise out of an encroachment upon these statutory provisions by judicial decisions. Undoubtedly this situation presents a ripe opportunity for collusion between unscrupulous finance companies and dealers to take unfair advantage of the buyer.[17] Clearly in some cases the finance company has actually participated in the transaction to such an extent that it cannot be a holder in due course within the statutory provisions. But in other cases there is no evidence of such direct participation in the transaction by the finance company as would charge it with "actual notice" or bad faith as required by the N. I. L. In the absence of additional legislation, it is submitted that innocent finance companies that come within the definition of a holder in due course under the existing statutes, should not be deprived of that position because of a tendency of the courts to "catalogue" them in the same class with unscrupulous companies by the indiscriminate or deliberate use of such terms as "close connection." Such a result seems especially unreasonable in the light of the fact that a certain amount of participation by the finance company, as pointed out earlier, is essential in order to avoid unreasonable delay or risks.[18]

BOBBY G. BYRD.

State Tort Claims Act—Construction

In three recent cases[1] the question whether the North Carolina Tort Claims Act[2] should be strictly or liberally construed has been presented to the court. In *Lyon & Sons v. Board of Education,*[3] the issue was

[17] In Davis v. Commercial Credit Corp., 87 Ohio 311, 94 N. E. 2d 710 (1950), the court found that the finance company engaged in a conspiracy with the dealer to defraud the buyer. But for something of a reversal of the usual situation see Mutual Finance Corp. v. Dickinson, 123 N. J. L. 62, 7 A. 2d 859 (Sup. Ct. 1938) and Motor Finance Corp. v. Huntsberger, 116 Ohio St. 317, 156 N. E. 111 (1927), where the courts indicated that if any collusion existed, it was between the purchaser and the dealer.

[18] Another problem which frequently arises is whether the simultaneous execution of the note with a conditional sales contract destroys its negotiability. According to the weight of authority it does not. Commercial Credit Corp. v. Orange County Machine Works, 34 Cal. 2d 766, 214 P. 2d 819 (1950); Mutual Finance Co. v. Martin, 63 So. 2d 649 (Fla. 1953); Implement Credit Corp. v. Elsinger, 268 Wis. 143, 66 N. W. 2d 657 (1954), *rehearing denied,* 67 N. W. 2d 873 (1955); 2 WILLISTON, SALES § 332, p. 291 (Rev. ed. 1948). But some cases have held that negotiability is destroyed. Note, 98 U. OF PA. L. REV. 244 (1949).

[1] Floyd v. State Highway and Public Works Commission, 241 N. C. 461, 85 S. E. 2d 703 (1955); Alliance Co. v. State Hospital at Butner, 241 N. C. 329, 85 S. E. 2d 386 (1955); Lyon & Sons v. Board of Education, 238 N. C. 24, 76 S. E. 2d 553 (1953).

[2] N. C. GEN. STAT. § 143-291 *et seq.,* as amended in 1953.

[3] 238 N. C. 24, 76 S. E. 2d 553 (1953). Discussed in note, 32 N. C. L. REV. 242 (1954), as to subrogation.

whether the right of subrogation existed under the act. In saying that the right existed, Justice Parker stated that most statutes waiving a government's immunity had been strictly construed, but that the current trend of legislative policy and judicial thought is away from such construction. In *Alliance Co. v. State Hospital at Butner*,[4] a prisoner detained at a state penal institution and negligently operating a hospital truck was held not to be an employee within the meaning of the Tort Claims Act. Justice Bobbitt, in a concurring opinion, argued that, if immunity is to be waived beyond the provisions of the Act as strictly construed, this is a matter for the General Assembly to decide. Then in *Floyd v. State Highway and Public Works Commission*,[5] plaintiff claimed a maintenance supervisor of the State Highway and Public Works Commission was negligent in failing to see that his instructions were carried out with respect to the use of larger tile for a fill, after he had notice that the fill had washed out once before. The fill again washed out and plaintiff's intestate was killed when he drove his car into the washout. In denying recovery, Justice Higgins, writing the majority opinion, stated that since the Act is in derogation of sovereign immunity, the sounder view is that it should be strictly construed. Justice Parker dissented in the latter two cases, arguing against a strict construction.

In discussing the construction of a statute waiving the immunity of a state, certain established principles should be recalled. The North Carolina court has repeatedy proclaimed that the state cannot be sued without its consent;[6] this immunity is absolute and unqualified.[7] Furthermore, an agency of the state may be sued only when and as authorized by statute,[8] and even if authority to use the agency is given, it does not extend to actions for torts unless expressly provided.[9] The remedy given to injured individuals before the State Tort Claims Act was a right

[4] 241 N. C. 329, 85 S. E. 2d 386 (1955).
[5] 241 N. C. 461, 85 S. E. 2d 703 (1955).
[6] This is apparently based on the construction given the Eleventh Amendment to the Constitution of the United States in Hans v. Louisiana, 134 U. S. 1 (1890). See also: Smith v. Hefner, 235 N. C. 1, 68 S. E. 2d 783 (1951); Dalton v. State Highway and Public Works Commission, 223 N. C. 406, 27 S. E. 2d 1 (1943); Prudential Insurance Co. v. Powell, 217 N. C. 495, 8 S. E. 2d 619 (1940).
[7] Schloss v. State Highway and Public Works Commission, 230 N. C. 489, 53 S. E. 2d 517 (1949); Dalton v. State Highway and Public Works Commission, 223 N. C. 406, 27 S. E. 2d 1 (1943).
[8] Burgin v. Smith, 151 N. C. 561, 66 S. E. 607 (1909); Moody v. State Prison, 128 N. C. 12, 38 S. E. 131 (1901).
[9] "It was a hardship on plaintiff, but no legal wrong of the defendant. It goes without saying that State authorities should exercise due care in the performance of governmental functions, but for the failure, in cases of this nature, no liability attaches." Reeves v. Asheville Construction Co., 194 N. C. 817, 818, 140 S. E. 733, 734 (1927). See also: Carpenter v. Atlanta and Charlotte Air Line Ry. Co., 184 N. C. 400, 114 S. E. 693 (1922); Jones v. Commissioners of Franklin County, 130 N. C. 451, 42 S. E. 144 (1902).

of action against the employees of the agency,[10] or against officials of the state in limited cases,[11] or on appeal to the legislature for an appropriation.[12]

Most of the states which have passed acts allowing the state or its agencies to be sued have construed such acts strictly.[13] In at least one case a *constitutional* provision allowing suits against the state has been strictly construed.[14] The reasons given for such construction are: (1) since the acts are in derogation of common law, or in derogation of sovereignty, it is elemental that they are to be strictly construed;[15] (2) actions against the state would impair respect for sovereignty and make inroads upon the public revenue;[16] (3) there can be no legal rights against the authority that makes the law upon which such rights depend;[17] (4) suits against the state would subject it to manifold, indefinite, and interminable liability;[18] and (5) there would be crippling interferences with government if the acts were liberally construed.[19]

In those states in which statutes authorizing suits against the state have been liberally construed, this result usually is obtained because such statutes have been passed in furtherance of constitutional provisions.[20] Another reason given is that such statutes are mererly remedial and do not create a new right of action.[21]

It is gradually being recognized that states, through their officers and agents, can and do commit tortious acts.[22] States are making an un-

[10] Miller v. Jones, 224 N. C. 783, 32 S. E. 2d 594 (1945); Carpenter v. Atlanta and Charlotte Air Line Ry. Co., 184 N. C. 400, 114 S. E. 693 (1922).

[11] Wilkins v. Burton, 220 N. C. 13, 16 S. E. 2d 406 (1941); Old Fort v. Harmon, 219 N. C. 241, 13 S. E. 2d 423 (1941). See note, 23 N. C. L. REV. 270 (1945), for discussion of distinction between liability for violation of discretionary duties and liability for violation of ministerial duties.

[12] Under Article IV, Section 9 of the North Carolina Constitution, the Supreme Court has original jurisdiction to hear claims against the state, but its decisions shall be merely recommendatory. The General Assembly alone decides whether a claim against the state is just and shall be paid. Rotan v. State, 195 N. C. 291, 141 S. E. 733 (1928).

[13] For a summary by states of state tort claims acts, see Leflar and Kantrowitz, *Tort Liability of the States*, 29 N. Y. U. L. REV. 1363 (1954).

[14] People v. Birch Securities, 86 Cal.2d 703, 196 P.2d 143 (1948).

[15] Hailey v. City of Newark, 22 N.J. 139, 36 A.2d 210 (1944).

[16] Quinton v. Board of Claims, 165 Tenn. 201, 54 S.W.2d 953 (1932).

[17] Kawananakoa v. Polyblank, 205 U. S. 349 (1907); Arnold v. State, 48 N. M. 596, 154 P. 2d 257 (1944).

[18] State v. Dickerson, 141 Tex. 475, 174 S.W.2d 244 (1943).

[19] Harrison v. Wyoming Liquor Commission, 63 Wyo. 13, 177 P.2d 397 (1947). But in Great Northern Life Ins. Co. v. Read, 322 U. S. 47 (1944), it was held that when authority to sue a sovereign is given, it is liberally construed to accomplish its purpose.

[20] Construction of such statutes should not be so strict as to violate the legislative intent or reflect on dignity of the state. Lewis v. State, 207 La. 194, 20 So. 2d 917 (1945); Jackson v. State, 261 N. Y. 134, 184 N. E. 735 (1933); Northwestern and Pacific Bank v. State, 18 Wash. 73, 50 Pac. 586 (1897).

[21] Lewis v. State, 207 La. 194, 20 So. 2d 917 (1945).

[22] This is generally recognized by the mere enactment of tort claims acts by the states. But the North Carolina court as late as 1949 said, as to the State High-

precedented expansion into many fields of activity and subjecting their citizens to increasing risks from "defective, negligent, perverse or erroneous administration"[23] of these activities. Along with this expansion come acts such as the North Carolina Tort Claims Act,[24] which recognize the moral duty imposed by considerations of equity and justice.[25] When a state thus discards its mantle of sovereignty, it would seem inconsistent to whittle the consent down by a strict construction.[26] "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."[27]

Some arguments that may be advanced in favor of a liberal construction of such statutes are: (1) they are intended to relieve the state legislatures from the pressure of private claims, so that the legislatures may devote their time to matters of public concern;[28] (2) prerogatives of governments should yield to needs of their citizens;[29] (3) when a state consents to be sued, it should occupy the same position as a private citizen and be entitled to no special privileges;[30] and (4) the courts should not be concerned with the problem of financing the possible results of suits against the state, but should leave it to the legislature to require liability insurance.[31]

Perhaps the question of strict construction because of sovereign immunity is best summed up by the Supreme Court of Arkansas in a decision in 1851:[32]

> "A notion which might have been plausibly challenged, if the question was an open one in the courts of this country, as a sickly

way and Public Works Commission: "It is as powerless to exceed its authority as is a robot to act beyond the limitations imposed by its own mechanism. It can commit no actionable wrong." Schloss v. State Highway and Public Works Commission, 230 N.C. 489, 53 S.E.2d 517 (1949).

[23] Borchard, *Government Liability in Tort*, 34 YALE L. J. 1, 129, 229 (1924-25). Professor Borchard referred to the "unexampled expansion of the police power in the United States." What about expansion from 1924 to 1955? See also Borchard, *Governmental Responsibility in Tort*, 36 YALE L. J. 1, 757, 1039 (1926-27); Anderson, *Claims Against States*, 7 VAND. L. REV. 234 (1954).

[24] N. C. GEN. STAT. § 143-291 *et seq.*, as amended in 1953.

[25] Jackson v. State, 261 N. Y. 134, 184 N. E. 735 (1933).

[26] United States v. Aetna Casualty & Surety Co., 338 U. S. 366 (1949), citing Anderson v. John L. Hayes Construction Co., 243 N. Y. 140, 153 N. E. 28 (1926). See also Seavey, *"Liberal Construction" and the Tort Liability of the Federal Government*, 67 HARV. L. REV. 994 (1954).

[27] Cardozo, J., in Anderson v. John L. Hayes Construction Co., 243 N. Y. 140, 147, 153 N. E. 28, 29 (1926).

[28] See dissents by Parker, J., in Alliance Co. v. State Hospital, 241 N. C. 329, 334, 85 S. E. 2d 386, 390 (1955), and in Floyd v. State Highway and Public Works Commission, 241 N. C. 461, 467, 85 S. E. 2d 703, 707 (1955).

[29] United States v. Yellow Cab Co., 340 U. S. 543 (1951).

[30] State v. Stanolind Oil & Gas Co., 190 S. W. 2d 510 (Tex. Civ. App. 1945).

[31] See Leflar and Kantrowitz, *Tort Liability of the States*, 29 N. Y. U. L. REV. 1363 (1954), for a discussion of this possibility.

[32] State v. Curran, 12 Ark. 321, 345 (1851).

> exotic in American soil, where government is not prescribed to the people by a superior power, but is merely the organ of their own sovereignty and the creation of laws enacted by themselves, and which derive all their obligatory force from the mutual consent of those who are to render them obedience.
>
> "The right of a citizen to sue a state, then is not derogatory to common right, or subversive of the true principles of the common law, but is clearly in harmony with both. . . ."

North Carolina has consistently recognized that claims against the state not only will be made,[33] but that they should be compensated.[34] In saying that the State Tort Claims Act should be strictly construed, it is submitted that the supreme court is following an out of date doctrine of governmental immunity, and is refusing to recognize the apparent legislative intent in passing such an act.

RICHARD O. GAMBLE.

Statutes—Determination of Moment at Which Newly Enacted Statute Attains Force of Law

The Supreme Court of Pennsylvania recently refused to apply to a tax statute the general rule that a day is regarded in the law as an indivisible unit of time which begins with its first moment, and thus, a statute is ordinarily deemed to take effect from the beginning of the day on which it is enacted.[1] Decedent died at 11:55 a.m. on the morning of 21 December, 1951. On the same day, the governor signed a bill which increased the collateral inheritance tax rate from 10 per cent to 15 per cent, and which was to become effective immediately upon its final enactment. There was no evidence as to the exact time of day when the governor signed the bill, but the Commonwealth, relying on the general rule, assumed the statute to have been operative from the first moment of the day of its enactment, and therefore in effect at decedent's death. The court held that the Commonwealth had failed to prove that the new law was actually in effect at the time of decedent's death, and that the lower court's verdict for a 10 per cent taxation was proper. It added that the general rule relied on by the Commonwealth was a legal fiction, and would be disregarded whenever its application would unjustly impair personal or property rights. In such cases, the court said that it would take cognizance of the actual hour or time of the passage of the statute.

[33] N. C. CONST. Art. IV, § 9: "The Supreme Court shall have original jurisdiction to hear claims against the State. . . ."

[34] Rotan v. State, 195 N. C. 291, 141 S. E. 733 (1928).

[1] *In re* Grant's Estate, 377 Pa. 264, 105 A.2d 80 (1954).

This line of reasoning, however, has not been followed in all cases in the past.[2] In fact, the general rule was advocated by many of the earlier decisions, whch held that where no exact time is named as the effective date of a statute, it will take effect from the date of its approval, and when computation is to be made from an act done (*e.g.*, the approval of the statute), the day on which the act was done should be included;[3] and since the law does not recognize fractions of a day,[4] the statute must be deemed to have been in effect from the first moment of the day of its approval.[5]

However, this general rule is by no means universal in its application.[6] A clear exception is in the field of criminal law. In *Moree v. State*,[7] defendant was convicted of having a distillery in his possession, which was discovered on the same day an act was passed which made the possession of such an apparatus illegal. The court, in reversing the conviction, refused to hold the statute effective from the first moment of the day of its passage. To consider the act in effect before it was actually signed by the governor would make it an ex post facto law.

Even in those areas of the law in which the general rule of non-divisibility of a day has been held applicable,[8] courts have at times seemed reluctant to apply it. In *Arrowsmith v. Hamering*,[9] plaintiff filed a petition in error without permission from the court on the same day that an act was passed which repealed the law allowing such petitions without permission. Since no evidence was offered as to the exact time of the passage of the repealing act or of plaintiff's filing of his petition, the court presumed that the repealing act took effect from the first moment of the day of its enactment, thereby antedating plainiff's petition. Even

[2] Leidigh Carriage Co. v. Stengel, 95 Fed. 637 (6th Cir. 1899); *In re* Welman, 20 Vt. 653, 29 Fed. Cas. 681, No. 17,407 (D. Vt. 1844).

[3] Arnold v. U. S., 9 Cranch 104, 120 (U. S. 1815); Mallory & Co. v. Hiles, 61 Ky. (4 Metcalfe) 53 (1861).

[4] Turnipseed v. Jones, 101 Ala. 593, 14 So. 377 (1893); 86 C. J. S., *Time* § 16 at p. 900 (1954).

[5] U. S. v. Norton, 97 U. S. 164 (1877); Lapeyre v. U. S., 17 Wall. 191 (U. S. 1872).

[6] Leavenworth Coal Co. v. Barber, 47 Kan. 29, 27 Pac. 114 (1891); 82 C.J.S., *Statutes* § 406 at p. 976 (1953); 50 AM. JUR., *Statutes* § 510 at p. 523 (1944); 36 CYC. 1198 (1910): "As a general rule, the law does not take notice of fractions of a day, and therefore a statute which takes effect from its passage, or approval, relates back and becomes effective from the first moment of the day on which it is passed, or approved, but this doctrine of relation is only a legal fiction, and whenever its application would cause injustice, the act will be given effect only from the moment of its approval."

[7] 130 Miss. 391, 94 So. 226 (1922).

[8] *In re* Boyce, 25 Wash. 612, 66 Pac. 54 (1901); *In re* Welman, 20 Vt. 653, 655, 29 Fed. Cas. 681, 682, No. 17,407 (D. Vt. 1844), where the court said: "But though divisions of a day are allowed to make priorities in questions concerning private acts and transactions, they are never allowed to make priorities in questions concerning public acts, such as legislative acts, or public laws, or such judicial proceedings as are matters of record."

[9] 39 Ohio St. 573 (1883).

so, the court indicates that had plaintiff sustained the burden of proving that the filing of his petition actually preceded the passage of the repealing act, the decision might have been in his favor.[10] The Supreme Court of North Carolina has said that in the absence of evidence or means of proof of the exact time of enactment, a statute would be considered in effect from the first moment of the day of its passage, but added that the court would hear evidence and determine the precise hour at which a statute was enacted whenever it became necessary in order to prevent wrong or to assert a meritorious right.[11] It should be noted that the act in question was to take effect "from and after its ratification." Where no such time is set forth in the act, however, the time of its taking effect is governed by statute in North Carolina.[12]

In many instances, as we have seen, courts have refused to apply the general rule, and instead, have received evidence as to the exact time of the passage of the act in question, and held it effective as of that time.[13] It has been said that the general rule will not be followed in cases where its application would defeat a vested right or otherwise work

[10] *Id.* at 577. The court said that "Whenever a question arises in a court of law as to the time when a statute takes effect, appropriate proof may be resorted to, to determine when the act took effect, that is, the exact time in the day. "No such proof was offered in the case at bar. If the plaintiff in error relies on the fact that his action was pending on the 18th before the actual time of the passage of the statute in question, he must, in order to defeat the presumption that it went into effect the first moment of that day, show that his petition was first filed. This he has not done, and we are left to the presumption that arises from the date of the act."

See Fabien v. Grabow, 134 Mo. App. 193, 114 S. W. 80 (1908). Here, the court says that the burden of proof rests on the party who asserts that an act or event occurred prior to some other act, which happened on the same day, to establish what he alleges.

[11] Lloyd v. N. C. Railroad Co., 151 N. C. 536, 66 S. E. 604 (1909). Apparently no such evidence was presented in this case, since the court held the statute in question to have been in effect from the beginning of the day of its passage. *Accord,* Croveno v. Atlantic Ave. Ry. Co., 150 N. Y. 225, 44 N. E. 968 (1896).

[12] N. C. GEN. STAT. § 120-20 (1952) provides, "Acts of the General Assembly shall be in force only from and after thirty days after the adjournment of the session in which they shall have been passed, unless the commencement of the operation thereof be expressly otherwise directed." In determining when acts to which this type of statute would apply should be considered in effect, the weight of authority is that the time is computed by excluding the day of the event from which time is to be computed (i.e., the day of adjournment) and including the last day of the number constituting the specific period. In other words, if the legislature adjourned on the first day of the month, then assuming the period to be thirty days, the act would take effect on the thirty-first. It is generally held that the act becomes effective as of the first moment of the last day in the period. A case so holding, and in which the applicable laws were similar to our own N. C. GEN. STAT. §§ 120-20 (1952) and 1-593 (1953), was Clingsmith v. Jackson Dairy Co., 202 Iowa 773, 211 N. W. 413 (1921). *Accord,* Garcia v. J. C. Penney Co., 52 N. M. 410, 200 P. 2d 372 (1948), citing SUTHERLAND ON STATUTORY CONSTRUCTION § 111.

[13] *In re* Wynne, 30 Fed. Cas. No. 18,177 at 760 (C. C. D. Va. 1868); Kennedy v. Palmer, 72 Mass. (6 Gray) 316 (1855); People *ex rel.* Campbell v. Clark, 1 Cal. 406 (1851).

injuriously,[14] or when public justice demands inquiry as to the time of day an act was passed.[15] Adherents to this school of thought hold that the time of the approval of a statute by the executive is a fact which can be ascertained and proved, and that in all cases where the rights of the parties are in any way affected by the time of such approval, the exact time of day at which the act of approval occurred may be shown.[16] This eliminates the often undesirable retroactive aspect necessarily involved whenever the presumption that a statute in question took effect from the first moment of the day of its passage is adopted.[17] Such retroactivity can easily bring about unjust results when applied in situations similar to that in the principal case.

The view that a statute should be considered in effect from the moment of its passage was criticized in *Parkinson v. Brandenburg*[18] for the reason that, while sound in theory, it is difficult to apply, since there is frequently no satisfactory means of ascertaining the exact moment at which an executive approves a given statute. In the *Parkinson* case, the court held that the law in question would take effect at the beginning of the day following its approval. The statute stated that it would take effect "from and after its passage."

As to the solutions mentioned here and their respective merits, it can easily be seen that all have their shortcomings. The general rule and the *Parkinson* rule adopt presumptions as to the time when the statute took effect which admittedly are not correct, technically speaking. They do, however, provide measuring points which can be ascertained easily and positively, arbitrary though they be. The measuring point which the court professes to use in the principal case, while technically correct, is, as noted above, often impossible to determine exactly. Nevertheless, the court in the principal case shows a commendable willingness to receive any available evidence as to the actual time of the passage

[14] Arrowsmith v. Hamering, 39 Ohio St. 573 (1883).

[15] People *ex rel.* Campbell v. Clark, 1 Cal. 406 (1851).

[16] *Ibid.; cf.* Township of Louisville v. Portsmouth Savings Bank, 104 U. S. 469 (1881), where the time of adoption of a constitutional provision by the voters was decided to be the hour at which the polls closed.

[17] Moree v. State, 130 Miss. 341, 94 So. 226 (1922); *cf.* West v. State, 120 Tex. Crim. Rep. 280, 47 S. W. 2d 324 (1932); Monroe Loan Society of N. H. v. Nute, 88 N. H. 13, 183 Atl. 703 (1932). *Cf.* Burgess v. Salmon, 97 U. S. 381 (1878), where the Court refused to hold that an act which increased the tax on tobacco sold was applicable during the entire day of its passage when it was admitted that plaintiff sold his tobacco before the statute was approved. The Court said that since a criminal punishment (fine or imprisonment) was provided for failure to pay the tax, it would, in effect, be subjecting plaintiff to the operation of an ex post facto law if it held this law in effect from the first moment of the day of its passage.

[18] 35 Minn. 294, 28 N. W. 919 (1886); *accord,* O'Connor v. City of Fond du Lac, 109 Wis. 253, 85 N. W. 327 (1901); Mushel v. Bd. of Comm'rs, 152 Minn. 226, 188 N. W. 555 (1922). However, in the Mushel case, the court said that the Parkinson rule was against the weight of authority.

of the act in question, when circumstances warrant the receiving of such evidence. Although this may never be established to the last second, such hair-splitting is not always necessary in order to do justice. Frequently, a showing that an act was approved in the morning or afternoon, or before or after a certain hour, may be sufficient to establish the actual priority of the events in question,[19] and thus lead to a verdict based upon fact rather than presumption.

Finally, it is submitted that this was a proper case for the disregarding of the general rule; that since the court properly placed upon the Commonwealth the burden of proving that the statute was actually in effect at the time of decedent's death, the court acted correctly in refusing to apply the presumption of the general rule in the absence of any evidence from the Commonwealth that the statute had been passed before decedent's death.

BENNETT H. PERRY, JR.

Constitutional Law—Validity of Penalties Imposed by States on Interstate Carriers for Violation of Weight and Size Regulations

Extensive use of the public highways by intrastate and interstate trucking has caused states to resort to regulation of weights and sizes of trucks.[1] With the enactment of such legislation, both before and after Congress acted on the subject, courts have been faced with two problems: (1) whether a state in the exercise of its police power can regulate interstate carriers, and (2) what penalties a state may impose on an interstate carrier for violation of the state regulation.

In 1924, Mr. Justice Brandeis, in *Buck v. Kuykendall*,[2] declared that

[19] *In re* Dreyfous, 28 Abb. N. Cas. 27, 18 N. Y. Supp. 767 (1892), is quite similar to the principal case. A proceeding was brought to impose a tax of 1 per cent on property bequeathed to the wife of deceased. The act under which the tax was levied was approved on 20 April, 1891, after 8 o'clock. The decedent died before 8 o'clock. It was held that the tax did not apply, since decedent's death occurred before the passage of the act.

[1] ALA. CODE tit. 36 §§ 89-94 (1940); IOWA CODE ANN. c. 321, §§ 321.452-321.481 (1949); N. C. GEN. STAT. §§ 20-116, 20-118 (1953); N. Y. VEHICLE AND TRAFFIC LAW § 14; OHIO. REV. CODE c. 4513 (1954). Every state has enacted either similar legislation or legislation accomplishing the same result.

[2] 267 U. S. 307, 315-316 (1924). Plaintiff desired to operate an auto stage line exclusively in interstate commerce, from a city in one state to a city in another. Oregon granted him a license, but Washington refused, saying the territory had been filled. In an action to enjoin enforcement of the applicable Washington law, the Court declared the state action unconstitutional, saying, "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. . . . Its effect upon such commerce is not merely to burden, but to obstruct it. Such action is forbidden by the Commerce Clause." (It should be noted that this was before any federal legislation on the subject of carriers in interstate commerce.) This has been precedent for all subsequent cases where there has been the possibility of discriminating against interstate commerce. See also: George W. Bush & Sons Co.

a state could *not* discriminate against interstate carriers, and later in *Morris v. Duby*,[3] the Supreme Court set forth generally, what a state *might* do by saying, "An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation, especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens."

With the passage of the Federal Motor Carrier Act of 1935,[4] the question arose to to whether this national legislation preëmpted the field from state regulation of weights and sizes of interstate trucks. State[5]

v. Maloy, 267 U. S. 317, 324-325 (1925). The Court there said: "The State action in the Buck case was held to be unconstitutional not because the statute prescribed an arbitrary test for the granting of permits, or because the director of Public Works had exercised the power conferred arbitrarily or unreasonably, but because the statute, as construed and applied, invaded a field reserved by the Commerce Clause for federal regulation."

[3] 274 U. S. 135, 143 (1927). (Action by motor carrier to restrain Oregon officials from enforcing a highway commission order reducing maximum load from 22,000 pounds to 16,500 pounds. The Court held that although the order prevented competition, since the carrier could not carry as much, such a consideration was outweighed when competent authority deemed such weight injurious to the highway for the use by the general public and unduly increased the cost of maintenance and repair. The only way to attack this state action was to show that it was arbitrary and unreasonable.) In Sproles v. Binford, 286 U. S. 374, 388-389 (1932) where carrier sought to restrain Texas state officials from enforcing the weight and size limitations of the Motor Vehicle Act, the Court held the statute constitutional, saying, "In exercising its authority over its highways, the state is not limited to the raising of revenue for maintenance and reconstruction, or to regulations as to the manner in which vehicles shall be operated, but the state may also prevent the wear and hazards due to excessive size of vehicles and weight of load. Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment intended to secure. When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome." Plaintiff said this was unconstitutional class legislation because passenger travel was treated differently, but the Court held that the peculiar importance of transportation for persons to provide communities with resources, both of employment and recreation, along with educational and social interests, were sufficient to support this classification.

[4] 49 STAT. 543, 49 U. S. C. § 301, *et seq.* (Supp. 1935), as amended, 54 STAT. 919 (1940), 49 U. S. C. § 301, *et seq.* (1952).

[5] Whitney v. Fife, 270 Ky. 434, 109 S. W. 2d 832 (1937) (Writ of prohibition to restrain judge from issuing warrants of arrest and prosecuting plaintiffs for violation of the weight limit law); Smithart v. State, 133 Tex. Crim. Rep. 145, 109 S. W. 2d 207 (1937); Johnson v. State, 133 Tex. Crim. Rep. 144, 109 S. W. 2d

and federal courts,[6] when confronted with the problem, held that it did not. In 1938, the Supreme Court decided, in *South Carolina Highway Dept. v. Barnwell Bros. Inc.*,[7] that such state legislation was a proper exercise of the police power. In reviewing the history of Section 225 of the federal act of 1935,[8] concerning weights and sizes, the Court in *Maurer v. Hamilton*,[9] declared that since Congress had not specifically

207 (1937); Morrison v. State, 133 Tex. Crim. Rep. 141, 109 S. W. 2d 205 (1937) (where truck driver appealed from the imposition of a fine for violating the weight load regulation).

[6] Werner Transportation Co. v. Hughes, 19 F. Supp. 425, 432 (N. D. Ill. 1937) (Suit by motor carriers to restrain Secretary of State of Illinois from enforcing state weight load limitations. The court, in denying the injunction, said: "While of course, a state may not discriminate against interstate commerce in the absence of national legislation, especially covering the subject, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens." The fact that surrounding states had a higher weight limit did not mean that the statute imposed an unreasonable burden upon interstate commerce.).

[7] 303 U. S. 177, 189-190, *rehearing denied*, 303 U. S. 667 (1938). Plaintiffs sought to restrain state officials from enforcing the weight and size statute of South Carolina contending that it violated the due process clause of the Fourteenth Amendment, had been superseded by federal legislation, and imposed an unconstitutional burden on interstate commerce. The South Carolina statute prescribed a maximum width for vehicles of 90 inches, whereas other states normally allowed 96 inches. The Court reversed the district court's holding that this statute excessively burdened interstate commerce, saying, "so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states. . . . In the absence of such legislation [Congressional] the judicial function, under the Commerce Clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen, are reasonably adapted to the end sought."

[8] Originally, at the time of Maurer v. Hamilton, 309 U. S. 598 (1940), this was section 225 of the Federal Motor Carrier Act. Substantially unchanged, today it is in Part II of the Interstate Commerce Act, 49 U. S. C. § 325, and reads: "The Commission is authorized to investigate and report on the need for federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle and in such investigation the Commission shall avail itself of the assistance of all departments and bureaus of the Government and of any organization of motor carriers having special knowledge of any such matter."

[9] 309 U. S. 598 (1940). Plaintiffs, carriers of new autos by motortruck, sought to restrain enforcement of Pennsylvania Motor Vehicle Code, contending the federal legislation superseded this state act. The Court interpreted Section 225 as creating strictly an investigatory power and, without clear and specific legislation on the subject, power to regulate was reserved to the states. Many cases have followed this interpretation, and it stands today: Lattavo Bros., Inc. v. Hudock, 119 F. Supp. 587, 589 (W. D. Pa. 1953), *aff'd*, 347 U. S. 910 (1954) (Plaintiff sought injunction restraining public official from enforcing weight limitations of Pennsylvania Motor Vehicle Code, by which plaintiff was detained and required to remove his excess load, and arrested with requirement to pay fine. In denying the injunction, the court said, "It is no longer open to dispute that a state in the exercise of its police power and in the absence of Congressional action, may impose *reasonable restrictions* upon the weight and size of vehicles which travel over its highways, equally applicable to intrastate and interstate commerce, without running afoul of the Commerce or Due Process Clause. . . ." [emphasis supplied]); Whitney v. Johnson, 37 F. Supp. 65 (E. D. Ky. 1941) (interstate motor carriers

provided for regulation, the power was thereby reserved to the states. This section has remained substantially unchanged, and without further act of Congress, it is well established today that states may regulate the weights and sizes of interstate carriers.

However, by the recent decision of *Castle v. Hayes Freight Lines, Inc.*,[10] a case involving penalties which may be imposed on interstate

were denied injunction to restrain enforcement of weight law); Philadelphia-Detroit Lines, Inc. v. Simpson, 37 F. Supp. 314 (S. D. W. Va. 1940), *aff'd*, 312 U. S. 655 (1941) (Carrier of autos sought injunction retraining enforcement of weight and size laws and was denied); Darnall Trucking Co. v. H. Simpson, 122 W. Va. 656, 12 S. E. 2d 516, *appeal dismissed*, 313 U. S. 549 (1940).

[10] 348 U. S. 61, 64 (1954). In this case an interstate carrier, operating under a certificate of convenience and necessity from the ICC, and from the state agency, sought to enjoin state authorities from enforcing the state regulation provided for the suspension of the carrier's right to use the highways for ninety days, or one year for habitual violators, on the ground that such an enforcement measure conflicted with the Federal Motor Carrier Act. The Supreme Court of Illinois, in Hayes Freight Lines, Inc. v. Castle, 2 Ill. 2d 58, 117 N. E. 2d 106 (1954), declared that the penalty could not be imposed on interstate operators, but could be imposed on intrastate operators. The U. S. Supreme Court affirmed, the substance of the reasoning being, that since the Federal Motor Carrier Act is all embracing with regard to issuance and suspension of certificates of public convenience and necessity "it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission granted right to operate." As to whether the public interest requiring safe highways necessitates the suspension of right to use the highways for habitual violators of the weight limit, *quaere*.

It appears that a state may impose many burdens on interstate carriers without fatally obstructing interstate commerce: In Lloyd A. Fry Roofing Co. v. Wood, 344 U. S. 157, 162 (1952), *rehearing denied*, 345 U. S. 913 (1953), an Arkansas statute requiring interstate as well as intrastate carriers to obtain a permit, was held constitutional. Mr. Justice Black there said: "In this situation our prior cases make clear that a state can regulate so long as no undue burden is imposed on interstate commerce and that a mere requirement for a permit is not such a burden. *It will be time enough to consider apprehended burdensome conditions when and if the state attempts to enforce them.*" (Emphasis supplied.) But the Court said the state had no discretionary right to refuse the permit to the interstate carrier. For other examples see: Aero Mayflower Transit Co. v. Bd. of R. R. Commissioners, 332 U. S. 495 (1947) (annual state tax levied on interstate carriers for use of highways allowed); California v. Thompson, 313 U. S. 109, 116 (1941) (A California statute required every transportation agent to procure a license from the state Railroad Commission, to pay a license fee, and to file a bond. The Court said: "If there is authority in the state, in the exercise of its police power, to adopt such regulations affecting interstate transportation, it must be deemed to possess the power to regulate the negotiations for such transportation where they affect matters of local concern which are in other respects within state regulatory power, and where the regulation does not infringe the national interest in maintaining the free flow of commerce and in preserving uniformity in the regulation of the commerce in matters of national concern."); Eichholz v. Public Service Commission, 306 U. S. 268 (1939) (an interstate motor carrier's practice of hauling merchandise, consigned from St. Louis, Missouri, to persons in Kansas City, Missouri, over the state line to Kansas City, Kansas, and then back to its intended destination in Missouri, was a mere subterfuge to evade permit requirements of Missouri, and the state could require that he obtain a permit.); H. P. Welch Co. v. New Hampshire, 306 U. S. 79 (1939) (before Federal Motor Carrier Act's effective date, state law limited hours of duty for drivers); Clark v. Poor, 274 U. S. 554 (1927) (carrier required to procure certificate and pay a tax for use of highways); Kane v. New Jersey, 242 U. S. 160 (1916) (licensing and registration); Hendrick v. Maryland, 235 U. S. 610 (1915) (licensing and registration required of non-resident operators); Dohrn Transfer Co. v. Hoegh, 116 F. Supp. 177 (S. D.

carriers for violating these weight and size regulations, Mr. Justice Black said that although regulation by states was not of itself invalid, a state could not prohibit an interstate carrier from using the highways, even though the carrier had habitually violated the state law. His language was, "We are not persuaded . . . that the conventional forms of punishment are inadequate to protect states from overweighted or improperly loaded motor trucks." No indication was given as to what specific penalties a state could validly enforce, but the Court did point out that since the Interstate Commerce Commission could revoke certificates of motor carriers which willfully refuse to comply with any lawful regulation of the Commission, and a Commission regulation requires that motor carriers abide by valid state highway regulations, relief to suspend a carrier would be through the Interstate Commerce Commission.

Before this decision, states had resorted to various methods to enforce their weight and size regulations. A very common one was allowing peace officers to weigh interstate vehicles, and upon finding them overloaded, require the removal of the excess weight.[11] Also, the driver could be arrested and the owner fined.[12] Injunctive relief[13] could be sought to force a carrier to comply with state regulations, and finally,

Iowa 1953) (state may condition use of highway by requiring a fee to maintain it); State v. Nagle, 148 Me. 197, 91 A. 2d 397 (1952) (license or permit); Council Bluffs Transit Co. v. City of Omaha, 154 Neb. 717, 49 N. W. 2d 453 (1951) (city ordinance routing interstate traffic); McClean Trucking Co. v. City of New York, 116 N. Y. S. 2d 292 (1952) (city motor use tax pursuant to statutory authorization); Arrow Carrier Corp. v. Traffic Commission of City of New York, 99 N. Y. S. 2d 138 (1950) (routing traffic in city); Ex parte Truelock, 139 Tex. Crim. Rep. 365, 140 S. W. 2d 167 (1940) (requiring a certificate of public convenience and necessity).

[11] ALA. CODE, tit. 36, § 85 (1940); IOWA CODE ANN. c. 321, § 321.465 (1949); N. C. GEN. STAT. § 20-118.1 (1953); OHIO REV. CODE § 4513.33 (1954). Most of these statutes are very similar and read like the North Carolina statute, *supra:* "Any peace officer having reason to believe that the weight of a vehicle and load is unlawful is authorized to weigh the same either by means of portable or stationary scales, and may require that such vehicle be driven to the nearest scales in event such scales are within 2 miles. The officer may then require the driver to unload immediately such portion of the load as may be necessary to decrease the gross weight of such vehicle to the maximum therefor specified in this article. All material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of such owner or operator. Any person who refuses to permit a vehicle being operated by him to be weighed as in this section provided or who refuses to drive said vehicle upon the scales provided for weighng for the purpose of being weighed, shall be guilty of a misdemeanor."

[12] ALA. CODE tit. 36, § 83 (1940); IOWA CODE ANN. c. 321, §§ 321.477, 321.482 (1949); N. C. GEN. STAT. §§ 20-176, 20-118(1) (1953); N. Y. VEHICLE AND TRAFFIC LAW § 70 (1952); OHIO REV. CODE § 4513.99 (1954). It should be noted that these are typical provisions for enforcement although the manner of arriving at the penalty differs in the various states. North Carolina imposes a fine proportionate to amount of overload, others base the fine on the number of offenses committed, and others provide still other methods.

[13] N. C. GEN. STAT. § 62-121.34 (1950). This is part of the N. C. Motor Truck Act of 1947.

an action for damages[14] against the carrier could be brought by the government official in charge. These methods are still widely used, and the Supreme Court decision[15] apparently does not encompass them in its prohibition. But, when the penalty imposed results in a complete obstruction of interstate commerce, as in the *Hayes Freight Lines* case,[16] by suspending the carrier's right to use the highways of the state, the courts will strike the penalty. However, in the twilight area of balancing the state's interest in the safety and maintenance of its highways, against the national interest in protecting the free flow of interstate commerce, the Supreme Court will probably uphold reasonable state regulations which fall short of preventing interstate commerce. This conclusion would seem to follow from the provision[17] in many state statutes for a construction not in conflict with federal legislation or the Constitution.

LOUIS A. BLEDSOE, JR.

Labor Law—Railway Labor Act—Federal-State Conflict Over Union Shop

In 1951 Congress amended the Railway Labor Act[1] to permit carriers and the union representative of their employees to enter into "union shop" agreements[2] under certain conditions. The amendment specifically states the agreements may be entered into "nothwithstanding any other provisions of the Act, or of any other statute or law of the United States or territory thereof, or any state."[3] The problem is thus

[14] IOWA CODE ANN. c. 321, § 321.475 (1949). In such case the superintendent of Public Works sues the owner of the vehicle for the damages the vehicle does to the highway, and the recovery goes to the highway fund.

[15] Castle v. Hayes Freight Lines, Inc., 348 U. S. 61 (1954).

[16] *Ibid.*

[17] ALA. CODE, tit. 48, § 28 (1940); N. C. GEN. STAT. § 62-121.39 (1950). The North Carolina statute reads: "(1) This article shall apply to persons and vehicles engaged in interstate commerce over the highways of this state and the Commission may, in its discretion, require such carriers to file with it copies of their respective interstate authority, registration of their vehicles operated in this State, and the observance of such reasonable rules and regulations as the Commismission may deem advisable in the administration of this article and for the protection of persons and property upon the highways of the State, except insofar as the provisions of this article may be inconsistent with, or shall contravene, the Constitution and laws of the U. S. (2) The Commission or its authorized representative is authorized to confer with and hold joint hearings with the authorities of other states or with the Interstate Commerce Commission or its representatives in connection with any matter arising under this article, or under the Federal Motor Carrier Act which may directly or indirectly affect the interests of the people of this state or the transportation policy declared by this article of the Interstate Commerce Act."

[1] 64 STAT. 1238, 45 U. S. C., § 152 (eleventh) (1951).

[2] "Union shop" agreements permitted by the Act are agreements requiring, as a condition of continued employment, that within 60 days following the beginning of such employment, or of the effective date of such agreements, whichever is later, all employees shall become members of the labor organization representing their craft or class.

[3] 64 STAT. 1238, 45 U. S. C., § 152 (eleventh) (1951).

presented: What effect will the amendment have in those states, as North Carolina, which have "Right-to-Work" laws[4] or constitutional provisions, which in substance outlaw the union shop contract?

There have been several lower court decisions on the problem and from these cases two principal questions have emerged: (1) is the amendment a constitutional exercise of the commerce power by Congress, and (2) has it pre-empted the field to be regulated and thus superseded state laws on the subject? Three lower state court cases ruling on these and related questions have reached divergent results, with two decisions[5] upholding the constitutional validity of the amendment, while a third case[6] questioned its constitutionality and held that, irrespective of this issue, the state constitutional prohibition against union shop agreements was not so inconsistent with the federal law as to be superseded.[7]

[4] The North Carolina "Right to Work" statute is G. S. §§ 95-78 to 95-84 (1950). By the statute any agreement between the employer and a labor organization whereby membership in the labor organization is made a condition of employment is declared to be against public policy of the state, and an illegal combination or conspiracy in restraint of trade. The statute also declares that it is the public policy of the state that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization or association.

As of 1950, seventeen states and the Territory of Hawaii had enacted statutes regulating union-security agreements. The following twelve states appear to have outlawed all forms of union security: Arizona, Arkansas, Florida, Georgia, Iowa, Nebraska, North Carolina, North Dakota, South Dakota, Tennessee, Texas and Virginia. Colorado, Kansas, and Wisconsin and the Territory of Hawaii require certain voting procedures as a condition precedent to the execution of valid union-security agreements. Colorado, Massachusetts, Pennsylvania and Wisconsin and the Territory of Hawaii specifically outlaw certain kinds of discrimination in the enforcement of union-security agreements. See MATTHEWS, LABOR RELATIONS AND THE LAW 484 (Boston: Little, Brown and Co., 1953). Within the past year "Right to Work" laws prohibiting union shop agreements have also been enacted in Alabama, Mississippi, and South Carolina and the Virginia law has been made more stringent. See 23 U. S. L. WEEK 2103 (Aug. 24, 1954).

[5] International Association of Machinists v. Sandsberry, 23 U. S. L. WEEK 2229 (Tex. Civ. App., Nov. 23, 1954) reversing 22 U. S. L. WEEK 2370 (Texas, Feb. 16, 1954); and Moore v. Chesapeake and Ohio Ry., 23 U. S. L. WEEK 2106 (Va., Richmond Hustings Court, Aug. 31, 1954). Both cases held that the 1951 amendment permitting the union shop contracts was a constitutional exercise of the commerce power by Congress. The Texas court cited the following cases to sustain its finding: United States v. Carolene Products Co., 304 U. S. 144 (1938); Virginian Ry. v. System Federation No. 40, 300 U. S. 515 (1937); Brotherhood of Railroad Shop Crafts v. Lowden, 86 F. 2d 458 (1936); and Texas & New Orleans Ry. v. Brotherhood of Railroad and Steamship Clerks, 281 U. S. 548 (1930). The Virginia court relied on the Virginian Ry. case *supra*.

[6] Hanson v. Union Pacific Ry., 22 U. S. L. WEEK 2346 (Neb., Feb. 2, 1954). The Nebraska court reasoned that the federal act merely permitted such contracts, while the Nebraska Constitution takes the definite position of forbidding them. Thus the direct conflict of position, if any, lies between private contracting parties who determine that such contracts shall be made and the state which has proscribed them. Under this interpretation, the court concludes that the state law will prevail.

[7] A North Carolina Superior Court case (Hudson v. Atlantic Coast Line RR, Jan. 6, 1955. In the Superior Court of New Hanover County, not officially reported) faced a similar problem when asked to enjoin the operation of a union shop agreement between the carrier and the unions representing its employes. However, in its findings and conclusions of law, the court did not discuss or even refer to the 1951 amendment to the Railway Labor Act permitting such agreements. Injunc-

The broad scope of the Commerce power of Congress has been established since *Gibbons v. Ogden,*[8] and the power has been recognized to embrace labor relations[9] and more specifically the relations of carriers and employees subject to the Railway Labor Act.[10] This Act was passed in 1926, and under it union shops were not illegal. However, company dominated unions began to control the field, and in 1934 organized labor pressed for federal legislation outlawing the company union. In response to this request, Congress outlawed the union shop entirely, irrespective of type.[11] With the disappearance of company unions and substitution therefor of organized labor unions, the latter began to press for the repeal of the prohibition against union-shop agreements, and finally succeeded in securing passage of the 1951 amendment.

---

tion was issued apparently on the grounds that the unions had failed properly to represent the employees, and had exceeded their authority in negotiating the agreements and that such contracts were contrary to the laws and public policy of the state. Since there was no consideration given to the Railway Labor Act amendment authorizing such contracts, it is uncertain what the court would have done if the amendment had been considered, and what the North Carolina Supreme Court will hold when faced with the problem.

A similar suit was instituted in another Superior Court of North Carolina by non-union employees of the Southern Railway to enjoin the enforcement of a union-shop contract. Defendant unions sought removal to the U. S. District Court for the Western District of North Carolina. A three judge court convened and the petition for removal was denied and the case remanded since the complaint did not set forth a cause of action arising under the 1951 amendment or under the Constitution or laws of the United States and thus no federal questions were involved. In his opinion, Judge Parker said: "The amendment to the Railway Labor Act of which we take judicial notice must unquestionably be considered in passing upon the case; but the complaint states no cause of action arising under that statute, the effect of which is to destroy any cause of action which plaintiff might otherwise have had under state law. . . . So long as plaintiff's cause of action does not arise under the laws of the United States, the case is not removable, even though when these laws are considered plaintiff has no cause of action and is not entitled to an injunction. The defendant in such case must rely for protection of his rights upon action by the state courts, which are just as much bound as are the federal courts to give effect to the laws of the United States, and in a case involving these laws are subject to review by the United States Supreme Court." Allen v. Southern Ry., 114 F. Supp. 72, 73, 75 (W. D. N. C. 1953).

The course of the litigation in the Sandsberry case, *supra* note 5, presents a problem similar to that faced by the North Carolina court. See Sandsberry v. Gulf, Colorado & Santa Fe Ry., 114 F. Supp. 834 (N. D. Tex. 1953) where the case was remanded for lack of a federal question, and International Association of Machinists v. Sandsberry, 22 U. S. L. WEEK 2370 (Tex., Feb. 16, 1954) where the union shop agreement was enjoined and the 1951 amendment declared unconstitutional, which decision was reversed by Texas Court of Civil Appeals, 23 U. S. L. WEEK 2229 (Tex., Nov. 23, 1954).

[8] 9 Wheat. 1, at 196 (U. S. 1824).

[9] Jones & Laughlin Steel Corp. v. N. L. R. B., 301 U. S. 1 (1937).

[10] Virginia Ry. v. System Federation No. 40, 300 U. S. 515 (1937).

[11] "They [the 1934 prohibitions against union shop contracts] were enacted into law against the background of employer use of these agreements as devices for establishing and maintaining company unions, thus effectively depriving a substantial number of employees of their right to collective bargaining. . . . It was because of this situation that labor organizations agreed to the present statutory prohibition against union security agreements." SEN. REP. No. 2262, 81st Cong., 2d Sess. 2 (1950).

Both the Railway Labor Act of 1926 and the Railway Labor Act of 1934 were upheld by the Supreme Court as valid legislation under the commerce power soon after the passage of each.[12] It is thus a matter of history that union shop agreements have been regulated in the interstate railroad industry (by section 2, paragraphs fourth and fifth of the Act of 1934) for some seventeen years prior to the enactment of the amendment of 1951. It is also history that the Wagner Act[13] legislated with reference to union security agreements for the non-railroad industry in that section 8 (3) of the Wagner Act did not prohibit union shop agreements, but permitted them, as well as the so-called "closed shop" agreements.[14] The constitutionality of the Wagner Act, and specifically of section 8, was upheld in *Jones & Laughlin Steel Corp. v. N. L. R. B.*[15]

If the provisions of the Wagner Act under which the even more restrictive "closed shop" contract could be entered into were constitutional, then it seems that section 2, paragraph eleventh, of the Railway Labor Act (the 1951 amendment), permitting "union shop" contracts would be valid. Throughout the period of the operation of the Wagner Act, the Supreme Court did not question the constitutionality of the closed shop proviso of the Act.[16] In 1947 Congress amended the Wagner Act by enacting the "Taft-Hartley" amendments.[17] At that time the subject of union shop agreements was thoroughly reviewed, and Congress restricted, but did not eliminate, the right of unions and employers to include union shop provisions in their contracts. The proviso of section 8 (a) (3)[18] of Taft-Hartley allowed union shop agreements on specified

[12] Texas & New Orleans Ry. v. Brotherhood of Railroad and Steamship Clerks, 281 U. S. 548 (1930); and Virginian Ry. v. System Federation No. 40, 300 U. S. 515 (1937). Note also that in Brotherhood of Railroad Shop Crafts v. Lowden, 86 F. 2d 458 (10th Cir. 1936) the court held the Congressional prohibition of check-off contracts contained in Section 2, fourth, of the Railway Labor Act of 1934 was a valid regulation under the commerce clause.

[13] 49 STAT. 449, 29 U. S. C. § 151 *et seq.* (1935).

[14] Under "closed shop" agreements, the employer contracts not to hire anyone except members of the appropriate union, and to to discharge any employee who does not remain a union member in good standing throughout the life of the agreement. See MATTHEWS, LABOR RELATIONS AND THE LAW 447 (Boston: Little, Brown and Co., 1953).

[15] 301 U. S. 1 (1937).

[16] In Colgate-Palmolive-Peet Co. v. N. L. R. B., 338 U. S. 355 (1949) the Court enforced a closed shop contract executed pursuant to the authority of the Wagner Act and said "Congress knew that a closed shop would interfere with the freedom of employees to organize in another union and would, if used, lead inevitably to discrimination in tenure of employment. Nevertheless, with full realization that there was a limitation by the proviso of section 8 (3) upon the freedom of section 7 [section guaranteeing right of self-organization and right to join union of choice], Congress inserted the proviso of section 8 (3). It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute." *Id.* at 362-363.

[17] 61 STAT. 136, 29 U. S. C. § 151 *et seq.* (1947) (Labor-Management-Relations Act).

[18] The section provides *inter alia* "that nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any

conditions and is substantially similar to the union shop proviso of the 1951 amendment to the Railway Labor Act. The Court in *Radio Officers Union, C. T. U. v. N. L. R. B.*[19] did not question last year the validity of the union shop proviso of section 8 (a) (3) as a proper regulation by Congress under the commerce power. The Court has not indicated that the Wagner or Taft-Hartley union shop provisions were invalid; rather the Court has indicated that it is a problem over which reasonable men will differ and over which Congress is to legislate.[20] Since the question is "at least debatable"[21] whether union shop agreements in the interstate railroad and airline industry should be left unregulated, restricted, or wholly prohibited, Congress may legislate on the subject, and the courts may not re-evaluate the judgment of Congress and strike down the legislation on the grounds that it was not in their opinion wise or reasonable.

Assuming, then, the 1951 amendment to be a valid exercise of the commerce power by Congress, does the amendment represent a preemption of the field and supersede state legislation on the subject? Two of the three lower court decisions held that it did, in ruling on this and related problems.[22]

---

action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later. . . ."

[19] 347 U. S. 17 (1954).

[20] See Radio Officers' Union, C. T. U. v. N. L. R. B., 347 U. S. 17, 41 (1954): In enacting the Taft-Hartley union-shop amendment which is similar to the Railway Labor Act union-shop amendment, "Congress recognized the validity of the union's concern about 'free riders,' *i.e.*, employees who receive the benefits of union represenation but are unwilling to contribute their share of financial support to such union, and gave the unions power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason."

[21] The problem of whether Congress should permit union shop agreements or prohibit them altogether is similar to the problem the Court faced in United States v. Carolene Products Co., 304 U. S. 144 (1938), as to whether Congress might prohibit the shipment of filled milk in interstate commerce. There the Court said the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted or wholly prohibited, and as that decision was for Congress, the court's decision could not be substituted for it.

[22] International Association of Machinists v. Sandsberry, 23 U. S. L. WEEK 2229 (Texas, Nov. 23, 1954) and Moore v. Chesapeake and Ohio Ry., 23 U. S. L. WEEK 2106 (Va., Aug. 31, 1954).

Other objections raised and ruled against by both courts included the contention that the 1951 amendment deprived non-union workers of rights guaranteed by the Bill of Rights. The Texas court said the agreement was between private parties and did not represent governmental action to which the Bill of Rights applied. Both courts noted a recent case, Otten v. Baltimore & Ohio Ry., 205 F. 2d 58 (1953), in which Chief Judge Learned Hand said that an argument to the effect that the 1951 amendment deprived an employee of right of religious liberty guaranteed under the first amendment did not even raise a substantial question. The Virginia court pointed out that whenever one becomes the employee of another, he does so by virtue of his contract, and while he has an absolute right to quit or work as he may see fit, his remaining rights are governed by all lawful conditions of the contract.

In previous labor relations cases,[23] the Supreme Court has upheld the power of Congress to supersede state legislation in a field subject to its regulation, and found that it does so when it enacts specific governing legislation. It is also the general rule that whether Congress has pre-empted the field and made the state law inapplicable is to be determined by the intention of Congress.[24]

The intention of Congress that the 1951 amendment should prevail over state legislation on the subject seems manifest in the language of the statute itself. While under the Wagner Act and Taft-Hartley amendments reference to state laws was omitted in the union shop provisos [and under Taft-Hartley, by section 14 (b) a proviso was inserted that union shop agreements were not authorized in states which had laws to the contrary], section 2, paragraph eleventh, of the Railway Labor Act (the 1951 amendment) expressly states, "notwithstanding . . . any statute or law . . . of any state . . . to the contrary," the carrier and the union may make union shop agreements. There is no proviso, as 14 (b) of Taft-Hartley, which makes the authorization of union shop contracts inapplicable in states with laws to the contrary; rather, the language is express and plain that the amendment shall prevail in such instances. The reports of the Committees of the House and Senate are likewise clear that the amendment was intended to supersede state regu-

Examining the 1951 amendment more specifically the Virginia court held the act valid against the following objections: (1) That there was no "regulation" within the meaning of the commerce clause. The Court pointed out that paragraphs fourth and fifth of the Act, which prohibit the carrier from requiring employees to join a labor organization as a condition of employment are regulatory, and paragraph eleventh (the 1951 amendment) recites a special situation in which paragraphs fourth and fifth are suspended. The Court concluded that when viewed in the light of creating an exception to a given regulation, while the language is permissive in a sense, it is regulatory in its character. (2) That there had been a delegation of legislative power. The court answered this by stating that Congress had spelled out a definite standard and left no discretion to the contracting parties. (3) That the amendment discriminated against "non-operating" employees (those who are not involved in actual operation of the trains, as yard and shop workmen) of the carriers. Under the amendment "operating" employees are deemed to have met the requirements of union membership if they belong to any one labor organization, while "non-operating" employees are required to be members of the labor organization which is the bargaining representative of their craft. The court said that this was a proper classification of the subject to be regulated by Congress, and noted that the Congressional committee hearings demonstrated that the application of the "union-shop" section to "operating employees" would have resulted in chaotic administrative situations, because they shuttle back and forth from one craft to another, while no such situation prevails among non-operating employees.

[23] International Union, U. A. W. v. O'Brien, 339 U. S. 454 (1954); Garner v. Teamsters Union, 346 U. S. 485 (1954); Amalgamated Association v. Wisconsin Employ. Bd., 340 U. S. 383 (1951).

[24] Allen Bradley Local v. Wisconsin Employ. Bd., 315 U. S. 740 (1942); United States v. Darby, 312 U. S. 100 (1941). Also see Algoma Plywood Co. v. Wisconsin Employ. Bd., 336 U. S. 310 (1949) in which the union-shop proviso of the original Wagner Act was involved.

lation on the subject.[25] And, as was noted by the Virginia court in the *Chesapeake and Ohio* case, attempts by Congressmen and Senators to amend the section to make it inoperative in those states which have the "Right to Work" laws were defeated by large majorities.[26]

The conclusion is rather inevitable that the patent intent of Congress was that the 1951 amendment should prevail over any state laws to the contrary. The trend of decisions surveyed here has been to recognize that conclusion and to apply the amendment in spite of laws of the state prohibiting union shop agreements. Whether to permit union shop contracts, and how to regulate them, is a problem to which neither the states nor Congress have found a clear-cut, definitive solution, and the states and Congress have taken varying positions with respect to it over a period of years. Undoubtedly there will be further legislation on the subject in the future.[27] Until there is further legislation, the 1951 amendment is the law of the land, and state "Right to Work" laws in conflict must yield to the Congressional Act.[28]

JAMES ALBERT HOUSE, JR.

Adverse Possession—Intent as a Requisite in Mistaken Boundary Cases

In a recent Texas case,[1] the court, in denying defendant's claim of title by adverse possession, reaffirmed the Texas rule as regards the intent necessary to acquire title by adverse possession in cases where there

[25] "It will be noted that the proposed paragraph eleventh would authorize agreements notwithstanding the laws of any state. For the following reasons, among others, it is the view of the committee, that if, as a matter of national policy such agreements are to be permitted in the railroad industries it would be wholly impracticable and unworkable for the various states to regulate such agreements. Railroads and airlines are direct instrumentalities of interstate commerce; the Railway Labor Act requires collective bargaining on a system-wide basis; agreements are uniformly negotiated for an entire railroad system and regulates the rates of pay, rules of working conditions of employees in many states, the duties of many employees require the constant crossing of state lines; many seniority districts under labor agreements extend across state lines, and in the exercise of their seniority rights employees are frequently required to move from one state to another." H. R. REP. No. 2811, 81st Cong., 2d Sess. 5 (1950).

The Senate Committee report stated that there was no disagreement that the right of unions generally in industry to enter into union shop contracts should be extended to labor organizations subject to the Railway Labor Act; but three members of the Committee reserved the right to introduce and support amendments on the floor, premised on asserted differencs between the provisions of the amendment and corresponding provisions of Taft-Hartley. The majority felt that the terms of the two Acts were substantially the same, and "such differences as exist are warranted either by experience or by special conditions existing among employees of our railroads and airlines." SEN. REP. No. 2262., 2d Sess. 3 (1950).

[26] See 96 CONG. REC. 536 (1951).

[27] For varying state and federal legislation on the subject, see MATTHEWS, LABOR RELATIONS AND THE LAW 475 *et seq.* (Boston: Little, Brown and Co., 1953).

[28] See discussion of Allen v. Southern Ry., 114 F. Supp. 72 (W. D. N. C. 1953), note 7 *supra.*

[1] Orlando v. Moore, 274 S. W. 2d 86 (Tex. Civ. App. 1954).

is a mistake in the boundary line between two adjacent landowners. The court said:

> "Where one of two adjacent landowners extends his fence, through mere inadvertence or ignorance of the location of the true boundary line, so as to embrace within his enclosure lands belonging to his neighbor, with no intent of claiming such extended area, but with intent of claiming adversely only to the true boundary line, wherever it may be, his possession of such extended area is not adverse or hostile to the true owner."[2]

The courts are in sharp disagreement as to the requisite intent necessary to acquire title through adverse possession. The purpose here is to compare the several rules applied, with particular emphasis on North Carolina decisions, in order to arrive at the most practical solution to this frequently occurring problem of boundary disputes.

The leading case of *French v. Pearce*[3] laid down the rule that the visible possession, with intent to possess, is the controlling factor. Whether the possession is with intent to disseize the owner or is merely under a mistake of ownership is immaterial. So long as the possessor holds the land as his own, he may acquire the fee through adverse possession. This view seems to be followed in the majority of jurisdictions.[4]

A second view, as stated in the early Iowa case of *Grube v. Wells*,[5] requires the possession to be consciously hostile before a possessor may acquire title by adverse possession. Under this view, unless the possessor knows that he is holding adversely and intends to do so, his posses-

[2] *Id.* at 89.

[3] 8 Conn. 439, 21 Am. Dec. 680 (1831).

[4] Milstead v. Devine, 254 Ala. 442, 48 So. 2d 530 (1950); Park v. Powers, 2 Cal. 2d 590, 42 P. 2d 75 (1935); Vade v. Suhler, 118 Colo. 236, 195 P. 2d 390 (1921); Searles v. DeLadson, 81 Conn. 133, 70 Atl. 589 (1890); Manuel v. Barley Mill Road Home, 104 A. 2d 908 (Del. 1954); Bridges v. Brackett, 205 Ga. 637, 54 S. E. 2d 642 (1949); Calkins v. Kausouros, 72 Idaho 150, 237 P. 2d 1053 (1951); Cooper v. Tarpley, 112 Ind. App. 1, 41 N. E. 2d 640 (1942); Sattler v. Pellichino, 71 So. 2d 689 (La. 1954); Hub Bel Air v. Hirsch, 203 Md. 637, 102 A. 2d 550 (1954); Locks and Canals v. Nashua and L. R. Co., 104 Mass. 1 (1870); May v. Maurer, 339 Mich. 115, 62 N. W. 2d 455 (1954); Fredericksen v. Henke, 167 Minn. 356, 209 N. W. 257 (1926); Alexander v. Hyland, 214 Miss. 348, 58 So. 2d 826 (1952); State *ex rel.* Edie v. Sharn, 348 Mo. 119, 152 S. W. 2d 174 (1941); Carman v. Hewitt, 105 N. Y. S. 2d 239 (Sup. Ct. 1951); Hallowell v. Borchers, 150 Neb. 322, 34 N. W. 2d 404 (1948); Yetzer v. Thoman, 17 Ohio St. 130, 91 Am. Dec. 122 (1866); Johnson v. Whelan, 186 Okla. 511, 98 P. 2d 1103 (1940); Liberto v. Steele, 188 Tenn. 529, 221 S. W. 2d 701 (1949); Menzer v. Tracy, 247 Wis. 245, 19 N. W. 2d 257 (1945); Rock Springs v. Sturm, 39 Wyo. 494, 273 Pac. 908 (1929). In Patterson v. Wilmont, 245 S. W. 2d 116, 121 (Mo. 1952), the court said: "It is not necessary that he intend to take away from the owner something which he knows belongs to another, or even that he be indifferent as to the facts of the legal title. It is the intent to possess, and not the intent to take irrespective of his right which governs."

[5] 34 Iowa 148 (1871).

sion cannot be adverse. This view has been repudiated in Iowa[6] and seems to be virtually abandoned as a rule of law.[7]

A third view, as laid down by *Preble v. Maine Central R. R.*,[8] is that if the party occupies to a fence beyond his boundary, believing it to be the true line, but with no intent to claim title if it be ascertained that the fence was on his neighbor's land, he cannot acquire title by adverse possession. The reason given is that the requisite intent to claim title exists only upon the condition that the fence be on the true boundary line. If, however, his intent is to claim title whether it shall eventually be found to be the correct boundary or not, then the possession is adverse. This is the view followed in the principal case[9] and in many jurisdictions.[10]

The North Carolina decisions appear to be inconsistent as to the rule to be applied in mistaken boundary cases. The case of *Locklear v. Savage*,[11] a frequently cited case in the field of adverse possession, lays down the rule as to the requirements necessary to hold adversely: The possession must be actual, open, decided, and as notorious as the property will admit, indicating an assertion of exclusive ownership and an intent to exercise dominion over it against all claimants. It is readily apparent that this definition of adverse possession could be interpreted to include cases of mistaken boundary where the possessor thought the land was his and exercised dominion over it. However, the cases have not so held.

The North Carolina Supreme Court has defined the requisite intent as being "the intent to claim, against the true owner, which renders the entry and possession adverse."[12] This language seems to indicate that it is necessary that the person holding the land have knowledge that it is not his land in order for him to hold adversely. This interpretation was followed in *Price v. Whisnant*,[13] where the court said that if the

[6] The *Grube* case was expressly overruled by Lawrence v. Washburn, 119 Iowa 109, 93 N. W. 73 (1903).

[7] See, however, Price v. Whisnant, 236 N. C. 381, 72 S. E. 2d 851 (1952) and Westland Realty Corp. v. Griffin, 151 Va. 1005, 145 S. E. 718 (1928), where the courts seemed to apply the rule of the *Grube* case.

[8] 85 Me. 260 (1893).

[9] Orlando v. Moore, 274 S. W. 2d 86 (Tex. Civ. App. 1954).

[10] Tanner v. Dobbins, 255 Ala. 671, 53 So. 2d 549 (1951); Davis v. Wright, 220 Ark. 743, 249 S. W. 2d 979 (1952); Shaw v. Williams, 50 So. 2d 125 (Fla. 1951); Patrick v. Chency, 226 Iowa 853, 285 N. W. 855 (1939); Wilson v. Pum Ze, 167 Kan. 31, 204 P. 2d 723 (1949); Traylor v. West, 255 S. W. 2d 612 (Ky. 1953); Landry v. Giguere, 127 Me. 264, 143 Atl. 1 (1928); Warner v. Noble, 286 Mich. 654, 282 N. W. 855 (1939); Northern Pacific Ry. v. Cash, 67 Mont. 585, 216 Pac. 782 (1923); Gibson v. Dudley, 233 N. C. 255, 63 S. E. 2d 630 (1951); Newton v. McKeel, 142 Ore. 674, 21 P. 2d 206 (1933); Bettack v. Conachen, 235 Wis. 559, 294 N. W. 57 (1940).

[11] 159 N. C. 236, 74 S. E. 347 (1912).

[12] Vanderbilt v. Chapman, 175 N. C. 11, 13, 94 S. E. 703, 704 (1918); Parker v. Banks, 79 N. C. 480, 485 (1878).

[13] 236 N. C. 381, 72 S. E. 2d 851 (1952).

possessor thought his deed covered the disputed area, his possession was not adverse, but a claim of rightful ownership. This is the view of the *Grube* case.

In *Gibson v. Dudley*,[14] plaintiff took possession of a driveway on the side of his lot, thinking the driveway belonged to him. He used the driveway for the requisite time to acquire title by adverse possession. The court, however, denied his claim, and said that it was not one of adverse possession, but of rightful ownership. The fact that plaintiff thought the driveway was his own prevented him from acquiring it by adverse possession. This case would also seem to be an example of the *Grube* view.[15]

Only one year prior to the *Gibson* case, the North Carolina Supreme Court upheld a claim of adverse possession for the defendant, although she testified that it was never her intention of claiming anything except what she owned.[16] This case would tend to support the view of the *French* case.

But to confuse the picture even further in North Carolina, the court has quoted with approval the doctrine of the *Preble* case to the effect that "where the occupation of the land is by a mere mistake, and with no intention on the part of the occupant to claim as his own land which does not belong to him, but he intends to claim only to the true line, wherever it may be, the holding is not adverse."[17] In this case, plaintiff testified that he had no intention of holding any land which did not belong to him; but the court held that there was adverse possession because plaintiff asserted the boundary to be at a certain place and claimed it as his own, even if there was a mistake. It appears that here the court applied the *Preble* view.

A discussion of the North Carolina decisions would not be complete without a brief mention of the firmly established doctrine to the effect that if there is but a "slight encroachment" and the jury finds the encroachment to be inadvertently or unintentionally made, and that the purpose was to run the fence on the true line, the possession of the small extra strip is permissive, and not adverse.[18] One North Carolina

[14] 233 N. C. 255, 63 S. E. 2d 630 (1951).

[15] The court said, however, that when the plaintiff first went into possession, he was claiming and intended to claim, only that which he had purchased. *Id.* at 257, 63 S. E. 2d at 631.

[16] Whiteheart v. Grubbs, 232 N. C. 236, 60 S. E. 2d 101 (1950). This case may be distinguished on the ground that there was a lappage question and the defendant was claiming adverse possession of land which her deed actually included.

[17] Dawson v. Abbott, 184 N. C. 192, 195, 114 S. E. 15, 16 (1922). Quoted from 1 Cyc., *Adverse Possession* § VI(E) (1901).

[18] Waldo v. Wilson, 173 N. C. 689, 92 S. E. 693 (1917); Blue Ridge Land Co. v. Floyd, 171 N. C. 543, 88 S. E. 862 (1916); Currie v. Gilchrist, 147 N. C. 648, 61 S. E. 581 (1908); McLean v. Smith, 106 N. C. 172, 11 S. E. 184 (1890); King v. Wells, 94 N. C. 344 (1886); Gilchrist v. McLaughlin, 29 N. C. 310 (1847);

case held that an encroachment of twenty-five yards is of sufficient notoriety to be adverse.[19]

Adverse possession statutes "rest on a wise public policy, which regards litigation with disfavor and aims at the repose of conditions which the parties have suffered to remain unquestioned long enough to indicate their acquiescence therein."[20] This public policy can best be realized by allowing one who has held the land for the statutory period to acquire the fee thereto.

To rely on an intent to dispossess, as is required by the view of *Grube v. Wells*,[21] would necessarily reward dishonesty, whereas the honest, mistaken possessor would be penalized.

It is submitted that the view of *Preble v. Maine Central R. R.*,[22] which is followed in the principal case, is too theoretical to be workable. "Neither the courts nor anyone else can tell or conjecture what the party might have intended to do in the event he discovered later that he had been mistaken as to the true line."[23] The possibility of the land belonging to someone else probably never occurs to the possessor in mistake cases, and therefore the test fails. It would seem that the intent, if acquird at all in cases under this test, is acquired after the possessor has learned of his mistake and consulted his lawyer.

Mistaken belief of the possessor should be immaterial, and the courts should allow what actually happened to govern.[24] The best view in mistaken boundary cases is the view as laid down in *French v. Pearce*,[25] that is, that visible possession, regardless of whether it be under a mistaken belief of ownerhip, will constitute adverse possession.

Under the view of the *French* case, here advocated, one holding for the requisite time would not lose the land by innocently stating at the trial that he did not intend to take what was not his. Nor would it be necessary to speculate as to what intent, if any, was in the mind of the possessor when he took possession, many years previously.

Bynum v. Carter, 26 N. C. 310 (1844) (The court, by way of dictum at page 314, said: "We admit there may be cases in which the possession may be of so minute a part of the disputed land as not to amount to an ouster of the owner, being regarded, rather, as an inadvertent encroachment without a claim of right, or as permissive and not adverse. But in such cases, the conclusion does not arise from the supposition that the owner was actually ignorant of the fact of the possession or of its extent, but that the other party did not intend to usurp a possession beyond the boundaries to which he had a good title."); Green v. Harmon, 15 N. C. 158 (1833).

[19] Mode v. Long, 64 N. C. 433 (1870).

[20] 1 AM. JUR., *Adverse Possession* § 4 at p. 794 (1936).

[21] 34 Iowa 148 (1871).

[22] 85 Me. 260 (1893).

[23] Bayhouse v. Urquides, 17 Idaho 286, 295, 105 Pac. 1066, 1068 (1909).

[24] See Note, 3 VAND. L. REV. 337 (1950), where the writer approved the view urged here.

[25] 8 Conn. 439, 21 Am. Dec. 680 (1831).

Finally, adoption of the *French* view would tranmute the seemingly irreconcilable rules existing in North Carolina today into one practicable, easy-to-apply rule, which gives effect to the policy behind the doctrine of adverse possession.[26]

ROBERT C. BRYAN.

Workmen's Compensation—Employer's Goodwill

In the recent case *Guest v. Brenner Iron & Metal Co.*,[1] plaintiff employee was sent out on the road to change two flat tires on one of defendant's trucks. After replacing the old tubes, it became necessary to obtain air to inflate the tires, so plaintiff drove along the highway until he found a service station open. He asked and received permission from the man in charge to use the air hose. Before he inflated the first tire, plaintiff was asked to assist in pushing off the stalled car of a customer of the station. Plaintiff acceded to this request and, while pushing, was struck and injured by an approaching car.

The North Carolina Industrial Commission awarded compensation on the ground that there was an injury arising out of and in the course of the employment.[2] The supreme court affirmed the award, rejecting the contentions that the plaintiff had deviated from the course of his employment, and that the hazard was not peculiar to the employment.[3] The main reasons given for the holding were that the response of the plaintiff was natural and reasonable; that he had reasonable grounds to believe that his acts were incidental to his employment and beneficial to his employer; and that if the employer had been present he would have instructed the employee to render the assistance. Under the circumstances, the aid received from the service station and the aid given by plaintiff were said to be so closely interwoven that the injury

[26] For excellent discussions on the problem here presented, see: Johnson v. Whelan, 186 Okla. 511, 98 P. 2d 1103 (1940), and Rock Springs v. Sturm, 39 Wyo. 494, 273 Pac. 908 (1929) with annotation in 97 A. L. R. 14 (1935).

[1] 241 N. C. 448, 85 S. E. 2d 596 (1955).

[2] The term "arising out of" refers to the cause or origin of the accident, and "in the course of" refers to the time, place, and circumstances under which the accident occurred. Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. 2d 387 (1947); Wilson v. Mooresville, 222 N. C. 283, 22 S. E. 2d 907 (1942); Ashley v. F-W Chevrolet Co., 222 N. C. 25, 21 S. E. 2d 834 (1942). See also Note, 10 N. C. L. REV. 373 (1932).

[3] If the risk involved is one to which all others in the general area are subjected, as distinguished from a hazard peculiar to the employee's work, the resulting injury is not compensable. Bryan v. T. A. Loving Co., 222 N. C. 724, 24 S. E. 2d 751 (1943); Plemmons v. White's Service, 213 N. C. 148, 195 S. E. 370 (1938). The court in the present case said, "Plaintiff, while pushing the car onto and along the highway, subjected himself to a hazard not common to all others in the neighborhood but peculiar to the task in which he was engaged." Guest v. Brenner Iron & Metal Co., 241 N. C. 448, 454, 85 S. E. 2d 596, 601 (1955).

must be held connected with[4] and incidental to[5] plaintiff's employment. The court also distinguished the present case from the so-called "good Samaritan" cases.[6]

There is a ground for an award of compensation in cases similar to the present case which has been very little used or referred to by the courts; that is, *acts of employees which further the good will of the employer.*[7] Good will is widely, if not universally, recognized as a very valuable asset of any business.[8] The acts of the employee creating good will, such as picking up riders or doing other small favors for the public in general, has a definite benefit to the employer's business.[9] They create a favorable attitude toward the business and aid in keeping its name before the public. This is especially true when the business deals directly with the customer, but it is also of benefit when it deals indirectly, in view of the widespread policy of putting the organization's name in conspicuous places on its cars and trucks.[10]

The employer's good will has been brought up in a few cases where a third party sued the employer or master under the doctrine of *re-*

[4] As to the necessity for a causal connection between the employment and the accident see, Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. 2d 387 (1947).

[5] As to the necessity that the acts of the employee be incidental to the employment see, Goodwin v. Bright, 202 N. C. 481, 163 S. E. 576 (1932).

[6] These cases involve situations where the employee voluntarily offers his assistance to a third party solely as an act of humanity, the act having no connection to the employment or the employer's business. Sichterman v. Kent Storage Co., 217 Mich. 364, 186 N. W. 498 (1922). See also, 17 CHI-KENT REV. 399 (1939), commenting on Puttkammer v. Industrial Commission, 371 Ill. 497, 21 N. E. 2d 575 (1939) in which case compensation was granted.

[7] The appellee refers to good will at only one point: "The primary, if not the sole object in the plaintiff's mind in so doing (pushing the car) was to accomplish his ultimate task for his employer with the good will and good relations expected of him by his employer." Brief for Appellees, pp. 15-16, Guest v. Brenner Iron & Metal Co., 241 N. C. 484, 85 S. E. 2d 596 (1955).

The court quotes from 7 SCHNEIDER, WORKMEN'S COMPENSATION § 1675 (1950): "However, where competent proof exists that the employee understood, or had reasonable grounds to believe that the act resulting in injury . . . was encouraged by the employer in performance of the act or similar acts for the purpose of creating a feeling of good will, . . . " No other specific reference is made to good will, but it is possible that the court may have had good will in mind, although it was not used as a ground for the compensation award.

[8] Ely Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. 2d 528 (1939), holding that good will is as much "property" as is coal or pig iron, or wheat, and is subject to audit, taxation, appraisal, purchase, and sale.

[9] Examples are acts of telephone operators, bus or truck drivers, and train conductors, in summoning aid, giving assistance to parties in need, and other courtesies beyond the call of duty. In certain instances these acts may be of an heroic nature. Employers are quick to take full advantage of such acts in their advertisements to build up good will or better public relations for their organizations.

[10] Note, 17 CHI-KENT REV. 399 (1939) discusses the custom of placing the business name on its vehicles, and the effect it has on the public when the driver refuses a small favor. The argument that the plaintiff's act in the present case was in furtherance of the defendant's good will would be stronger if a company car or truck had been used which had the company name painted on the door or side.

spondeat superior for injury caused by the employee's negligence. Generally in these cases, the employee has picked up riders or is accommodating friends, although they may not be potential customers of the employer.[11] The rider, friend, or some other person, *e.g.*, a pedestrian, is injured by the negligence of the employee. The employer contends that the employee has deviated from the scope of his employment, thereby relieving the employer of liability.[12] But if the acts can be shown to have furthered the good will of the employer, the courts may hold them to be within the scope of the employment.[13] This argument would seem to apply as well to workmen's compensation cases. In both groups the main issue is whether the act in furtherance of good will is a deviation[14] to such an extent that it will relieve the employer from responsibility or liability for the injury. The application would not be too far-fetched in view of the fact that the courts tend to give the compensation acts a very liberal construction.[15] Under such a doctrine any bona fide argument in favor of the employee should be considered.

The workmen's compensation cases which have considered the em-

[11] It should be noted that ordinarily one who is engaged to operate a motor vehicle has no implied authority, by virtue of the employment, to invite or permit third parties to ride; and the employer is ordinarily not liable for personal injuries sustained by the invitee while riding therein, except for willful or malicious acts of the employee. Wigginton Studio, Inc. v. Reuter's Adm'r, 254 Ky. 128, 71 S. W. 2d 14 (1934); Cotton v. Carolina Truck Transportation Co., 197 N. C. 709, 150 S. E. 505 (1929). This rule does not apply where there is express or ostensible authority to invite people to ride. Cole v. Johnson Motor Co., 217 N. C. 756, 9 S. E. 2d 425 (1940); Shrimplin v. Simmons Auto Co., 122 W. Va. 248, 9 S. E. 2d 49 (1940). The latter case left open the question whether a servant in charge of an automobile may not in some circumstances be clothed with ostensible or apparent authority.

[12] In Russell v. Cutshall, 223 N. C. 353, 26 S. E. 2d 866 (1943) it was alleged that the employee had the implied authority to pick up passengers, on the ground that the defendant customarily carried passengers in the conduct of business in that particular area for the purpose of creating good will. The court held the evidence did not sustain any such custom and the act was a deviation relieving the employer of liability.

[13] Cole v. Johnson Motor Co., 217 N. C. 756, 9 S. E. 2d 425 (1940). In this case there was a conflict in the testimony as to the authority of the employee to pick up hitchikers; there was also evidence that in the course of the employee's duties he was to promote good will by contacting prospects. The court held that he was acting within the ostensible scope of his authority and whether the acts constituted a violation of his instructions and thereby a deviation from the course of the employment was a question for the jury. Cochran v. Michaels, 110 W. Va. 127, 133, 157 S. E. 173, 175 (1931). There the court said, "A friend picked up became an eager informant as well as a partisan of the driver, and the interest of the defendant was thus promoted." The *Cochran* case is criticized in Note, 37 W. VA. L. Q. 441 (1931), but is approved in Note, 18 VA. L. REV. 330 (1931).

[14] Parrish v. Armour & Co., 200 N. C. 654, 158 S. E. 188 (1931) (Workmen's Compensation); Paiewonsky v. Joffe, 101 N. J. L. 521, 129 Atl. 142 (1925) (Master and Servant).

[15] Johnson v. Asheville Hosiery Co., 199 N. C. 38, 40, 153 S. E. 591, 593 (1930): "It is generally held by courts that the various compensation acts of the Union should be liberally construed to the end that benefits thereof should not be denied upon technical, narrow, and strict interpretation."

ployer's good will in granting an award have varied as to the authority granted the employee. There are cases where express authority was granted to do anything necessary to create good will. An example is *Gross v. Davey Tree Expert Co.*[16] where defendant company instructed the employee to do all that he could to further the good will of the telephone company for which defendant was working.[17] Plaintiff's job consisted of trimming trees that grew near the telephone lines. At the request of a third party, plaintiff came down from a tree and pushed the party's car approximately two miles in an attempt to get it started. Plaintiff was injured at that point, distant from his place of employment. Compensation was granted on the ground that the defendant had not placed any limit on the favors the plaintiff could extend.

At the other extreme are cases in which the furtherance of the employer's good will is implied from the nature of the employment itself without any express authority. An example of this is *Parrish v. Armour & Co.*[18] where a wrong delivery was made to one of defendant's customers and plaintiff was sent to straighten out the matter. On the way to see the customer, plaintiff deviated several blocks to obtain some cigars which he thought would be expedient to the purpose of his visit. He was injured before he reached the place where he intended to obtain the cigars. Compensation was granted by the commission on the theory that the deviation was incidental to the employment.

It would also seem probable that acts furthering the good will of the employer might in some instances be done in violation of the employer's express instructions.[19] When the acts violate instructions, com-

[16] 248 App. Div. 838, 290 N. Y. Supp. 168 (3d Dep't 1936), *aff'd*, 272 N. Y. 657, 5 N. E. 2d 379 (1936). See also, Murphy v. N. Y. Butchers Dressed Meat Co., 249 App. Div. 888, 292 N. Y. Supp. 629 (3d Dep't 1937), where the employee was crossing the street to buy a drink for the merchant from whom he had obtained a check in payment of his employer's account. This was a custom and an expense account was furnished for such courtesy. The court held that the employee was engaged in the interests of his employer and in the furtherance of the employer's good will.

[17] The instructions were to create good will for the customer of the employer rather than for the employer himself, but the same reasoning and result would seem to follow in the latter situation.

[18] 200 N. C. 654, 158 S. E. 188 (1931). See also, Bauman v. Howard J. Ehmke Co., 126 Pa. Super. 108, 190 Atl. 343 (1937) where a salesman staying overnight at a farmer's house helped the farmer fell a tree. Compensation was awarded upon the ground that the assistance was no more than any other guest would do in the natural order of events. In Boyd v. Philmont Country Club, 129 Pa. Super. 135, 195 Atl. 156 (1937), a caddy went into the woods to pick flowers upon the request of a customer of the defendant and was struck by a golf ball. Compensation was granted.

[19] No workmen's compensation cases discussing good will as a basis for awarding or denying compensation when the acts violated instructions have been found. In Cole v. Johnson Motor Co., 217 N. C. 756, 9 S. E. 2d 425 (1940) (liability of the master for tort of servant) the court said, conceding the instructions prohibited picking up riders, it would be questionable whether the violation was such a deviation from the employment as would put the employee entirely without the purposes and confines of his employment and relieve the employer from liability.

pensation is generally denied if the instructions limited the sphere of the employment, but compensation is generally awarded if the instructions merely directed the employees not to do certain acts, or not to do an act within the sphere of the employment in a certain way.[20] If the violation does not take the employee out of the sphere of the employment, he is only guilty of negligence and is not deprived of the protection of the workmen's compensation acts.[21] In addition, where the act is necessitated by an emergency,[22] or the instructions against committing the acts is habitually violated,[23] the employee's case is greatly strengthened.

It is submitted that if there is authority, express or implied, to do acts in furtherance of the employer's good will, such acts should not be held to be a deviation from the course of the employment to the extent that compensation will not be granted. Of course, the courts will have to examine the facts and circumstances of each case and apply a reasonable rule, such as, whether the acts could be reasonably held within the scope of an employer's policy to create good will. The courts might go further and base the award on whether the act did create, or was aimed at creating, good will for the employer; but whatever the theory or basis used, good will should be given careful consideration by the courts when applicable to a particular fact situation.

CALVIN B. BRYANT.

Criminal Law—Attempted Perjury—the Rules of "Legal" and "Factual" Impossibility as Applied to the Law of Criminal Attempts

In a recent decision, *State v. Latiolais*,[1] the Supreme Court of Louisiana upheld a conviction of attempted prejury. So far as is known, this is the first reported conviction of such a crime in the history of law.[2]

[20] Maryland Casualty Co. v. Brown, 131 Tex. 404, 115 S. W. 2d 394 (1938); Prentice v. Twin City Wholesale Grocery, 202 Minn. 455, 278 N. W. 895 (1938); Moss v. Hamilton, 234 Ala. 181, 174 So. 622 (1937).

[21] See note 20 *supra*.

[22] O'Leary v. Brown-Pacific-Maxon, 340 U. S. 504 (1951). Defendant maintained a recreation area for employees. It was forbidden, and signs were erected to that effect, to swim in the channel because of the dangerous currents. The plaintiff's intestate swam in the channel in an attempt to rescue an unknown man and was downed. Compensation was granted.

[23] Archie v. Greene Bros. Lumber Co., 222 N. C. 477, 23 S. E. 2d 834 (1934); Moss v. Hamilton, 234 Ala. 181, 174 So. 622 (1937).

[1] 225 La. 878, 74 So. 2d 148 (1954).

[2] Generally, when courts have been unable to convict a defendant of perjury, the defendant has been acquitted. Where, for example, the officer administering the oath did not have authority to administer it, courts have held that a demurrer to the indictment should be sustained. United States v. Curtis, 107 U. S. 671 (1883); United States v. Garcelon, 82 Fed. 611 (D. Colo. 1897); United States v. Edwards, 43 Fed. 67 (C. C. S. D. Ala. 1890); State v. Phippen, 62 Iowa 54, 17 N. W. 146 (1883).

The verdict in the lower court was returned on an indictment for perjury.[3] The opinion of the court did not relate the facts of the case, but stated that there could be attempted perjury, for example, where "the board or official for some reason was not legally authorized to take testimony, or if the one administering the oath was not authorized or qualified to administer it."[4]

The questions raised by the case are (1) whether the elements of criminal attempts are applicable to the crime of perjury, and (2) if so, whether the so-called "rules" relating to "impossibility," applied in many attempt situations, are relevant to attempted perjury. Each of these will be discussed.

Criminal attempt is defined as an act done with intent to commit a crime, tending but failing to effect its commission.[5] Thus, the elements of attempt are: (1) specific intent to commit the particular crime attempted; (2) some overt act directed toward accomplishment of the crime; and (3) failure of consummation of the crime intended.[6]

The intent. There must be specific intent to commit the particular

[3] Such procedure is permitted in Louisiana by the following statute: "When the crime charged includes another of lesser grade, a verdict of guilty of the lesser crime is responsive to the indictment, and it is of no moment that the greater offense is a felony and the lesser a misdemeanor." LA. REV. STAT. ANN. § 15:406 (1951).

The following states have a similar statute: Alabama, Arizona, California, Connecticut, Florida, Georgia, Indiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

For the federal statute on this procedure, see FED. R. CRIM. P. 31(c).

It would seem, theoretically at least, that states having this statute and the federal courts would permit the return of a verdict of guilty of attempted perjury on a charge for perjury. Much would depend, however, on the substantive law of each jurisdiction.

[4] State v. Latiolais, 225 La. 878, 74 So. 2d 148, 150 (1954). The court actually held that the verdict of guilty of attempted perjury was responsive to the indictment for perjury.

[5] N. Y. PEN. LAW § 2. The Louisiana statutory definition is: "Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose." LA. REV. STAT. ANN. § 14:27 (1951).

The following states have varying statutory definitions of attempt: Montana, Nevada, North Dakota, Utah, Washington, and Wisconsin. All states have general penal statutes for attempt, except: Alabama, Arizona, Arkansas, Colorado, Delaware, Indiana, Iowa, Kentucky, Maryland, Michigan, Nebraska, North Carolina, Ohio, Rhode Island, South Carolina, and Texas. Although these states do not have general penal statutes encompassing all attempted crimes, most of them have statutes punishing specific attempts, such as attempted arson, rape, robbery, etc.

[6] Graham v. People, 181 Ill. 477, 55 N. E. 179 (1899); Scott v. People, 141 Ill. 195, 30 N. E. 329 (1892); Thompson v. People, 96 Ill. 158 (1880); Johnson v. State, 27 Neb. 687, 43 N. W. 425 (1889); State v. Thompson, 31 Nev. 209, 101 Pac. 557 (1909); Hicks v. Commonwealth, 86 Va. 223, 9 S. E. 1024 (1889).

crime attempted,[7] or as stated by one writer, there must be intent to commit a specific crime.[8] The requisite *mens rea* is "the state of mind of the man who intends the consequences of his conduct."[9] In attempt situations, special emphasis is placed on the element of intent.

These generalizations may be more meaningful if we consider the function of the mental element in criminal attempts. It is to identify those who consciously engage in a criminal endeavor and to distinguish those who act negligently[10] and blunderingly[11] from those who will or desire specific consequences which the criminal law proscribes.

Applying this to attempted perjury, it would appear that a defendant, to be convicted in Louisiana and most other states,[12] would have to make

[7] Lewis v. State, 35 Ala. 380 (1860); Dahlberg v. People, 225 Ill. 485, 80 N. E. 310 (1907); State v. Meadows, 18 W. Va. 658 (1881); MILLER, CRIMINAL LAW § 29a (1934); 1 WHARTON, CRIMINAL LAW § 215 (11th ed. 1912); Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 837-842 (1928); Turner, *Attempts to Commit Crimes*, 5 CAMB. L. J. 230, 235 (1934).

[8] Keedy, *Criminal Attempts at Common Law*, U. OF PA. L. REV. 464, 468 (1954).

[9] Turner, *supra* note 7, at 235.

[10] Obviously there can be no attempt at negligence, since a negligent act is by definition done without intent. Moore v. State, 18 Ala. 532, 534 (1851); Scott v. State, 49 Ark. 156, 4 S. W. 750 (1886). See also Simpson v. State, 59 Ala. 1 (1879); Morgan v. State, 33 Ala. 413, 414 (1859); White v. State, 13 Tex. App. 259, 261 (1882); MILLER, *op. cit. supra* note 7, § 29a; Sayre, *supra* note 7, at 842.

[11] Definition also precludes blundering into an attempt. Sayre, *supra* note 7, at 842.

[12] The Louisiana statutory definition of perjury is as follows: "Perjury is the intentional making of a false statement in, or for use in, a judicial proceeding, or any proceeding before a board or official, wherein such board or official is authorized to take testimony. In order to constitute perjury the false statement must be made under sanction of an oath or an equivalent affirmation and must relate to matter material to the issue or question in controversy." LA. REV. STAT. ANN. § 14:123 (1951).

It should be noted that the Louisiana statutory definition of perjury has incorporated the common law offenses of perjury and false swearing. At common law, false swearing in only judicial proceedings was punished as perjury. CLARK AND MARSHALL, CRIMES § 446 (5th ed. 1952); 2 WHARTON, *op. cit. supra* note 7, § 1058. All other false swearing under oaths required by law was punished under the offense designated "false swearing." Regina v. Hodgkiss, 11 Cox C. C. 365 (1869); Regina v. Chapman, 175 Eng. Rep. 356 (1850); 2 WHARTON, *supra*.

Most states have statutes similar to the Louisiana statute: ARIZ. CODE ANN. § 43-4201 (1939); ARK. STAT. §§ 41-3001 and 41-3002 (1947); CAL. PEN. CODE §§ 118 and 118a (Supp. 1953); CONN. GEN. STAT. § 8481 (1949); IDAHO CODE ANN. § 18-5401 (1948); ILL. ANN. STAT. c. 38, § 473 (1935); IND. ANN. STAT. § 10-3801 (1942); IOWA CODE ANN. § 721.1 (1950); KAN. GEN. STAT. § 21-701 (1949); KY. REV. STAT. § 432.170 (1953) (this statute does not call the offense "perjury," but is similar to the general perjury statutes); ME. REV. STAT. c. 135, § 1 (1954); MD. ANN. CODE GEN. LAWS art. 27, § 531 (1951); MASS. ANN. LAWS c. 268, §§ 1 and 1A (Supp. 1954); MINN. STAT. ANN. § 613.39 (1947); MISS. CODE ANN. § 2315 (1942); MO. ANN. STAT. § 557.010 (1953); MONT. REV. CODES ANN. § 94-3801 (1947); NEB. REV. STAT. § 29-2025 (1943); NEV. COMP. LAWS § 9974 (1929); N. H. REV. LAWS c. 457, § 1 (1942); N. C. GEN. STAT. § 14-209 (1953); N. D. REV. CODE § 12-1401 (1943); OHIO REV. CODE § 2917.25 (1954); OKLA. STAT. ANN. tit. 21, § 491 (1937); PENN. STAT. ANN. tit. 18, § 4322 (1945); R. I. GEN. LAWS c. 605, § 1 (1938); S. D. CODE § 13.1237 (1939); TENN. CODE ANN. § 11073 (Williams 1934); UTAH CODE ANN. §§ 76-45-1, 76-45-7, 76-45-8 (1953); VA. CODE § 18-237 (1950); WASH. REV. CODE §§ 9.72.010 and 9.72.030 (1953); WIS. CRIM. CODE § 346.31 (1953).

However, a few states have preserved the common law distinction between the

a false statement under an oath required by law, in the belief that the person administering the oath was qualified and authorized, and in the belief that the official, board, or judicial proceeding was authorized to receive his testimony (whether written or oral).[13] *Quaere,* whether the defendant would also have to possess the belief that his false statement would be "material," in those jurisdictions where materiality is an element of the substantive crime of perjury.

The overt act. Intent alone, however clear, is of course never enough to constitute an attempt. There must be some overt act directed toward the accomplishment of the crime, by means "apparently suitable" to accomplishment, and this overt activity must be designed to achieve the anticipated results and must go beyond that stage which the courts ambiguously refer to as "mere preparation."[14]

---

offenses of perjury and false swearing: DEL. CODE ANN. tit. 11, §§ 721 and 722 (1953); GA. CODE ANN. §§ 26-4001-4003 (1953); N. J. STAT. ANN. §§ 2-157-1 and 2-157-4 (1939); ORE. REV. STAT. §§ 162.110 and 162.140 (1953) (the latter statute defines false swearing as a false statement not material to the issue in question; otherwise, false statements are perjury); W. VA. CODE ANN. §§ 5999 and 6000 (1949).

The remaining states, though they have not merged into one the general statutes on perjury and false swearing, define false swearing as perjury: COLO. REV. STAT. §§ 40-7-1 and 40-7-2 (1953); FLA. STAT. ANN. §§ 837.02 and 837.01 (1944); MICH. STAT. ANN. §§ 28.664 and 28.665 (1954); N. H. REV. LAWS c. 457, §§ 1 and 2 (1942); N. Y. PEN. LAW §§ 1620 and 1622; S. C. CODE ANN. §§ 16-201 and 16-203 (1952); VT. REV. STAT. §§ 8515 and 8516 (1947).

The general federal statute on perjury is 18 U. S. C. § 1621 (1952).

[13] For example, see the federal statute, and the statutes in New Jersey, Oregon, and West Virginia. *Supra* note 12. In the Louisiana statute, *supra* note 12, materiality is made an element of the crime of perjury, but the court in State v. Latiolais did not discuss what effect, if any, this might have on the requisite nature of the defendant's intent.

This problem would not arise in Arkansas, New York, Utah, and Washington where the offense of perjury has been divided into two degrees. The main distinction between the two classifications is that first degree perjury applies to false swearing as to material matter, and second degree, to immaterial matter. *Supra* note 12.

[14] CLARK AND MARSHALL, CRIMES § 118 (5th ed. 1952); HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 99-117 (Indianapolis: The Bobbs-Merrill Co., (1947); MILLER, *op. cit. supra* note 7, § 29f; 1 WHARTON, *op. cit. supra* note 7, § 219.

If the means appear to the defendant sufficient to consummate the crime, the weight of authority is that there is an attempt. Beale, *Criminal Attempts,* 16 HARV. L. REV. 491, 496-500 (1903). Thus, where the defendant points a gun and pulls the trigger, it is an attempt to kill, even though the gun did not go off, People v. Ryan, 55 Hun, 214, 8 N. Y. Supp. 41 (1889), or even though the gun did not have a cap on it, Mullen v. State, 45 Ala. 43 (1871). And it has been held an attempt to kill where one administers a harmless drug to another, thinking it poisonous. State v. Glover, 27 S. C. 602, 4 S. E. 564 (1888). Likewise, placing an insufficient dose of poison into another's cup with intent to kill has been held an attempt. Commonwealth v. Kennedy, 170 Mass. 18, 48 N. E. 770 (1897).

The problem of distinguishing between "mere preparation" and attempt is sometimes difficult, though some of the cases provide rather clear examples. For instance, generally it is held that purchasing or owning some article with which to commit a crime is not an indictable attempt. Purchasing poison would not be indictable as as attempt to poison, but intentionally placing it in the way of other human beings would be. Mullen v. State, 45 Ala. 43 (1871). Owning a false weight would not be an attempt to cheat, but using it as a means of cheating would

The function of the overt act "element" is similar to that of the intent "element." The rationale of attempts assumes that certain acts, which tend but fail to effect the commission of a crime intended to be consummated, ought to be punished.[15] Functionally, then, the act should (1) supply evidence to preclude punishment of mere mental activity; (2) supply evidence that the defendant intended the commission of a specific crime; and (3) supply evidence of some external harm to society[16] (this external harm may be recognizable from the harm inherent in the nature of the overt act itself, or it may be recognizable from the imminent threat of the harm that would result if the substantive crime were committed).[17]

---

be such an attempt. Regina v. Brown, 48 L. T. 270 (1882). If a man, with intent to rape a child, went to the place where the child was located, though that would be some act toward commission of the crime, it would not be indictable. Regina v. Meredith, 173 Eng. Rep. 630 (1838). Holmes has said that "the act must come pretty near to accomplishing that result [intended]." Commonwealth v. Kennedy, 170 Mass. 18, 20, 48 N. E. 470 (1897). And Baron Parke has stated that criminal attempt originates when the actor no longer controls the force which he has set in motion, Regina v. Eagleton, 169 Eng. Rep. 826, 836 (1855), though that would not seem applicable when considering, for example, attempted rape.

So as not to oversimplify the problem of distinguishing between "mere preparation" and attempt, the following will illustrate some of the difficulties: "The defendant bought matches to set a fire; he cannot yet be punished. He solicited another to burn and furnished him with material; there is no punishable attempt. He prepared combustibles at the house, went to a third party, solicited him to set the fire, and started with him toward the house. *Quaere*—whether a punishable attempt has been committed. The combustibles were arranged and another who was on the spot was solicited to light it; the attempt is punishable. The defendant himself having arranged the combustibles lit a match, which went out, or lit a candle and placed it among the combustibles, or lit the combustibles, he has committed a crime." Beale, *Criminal Attemps,* 16 HARV. L. REV. 491, 504-505 (1903).

It is hoped that the ideas developed in this note will be of some assistance in approaching the problem of "preparation."

[15] HALL, *op. cit. supra* note 14, at 99 and 129.

[16] External harm to society may be said to result from the impairment of some legally protectible interest or from a threat of such impairment. Some of these interests are life, limb, privacy, property, public peace, health, morals, welfare, and the like. As applied to perjury, some protectible interests are: effective and efficient functioning of governmental agenices, orderly conduct of legal proceedings, solemnity of the oath, dignity and respect of the court, essential powers of legal agencies for administration of justice, etc.

What constitutes external harm to society will vary with social mores and attitudes and how both are reflected and ingrained into the minds of individuals attempting to determine the external harm. Social mores and attitudes are naturally affected by philosophical, sociological, theological, psychological, political, and economic influences.

External harm is not absolute, but relative to a given society. This is evidenced by the fact that at very early common law attempts to commit crimes were not punished though today they are.

On the subject of external harm, see HALL, *op. cit. supra* note 14, at 15, 61, 96-97, 111, 113, 115-116, 135-136.

[17] It is important to realize that there may be harm inherent in the overt act itself as well as in the threat of the harm of the substantive crime. For example, in attempted perjury, it may be harmful to society for a person to exhibit a contempt for legal proceedings, even under circumstances where his false swearing cannot amount to perjury. It may very well be that the threat of perjury may add to that harm but there is nevertheless harm in the unsuccessful act itself. The same is true of attempted rape, where there is harm both in the unsuccessful acts as well

Functional rather than conceptual application of the elements of attempt may be a more edifying method of determining criminality in specific cases involving alleged attempts. This is true, for example, when considering attempted perjury, where the court should be less concerned with how "dangerously close" the act comes to consummation of the intended crime, and more primarily concerned with the external harm inherent in the defendant's acts, that is, his wilful affront to the solemnity of the oath and to the dignity of a governmental agency.[18]

Accordingly, intentional lying under oath before an official *apparently* authorized to administer the oath should be a sufficient overt act. *Quaere,* whether the following would be sufficient: making an immaterial false statement (in jurisdictions requiring the statement to be material for the crime of perjury); making a false statement on the witness stand which is interrupted before completion; falsifying an affidavit which is never used for the purpose intended; falsifying a written statement which is changed before an oath is taken.

Failure of consummation of the crime intended. Obviously, the overt act must fail to effect the crime, else the law would concern itself with punishing the substantive crime.[19] As reference to particular cases indicates, many circumstances may operate to prevent successful completion. Some may cause interruption of the overt act,[20] preventing the defendant

as in the threat of rape. In some cases of attempted rape, the threat may not in actuality be so important, for example where the offender is impotent.

The extent of the harm in attempts will always be affected by the gravity of the substantive crime, but it is important to recognize that that will not necessarily be exclusive of the extent of the harm.

See note 52 *infra.*

[18] However, in a case of attempted arson, where the defendant's match is blown out before the combustibles are lit, a court could concern itself equally with the problems of proximity (how "dangerously close") and external harm.

The proximity test is often applied by the courts in attempt cases. For a discussion of this aspect of attempts, see Beale, *Criminal Attempts,* 16 HARV. L. REV. 491, 501-506 (1903).

[19] However, the language of this Louisiana statute would seem to be *contra:* "An attempt is a separate but lesser grade of the intended crime and any person may be convicted of an attempt to commit a crime although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt." LA. REV. STAT. ANN. § 14:27 (1951).

Most states do not permit conviction of an attempt when the substantive crime has been consummated. However, several states have statutes similar to the one in Louisiana.

[20] These circumstances involve the over-all question of how far one must go in preparation before being guilty of an attempt. If one preparing to commit arson strikes a match to combustibles, but the match goes out, the person will still be guilty of an attempt. Regina v. Taylor, 175 Eng. Rep. 831 (1859). And where the defendant starts from his house with a dynamite bomb to blow up a railroad track, but is arrested some distance from the track, it has been held that he is guilty of an attempt. People v. Stites, 75 Cal. 570, 17 Pac. 693 (1888). Attempt has also been found where the defendant threw oil on a house with intent to burn it, but was frightened away before igniting the oil. Weaver v. State, 116 Ga. 550, 42 S. E. 745 (1902). "So far as the defendant's criminality is concerned, it would seem to make little or no difference whether the interruption of the defendant's intended acts is due to another's interference or to his own repentance or change of mind. . . . The

from doing what he sought to do, and others may render completion of the crime impossible, even where the defendant does all he planned to do.[21] These latter circumstances have been labeled as "legal impossibility," "factual impossibility," "intrinsic impossibility," "extrinsic impossibility," "absolute impossibility," and "relative impossibility."[22]

Impossibility to commit the crime of perjury may be evidenced where an unauthorized official administers the oath; where a board, investigative committee, judicial proceeding, or any other legal proceeding is unauthorized to receive testimony, or is illegally constituted; where a legal proceeding does not have jurisdiction over the person testifying; where an affidavit given is mistakenly believed to be required by law; and the like.

From this discussion of the elements of criminal attempt, it is evident that they can be made applicable to the crime of perjury.

What is primarily involved in *State v. Latiolais* is the "impossibility" aspect of the case. In the examples cited by the court, where the board or official was not legally authorized to take testimony, or where the one administering the oath was not authorized or qualified to administer the oath, it is impossible under all of the circumstances for the defendant to commit the substantive crime of perjury. The problem therefore is the relevancy of the general "rules" relating to "impossibility" in criminal attempts to these particular circumstances.

Courts and writers generally recognize two kinds of "impossibility," "legal" and "factual."[23]

It is said to be a general "rule" that a defendant cannot be guilty of an attempt where it was "legally impossible" for him to commit the

burglar who, while trying to force the lock on the front door, decides to abandon the attempt is equally guilty whether his change of mind is due to the voice of his own conscience or the voice of an approaching policeman." Sayre, *supra* note 7, at 847.

[21] Some cases in which the defendant has been held guilty under these circumstances are where the defendant attempts to pick an empty pocket, People v. Moran, 123 N. Y. 254, 25 N. E. 412 (1890), Regina v. Ring, 17 Cox C. C. 491, 66 L. T. 300 (1892), Regina v. Brown, 16 Cox C. C. 715, 61 L. T. 594 (1889); attempts an abortion on a woman who is not pregnant, Eggart v. State, 40 Fla. 527, 25 So. 144 (1898), State v. Snyder, 188 Iowa 1150, 177 N. W. 77 (1920), State v. Fitzgerald, 49 Iowa 260 (1878), Commonwealth v. Tibbets, 157 Mass. 519, 32 N. E. 910 (1893), Commonwealth v. Taylor, 132 Mass. 261 (1882); attempts to shoot one who is not in the place where the bullet is shot, People v. Lee Kong, 95 Cal. 666, 30 Pac. 800 (1892), State v. Mitchell, 170 Mo. 633, 71 S. W. 175 (1902); attempts to poison when the intended victim does not actually consume the poison, Commonwealth v. Kennedy, 170 Mass. 18, 48 N. E. 770 (1897).

Cases in which the defendant has not been held guilty in "impossibility" circumstances are discussed in the text under "legal impossibility."

[22] See Keedy, *supra* note 8, at 476-489; Strayhorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. OF PA. L. REV. 962 (1930); Turner, *supra* note 7, at 246.

[23] Other classifications, mentioned in the text elsewhere, are simply variations of "legal" and "factual" impossibility.

intended crime.[24] In *People v. Jaffe*,[25] it was held that the defendant could not be guilty of an attempt to receive stolen goods because the goods were not actually stolen. In *Marley v. State*,[26] it was held that the defendants, members of a county board of freeholders, could not be guilty of an attempt to incur indebtedness on behalf of the county in an amount greater than that provided by law. Another classic illustration of "legal impossibility" is that a boy under fourteen years of age cannot be guilty of an attempt to commit rape, because he is "conclusively presumed to be incapable of committing the crime of rape."[27]

Where, however, the courts have found not a "legal" but a "factual impossibility," it is said to be a general "rule" that the defendant may be guilty of a criminal attempt.[28] It has been stated that "factual impossibility" exists when "the accomplishment of the crime may be rendered impossible by reason of (1) the physical inability of the actor, (2) some inactive prevention or (3) the intervention of some natural force."[29] A man who fails to rape a woman because of a physical impotency is said to be guilty of attempted rape.[30] Inactive prevention may be provided by the absence of a subject of larceny in a man's pocket, though the person who attempts to pick the pocket will be guilty of attempted larceny.[31] Active prevention may be illustrated by the defendant's attempt to rape a girl who runs away from him, in which case the defendant has been found guilty of attempted rape.[32]

Some of the difficulties in "impossibility" are presented when one considers the instant case of attempted perjury. Three writers have said that a person could not be convicted of an attempted perjury (applying the rule of "legal impossibility").[33] However, Wharton states: "An attempt to commit perjury is indictable on the same reasoning as are attempts to commit other offenses. And when the complete offense of perjury is not proved (as where the false oath is taken before an incompetent officer, the defendant believing him to be competent), the defendant may be indicted for the attempt."[34] Yet, none of the cases cited by Wharton recognized the crime of attempted perjury as such.[35] Two

[24] HALL, *op. cit. supra* note 14, at 117.
[25] 185 N. Y. 497, 78 N. E. 169 (1906).
[26] 58 N. J. L. 207, 33 Atl. 208 (Sup. Ct. 1895).
[27] Foster v. Commonwealth, 96 Va. 306, 311, 31 S. E. 503, 505 (1898).
[28] HALL, *op. cit. supra* note 14, at 117.
[29] Keedy, *supra* note 8, at 479.
[30] Preddy v. Commonwealth, 184 Va. 765, 36 S. E. 2d 549 (1946).
[31] State v. Wilson, 30 Conn. 500 (1862); People v. Jones, 46 Mich. 441 (1881).
[32] Lewis v. State, 35 Ala. 380 (1860).
[33] HALL, *op. cit. supra* note 14, at 92; 2 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 227 (London: MacMillan and Co., 1883); Strayhorn, *supra* note 22, at 995.
[34] 2 WHARTON, *op. cit. supra* note 7, § 1592.
[35] Regina v. Hodgkiss, 11 Cox C. C. 365 (1869); Regina v. Stone, 6 Cox C. C. 235, 169 Eng. Rep. 715 (1853); Regina v. Chapman, 175 Eng. Rep. 356 (1850); Rex v. Taylor, 90 Eng. Rep. 1194 (1738). Each of these defendants was indicted

cases somewhat in point seem to infer that the notion of "legal impossibility" should preclude conviction.[36]

What seems to be involved in the examples cited by the court in *State v. Latiolais* is the label "legal impossibility." Thus, if the general rule of "legal impossibility" is followed, the defendant in such circumstances should be acquitted. But should the determination of whether certain acts constitute criminal attempts turn on the labeling of various circumstances as "legally impossible" or "factually impossible?" That is what the courts have done in many cases, but a reference to them will indicate that this is not a wholly satisfactory procedure.

It is submitted that the rule of "legal impossibility" is of no relevance to attempted perjury (or other criminal attempts). It must be remembered that what is involved in all attempt cases is the absence of a material element of the substantive crime;[37] and that that absence creates the failure of consummation of the intended substantive crime. To label a circumstance "legally impossible" is merely to designate a missing material element of the substantive crime. In that respect, a "legally impossible" circumstance merely possesses what is common to all other attempt situations, that is, a factual circumstance which prevents commission of the substantive crime. Consider a classic case of "factual impossibility"—the thief who picks an empty pocket,[38] with a classic case of "legal impossibility"—the thief who buys goods that he wrongly thinks are stolen from the true owner.[39] In the former the defendant was held *guilty* of attempted larceny, and in the latter the defendant was held *not guilty* of an attempt to receive stolen goods. In the pickpocket case, it was

for perjury. In Rex v. Taylor, the court merely discussed an evidentiary question. In Regina v. Hodgkiss and Regina v. Chapman, no case for perjury could be made out, so the courts found the defendants guilty of a misdemeanor, more for making false affidavits under prohibition of statute than for attempting perjury. No mention of attempt was made at all. The cases seemed to be simply statutory cases of false swearing, for which the defendants had not been properly indicted. There is some sign of attempted perjury in Regina v. Stone. There the defendant swore to a false affidavit for use in the Admiralty Court, but the official did not have authority to give the oath or take the affidavit for that purpose. The court held that the defendant would not be guilty of perjury, but "would be guilty of a misdemeanor—for he would thereby attempt to fraud the court." Regina v. Stone, 6 Cox C. C. at 240. It is interesting to note that the English Reprint report, written in somewhat different language, does not contain the clause "for he would thereby attempt to fraud the court."

[36] One held that the defendant could not be guilty of an attempt to obtain a school warrant from a board of school officials, if the officials had no legal authority to issue a valid warrant. State v. Lawrence, 178 Mo. 350, 77 S. W. 497 (1903). The other held that the defendant could not be guilty of an attempt to bribe an official to vote for awarding a contract, when the official had no legal right or authority to vote on the issue. State v. Butler, 178 Mo. 272, 77 S. W. 560 (1903).

[37] See HALL, *op. cit. supra* note 14, at 117-129.

[38] State v. Wilson, 30 Conn. 500 (1862); People v. Jones, 46 Mich. 441 (1881); People v. Moran, 123 N. Y. 254, 25 N. E. 412 (1890); Regina v. Ring, 17 Cox C. C. 491, 66 L. T. 300 (1892); Regina v. Brown, 16 Cox C. C. 715, 61 L. T. 594 (1889).

[39] 185 N. Y. 497, 78 N. E. 169 (1906).

impossible for the defendant to violate the law of larceny. And in the stolen goods case, it was impossible for the defendant to violate the law of criminal receiving. In one case, the *fact* that the pocket was empty, and in the other, the *fact* that the goods had been surreptitiously returned to the true owner's control prevented commission of the intended substantive crime. In both cases, the law was dealing with thieves who had done all they could to achieve success in a manifestly anti-social enterprise. For penological purposes, both defendants were thieves, and both had engaged in open thievery. In both cases, a *factual* circumstance was the essential factor which prevented the commission of the substantive crime.

The same argument holds true in other cases of "legal impossibility." For example, the *fact* that a boy is under the statutory age precludes his being held guilty of rape.[40] But if he possesses the intent to ravish a woman and does some act toward the accomplishment of that end, why should he not be held guilty of an attempted rape? If it is believed that he should not be so convicted, such a conclusion should be based on reasoning other than that it was "legally impossible" for him to commit the crime of rape.[41] It would seem therefore that the rule of "legal impossibility" is circumscribed by the rule of "factual impossibility." Thus one writer has been led to the conclusion that "there is no such thing as 'legal impossibility,' "[42] and that in criminal attempts only "factual impossibility" is relevant.[43]

The significance of "impossibility" circumstances has been summarized by Professor Hall as follows: "(1) that unless the objective sought is legally proscribed, the doing of it is not criminal nor is any conduct falling short of it a criminal attempt . . . ; and (2) if the end sought is legally proscribed, the failure to attain it, because of the lack of a factual condition necessary to its attainment, is no defense."[44] Thus, it is what the defendant believes he is doing that is important. If what the defendant intends is not a crime, no act falling short of it will be criminal. But if the result which he thinks he can accomplish—his expectations as he conceived them—is a crime, action which does not result in commission of the crime may nevertheless be a criminal attempt.

Thus, since all "impossibility" is "factual," and since that should be no defense, "impossibility" is not a criterion to be utilized in determining whether a given overt act is a criminal attempt, but is merely a term

[40] Foster v. Commonwealth, 96 Va. 306, 311, 31 S. E. 503, 505 (1898).
[41] "[T]he simple holding that age is also a material fact in the criminal attempt suffices." HALL, *op. cit. supra* note 14, at 127.
[42] *Id.* at 118.
[43] *Id.* at 128.
[44] *Id.* at 118.

descriptive of some types of circumstances which operate to prevent commission of the substantive crime.[45]

We are left, then, with the question of what criteria should be utilized in determining when an overt act, failing to effect the commission of the crime intended, becomes a criminal attempt.

It must be remembered that at very early common law attempts to commit crimes were not punished, simply for the reason that they were not regarded as *harmful.*[46] And it was not until the 17th and 18th centuries that the English courts began recognizing certain attempts as criminal.[47] During that period, courts, apparently with no conscious design, began to realize that certain attempts to commit crimes were harmful to society and should be punished. However inarticulate their motivations may have been, courts slowly recognized that certain attempts constituted punishable behavior that was antithetical to the interests of social welfare and detrimental to the existence of a well-ordered society. This rationale of attempts led to the formulation of the doctrine that an attempt to commit a crime is criminal.

Since the origin of this doctrine, the maze created by the voluminous number of court decisions has tended to obscure the rationale and its function. The rationale recognizes that certain attempts to commit crimes ought to be punished. The function of the rationale is the determination of whether the defendant's ultimate objective as he conceived it is legally proscribed, and, if it is, whether the steps taken toward its consummation produce sufficient external harm to society to justify legal cognizance and punishment. What is important is not how "dangerously

[45] The most significant effort to deal with the problems of attempt and "impossibility" is found in WIS. CRIM. CODE § 339.32 (1953): "(2) An attempt to commit a crime requires that the actor have an intent to commit that crime and that he either:

(a) Does all the acts which he believes necessary to commit the crime; or

(b) Does acts which go far enough toward the commission of the crime to demonstrate unequivocally, under all the circumstances, that a person having formed that intent and having gone that far would normally commit the crime except for the intervention of another person or some other extraneous factor. This paragraph does not apply if the actor voluntarily changes his intent and decides not to commit the crime.

(3) It is not a defense to a prosecution under this section that, because of a mistake of fact or law other than criminal law, which does not negative the actor's intent to commit the crime, it would have been impossible for him to commit the crime attempted."

[46] "Apparently in those forthright days, a miss was as good as a mile." *Id.* at 64. Bracton quoted what was apparently a maxim of the day, "'For what harm did the attempt cause, since the injury took no effect?'" 2 BRACTON, DE LEGIBUS ET CONSUETUDINUS ANGLIAE 337, f. 128, 13 (Twiss ed.; London: Longman and Co., 1878).

[47] Authorities are in disagreement as to whether the doctrine of criminal attempts was born in the Court of the Star Chamber. *Compare* HALL, *op. cit. supra* note 14, at 72-81 *with* 2 STEPHEN, *op. cit. supra* note 33, at 223. Stephen is of the opinion that the doctrine originated in that court. But Professor Hall believes that it did not receive expression until 1801. HALL at 87. On the history of criminal attempts, see HALL at 61-88.

close" the act comes within completion of the substantive crime, or how "impossible" it is to commit the crime, but rather whether the external harm created by the overt act is of such magnitude that it can be recognized and identified as an act which ought to be punished.

The determination of the criminality of overt acts must be left to the courts, for the law of criminal attempts presupposes that statutory criminal prohibitions cannot be all-inclusive of human conduct that should be punishable. The law of criminal attempts therefore gives the courts a power[48] to extend the rationale of prohibited substantive crimes to include conduct which, though not within the definition of a substantive crime, ought not to go unpunished.[49]

Criteria that may be applied in determining whether certain acts constitute criminal attempts are: (1) what is the rationale of the prohibited substantive crime;[50] (2) what is the nature of the defendant's intent and overt act;[51] (3) what is the extent of the external harm to society created by the defendant's act;[52] and (4) do the rationale of the substantive crime and the extent of the external harm justify legal cognizance and punishment of the defendant's act?[53]

These criteria can be applied to the instance case. The commission of the crime of perjury is a flagrant exhibition of contempt for the organized proceedings of government, which if left unpunished would eventually lead to a chaotic state of government. The rationale of its statutory prohibition recognizes: (1) the essentiality of soliciting truthful testimony from citizens for effective performance of various governmental functions; and (2) for the purpose of minimizing obstructions to the accomplishment of that end, the essentiality of preserving the solemnity of the oath and the dignity of the courts, tribunals and other agencies of government. The defendant in *State v. Latiolais* intended to commit perjury before an apparently legally authorized governmental

[48] See Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L. J. 53, 75-80 (1930).

[49] Thus, in dealing with a given overt act, it is necessary to understand the rationale of the substantive crime attempted, in addition to the rationale of attempts.

[50] Determination of the rationale of the prohibited substantive crime involves a consideration of what human action is proscribed by the prohibition, a consideration of the policy underlying the particular prohibition (i.e., why such action is deemed punishable), and a consideration of theories of punishment underlying the entire field of criminal law and their relation to the policy of the particular prohibition. This determination lays the foundation for the consideration of whether the defendant's acts should be punished.

[51] This criterion merely involves the determination of the physical aspects of the defendant's actions.

[52] Determination of external harm will depend upon the nature of the defendant's action, the nature (i.e., the physical aspects) and the rationale of the prohibited substantive crime, and the functions of the mental element and the overt act. See notes 16 and 17 *supra* for a discussion of the meaning of external harm and some of the problems involved in recognizing external harm.

[53] This determination will of course depend primarily upon the attitude and approach of each court or jurisdiction.

agency, and made a false statement under oath before that agency. His effort was frustrated only by the fact that for some reason the agency was either unauthorized to receive his testimony or by the fact that the official administering the oath was unauthorized to administer it. The defendant's acts, though not constituting perjury, nevertheless seem to be within the scope of the rationale of the substantive crime.

To permit such actions to go unpunished because of "legal impossibility" would not only condone planned and deliberate contempt of legal proceedings, but would make criminality turn on rules which have no functional relevance to the determination of whether the defendant's behavior should be punished. It would seem under such circumstances that a court should be justified in punishing the defendant's actions as a criminal attempt.

J. THOMAS MANN.

Dead Bodies—Autopsies—Authority to Use Parts Removed in Treatment of the Living

Medical science has made great progress in the use of tissue, bone, and other matter removed from deceased persons in the treatment of living patients,[1] but in North Carolina the sources of supply of such matter are limited because of areas of uncertainty in the law with regard to property and disposition rights in dead bodies.[2]

North Carolina seems to be in accord with the general rule that a dead body is not property, in the ordinary sense.[3] However, a right of testamentary disposition is recognized by the court,[4] and provided for by statute.[5] In the absence of such disposition, there is a right to pos-

[1] "It is becoming increasingly easy to use organs and tissues from deceased persons (cadavers) in treating and sometimes curing, otherwise fatal diseases in living patients. There is a good possibility that within 10 years it will be possible to transplant complex organs from a cadaver to a living person." Letter from John B. Graham, M.D., Department of Pathology, University of North Carolina School of Medicine, to Richard A. Myren, Assistant Director, Institute of Government, University of North Carolina, March 7, 1955. The Raleigh Times, March 28, 1955, p. 9, col. 6, reported the successful transplantation of four ribs, a collarbone, and a breastbone from the body of a deceased person to that of a living person. Colliers, April 25, 1953, pp. 74-77.

[2] Although medical schools obtain cadavers for use in the study of anatomy under the authority of N. C. GEN. STAT. §§ 90-211, *et seq.* (1950), these sections do not authorize the use of parts of such bodies in the treatment of patients.

[3] Travelers' Insurance Co. v. Welch, 82 F. 2d 799 (5th Cir. 1936); Gray v. Southern Pacific Co., 21 Cal. App. 2d 240, 68 P. 2d 1011 (1937); Pierce v. Proprietors, 10 R. I. 227 (1872); Koerber v. Patek, 123 Wis. 453, 102 N. W. 40 (1905). *Accord,* Kyles v. Southern Ry. Co., 147 N. C. 394, 61 S. E. 278 (1908). *But see* Bonaparte v. Fraternal Funeral Home, 206 N. C. 652, 175 S. E. 137 (1934).

[4] Kyles v. Southern Ry. Co., *supra* note 3. 25 C. J. S., *Dead Bodies* § 9 (1941).

[5] ". . . nothing in §§ 90-211 through 90-216, inclusive, shall prevent a person from making testamentary disposition of his or her body after death." N. C. GEN. STAT. § 90-213 (1950). N. C. GEN. STAT. §§ 90-216.1, *et seq.* (Supp. 1953) provides for the testamentary donation of one's body to certain institutions for the rehabilitation of the maimed.

session in the surviving spouse, if any, and then in the next of kin, for purposes of preservation and burial.[6] Nowhere does the North Carolina court intimate that the right of possession exists for any other purpose, and no North Carolina statute specifically provides for sale, donation, or other disposition of a dead body by the surviving spouse or next of kin.

If there were legal authority to do so, parts removed during the course of an authorized autopsy could be preserved and later used in the treatment of patients.[7] The right to perform an autopsy in North Carolina is limited "to cases specially provided by statute. . . ."[8] The statutes which so provide define certain conditions under which an autopsy may be ordered under governmental authority without the consent of the person entitled to possession of the body,[9] and other circumstances under which the consent of such person specifically is required.[10] None of these statutes, however, authorizes the retention of parts removed or their use in the treatment of patients.

In other jurisdictions, where authority to perform an autopsy is given in general terms, without specific limitations, it has been held that there is included by implication the right to remove such parts of the body for any further microscopic examination as is necessary and proper to accomplish the purpose of the autopsy.[11] However, in all cases examined, the attitude of the court was clearly opposed to the idea that a general authorization to perform an autopsy might include the right to retain parts removed for any purpose other than examination for a reasonable time.[12] It is apparent from a study of these cases that those

[6] Lamm v. Shingleton, 231 N. C. 10, 55 S. E. 2d 810 (1949); Gurganious v. Simpson, 213 N. C. 613, 197 S. E. 163 (1938); Bonaparte v. Fraternal Funeral Home, 206 N. C. 652, 175 S. E. 137 (1934); Kyles v. Southern Ry. Co., 147 N. C. 394, 61 S. E. 278 (1908); Note, 30 N. C. L. REV. 299 (1952); 15 AM. JUR., *Dead Bodies* § 9 (1938).

[7] After six days in storage, a six inch long piece of aorta was successfully transplanted to the body of a living person. Science News Letter, Jan. 30, 1954, p. 71, col. 3.

[8] N. C. GEN. STAT. § 90-217 (1950) (This section also provides the right to perform an autopsy "by direction or will of the deceased . . . and [in] cases where the husband or wife or one of the next of kin or nearest known relative or other person charged by law with the duty of burial, in the order named and as known, shall authorize such examination or autopsy.").

[9] N. C. GEN. STAT. § 15-7 (1953) (Officer prosecuting for the state in cases of homicide); N. C. GEN. STAT. § 90-213 (1950) (Chairman of N. C. Board of Anatomy); N. C. GEN. STAT. § 90-217 (1950) (Coroner or majority of coroner's jury); N. C. GEN. STAT. § 152-7 (6) (1952) (Coroner, coroner's jury, or solicitor).

[10] N. C. GEN. STAT. § 90-220 (1950) requires "the written consent of the deceased person's husband or wife, or one of the next of kin, or nearest known relative or other person charged by law with the duty of burial, in the order named and as known" before the administrative head of a public institution for the care of the sick, insane, etc. may authorize a post mortem examination upon the body of a person dying while an inmate of such institution.

[11] Palmquist v. Standard Acc. Ins. Co., 3 F. Supp. 358 (S. D. Cal. 1933); Winkler v. Hawkes, 126 Iowa 474, 102 N. W. 418 (1905).

[12] Palmquist v. Standard Acc. Ins. Co., 3 F. Supp. 358, 359 (S. D. Cal. 1933),

performing an autopsy, even when properly authorized, are under a clear duty to replace in the body before burial all parts removed,[13] and that the next of kin of the deceased have a cause of action against such persons for any violation of this duty.[14] North Carolina has imposed liability upon those performing an autopsy at the order of a coroner when the order is later found to have been improperly issued,[15] and it seems clear that liability would also accrue in such a case for retention of parts removed.

It remains to be considered whether consent to the performance of an autopsy may lawfully include permission to retain and use removed parts in the treatment of patients. If a dead body is not property, and the property right, or quasi property right, in the surviving spouse or next of kin is solely for the purpose of preservation and burial, it would seem to follow that the person entitled to possession of the body has no power to grant such permission. Since consent to have an autopsy performed is based upon statutory provision in North Carolina,[16] and since that statutory provision is for consent only to the performance of an autopsy, it would seem that there is no basis for consent to retention and later use of parts removed.[17]

"No right was possessed by the insurance company other than to make an autopsy. This included acts and operations necessarily involved therein. It contemplated removal of the internal organs, but did not contemplate their retention." Robertson v. Mutual Life Ins. Co., 232 Iowa 743, 6 N. W. 2d 153 (1942) (The court deemed the demand of the insurance company for an autopsy to be unreasonable because it included the authority to retain parts of the body removed, whereas the policy gave only a general right to have an autopsy performed.).

[13] *In re* Disinterment of Body of Jarvis, 244 Iowa 1025, 1032, 58 N. W. 2d 24, 28 (1953). A court order granting an application to have an autopsy performed included authority to remove such "organs from the body . . . as may be required to effectively perform such autopsy, provided, however, such organs or parts of organs so removed, *except only such portions thereof as may be necessary to be subjected to microscopic examination,* shall be restored to their normal place in the body prior to reburial." On appeal, the italicized portion was modified to read, "except only shavings or such slivers of tissue as may be necessary to subject to microscopic examination," and the order was approved.

[14] Palmquist v. Standard Acc. Ins. Co., 3 F. Supp. 358 (S. D. Cal. 1933); Gould v. State, 181 Misc. 884, 46 N. Y. S. 2d 313 (Sup. Ct. 1944) *semble;* Koerber v. Patek, 123 Wis. 453, 102 N. W. 40 (1905). *But cf.* Gray v. Southern Pacific Co., 21 Cal. App. 2d 240, 68 P. 2d 1011 (1937).

[15] Gurganious v. Simpson, 213 N. C. 613, 197 S. E. 163 (1938).

[16] N. C. GEN. STAT. § 90-217 (1950); N. C. GEN. STAT. § 152-7 (6) (1952) (It is the duty of the coroner to have a post-mortem examination performed "upon the request of . . . any member of the family of the deceased. . . .").

[17] The effect of consent to the use of parts removed for purposes of treatment of patients apparently has not been decided in this jurisdiction. The question raises a number of problems beyond the scope of this note. For example, would such consent be an absolute defense to a suit for mutilation of the body if the court held that the person giving the consent was not authorized to do so? Even if consent were a good defense in such a case, would the agency retaining the parts removed be protected by the consent of only the person entitled to possession, or would it be necessary for complete protection to get the written consent of all of the next of kin entitled to sue for mutilation of the body? The difficulty of determining with certainty the identity of such person or persons is apparent, *e.g.*, where the deceased was living apart from his wife at the time of his death and the next of kin lived

A desirable solution of the problem might be obtained by means of several slight statutory modifications, *viz.:*

(1) The statutes providing for testamentary disposition of one's body to certain institutions for the rehabilitation of the maimed[18] could be reworded so as to give a present right of disposition for similar purposes to the surviving spouse or next of kin, in the absence of such testamentary disposition.

(2) The statutes providing for the distribution of cadavers to medical schools[19] could be modified so as to include a specific grant of such bodies to medical schools for the additional purpose of obtaining material to be used in the treatment of the living.

(3) The autopsy statutes[20] could be reworded to authorize the delivery to public institutions for the rehabilitation of the maimed of all parts and other material removed, upon completion of the examination, with the written consent of the person entitled to possession of the body, if known.

It is submitted that the enactment of such amendments would serve not only to enhance the development of medical science in the field of transplantation in North Carolina, but would also serve to clarify in some measure the uncertainty in the law of this state with regard to the rights of others in the bodies of deceased persons.

ROYAL G. SHANNONHOUSE, III.

Criminal Law—Insanity as a Defense—New Test for Determining

In the important case of *Durham v. United States* defendant had been discharged from the United States Navy in 1945 at the age of seventeen, after a psychiatric examination showed that he was mentally unfit for Naval service because of a personality disorder.[1] During the succeeding eight years he attempted suicide, was convicted of stealing cars and passing bad checks, and was committed three different times to mental hospitals. Two months after his third release from a mental hospital, he was caught breaking into a house. Again he was committed to a mental hospital. Finally, in February of 1953, he was brought to trial in the United States District Court in the District of Columbia

in other sections of the country. From whom would the performing agency obtain the consent where the deceased was survived by several children by two marriages when neither wife survived him? Since consent to retention is, in effect, a donation, the statutes providing for consent to the performance of an autopsy do not provide the answers to these questions.

[18] N. C. GEN. STAT. §§ 90-216.1 *et seq.* (Supp. 1953).

[19] N. C. GEN. STAT. §§ 90-211 *et seq.* (1950).

[20] N. C. GEN. STAT. § 15-7 (1953); N. C. GEN. STAT. §§ 90-217 *et seq.* (1950); N. C. GEN. STAT. § 152-7 (6) (1952). See also N. C. GEN. STAT. § 90-216.1 (Supp. 1953).

[1] Durham v. United States, 214 F. 2d 862 (D. C. Cir. 1954).

charged with housebreaking. The only defense raised was that of insanity at the time the crime was committed.

During the trial, an expert witness testified at least four different times that defendant was of unsound mind at the time the crime was committed.[2] Yet the trial court, without a jury, convicted accused of housebreaking. The basis for the conviction was very simple: the expert witness would not testify to the fact that defendant did not "know" "the difference between right and wrong in connection with governing his own actions."[3]

The test applied by the district court was that set out in the celebrated *M'Naghten* case,[4] a test which has been adopted by a majority of the states[5] and the Supreme Court of the United States.[6] Many states and the District of Columbia (until the *Durham* case) have added to the right and wrong test, the irresistible impulse test.[7] Yet this defendant, an acknowledged mental case, received no benefit from either of these rules in the district court. The court of appeals, however, reversed the district court, set out a new test by which mental responsibility is to be determined, and sent the case back for a new trial. And the court of appeals abandoned completely the old right and wrong test which has so long held sway over the defense of insanity in the criminal law.

Briefly, the circumstances under which the right and wrong rule was promulgated one hundred and twelve years ago by an English court

[2] *Id.* at 866.
[3] *Id.* at 868.
[4] 8 Eng. Rep. 718 (1843).
[5] Leland v. Oregon, 343 U. S. 790 (1952); State v. Eisenstein, 72 Ariz. 320, 235 P. 2d 1011 (1951); People v. Field, 108 Cal. App. 2d 496, 238 P. 2d 1052 (1951); Hall v. State, 78 Fla. 420, 83 So. 513 (1919); Griffin v. State, 208 Ga. 746, 69 S.E. 2d 192 (1952); State v. Powell, 71 Idaho 145, 227 P. 2d 582 (1951); State v. Beckwith, 242 Ia. 228, 46 N. W. 2d 20 (1951); Fisher v. Fraser, 171 Kan. 472, 233 P. 2d 1066 (1951); State v. Johnston, 207 La. 161, 20 So. 2d 741 (1945); State v. Knight, 95 Me. 467, 50 Atl. 276 (1901); Taylor v. State, 187 Md. 306, 49 A. 2d 787 (1946); State v. Simenson, 195 Minn. 258, 262 N. W. 638 (1935); McGann v. State, 175 Miss. 320, 167 So. 53 (1938); State v. Barton, 361 Mo. 780, 236 S. W. 2d 596 (1951); Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349 (1951); State v. 27 (1949); People v. Irwin, 166 Misc. 751, 4 N. Y. S. 2d 548 (Ct. Gen. Sess. Skaug, 63 Nev. 59, 161 P. 2d 708 (1945); State v. Cordasco, 2 N. J. 189, 66 A. 2d 27 (1949); People v. Irwin, 166 Misc. 751, 4 N. Y. S. 2d 548 (Ct. Gen. Sess. 1938); State v. Shackleford, 232 N. C. 299, 59 S. E. 2d 825 (1951); State v. Barry, 11 N. D. 428, 92 N. W. 809 (1903); Kobyluk v. State, 94 Okla. Crim. Rep. 73, 231 P. 2d 388 (1951); State v. Layton, 174 Ore. 217, 148 P. 2d 522 (1944); Comm. v. Neill, 362 Pa. 507, 67 A. 2d 276 (1949); State v. Gardner, 219 S. C. 97, 64 S. E. 2d 130 (1951); State v. Leehman, 2 S. D. 171, 49 N. W. 3 (1891); Gibbs v. State, 192 Tenn. 529, 241 S.W. 2d 556 (1951); McGee v. State, 155 Tex. Crim. 639, 238 S. W. 2d 707 (1951); State v. Putzell, 40 Wash. 2d 174, 242 P. 2d 180 (1952); State v. Harrison, 36 W. Va. 729, 15 S. E. 982 (1892); Simecek v. State, 243 Wis. 439, 10 N. W. 2d 161 (1943); GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW 403 (New York: W. W. Norton and Company, Inc., 1952); WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 68, 129-173 (Buffalo: Dennis and Co., Inc., 1954).
[6] Davis v. United States, 160 U. S. 469, 488 (1895).
[7] WEIHOFEN, *op. cit. supra* note 5, at 129-173; Keedy, *Irresistible Impulse As a Defense in the Criminal Law*, 100 U. OF PA. L. REV. 956 (1952).

were these: M'Naghten, a paranoiac under delusions of persecution, shot and killed the secretary to Sir Robert Peel in an attempt to kill Peel. M'Naghten was found not guilty because of insanity. The case aroused a great deal of public interest and debate, prompting the House of Lords to ask the fifteen highest judges of England to state the law governing such cases. These judges stated that in order to establish the defense of insanity, it must be "proved to the satisfaction of the jury" that:

> "at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."[8]

At the time this case was decided, Francis Gall's theory of phrenology was the accepted view in medicine.[9] The fifteen English judges evidently were influenced by Gall's theory[10] for they spoke of a person suffering from delusions "and not in other respects insane."[11] Thus it would appear that the judges had the idea that if the particular section of the brain governing reason and logic were not unbalanced, the person was sane and capable of committing a criminal act. It made no difference that the person was totally insane in other sections of the brain.

The irresistible impulse rule needs little explanation, for it is exactly what the name implies. The person compelled to commit a criminal act by an impluse produced by a mental disease which is beyond his power to control, may be excused from criminal responsibility.[12] The Supreme Court of the United States stated the irresistible impulse rule in conjunction with the M'Naghten rule as follows:

> "The term 'insanity' as used in this defence means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and

[8] M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

[9] Gall declared that the brain was divided into twenty-seven different sections or organs, each section controlling a particular trait of the person. The dominant trait of a person depended on which section was the largest, and the size of each section could be ascertained by studying the shape of the skull. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 170 (Boston: Little, Brown, and Company, 1925); GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW 418 (New York: W. W. Norton and Company, Inc., 1952); WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 3-4 (Buffalo: Dennis and Co., Inc., 1954).

[10] "It seems not at all improbable that the learned judges . . . had a sentimental weakness for phrenology." GLUECK, *op. cit. supra* note 9, at 170. "It is this discarded fanciful brain-child of an eccentric Viennese physician of a hundred and thirty years ago that underlies the cornerstone of our law governing the criminal responsibility of the mentally sound." WEIHOFEN, *op. cit. supra* note 9, at 4.

[11] M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

[12] U. S. *ex rel.* Wing v. Pennsylvania, 90 F. Supp. 208 (W. D. Penn. 1950).

> wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control."[13]

By applying the irresistible impulse rule with the M'Naghten rule, the scope of insanity sufficient to excuse a criminal act is increased.

North Carolina follows the majority of American jurisdictions in applying the M'Naghten rule.[14] In *State v. Haywood,* the following charge to the jury was called to the attention of trial court judges as being a proper one to use:

> "That if the prisoner, at the time he committed the homicide, was in a state to comprehend his relations to other persons, the nature of the act and its criminal character, or, in other words, if he was conscious of doing wrong at the time he committed the homicide, he is responsible. But if on the contrary, the prisoner was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, he is not guilty of any offense against the law; for guilt arises from the mind and wicked will."[15]

Today, eighty-eight years later, this same charge or one very similar, is still used.[16]

The person compelled to commit a crime by an "irresistible impulse" is denied the defense of insanity in North Carolina,[17] for the reason stated by Justice Bailey in *State v. Brandon,*

> "The law does not recognize any moral power compelling one to do what he knows is wrong. . . . There are many appetites and passions which by long indulgence acquire a mastery over men more or less strong. Some persons, indeed, deem themselves incapable of exerting strength of will sufficient to arrest their rule, speak of them as irresistible, and impotently continue under their dominion; but the law is far from excusing criminal acts committed under the impuse of such passions. . . . If the prisoner

[13] Davis v. United States, 165 U. S. 373, 378 (1897).

[14] State v. Shackelford, 232 N. C. 299, 59 S. E. 2d 825 (1950); State v. Haywood, 61 N. C. 376 (1867); State v. Brandon, 53 N. C. 463 (1862); Gardner, *Insanity As a Defense in the North Carolina Criminal Law,* 30 N. C. L. REV. 4, 10 (1952).

[15] State v. Haywood, *supra* note 14, at 377.

[16] State v. Grayson, 239 N. C. 453, 80 S. E. 2d 387 (1954); State v. Shackleford, 232 N. C. 299, 59 S. E. 2d 825 (1950); State v. Creech, 229 N. C. 662, 51 S. E. 2d 348 (1949).

[17] State v. Shackleford, *supra* note 16; Gardner, *supra* note 14, at 18.

> knew that what he did was wrong, the law presumes that he had the power to resist it against all supernatural agencies and holds him amenable to punishment."[18]

It seems that the court has given little credence to the idea that "passions" and "supernatural agencies" could overcome the power of reason to know right from wrong. In *State v. Potts,* Chief Justice Smith, writing the majority opinion, said,

> "We have not allowed, as exempting from the consequences of crime, what is called moral insanity;[19] that is, an alleged uncontrollable impulse to commit an act, with the mental faculties in full force, to comprehend its criminality and wrong."[20]

A fair interpretation of this language would indicate that the court has not been persuaded that the emotional "section" of the brain could influence the reasoning "section" of the brain; otherwise how could the person have his "mental faculties in full force, to comprehend its criminality and wrong"?

> It was stated in *State v. Bracy* that:
> "Whatever may be his mental weakness, if a person has knowledge and consciousness that the act he is doing is wrong and will deserve punishment whatever may be his mental weakness, he is in the eye of the law of sound mind and memory, and subject to punishment."[21]

It seems a bit inconsistent to recognize a person's mental weakness in one sentence, yet declare him to be of sound mind in the next sentence.

Therefore, a proper conclusion would seem to be that the court not only follows the rule of *M'Naghten's* case, but in denying the irresistible impulse test, follows the medical rationale on which the reasoning of the *M'Naghten* case is based. The North Carolina Supreme Court recognizes that intelligence and reasoning can be overcome only by a "visitation of God"[22] and the defense of insanity is not available unless reason has been overcome.[23]

[18] State v. Brandon, 53 N. C. 463, 467-468 (1862).

[19] "Moral insanity" as used here means an irresistible impulse. See State v. Terry, 173 N. C. 761, 765, 92 S. E. 154, 156 (1917).

[20] State v. Potts, 100 N. C. 457, 465, 6 S. E. 657, 660 (1887).

[21] State v. Bracy, 215 N. C. 249, 256, 1 S. E. 2d 891, 896 (1939).

[22] The court does not attempt to define of what a "visitation of God" consists. Still this phrase is repeated in many of the older cases. See State v. Journegan, 185 N. C. 700, 117 S. E. 27 (1923); State v. English, 164 N. C. 498, 80 S. E. 72 (1913); State v. Spivey, 132 N. C. 989, 43 S. E. 475 (1903).

[23] State v. Grayson, 239 N. C. 453, 80 S. E. 2d 387 (1954) (defendant was an illiterate man 26 years old. He had congenital syphilis which resulted in chronic infection of the brain and meninges. From 1944 until 1949, except for a period of two months, he was confined in two mental hospitals. In July of 1949 he was

It is submitted that the medical theory on which the *M'Naghten* case was based is outdated, and thus the law of the case is outdated.[24] Francis Gall's "section" theory of the brain has been discredited. Modern medicine has shown that the brain functions as a unit.[25] A disorder to any one part of the brain is a disorder to the whole.[26] An emotional disorder can overcome the power of reason in the strongest of persons.[27] Thus the person emotionally deranged may be driven to commit a crime which he knows to be wrong.[28] Tested by the traditional application of the right and wrong standard, this person is guilty of a crime even though it was not an act of his free will.[29]

In recent years, the right and wrong rule has been the subject of much criticism.[30] The North Carolina Supreme Court as early as 1935

released to his mother who was to place him in another mental hospital. Tests showed his mental age to be four years, eleven months, and he had the intelligence quotient of an imbecile. The court reversed a conviction of murder on the ground that there was an error in the instructions, and awarded a new trial.); State v. Shackleford, 232 N. C. 299, 59 S. E. 2d 825 (1950) (defendant had a long record of maladjustment in his home life, had been tried for petty larceny, drunkenness, immoral conduct, and reckless driving, and served time for killing a man while in service. An expert witness testified that the defendant had a psychopathic personality. Still the defendant was convicted of rape and sentenced to die.); State v. Potts, 100 N. C. 457, 6 S. E. 657 (1887) (dipsomanic convicted of murder).

[24] It should be noted that some experts feel that it is not the law of the M'Naghten Case that is outdated, but it is the interpretation of the law that is outdated. "[A] person who is prevented by mental disease from controlling his own conduct cannot be said, in the true sense of the words, to 'know the nature of his acts' and . . . he is therefore not criminally responsible under the existing law as formulated in the M'Naghten Rules." *Royal Commission on Capital Punishment 1949-1953 Report* (Cmd. 8932) 80 (1953).

[25] "What is needed in the law . . . is a proper conception of the unified personality. Disease of the mind is disease of a unity. . . ." GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 265-266 (Boston: Little, Brown, and Company, 1925); Notes, 40 CORNELL L. Q. 135 (1954); 102 U. OF PA. L. REV. 224 (1954).

[26] "The intellect, the emotions, and the will are not disparate functions operating in separate compartments of the brain, but are wholly interdependent, each reacting on the other. A disorder manifesting itself in one sphere of mental activity is still a disorder of the mind as a whole, and not merely of the one compartment." WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 10 (Buffalo: Dennis and Co., Inc., 1954).

[27] GLUECK, *op. cit. supra* note 21, at 312; "On the basis of undeniable and overwhelming clinical evidence, it has been proven that human behavior is basically emotionally conditioned and that intellectual activities are emotionally determined." Karpman, *Concepts of Law and Psychiatry,* 38 J. OF CRIM. L. AND CRIMINOLOGY 206, 212 (1948).

[28] DAVIDSON, FORENSIC PSYCHIATRY 13 (New York: The Ronald Press Company, 1952); GLUECK, *op. cit. supra* note 21 at 312; MERCIER, CRIMINAL RESPONSIBILITY 157 (New York: Physicians and Surgeons Book Co., 1926); Keedy, *Irresistible Impulse As a Defense in the Criminal Law,* 100 U. OF PA. L. REV. 956, 957 (1952); Weihofen and Overholser, *Mental Disorder Affecting the Degree of a Crime,* 56 YALE L. J. 959, 975 (1947).

[29] State v. Shackleford, 232 N. C. 299, 59 S. E. 2d 825 (1950); State v. Potts, 100 N. C. 457, 6 S. E. 657 (1887).

[30] In a recent poll, the question of the adequacy of the M'Naghten rule was submitted to a large group of psychiatrists in the United States. Eighty per cent stated that the rule was unsatisfactory. In a similar poll among Canadian psychiatrists, ninety per cent expressed dissatisfaction. GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW 408 (New York: W. W. Norton and Company, Inc.,

recognized the fact that the rule was under attack, but refused to make any change.[31] In 1951, the Special Committee on Crime and Psychiatry of the North Carolina Bar Association recommended that the legal test of insanity "should be extended to include diseases which destroy will power and volition and the capacity to control one's conduct."[32]

The *Durham* case is undoubtedly a result of this criticism for it overruled the previous tests applied in the District of Columbia.[33] The court of appeals, in reversing the district court by a unanimous decision discarded the old right and wrong rule, saying:

> "We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances."[34]

The new test to be applied by the district court on retrial is simple in its statement:

> "An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[35]

The mental-cause rule of the *Durham* case is not new in the United States. Eighty-five years ago, in *State v. Pike*,[36] the Supreme Court of New Hampshire affirmed a similar rule which is still followed in that state.[37] The court of appeals probably used the New Hampshire rule

1952); Speaking of the M'Naghten standards, Dr. Gregory Zilboorg said, "These moralistic criteria are the expression of man's horror of the revolting act of murder, but they are disguised in the formalistic, quasi-metaphysical dress of centuries gone by, which one is asked to accept as a judicial formula of logic and law." ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT 17 (New York: Harcourt, Brace, and Company, 1954).

[31] "We are aware of the criticism of this standard by some psychiatrists and others." State v. Jenkins, 208 N. C. 740, 741, 182 S. E. 324, 325 (1935); The court repeated this statement in State v. Creech, 229, N. C. 662, 51 S. E. 2d 348 (1949).

[32] 30 N. C. L. REV. 25 (1951).

[33] Durham v. United States, 214 F. 2d 862 (D. C. Cir. 1954).

[34] *Id.* at 874. The irresistible impulse rule was found inadequate "in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test." *Id.* at 874.

[35] *Id.* at 875. This test is now the sole legal test for insanity in criminal cases in the District of Columbia, for the circuit court of appeals denied a rehearing en banc on September 10, 1954, and the time limit for filing a writ of certiorari expired October 10, 1954. In the subsequent case of Stewart v. United States, 214 F. 2d 879 (D. C. Cir. 1954), the new test was held to be applicable.

[36] The trial court of New Hampshire instructed the jury, "that whether there is such a mental diseases as dipsomania, and whether defendant had that disease, and whether the killing . . . was the product of such disease, were questions of fact for the jury." The Supreme Court of New Hampshire affirmed this instruction. 49 N. H. 399, 407-408 (1870).

[37] The events preceding the New Hampshire case show that particular attention was given to its decision. Chief Justice Doe had voluminous correspondence with Dr. Issac Ray, a leading forensic psychiatrist, concerning responsibility of a mentally disordered person. See: Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 YALE L. REV. 183 (1953).

in formulating its own, for it said, "The rule . . . is not unlike that followed by the New Hampshire court since 1870."[38]

The application of the rule by the court presents no great problem. The court of appeals' proposed charge to the jury[39] suggests the procedure applicable. Evidence is received concerning the mental disease[40] or the mental defect.[41] This will, of course, include the use of expert witnesses. It is then left to the jury to determine (a) if the defendant had a mental disease or mental defect, and (b) if the criminal act was "caused" by the mental disease or defect. The jury must find both for insanity to be a good defense. The application of the rule is somewhat similar to that applied in tort cases where negligence is involved.[42]

The function of the expert witness is to describe the mental condition of the accused. No longer does he have to pass upon the very issue of insanity by testifying to the ability of the defendant to distinguish right from wrong.[43] The issue of insanity must be determined by the jury from the evidence before it, as it properly should be. This also leaves the psychiatrist free to use the terminology of his profession rather than to try to interpret his diagnoses into legal terms.

Nor is there any greater chance that the defendant can feign insanity under this mental-cause rule. For there are the same two safe-guards provided: the expert witness and the jury. Under the right and wrong rule, the testimony of the expert witness, in effect, decides the outcome of the insanity issue as was demonstrated in the *Durham* case at the trial in the district court. Under the new rule, the expert witness testifies only as to mental condition and the jury determines the issue of responsibility. Thus, if one does not catch the pretense, the other should.

The *Durham* case represents an attempt to get away from a legal

[38] Durham v. United States, 214 F. 2d 862, 874 (1954).

[39] "If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity. Thus your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act. These questions must be determined by you from the facts which you find to be fairly deducible from the testimony and the evidence in this case." *Id.* at 875.

[40] "We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating." *Ibid.*

[41] "We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease." *Ibid.*

[42] Henderson v. Henderson, 239 N. C. 484, 490, 80 S. E. 2d 383, 385 (1954), which states law of proximate cause for negligence.

[43] STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE 238.

definition of insanity. The authorities in the field of psychiatry concede that insanity cannot be defined.[44] The attempts of the courts to reach a legal definition of that state of mental disorder which renders a crime excusable have met with some difficulties because of the different interpretations of the terminology used and the difficulty of translating medical testimony into the legal terms used in the tests. The *Durham* case presents no standard to which the court may point and attempt to compare with the mind of the defendant. It is unnecessary under this test for the expert witness to attempt to translate the terms of his profession into legal concepts.

Perhaps the *Durham* case also represents a more humanitarian approach to the problem of the mentally disordered criminal, for rehabilitation rather than punishment could be stressed under this rule.[45] Take, for example, the person with a psychopathic personality. He is able to distinguish right from wrong, but has no control over his will due to emotional instability. He lives for the present, not the future, and any present impulse will control over the threat of possible punishment in the future.[46] The court of appeals speaks of the type of "mental illness characterized by brooding and reflection."[47] That is the person who knows that society has declared an act to be wrong, but after much deliberation decides in his warped manner of thinking that it is better to commit the wrong act.

It would serve no useful purpose to send this type of mentally ill prisoner off to prison to become even more unbalanced and antisocial. An eminent psychiatrist has said,

> "The belief that society serves the common and individual good by a system of rigid punishment has never been fully justified by history, and its persistence looks more and more like supersition than conviction based on fact."[48]

[44] GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW 419-420 (New York: W. W. Norton and Company, Inc., 1952).

[45] A finding of insanity by the jury would not result in the complete discharge of the prisoner, instead he should be committed to a hospital for treatment. This would entail having available adequate facilities and personnel to accommodate such patients. Unfortunately North Carolina appears unwilling to provide adequately for the criminally insane as was demonstrated by the recent defeat of H. R. 48 dealing with sexual psychopaths. Lack of facilities to handle those committed under the proposed statute would seem to be the reason for its defeat.

[46] WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 23 (Buffalo: Dennis and Co., Inc., 1954).

[47] Durham v. United States, 214 F. 2d 862, 874 (D. C. Cir. 1954).

[48] Dr. Zilboorg believes that society is too concerned with the idea of seeking revenge against the violator of the law. He agrees that a criminal should be punished for his crimes when punishment would be effective, but in the case of mentally ill prisoners, punishment has little or no effect as a deterrent of future crimes. ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT 97 (New York: Harcourt, Brace, and Company, 1954); "Punishment, in such instances, is not useful as a means of dissuading the offender from repeating his unlawful act. . . ." Waelder, *Psychiatry and the Problem of Criminal Responsibility,* 101 U. OF PA. L. REV. 378, 379 (1952).

A program of rehabilitation based on psychiatric treatment could cure the accused in many cases, and by doing this, more serious crimes in the future would be prevented. It is society, not the defendant, which will receive the chief benefits from this rule.

In a dissenting opinion in a case in the United States Circuit Court of Appeals for the Third Circuit, there was a statement suggestive of the North Carolina situation,

> "The rule of M'Naghten's case was created by decision. Perhaps it is not too much to think that it may be altered by the same means."[49]

THOMAS G. NALL.

Criminal Law—Improper Court Response to Spontaneous Jury Inquiry as to Pardon and Parole Possibilities

Does a jury which has "unbridled discretion" to recommend life imprisonment in a capital case have a right to consider what effect parole and pardon may have upon that sentence? North Carolina first answered this question in *State v. Dockery*,[1] where a private prosecutor referred to parole possibilities in his argument before the jury. In reversing, the North Carolina Supreme Court held that such argument was prejudicial and directly in conflict with the 1949 statutory proviso which granted to juries the right to recommend life imprisonment in capital cases.[2] Recently, in *State v. Conner*,[3] the problem arose in a different manner. Here, the jury spontaneously returned to the court room after having deliberated for some time, and one of the jurors asked the court the following question: "Will the defendant be eligible for parole if given life imprisonment?" The court replied without elaboration, "Gentlemen, I cannot answer that question." The supreme court held that the presiding judge was correct in refraining from commenting on defendant's eligibility for parole, because such matters are deemed in law to be irrelevant to the issues involved in the case and prejudicial to the accused. The court granted a new trial, however, on the ground that once such a question was propounded, it became the duty of the presiding judge to positively charge the jury to put the question and matters relating thereto out of their minds.

The courts have long been divided as to the permissibility of an explanation, in response to queries from the jury, of the possible effect of

[49] United States v. Baldi, 192 F. 2d 540, 568 (3rd Cir. 1951). The dissenting judges were Biggs, McLaughlin, and Staley.

[1] 238 N. C. 222, 77 S. E. 2d 664 (1953).

[2] N. C. GEN. STAT. § 14-17 (1953). The 1949 proviso referred to above by the court was added to this section by the 1949 Session Laws of North Carolina, Chapter 299, section 1.

[3] 241 N. C. 468, 85 S. E. 2d 584 (1955).

pardon and parole upon a sentence. North Carolina's position is that of perhaps a bare majority of jurisdictions,[4] with the exception that few other courts hold the trial court responsible for instructing the jury to dismiss the factor from their minds,[5] once the question has been propounded.

The basic reason for excluding such matters from the jury is that the power of pardon and parole rests with the executive—not the judicial—branch of government, and the jury's discretion should not be influenced by speculation as to what another branch of government may

[4] In addition to North Carolina, the following states hold that such explanation is improper: *Colorado:* Sukle v. People, 107 Colo. 269, 111 P. 2d 233 (1941). *Georgia:* Bland v. State, 211 Ga. 178, 84 S. E. 2d 369 (1954); Strickland v. State, 209 Ga. 65, 70 S. E. 2d 710 (1952); Thompson v. State, 203 Ga. 416, 47 S. E. 2d 54 (1948). In the *Bland* case three justices thought the trial judge's explanation of pardon and parole in response to a jury inquiry was proper. Another concurred on the ground that no objection thereto was timely entered, so the case was affirmed. (The North Carolina court usually grants a new trial in capital cases where there is error, regardless of whether an exception has been timely entered.) See Note, 31 N. C. L. Rev. 300 (1953). *Kentucky:* Houston v. Commonwealth, 270 Ky. 125, 109 S. W. 2d 45 (1937); Gaines v. Commonwealth, 242 Ky. 237, 46 S. W. 2d 75 (1932). *Missouri:* State v. Quilling, 363 Mo. 1016, 256 S. W. 2d 751 (1953). But see also State v. McGee, 361 Mo. 309, 234 S. W. 2d 587 (1950), and State v. Shipman, 354 Mo. 265, 189 S. W. 2d 273 (1945). *Pennsylvania:* Commonwealth v. Carey, 368 Pa. 157, 82 A. 2d 240 (1951); Commonwealth v. Johnson, 368 Pa. 139, 81 A. 2d 569 (1951); Commonwealth v. Mills, 350 Pa. 478, 39 A. 2d 572 (1944). *Tennessee:* Williams v. State, 191 Tenn. 456, 234, S. W. 2d 993 (1950); Porter v. State, 177 Tenn. 515, 151 S. W. 2d 171 (1941). *Texas:* Moore v. State, 152 Tex. Cr. App. 312, 213 S. W. 2d 844 (1948); Prater v. State, 131 Tex. Cr. 35, 95 S. W. 2d 971 (1936). *Virginia:* Jones v. Commonwealth, 194 Va. 273, 72 S. E. 2d 693 (1952).

Explanations by the trial court have been sustained in the following states: *Arkansas:* Glover v. State, 211 Ark. 1002, 204 S. W. 2d 373 (1947). But in a later case it was held error for the trial judge to answer from his personal observations rather than with declarations of law. Bell v. State, 265 S. W. 2d 709 (Ark. 1954). *California:* It is generally held that the jury should not consider the possibility of parole or pardon in determining guilt; however, the jury may consider and the court instruct as to how pardon and parole relates to the punishment. See People v. Barclay, 40 Cal. 2d 146, 252 P. 2d 321 (1953); People v. Chessman, 38 Cal. 2d 166, 238 P. 2d 1001 (1951); People v. Osborn, 37 Cal. 2d 380, 231 P. 2d 850 (1951); People v. Alcade, 24 Cal. 2d 177, 148 P. 2d 627 (1944). Earlier cases clearly held that the proper course was for the trial judge to refuse to discuss parole and pardon in response to queries from the jury. People v. Hoyt, 20 Cal. 2d 306, 125 P. 2d 29 (1942); People v. Ramos, 3 Cal. 2d 269, 44 P. 2d 301 (1935). *Kansas:* State v. Lammers, 171 Kan. 668, 237 P. 2d 410 (1951). *Nebraska:* The court, in the exercise of judicial discretion, may reply or refuse to reply to jury inquiry as to parole eligibility of defendant. Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701 (1953). *New Jersey:* State v. Molnar, 133 N. J. L. 327, 44 A. 2d 197 (1945); State v. Barth, 114 N. J. L. 112, 176 Atl. 183 (1935). *Ohio:* State v. Tudor, 154 Ohio St. 249, 95 N. E. 2d 385 (1950); State v. Evans, 146 Ohio St. 276, 63 N. E. 2d 838 (1945); Liska v. State, 115 Ohio St. 283, 152 N. E. 667 (1926); State v. Schiller, 70 Ohio St. 1, 70 N. E. 505 (1904). *Wyoming:* State v. Carrol, 52 Wyo. 29, 69 P. 2d 542 (1937). However, jury should be told not to speculate on what might happen after verdict.

[5] See Jones v. Commonwealth, 194 Va. 273, 72 S. E. 2d 693 (1952). But note that in Virginia it is the duty of the jury to impose such punishment as they consider to be just under the evidence; whereas, in North Carolina, the jury need not consider the evidence in exercising its "unbridled discretion" to recommend life imprisonment. State v. McMillan, 233 N. C. 630, 65 S. E. 2d 212 (1951).

do in the future.[6] Furthermore, punishment is assessed against a person convicted of crime on the basis of his acts and conduct prior to trial; whereas, parole is determined mainly on the basis of subsequent acts and demeanor.[7] Other less frequently used arguments include the following: parole and pardon rules and regulations may change; hence, the regulations influencing a jury's action might not be the ones the defendant will be subject to at a later time.[8] If jurors impose capital punishment because of the fear that the defendant may be paroled at some future time, they are, in effect, predicting that he will be paroled even though unworthy of it.[9] Moreover, even though an undeserving person may be released, the weakness is one of the parole system and does not necessarily mean that the defendant should be executed.[10]

In cases where the prosecuting counsel argues the possibility of parole or pardon as in the *Dockery* case, the majority of jurisdictions do not regard it as proper;[11] however, many are reluctant to consider this sufficiently prejudicial to warrant reversal.[12] In Kentucky, where the propriety of such argument has been most frequently considered, the

[6] Sukle v. People, 107 Colo. 269, 111 P. 2d 233 (1941); Thompson v. State, 203 Ga. 416, 47 S. E. 2d 53 (1948); State v. Conner, 241 N. C. 468, 85 S. E. 2d 584 (1955); Commonwealth v. Johnson, 368 Pa. 139, 81 A. 2d 569 (1951); Prater v. State, 177 Tenn. 515, 151, S. W. 2d 171 (1941).

[7] State v. Conner, 241 N. C. 468, 469, 85 S. E. 2d 584, 586 (1955).

[8] Broyles v. Commonwealth, 267 S. W. 2d 73 (Ky. 1954).

[9] Knowlton, *Problems of Jury Discretion in Capital Cases,* 101 U. OF PA. L. REV. 1009, 1118 (1953).

[10] *Ibid.*

[11] *Alabama:* Cobb v. State, 248 Ala. 548, 28 So. 2d 713 (1947); Oliver v. State, 232 Ala. 5, 166 So. 615 (1936). *California:* People v. Byrd, 42 Cal. 2d 200, 266 P. 2d 505 (1954). *Illinois:* People v. Burgard, 377 Ill. 322, 36 N. E. 2d 558 (1941); People v. Klapperich, 370 Ill. 588, 19 N. E. 2d 579 (1939); People v. Kircher, 333 Ill. 200, 164 N. E. 150 (1928). *Indiana:* Pollard v. State, 201 Ind. 180, 166 N. E. 654 (1929). *Kentucky:* Broyles v. Commonwealth, 267 S. W. 2d 73 (Ky. 1954); Howard v. Commonwealth, 313 Ky. 667, 233 S. W. 2d 282 (1950); Bass v. Commonwealth, 296 Ky. 426, 177 S.W. 2d 282 (1944); Powell v. Commonwealth, 276 Ky. 234, 123 S. W. 2d 279 (1938); Lee v. Commonwealth, 262 Ky. 15, 89 S. W. 2d 316 (1935); Tiernay v. Commonwealth, 241 Ky. 201, 43 S. W. 2d 661 (1931); Hall v. Commonwealth, 207 Ky. 718, 270 S. W. 5 (1925); Bolin v. Commonwealth, 206 Ky. 608, 268 S. W. 306 (1925); Chappel v. Commonwealth, 200 Ky. 429, 255 S. W. 90 (1923). *Louisiana:* State v. Henry, 196 La. 217, 198 So. 910 (1940); State v. Johnson, 151 La. 625, 92 So. 139 (1922). *Mississippi:* Augustine v. State, 201 Miss. 731, 28 So. 2d 243 (1946). *Pennsylvania:* Commonwealth v. Earnest, 342 Pa. 544, 21 A. 2d 38 (1941). *Texas:* Pena v. State, 137 Tex. Cr. 311, 129 S. W. 2d 667 (1939). *Virginia:* Dingus v. Commonwealth, 194 Va. 273, 149 S. E. 414 (1929).

The following states have held such arguments by prosecutors not to be improper: *Arizona:* State v. Macias, 60 Ariz. 93, 131 P. 2d 810 (1942); Sullivan v. State, 47 Ariz. 224, 55 P. 2d 312 (1936). *Arkansas:* House v. State, 122 Ark. 476, 92 S. W. 2d 868 (1936). *Georgia:* Fields v. State, 88 Ga. App. 1, 75 S. E. 2d 839 (1953); McLendon v. State, 205 Ga. 55, 52 S. E. 2d 294 (1949); Bryan v. State, 206 Ga. 73, 55 S. E. 2d 574 (1949); Hyde v. State, 196 Ga. 475, 26 S. E. 2d 744 (1943); Lucas v. State, 146 Ga. 315, 91 S. E. 72 (1916). *Washington:* State v. Buttry, 199 Wash. 228, 90 P. 2d 1026 (1939); State v. Talbott, 199 Wash. 431, 91 P. 2d 1020 (1939).

[12] See Note, 28 N. C. L. REV. 342 (1949).

court formerly took such a position.[13] Recently, however, the Kentucky court granted a new trial on the ground that such argument was prejudicial.[14] Apparently, the court was influenced by the fact that prosecutors persisted in talking about parole and pardon, though the court had for thirty years consistently condemned such argument as improper.

Paradoxically, the Georgia court does not regard argument of parole and pardon possibilities by the prosecutor as improper, although it has held instruction by the trial court in response to jury questions about such matter to be reversible error.[15] One distinction offered is that when the prosecutor refers to the possibility of a pardon or parole, it does not bind the jury but is merely a matter of argument; whereas, when the court speaks, the jury receives it as solemn verity.[16] However, a review of the language used by some of the Georgia proscutors immediately raises the issue as to which is more prejudicial, a fair and accurate instruction on the part of the court, or a zealous and impassioned argument by the prosecutor.[17]

There is substantial authority holding that it is not improper for a jury to consider parole and pardon possibilities.[18] One line of reasoning is that the fact that a person sentenced to life imprisonment may be paroled is universal knowledge among intelligent citizens, and the jury is entitled to consider the effect parole will have upon the sentence which it imposes.[19] Also, it is maintained that society is entitled to have the jury know the true meaning of their verdict,[20] namely, life imprisonment provided the defendant is not paroled or pardoned.

Where, as in North Carolina, there are no conditions attached to, and no qualifications or limitations imposed upon, the right of the jury to recommend life imprisonment,[21] there would seem to be several reasons

[13] See Kentucky cases cited in note 11 *supra*, which were decided prior to 1954.
[14] Broyles v. Commonwealth, 267 S. W. 2d 73 (Ky. 1954).
[15] Compare Georgia cases cited in note 11 *supra*, with those cited in note 4 *supra*.
[16] Bland v. State, 211 Ga. 178, 84 S. E. 2d 369, 371 (1954). (concurring opinion).
[17] "If you give the defendant a life sentence his lawyers and some politicians will get him out of jail and have him walking the streets in a few years." McLendon v. State, 205 Ga. 55, 63, 52 S. E. 2d 294, 299 (1949). In White v. State, 177 Ga. 115, 125, 169 S. E. 499, 504 (1933), the judge instructed the jury not to consider the following language; however, no mistrial was declared and the case was affirmed on appeal: "The jury has it in their power to recommend imprisonment for life. Now what does that mean? It means that after three years this defendent has a right to ask for a parole by going over with a sob sister from the Interracial Commission."
[18] State v. Macias, 60 Ariz. 93, 131 P. 2d 810 (1942); Sullivan v. State, 47 Ariz. 224, 55 P. 2d 312 (1936); see also other cases in second paragraph, note 11 *supra*.
[19] State v. Molnar, 133 N. J. L. 327, 44 A. 2d 197 (1945); State v. Shawen, 40 W. Va. 1, 8, 20 S. E. 873, 875 (1894). In the latter case it is said: "The jury was the sole judge as to whether prisoner should die or suffer lifelong imprisonment—and cannot the jury consider whether the circumstances of the crime show its perpetrator to be a desperate man and an enemy of society, and dangerous, should he escape or be pardoned?"
[20] Bland v. State, 211 Ga. 178, 84 S. E. 2d 369 (1954).
[21] State v. McMillan, 233 N. C. 630, 65 S. E. 2d 212 (1951).

for allowing the jury to consider the possibility of defendant's subsequent release in arriving at its decision.[22]

In the first place, if the basic philosophy upon which a jury seeks to arrive at its decision is one based upon the idea of punishment, it would seem proper that they consider parole and pardon possibilities, because such factors bear directly on the quantum of the punishment.

Secondly, if the sentence is imposed as a deterrent to future crimes, should the jury not be allowed to consider whether a life sentence with a possibility of parole will be a sufficient deterrent? Also, if the sentence is based upon the idea of protecting society through the rehabilitation of the defendant, the jury must necessarily decide whether the defendant is beyond rehabilitation. If they decide he is, should they be forbidden to consider the possibility that he may be released in the future if given a life sentence?

At any rate, it is reasonable to assume that most intelligent jurors are aware that there is a fair possibility that a convicted person will not serve the full sentence imposed. It is equally reasonable to assume that they often consider this possibility in deliberating on questions of punishment in capital cases. Even if the correctness of the North Carolina court in holding such considerations to be prejudicial and improper be conceded, the present approach of the court affords theoretical protection only in those cases where the issue of parol or pardon is openly raised by the prosecutor or jury. In other cases, the jury is left free to apply its own knowledge of the laws relating to parole and pardon, if it chooses to do so.[23]

As long as we are to follow the present North Carolina view as to the total irrelevancy of parole and pardon, it is submitted that a better approach would be to allow the trial court to inform the jury in its charge that they are to consider no matters relating to pardon or parole in withholding a recommendation of life imprisonment. This would prevent the problem of a later request by the jury for information as to the possibility of parole or pardon. But perhaps even more important, it would discourage the jury from being influenced by any misconceived ideas individual jurors might have as to defendant's parole and pardon eligibilty.

WILLIAM E. GRAHAM, JR.

[22] "The court has said the jurors have the right in their unbridled discretion to recommend life imprisonment. The right to refuse to make such a recommendation is equally unbridled. For the judge to have told the jury that the question of parole was no concern of theirs and that they should not consider it tends to put a bridle on discretion." Higgins, J., dissenting in Conner v. State, 241 N. C. 468, 472, 473, 85 S. E. 2d 584, 588 (1955).

[23] In any event, it is doubtful whether the defendant's interests are served by leaving the jury to apply its own limited knowledge of parole laws, and the fact of this common knowledge cannot be overlooked." Note, 90 U. OF PA. L. REV. 221, 222 (1941).

Torts—Res Ipsa Loquitur—Mid-Air Explosion of Aircraft

Plaintiffs' homes were showered with burning fuel and debris following the mid-air explosion of a B-47 Stratojet operated by the United States Air Force. The aircraft was totally destroyed and there were no survivors. The wives of both plaintiffs and plaintiff Williams' two children were burned, the latter fatally, and the homes of both plaintiffs were destroyed.[1] At trial plaintiffs were unable to show any specific "negligent or wrongful act or omission"[2] and rested their case on the rule of res ipsa loquitur. At the close of the plaintiffs' evidence, counsel for the defendant moved for judgment in its favor, stating that as national security would be imperiled the government would not call any witnesses to testify.[3] Judgment was entered for the United States on the grounds that the court lacked jurisdiction, the activity being of the sort falling within the section of the Federal Tort Claims Act related to discretionary activities of the United States government.[4] The United States Court of Appeals for the Fifth Circuit held these grounds untenable but refused to disturb the decision, affirming the ruling on the ground that the doctrine of res ipsa loquitur was inapplicable to the facts.[5]

Under Florida law, the rule of res ipsa loquitur is one of circumstantial evidence, by which allegations and proof of the circumstances surrounding the occurrence may raise a presumption of negligence, based on the probability that negligence on the part of some person was the legal cause of the plaintiff's injury. To rebut this presumption the defendant must show that proper care was in fact exercised.[6] The rule has various effects in different jurisdictions,[7] but in Florida the effect of the rule is to afford a sufficient basis for a finding that the accident arose from want of care in the absence of a satisfactory showing to the con-

[1] Williams v. United States, 115 F. Supp. 386 (N. D. Fla. 1952).

[2] Suits against the government for torts of its employees are brought under the Federal Tort Claims Act, 60 STAT. 843 (1946), 28 U. S. C. §§ 1346(b), 2671 *et seq.* (1952). This act in substance provides that the United States shall be liable for the negligence of its employees, acting within the scope of their employment, if a private person, in accordance with the law of the place where the act or omission occurred, would be liable. *Cf.* United States v. Harris, 205 F. 2d 765 (11th Cir. 1953). It is procedural and bare of any substantive tort law implications.

[3] See United States v. Reynolds *et al.*, 345 U. S. 1 (1953). See Note, 32 A. L. R. 2d 393 (1953).

[4] Under 28 U. S. C. § 2680 (a) (1950), jurisdiction is withheld as to discretionary acts of the United States Government. See Dalehite v. United States, 346 U. S. 15 (1953), and Note, 32 N. C. L. REV. 118 (1954).

[5] Williams v. United States, 218 F. 2d 473 (5th Cir. 1955).

[6] Orme v. Burr, 157 Fla. 378, 25 So. 2d 870 (1946).

[7] The majority rule is that the effect of the doctrine is to raise an inference of negligence. See Williams v. United States, 218 F. 2d 473, 475 (5th Cir. 1955). See PROSSER, TORTS § 43 (1941). It is also said to raise an inference of fact. Parcell v. United States, 104 F. Supp. 110 (S. D. W. Va. 1951) and cases cited therein. See Notes, 53 A. L. R. 1494 (1928) and 167 A. L. R. 658 (1947). The difference in the statements of the effect of the rule may be semantic. See Seavey, *Res Ipsa Loquitur, Tabula in Naufragio,* 63 HARV. L. REV. 643 (1950).

trary by the defendant.[8] The rationale for the rule is that as between the plaintiff and the defendant, the defendant is more likely to know or have access to knowledge as to whether proper care was exercised. To justify this reasoning, there must be a showing that the defendant had exclusive control of the instrumentality causing injury to the plaintiff, and that the occurrence was one which does not happen in the ordinary course of events if those having the management of the instrumentality use proper care.[9]

The instant case refers to the rule as one of human experience and notes that although inapplicable at one time, in that it cannot be shown that the occurrence was extraordinary in the absence of negligence, it may later become applicable, "when experience . . . in the situation is so uniform and well established that it is not necessary to prove this by extrinsic evidence."[10] Speaking of the requirement that plaintiff show extraordinariness, the court said further:

> "We have no knowledge, judicial or otherwise as to what would cause a jet airplane to explode while in mid-air."[11]

The court points, as do many legal writers, to a split of authority as to the applicability of the doctrine to aircraft accidents.[12] Both the "exclusive control" and "extraordinary event" requirements have given difficulty in this application of the res ipsa loquitur doctrine. The former is more often involved in litigation involving private aircraft, where there is the problem of dual control, and the latter in the commercial carrier cases, although the first requirement is troublesome even in these cases where the problem is one of negligence in the repair or maintenance of the aircraft by an independent contractor. The applicability of the doctrine has been tested predominantly in suits by passengers or guests against the owners or operators of private or commercial aircraft.[13]

The problems involved where negligence in the operation or maintenance of the aircraft causes personal injury or property damage to persons on the ground is totally removed from occurrences in which there is injury to the person or property of the passenger or guest. In the former situation the injured party is removed from questions of assumption of risk or contributory negligence, *i.e.,* there is no question as to the

[8] Orme v. Burr, *supra* note 6.
[9] PROSSER, TORTS § 43 (1941).
[10] Williams v. United States, 218 F. 2d 473, 476 (5th Cir. 1955).
[11] *Ibid.*
[12] See United States v. Kesinger, 190 F. 2d 529 (10th Cir. 1951), where authorities on both sides are listed. See also Note, 6 A. L. R. 2d 528 (1949). Comprehensive articles with analytical tabulations appear in McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation,* 37 VA. L. REV. 55 (1951). See also Goldin, *Res Ipsa Loquitur in Aircraft Law,* 18 So. CALIF. L. REV. 15, 152 (1946).
[13] See note 12 *supra.* See also Notes, 22 N. C. L. REV. 160 (1944) and 28 N. C. L. REV. 432 (1950).

defendant's exclusive control. Another distinguishing feature is the nature of the interest invaded in each type case. In the ground damage cases, there is an invasion of two of the plaintiff's interests; (1) freedom from negligently inflicted harm to person or property, and (2) freedom from trespass upon his possessory interests in land.[14]

No reported case on "all fours" with the instant case has been found, and in those cases presenting somewhat similar fact situations the plaintiffs have not chosen to rely solely on negligence with its doctrine of res ipsa loquitur but have asserted in addition strict liability,[15] whether common law for trespass,[16] statutory, [17] or that arising from the carrying on of an ultrahazardous activity.[18] Also, in many of these cases the plaintiff has been able to prove some antecedent acts of specific negligence on the part of the defendant.[19] In the cases asserting that res ipsa loquitur is applicable, it is questionable whether statements to that effect are holdings or *dicta.*

Two cases seem to hold that the doctrine of res ipsa loquiture is applicable. However, in *Parcell v. United States*[20] the court bolsters its decision with the further statement that the defendant was also liable on the grounds of strict liability for carrying on an ultrahazardous activity. In *San Diego Gas & Electric Co. v. United States*[21] there was evidence that the aircraft had been continuously operated below the legal altitude of 500 feet.

In the *Parcell* case two jet aircraft crashed and then exploded, hurling burning fuel into the plaintiff's dwelling and outbuildings. Speaking of the grounds asserted for the decision in the principal case, the court said:

> "If one were to follow this logic to its ultimate conclusion there would be few cases indeed in which the doctrine would be applicable. It is because the facts surrounding the accident *are* unknown that the plaintiff seeks the benefit of the legal inference or presumption. An accident known to grow out of one set of circumstances and no others would supply a plaintiff with good and

[14] PROSSER, TORTS §§ 6, 13 (1941).
[15] RESTATEMENT, TORTS §§ 519, 520 (a), (b), (d). (1938). PROSSER, TORTS § 44 (1941).
[16] United States v. Gaidys *et ux.*, 194 F. 2d 762 (10th Cir. 1952). *Cf.* Rochester Gas and Electric Corp. v. Dunlop, 266 N. Y. Supp. 469 (Monroe Co. Ct. 1933) (Res ipsa loquitur not applicable but defendant liable on theory of trespass.)
[17] United States v. Praylou *et al.*, 208 F. 2d 291 (4th Cir. 1953); D'Anna v. United States, 181 F. 2d 335 (4th Cir. 1950); Prentiss v. National Airlines Inc., 112 F. Supp. 306 (D. N. J. 1953).
[18] Parcell v. United States, 104 F. Supp. 110 (S. D. W. Va. 1951).
[19] United States v. Gaidys *et ux.*, 194 F. 2d 762 (10th Cir. 1952); United States v. Kesinger, 190 F. 2d 529 (10th Cir. 1951); San Diego Gas & Elec. Co. v. United States, 173 F. 2d 92 (9th Cir. 1949); Leisy v. United States, 102 F. Supp. 789 (D. Md. 1953); Evans *et al.* v. United States, 100 F. Supp. 5 (D. La. 1951).
[20] Parcell v. United States, 104 F. Supp. 110 (S. D. W. Va. 1951).
[21] San Diego Gas & Elec. Co. v. United States, 173 F. 2d 92 (9th Cir. 1949).

sufficient evidence of itself, without the aid of a rule of law based on probabilities."[22]

In *D'Anna v. United States*[23] an auxiliary fuel tank suspended beneath the fuselage of a diving naval aircraft became detached and fell into the plaintiff's fruitstand injuring the plaintiff and others, and damaging property. Here, there was a statute making the owner of the aircraft prima facie liable, rebuttable by a showing of proper care. The court held res ipsa loquitur was applicable *in addition* to the statutory presumption and justified a finding of liability. Speaking of the burden on the defendant to rebut the presumption, Chief Judge Parker said.

"Such burden . . . is more difficult to meet where the plane itself or an object attached to it crashes to the ground and inflicts injury, for the falling in such case is the strongest sort of proof of either negligent operation defective constrution or equipment."[24]

The court points out in *Kesigner v. United States*[25] that the hazards of flying have been so reduced that the proposition is now acceptable that aircraft do not usually fall in the absence of negligence. This view has gained some support since World War II largely due to considerations of the social value of air transport and the desire to remove the fledgling industry from under the rules of strict liability. On the other hand, there has been much agitation pro and con among the legal writers as to which policy should control, and the trend in thinking seems to be veering towards idea that flying is an ultrahazardous activity and that those legally responsibile should be liable accordingly.[26]

The court in the instant case seems convinced that aviation has not yet reached the staged where the fiction of *vis major* or Act of God has no application, and feels that there are some "accidents" which no amount of care would avoid. The distinction drawn between jet and conventional aircraft may be valid, and if so, the application of the legal rule is probably correct. However, if such be the case, this is the strongest argument for the imposition of strict liability. Other considerations would seem to indicate that the modified strict liability statute such as

[22] 104 F. Supp. 110, 115.
[23] 181 F. 2d 335 (4th Cir. 1950).
[24] *Id.* at 337.
[25] 190 F. 2d 529 (10th Cir. 1951).
[26] See Notes, 22 GEO. WASH. L. REV. 245 (1954), 30 TEXAS L. REV. 790 (1952). Orr, *Constitutionality of Prentiss v. National Airlines,* 21 INSUR. COUNSEL JOUR. 48 (1954) (Statistical survey of air operations in relation to fatal accidents.) Leading articles urging strict liability are: Vold, *Strict Liability for Aircraft Crashes and Forced Landings on Ground Victims Outside of Established Landing Areas,* 5 HASTING L. JOUR. 1 (1953) and Baker, *An Eclipse of Fault Liability,* 40 VA. L. REV. 273 (1954). By international agreement absolute liability is imposed for damages caused on the surface by aircraft or objects falling therefrom. See discussion of 1952 Rome Aircraft Convention in 31 CAN. BAR. REV. 90 (1953).

that involved in the *D'Anna* case presents the most workable approach to the problem for the benefit of all concerned.[27] Without the benefit of the statute and without access to some evidence of negligence the plaintiff faces the difficulty illustrated here.[28]

North Carolina has not considered the problem directly, and has no explicit statutory provision.[29] If the case applying the doctrine of res ipsa loquitur where injuries were sustained by a guest is held not to be controlling,[30] the policy of the statutory provision as to dangerous flying may afford the plaintiff some evidence of negligence.[31]

WALTER LEE HORTON, JR.

Libel—Special Damages

The law of libel is an area of the law which at the present time is fraught with confusion in this jurisdiction.

Some of this confusion in North Carolina and elsewhere may be attributed to the fact that the common law distinguishes between that defamation which is oral and that which is written. Originally the common law courts took no jurisdiction over defamatory utterances, *i.e.*, spoken statements calculated to detract in a substantial way from the esteem in which a person is held in the community. The ecclesiastical courts took them under their jurisdiction, regarding them as sins, and dealt with them accordingly. As these spiritual courts began to lose

[27] Art. I-A Maryland Code § 9 (1951) as applied in D'Anna v. United States, 181 F. 2d 335 (4th Cir. 1950), provides that the owner of any aircraft damaging property or injuring persons in ascent, descent, or flight shall be prima facie liable in the absence of contributory negligence of the person involved or unless the aircraft is used without the consent, express or implied, of the owner. This statute provides the plaintiff a way to the jury as contrasted with the futility of the plaintiff's position in the *Williams* case. It does not burden the aircraft industry with absolute liability, but at the same time affords the plaintiff protection.

[28] These problems are set out and discussed fully in Simpson, *Use of Aircraft Accident Investigation Information in Actions for Damages,* 17 J. AIR L. 283 (1950). As to preparation for trial see Finley, *Trial Technique in Aircraft Accident Cases,* 31 TEXAS L. REV. 809 (1953), in which the author points out the overwhelming ignorance of most attorneys in the intricacies of obtaining, evaluating, and presenting evidence in aircraft litigation. As was indicated in Williams v. United States, 115 F. Supp. 386 (N. D. Fla. 1952), where military aircraft are involved recourse may be had to Congress for legislative relief. For some of the difficulties involved in obtaining Congressional relief where the judiciary offers none see Gellhorn and Lauer, *Congressional Settlement of Tort Claims against the United States,* 55 COL. L. REV. 1 (1955).

[29] Section 5 of the Uniform Aviation Act was adopted by North Carolina in 1927, as N. C. GEN. STAT. § 63-14 (1943). It was repealed in 1947 by c. 1069, § 3 of Session Laws of 1947. This statute is identical with that involved in the *Praylou* and *Prentiss* cases cited in footnote 17 *supra.* This statute imposed strict liability under precisely the same conditions as the Maryland statute set out in footnote 27 *supra* raises a prima facie presumption.

[30] Smith v. Whitley, 223 N. C. 534, 27 S. E. 2d 442 (1943). See Note, 28 N. C. L. REV. 432 (1950).

[31] N. C. GEN. STAT. § 63-18 (1953) makes it a misdemeanor to drop any object from an aircraft other than water or loose sand.

their power, tort actions for slander began to creep into the common law courts. Thus arose a conflict over jurisdiction, which led the common law courts to hold that oral defamation was a spiritual matter to be dealt with by the spiritual court unless "temporal" damages could be proved.[1] However, as the common law courts strengthened their position, they assumed jurisdiction over three classes of oral defamation declaring that these were of such serious character that malice and temporal damages would be conclusively presumed. These three favored classes were oral charges (1) imputing the commission of a crime, (2) imputing a loathesome disease, or (3) tending to prejudice one in his trade, profession, or calling.[2] Modern statutes have added a fourth class to this group.[3]

It was not until much later, after the introduction of printing, that a separate set of rules was worked ont for written and printed defamation by the Court of Star Chamber. With the abolition of the Star Chamber, jurisdiction over written and printed defamation passed to the common law courts. All written or printed statements tending to injure one's reputation and expose him to hatred, contempt, or ridicule were considered defamatory and actionable without the necessity of proving special damages. Perhaps there are three reasons why proof of special damages was not required in cases of written defamation: (1) originally, written defamation was a crime as well as a tort, (2) it was considered much more serious to put down deliberately on paper a lasting memorial of a lie against a person's good reputation, and (3) there was no jurisdictional conflct over these actions.[4]

Therefore, at common law oral defamations were divided into two groups—those which came within the favored classes, and all others. The former were called slander per se, *i.e.,* actionable without proof of special damages. The latter were called slander per quod, *i.e.,* actionable only with allegation and proof of special damages. Within the favored classes, constituting slander per se, it made no difference whether the spoken words were slanderous on their face or whether resort to extrinsic evidence was necessary to show that the oral statements were slanderous. On the other hand, libelous statements were not separated into classes. Any written or printed statements that were defamatory were actionable without proof of special damage. Thus it is obvious that the phrase "slander per se" merely had reference to the three favored classes which were actionable in themselves, and that it did not mean slander "on its face" as one might use the term "per se" today. As libel was not divided into classes which required proof of special damages and classes

[1] PROSSER, TORTS 793-799 (1941); MCCORMICK, DAMAGES 415-419 (1935); Note, 14 CALIF. L. REV. 61 (1925).

[2] PROSSER, TORTS 793-799 (1941); MCCORMICK, DAMAGES 415-419 (1935).

[3] N. C. GEN. STAT. § 99-4 (1953). (Dealing with charges of incontinency against an innocent woman).

[4] *Supra,* note 2.

which did not, there was no place in the law for such a corresponding phrase as "libel per se." Any libelous statement was actionable in itself. However—and herein lies the root of the confusion today—the courts did begin to use the phrase "libel per se," but they used it simply to distinguish between written or printed statements which were clearly libelous on their face and those in which resort to extrinsic evidence was necessary in order to reveal their defamatory meanings. Their use of the phrase carried no implication with respect to special damages.[5]

The courts of the United States accepted the common law rule that any libel was actionable without the necessity of pleading and proving special damages, and in the minority of the American jurisdictions this is the rule today, not only as to written or printed publications which are defamatory upon their face, but also as to those which require extrinsic evidence to establish their defamatory meaning.[6] However, a greater number of courts hold that where extrinsic evidence is necessary to establish the defamatory meaning, libel is not actionable without proof of special damages, *i.e.*, if the words are not libelous "per se" (on their face), they are not actionable without proof of special damages.[7] This majority rule clearly is the product of confusion. It differs from the corresponding rule of slander in only one respect—the difference between the meaning of "slander per se" and libel "per se." The courts have tripped over their own ambiguous device, confused the dual use of "per se," and, in their confusion, imported the concept of special damages from the field of slander into the field of libel. An illustration will point out the difference in the two views. If the written or printed publication stated that X was a Negro, when in fact X was a white man, the minority would and do hold that the publication is libelous and actionable without proof of special damages even though the publication is not

[5] PROSSER, TORTS 793-799 (1941); POLLOCK, TORTS 238-239 (12th ed. 1923); MCCORMICK, DAMAGES 415-419 (1935); NEWELL, SLANDER AND LIBEL §§ 5, 6, 20, 21 (4th ed. 1924); Note, 14 CALIF. L. REV. 61 (1925); Note, MICH. L. REV. 253 (1939).

[6] SMITH AND PROSSER, CASES ON TORTS 1022 (1952); Merchants' Ins. Co. v. Buckner, 98 Fed. 222 (6th Cir. 1899); Ervin v. Record Pub. Co., 154 Cal. 79, 97 P. 21 (1908); Hughes v. Samuels Bros., 179 Iowa 1077, 159 N. W. 589 (1916); Courier Journal Co. v. Noble, 251 Ky. 527, 65 S. W. 2d 703 (1933); Sydney v. MacFadden Newspaper Pub. Corp., 242 N. Y. 208, 151 N. E. 209 (1926); Marr v. Putnam, 196 Ore. 1, 246 P. 2d 509 (1952); Reiman v. Pacific Development Soc., 132 Ore. 82, 284 P. 575 (1930).

[7] SMITH AND PROSSER, CASES ON TORTS 1025 (1952); Rose v. Indianapolis Newspapers, 213 F. 2d 227 (7th Cir. 1954); Landstrom v. Thorpe, 189 F. 2d 46 (8th Cir. 1951); Ilitzky v. Goodman, 57 Ariz. 216, 112 P. 2d 860 (1941); Shaw Cleaners and Dyers, Inc., v. Des Moines Dress Club, 215 Iowa 1130, 245 N. W. 231 (1932); Jerald v. Houston, 124 Kan. 657, 261 P. 851 (1927); Del Rico Co. v. New Mexican, Inc., 56 N. M. 538, 246 P. 2d 206 (1953); Wiley v. Oklahoma Press Pub. Co., 106 Okla. 52, 233 P. 224 (1924); Lana v. Seattle Times Co., 186 Wash. 618, 59 P. 2d 753 (1936). Also see dissent in Sydney v. MacFadden Newspaper Pub. Corp., 242 N. Y. 208, 151 N. E. 209 (1926).

libelous on its face, or libel "per se."[8] On the other hand, the majority would hold that as the publication is not libelous on its face and as the defamatory meaning is not shown until the plaintiff proves that he is a white man, the publication is not actionable without proof of special damages.[9]

It is impossible to determine accurately North Carolina's position on the question prior to 1937. Oddly enough, only one case, *Harrison v. Garrett,* arose in this state prior to that year in which the issue was directly raised.[10] Perhaps this is due to the fact that the definition of libel is so broad that practically all defamatory publications prompting suits are libelous on their face. In that case the defendant did not raise the question until on appeal. Instead of deciding the point, the court said, "The defect alleged in this case is that the matter contained in the letter is not libelous per se and that the plaintiff does not allege special damages. If the words of the letter are not libelous per se and could only become actionable if special damages be alleged, the complaint, if there has been a failure to allege special damages, would only be a defective statement of a cause of action as distinguished from the statement of a defective cause of action, and the defect was waived or cured when the defendant answered the complaint."[11] Another opportunity to decide the issue did not present itself until 34 years later.[12] In the cases in which the question was not directly presented during the intervening period, the court repeatedly used the phrase "libel per se,"[13] but since the point was not directly in issue in these cases, the court apparently did not think it necessary to render any definitive decision. As a result the question lay in doubt for years, the assumption being that the common law rules would apply.[14]

In 1937 the controversial *Flake* case[15] was decided. Speaking as if

[8] Upton v. Times-Democrat Pub. Co., 104 La. 141, 28 So. 970 (1900); Flood v. News and Courier Co., 71 S. C. 112, 50 S. E. 637 (1905).

[9] Ilitzky v. Goodman, 57 Ariz. 216, 112 P. 2d 860 (1941). However, if this statement were spoken instead of written, all jurisdictions would hold that as it is not within one of the favored classes of slander per se, the statement is not actionable without proof of special damages. PROSSER, TORTS 798-807 (1941); MCCORMICK, DAMAGES 415-419 (1935); Deese v. Collins, 191 N. C. 749, 133 S. E. 92 (1926).

[10] 132 N. C. 172, 43 S. E. 594 (1903).

[11] *Id.* at 177, 43 S. E. at 596.

[12] Flake v. Greensboro News Co., 212 N. C. 780, 195 S. E. 55 (1937).

[13] Davis v. Askin's Retail Stores, 211 N. C. 551, 191 S. E. 33 (1937); Harrel v. Goerch, 209 N. C. 741, 184 S. E. 489 (1936); Oates v. Wachovia Bank and Trust Co., 205 N. C. 14, 169 S. E. 869 (1933); Pentuff v. Park, 194 N. C. 146, 138 S. E. 616 (1927); Hedgepeth v. Coleman, 183 N. C. 309, 111 S. E. 517 (1922); Hall v. Hall, 179 N. C. 571, 103 S. E. 136 (1920); Brown v. Elm City Lumber Co., 167 N. C. 9, 82 S. E. 961 (1914).

[14] Wettach, *Recent Developments in Newspaper Libel,* 7 N. C. L. REV. 3 (1928); Brandis and Trotter, *Some Observations on Pleading Damages in North Carolina,* 31 N. C. L. REV. 249, 269 (1953).

[15] Flake v. Greensboro News Co., 212 N. C. 780, 195 S. E. 55 (1937).

it had been the law in this state from time immemorial, the court said, "In publications which are libelous per quod the innuendo and special damages must be alleged and proved."[16] Here, for the first time in North Carolina, the court directly stated that special damages must be alleged and proved if a publication is not libelous "per se" (on its face). This case divides libel into three classes: (1) publications which are obviously defamatory and which are termed libel per se; (2) publications which are susceptible of two reasonable interpretations, one of which is defamatory and the other is not; and (3) publications which are not defamatory without the aid of explanatory circumstances and which are called libel per quod. If the publication constitutes libel per se, special damages need not be alleged and proved, but if it constitutes libel per quod, they must be. The status of the second class is left somewhat in doubt. Prior to this case it was held that if the publication were susceptible of two interpretations, one defamatory and the other not, the jury should decide the meaning understood, and the court said nothing about special damages.[17] The *Flake* case seems to indicate that special damages need not be alleged if the complaint alleges that the defamatory meaning was intended and understood.[18]

The only North Carolina authority relied on for holding the special damages must be alleged and proved in publications which are libelous per quod was *Oates v. Wachovia Bank and Trust Co.*,[19] a slander case concerned with the question of whether the charge came within one of the four classes of slander per se. Not only is this a slander case, but the court also clearly indicated that extrinsic evidence could be used to bring the charge within one of the classes of slander per se, eliminating the necessity of proving special damages. As a slander case, it would seem not to be controlling in a libel decision. Additionally it would seem that its use in the *Flake* case as supporting authority for the proposition that in libel special damages must be alleged and proved where extrinsic evidence is necessary, was a result of a misinterpretation of the decision.[20] It is also worthy of note that the *Flake* case cites the same outside authority for its distinction between libel per se and per quod that the *Oates* case cites for its distinction between slander per se and per quod. That authority is a slander case also.[21]

So it is seen that the North Carolina court has lost sight of the dis-

[16] *Id.* at 785, 195 S. E. at 58.

[17] Oates v. Wachovia Bank and Trust Co., 205 N. C. 14, 169 S. E. 869 (1933); Castelloe v. Phelps, 198 N. C. 454, 152 S. E. 163 (1930).

[18] Brandis and Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N. C. L. Rev. 249, 269 (1953).

[19] 205 N. C. 14, 169 S. E. 869 (1933).

[20] Brandis and Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N. C. L. Rev. 249, 269 (1953).

[21] Walker v. Tucker, 220 Ky. 362, 295 S. W. 138 (1927).

tinction between "slander per se" (charges within the four classes actionable in themselves without proof of special damages) and libel "per se" (on its face) and has brought the special damage concept over from the field of slander into the field of libel. Instead of the original rule that the existence of damages is conclusively presumed from the publication of the libel, North Carolina now divides libel into two broad classes. As to the first, libel per se, the original rule is still applied; but as to the second, libel per quod, the existence of damages is no longer presumed, but proof thereof is required. Why? Because long ago a judge used the phrase "libel per se" simply to indicate that the publication was libelous without need of extrinsic evidence. Had he simply said "this publication is not actionable without extrinsic evidence to show its defamatory meaning," perhaps the confusion would never have arisen. In 1928 it was pointed out in this *Law Review* that the confusion existed in other states.[22] It is difficult to determine whether the court in the *Flake* case was merely confused, whether it deliberately adopted what it considered the best view, or both.

Since the *Flake* case, there has been only one North Carolina decision having any implications as to this problem.[23] This case arose on demurrer to test the sufficiency of a complaint, and, while not decisive of the issue, it seems that the court clearly recognized that publication of any libel is actionable in itself—irrespective of whether any special damage has been caused to plaintiff's reputation or otherwise. At least it cites authority to that effect. On the other hand, it is a sound presumption that the court was aware of the *Flake* case; especially since it cites it for its broad definition of libel "per se."

Thus it appears that the law in North Carolina as regards libel remains confused. It seems that the clarity expressed in the *Flake* case was short lived. Of course, it remains to be seen whether the court, in subsequent decisions, will follow the majority rule clearly set out in the *Flake* case, or adopt the minority rule as indicated by the court in the *Kindley* case.

Prior to the *Flake* case, the court had consistently allowed extrinsic evidence to show that spoken charges were within one of the four categories of slander per se without requiring allegation and proof of special damages, although on their face they were not within any of them.[24] As to whether the court will require allegation and proof of special damages in such cases today by analogy to the rule laid down in the *Flake* case,

[22] Wettach, *Recent Developments in Newspaper Libel*, 7 N. C. L. REV. 3 (1928).
[23] Kindley v. Privette, 241 N. C. 140, 84 S. E. 2d 660 (1954).
[24] See for example: Oates v. Wachovia Bank and Trust Co., 205 N. C. 14, 169 S. E. 869 (1933); Hurley v. Lovett, 199 N. C. 793, 155 S. E. 875 (1930); Castelloe v. Phelps, 198 N. C. 454, 152 S. E. 163 (1930); Simmons v. Morse, 51 N. C. 6 (1858); Watts v. Greenlee, 13 N. C. 115 (1829).

quaere. A case closely following the *Flake* case implies that it would not be necessary.[25]

On the surface the majority rule may seem to be a good one. However, if a departure from the common law is deemed desirable, instead of bringing the special damage concept over from slander into libel, it would seem far better to abolish the special damage concept altogether in the field of defamation. There was no legal reason nor logic for the original common law rule that in all cases of slander special damages had to be alleged and proved. There was even less reason for making exceptions as to the three narrow categories of slander per se. All defamation should either be actionable or not actionable. When proof of special damages is required where extrinsic evidence is necessary to show the defamatory meaning, the court is, in effect, holding that the defamatory meaning was understood only by those who understood the innuendo and knew the circumstances, and that this is not sufficient to make it actionable unless the plaintiff has suffered pecuniary damages because of it. Yet it is among those who understood the defamatory meaning that plaintiff's reputation has been damaged—and it is for damages to reputation that an action for defamation lies.

ALEXANDER H. BARNES.

Conflict of Laws—Residence or Domicile—Non-Resident Motorist Statutes

In a recent decision[1] the defendant was served with summons under the North Carolina Non-Resident Motorist Statute.[2] He moved to set aside the service of process as invalid on the ground that at the time of the accident he was a resident of North Carolina.[3]

It appeared from the facts that some time prior to November, 1952, the defendant was assigned to active duty in the armed services at Camp Lejeune, near Jacksonville, North Carolina. The accident occurred in January 1954, and nine days later the defendant was transferred to

[25] Scott v. Harrison, 215 N. C. 427, 2 S. E. 2d 1 (1939).

[1] Hart v. Queen City Coach Co., 241 N. C. 389, 85 S. E. 2d 319 (1955).

[2] N. C. GEN. STAT. § 1-105 (1953). All forty-eight states and the District of Columbia have now enacted non-resident motorist statutes. For a complete list of citations as of 1947 see, Knoop v. Anderson, 71 F. Supp. 832 (W. D. Iowa 1947).

[3] Unless otherwise provided, it is the residence of the defendant at the time of the accident which controls in the application of statutes authorizing constructive service on non-resident motorists. Rompza v. Rucas, 337 Ill. App. 106, 85 N. E. 2d 467 (1949) (One of the basic jurisdictional facts is the non-residence of the defendant at the time of the accident.); Netter v. King, 331 Ill. App. 619, 73 N. E. 2d 798 (1947); Welsh v. Ruopp, 228 Iowa 70, 289 N. W. 760 (1940) (Non-residence at the time of the accident cannot be assumed.); Bigham v. Foor, 201 N. C. 14, 158 S. E. 548 (1931). *Contra:* Hendershot v. Ferkel, 144 Ohio St. 112, 56 N. E. 2d 205 (1944) (Act applies to residents who subsequently became non-residents or who conceal their whereabouts.)

Portsmouth, Virginia, where he was on duty at the time process was served on the Commissioner of Motor Vehicles. It also appeared that before entering the armed services his home was in Virginia. The court held that the defendant was a "non-resident" and was amenable to service of process under the statute.

The court, it is believed, based its decision primarily on the fact that the defendant was a member of the armed services.[4] It is stated as an accepted view that members of the armed services stationed in this state under military orders do not acquire residence here. However, in support of this view the court cited and quoted from a recent decision of the Supreme Court of Arkansas, which concerned the acquisition of an Arkansas *domicile* by a serviceman.[5]

This raises the question as to what is meant by "non-resident" as used in the North Carolina Non-Resident Motorist Statute. The court said: "What constitutes non-residence under G. S. 1-105 has not been the subject of direct judicial review."[6] The issue is whether the term "non-resident" requires domicile or merely actual residence.[7] Stating

[4] For cases under the non-resident motorist statutes in accord see: Briggs v. Superior Court of Alameda County, 81 Cal. App. 2d 240, 183 P. 2d 758 (1947) (defendant from New York held not to have become a resident of California while stationed there in the Navy, the court defining a non-resident as one who has not established actual residence, irrespective of domicile). In Hughes v. Lucker, 233 Minn. 207, 213, 46 N. W. 2d 497, 501 (1951), speaking of the effect of entering the armed services, the court said: "His military service, without regard to where he was stationed from time to time, did not of itself, without more, preclude or effect any change of residence." United States Automobile Ass'n v. Harman, 151 S. W. 2d 609 (Tex. Civ. App. 1941) (A former resident and domiciliary of Texas contended that he became a resident of Maryland by his assignment there in the Army. The court rejected the contention saying in effect that his lack of volition and his living in the barracks made it impossible for him to establish a residence in Maryland.) *Cf:* De Pier v. Maddow, 87 Cal. App. 2d 460, 197 P. 2d 87 (1948) (resident of Alabama stationed in the Marines in California held to have become a resident by living off the base for five years); Suit v. Shailer, 18 F. Supp. 568 (D. Md. 1937) (California defendant lived with husband who was stationed in Maryland. They lived off the base. The court said the wife definitely became a resident and that it would be difficult to see how the husband could be classed as a non-resident.)

The facts in the principal case do not indicate where the defendant lived, whether in government housing or off the base. As illustrated by the decisions in this note, this is sometimes the controlling factor in a determination of a serviceman's residence.

[5] "The domicile of a soldier or sailor in the military or naval service of his country generally remains unchanged, domicile being neither gained nor lost by being stationed in the line of duty at a particular place, even for a period of years." Central Manufacturer's Mut. Ins. Co. v. Friedman, 213 Ark. 9, 11, 209 S. W. 2d 102, 104 (1948).

[6] Hart v. Queen City Coach Co., 241 N. C. 389, 391, 85 S. E. 2d 319, 320 (1955).

[7] Domicile is said to be that place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. *In re* Stabile, 348 Pa. 587, 36 A. 2d 541 (1944).

Residence indicates merely a factual place of abode; the living in a particular locality. Zimmerman v. Zimmerman, 175 Ore. 585, 155 P. 2d 293 (1945).

As domicile and residence are usually in the same place, they are sometimes used as if they had the same meaning, but they are not identical terms, for a person may have more than one place of residence, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent

the problem in another way, is one required to have his domicile in a state other than North Carolina to be a non-resident and thus make the Commissioner of Motor Vehicles his agent for the purpose of service of process?

In *Baker v. Varser*,[8] the plaintiff sued to compel the North Carolina Board of Law Examiners to permit him to take the Bar Examination. One of the requirements was that the applicant have been a resident of North Carolina for one year. It was established that the plaintiff's domicile was not in North Carolina. The supreme court said, in upholding the Board's refusal to allow him to take the examination: "In our opinion, the term resident as used in Rule Five, means that residence is synonymous with domicile."[9] The test used by the court in reaching this conclusion was: "Whether the term residence . . . is synonymous with domicile depends on the purpose of Rule Five, the nature of the subject matter, as well as the context in which the term is used."[10]

It would seem to follow, then, that whether the term residence is synonymous with domicile in the North Carolina Non-Resident Motorist Statute depends on the purpose of the act,[11] the nature of the subject matter,[12] and the context in which the term is used.[13]

In *Ewing v. Thompson*,[14] the plaintiff and defendant were involved in an automobile accident on a North Carolina highway. The plaintiff proceeded under the non-resident motorist statute and served the defendant with process through the statutory agent, the Commissioner of Motor Vehicles. The defendant, a resident of Canada, made a special appearance and moved to set aside the service of process as invalid on the ground that he was not such a non-resident as was contemplated by

---

to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile. *In re* Riley, 148 Misc. 588, 266 N. Y. S. 209 (Surr. Ct. 1933).

[8] 240 N. C. 260, 82 S. E. 2d 90 (1954).

[9] *Id.* at 269, 82 S. E. 2d at 97. Residence has been held to mean domicile in rules concerning admission to the state bar in several other jurisdictions. *In re* Benedetto, 196 Ind. 323, 148 N. E. 413 (1925); *Re* Horowitz, 276 App. Div. 918, 94 N. Y. S. 2d 490 (3d Dep't 1950); *Re* McGrath, 243 App. Div. 803, 278 N. Y. S. 135 (3d Dep't 1935); *In re* Pierce, 189 Wis. 441, 207 N. W. 966 (1926); *In re* Mosness, 39 Wis. 509, 20 Am. St. Rep. 55 (1876).

[10] Baker v. Varser, 240 N. C. 260, 267, 82 S. E. 2d 90, 96 (1954).

[11] "The broad purpose of the statute is to enable an injured resident of this state to bring back to answer for his tort a non-resident motorist who has inflicted injury while using the state's highways and by the time suit can be instituted would otherwise be beyond this jurisdiction." Hart v. Queen City Coach Co., 240 N. C. 389, 391, 85 S. E. 2d 319, 320 (1955).

[12] The subject matter of the non-resident motorist statutes seems primarily to be "the non-resident transient motorist who is here today and gone tomorrow." Johnson v. Jacoby, 195 F. 2d 563, 565 (D. C. Cir. 1951).

[13] That the term expresses different concepts according to the context in which it is used, see: Chapman v. Davis, 233 Minn. 62, 45 N. W. 2d 822 (1951); Note, 33 N. C. L. Rev. 697 (1955); notes 27 through 31 *infra*.

[14] 233 N. C. 564, 65 S. E. 2d 17 (1950).

the statute and, therefore, was not amenable to the substituted service. The court refused to set aside the process. In construing the term non-resident, the court turned to other statutes in which that term is used. "The word non-resident, as used in the Motor Vehicle Act . . . is defined by the General Assembly as every person who is not a resident of this state. The trend of decisions in this court in matters pertaining to attachment proceedings is of like tenor."[15]

The court's reference to the definition in the Motor Vehicle Act and to decisions pertaining to attachment proceedings could be said to be two very strong arguments that would support the conclusion that residence as used in the North Carolina Non-Resident Motorist Statute is not used synonymously with domicile.

In Chapter 20 of the General Statutes of North Carolina (the Motor Vehicle Act), non-resident is defined in three different places: (1) legal residence,[16] (2) bona fide resident,[17] and (3) resident.[18] The supreme court in choosing the latter definition in *Ewing v. Thompson,* seems to indicate that the purpose of the non-resident motorist statute will be accomplished by a requirement, not of domicile, but of actual residence.

By making the reference to attachment proceedings in the *Ewing* case, it would seem safe to assume that the court would construe "non-resident" in the non-resident motorist statute as it has been construed in foreign attachment proceedings. In *Brann v. Hanes,*[19] the trial court had held that the defendant was a non-resident, upholding the clerk's order for service of summons and warrant of attachment. It was clear that the defendant had his domicile in North Carolina but he had been at Saranac Lake, New York, for health purposes for about eleven months. In affirming the trial court's holding, the supreme court said: "Whether or not the defendant has retained his domicile in this state is not determinative of the question here presented for decision."[20] The court added:

> "In *Wheeler v. Cobb,* 75 N. C. 21, it is said that one may be a non-resident without losing his domicile or rights of citizenship in

[15] *Id.* at 568, 65 S. E. 2d at 20.

[16] N. C. GEN. STAT. § 20-6 (1953) (Uniform Driver's License Act): "'Non-resident' shall mean any person whose legal residence is in some state other than North Carolina or in a foreign country."

A distinction exists between legal and actual residence, since a person may have his legal residence in one place and his actual residence in another. A person's legal residence is his domicile. Roof v. Tiller, 195 S. C. 132, 10 S. E. 2d 333 (1940).

[17] N. C. GEN. STAT. § 20-279.1 (1953) (Motor Vehicle Safety and Financial Responsibility Act): "'Non-resident' means every person who is not a bona fide resident of this state."

[18] N. C. GEN. STAT. § 20-38 (1953): "Non-resident—Every person who is not a resident of this state." (This is the definition quoted by the court in *Ewing v. Thompson.*)

[19] 194 N. C. 571, 140 S. E. 292 (1927).

[20] *Id.* at 574, 140 S. E. at 294.

> the state of his origin or gaining a domicile in another state. It is there held that one may have his domicile in North Carolina and his residence elsewhere, and that, therefore where one voluntarily removes from this to another state, for the purpose of discharging the duties of an office of indefinite duration, which requires his continued presence there for an unlimited time such person is a non-resident of this state for the purpose of attachment."[21]

In construing the term "non-resident" in the non-resident motorist statutes, courts of other jurisdictions[22] have made the same comparison with their attachment proceedings as did North Carolina in the *Ewing* case. Those jurisdictions, however, made it clear that residence was not to be treated as synonymous with domicile.[23] Yet as previously pointed out, without reference to the *Ewing* case the court said in the principal case that "non-residence" under G. S. 1-105 had not been the subject of direct judicial review.[24]

The meanings given to residence in other statutes have also varied according to the purpose, the nature of the subject matter, and the context in which the term is used. For example, in the chattel mortgage and conditional sales recordation statutes the word is said to mean only actual residence,[25] while in the divorce[26] and voting[27] statutes the term is treated

[21] *Ibid.* Residence as the term is used in attachment statutes does not normally mean domicile but merely actual residence. Hanson v. Graham, 82 Cal. 631, 23 Pac. 56 (1890); Union National Bank v. Finely, 180 Ind. 470, 103 N. E. 110 (1913); Mahoney v. Tyler, 136 N. C. 40, 48 S. E. 549 (1904); Howland v. Marshall, 127 N. C. 427, 37 S. E. 462 (1900); Carden v. Carden, 107 N. C. 214, 12 S. E. 197 (1890); Raymond v. Leishman, 243 Pa. 64, 89 Atl. 791 (1914).

[22] *E.g.,* Colon v. Pennsylvania Greyhound Lines, Inc., 27 N. J. Super. 280, 99 A. 2d 181 (1953); Chapman v. Davis, 233 Minn. 62, 45 N. W. 2d 822 (1951).

[23] See notes 32 and 36 *infra.*

[24] Hart v. Queen City Coach Co., 241 N. C. 389, 391, 85 S. E. 2d 319, 320 (1955).

[25] Sheffield v. Walker, 231 N. C. 556, 560, 58 S. E. 2d 356, 359 (1950) ("It thus appears that under these statutes 'residence' means something more than a mere physical presence in a place and something less than a domicile."); Industrial Discount Corp. v. Rodesky, 205 N. C. 163, 165, 170 S. E. 640, 641 (1933) ("The word signifies the actual residence of the mortgagor and not his domicile or legal residence."); *In re* Watson, 99 F. Supp. 49 (W. D. Ark. 1951); Commercial Bank of Crawford v. Pharr, 75 Ga. App. 364, 43 S. E. 2d 439 (1947). *Contra:* Petition of McLauchlan, 1 F. 2d 5 (1st Cir. 1924) (equivalent to domicile); Fidelity and Deposit Co. v. First National Bank, 113 S. W. 2d 622 (Tex. Civ. App. 1938) (equivalent to domicile).

[26] Such statutes ordinarily provide that in order to secure a divorce the plaintiff must have been a resident of the state for a prescribed period of time, and the courts interpret this to mean domicile. Williams v. North Carolina, 317 U. S. 287 (1942) (one of the parties must be domiciled in the state before the court can have jurisdiction); Stewart v. Stewart, 185 F. 2d 436 (D. C. Cir. 1930); Snyder v. Snyder, 240 Iowa 239, 35 N. W. 2d 32 (1948); Wray v. Wray, 149 Neb. 376, 31 N. W. 2d 228 (1948); Welch v. Welch, 226 N. C. 541, 39 S. E. 2d 457 (1946); Lynch v. Lynch, 210 Miss. 810, 50 So. 2d 378 (1951); RESTATEMENT, CONFLICT OF LAWS § 111 (1934).

[27] Residence in a state, or a local subdivision thereof, is a normal statutory requirement for eligibility to vote. The term is usually synonymous with domicile. State v. Carter, 194 N. C. 293, 296, 139 S. E. 604, 606 (1927) ("Residence as the

as synonymous with domicile. Statutes that accord jurisdiction to the courts on the basis of residence are frequently treated as referring to domicile, as in the case of statutes for the probate of a will[28] or the appointment of an administrator.[29]

Several states have faced this issue squarely and have made it clear how the term "non-resident" should be construed in their non-resident motorist statutes. In *Colon v. Pennsylvania Greyhound Lines, Inc.*,[30] the defendant at the time of the accident was domiciled outside the state of New Jersey but resided therein. He was living with his wife's family while serving in the Army. Before service of process was completed he had moved out of the state. The court, after deciding that the statute refers to residence at the time of the accident, said: "The statute is not concerned with domicile. In our opinion the word 'resident' is to be taken to refer to a person who has a dwelling place or usual place of abode . . . at which a summons can be served. Thus the defendant cannot be served with process under the statute."[31]

In *Northwestern Mortgage and Security Co. v. Noel Construction Co.*,[32] the defendant and his wife left their home in North Dakota with the intention of establishing themselves in Washington. While still in North Dakota, he had an automobile accident with the plaintiff. Shortly after the collision, he resumed his journey and later established a permanent residence in the state of Washington. The plaintiff attempted substituted service of process on the defendant under the North Dakota non-resident motorist statute. The court found that at the time of the accident the defendant still retained his domicile in North Dakota and because of this could not be served with process under the statute. "The term residence as employed by the legislature in this statute is synonymous with domicile."[33]

The Minnesota court in *Chapman v. Davis*,[34] had to decide the

word is used in this section in defining political rights, is, in our opinion, essentially synonymous with domicile."); Vanderpool v. O'Harlon, 53 Iowa 246, 5 N. W. 119 (1880); Everman v. Thomas, 303 Ky. 156, 197 S. W. 2d 58 (1946); Berry v. Wilcox, 44 Neb. 82, 62 N. W. 249 (1895); Hannon v. Grizzard, 89 N. C. 115 (1883); *In re* Stabile, 348 Pa. 587, 36 A. 2d 541 (1944).

[28] Ford v. Pack, 116 Kan. 74, 225 Pac. 1054 (1924); Johnson v. Harvey, 261 Ky. 522, 88 S. W. 2d 42 (1935); *In re* Ellis, 187 N. C. 840, 123 S. E. 82 (1924); *In re* Strobel's Estate, 264 Pa. 552, 107 Atl. 888 (1919).

[29] Sherton v. Abbott, 178 Md. 526, 15 A. 2d 906 (1940); *In re* Webber's Will, 187 Misc. 135, 64 N. Y. S. 2d 281 (Surr. Ct. 1950); Reynolds v. Lloyd Cotton Mills, 177 N. C. 412, 99 S. E. 240 (1919).

[30] 27 N. J. Super. 280, 99 A. 2d 181 (1953).

[31] *Id.* at 281, 99 A. 2d at 182.

[32] 71 N. D. 256, 300 N. W. 28 (1941).

[33] *Id.* at 261, 300 N. W. at 31. The same result would have been reached if the court had used a test of actual residence rather than domicile because the defendant was probably also not a non-resident at the time of the accident. However, this construction will likely be followed in subsequent decisions even when the defendant is residing outside the state but proves a retention of his domicile within.

[34] 233 Minn. 62, 45 N. W. 2d 822 (1951).

applicability of the non-resident motorist statute to the defendant, a school teacher in Minnesota, who returned each summer to her home in Missouri. The plaintiff contended that the defendant was a non-resident at the time of the accident and served her through the statutory agent, the Secretary of State. Speaking generally of the term non-residence, the court said that it expresses different concepts according to the context in which it is used and could mean either a legal domicile or an actual residence. In accepting the latter concept as the desired one, the court said: "if the first concept of residence, namely, legal domicile, is adopted and no one is to be deemed a non-resident . . . whose domicile is in the state, the purpose of the statute would to a great extent be defeated. For example, a motorist could leave this state with the intent of returning; as a result his domicile would still be in the state, although he no longer maintained a place of abode in it. An man may have a residence in one state and his domicile in another."[35]

In a later case,[36] the same court said, when speaking of the concept of residence as used in the non-resident motorist statute, that: "it was not intended to be synonymous with legal domicile and that if actual residence within the state at the time of the accident on the highways were established the provisions of the statute relative to service upon non-residents would be inapplicable."[37]

What constitutes residence under the non-resident motorist statutes of several other jurisdictions has been the subject of direct judicial review and those jurisdictions have all decided that it should not be construed as being synonymous with domicile.[38] Thus, an examination of the decisions has revealed only one jurisdiction[39] interpreting residence to be the equivalent of domicile. It is believed that such a construction will defeat the purposes for which the statutes have been enacted.

Another problem arising frequently under the non-resident motorist statutes is illustrated by a decision from Oklahoma.[40] There the plaintiff

[35] *Id.* at 68, 45 N. W. 2d at 825-826.

[36] Hinton v. Peter, 238 Minn. 48, 55 N. W. 2d 422 (1952).

[37] *Id.* at 51, 55 N. W. 2d at 424.

[38] Johnson v. Jacoby, 195 F. 2d 563, 565 (D. C. Cir. 1951) ("one may be a resident of the District for the purposes of the Act, even though domiciled elsewhere"); Suit v. Shailer, 18 F. Supp. 568 (D. Md. 1937); De Pier v. Maddox, 87 Cal. App. 2d 460, 179 P. 2d 87 (1948); Briggs v. Superior Court of Alameda County, 81 Cal. App. 2d 240, 183 P. 2d. 758 (1947); Warwick v. District Court of City and County of Denver, 269 P. 2d 704 (Colo. 1954); Carlson v. District Court of City and County of Denver, 116 Colo. 330, 180 P. 2d 525 (1947); Sease v. Central Greyhound Lines, Inc. of New York, 281 App. Div. 192, 118 N. Y. S. 2d 433 (3d Dep't 1952) (The term residence is not synonymous with domicile. A person who is domiciled in New York may nevertheless be a resident of another state within the meaning of the non-resident motorist statute.); Uslan v. Woronoff, 173 Misc. 693, 18 N. Y. S. 2d 222 (N. Y. City Ct. 1940).

[39] Northwestern Mortgage and Security Co. v. Noel Construction Co., 71 N. D. 256, 300 N. W. 28 (1941).

[40] Clendening v. Fitterer, 261 P. 2d 896 (Okla. 1953).

attempted substituted service upon the defendant alleging that he (the defendant) was a resident of Texas. The defendant proved that he was a resident of Oklahoma at the time of the accident. The court, in construing the statute, said that it did not apply to a resident who later left the state, and the service of process was set aside. A North Carolina example of this problem is seen in *Foster v. Holt*,[41] where the defendant, a resident, left the state after the accident to return to duty in the armed services and he court held that the statute was inapplicable to him.

The New Mexico court, in *Fisher v. Terrell*,[42] was faced with the same problem when the plaintiff alleged that the defendant was a non-resident, but it was shown that at the time of the accident the defendant was a resident of New Mexico. The court after holding that for the service to be valid the defendant must have been a non-resident at the time of the accident and not at the time the suit was filed, said: "It is unfortunate that we do not have a statute . . . where service may be had on the Secretary of State when a resident is involved in a motor car accident and leaves the state before suit is filed, or process served on him, or where after diligent search he cannot be found in the state even though he does not leave."[43]

As these statutes were enacted for the purpose of enabling the injured plaintiff to serve the defendant who has inflicted injury on him while using the state's highways and who, by the time suit can be instituted, would otherwise be beyond the jurisdiction of the courts, it is evident that some provision is needed to remedy such an apparent gap.

This defect has been corrected in several states[44] by making the non-resident motorist statute applicable to residents of the state, who, after the accident, cannot with due diligence be found in the state, and to residents who have, after the accident, left the state and remained away for a specified period.[45]

[41] 237 N. C. 495, 75 S. E. 2d 319 (1953).

[42] 51 N. M. 427, 187 P. 2d 387 (1947).

[43] *Id.* at 428, 187 P. 2d at 388. Other cases reaching the same result are: Warwick v. District Court of City and County of Denver, 269 P. 2d 704, 706 (Colo. 1954) ("the fact that the resident left the state after the accident was immaterial."); Cassan v. Fern, 109 A. 2d 482 (N. J. Super. 1954).

[44] ARIZ. CODE ANN. § 66-266 (1949) ("The provisions of this section shall also apply to a non-resident defendant who was a resident of the state at the time of the accident or occurrence which gave rise to the cause of action sued on."); ILL. REV. STAT. c. 95½, § 23 (1953); IOWA CODE ANN. §§321.498, 321.499 (1953); ME. REV. STAT. c. 22, § 70 (1954); MD. ANN. CODE GEN. LAWS art. 66½, § 113(h) (1953); MINN. STAT. ANNOTATIONS § 170.55 (1949); MO. REV. STAT. § 506.220 (1949); MONT. REV. CODES ANN. §§ 53-202, 53-203 (1947); N. H. REV. LAWS c. 116, §§ 42 through 45 (1942); N. Y. VEHICLE AND TRAFFIC LAW §§ 52, 52a ("The provisions of section fifty-two of this chapter shall also apply to a resident who departs from the state subsequent to the accident or collision and remains absent therefrom for thirty days continuously, whether such absence is intended to be temporary or permanent."); OHIO GEN. CODE ANN. § 2703.20 (1953); PA. STAT. tit. 75, §§ 1201 through 1206 (Purdon's 1953).

[45] MD. ANN. CODE GEN. LAWS, art. 66½ § 113(h) (1953) (six months); MINN.

The General Assembly of North Carolina in the 1955 session, incorporated such a provision into the North Carolina statute.[46] Decisions from other jurisdictions interpreting and applying such a provision have demonstrated its usefulness.[47]

It is believed that the recent amendment to the North Carolina statute will aid in the accomplishment of the purposes for which it was enacted by making the absent resident amenable to the substituted service. It is also believed that the amendment will eliminate, to a great extent, the issue raised in the principal case, but for one possible exception. This would arise when a motorist, who is an actual resident of North Carolina but has his domicile in another state, has an accident in North Carolina, and the plaintiff attempts to serve him under the non-resident motorist statute. If the defendant claims to be a resident of North Carolina and thus not amenable to service under the statute, a "direct judicial review" of the meaning of "non-resident" would be required.

Because of the fact "that the holdings as to what constitutes residence, domicile, etc., vary according to the purposes of the statutes,"[48] the legislature should make it clear what meaning is to be given "non-resident" as used in the North Carolina Non-Resident Motorist Statute.

ROBERT L. SPENCER.

Taxation—Tax Fraud Cases—Use of Net Worth Method

In December of 1954, the United States Supreme Court handed down four decisions involving the use of the net worth method of discovering unreported income in prosecutions for attempted evasion of income taxes.[1] This note is an effort to examine the state of the law as it exists in the lower federal courts and to determine what effect the decisions of the Supreme Court will have upon the rules as laid down by the lower courts.

STAT. ANNOTATIONS § 170.55 (1949) (six months); N. Y. VEHICLE AND TRAFFIC LAW § 52a (thirty days).

[46] N. C. Sess. Laws (1955) c. 232. See, Survey of Statutory Changes, p. —, *supra*.

[47] Ogdon v. Granakos, 415 Ill. 591, 114 N. E. 2d 686 (1953); State *ex rel.* Thompson v. District Court, 108 Mont. 362, 91 P. 2d 422 (1939); Reed v. Lombardi, 266 App. Div. 44, 44 N. Y. S. 2d 382 (2d Dep't 1943).

[48] Hart v. Queen City Coach Co., 241 N. C. 389, 391, 85 S. E. 2d 319, 321 (1955).

---

[1] Holland v. United States, 348 U. S. 121; Friedburg v. Unoted States, 348 U. S. 142; Smith v. United States, 348 U. S. 147; United States v. Calderon, 348 U. S. 160.

In Sullivan v. United States, 348 U. S. 170, decided at the same time, the Government had used the net worth method in prosecuting the case, but the issues raised on appeal were whether a federal district attorney could prosecute a tax case without the sanction of the Department of Justice and whether the trial court erred in denying defendant's post-sentencing motion to withdraw pleas of nolo contendere. Since no issues as to the use of the net worth method were raised on appeal, the case will not be considered.

Essentially, the use of the net worth method involves the calculation of the net worth of the taxpayer at the beginning and end of each year in question. The difference between these figures plus non-deductible expenses during the same year is calculated to be taxable income.

Originally, the method was used against racketeers,[2] to corroborate specific proof of unreported income from sources not disclosed by the taxpayer's income tax returns.[3] Today, it is frequently employed to test the accuracy of the income tax returns of business and professional men.[4] By its use, the United States is realizing revenue it would otherwise be unable to collect and prosecuting tax evaders who otherwise might never be apprehended.

The instances in which the government can prove undisclosed income by direct evidence are rare indeed. Therefore, it is necssary that the government have available means of proving its case indirectly. This is the reason and justification for the use of the method. There is, however, reason to think that upon occasion the net worth method is used even though direct evidence is available.[5] Its use under such circumstances should not be allowed since the method involves great danger to the rights of the taxpayer, as hereinafter discussed. Zealousness in the collection of the revenue is highly commendable but should not lead to unethical practices.

The authority for the use of indirect proof of unreported income is given by the Internal Revenue Code (1954) Section 446 (b).[6] There has been no limitation of this authority to civil cases as evidenced by the fact that all four of the cases presently under discussion are criminal prosecutions.

Dangers in Use

The consideration which should serve as a limitation on the use of

[2] Report of the Assistant Attorney General, 4 P-H 1955 FED. TAX SERV. ¶ 34,013 (1955).

[3] In United States v. Johnson, 319 U. S. 503 (1943), its use was approved to support the inference that income of a substantial amount had been received from a vast network of gambling houses during the years in which there was no income reported from this source. The four cases decided in December of last year, however, all concern income from the same source that produced the taxpayer's reported income.

[4] See note 2 *supra*.

[5] In United States v. Riganto, 121 F. Supp. 158, 159 (E. D. Va. 1954), Judge Hutcheson states that, "Basing my observation upon a number of cases during the past few years, it would seem that the use of one or both of these methods [net worth method and bank deposits and expenditures method] has been employed through preference at times when direct evidence is available."

[6] "Exceptions—If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary or his delegate, does clearly reflect income." This prerequisite to the use of indirect methods of proof, that the taxpayer's method of accounting must be such that it does not clearly reflect his income, seems to demand only that the agents of the government so state. This problem is discussed later in this note.

the method is that it is fraught with danger to the taxpayer.[7] The jury may assume that once the government has established its computation, the crime of tax evasion automatically follows. Though it sounds plausible to say that the taxpayer should be able to explain the "bulge" in his net worth, he may be honestly unable to recount his financial history. As a practical matter, to force the taxpayer to explain such a "bulge" would tend to shift the burden of proof to the defendant, despite the recognized rule that the burden may not be shifted in criminal prosecution or civil fraud cases.[8]

Specific Problems

From these general considerations in the use of the net worth method, we turn to a consideration of specific problems involved in its use. A criminal conviction does not prevent the imposition of a civil penalty nor does a previously imposed civil penalty prevent a criminal conviction.[9] Therefore, both types of action will be considered.

a. *Adequacy of Records*

One of the most frequent defenses offered by taxpayers has been that indirect methods of proof could not be used when the taxpayer's books were, on their face, complete and accurate, unless the government showed specific omissions or inaccuracies. A number of lower courts had considered this contention justified.[10] In the *Holland* case, the Supreme Court ruled that the Internal Revenue Code, (1939) Section 41[11] did not so limit the Commissioner. It held that when the use of the method seems to disclose unreported income not reflected on the taxpayer's records, the records have been shown to contain false entries or to have serious omissions. Skillful concealment should not be an invincible barrier to proof.[12]

[7] "[T]here is danger of the case being tried on a theory which, keeping to the ear the promise that a defendant is presumed innocent until his guilt is established beyond a reasonable doubt, breaks it to the hope by allowing a series of theoretical estimates and computations as to defendant's income to take the place of proof of it." Demetree v. United States, 207 F. 2d 892, 893 (5th Cir. 1953).

[8] *Holland v. United States.* The Court also said: "Were the taxpayer compelled to come forward with evidence to explain the "bulge" in his net worth, he might risk lending support to the Government's case by showing loose business methods or losing the jury through his apparent evasiveness." 348 U. S. 121, 128 (1954). See also Demetree v. United States, 207 F. 2d 892 (5th Cir. 1953).

[9] Spies v. United States, 317 U. S. 492 (1943); Slick v. United States, 1 F. 2d 897 (7th Cir. 1924).

[10] United States v. Riganto, 121 F. Supp. 158 (E. D. Va. 1954); Ragsdale v. Paschal, 118 F. Supp. 280 (E. D. Ark. 1954); Talley v. Commissioner, 20 T. C. 715 (1953); Booker W. Evans, P-H 1954 MEM. DEC. ¶ 54,014 (1954).

[11] Now INT. REV. CODE § 446 (1954).

[12] There were cases in the lower courts which had adopted the same view. The Court of Claims speaking in Jacobs v. United States, 54-2 U. S. T. C. ¶ 9740 (1954), said: "The law allows the Commissioner to use another method if the taxpayer's method does not clearly reflect income. To determine this question itself involves computation of income by some alternative method. Another method of accounting

In two cases the lower courts have allowed the use of the method[13] even though the taxpayer's books have appeared adequate. One of these cases[14] even held that the taxpayer had no right to have the question of the sufficiency of his records submitted to the jury as the government had a right to use the net worth method whether his records were adequate or not. If this rule is limited to the *adequacy* of the records, there is nothing wrong with this statement of the law. It would, however, be unjustifiable to extend this rule to *accuracy* because the very thing which the government is attempting to show by the use of the net worth method is that the books are not accurate, *i.e.,* that they are false or incomplete.

b. *Burden of Proof*

Having thus established the right to make use of the net worth method, the government faces the problem of proving its case through the use of that method. The government usually presents evidence showing, by an itemized list, the assets of the taxpayer at the beginning and end of each year in question. It also presents itemized lists of nondeductible expenses of the taxpayer for each of those years. Then, the calculations made from these figures and the results achieved are presented. The general rule in civil cases is that once the government has so established its net worth calculations the accuracy of those calculations is presumed subject to rebuttal by the taxpayer.[15] But the burden of proof remains upon the government to prove fraudulent intent in civil fraud cases and to prove willful intention to evade income taxes in criminal cases.[16] The use of the net worth method involves the use of circumstantial evidence, but it is not necessary that such circumstantial evidence exclude every reasonable hypothesis other than guilt;

> "[T]he better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect."[17]

---

may not be used unless one can show by use of that method that the taxpayer's own method does not clearly state income." The Tax Court also limited its pronouncement that the net worth method cannot be used when the taxpayer's books are complete and accurate. "And when the increase in net worth is greater than that reported on the taxpayer's returns or is inconsistent with such books and records as are maintained by him, the net worth method is cogent evidence that there is unreported income or that the books and records are inadequate, inaccurate or false."

[13] Dupree v. United States, 218 F. 2d 781 (5th Cir. 1955); Earl Kite, 22 P-H MEMO T. C. 53-865 (1953).

[14] Dupree v. United States, *supra* note 13.

[15] BALTER, FRAUD UNDER FEDERAL TAX LAW ¶ 177 (2d ed.; Chicago: Commerce Clearing House, 1953).

[16] *Holland v. United States;* United States v. Skidmore, 123 F. 2d 604 (7th Cir. 1941).

[17] Holland v. United States, 348 U. S. 121, 139 (1954).

c. *Opening Net Worth*

To establish the offense or penalty by the use of the net worth method, the government must prove with "reasonable certainty" that its opening net worth figure is accurate, that is, that the value of the assets of the accused at the beginning of the prosecution period was as represented by the government's net worth statement.[18] Even though the government's case shows an increase of the taxpayer's assets, if the opening net worth figure is wrong, then all of the caluculations are wrong. The Court does not fully discuss what it means by the phrase "reasonable certainty." In the *Holland* case, the government introduced evidence of extreme economic hardship in the taxpayer's past financial history. The taxpayer's past income tax returns were also introduced to show that his reported income had been practically nil. The purpose of this evidence was to prove that the taxpayer could not have had $113,000 in cash on hand at the beginning of the period as he maintained.

While it is not contended that this evidence was insufficient to refute the taxpayer's claim, there seems to be a failure on the part of the Court to discuss what evidence is necessary to show the accuracy of the government's opening net worth statement with "reasonable certainty" in the first instance. The burden upon the government in fraud and civil cases should be to show that it has made an extensive investigation of the taxpayer's records and has made inquiries of the banks and other financial institutions and agencies with which he deals, his business associates, his family, his attorney, etc., without being able to discover any assets other than the ones included in its statement of opening net worth. Further, the government should show the past financial history of the taxpayer in order to ascertain the range within which the assets of the taxpayer can be expected to fall. Such evidence will not prove beyond any doubt that its figures are correct, but it is all that reasonably can be expected of the government.

To place any greater burden upon the government would be to impose an impossible task.[19] The taxpayer has more and better knowledge of his assets at any particular time than anyone else. So it will not be impossible for him to show any inaccuracies in the government's figures which may occur.[20] Any less proof by the government should not be considered as sufficient evidence of the accuracy of the opening net worth figures to allow the government's case to go to the jury.

[18] Holland v. United States, 348 U. S. 121, 132 (1954).

[19] Bryan v. United States, 175 F. 2d 223, 227 (5th Cir. 1949) (dissenting opinion). For examples of the type of evidence used in the past to establish the government's opening net worth statement see Friedburg v. United States, 348 U. S. 142 (1954); Schauerman v. United States, 174 F. 2d 985 (8th Cir. 1951).

[20] Still we must be careful that in the application of the rule, the burden of proof is not shifted to the taxpayer. See United States v. Riganto, 121 F. Supp. 158 (E. D. Va. 1954).

d. *Furnishing Leads*

The *Holland* case establishes one rule upon which it is to be hoped the taxpayer may rely. If he furnishes "relevant leads" as to the source of assets claimed to be on hand at the opening date, it is incumbent upon the government to check such leads.[21] "Relevant leads" may be defined as those which are not too far removed and not impossible of being checked, and which if true would establish the innocence of the taxpayer. Failure to check such leads may be interpreted by the trial court to mean that the leads would have verified such sources and that the government's case is too weak to go to the jury. Unfortunately, this rule is watered down by the Court's holding that though the government did fail to track down leads given it in the *Holland* case, the showing made by the government of the financial history of the taxpayer was conclusive proof that he could not have had on hand at the opening date the hoard of cash which he claimed. Therefore, the taxpayer must not assume that the government is compelled under all circumstances to track down leads which he provides.

e. *Admissions*

One type of proof frequently offered by the government in order to prove its opening net worth figure is the introduction of books and records of the accused and admissions made by him, *i.e.*, extra-judicial statements made after the fact to agents of the government charged with investigating the offense. This raises the vitally important question of constitutional privilege against self-incrimination. As in the usual criminal case, the taxpayer has this privilege in tax evasion prosecutions, but it may be waived if not seasonably claimed.[22] Of course, a claim alone does not establish the privilege. The government is entitled to a proceeding to compel testimony and so have the claim tested out.[23]

[21] Holland v. United States, 348 U. S. 121, 127 (1954).

[22] United States v. Murdock, 284 U. S. 141 (1931); Hanson v. United States, 186 F. 2d 61 (8th Cir. 1950); Nicola v. United States, 72 F. 2d 780 (3d Cir. 1934); United States v. Lawn, 115 F. Supp. 674 (S. D. N. Y. 1953). The taxpayer must make the claim of constitutional privilege to the revenue agent when asked for books or testimony. Nicola v. United States, *supra*. There is no requirement that the taxpayer be warned of his constitutional privilege before information is elicited. Power v. United States, 223 U. S. 303 (1911); Wilson v. United States, 162 U. S. 613 (1895); United States v. Block, 88 F. 2d 618 (2d Cir. 1927).

[23] United States v. Murdock, *supra* note 22. As to the power of the Commissioner to compel testimony and to examine books, see INT. REV. CODE §§ 7602, 7604(a), 7605, 6501(a) (1954). The Constitutional privilege attaches to personal records and partnership records since they, too, are considered personal records. Hanson v. United States, 186 F. 2d 61 (8th Cir. 1950); Nicola v. United States, 72 F. 2d 780 (3d Cir. 1934); United States v. Lawn, 115 F. Supp. 674 (S. D. N. Y. 1953). But no privilege attaches to corporate or public records. There is a possible argument that since all records are required to be kept by the provisions of INT. REV. CODE §§ 446(a) and 446(c) (1954), they thereby become public records and have no privilege. Such an argument was sustained under the similar provisions of the Emergency Price Control Act. Shapiro v. United States, 333 U. S. 1

Assuming that the taxpayer does waive his constitutional immunity, of what value are his admissions to the government? The *Smith* case holds that they may be used as evidence but must be corroborated as in other criminal cases.[24] All admissions made after the fact, to a person charged with investigating the possibility of wrong-doing and which embrace an element vital to the government's case, must be corroborated.[25] Any time a fact is sufficiently important for the government to adduce extra-judicial statements of the accused bearing on its existence, and it is relied upon to sustain the defendant's conviction, there is need for corroboration.[26]

The corroboration required is independent proof of the corpus delicti. This requirement is recognized by the Court to force the government to prove not only the commission of the crime, but who committed it. However, this is true in any crime involving scienter.[27] It is not necessary that the corroborative evidence prove the offense beyond a reasonable doubt, or by a preponderence of the evidence, as long as it is substantial and the evidence as a whole is sufficient for a jury to find that the defendant is guilty.[28] The independent evidence may bolster the admissions and thus prove the offense "through" the statments of the accused.[29]

f. *Source of Income*

Once the government has proven that there is unreported income, it must prove that the source of it is one that produces taxable income. Some lower courts had taken the view that in order to do this, the government had to negate all possibilty of there being sources of non-taxable income.[30] Others had refused to place this "impossible burden" upon

(1947). So far, it has not been sustained under the Internal Revenue Code. For an excellent discussion of this whole problem, see Norman Redlich, *Searches, Seizures, and Self-Incrimination in Tax Cases,* 10 TAX L. REV. 191, 192 (1955).

[24] Admissions are universally held to be admissible in evidence against the party making them in civil cases. WIGMORE, EVIDENCE § 1048 (1940). Therefore civil cases are not included in this discussion.

[25] But the Court in the *Holland* case does leave the door open to the possibility that the admissions may be made under such circumstances as to lend to them a great degree of credibility, citing State v. Saltzman, 241 Iowa 1373, 44 N. W. 2d 24 (1950).

[26] Smith v. United States, 348 U. S. 147 (1954). The government had based its finding of the value of the assets of the taxpayer at the opening date upon the taxpayer's past financial history, which history was reconstructed from statements made by the taxpayer.

[27] Forte v. United States, 94 F. 2d 236 (D. C. Cir. 1937).

[28] Smith v. United States, 348 U. S. 147, 150 (1954); Heasley v. United States, 218 F. 2d 872 (9th Cir. 1953); Bell v. United States, 185 F. 2d 302 (4th Cir. 1950); Forte v. United States, 94 F. 2d 236 (D. C. Cir. 1937); Daeche v. United States, 250 Fed. 566 (2d Cir. 1918). See also Pearlman v. United States, 10 F. 2d 460 (9th Cir. 1926).

[29] Smith v. United States.

[30] United States v. Fenwick, 177 F. 2d 397 (8th Cir. 1949); Bryan v. United States, 175 F. 2d 223 (5th Cir. 1949).

the government.[31] Other courts went further, holding that when a discrepancy between increased net worth and reported income was shown, the burden of explanation shifted to the taxpayer.[32]

The Supreme Court, in the *Holland* case, held that proof of a likely source from which the income could have arisen is sufficient to go to the jury. But if the taxpayer supplies the government with relevant leads, it is incumbent upon the government to track them down.[33]

So the Court's view seems to be the intermediate one. The government need show only that there is a source of income which is probably capable of producing the alleged unreported taxable income. It is not necessary for it to go further and disprove the possibility of there being any sources of non-taxable income. It has made out its prima facie case upon showing the likely source of the unreported taxable income, which income it claims is proven to exist through the employment of the net worth method.

g. *Willfulness*

To sustain the imposition of the penalty for attempt to evade income taxes, it must be shown that there was such an attempt.[34] In order to sustain a conviction for such an attempt, it must be shown that the attempt was willful.[35] Merely establishing unreported taxable income is not sufficient to show either.[36] Willfulness is not proved by a mere intentional act or omission, but there must be a corrupt intent to do the wrong.[37] A consistent pattern, over a number of years, of substantial

[31] Bell v. United States, 185 F. 2d 302 (4th Cir. 1950); Brodella v. United States, 184 F. 2d 823 (6th Cir. 1950).

[32] 174 F. 2d 391 (8th Cir. 1949) end cases cited in United States v. Caserta, 199 F. 2d 905, 907 (3d Cir. 1952).

[33] One wonders how much the taxpayer may rely upon this rule in view of the rule previously discussed concerning leads furnished as to possible sources of income from which a cache of mony could have arisen and the qualification to that rule that the government may not have to trace down even relevant leads if its case is strong enough. However, notwithstanding the fact that the government's proof in the *Holland* case was quite strong, the Court intimated that it would have required checking of leads had the taxpayer provided any which were relevant. Though the taxpayer had given leads to the government as to the source of the hoard of cash he claimed to have had at the opening date, he gave none as regards a possible source of non-taxable income in the subsequent years.

The court remarked in Dupree v. United States, 218 F. 2d 781 (5th Cir. 1955), that it had waited for the decisions in the four cases here under consideration in order to receive guidance therefrom. It then held that the government, by affirmative evidence, must negative all sources of non-taxable income before it has established its prima facie case. For a statement of the law on this point in civil tax fraud cases see, BALTER, FRAUD UNDER FEDERAL TAX LAW ¶ 175 (2d ed.; Chicago: Commerce Clearing House, 1953).

[34] Morris Lipsitz, 21 T. C. 917 (1950).

[35] Holland v. United States, 348 U. S. 121, 139 (1954); United States v. Sullivan, 274 U. S. 255 (1927); United States v. Skidmore, 133 F. 2d 604 (7th Cir. 1941).

[36] Holland v. United States; 10 MERTENS, LAW OF FEDERAL INCOME TAXATION ¶ 55.58 (Supp. Jan. 1955).

[37] United States v. Murdock, 290 U. S. 389 (1933); 27 AM. JUR., *Income Taxes* § 250 (1940). Willfulness has been defined as "an act done with a bad purpose"

understatements of income is enough to sustain a criminal conviction if coupled with a showing of a lack of records or exclusion of income from the records, or other indirect evidence.[38]

h. *Annual Accounting Period*

It is further clear that proof of an understatement in some but not all of the prosecution years will sustain a conviction only for those years in which an understatement is proved.[39] There is a surprising tendency on the part of the courts in both civil and criminal cases to allow the government to allocate the income it has discovered by use of the net worth method equally over the years in question. Then the taxpayer is obliged to come forward and show that this is an improper allocation.[40]

Conclusion

Just what effect the four cases will have upon the proceedings in lower courts is problematical. Except for those few rules previously accepted in some lower courts and rejected in these cases, it is doubtful that the decisions will cause much change in the holdings of the lower courts. The rules formulated for the guidance of the lower courts are unfortunately too nebulous and shadowy to be of much practical help, except that the lower courts are now on notice that the Supreme Court does think cases involving the use of the net worth method should be regarded with some suspicion and so should be closely scrutinized to protect the rights of the taxpayer.

The opinions of the Court do apparently cast a greater burden upon the government to establish its prima facie case, but just how great a burden this turns out to be will have to await the light of later decisions of the lower courts interpreting these opinions, or possibly even further decisions of the Supreme Court.

Until that time, it is hoped that the courts will closely scrutinize cases involving the use of the net worth method and that the Department

---

or "without justifiable excuse" or with "careless disregard whether or not one has the right so to act." 10 MERTENS, LAW OF FEDERAL INCOME TAXATION ¶ 55.41 (1948).

[38] Double sets of books, false entries or authorizations, false invoices or documents, destruction of books and records, concealment of assets or covering up sources of income, handling of one's affairs in a manner to avoid the making of records usual in such transactions, and any other conduct, the likely effect of which would be to mislead or conceal. Spies v. United States, 317 U. S. 492 (1943); United States v. Clark, 123 F. Supp. 608 (S. D. Cal. 1954).

[39] Holland v. United States, 348 U. S. 121, 129 (1954).

[40] United States v. Ridley, 120 F. Supp. 530 (N. D. Ga. 1954); Estate of Bartlett, 22 T. C. No. 151 (1954). Another interesting case is Harry B. Mikelberg, 23 T. C. No. 41 (1954), where income of husband and wife, both physicians, who kept no records, was allocated between them on the basis of the time devoted to their practice.

of Justice and the Internal Revenue Service will not abuse the use of the method.

NELSON W. TAYLOR, III.

Statutes—Interpretation of "Residence"

The North Carolina Supreme Court was recently faced with the problem of interpreting the word "residing" in what appears to be a new setting. In *Barker v. Iowa Mutual Insurance Company*,[1] the court determined that a minor and dependent son, though married and living in another city while attending college, was "residing with" his father within the meaning of the clause in a fire insurance policy covering personalty "belonging to the insured or any member of the family of and residing with, the insured, while elsewhere than on the described premises."[2] The court said that the term "residing with" was equivalent to having a residence with the insured, construing the word residence to mean domicile.

Whether or not a particular place is a person's residence or domicile has long been a problem. This problem is always acute since a person must have a residence or domicile in a particular place for many purposes. Among these purposes for which a person's residence or domicile is important are attachment,[3] candidacy for office,[4] registration of chattel mortgages and conditional sales contracts,[5] as executor or administrator of a decedent's estate,[6] divorce,[7] homestead,[8] both petit and grand jury service,[9] in actions before a justice of the peace,[10] as a candidate for the state bar examination,[11] naturalization,[12] service of process on nonresi-

[1] 241 N. C. 397, 85 S. E. 2d 305 (1955).
[2] *Id.* at 399, 85 S. E. 2d at 306.
[3] *E.g.*, Brann v. Hanes, 194 N. C. 571, 140 S. E. 292 (1927); N. C. GEN. STAT. § 1-440.3 (1953).
[4] *E.g.*, Hannon v. Grizzard, 89 N. C. 115 (1883).
[5] *E.g.*, Sheffield v. Walker, 231 N. C. 556, 58 S. E. 2d 356 (1950); Industrial Discount Corp. v. Radecky, 205 N. C. 163, 170 S. E. 640 (1933); Weeks v. Adams, 196 N. C. 512, 146 S. E. 130 (1928); N. C. GEN. STAT. § 47-20.2 (1953).
[6] *E.g.*, Branch Banking and Trust Co. v. Finch, 232 N. C. 485, 61 S. E. 2d 377 (1950).
[7] *E.g.*, Williams v. North Carolina, 325 U. S. 226 (1945); McLean v. McLean, 233 N. C. 139, 63 S. E. 2d 138 (1950); Henderson v. Henderson, 232 N. C. 1, 59 S. E. 2d 227 (1950); Bryant v. Bryant, 228 N. C. 287, 45 S. E. 2d 572 (1947); N. C. GEN. STAT. §§ 50-5 (4), 50-5 (6), 50-6 (1950 as amended 1953).
[8] *E.g.*, Taylor v. Hayes, 172 N. C. 663, 90 S. E. 801 (1916); Cromer v. Self, 149 N. C. 164, 62 S. E. 885 (1908); Fulton v. Roberts, 113 N. C. 422, 18 S. E. 510 (1890); Munds v. Cassidey, 95 N. C. 558, 4 S. E. 353 (1887); N. C. CONST. Art. X, § 1.
[9] *E.g.*, State v. Wilcox, 104 N. C. 847, 10 S. E. 453 (1889); State v. Bullock, 63 N. C. 520 (1869); N. C. GEN. STAT. § 9-1 (1953).
[10] *E.g.*, Austin v. Lewis, 156 N. C. 461, 72 S. E. 493 (1911); N. C. GEN. STAT. §§ 7-138 and 7-142 (1953).
[11] *E.g.*, Baker v. Varser, 240 N. C. 260, 82 S. E. 2d 90 (1954); Rule Five of the Rules Governing Admission to Practice of Law in North Carolina, Vol. 4 N. C. GEN. STAT. 65 *et seq.* (1943).
[12] *E.g.*, Hantzopoulos v. United States, 20 F. 2d 146 (M. D. N. C. 1927).

dent motorists,[13] for purposes of some local ordinances,[14] for service of process in general,[15] for statute of limitation purposes,[16] tuition at college,[17] property taxes,[18] inheritance taxes,[19] voting,[20] legal settlement for admission to the poor house,[21] and venue.[22]

It is well established that two essential things must concur to constitute a domicile: there must be physical presence at a dwelling place and an intent to make it a home.[23] Domicile is defined as a person's fixed, established, permanent dwelling place as distinguished from his temporary, though actual, place of residence.[24] Residence has always been the problem. In *Watson v. North Carolina Railroad Company*,[25] the court said: "The word 'residence' has, like the word 'fixtures,' different shades of meaning in the statutes . . . and even in the constitution, according to its purpose and context." Generally, residence means something more than mere physical presence at a particular place and something less than a domicile.[26] Isolated statements on residence, when taken out of their context and compared, would seem to show confusion and inconsistency on the part of the court.[27] In one case there seems to

[13] *E.g.*, Winborne v. Stokes, 238 N. C. 414, 78 S. E. 2d 171 (1953); Ewing v. Thompson, 233 N. C. 564, 65 S. E. 2d 17 (1951); N. C. GEN. STAT. § 1-105 (1953). See also, Note 33 N. C. L. REV. —— (1955).

[14] *E.g.*, Aydlett v. Elizabeth City, 121 N. C. 4, 27 S. E. 1002 (1897).

[15] *E.g.*, Southern Mills v. Armstrong, 223 N. C. 495, 27 S. E. 2d 281 (1943); Current v. Webb, 220 N. C. 425, 17 S. E. 2d 614 (1941); Greenleaf v. Peoples Bank of Buffalo, 133 N. C. 292, 45 S. E. 638 (1903).

[16] *E.g.*, Hill v. Lindsay, 210 N. C. 694, 188 S. E. 406 (1936); Lee v. McKoy, 118 N. C. 518, 24 S. E. 210 (1896); Armfield v. Moore, 97 N. C. 34, 2 S. E. 347 (1887).

[17] *E.g.*, N. C. GEN. STAT. § 116-144 (1952).

[18] *E.g.*, Texas Co. v. Elizabeth City, 210 N. C. 454, 187 S. E. 551 (1936); Roanoke Rapids v. Patterson, 184 N. C. 135, 113 S. E. 603 (1922); N. C. GEN. STAT. § 105-302 (1950).

[19] *E.g.*, Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69 (1926), *reversing* 187 N. C. 263, 121 S. E. 741 (1924).

[20] *E.g.*, Owens v. Chaplin, 229 N. C. 797, 48 S. E. 2d 37 (1948); Gower v. Carter, 195 N. C. 697, 143 S. E. 513 (1928); Groves v. Commissioners of Rutherford, 180 N. C. 568, 105 S. E. 172 (1920); N. C. CONST. Art. VI, § 2; N. C. GEN. STAT. §§ 163-25 (f) and 163-26 (1952).

[21] *E.g.*, Commissioners of Burke v. Commissioners of Buncombe, 101 N. C. 520, 8 S. E. 176 (1888); N. C. GEN. STAT. § 153-159 (1952).

[22] *E.g.*, Howard v. Queen City Coach Co., 212 N. C. 201, 193 S. E. 138 (1937); N. C. GEN. STAT. § 1-82 (1953).

[23] Horne v. Horne, 31 N. C. 99 (1848); RESTATEMENT, CONFLICT OF LAWS §§ 15, 16, 18 (1934).

[24] Roanoke Rapids v. Patterson, 184 N. C. 135, 113 S. E. 603 (1922). In Granite Trading Corp. v. Harris, 80 F. 2d 174, 176 (4th Cir. 1935), the court gave the following simple definition of domicile: "No better practical concept of a man's legal domicile can be obtained than from the untechnical definition of the Roman law, *i.e.*, the place 'from which when he goes away he seems to be wandering from home.'"

[25] 152 N. C. 215, 216, 67 S. E. 502, 503 (1910).

[26] Sheffield v. Walker, 231 N. C. 556, 58 S. E. 2d 356 (1950).

[27] Residence and domicile found to be synonymous: Hannon v. Grizzard, 89 N. C. 115, 120: "Residence as the word is used in this section in defining political rights, is, in our opinion, essentially synonymous with domicile denoting a permanent as distinguished from a temporary dwelling place." Similar statements are

have been actual confusion.[28] However, on close examination of the cases, it becomes clear that in certain situations residence is always interpreted to mean domicile, as in the divorce[29] and voting[30] cases; and in other situations, residence is interpreted to mean actual residence, as in the homestead[31] and attachment[32] cases. Whether residence is synonymous with domicile in a particular connection depends upon the nature of the subject matter, the context in which the word is used, and the purpose of the legislation or writing in which the word is used.[33] This principal is reiterated in the *Barker* case[34] with great clarity.

The cases involving students have been primarily concerned with the residence of students for voting purposes.[35] As a general rule, a student

found in Owens v. Chaplin, 229 N. C. 797, 48 S. E. 2d 37 (1948); Gower v. Carter, 195 N. C. 697, 143 S. E. 513 (1928); Groves v. Commissioners of Rutherford, 180 N. C. 568, 105 S. E. 172 (1920); Roberts v. Canon, 20 N. C. 398 (1839). All of these cases deal with residence requirements for voting or holding office.

Roanoke Rapids v. Patterson, 184 N. C. 135, 137, 113 S. E. 603, 604 (1922): "When accurately used, 'domicile' and 'residence' are not convertible terms. Domicile is a person's fixed, permanent, established, dwelling-place, as distinguished from his temporary, although actual, place of residence." This case involved the requirement of listing property for taxation in the township in which the taxpayer resides.

Watson v. North Carolina R. R., 152 N. C. 215, 217, 67 S. E. 502, 503 (1910), quoting with approval from Barney v. Oelrichs, 138 U. S. 529 (1891): "Residence is dwelling in a place for some continuance of time and is not synonymous with domicile, but means a fixed and permanent abode or dwelling, as distinguished from a mere temporary locality of existence; and to entitle one to the character of a 'resident,' there must be a settled, fixed abode, and an intention to remain permanently. . . ." The case involved the venue requirement of bringing suit in the county in which the plaintiff resided, which was construed to mean domicile although the court, in the above quotation, states that the words are not synonymous.

Residence and domicile not synonymous: Sheffield v. Walker, 231 N. C. 556, 559, 58 S. E. 2d 356, 359 (1950): "'Residence' is sometimes synonymous with 'domicile.' But when the words are accurately and precisely used, they are not convertible terms." This was a case involving recordation of a conditional sales contract in the county where the conditional vendee resides. Residence was held to mean actual, personal residence and not domicile.

[28] Howard v. Queen City Coach Co., 212 N. C. 201, 193 S. E. 138 (1937). The court held that residence in the venue statute means a person's domicile, but the opinion after stating that residence and domicile are not synonymous goes on to define both terms as a person's fixed, permanent, and established abode.

[29] Cases cited note 7 *supra*.

[30] Cases cited note 20 *supra*.

[31] Cases cited note 8 *supra*.

[32] Cases cited note 3 *supra*. The purpose of the attachment statute, for example, is to protect domestic creditors against debtors who are out of the state and cannot be served with legal process. Six months' absence may be sufficient to justify attachment of the debtor's property although the debtor still retains his domicile in the state for other purposes such as administration of his estate at his death. See the discussion in RESTATEMENT, CONFLCT OF LAWS § 9, comment *e* (1934).

[33] Baker v. Varser, 240 N. C. 260, 82 S. E. 2d 90 (1954); Industrial Discount Corp. v. Radecky, 205 N. C. 163, 170 S. E. 640 (1933).

[34] 241 N. C. 397, 399, 85 S. E. 2d 305, 306, 307 (1955): "Residence has been variously defined by this court. The definitions vary according to the purposes of the several statutes referring to residence and the objects to be accomplished by them."

[35] See 37 A. L. R. 134 (1925).

who resides in a college town while seeking an education will not acquire a legal residence or a domicile in that town even though he is an adult.[36] An adult student may acquire a domicile in the college town while attending school if he intends to remain there permanently or indefinitely without any present intention of returning to his former home.[37] Thus students who intend to remain in the college community only during the time necessary to complete their education and then intending to locate elsewhere are not residents for voting purposes.[38] It has been said that there must be a bona fide intent to make the city their home for a period not limited by the length of time that would be required for their educational stay.[39] It is to be noted that in these cases the word "residence" is construed to mean "domicile."

Many other cases have arisen regarding residence of a child in a school district for the purpose of obtaining a free public education. When a minor leaves his father's home and goes to another place for the sole purpose of seeking a free public school education, maintaining an intent to return to his former home, he will not become a "resident" in the school district.[40] Generally, however, the courts have construed residence here as actual residence rather than domicile.[41]

In an interesting South Carolina case,[42] a student attending college was held to be an "actual" resident of the university community for purposes of a venue statute though his "legal" residence may have been elsewhere. The dissent in this case vigorously attacked this conclusion, stating that the student's residence was with his parents. This is another example of "residence" meaning "actual residence."

A student who joined a National Guard unit in the state where he attended college, his domicile being in another state, has been held to be a resident of the state in which he attended school and therefore not entitled to a discharge under a statute limiting membership in the militia to residents of the state.[43]

[36] See 28 C. J. S., *Domicile* § 12(g) 3 (1941) and 17 AM. JUR., *Domicile* § 74 (1938), and cases cited therein.

[37] Baker v. Varser, 240 N. C. 260, 82 S. E. 2d 906 (1954); Berry v. Wilcox, 44 Neb. 82, 62 N. W. 249, 48 Am. St. Rep. 706 (1895).

[38] Chomeau v. Roth, 230 Mo. App. 709, 72 S. W. 2d 997 (1934); Goben v. Murrell, 195 Mo. App. 104, 190 S. W. 986 (1916).

[39] Ptak v. Jameson, 215 Ark. 292, 220 S. W. 2d 592 (1949).

[40] State v. School Dist. No. 12, Niobrara County, 45 Wyo. 365, 18 P. 2d 1010 (1933); Mt. Hope School Dist. v. Hendrickson, 197 Iowa 191, 197 N. W. 47 (1924). The court found in the Mt. Hope case that the children were emancipated by their father, had no intention of returning to their Canadian home, and were, therefore, residents of the school district.

[41] People v. Hendrickson, 54 Misc. 337, 104 N. Y. S. 122 (Sup. Ct. 1907), *aff'd*, 196 N. Y. 551, 90 N. E. 1163 (1909). The court held that an orphan residing with a resident of the school district was entitled to a free education since the legislature did not intend residence to be construed as domicile. *See* State v. School Dist. No. 12, Niobrara County, 45 Wyo. 365, 376, 18 P. 2d 1010, 1013 (1933).

[42] Roof v. Tiller, 195 S. C. 132, 10 S. E. 2d 333 (1940).

[43] Owens v. Huntling, 115 F. 2d 160 (9th Cir. 1940).

Students have also been held to be nonresidents of the state of their domicile for the purpose of service of process under the nonresident motorist statutes of their home states.[44]

Many states have statutes permitting their state universities to charge higher tuition for nonresident students than that charged for resident students.[45] While there is a dearth of cases on the point possibly due to the relatively small amounts involved, it seems that in the absence of express rules governing this matter, those charged with the duty of deciding who shall be assessed nonresident tuition fees rely on the common law rules of domicile.[46]

In summation, the cases involving students and their "residence" show that, as in the cases involving residence of those in other situations, whether the student is a resident of the college community will be determined by the purpose of the statute involved and the objects to be accomplished by it.

The domicile of an unemancipated child ordinarily follows that of the father.[47] This domicile cannot be changed by the child on its own volition since it is *non sui juris*.[48] A child may, however, reside in one place while its domicile is in another.[49] Marriage may emancipate an infant so that it may acquire a domicile of its own choice,[50] but this does not always follow as a matter of course.[51]

In determining the meaning of residence in the *Barker* case, the court said that under the tuition statutes in North Carolina a student does not become a resident of the college community merely by attending classes; that to say the son became a resident of Raleigh under the facts in the case would be to give a narrow and restricted meaning to the words "residing with the insured" which would be unjustified in view of the principle of construing insurance policies liberally with respect to the insured. Such a view seems to have been justified though the court came close in result to saying that "residing with" meant "having his domicile with" by its analogy to the tuition situation in which rules of domicile

[44] Uslan v. Woronoff, 173 Misc. 693, 18 N. Y. S. 2d 222 (New Rochelle City Ct. 1940), *aff'd mem.*, 259 App. Div. 1093, 21 N. Y. S. 2d 613 (2d Dep't 1940); Hughes v. Luckner, 233 Minn. 207, 46 N. W. 2d 497 (1951).

[45] See *e.g.*, N. C. GEN. STAT. § 116-144 (1952).

[46] Dykstra and Dykstra, *Who Are Nonresident Students*, 16 JOURNAL OF THE AMERICAN ASSOCATION OF COLLEGIATE REGISTRARS 255 (1941).

[47] Allman v. Register, 233 N. C. 531, 64 S. E. 2d 861 (1951); Thayer v. Thayer, 187 N. C. 573, 122 S. E. 307 (1924); *In re* Means, 176 N. C. 307, 97 S. E. 39 (1918).

[48] *In re* Blalock, 233 N. C. 493, 64 S. E. 2d 848, 25 A. L. R. 2d 818 (1951); Thayer v. Thayer, 187 N. C. 573, 122 S. E. 307 (1924).

[49] Allman v. Register, 233 N. C. 531, 64 S. E. 2d 861 (1951).

[50] Bonneau v. Russell, 117 Vt. 134, 85 A. 2d 569 (1952); *Ex parte* Olcott, 141 N. J. Eq. 8, 55 A. 2d 820 (Ch. 1947); RESTATEMENT, CONFLICT OF LAWS § 31 (1934).

[51] *In re* Dawkins, 190 Misc. 995, 75 N. Y. S. 2d 546 (N. Y. Dom. Rel. Ct. 1947).

are usually said to apply,[52] and by relying on a similar case in which a court said that a minor's residence was where his domicile was, since domicile includes residence.[53]

The important thing to be remembered is that the North Carolina court will look to the nature of the subject matter, the purpose of the statute or other instrument, and the context in which the word is used in determining what "residence" means. An equally important corollary is that cases interpreting the word "residence" in one connection do not necessarily indicate the way in which that word will be interpreted when it arises in another connection.

F. KENT BURNS.

Descent and Distribution—Homicide—Effect on Guilty Party's Right to Inherit

A husband was acquitted of the unlawful homicide of his wife, whom he killed while shooting at a man he suspected of being her lover. In a subsequent suit by her son and her administrator for a declaratory judgment debarring him from inheriting from his wife, the husband's right to inherit was declared unchanged by the mere fact of the homicide.[1] A statute[2] which provided that no one convicted of "unlawfully killing" another should benefit from the death had no application, since the husband had been acquitted of any unlawful killing.

The theory of the court in allowing the husband to inherit was that the intent necessary to preclude a killer from benefiting by the death of his victim is more than a mere general criminal intent, or an intent directed at a third person. It must be an intent to kill unlawfully the person by whose death the killer seeks to benefit. The evidence showed that such intent had been absent in this case.

The problem of whether one who kills an ancestor, a testator, or a joint tenant, may acquire property from his victim, thus benefiting by virtue of his own homicidal act, has long been the subject of judicial and legislative discord.[3] A brief look at some of the decisions and statutes may aid in understanding the problems raised by the principal case.

In the absence of statutes directly in point the courts have, in general, fallen into one of three groups:

[52] Dykstra and Dykstra, *supra* note 46.

[53] Central Manufacturers Mutual Ins. Co. v. Friedman, 213 Ark. 9, 12, 209 S. W. 2d 102, 103, 1 A. L. R. 2d 557, 559, 560 (1948): "The domicile of Benno was with his father . . . Domicile includes residence. . . ."

[1] Legette v. Smith, 85 S. E. 2d 576 (S. C. 1955).

[2] S. C. CODE § 19-5 (1952).

[3] See generally, 16 AM. JUR., *Desecent and Distribution* §§ 74-78 (1938); Note, 39 A. L. R. 2d 477 (1955); 3 BOGERT, TRUSTS AND TRUSTEES § 477 (1946); Wade, *Acquisition of Property by Willfully Killing Another—A Statutory Solution*, 49 HARV. L. R. 715 (1936); AMES, LECTURES ON LEGAL HISTORY 310-312 (1913).

(1) Those courts which have allowed inheritance despite the fact that the property descends by virtue of the heir's felonious killing of the ancestor have done so on the theory that the statutes of wills and of descent and distribution are clear and unambiguous, and make no provision for such a situation, and that, until the legislature speaks again and deprives a killer of his right to inherit, the courts are powerless to prevent the property from going directly to the felon.[4] In support of this view the argument has been advanced that depriving an heir of his right to the property would be a forfeiture of estate upon conviction of a crime, in violation of express constitutional provisions.[5]

(2) Courts which have refused to allow the killer to benefit by his act insist that statutes of wills and descent were passed subject to the common-law doctrine that one may not profit by his own wrong, and that courts must read this principle into the statutes as being the intent of the legislature.[6] In answer to the contention that denying the right of inheritance to the killer is an unconstitutional forfeiture of his estate, these courts point out that the estate never vested in the killer; thus, that there is no *forfeiture,* but a mere *exclusion* of the killer from the group entitled to inherit.[7]

(3) Still a third group of courts has held that the statutes of descent and distribution control to the extent that the legal title passes to the killer immediately upon the death of his victim, but that, in keeping with principles of equity and good conscience, he becomes a constructive trustee, or holder of the bare legal title, for the benefit of those who

[4] Carpenter's Estate, 170 Pa. 203, 32 Atl. 637 (1895); Crumley v. Hall, 202 Ga. 588, 53 S. E. 2d 646 (1947); Deem v. Milliken, 6 Ohio C. C. 357 (1892), *aff'd,* 53 Ohio St. 668, 44 N. E. 1134 (1895); Eversole v. Eversole, 169 Ky. 793, 185 S. W. 487 (1916); Gollnik v. Mengel, 112 Minn. 349, 128 N. W. 292 (1910); Hagan v. Cone, 21 Ga. App. 416, 94 S. E. 602 (1917); Hill v. Noland, 149 S. W. 288, Tex. Civ. App. (1912); Holloway v. McCormick, 41 Okla. 1, 136 Pac. 1111 (1913); Owens v. Owens, 100 N. C. 240, 6 S. E. 794 (1888); McAllister v. Fair, 72 Kan. 533, 84 Pac. 112 (1906); *Re* Duncan's Estates, 40 Wash. 2d 850, 246 P. 2d 445 (1952); Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935 (1894); Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 785 (1914); Wilson v. Randolph, 50 Nev. 371, 261 Pac. 654, *rehearing denied,* 50 Nev. 440, 264 Pac. 697 (1927).

[5] Carpenter's Estate, 170 Pa. 203, 32 Atl. 637 (1895); Owens v. Owens, 100 N. C. 240, 6 S. E. 794 (1888); Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 785 (1914).

[6] Garwols v. Bankers' Trust Co., 251 Mich. 420, 232 N. W. 239 (1930); *In re* Wilkin's Estate, 192 Wis. 111, 211 N. W. 652 (1927); McDonald v. Mutual Life Ins. Co., 178 Iowa 863, 160 N. W. 289 (1916) (insurance case); Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641 (1908); Price v. Hitaffer, 164 Md. 505, 165 Atl. 470 (1933); *Re* Spark's Estate, 172 Misc. 642, 15 N. Y. S. 2d 926 (Surr. Ct. 1939); *Re* Tyler's Estate, 140 Wash. 679, 250 Pac. 456 (1926) (apparently overruled by *Re* Duncan's Estates, *supra* note 4); Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188 (1889); Weaver v. Hollis, 247 Ala. 57, 22 So. 2d 525 (1945).

[7] Garwols v. Bankers' Trust Co., 251 Mich. 420, 232 N. W. 239 (1930); Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641 (1908); Weaver v. Hollis, 247 Ala. 57, 22 So. 2d 525 (1945).

would have taken had he not been living.[8] The North Carolina court has unqualifiedly allied itself with this view.[9]

The decision in the principal case points up the tendency of courts in jurisdictions which, by virtue of judicial construction or statutory directive, have denied some killers the right to inherit, to inquire into the "intent" of the killer in determining whether or not he shall be allowed to benefit by the death of his victim. In the principal case the South Carolina court refused to apply the criminal law theory that "malice follows the bullet," saying: "But to invoke this fiction of the criminal law against the right of inheritance in a civil case is, it seems to us, extending the common law principle to encompass a factual situation that was never intended to be within its purview."[10] The husband directed no malice toward his wife; thus, he did not forfeit his rights as an heir.

That courts consider the killer's intent in determining his right to inherit is made apparent in many ways. Clearly, no court would deny inheritance to one who kills an ancestor negligently—who kills in the commission of a mere tortious wrong,[11] while, at the other extreme, a court which denies the right to inherit to any killer would naturally deny it to one convicted of murder in the first degree. It has been said that if the killing was justified, as by self-defense, it would not preclude inheritance by the killer.[12] Killers who were insane at the time they committed the homicide have been held capable of inheriting.[13] The theory here seems to be that unless the killer has a *mens rea,* the common law or statutory doctrine which precludes him from inheriting is not justifiable.[14] One court refused to deny a husband the right to inherit from his wife, whom he killed while shooting at her alleged paramour, on the theory that he did not kill with the *intent* to inherit from his wife.[15]

As a consequence of the refusal of courts in group (1) to "read into"

[8] Neiman v. Hurff, 11 N. J. 55, 93 A. 2d 345 (1952) (joint ownership of stock); Whitney v. Lott, 134 N. J. Eq. 596, 36 A. 2d 888 (Ch. 1944); Sherman v. Weber, 113 N. J. Eq. 45, 167 Atl. 517 (Ch. 1933); Ellerson v. Wescott, 148 N. Y. 149, 42 N. E. 540 (1896); Van Alstyne v. Tuffy, 103 Misc. 455, 169 N. Y. S. 173 (Sup. Ct. 1918).

[9] Garner v. Phillips, 229 N. C. 160, 47 S. E. 2d 845 (1948); Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188 (1927). See also, advocating this view, RESTATEMENT, RESTITUTION § 187 (1937).

[10] Legette v. Smith, 85 S. E. 2d 576, 580 (S. C. 1955).

[11] *In re* Houghton, [1915] 2 Ch. 173, 176, where the court said: "Hitherto it has never been suggested that there is any such incapacity or disqualification, where the person guilty of the act of slaying the deceased was innocent of any crime, as where the deceased was killed accidently or by misadventure, or his death was held to be a case of justifiable homicide."

[12] Floyd v. Franklin, 251 Ala. 15, 36 So. 2d 234 (1948).

[13] *In re* Houghton, *supra* note 11; Eisenhardt v. Siegel, 343 Mo. 22, 119 S. W. 2d 810 (1938); Petrillo v. Hanley, 29 Pa. D. & C. 512 (1936); *In re* Hoffman's Estate, 39 Pa. D. & C. 208 (1940); *In re* Estate of Mason, 31 D. L. R. 305 (1916).

[14] *In re* Pitts [1931] 1 Ch. 546.

[15] *In re* Wolf, 88 Misc. 433, 150 N. Y. S. 738 (Surr. Ct. 1914).

the statutes of descent and distribution any preclusion of murderers from inheriting, statutes have been passed in many jurisdictions in an effort to remedy this situation.[16] These statutes, however, are far from uniform. Almost as many different statutes have been enacted as there are ways of describing the act which will bring about disinheritance of the killer. Indirectly, they all have reference to the intent or state of mind of the killer. Some hold that only a "murder" is sufficiently reprehensible to deprive the killer of his inheritance.[17] Others refer to "murder in the first or second degree."[18] Still others apply only when there has been a "felonious"[19] or "willful"[20] causing of death, or an "unlawful"[21] or "criminal causing or procuring of death."[22] Several statutes extend the doctrine beyond the actual act of killing, and disinherit one who "conspires"[23] to kill, or "aids and abets"[24] the killing. One statute comes into play only where the killing has been done with the intent to obtain the property of the person killed.[25] Whether or not one who commits manslaughter is prevented from inheriting the property of the deceased depends entirely on the wording of the individual statute.[26]

The North Carolina statute on this point is even more limited than most, applying only to husband-wife homicides.[27] The North Carolina court avoided the inequitable consequences of a strict construction of the statute of descent in *Bryant v. Bryant*[28] and *Garner v. Phillips*[29] by

[16] See 3 BOGERT, TRUSTS AND TRUSTEES § 478 (1946), where these statutes are catalogued.

[17] CAL. PROB. CODE § 258 (1949).

[18] COLO. REV. STAT. ANN. §152-2-13 (1953); PA. STAT. ANN., tit. 20 §§ 136, 244 (1950).

[19] N. D. REV. CODE § 56-0423 (1943).

[20] MISS. CODE ANN. § 672 (1942).

[21] S. C. CODE § 19-5 (1952).

[22] OKLA. STAT. tit. 84, § 231 (1951).

[23] NEB. REV. STAT. §§ 30-119 and 30-120 (1943); KAN. GEN. STAT. § 59-513 (1949).

[24] IND. ANN. STAT. § 6-212 (1953).

[25] VA. CODE § 64-18 (1950). This statute was strictly construed in Ward v. Ward, 174 Va. 331, 6 S. E. 2d 664 (1940) and Blanks v. Jiggetts, 192 Va. 337, 64 S. E. 2d 809 (1951).

[26] Thus, in Strickland v. Wysowatcky, 250 P. 2d 199 (Colo., 1952), the court held that one who was convicted of voluntary manslaughter of his wife was not precluded from inheriting from her by a statute (COLO. REV. STAT. ANN. § 152-2-13 (1953)) which provided that "any person convicted of murder in the first or second degree . . . shall not take . . . any of the estate of deceased." In Hamblin v. Marchant, 103 Kan. 508, 175 Jac. 678 (1918), where the statute denied the right of inheritance in the decedent's estate to anyone convicted of "killing" decedent, it was held that a wife who was convicted of manslaughter in the third degree was precluded from inheritance.

[27] N. C. GEN. STAT. §§ 28-10, 30-4, 52-19 (1953). Since the North Carolina statutes deny the right of one spouse to succeed to the property of the other whom he has "feloniously slain," and since manslaughter, both voluntary and involuntary, is a felony in North Carolina (see State v. Dunn, 208 N. C. 333, 180 S. E. 708 (1935)), it seems that, under the statute, even manslaughter would preclude one spouse's inheriting from the other.

[28] 193 N. C. 372, 137 S. E. 188 (1927). Husband and wife were tenants by the entirety. Husband killed wife and the court denied him the benefits of the land on

the device of the constructive trust. But, necessarily, the law in this area is still in a nebulous state, since these decisions have set out the law in only two of a myriad of possible fact situations. Inevitably these situations will arise, and even granting that the court will feel justified in applying a constructive trust in every case, a comprehensive statute would seem vastly preferable. The result would be a much more predictable law in this area, relieving the necessity for litigation and for employing such a legal fiction each time an even slightly different set of facts arises.

DAVID M. CLINARD.

Trade Regulation—Exclusive Dealing Arrangements—Effect on Competition Required by Section 3 of the Clayton Act

Congress enacted Section 3 of the Clayton Act[1] in 1914. The intent of Congress was to apply a narrower standard of legality to exclusive dealing arrangements than was employed by the Sherman Act rule of reason approach.[2] The Act[3] was designed to eliminate unreasonably restrictive practices in their incipiency.[4]

Section 3 covers both tying clauses and exclusive dealing contracts.[5]

"equitable principles," expressly reserving the question of whether or not N. C. GEN. STAT. § 28-10 (1953) applied.

[20] 229 N. C. 160, 47 S. E. 2d 845 (1948). Son killed both parents. This case was clearly not within N. C. GEN. STAT. §§ 28-10, 30-4, or 52-19 (1953).

[1] 38 STAT. 731 (1914), 15 U. S. C. § 14 (1946).

[2] In Chicago Board of Trade v. United States, 246 U. S. 231, 238 (1918), Justice Brandeis stated the rule of reason as follows: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

[3] 38 STAT. 731 (1914), 15 U. S. C. § 14 (1946). Section 3 of the Clayton Act provides that: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . whether patented or unpatented, for use, consumption, or resale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

[4] Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346, 356 (1922): "The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency, and in the section under consideration to determine their legality by specific tests of its own which declared illegal contracts of sale made upon the agreement or understanding that the purchaser shall not deal in the goods of a competitor or competitors of the seller, which may 'substantially lessen competition or tend to create a monopoly.'"

[5] North Carolina has a statute declaring such practices illegal per se, since there is no qualifying clause therein. N. C. GEN. STAT. § 75-5(b) (Supp. 1953). See also Note, 29 N. C. L. REV. 316 (1951).

An example of a tying clause is where a manufacturer leases a tabulating machine to a lessee, and as a condition of the lease, requires the lessee to use in the machine only cards manufactured by the lessor.[6] On the other hand, an exclusive dealing contract has a direct exclusionary effect in the form of either a total requirements or an exclusive supply contract. A total requirements contract compels a dealer to buy or lease his full requirements of a product from the seller or lessor; the obvious result is that all other competitors are foreclosed from doing business with the dealer. An exclusive supply contract has the same effect by virtue of a specific provision that the dealer will handle certain goods of the supplier only and is forbidden to deal in goods of competitors of that supplier.

Although Section 3 makes no distinction between tying clauses and exclusive dealing contracts, courts have developed different standards of legality for them. The primary purpose of tying restrictions is to suppress competition,[7] but there are many economic advantages attributed to exclusive dealing contracts.[8] Consequently, tying restrictions have been held illegal per se,[9] whereas exclusive dealing contracts have been accorded more liberal treatment.

In applying Section 3[10] the meaning to be given the qualifying clause presents the most difficult problem. The first case involving exclusive dealing contracts to reach the United States Supreme Court was *Standard Fashion Co. v. Magrane-Houston Co.*[11] In a private suit by a manufacturer of dress patterns to enjoin a dealer from violating an "agency" contract, the Court found that the contract was an exclusive dealing restriction.[12] In view of the fact that the manufacturer controlled ap-

[6] International Business Machines Corp. v. United States 298 U. S. 131 (1936).
[7] Standard Oil Co. of California v. United States, 337 U. S. 293, 305-306 (1949).
[8] *Id.* at 306; Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts,* 23 N. Y. U. L. Q. REV. 412, 413-14 (1948).
[9] International Salt Co. v. United States, 332 U. S. 392 (1947).
[10] Generally speaking, there are three methods by which a Section 3 suit arises:
(1) Department of Justice prosecution in a federal district court:
(2) Federal Trade Commission investigation and proceeding with right to appeal from a Federal Trade Commission order direct to the United States Court of Appeals; and
(3) Private suit in the federal courts. A Section 3 case may arise on an injunction petition against a restrictive practice, a defense to a restrictive contract enforcement action, or in a suit for treble damages for injury sustained on account of the restrictive practice.
In the field of private litigation under Section 3 no case has been discovered where treble damages were allowed a small buyer or dealer because of restrictions imposed by an exclusive dealing contract. To allow recovery there must be not only proof of a public injury, but also a causal connection between the violation charged and injury claimed in addition to proof of the nature and extent of that injury. See Libman v. Sun Oil Co., 127 F. Supp. 52 (D. Conn. 1954); Hudson Sales Corp. v. Waldrip, 211 F. 2d 268, 274 (5th Cir. 1954).
[11] 258 U. S. 346 (1922).
[12] Exclusive agency contracts, vertical integrations, allocations of exclusive territories, and refusals to deal are not covered by Section 3 of the Clayton Act. Also, exclusive buying arrangements that commit the seller to trade exclusively with the

proximately 40 per cent of the 52,000 so-called pattern agencies in the entire country, the Court concluded that such contracts came within the prohibition of Section 3. The Court applied the "dominance" test, which is to the effect that if the degree of domination of the market is sufficient to justify the inference that competition had been or probably would be lessened, then the alleged violator's exclusive dealing contracts are illegal under the qualifying clause of Section 3. Twenty-seven years later came the *Standard Oil of California* case[13] on a government prosecution,[14] which laid down a narrower rule called the test of substantiality. This test is met when a substantial portion of the industry's business is foreclosed by the restrictive arrangement.[15] Conversely, if the amount of business foreclosed by a restrictive arrangement is insufficient to adversely affect a substantial amount of competition, such arrangement is not a violation of Section 3.

Since the *Standard Oil of California* decision, there has been much uncertainty as to whether exclusive dealing contracts are illegal per se if the defendant is doing a substantial amount of business, or whether the amount of business foreclosed by the contracts is the major factor.[16] There is also a contention that the courts are inconsistent in their holdings. And further, it is contended that the Federal Trade Commission orders are closer to the rule of reason approach than are the court deci-

buyer are not covered by Section 3. See Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U. S. 392 (1953).

[13] Standard Oil Co. of California v. United States, 337 U. S. 293 (1949). Here the defendant corporation had exclusive dealing contracts with 6000 independent dealers representing 16% of the retail gasoline outlets through which $58,000,000 worth of gasoline was sold in the western area comprising seven states. Defendant, the largest seller in the area, also had 23% of the industry's business although only 6.7% of it was obtained through defendant's exclusive dealing contracts. Six other competitors had similar arrangements which foreclosed a total of 42.5% of the market to more than 70 smaller companies. The length of defendant's contracts varied from specified terms in some cases to year-to-year terms in others. The Supreme Court held that in view of the substantiality of the affected proportion of retail sales and widespread adoption of such contracts by the other large competitors, the contracts created such a potential clog on competition that Section 3 was violated.

[14] An examination of the FTC Docket of Complaints, 3 CCH TRADE REG. REP. (10th ed.) 40,021-406 (1954), reveals the fact that there has been a great increase in Federal Trade Commission activities in this field against major companies in various industries since the decision in Standard Oil Co. of California v. United States, 337 U. S. 293 (1949).

[15] For a discussion of the substantiality test applied in Standard Oil Co. of California v. United States, 337 U. S. 293 (1949), see Note, 28 N. C. L. REV. 188 (1949).

[16] See Sunderland, *Antitrust Developments: A New Era for Competitive Pricing*, 41 A. B. A. J. 113 (1955); 18 FORD. L. REV. 306 (1949); 35 IOWA L. REV. 131 (1949); 19 U. OF CIN. L. REV. 163 (1950).

But see McLaren, *Related Problems of "Requirements" Contracts and Acquisitions in Vertical Integration under the Anti-Trust Laws*, 45 ILL. L. REV. 141 (1950); Schwartz, *Potential Impairment of Competition—The Impact of "Standard Oil Co. of California v. United States" on the Standard of Legality under the Clayton Act*, 98 U. OF PA. L. REV. 10 (1949).

sions.[17] A study of the cases reveals that a pattern is developing which tends to show that the substantiality test laid down in the *Standard Oil of California* case is being consistently applied by both the courts and the Federal Trade Commission. That test has been universally adopted even though a bare majority of the Supreme Court adhered to it.[18] In testing for substantiality the inquiry goes beyond an ascertainment of the amount of business done by the alleged violator and includes such matters as a determination of the amount of business foreclosed by the restrictive arrangement. Other economic factors are also of importance on the issue of substantiality.[19]

The *Richfield Oil* case[20] involved one of the big producers in the western area. In 1950 Richfield did $36,000,000 worth of gasoline business[21] plus $3,650,000 worth of business in tires, batteries, and accessories. Of the 2965 stations involved, there were over 4500 written agreements of indefinite length and 3000 oral stipulations found to have exclusionary effects. First of all, the exclusive dealing arrangements had to be proved before substantiality of foreclosure of competition could be determined. Richfield had two main types of stations which were called leased out (L-O) stations and dealer stations. It was contended that the L-O stations were created by Richfield and therefore were agencies in fact. But the lease provisions containing fifteen clauses were so elaborate and so worded as to make the lessees independent. A legal estate of at least a tenancy at will was found to exist.[22] Superimposed upon these leases were oral requirements restrictions which, combined with the leases, had the effect of establishing exclusive dealing arrangements with the 1343 L-O stations. Dealer stations operated under 80 per cent requirements contracts which, without more, would not have been fully exclusive dealing arrangements. Richfield further employed restrictions in the form of painting agreements and restrictions against

[17] Sunderland, *Antitrust Developments: A New Era for Competitive Pricing*, 41 A. B. A. J. 113 (1955); 1 CCH TRADE REG. REP. (10th ed.) ¶ 4007 (1954).

[18] Standard Oil Co. of California v. United States, 337 U. S. 293 (1949). The lower court decision was affirmed by a 5-4 vote.

[19] *See, e.g.*, Dictograph Products, Inc. v. Federal Trade Commission, 217 F. 2d 821 (2d Cir. 1954), and Anchor Serum Co. v. Federal Trade Commission, 217 F. 2d 867 (7th Cir. 1954). Both cases will be discussed later in this note.

[20] United States v. Richfield Oil Corp., 99 F. Supp. 280 (S. D. Cal. 1951), *aff'd per curiam*, 343 U. S. 922 (1952).

[21] See Kahn, *A Legal and Economic Appraisal of the "New Sherman and Clayton Acts,"* 63 YALE L. J. 293, 315 n. 123 (1954): "This absolute volume probably amounted to less than 3% of the total gasoline sales in the area, though a substantially higher proportion of the sales through service stations alone."

[22] United States v. Richfield Oil Corp., 99 F. Supp. 280, 290 (S. D. Cal. 1951): "If we consider the provision for 24-hours' termination as valid, the lessee has, at the worst, *a tenancy at will*. . . . And I am inclined to think that, because of the conflict of the 24-hours' termination clause with the monthly rental provisions, Courts would consider the tenancy created by the L-O agreements, *at least*, a month-to-month tenancy *terminable only* upon the minimum notice required in such cases."

displaying unauthorized signs or operating unauthorized gasoline pumps. These restrictions, together with their rigid enforcement by overwhelming coercion, precluded competitors from trading with the dealer stations. Applying the substantiality test, the court, undoubtedly having in mind that 55 per cent of the industry was tied up by restrictive arrangements of the big producers, relied on the volume of business of Richfield under the exclusive dealing arrangements, the number of such arrangements employed by Richfield, and the coercion practiced in enforcing them, all of which indicated that the objective was to restrain competition. Therefore, the practices involved were held to violate Section 3 of the Clayton Act.

In contrast to the finding of substantiality in the *Richfield Oil* case, *J. I. Case Co.*[23] is an example of a lack of substantiality. The defendant in this case was the nation's third largest producer of farm machinery doing a $108,000,000 business in 1948, which amounted to 7 per cent of the total business in the industry. J. I. Case Co. required its 3738 dealers to handle its complete line of products[24] under one year contracts which were renewable. 1050 of the dealers handled J. I. Case Co. products exclusively, but it was found that such arrangements were on the dealers' own volition. 108 instances where pressure was applied to restrict the dealers from trading with competitors were reported, but of these only twenty-six instances were reported since 1946 and none in 1948. The court held that on the entire evidence there were no exclusionary restrictions imposed on the dealers.

Thus, many facts had to be considered in both cases to determine whether exclusive dealing practices were employed. In one case exclusive dealing arrangements were proved, whereas in the other there were no exclusionary understandings found except in 108 isolated instances.[25]

Two recent Court of Appeals decisions from different circuits have applied the substantiality test. In the *Dictograph Products* case[26] the court in an opinion by Judge Medina stated that economic inquiry was unnecessary after a finding of substantiality. But in determining the question of substantiality, such facts were relied upon as the volume of

[23] United States v. J. I. Case Co., 101 F. Supp. 856 (D. Minn. 1951).

[24] The policy employed by J. I. Case Co. and other producers in the farm machinery industry is that of full line forcing; its effect is to require a dealer to handle the complete line of the producer's products as a condition of lease or purchase of any of the producer's goods. Full line contracts are not restrictive under Section 3 unless the dealer is precluded from handling competitors' products.

[25] Proof of exclusive dealing agreements in most cases is not so difficult to establish since the exclusionary provisions are usually incorporated in formal written contracts. See Standard Oil Co. of California v. United States, 337 U. S. 293 (1949); Dictograph Products, Inc. v. Federal Trade Commission, 217 F. 2d 821 (2d Cir. 1954); Anchor Serum Co. v. Federal Trade Commission, 217 F. 2d 867 (7th Cir. 1954).

[26] Dictograph Products, Inc. v. Federal Trade Commission, 217 F. 2d 821 (2d Cir. 1954).

business done under the defendant's written exclusive dealing contracts, its third position in rank in the hearing aid industry, that it is one of three large producers that use these contracts, that it controls 220 of the 1000 prime retail outlets, and that the defendant has maintained its position during the post-war period of growth. Upon consideration of these facts, probable adverse effect on competition was found.

In the other case, *Anchor Serum Co. v. Federal Trade Commission*,[27] the court's opinion by Judge Major stated:

> "There was no legal issue before the Commission as to whether the contracts were illegal per se; the only legal issue before the Commission, as it is here, was whether the contracts with their restrictive provisions were calculated to have the proscribed effect or consequences. . . . Only contracts which had the proscribed effect were made unlawful [by Section 3]."[28]

The findings of the Federal Trade Commission were to the effect that defendant had full requirements contracts with sixteen wholesalers, that it was the largest producer of hog cholera serum and virus in the "lay" producing group, and that the dollar volume of business with the sixteen contract holders was substantial. In addition the Federal Trade Commission found that $1,000,000 worth of business was done annually with its two largest wholesale dealers who were the biggest distributors in the enormous hog producing states of Iowa and Illinois; facts were shown to prove that competition was completely stymied in certain instances after the exclusive contracts were made in 1947. The inescapable inference is that obligation of the dealers under the contracts caused it.[29] Here again the decision rests not only on volume of business done under the restriction, but also leadership in the industry and number of outlets foreclosed along with specific instances of eliminating competitors from the market.

The fact that Federal Trade Commission orders are following the substantiality pattern is illustrated by the *Maico Co.* case.[30] The Commission remanded the case to the hearing examiner to determine the substantiality of foreclosure of competition because he, in concluding that Section 3 was violated, had found only the following: the petitioner's rank in the hearing aid field, volume of business, and that there were restrictive contracts with 123 distributors. Not a single case discussed has held exclusive dealing contracts invalid on the meager evidence the hearing examiner relied upon in the *Maico Co.* case. The Commission

[27] 217 F. 2d 867 (7th Cir. 1954).
[28] *Id.* at 870.
[29] *Id.* at 873.
[30] The Maico Co., Inc., 3 CCH TRADE REG. REP. (9th ed.) ¶ 11,577 (F. T. C. 1952).

requires evidence of the same type as the courts require, except that due to its specialized nature, it is better equipped to probe more deeply into the same complex relevant economic facts that the courts consider in order to determine whether competition has been or probably will be substantially lessened.[31]

From the foregoing it is apparent that the mere doing of a substantial amount of business by an alleged violator is not sufficient to satisfy the requirements of the qualifying clause of Section 3. The major factor in the substantiality test is the amount of business foreclosed by the exclusive dealing arrangements. However, the courts do broaden an inquiry to include such factors as the rank in the industry, practice in the industry, number and per cent of outlets foreclosed, rigidity of enforcement of the restrictive practices, alleged violator's share of the market, length of the contracts, intent of the parties, availability of alternative ways of obtaining an assured market, and the economic power and capacity of the alleged violator to enforce restrictive provisions.

The fact that it is necessary to make an inquiry into the question of substantiality makes it clear that exclusive dealing contracts or arrangements are not legal per se. On the other hand, the fact that such inquiry is made does not mean that the rule of reason is employed. The technique adopted to determine the question of substantiality is similar to that in the rule of reason. But the analogy goes no further. Once substantiality is found to exist, these arrangements may be said to be illegal per se because there is no further inquiry into the reasonableness or beneficial effects that may, in fact, flow from such arrangements in a particular case. But it must be emphasized that the necessity of finding substantiality precludes such contracts from being per se illegal. Thus, it appears that the courts and the Federal Trade Commission have carried out the congressional intent in regard to exclusive dealing arrangements by applying a test of legality that falls between the rule of reason and illegality per se tests.

JAMES R. STRICKLAND.

Trade Regulation—Robinson-Patman Act—Unjustified Price Discrimination—Additional Requirements Necessary to Constitute Violation of Section 2(a).

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act,[1] prohibits an interstate seller from making certain price discriminations. The section in part states:

[31] *Cf.* Revlon Products Corporation, 3 CCH TRADE REG. REP. (10th ed.) ¶ 25,184, *motion to reopen denied*, ¶ 25,249 (F. T. C. 1954); Beltone Hearing Aid Co., 3 CCH TRADE REG. REP. (10th ed.) ¶ 25,397 (F. T. C. 1955) (Here the order is not a final Commission order, but a hearing examiner's ruling.)

[1] 38 STAT. 730 (1914), 15 U. S. C. § 13 (1946), as amended, 49 STAT. 1526 (1938), 15 U. S. C. § 13 (Supp. 1952).

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers or commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

In addition to an unjustified price discrimination[2] this statute seems to require that (1) the defendant be engaged in interstate commerce, (2) the discrimination occur in the course of such interstate commerce, and (3) the discrimination be of such a nature that the effect may be substantially to lessen competition, or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition. This note assumes the existence of a price discrimination[3] and will deal only with these additional requirements of Section 2(a).

With the exception of the "flow of commerce"[4] and "bulk storage"[5] doctrines, courts find little trouble in determining whether the alleged price discriminator was engaged in interstate commerce.[6] Since the "affection doctrine"[7] of the Sherman Act has been found inapplicable to Section 2(a) of the Clayton Act,[8] a defendant solely engaged in intrastate commerce is not within the coverage of this section regardless of any effect his discrimination may have on interstate commerce.[9]

[2] Certain defenses are available to the alleged discriminator in justification of his price differences. They are contained in Subsections (a) and (b) of Section 2 of the Clayton Act. For a recent discussion see Fortas, *Affirmative Legal Defenses*, HOW TO COMPLY WITH THE ANTITRUST LAWS 187 (Chicago Commerce Clearing House, 1954).

[3] For a discussion of this problem see Correa, *Discrimination in Prices*, How to COMPLY WITH THE ANTITRUST LAWS 152 (Chicago: Commerce Clearing House, 1954).

[4] This applies to products which after being produced or refined in one state are transported across state lines and sold from storage facilities in another state. Standard Oil Co. v. Federal Trade Commission, 340 U. S. 231 (1951); Midland Oil Co. v. Sinclair Refining Co., 41 F. Supp. 436 (N. D. Ill. 1941).

[5] This doctrine refers to intrastate sales where the goods involved were stored in bulk warehouses or storage tanks but had moved in interstate commerce prior to the storage. Walling v. Jacksonville Paper Co., 317 U. S. 564 (1943); Alabama Independent Service Station Ass'n v. Shell Petroleum Corp., 28 F. Supp. 386 (N. D. Ala. 1939).

[6] Austin, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 14 (Philadelphia: American Law Institute, 1953).

[7] Mandeville Island Farms v. American Crystal Sugar Co., 334 U. S. 219 (1948).

[8] Myers v. Shell Oil Co., 96 F. Supp. 670 (S. D. Cal. 1951); Spencer v. Sun Oil Co., 94 F. Supp. 408 (D. Conn. 1950.)

[9] *But see* Bowamn Dairy Co v. Hedlin Dairy Co., C. C. H. TRADE REG. REP. (10th ed.) ¶ 67,959 (N. D. Ill. 1954). The defendant was an *intrastate* dealer and

The requirement that the discrimination must have occurred *in the course* of defendant's interstate commerce has caused difficulty. It has been established that if defendant's goods are moving to him across state lines, as in the "flow of commerce" cases, then any discriminatory prices in his later sales will meet this requirement. This may be illustrated by a case in which the defendant refines gasoline in Indiana, ships it to storage tanks in Illinois, and competes with plaintiff, an intrastate dealer who buys gasoline from an Illinois corporation and sells it in Illinois. Defendant's discriminatory sales to customers of plaintiff would be in the course of his interstate commerce.[10] Section 2(a) may also be held applicable even if only one of the discriminatory sales was made in interstate commerce.[11] On the other hand, most courts have taken the view that a discriminatory act in intrastate commerce resulting in an injury to an intrastate merchant is not deprived of its local character merely because the same seller is conducting other transactions in interstate commerce. For example, in *Shlomchik v. Hygrade Bakery Company*[12] the defendant manufactured bakery products and sold them in interstate commerce. The plaintiff, an intrastate operator, sold similar products. The defendant was charged with following plaintiff's salesmen and underselling them while at the same time defendant was maintaining higher prices elsewhere. In regard to the jurisdictional requirement that the discrimination must occur in the course of defendant's interstate commerce, the court said:

> "In order for the sales here involved to come under the Clayton Act as amended by the Robinson-Patman Act, they must have been made in interstate commerce. The fact that the defendant conducts other business across state lines is not enough, nor is the additional fact that the effect of the discrimination may be to lessen competition with the person [the defendant in this case] who grants the benefit of such discrimination."[13]

The court further said that Congress plainly did not intend to regulate

---

the plaintiff was engaged in interstate commerce. The plaintiff alleged that the defendant had by means of discriminatory prices taken customers away from the plaintiff. The defendant moved for summary judgment on the ground that none of the alleged practices had occurred in interestate commerce. The court in denying defendant's motion relied on Moore's Bakery v. Mead's Fine Bread Co., 348 U. S. 115 (1954). The parties in the *Mead* case represented the converse of this situation with the defendant there being the party engaged in interstate commerce. However, the court said that since the plaintiff would be amenable to suit by the defendant under the *Mead* decision, then the plaintiff must be accorded a corresponding right.

[10] Midland Oil Co. v. Sinclair Refining Co., 41 F. Supp. 436 (N. D. Ill. 1941).

[11] The present language of Section 2(a) of the Clayton Act is that it covers situations "where either of any of the purchases involved in such discrimination are in commerce."

[12] C. C. H. TRADE REG. REP. (1953 Trade Cas.) ¶ 67,632 (E. D. Pa. 1953).

[13] *Id* at 68,992.

every transaction of every business engaged in interstate commerce and that the phrase "in the course of such commerce" indicates an intent to limit the operation of the Act to interstate transactions and not to attempt to regulate those which are wholly intrastate even though part of the seller's business may be interstate. This action was dismissed for lack of jurisdiction.[14]

Subsequently, the United States Supreme Court in *Moore's Bakery v. Mead's Fine Bread Company*[15] reached a different result, deciding that such a discrimination had occurred in the course of defendant's commerce and was therefore within the scope of Section 2(a) of the Clayton Act.[16] Mead's the defendant, manufactured bread in New Mexico and in one town in Texas. The plaintiff, Moore, was a local baker making and selling his bread only in Santa Rosa, New Mexico. Plaintiff and defendant were competitors in Santa Rosa. The defendant, on learning of an agreement by the local merchants to buy exclusively from the plaintiff, cut the price of his bread below cost and kept it low until the plaintiff was forced out of business. During this time de-

[14] *Accord,* Myers v. Shell Oil Co., 93 F. Supp. 670 (D. C. Cal. 1951). The defendant was engaged in interstate commerce but the discriminatory acts complained of by the plaintiff were made wholly in California. The plaintiff was engaged in intrastate commerce only. The court said the question here was whether the discrimination was committed in the course of defendant's interstate commerce. In denying relief under the Clayton Act the court said that Congress had not exercised all of its power over interstate commerce but had dealt only with persons who were not merely engaged in interstate commerce but who also practiced restraints in the course of the interstate commerce. See also Danko v. Shell Oil Co., 115 F. Supp. 886 (E. D. N. Y. 1953); Lewis v. Shell Oil Co., 50 F Supp. 547 (N. D. Ill. 1943).

[15] 348 U. S. 115 (1954). This case was begun March 10, 1949, in the United States District Court for the District of New Mexico. It was dismissed at the close of plaintiff's case on the ground that the plaintiff was "in pari delicto" with the defendant. This was affirmed in Moore v. Mead Service Co., 184 F. 2d 338 (10th Cir. 1950). The Supreme Court, in Moore v. Mead Service Co., 340 U. S. 944 (1951), granted certiorari, vacated the judgment, and remanded the case for consideration in the light of Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U. S. 211 (1951). The district court in a new trial again dismissed the plaintiff's complaint and rendered judgment for the defendant on the ground that the price discrimination was justified under the fourth proviso in Section 2(a) of the Clayton Act, allowing discriminatory prices to meet changed market conditions. This was reversed and remanded for new trial in Moore v. Mead Service Co., 190 F. 2d 540 (10th Cir. 1951), *cert. denied,* 342 U. S. 902 (1952). The district court in a new trial gave judgment for the plaintiff for $57,000 ($19,000 trebled) under Section 4 of the Clayton Act. This was reversed in Mead's Fine Bread Co. v. Moore, 208 F. 2d 777 (10th Cir. 1953), *cert. granted,* 347 U. S. 1012, *rev'd sub nom.* Moore's Bakery v. Mead's Fine Bread Co., 348 U. S. 115 (1954).

[16] A violation of Section 3 of the Robinson-Patman Act, 49 STAT. 1528 (1936), 15 U. S. C. § 13a (1946), was also found. This section, also known as the Borah-Van Nuys Act, prevents, *inter alia,* a person engaged in interstate commerce from selling goods "in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." This section was once thought to be criminal only, but now it is conceded that it provides for treble damage actions also. Note, 31 N. C. L. REV. 454 (1953).

fendant's bread prices in the other towns—including the one town in Texas—remained unchanged. Regarding the jurisdictional requirement of interestate commerce, the Supreme Court said:

> "Respondent [Mead] is engaged in commerce, selling bread both locally and interstate. In the course of such business, it made price discriminations, maintaining the price in the *interstate* transactions and cutting the price in the *intrastate* sales. . . . The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him."[17]

Nevertheless, the Supreme Court found an interstate connection on the ground that the defendant, an interstate merchant, was the beneficiary of the discrimination. He was financed from his interstate operations and also from other interstate companies in the Mead organization.[18] These sources enabled him to survive while his low prices forced the local competitor out of business.

In this decision the Supreme Court seems to have made a reality of Cyrus Austin's warning that:

> "It is unsafe for a seller engaged in interstate commerce to assume that his intrastate pricing policies are without the scope of the [Clayton] Act, even where only intrastate competition appears to be involved. There is always the possibility that the lowering of his intrastate prices will be held to be supported by the higher prices charged interstate purchasers; and this would undoubtedly be the case if such a seller should lower his price throughout an intrastate area to meet (or beat) local competition."[19]

The qualifying clause of Section 2(a) which requires a showing that the effect of such discrimination may be substantially (1) to lessen competition or (2) tend to create a monopoly in any line of commerce, or (3) to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination also has presented difficulty in interpretation. The first two of these "effects" were part of the original Clayton Act,[20] and the third was added by the Robinson-Patman Act. Protection to individual competitors was

[17] Moore's Bakery v. Mead's Fine Bread Co., 348 U. S. 115, 118 (1954).

[18] Defendant was affiliated with an interlocked chain of bakeries operating in southwest United States. The Court of Appeals for the Tenth Circuit said the fact that the stockholders and officers of the Mead Company in New Mexico were also stockholders and officers of other Mead organizations would not prove that the price war affected interstate commerce in the absence of a showing that the interlocking corporate ownership was related to the price war. Mead's Fine Bread Co. v. Moore, 208 F. 2d 777, 779 (10th Cir. 1953).

[19] Austin, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 17 (Philadelphia: American Law Institute, 1953).

[20] 38 STAT. 730 (1914), 15 U. S. C. § 13 (1946).

intended by this language,[21] but the problem remains whether injury to an intrastate operator will fulfill the requirement.

In cases brought by the Federal Trade Commission public policy is of primary importance, and some probability must exist that interstate commerce will suffer one of the proscribed effects.[22] However, private damage actions under the third possible effect involve no general public policy,[23] but the question remains whether the commerce or competition injured must be interstate. The United States Court of Appeals for the Tenth Circuit took the view in *Moore v. Mead* that it was still necessary for the plaintiff to prove an effect on interstate commerce.[24] However, the Supreme Court's decision in the *Mead* case[25] appears to take the view that an injury caused by price discriminations of one engaged in interstate commerce against an individual merchant competing locally will come under the prohibition of the Clayton Act regardless of the resulting effect on conditions in interstate commerce. The argument that the destroyed competition did not have to be interstate was submitted to the Supreme Court in the *Mead* case[26] and was apparently accepted by the following language in the Court's opinion: "The destruction of competition was plainly established as required by Section 2(a) of the Clayton Act." The only competition involved was that between Moore and Mead in Santa Rosa, New Mexico—which seems entirely intrastate. Therefore, it appears that in treble damage actions under Section 2(a) of the Clayton Act,[27] so long as the jurisdictional

[21] The original Clayton Act was "too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is an injury to the competitor victimized by the discrimination." SEN. REP. No. 1502, 74th Cong., 2d Sess. 4 (1936).

[22] Federal Trade Commission v. Morton Salt Co., 334 U. S. 37 (1948); Corn Products Refining Co. v. Federal Trade Commission, 324 U. S. 726 (1945); Samuel H. Moss Inc. v. Federal Trade Commission, 148 F. 2d 378 (2d Cir. 1945); Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission, 191 Fed. 2d 786 (7th Cir. 1951), *cert. denied*, 344 U. S. 206 (1952).

[23] Reid v. Doubleday and Co., 109 F. Supp. 354 (D. Ohio 1952); Myers v. Shell Oil Co., 96 F. Supp. 670 (S. D. Cal. 1951).

[24] Moore v. Mead Service Co., 184 F. 2d 338 (10th Cir. 1950), *rev'd on other grounds*, 340 U. S. 944 (1951).

[25] Moore's Bakery v. Mead's Fine Bread Co., 348 U. S. 115 (1954).

[26] Brief of Petitioner, Moore's Bakery v. Mead's Fine Bread Co., 348 U. S. 115 (1954).

[27] This is also true under Section 3 of the Robinson-Patman Act. See note 14 *supra*. The Supreme Court, in disposing of the added requirement in Section 3—"for the purpose of destroying competition, or eliminating a competitor"—which replaces the qualifying clause of Section 2(a) of the Clayton Act, said there was ample evidence to support a finding that defendant's purpose in the price war was to eliminate a competitor. Again an intrastate competitor appears sufficient. Other cases involving violations of Section 3 are: Atlantic Co. v. Citizens Ice and Cold Storage Co., 178 F. 2d 453 (5th Cir. 1949); Spencer v. Sun Oil Co., 94 F. Supp. 408 (D. Conn. 1950); Balian Ice Cream Co. v. Arden Farms Co., 94 F. Supp. 796 (S. D. Cal. 1950); Hipps v. Bowman Dairy Co., C. C. H. TRADE REG. REP. (1950-51 Trade Cas.) ¶ 62,859 (N. D. Ill. 1951).

requirement is met, any destruction of a competitor—in either intrastate or interstate competition—will per se satisfy the qualifying clause.

The decision of the United States Supreme Court in *Moore v. Mead* extends coverage of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, beyond any previous interpretation. This is in keeping with the original intentions of the proponents of the Robinson-Patman amendment to provide more protection to small business.[28]

[28] AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 1 (Philadelphia: American Law Institute, 1953); Evans, *Anti-Price Discrimination Act of 1936,* 23 VA. L. REV. 140 (1936).