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Notes and Comments

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Constitutional Law—Civil Courts' Jurisdictions Over Church Doctrines

Seldom has a decision touched off such a furor of lay discussion in North Carolina as did that of *Reid v. Johnston*.[1] Briefly, the facts of that decision are these: The North Rocky Mount Baptist Church was a member of the North Carolina and Southern Baptist Conventions. The majority of its membership, led by the pastor, voted to disaffiliate from both those associations and to enroll the church into membership in the General Association of Regular Baptist Churches. The legal issue was whether the majority could control the property of the church as against the minority who wished to remain affiliated with the North Carolina and Southern Baptist Conventions. The court held that the minority should control the property. The reasoning was that only the church could control its property and the church was those members—even a minority—who adhere to the customs, practices and doctrines accepted by both groups before dissension. Since the tenets of the Southern Baptist and North Carolina Baptist Conventions had been accepted by both groups before dissension, the minority who remained loyal to those conventions controlled the property.

This raises the fundamental issue—when will civil courts take jurisdiction over, and adjudicate ecclesiastical doctrines?

It is well settled, that under our government, founded as it is, on separation of church and state, civil courts will not entertain controversies relating to strictly ecclesiastical doctrines or laws.[2] Generally, civil courts will investigate ecclesiastical matters if property rights are involved. A Texas case states a common formulation of the principle:[3] "In disputes between factions of religious societies the only questions which the civil courts are authorized to determine are those affecting property rights. In such controversies, ecclesiastical or doctrinal questions will only be inquired in so far as may be necessary to determine the property rights of the parties."

In *Watson v. Jones*,[4] generally accepted as the leading case on the subject, the court classifies the types of situations which come before the civil courts concerning the rights to property held by an ecclesiastical

[1] 241 N. C. 201, 85 S. E. 2d 114 (1954), *See Case Survey* 34 N. C. L. REV. 26 (1955).
[2] 76 C. J. S., *Religious Societies*, Sec. 86 (1952).
[3] Mendolsohn v. Gordon, 156 S. W. 1149 Tex. Civ. App. (1913).
[4] 13 Wall. (U. S. 679, 20 L. Ed. 666 (1872).

body in which there has been a schism as follows: (1). Where the property is held by the religious society subject to an express trust, i.e. where the instrument by its terms spells out to what uses the property is to be devoted. (2). Where the property is held by a hierarchial church—a church over which there are superior ecclesiastical tribunals with ultimate power of control over the whole membership. (3). Where the property is held by a church which is strictly independent of other ecclesiastical organizations "and, so far as church government is concerned, owes no fealty or obligation to any higher authority."[5]

Property Subject to an Express Trust

The first of these situations may be illustrated by assuming that a decedent had devised land "to the Downtown Baptist Church as long as that church follows the doctrine of total immersion," and that a majority of that church had later rejected that doctrine. To which group would the control of the devised property remain? As stated by the Tennessee court in *Nance v. Busby*:[6] "In the case of a definite trust for the maintainance of a particular faith or form of worship the court will even go so far as to prevent the diversion of the property by the action of the majority of the beneficiaries, and if there be a minority who adhere to the original principles, such minority will be held to comprise the exclusive beneficiaries, and entitled to the control and enjoyment of the property without interference by the unfaithful majority." In other words, courts will enforce the terms of a trust and thereby carry out the settlor's expressed intent wherever possible. This principle, with reference to property held by a congregational or independent society subject to an express trust, is generally conceded. However, where the terms of the trust are not clearly spelled out, a question of construction remains as to the exact uses to which the property is restricted. It is in determining this question that the civil courts do become involved in the investigation and comparison of religious doctrines.

Property of a Hierarchical Church

The United States Supreme Court has recently stated the applicable principle in this area in *Kedroff v. St. Nicholas Cathedral*.[7] At issue in that case was the beneficial use of the St. Nicholas Cathedral, the seat of the Russian Orthodox Church in North America. In 1924 the plaintiffs, who represented most of the Russian Orthodox Churches in the United States, seceded from the administrative control of the Moscow Patriarch and formed the Independent American Church. That action

[5] *Id.* at 718, 20 L. Ed. 666 at 674.
[6] 91 Tenn. 303, 18 S. W. 874 (1892).
[7] 344 U. S. 94 (1952).

was taken because of attempts of the Soviet Government to control the patriarchate. In asserting the right to the property, the plaintiffs raised no question as to the legitimacy of the Patriarch, or as to his appointments, or as to the orthodoxy of the Mother church, but relied on a New York statute which stated that the beneficial owner of all Russian Orthodox Church property in the state was the Independent American Church.[8] The New York Court of Appeals held for the plaintiffs and found that the statute was within the province of the legislature in that it was a legitimate supervision of religious corporations "and was a recognition, reasonably founded, that the Church in Moscow was no longer capable of functioning as a true religious body, but had become a tool of the Soviet Government primarily designed to implement its foreign policy."[9]

The Supreme Court reversed and held the statute to be invalid. The decision was put squarely in terms of religious liberty—the court said that such statutory transfer of control of church property "violates the Fourteenth Amendment. It prohibits in this country the free exercise of religion."[10] The court relied heavily on the *Watson* case, which itself upheld the right of the general Presbyterian judicatory to property with which a proslavery congregation had seceded. The Supreme Court in the *Watson* case said, "it is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance."[11]

One writer expressed the result of the decision in the *Kedroff* case in this manner, "The Court thus raised to the dignity of a constitutional right a hitherto debated principle of American Church law—the principle that the property of a hierarchical church is to be disposed of in accordance with the decision of its rulers, however sound the reasons and however great the number of church members defying this authority."[12]

Property Not Subject to an Express Trust

If property were donated to the "Downtown Baptist Church" without any specific trust being impressed thereon and subsequently a majority of members of that church voted for an act or course of conduct different from that which had existed previously, would the majority control the church property?

[8] N. Y. RELIGIOUS CORP. LAW §§ 105-08 (1945).
[9] 302 N. Y. 1, 33, 96 N. E. 2d 56, 74 (1951), See note 64 HARV. L. REV. 1360 (1951).
[10] 344 U. S. at 107.
[11] 13 Wall. (U. S.) 679, 729, 20 L. Ed. 666, 676 (1872).
[12] 67 HARV. L. REV. 110 (1953).

The general rule is that the majority faction of an independent or congregational church, however regular in its actions or procedures in other respects, may not, as against a faithful minority, divert the property of the church to another denomination or to support doctrines radically and fundamentally opposed to the characteristic doctrines of the church even though the property is subject to no express or specific trust.[13] This differs from the rule with regard to expressly held trust property in that in this area *some* changes are possible, while with respect to property held by an express trust, the specific terms of the trust cannot, by majority vote, be set aside or departed from.

Two questions arise here: Whether the change was a fundamental or radical departure from previous doctrine? Should a civil court decide whether the issue involved in such a fundamental change?

In most matters of church doctrine, the duly constituted tribunal will decide such questions. Civil courts will not ordinarily attempt to interfere with the decision of that tribunal, but will leave matters of doctrinal differences to be ironed out within the church.[14] It is generally conceded that the "tribunal" referred to in congregational or independent churches is the majority of the membership meeting in due course. A recent summary of the law in this area is found in the following Alabama decision:[15]

> "But to justify court interference it must be shown that the purpose of the majority [of a Baptist church] is to make a gratuitous transfer of the property to another denomination, or to disavow and depart from the characteristic, distinctive doctrines and practices of the society. Such purpose must appear either from an open avowal on the part of the majority, or from its acts and conduct manifesting such purpose beyond all reasonable doubt. It is not enough that a schism or division has developed among the members on account of differences of opinion in the interpretation and application of the declared doctrines and practices of the society; such matters must be settled by the society itself in its own way."

One specific guidepost stands out in this area, and that is that the *withdrawal from a voluntary ecclesiastical connection* is not considered a change in fundamental doctrines or practices. As one authority ex-

[13] Bogard v. Boone, 200 Ky. 572, 255 S. W. 112 (1923); Grupe v. Radsill, 101 N. J. Eq. 145, 136 Atl. 911 (1927). *Contra,* Christian Church v. Crystal, 78 Cal. App. 1, 247 Pac. 609 (1926), *But c.f.* Dyer v. Superior Court, 94 Cal. App. 260, 271 Pac. 113 (1928).

[14] Mack v. Kime, 129 Ga. 1, 58 S. E. 184 (1907).

[15] Williams v. Jones, 258 Ala. 59, 61 So. 2d 101 (1952). For cases construing what are fundamental changes, see Annot. 8 A. L. R. 113 (1920), and Annot. 70 A. L. R. 83 (1931).

presses it, "it is to be observed that the rule stated . . . that the majority faction of an independent or congregational society may not divert the property from the denomination to which the society belongs or from the fundamental and distinctive doctrines or tenets to which it originally subscribed, does not prevent the majority faction of such a society, over the objection of the minority faction, from severing a voluntary ecclesiastical connection of the society with another body."[16]

In the case of *Wehmer v. Fokenga*,[17] a rather strong decision, the Nebraska court was faced with deciding whether the majority faction of a Lutheran church, after having voted to leave the synod to which they had belonged and to join another synod, could control the church property. The trial court found as fact that the two synods differed in both doctrine and tenets.[18] The court held that the finding of the trial court could not be sustained because the civil courts are not so equipped as to make findings on ecclesiastical dogma. The court preferred to leave the question of fundamental tenets and doctrines to the decision of the rulers of the church—the majority of members in the local church.

The North Carolina Position[19]

A proper application of the rule applied to congregational churches is found in the case of *Wheeles v. Barrett*.[20] Property had been conveyed to the "City Mission of Rocky Mount" which was a non-denominational religious and social organization promoting religious training, education, Christian unity, and the spreading of the Gospel. Subsequently, a majority of members voted to form, from the Mission, "The Central Baptist Church." After this was done the issue of control of the property arose and the court held that the diversion of the property by the majority was without authority in law. This seems clearly within

[16] Annot. 8 A. L. R. 105, 123 (1920).

[17] 57 Neb. 510, 78 N. W. 28 (1899).

[18] ". . . for instance, the congregations in the Iowa synod practice what is called 'close communion'—that is, these congregations do not permit members of other Christian churches to commune with them, while the . . . General synod admit all Christians to their communion table. The congregations of the Iowa synod believe in the doctrine of Chiliasm, or that Christ will visibly reign on earth for a thousand years, . . . the General synod reject this doctrine. In the matters of church discipline or government the congregations of the Iowa synod will not allow a minister belonging to another synod to officiate, . . . the General synod permit ministers of any synod to act as their pastors. The congregations of the Iowa synod do not permit their members to belong to secret societies, . . . the General synod do not control their members as to that respect." 57 Neb. 510, 512, 78 N. W. 28 (1899).

[19] Due to considerations of space the scope of the North Carolina position will be limited to the problem presented in the principal case, i.e. non-hierarchical churches where the property is not subject to an express trust. For cases where property is held subject to an express trust, see N. C. GEN. STAT. § 61-3 and annotations thereto.

[20] 229 N. C. 282, 49 S. E. 2d 629 (1948).

the general rule because there was a diversion of the property of the Mission to another and entirely different organization, whose doctrines were directly opposite to those of the original Mission.

Similarly, the decision in *Dix v. Pruitt*[21] follows the majority rule of allowing the church property to be controlled by a minority if the majority diverts the property of the church for use in another denomination or to support of doctrines fundamentally or radically different to the characteristic doctrines of the society as it existed before the diversion. Basically, the facts in that case were: A minister in Danville, Va. had been expelled from the Primitive Baptist Church of that city. He had been given employment as a minister in Dan River after the majority of members, with knowledge of his expulsion, had so voted. The minority introduced evidence of the customs of Primitive Baptist churches among which was a tenet that once a member had been expelled from a church, he could not be accepted in another Primitive Baptist church without having first been taken back into fellowship by the expelling church. Our court held that the majority had violated a fundamental doctrine of the church by employing an expelled minister and awarded the control of property to the minority.

While the general rule was correctly stated in the *Dix* case there appears to be a conflict in its application. The Alabama court when faced with an almost identical fact situation, had this to say on the problem.[22] "So we will not undertake to rationalize the claimed fundamental differences which gave rise to the dissatisfaction in the Mount Olive congregation. It is sufficient to say that the court, if it would, could not determine with the slightest degree of accuracy that the method of exclusion of Copeland from membership was that radical departure of doctrine to justify court action."

In *Organ Meeting House v. Seaford*[23] the majority of members of a Lutheran church declared that the local church was leaving the synod to which the church formerly belonged and taking membership in a different synod, previously unknown to the Lutheran church. The plaintiffs were trustees under the original conveyance and opposed the movement to the new synod. The court held that it would not decide a religious controversy between the members of the church. The court said, "with respect to the allegation made by the plaintiffs (minority), that the defendants, or the church they represent, have strayed from the true faith, or that errors have crept into the church government, the answer is, that on that question, it is not for them nor this Court to

[21] 194 N. C. 64, 138 S. E. 412 (1927).
[22] Mt. Olive Primitive Baptist Church v. Patrick, 252 Ala. 672, 42 So. 2d 617 (1949).
[23] 16 N. C. 453 (1830).

decide. It might be more than difficult to qualify any earthly tribunal to decide it."[24]

In *North Carolina Christian Conference v. Allen*,[25] the court held that a voluntary association with which an independent church is affiliated has no control over that local church. In that case it was held that a "conference" had no right or interest in the church property as it was not a proper party to a suit involving the control of the church property. The dispute arose out of the refusal of the majority of members to accept a pastor sent by the "conference." The court by way of explanation of the differences between hierarchical and independent churches said, "The churches of the congregational system often combine into associations, conferences and general conventions. But unlike such organizations under the connectional system, these bodies under the congregational system are purely voluntary associations for the purpose of joining their efforts of missions and similar work, but having no supervision, control, or governmental authority of any kind whatsoever over the individual congregations, which are absolutely independent of each other."[26] This language by Chief Justice Clark seems strong enough to allow a voluntary severence from such association or convention by a local church of the congregational form without interference of a civil court, i.e. that such severence is not a fundamental or radical change of doctrine.

A converse of severence from a voluntary association is found in *Windley v. McCliney*.[27] There, property was deeded to "Trustees of the Free Will Baptist Church of Pantego" and the congregation subsequently united with other churches and changed its name to the "United American Free Will Baptist Church." (A minority of the local church then objected to a revision of discipline for which the delegate of the local church had voted.) The minority, going back to the "Free Will Baptist Church of Pantego" claimed the church property because of the original designation in the deed to that church. The trial court found as fact that the discipline involved did not essentially differ in doctrine from what had gone on before. The Supreme Court affirmed a judgment which excluded neither faction from the use of the church building, but recognized the ownership and control as being in the whole membership "and that their will must be determined by the majority."[28] The court then, in effect, held that the local church did not lose its independence or identity as the "Free Will Baptist Church of Pantego" by being a member of the association.

[24] *Id.* at 455.
[25] 156 N. C. 524, 72 S. E. 617 (1911).
[26] *Id.* at 526, 72 S. E. at 618.
[27] 161 N. C. 318, 77 S. E. 226 (1913).
[28] *Id.* at 321, 77 S. E. at 228.

Thus if a majority of the members votes to associate with a convention against the wishes of the minority, there being no other change in discipline, and the court, as here, upholds that right, then logically it would appear that a majority could sever its relationship with the convention and the court uphold that action.

The *Reid*[29] case is the latest North Carolina decision on the problem. The court, in attempting to distinguish the decision in the *Organ Meeting House*[30] case, held that the majority did more than merely disaffiliate from the North Carolina and Southern Baptist Conventions. The court listed six items, in substance as follows: (1). They ceased all connection with the above mentioned Baptist conventions and withdrew financial support of agencies sponsored by those conventions, except for a Baptist orphanage. (2). After they disaffiliated they continued as an Independent Baptist Church. (3). They ceased to use Sunday School literature approved by the Southern Baptist Convention and began using literature supplied by the General Association of Regular Baptist Churches, in which organization they had planned to enroll. (4). The Board of Deacons had approved the exclusive control of the pulpit by the church's minister, Mr. Johnston. (5). They discharged several Sunday School teachers for the reason that they opposed the views of the majority of members. (6). Finally, the minister had done all he could to separate himself as far as possible from the programs of the North Carolina and Southern Baptist Conventions.

It is submitted that all of the above items do not successfully distinguish this case from the *Organ Meeting House* decision, and that all that the majority did was implement their decision to leave the North Carolina and Southern Baptist Conventions. The cessation of literature and financial support to those Conventions flowed naturally and proximately from the decision to disaffiliate. The release of employees who did not believe or teach what the majority thought, was within the prerogative of any employer. Is the court saying that it is permissible for the group to disaffiliate but that they must continue to support in every manner—financially, spiritually and morally, those organizations which they had previously voted to abandon?

The above argument seems to be strengthened by this quotation from the *Organ Meeting House* case. "Whether the grantor would have any claim to it, [church property] in case the church were to become Mohammedan or Pagan, or profess their belief in the heathen mythology, I am not now, nor shall I ever be called upon to give an opinion. *I am also spared from giving any opinion, provided they worship Almighty God according to the dictates of their own conscience. But I am free*

[29] 241 N. C. 201, 85 S. E. 2d 114 (1954).
[30] 16 N. C. 454 (1830).

to give the opinion, that as long as their religious tenets and devotions are confined to the sphere of Christianity, the grantor can have no claim; . . . . If the grantor has no right, on what foundation does the plaintiffs claim rest? It appears, that they [plaintiffs] are seceders from the church, and are not the trustees or representatives of it; they were a minority of the members before their secession. Had they remained in the church, they must have yielded to the government of the majority. Much less can they have any control over it, when they are no part of it. It is a rule applicaable to aggregate corporations or to societies, that the will of the majority must govern. A contrary rule would be as absurd, as to say, that a lesser number contained more units than a greater.

"With respect to the allegation made by the plaintiffs, that the defendants, or the church they represent, have strayed from the true faith . . . on that question, it is not for them, nor this Court to decide. It might be more than difficult to qualify any earthly tribunal to decide it."[31]

On principle it would seem desirable that a religious society in a country of religious equality should be allowed to change its faith without losing its property, where no express trust is present and the church is non-hierarchical. It is submitted that the general rule in this area should be construed in the light of the words and spirit of the *Organ Meeting House* case, and that as long as the majority "worship Almighty God according to dictates of their own conscience" or at least remain "confined to the sphere of Christianity," they should control the property of the church. Civil courts should adopt the view of the Nebraska court in the *Wehmer* case, "whether the religious teachings, faith, and church polity of these synods differed in essential particulars was and is a question for the ecclesiastical tribunals, not the civil courts."[32] To hold otherwise is to have a temporal court adjudicate religious doctrines under the guise of "property rights."

MORTON A. SMITH.

Constitutional Law—Second Class Mail

Article 1, section 8 of the United States Constitution grants to Congress the power to establish post offices. Since the dissemination of news has always been considered a contribution to the public good, special mailing rates were accorded to newspapers in 1792.[1] In 1879 Congress divided the mails into four classes,[2] with matters coming within

[31] *Id.* at 455.
[32] 57 Neb. 510, 516, 78 N. W. 28, 30 (1899).

[1] Act of February 20, 1792, I STAT. 232.
[2] Sec. 7 of the Classification Act of 1879, as amended, 39 U. S. C. § 221 (1926) provides:

the second class afforded the most favorable rate. Certain objective standards were set to determine which publications qualified for this rate. Sections 10 and 14 of the Classification Act of 1879 as amended in sections 224 and 226 of title 39 of the United States Code provides:

> "Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in 225 and 226 of this Title."[3]
>
> "Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class mail are as follows:
>
> First. It must be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguishes printed books for preservation from periodical publications. Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."[4]

The constitutional validity of these standards was upheld in the case of *Lewis Publishing Company v. Morgan*,[5] which case further upheld an act of Congress requiring publishers intending to use the facilities of second class mail to file at stated intervals with the Postmaster General certain information concerning their publications.[6] This, said the court, was an incident necessary to Congress' power to classify.

The determination of what particular publications are to be properly included or excluded from second-class mail carriage under the above

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"Mailable matter shall be divided into four classes:
First, written matter;
Second, periodical publications;
Third, Miscellaneous printed matter and other mailable matter not in the first, second or fourth classes.
Fourth, merchandise and other mailable matter weighing not less than eight ounces, and not in any other class."

[3] 20 STAT. 359, 39 U. S. C. § 224 (1926).
[4] 20 STAT. 359, 39 U. S. C. § 226 (1926).
[5] 229 U. S. 288 (1912).
[6] Post Office Appropriation Act of August 24, 1912, 37 STAT. 539, 553, 554.

statutes is necessarily delegated to the Post Office Department.[7] It may be readily seen that this determination is of great economic importance to publishers.[8] The amount of discretion which the Postmaster General may use in deciding whether or not a particular publication is eligible to travel through the mails at a second-class postal rate has been a constant source of litigation in the federal courts. It has been stated that "Where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive, and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they have the power and will occasionally exercise the right of so doing."[9] It would thus appear that the Postmaster General's determination of whether a publication was "issued as frequently as four times a year," "numbered consecutively," and "formed of printed paper sheets without board, cloth or leather binding" would be conclusive, and not reviewable by the courts.

A question which has caused some controversy has been the interpretion of the meaning of the word "periodical" within section 224 of title 39 of the United States Code. The problem usually involved is whether the particular publication is a periodical and thus eligible to qualify for second-class rates, or is a book, complete in itself,[10] and subject to the higher third-class rates. In *Houghton v. Payne*,[11] the court stated:

> "But while section 14[12] lays down certain conditions requisite to the admission of a publication as to mail matter of the second-class, it does not define a periodical, or declare that upon compliance with these conditions the publication shall be deemed such. In other words it defines certain requisites of a periodical, but does not declare that they shall be the only requisites. Under section 10 the publication must be a periodical publication; which means, we think, that it shall not only have the feature of perio-

[7] 42 STAT. 24, 5 U. S. C. § 369 (1921) states that it shall be the duty of the Postmaster General to superintend generally the business of the department and to execute all laws relative to the Postal Service.

[8] In Hannegan v. Esquire, 327 U. S. 146, 151 (1945) it was found that the second class mailing privilege was worth $500,000 a year to Esquire Magazine. "A newspaper editor fears being put out of business by the administrative denial of the second-class mailing privilege much more than the prospect of prison subject to a jury trial." CHAFEE, FREEDOM OF SPEECH, p. 199 (1920).

[9] Bates & Guild Co. v. Payne, 194 U. S. 106 (1903).

[10] "Mail matter of the third class shall include books, circulars, and other matter wholly in print (except newspapers and other periodicals entered as second class matter) . . ." 43 STAT. 1067 U. S. C. § 235 (1926).

[11] 194 U. S. 88 (1903).

[12] Section 14 of the Classification Act of 1879.

dicity, but that it shall be a periodical in the ordinary meaning of the term."[13]

The court relied on the definition of a periodical stated by Century Dictionary to be "a publication issued at regular intervals in successive numbers or parts, each of which (properly) contains matter on a variety of topics and no one of which is contemplated as forming a book of itself,"[14] and concluded that the Postmaster General properly used his discretion in determining that the publication of the plaintiff was not a "periodical publication" within the meaning of the statute. In a later decision to the same effect, the court stated, "But we think that although the question is largely one of law, there is some discretion left in the Postmaster General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of the opinion that it was wrong."[15]

Congress has made certain matter nonmailable. Section 1461 of title 18 of the United States Code provides that no "obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character" may be conveyed in the mails under a penalty of fine and imprisonment. For purposes of exclusion from the mails the Postmaster General is given the power to determine what mater is obscene under the standards set by Congress, subject to a hearing and review by the courts.[16]

In *Milwaukee Publishing Company v. Burleson*,[17] it was held that under the Espionage Act of June 15, 1917,[18] declaring periodicals containing subversive material nonmailable, the Postmaster had an implied power to refuse second-class rates to an offender without denying it the use of the mails altogether. A prior decision had established that Congress had power to deny subversive publications the use of the mails

[13] 194 U. S. at 96. The publications in question (*Riverside Literature Series*) were small books, 4½ by 7 inches, in paper covers, issued from their office of publication monthly and numbered consecutively, but each number contained a novel, story or a collection of short stories or poems by the same author.

[14] *Id.* at 96.

[15] Bates & Guild Co. v. Payne, 194 U. S. 106, 107 (1903). "The Postmaster General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong, and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied." *Id.* at 108. See also: Smith v. Hitchcock, 226 U. S. 53, 57 (1912); Smith v. Payne, 194 U. S. 104 (1904).

[16] See LAW AND CONTEMPORARY PROBLEMS § 20, p. 608 (Autumn 1955) for a thorough discussion of obscenity and the mails. For other matters which are nonmailable, see 62 STAT. 762, 18 U. S. C. § 1302 (1948) pertaining to lotteries, and 63 STAT. 94, 18 U. S. C. § 1341 (1948) dealing with mail fraud.

[17] 255 U. S. 407 (1921). The dissent in this case was to the effect that there was no authorization to deny second class privileges with regard to *future issues* of a paper merely on the grounds that previous issues contained non-mailable matter.

[18] 40 STAT. 217 (1917).

altogether.[19] The Postmaster in this case had not rested his entire argument on this point, but also contended that section 14 of the Classification Act of 1879, by its fourth condition, demanded that the publication contain something of positive worth in order to enjoy the second-class mailing privilege.

This contention alone appeared to be the government's defense in *Hannegan v. Esquire*.[20] The Postmaster General had issued a citation to Esquire Magazine to show cause why its second-class mailing permit should not be revoked. After a scheduled hearing[21] the permit was revoked, and Esquire brought suit to enjoin the Postmaster General from enforcing the revocation. The Postmaster General did not contend that the subject matter of Esquire Magazine was obscene and therefore nonmailable, but stated that he revoked the permit because:

> "The plain language of this statute does not assume that a publication must in fact be 'obscene' within the intendment of the postal obscenity statutes before it can be found not to be 'originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry'. . . . a publication to enjoy these unique mailing privileges is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare."[22]

The court refuted this contention, saying that the Classification Act plainly adopted a strictly objective test and left no discretion to the postal authorities to withhold from a mailable periodical the second-class privilege because it failed to meet some standard of worth; that the more particular descriptions of the first,[23] third,[24] and fourth,[25] classes are like the first three conditions of the second-class, and if the fourth condition is read in context with these, it too must be taken to supply standards which relate to the format of the publication and to the nature, but not the quality, worth, or value of its contents; that in this view "literature" and "arts" mean no more than productions which convey

[19] Frohwerk v. United States, 249 U. S. 204 (1919).
[20] 327 U. S. 146 (1945).
[21] 31 STAT. 1007, 39 U. S. C. 232 provides: "When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested." In this case the board designated for the hearing recommended that the permit not be revoked, but the Postmaster General revoked notwithstanding such recommendation; so it appears that the value of such hearing is dubious since the prosecutor, after the hearing, becomes the judge.
[22] 327 U. S. at 149 (1945).
[23] 20 STAT. 358, 39 U. S. C. § 222 (1926).
[24] 43 STAT. 1067, 39 U. S. C. § 235 (1926).
[25] 43 STAT. 1067, 39 U. S. C. § 240 (1926).

ideas by words, pictures, or drawings; and that to uphold the Postmaster General's revocation would be saying that Congress granted him the power of censorship, or the power to alone determine whether a publication is good or bad for the public to read. This, said the court, would be a radical change from the other standards regarding classifications, and "such a power is so abhorrent to our traditions that it should not be easily inferred."[26]

The Postmaster General in *Esquire* relied on the holding of *Milwaukee Publishing Company,* but as has been pointed out the matter involved in the latter case was completely nonmailable. It appears then that anything which the Postmaster General may properly declare nonmailable, he may exclude from the second-class without denying mailing privileges entirely, but where the matter involved is mailable he must objectively apply the standards set by Congress.

The basis of the court's decision in the *Esquire* case was that Congress had not intended to give to the Postmaster General the power of enforcing tests of "positive worth" in determining whether a periodical should be accorded second-class mailing privileges. The case suggests the question of whether Congress could delegate such powers. It could be argued that there is no constitutional right to cheap mail, that Congress is not attempting to regulate the businesses of newspapers and periodicals, but is merely performing a service, and in so doing may name its conditions for performance. On the other hand, it may readily be seen that the denial of second-class privilages would be likely to drive a publisher out of business,[27] and in this respect actually would be a regulation. The court of appeals in the *Esquire* case[28] considered this question and concluded that Congress might withdraw the second-class privilege completely if it felt that the benefits of wide circulation were not worth the cost of the subsidy, as there was no obligation to grant it in the first place, but that Congress may not use the privilege as a weapon to force compliance with its notions of what is worthwhile. To allow a "merit test" would be to deny what is meant by freedom of the press.

LEWIS H. PARHAM, JR.

Criminal Law—Homicide—Application of Felony-Murder Rule When Non-Felon Kills Felon

Under the common law a homicide, whether intentional or not, committed by a person in the perpetration of a felony, is murder by each

[26] Hannegan v. Esquire, 327 U. S. at 151.
[27] *Supra* note 8.
[28] Esquire v. Walker, 151 F. 2d 49 (D. C. Cir. 1945).

of the felons.[1] Commission of the felony supplies malice, which is an essential element of common law murder.[2] This doctrine undisputedly applies in cases where: (1) one of a group of robbers intentionally shoots a person in order to rob him; (2) one of the group accidentally shoots the victim of the robbery; (3) one of the group accidentally fires and kills a bystander.[3] Statutes stemming from this doctrine have been enacted in all but four[4] American states. The various statutes are not uniform in their requirements as to the felonies that must be committed for the ensuing homicide to be murder. It may be any felony[5] or some similar provision;[6] a crime punishable in certain ways;[7] the specific felonies of arson, burglary, rape, and robbery;[8] these plus other named felonies,[9] the most common additions being mayhem and kidnapping; or the four previous named felonies "or any other felony."[10]

[1] The scope of this note does not permit an extended analysis of the felony-murder doctrine. For such an analysis see: WHARTON, HOMICIDE p. 112 (3rd ed. 1907); 26 AM. JUR., *Homicide* §§ 64-69 (1940); 40 C. J. S., *Homicide* § 21 (1944); Arent, *The Felony Murder Doctrine and Its Application Under the New York Statutes,* 20 CORN. L. Q. 228 (1934); Crum, *Causal Relations and the Felony-Murder Rule,* 1952 WASH. U. L. Q. 191; Perkins, *A Re-Examination of Malice Aforethought,* 43 YALE L. J. 537, 557 (1934); Perkins, *The Law of Homicide,* 36 J. CRIM. L. 391, 401 (1946).

[2] CLARK AND MARSHALL, CRIMES, § 248 (5th ed. 1952).

[3] For a treatment of all the possible arrangements of parties in felony-murder situations see Hitchler, *The Killer and His Victim in Felony-Murder Cases,* 53 DICK. L. REV. 3 (1949).

[4] Kentucky, Maine, South Carolina, Texas, and Wisconsin; but see KEN. REV. STAT. §§ 435.010-435.020 (1953); ME. REV. STAT. c. 130, § 1 (1954); S. C. CODE ANN. § 16-51 (1952); TEX. ANN. PEN. CODE §§ 1207-1228, 1241, 1256 (Vernon 1948). The common law felony-murder rules would apply to some extent in all these states.

[5] MINN. STAT. ANN. §§ 619.08, 619.10 (1947); N. M. STAT. ANN. § 40-24-4 (1953); N. Y. PEN. LAW § 1044; OKLA. STAT. ANN. tit. 21, § 701 (1937); S. D. CODE § 13.2007 (1939); WIS. CRIM. CODE § 940.03 (1955).

[6] ILL. ANN. STAT. c. 38, §§ 358, 363 (Smith-Hurd 1955).

[7] DEL. CODE ANN. tit. 11, § 571 (1953); GA. CODE ANN. § 26-1009 (1953); MASS. ANN. LAWS c. 265, § 1 (1933).

[8] ALA. CODE ANN. tit. 14, § 314 (1940); IND. STAT. ANN. § 10-3401 (1942); MICH. STAT. ANN. § 28.548 (1954); MISS. CODE ANN. § 2215 (1942); OHIO REV. CODE ANN. § 2901.01 (Page 1954); ORE. REV. STAT. § 163.010 (1955); UTAH CODE ANN. § 76-30-3 (1953); VT. REV. STAT. § 8240 (1947); VA. CODE ANN. § 18-30 (Michie 1950); W. VA. CODE ANN. § 5916 (1955); WYO. COMP. STAT. ANN. § 9-201 (1945).

[9] ARIZ. CODE ANN. § 43-2902 (1939); ARK. STAT. ANN. § 41-2205 (1947); CAL. PEN. CODE pt. 1, tit. 8, c. 1, § 189 (Deering Supp. 1953); COLO. REV. STAT. c. 40, § 2-3 (1953); CONN. GEN. STAT. § 8350 (1949); D. C. CODE §§ 22-2401, 2402 (1951) (31 STAT. c. 854); FLA. STAT. ANN. § 782.04 (Supp. 1954); IDAHO CODE vol. 4, c. 40, § 18-4003 (1948); IOWA CODE ANN. § 690.2 (1950); LA. REV. STAT. ANN. § 14:30 (West 1951); MD. ANN. CODE art. 27, §§ 495-497 (Flack 1951); MO. STAT. ANN. § 559.010 (Vernon 1953); MONT. REV. CODE ANN. § 94-2503 (1947); NEB. REV. STAT. vol. 2, § 28-401 (1948); NEV. COMP. LAWS ANN. § 10068 (1950); N. H. REV. STAT. ANN. c. 585, § 1 (1955); N. J. STAT. ANN. § 2:138-2 (1939); N. D. REV. CODE § 12-2712 (1943); PA. STAT. ANN. tit. 18, § 4701 (Purdon 1930); R. I. GEN. LAWS c. 606, § 1 (1938); TENN. CODE ANN. § 39-2402 (1955); WASH. REV. CODE § 9.48.030 (1952).

[10] KAN. GEN. STAT. ANN. § 21-401 (Corrick 1949); N. C. GEN. STAT. § 14-17 (1953).

These and other differences[11] in the statutes must be kept in mind in any discussion of this problem.

In the recent case of *Commonwealth v. Thomas,*[12] a Pennsylvania case, two men held up the proprietor of a store. After emptying the cash register they ran out of the store and down the street in opposite directions. The proprietor chased one of the robbers and killed him in a gun battle. His cohort was tried and convicted of first degree murder under the Pennsylvania felony-murder statute, which declares that "all murder . . . which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree."[13] In a four to three decision the Supreme Court of Pennsylvania upheld the conviction, saying:

> "If the defendant sets in motion the physical power of another, he is liable for its result. . . . The felon's robbery set in motion a chain of events which were or should have been within his contemplation when the motion was initiated. He therefore should be held responsible for *any death* which by direct and almost inevitable sequence results from the original criminal act."[14]

When a non-felon does the act causing death

Until recently it was uniformly held that the act causing death must be in furtherance of a common purpose in order to be murder by all the felons;[15] thus, when someone other than one of the felons did the immediate act causing death, the felony-murder rule was not applicable.[16] In *State v. Oxendine,*[17] where an innocent bystander was accidentally killed by the intended victim of an assault with intent to kill, the North Carolina Supreme Court held that the defendants were not guilty of

[11] See notes 29 and 41 *infra.*

[12] — Pa. —, 117 A. 2d 204 (1955).

[13] PA. STAT. ANN. tit. 18, § 4701 (Purdon 1930).

[14] Commonwealth v. Thomas, — Pa. —, —, 117 A. 2d 204, 205 (1955).

[15] Wilson v. State, 24 S. W. 409 (Tex. Cr. App. 1893); People v. Sobieskoda, 235 N. Y. 411, 139 N. E. 558 (1923).

[16] People v. Garippo, 292 Ill. 293, 127 N. E. 75 (1920); Butler v. People, 125 Ill. 641, 18 N. E. 338, 1 L. R. A. 211 (1888) (dictum, for a felony was not being committed); Commonwealth v. Moore, 121 Ky. 97, 88 S. W. 1085, 2 L. R. A. (N. S.) 719 (1905); Commonwealth v. Campbell, 89 Mass. (7 Allen) 541, 545, 83 Am. Dec. 705, 709 (1863) (where it was said by Bigelow, C. J., that if a man in defending his home from a burglar were to kill someone else, "Can the burglar in such a case be deemed guilty of criminal homicide? Certainly not."); State v. Majors, 237 S. W. 486 (Mo. Sup. 1922); Commonwealth v. Thompson, 321 Pa. 327, 184 Atl. 97 (1936) (where the charge of the court, indicating that defendant rather than an outsider would have had to have fired the fatal shot to be guilty of murder, was held to be proper); Commonwealth v. Mellor, 294 Pa. 339, 144 Atl. 534 (1928) (where a charge that if the fatal bullet was fired by one trying to stop the robbery defendants would not be guilty of murder, was characterized by the supreme court, not as incorrect, but as favorable to the defendant).

[17] 187 N. C. 658, 122 S. E. 568 (1924).

culpable homicide, there being no concert or purpose between defendants and their intended victim.[18]

The first variation from this rule came in the so-called "shield" cases —cases in which the felon forced someone to occupy a position in the line of fire of those trying to avert the felony, hoping, of course, that his assailants would hold their fire. When the "shield" was killed, it was held that the felon was guilty of murder because he had forced the deceased to occupy a place of danger, causing his death.[19]

To tie in with felony-murder the theory of proximate cause, on which theory the principal case is based, is not a new idea.[20] The very nature of the offence necessitates an application of some causation rule, but there is a divergence of opinion as to what the rule should be. The role of proximate cause under the classical view is that *unless* the felony proximately causes the death *no murder* is committed. This rule is negative in concept, preventing an inference of murder in such a case as when a house burns down, killing the occupants, a burglar being in the house at the time the fire started. But recent decisions tend to hold that a felon is guilty of murder when a third person is killed by gunfire intended for the felon in the prevention of the felony.[21] This trend, of

[18] In the opinion it was said: "Suppose instead of killing an innocent bystander, Proctor Locklear had killed . . . one of his assailants, would the law, under these circumstances, hold the surviving assailants or confederates . . . criminally responsible for the homicide? We think not." *Id.* at 662, 122 S. E. at 570.

[19] Wilson v. State, 188 Ark. 846, 68 S. W. 2d 100 (1934); Keaton v. State, 41 Tex. Crim. 621, 57 S. W. 1125 (1900); Taylor v. State, 41 Tex. Crim. 564, 55 S. W. 961 (1900).

[20] "The killing must have had an intimate relation and close connection with the felony, and not be separate, distinct, and independent from it; and when the act constituting the felony is in itself dangerous to life, the killing must be naturally consequent to the felony. The death must have occurred as a result or outcome of the attempt to commit the felony." WHARTON, HOMICIDE p. 184 (3rd ed. 1907).

[21] A policeman shot himself in a struggle with a felon for the felon's gun; the felon was held guilty of murder, for "the shooting was a consequence naturally to be expected from plaintiff in error's acts"; People v. Krausner, 315 Ill. 485, 506, 146 N. E. 593, 601 (1925). In trying to prevent a robbery one intended victim shot another; defendants were held guilty of murder because such a result "might reasonably might be anticipated"; People v. Payne, 359 Ill. 246, 255, 194 N. E. 539, 543 (1935). In a fact situation similar to that in the *Payne* case defendants were held guilty of murder; "for whatever results follow from that natural and legal use of retaliating force, the felon must be held responsible"; Commonwealth v. Moyer, 357 Pa. 181, 191, 53 A. 2d 736, 742 (1947), 17 FORDHAM L. REV. 124 (1948), 96 PA. L. REV. 278 (1948), 22 TUL. L. REV. 325 (1948). A policeman, in trying to prevent the escape of robbers, shot another policeman; the robbers were held guilty of murder, with reliance on the *Moyer* case; Commonwealth v. Almeida, 362 Pa. 596, 68 A. 2d 595, 12 A. L. R. 2d 183 (1949), *cert. denied,* 339 U. S. 924 (1950), *rehearing denied,* 339 U. S. 950 (1950), *cert. denied,* 340 U. S. 867 (1950), 30 B. U. L. REV. 422 (1950), 23 TEMP. L. Q. 423 (1950). In trying to prevent a robbery deceased was killed when he wrested the gun away from defendant and hit him with it, causing it to fire; defendant was held guilty of murder because he set in motion the "cause which occasioned the death of deceased"; Miers v. State, 157 Tex. Crim. 572, 578, 251 S. W. 2d 404, 408 (1952). See also People v. Podolski, 332 Mich. 508, 52 N. W. 2d 201, *cert. denied,* 344 U. S. 845 (1952), *rehearing denied,* 344 U. S. 888 (1952), 1952 INTRA. L. REV. (U. C. L. A.) 67, following the *Moyer* case; Hornbeck v. State, 77 So. 2d 876 (Fla. 1955) (dictum).

which the principal case is a culmination, maintains that *if* the felony proximately causes the death the felon *is guilty of murder.* This affirmative application of proximate cause is not merely a different expression of the earlier negative approach; it is an entirely different rule of causation, not necessarily following from the earlier rule.[22]

That this affirmative application of proximate cause is a new concept in felony-murder cases does not necessarily mean that the result reached where a non-felon has immediately caused the death of another non-felon is subject to criticism. In all of the cases which have followed this trend the felony involved was one imminently dangerous to human life,[23] for the felon was armed and could expect armed resistance.[24] If the cases holding the felons guilty of murder when a non-felon kills a non-felon are limited to those situations where danger to others should have been anticipated by the felons, they are not subject to strong criticism, for this trend is but an extension of the "shield" cases[25] and is analogous to the concept of implying malice from wanton disregard of human life.[26] It must be remembered, however, that this trend is contrary to the earlier line of cases[27] and perhaps reaches a less desirable result in not fitting the punnishment to the crime actually committed by the felon.

When a felon is killed

In the principal case, not only was the death-dealing force delivered by someone other than one of the felons, but in addition the person killed was one of the felons. The only other cases in which it has been seriously contended that one felon should be held guilty of murder when

[22] The difference between these two rules can be illustrated by a more concrete example: Unless a man strike another, he cannot be guilty of a battery. But it does not follow from this that if a man strikes another he is guilty of a battery, for there are many circumstances under which the striking of a person does not amount to a battery.

[23] Indeed, this seems to be the situation in *all* modern applications of the felony-murder rule. According to Perkins, ". . . a study of the cases which repeat the formula that homicide committed while perpetrating a felony is murder, will disclose that the other felony actually involved is one which may properly be classified as 'dangerous,' . . ." *A Re-Examination of Malice Aforethought,* 43 YALE L. J. at 561. But in a case where it was not raised in the record, the North Carolina Supreme Court refused to express an opinion "as to whether the words 'other felony' as used in the statute [N. C. GEN. STAT. § 14-17 (1953)] mean any statutory felony, or are limited under the *ejusdem generis* principle to felonies dangerous to life." State v. Streeton, 231 N. C. 301, 305, 56 S. E. 2d 649, 653 (1949).

[24] Cases cited note 21 *supra.*

[25] Cases cited note 19 *supra.* The only difference in reasoning in the two situations is that in the "shield" cases the felon caused the deceased to assume a place of danger for protection, while in the recent trend the felon caused the deceased to be in a place of danger by the commission of a dangerous felony.

[26] People v. Jernatowski, 238 N. Y. 188, 144 N. E. 497 (1924); State v. Capps, 134 N. C. 622, 46 S. E. 730 (1904); State v. Saunders, 108 W. Va. 148, 150 S. E. 519 (1929).

[27] Cases cited in note 16 *supra.*

his co-felon was killed in the perpetration of their crime here cases where (1) one of the felons killed another felon,[28] or (2) the deceased felon accidentally caused his own death during the commission of the felony. In *People v. Ferlin*,[29] a California case, one arsonist was killed in the fire; the other was held not guilty of murder because the death was opposed to the conspiracy and not in furtherance of it. But in *Commonwealth v. Bolish*[30] in a similar situation, the defendant was held guilty of murder on the proximate cause theory as previously expounded in Pennsylvania.[31]

In only two cases previous to the principal case had the question of murder even arisen when a felon in the perpetration of a felony was killed by a *non-felon*. In *People v. Garippo*,[32] an Illinois case, convictions of murder were reversed because, under the instructions given, "plaintiffs in error might be held responsible for shooting done by another person when there was no concert of action between him and them."[33] In *People v. Udwin*,[34] decided under the New York statutes,[35] it was implicit that if deceased had been killed by a prison guard instead of by one of his fellow rioting prisoners the latter would not have been guilty of murder.

Thus the *Bolish* case is the only previous case in which the death of a felon otherwise than at the hands of his co-felons resulted in their conviction of murder, and this on the theory of proximate cause. The result reached in the *Bolish* case was criticized in able dissenting

[28] Such killing, of course, must not be totally unconnected with the furtherance of the felony undertaken. When *D1* became "trigger happy" and took some shots at a pasing automobile, *D2* became furious at the needless risk of detection and killed *D1*. Both *D2* and *D3* were held guilty of first degree murder. People v. Cabaltero, 31 Cal. App. 52, 87 P. 2d 364 (1939).

[29] 203 Cal. 587, 265 Pac. 230 (1928). In People v. LaBarbera, 159 Misc. 177, 287 N. Y. Supp. 257 (1936), the same result was reached. This case is distinguishable, however, because the New York statutes declare that homicide is "the killing of one human being by an act, procurement, or omission of *another*," N. Y. PEN. LAW § 1042 (Emphasis added), and that "the killing of a human being . . . is murder in the first degree, when committed . . . *by a person engaged* in the commission of, or in the attempt to commit a felony. . . ." N. Y. PEN. LAW § 1044. (Emphasis added.)

In addition to New York eleven states (Delaware, Indiana, Minnesota, Mississippi, Nebraska, Ohio, Oklahoma, Oregon, South Dakota, Washington, and Wyoming) and the District of Columbia have statutes indicating a requirement that one of the felons do the act causing death. Ohio and Wyoming statutes require that the act be done "purposely" as does the statute of the District of Columbia, but in the last only in cases where the offence perpetrated is not one of the enumerated felonies but any other act punishable by imprisonment.

[30] 381 Pa. 500. 113 A. 2d 464 (1955). The decision of the lower court, which the Supreme Court of Pennsylvania reversed on other grounds, is noted in 59 DICK. L. REV. 183 (1955).

[31] Pennsylvania cases cited note 21 *supra*.

[32] 292 Ill. 293, 127 N. E. 75 (1920).

[33] *Id.* at 300, 127 N. E. at 78.

[34] 254 N. Y. 255, 172 N. E. 489 (1930).

[35] See note 29 *supra*.

opinions both in the lower court[36] and the Supreme Court of Pennsylvania.[37]

When a felon is killed by a non-felon

Therefore, the result in the principal case was reached under the following status of the law: (a) controlling state authority on the possibility of murder when a non-felon does the act causing death, but a split of outside authority; (b) controlling state authority of the possibility of murder when a felon is killed, but with all outside authority contrary; (c) absence of authority anywhere that a felon is guilty of murder when his co-felon is justifiably killed by one attempting to prevent the commission of the felony.

Only through the proximate cause theory, that a felon is guilty of murder if any death results from the commission of the felony, can the holding in the principal case be justified. The decision is contrary to the formerly well-established rule that the homicide must be in furtherance of the felony.[38] It cannot be justified on the ground that the accused caused the deceased to be in a place of danger, for the deceased voluntarily entered what he knew would be a dangerous undertaking. Deterrance of criminal activity has been advanced as a justification of the decision. Whether general acceptance of the view of this case would have an appreciable deterrent effect is doubtful.[39] At any rate, deterrence is a factor to be considered not by the court but by the legislature.[40]

This proximate cause theory of Pennsylvania, applied in the principal case, caused a man to be convicted of murder for a justifiable homicide

[36] 55 Lack. Jur. 213, 235 (1954).
[37] 381 Pa. 500, 527, 113 A. 2d 464, 478 (1955).
[38] See notes 15 and 16 *supra*.
[39] Certainty of punishment, rather than harshness, would seem to be the deterrent factor in a situation such as this, and in all these cases the criminal is certain to be punished for a felony if he gets caught. For a brief discussion of the deterrence factor, see Ball, *The Deterrence Concept in Criminology and Law*, 46 J. CRIM. L. 347 (1955).
[40] "With all the will in the world to wish otherwise, I can only see in the Majority's Opinion an arbitrary exercise of power rising out of a zeal to combat criminals, which zeal does not surpass that of the writer's. However, zeal must be channeled into the ways of the law as *written*." Justice Musmanno (dissenting) in Commonwealth v. Thomas, — Pa. —, —, 117 A. 2d 204, 222 (1955).
"If it should be deemed essential to the public safety and security that felons be made chargeable with murder for *all* deaths occurring in and about the perpetration of a felony, . . . the legislature should be looked to for appropriate exercise of the State's sovereign police power to an end never yet legislatively enacted." Justice Jones (dissenting), *Id.* at —, 117 A. 2d at 221.
The 1955 Legislature of Wisconsin enacted a new criminal code which embodies this proximate cause idea in the third degree murder statute: "Whoever in the course of committing or attempting a felony causes the death of another human being as a natural and proximate consequence of the commission of or attempt to commit the felony, may be imprisoned not more than 15 years in excess of the maximum provided by law for the felony." WIS. CRIM. CODE § 940.03 (1955).

and under circumstances in which the deceased should be considered to have "assumed the risk" of the undertaking. This carries the affirmative proximate cause idea to its logical conclusion and points out the inadequacy of this theory when applied as the sole criterion for establishing the implied crime of felony-murder. The split decision in this case shows a dissatisfaction within the court which has advanced the theory most strongly.[41]

The use of affirmative proximate cause is not necessary for the obtaining of murder convictions when such *ought* to be obtained.[42] If its use is helpful in the understanding of what the law is doing in felony-murder cases, such use should be limited to those cases where a person trying to prevent a felony dangerous to human life accidentally kills someone other than one of the felons.

JAMES P. CREWS.

Damages—Loss of Profits—Standard of Certainty

Calling our attention to a much litigated area of damage law is the case of *Evergreen Amusement Corporation v. Milstead*.[1] The plaintiff had contracted to perform the excavation for an outdoor theater, but delayed completion two and one-half months beyond the date specified. To the plaintiff's action to recover the agreed price for the job, the defendant filed a counterclaim seeking damages for the lost profits caused by the delay. The Court of Appeals of Maryland refused to allow recovery of such profits holding them to be too speculative for the jury to

[41] The three dissenting judges based their dissents mainly on the fact that the killing was justifiable, and thus concluded that no one, either legally or morally, should have been held guilty of murder. This question involves to some extent a consideration of the wording of the Pennsylvania statute. "All murder . . . which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree." PA. STAT. ANN. tit. 18, § 4701 (Purdon 1930). It was an obvious begging of the question if such wording was meant to declare certain killings murder. All such a statute can do is raise certain murders to first degree murder. Whether or not the killing is murder depends on the common law definition.

In thirteen states (Florida, Georgia, Illinois, Indiana, Louisiana, Minnesota, Mississippi, Nebraska, New York, Ohio, Oregon, Washington, and Wyoming) and the District of Columbia, some form of the word "kill" is used instead of "murder"; thus these statutes are definitive in nature. The same is true in Alabama, Missouri, Oklahoma, and South Dakota, where "homicide is used. The Wisconsin statute refers to causing the death. The rest of the felony-murder statutes are like Pennsylvania's in using "murder."

[42] A casual polling of laymen has revealed no one who felt that the defendant in this case ought to be considered a murderer. The principal case deals with a set of facts never previously considered in a reported decision in the United States. Appeal would follow automatically on such an unsettled issue if prosecution were brought. It would be absurd to say that a similar set of facts never existed before. The reason for failure to prosecute for murder in such a case must be the failure on the part of the states' officials to consider it appropriate, or even to consider it at all.

[1] 206 Md. 610, 112 A. 2d 901 (1955).

assess. A fair rental value of the theater property was allowed as an alternative remedy.[2]

Denial of recovery for lost profits is commonly based on the court's determination that such profits are too uncertain and speculative. The general rule for recovering any damages is that the plaintiff must show that he has suffered a loss and must show to a reasonable certainty the nature and extent of the loss.[3] On this reasoning the early American courts refused recovery for lost profits altogether, but the present view is to allow such a recovery if the loss is the natural result of the defendant's wrong, and the loss is not uncertain or speculative.[4]

The North Carolina story has not been unique. Attempts to recover damages for lost profits have arisen frequently in two situations: interference in the cultivation of agricultural crops and interference with business enterprises. At the risk of generalizing, it may be said that the early North Carolina Court denied recovery in both instances.[5]

Representative of the early view in respect to crops is the case of *Roberts v. Cole*.[6] The court refused plaintiff's attempt to recover anticipated profits stating that what the crop would have been worth was "purely and wholly speculative." This reasoning was followed in a later case where the rice seed, which defendant had sold the plaintiff, failed to sprout. The court stated: ". . . [W]e have concluded, after mature reflection and a careful study . . . that the principle . . . in *Roberts v. Cole* applies. . . ."[7] It is interesting to note that only two years later the court in *Herring v. Armwood*[8] did allow recovery of damages for lost profits where the defendant breached his contract to fertilize the soil.

[2] The decision turned on the fact that the lost profits sought were for a new business as distingiushed from an established business where damages could be more certainly determined by assessing lost profits on the basis of previous earnings.

[3] 1 SEDGWICK, DAMAGES § 170 (9th ed. 1920).

[4] 25 C. J. S., DAMAGES § 41 (1941).

[5] However, there has always been an alternative remedy. In the case of crops it is normally the fair rental value of the land under cultivation, plus the plaintiff's expenditures frustrated by the defendant's wrong. Reiger v. Worth, 127 N. C. 230, 37 S. E. 217 (1900). In the case of lost profits for business enterprise, the alternative remedy is normally the legal interest on the capital investment which is made unproductive by the defendant's wrong. Foard v. Atlantic and North Carolina R. R., 53 N. C. 235 (1860). Of course, the defendant has the right to prove that the plaintiff did minimize his damages or had reasonable opportunity to do so. Reiger v. Worth, *supra* (crops) and Jones v. Call, 96 N. C. 337, 2 S. E. 647 (1887) (business).

[6] 82 N. C. 293 (1880).

[7] Reiger v. Worth, 127 N. C. 230, 236, 37 S. E. 217, 219 (1900). In this decision the court made no mention of the earlier case of Spencer v. Hamilton, 113 N. C. 49, 18 S. E. 167 (1893) where the plaintiff was allowed recovery for the lessening of his net yield by the defendant's failure to maintain adequate ditches as he had contracted to do.

[8] 130 N. C. 177, 41 S. E. 96 (1902). The court did not discuss the decision in the *Reiger* case, note 7 *supra*, but based its decision on the *Spencer* case, note 7 *supra*. Doubtless the court was influenced by the character of the defendants' wrongs; however, its reasoning was based solely on the issue of certainty.

Since the *Herring* decision the rule has become well established that the value of the lost crop may be recovered.[9] But the plaintiff has the burden of proving what the crop would have been worth but for the defendant's wrong. Where the only evidence as to the anticipated value of the crop was plaintiff's testimony as to what he thought it would have been, the court denied recovery.[10] And where the plaintiff merely made a comparison of the crop yield of one year with that of another the court denied recovery, but in so doing enumerated some of the evidence which should have been presented.[11] The recent case of *Perry v. Doub*[12] reflects the court's present liberal view on the recovery of lost profits for damage to crops.[13] Interestingly enough, the plaintiff had based his claim for loss of profits on the defendant's breach of contract to loan money, thus preventing a maximum crop production.[14]

The liberal trend of the court in allowing recovery for lost profits where the plaintiff's crop has been damaged has also characterized the court's reaction to attempts for recovery of lost profits in business ventures. Where there was an existing contract calling for short term performance by the plaintiff, loss of anticipated profits was allowed as the measure of damages. Thus, where defendant reneged on his agreement to allow plaintiff to grind his corn at a profit of three cents per bushel, the court allowed the loss of such profits.[15] And where a contract called for the manufacture and sale of certain machinery from which plaintiff expected to make twelve hundred dollars profit, the court allowed recovery of that amount.[16] Other cases have allowed similar recoveries.[17]

[9] Gulley v. Raynor, 185 N. C. 96, 116 S. E. 171 (1928); Perry v. Kime, 169 N. C. 540, 86 S. E. 337 (1915).

[10] Gulley v. Raynor, 185 N. C. 96, 116 S. E. 171 (1928).

[11] Perry v. Kime, 169 N. C. 540, 86 S. E. 337 (1915). "The character of the soil and its condition; the kind of seed used, when planted and how; the preparation of the soil for planting; the quality of fertilizer, the quantity and the time and manner of its application; the cultivation of the crop; the harvesting of the crop; the seasons, and other circumstances enter into the estimate of what ought to be made. . . ."

[12] 238 N. C. 233, 77 S. E. 2d 711 (1953).

[13] Counsel should be wary, however, when the claim for lost profits is based on inferior fertilizer purchased from a fertilizer company. N. C. GEN. STAT. § 106-50.7 (4) (1952) proscribes the *bringing of any action* for damages based on inferior fertilizer purchased from a fertilizer company, except where enumerated requirements are met. These statutory requirements are so numerous and so technical that the bringing of such actions is virtually barred. However, where the farmer-defendant gave his promissory notes for the purchase price of fertilizer the statute did not prevent his defense of failure of consideration based on faulty fertilizer in an action by the payee-plaintiff. Swift & Co. v. Aydlett, 192 N. C. 330, 135 S. E. 141 (1926).

[14] The general rule seems to be that the normal damage for breach of contract to loan money is the difference that plaintiff would have had to pay in interest and expenses under the contract and that paid for a similar loan elsewhere. MCCORMICK, DAMAGES § 139 (1935).

[15] Oldham v. Kerchner, 79 N. C. 106 (1878).

[16] Jones v. Call, 96 N. C. 337, 2 S. E. 647 (1887).

[17] Recovery for anticipated profits from accommodating tourists with a pleasure boat which defendant had contracted for hire. Mace v. Ramsey, 74 N. C. 11

Where no such contract existed and the plaintiff sought recovery for the anticipated general profits of his business, the early North Carolina Court denied them as too speculative. In *Boyle v. Reeder*[18] the defendant failed to deliver certain machinery on the agreed date. The court clearly expressed its aversion to the plaintiff's attempt to recover his lost profits: "Very certainly, damages are not to be measured by any such vague and indeterminate notion of anticipated and fancied profits of a business or adventure which depends so much on skill experience, good management and good luck for success."[19] A clear contrast of lost profits in the "existing contract" category and the "general profits" category is found in *Jones v. Call.*[20] The plaintiff was allowed the lost profits expected from existing contracts but was denied any recovery for the expected profits on the "continued manufacture and sale" of machinery. A more recent case refused the plaintiff's attempt to recover the lost profits anticipated from the operation of a barbershop.[21]

Without belaboring a summary of the intervening case law[22] one may find the present viewpoint of the court as to lost business profits in *Perkins v. Langdon*[23] where an oral agreement between the parties provided that the defendant would lease a tobacco warehouse to the plaintiff for three market seasons. The defendant refused to continue the lease after the first season and the plantiff's action sought recovery for his lost prospective profits. Recovery was allowed based on the peculiarly favorable evidence for meeting the certainty standard: government control of tobacco crops, stabilization of tobacco prices by fixing floor prices of all grades of tobacco, and statutory requirements for maintaining accurate sales records.[24] This commendable decision should lead in the future to the court's according greater weight to sound economic data for purposes of meeting the certainty standard.

Although the American courts have liberalized their views in allow-

(1876); plaintiff recovered $27,000, the expected profits from the manufacture and sale of cell doors for the state penitentiary. Clements v. State, 77 N. C. 142 (1877).

[18] 23 N. C. 607 (1841).

[19] *Id.* at 614.

[20] 96 N. C. 337, 2 S. E. 647 (1887).

[21] Brewington v. Loughran, 183 N. C. 558, 112 S. E. 257 (1922).

[22] Other, but not all, similar North Carolina decisions are: Foard v. Atlantic and North Carolina R. R., 53 N. C. 235 (1860); Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co., 141 N. C. 284, 53 S. E. 885 (1906); Thompson v. Seaboard Air Line Ry., 165 N. C. 377, 81 S. E. 315 (1914); Reliable Trucking Co. v. Payne, 233 N. C. 637, 68 S. E. 2d 288 (1951).

[23] 237 N. C. 159, 74 S. E. 2d 634 (1953).

[24] Notice that the action was brought after the expiration date agreed upon in the lease. The evidence relied upon to meet the certainty standard would not have been available had the action been brought immediately upon the defendant's breach. Plaintiffs might be well advised to delay suit in order to accumulate the necessary evidence to support their claims for lost profits.

ing recovery for lost profits there still remains a standard of certainty to be met. It is significant that this standard is not applied in other areas of damage law.[25] Recognizing the speculative character of the plaintiff's claim, courts nevertheless allow the claim as the measure of damage, for instance, loss of consortium,[26] invasion of privacy,[27] and impairment of an infant's earning capacity after he reaches his majority.[28] No decisions have undertaken to analyze the rationale for applying the standard in some instances and not applying it in others. Justification that the standard restrains excessive verdicts is hardly valid, since the remittitur safeguard would be equally effective for lost profits as it would for personal injury claims. Quaere whether such a restraint is necessary.[29] It has been suggested that the availability of alternative remedies motivates the courts' application of the standard in actions for lost profits.[30] But the alternative remedies do not necessarily achieve the purpose of money damages, making the plaintiff whole. Some justification might be found in the business-plaintiff's ability to offset his injury through additional efforts for profits, as contrasted with the usual inability of the personally injured plaintiff to do so. A broader reason could be urged that the policy of spreading the loss can be effectuated through the business-plaintiff's own efforts, whereas in the case of the personally injured plaintiff, the aid of the court is needed. These conjectures can be nothing more than rationalizations for the now well-entrenched standard of certainty.

According to one authority the extensive use of the certainty standard is a peculiar American contribution to damage law.[31] This being true

[25] "In the tort field, it has in fact no application at all to the measurement of damages to interest of personality, such as claims for pain, mental anguish, or humiliation, nor, of course, to punitive damages." McCORMICK, DAMAGES § 32, p. 124 (1935).

[26] "The value of such loss must be determined by the triers of fact in the exercise of a sound discretion in the light of their own experience, observation and reflection." Gist v. French, 288 P. 2d 1003, 1009 (Cal. App., 1955).

[27] "The measure of damages therefore is for the trier of fact, and in assessing such damages he is accorded a wide and elastic discretion." Fairfield v. American Photocopy Equipment Co., 291 P. 2d 194, 198 (Cal. App., 1955).

[28] ". . . [I]t is clear enough . . . that a finding of impaired earning capacity afterwards would have been nothing more substantial than a mere speculation . . . [T]he law furnishes no measure of damages other than the enlightened conscience of impartial jurors, guided by all the facts and circumstances of the particular case." Birmingham Electric Co. v. Cleveland, 216 Ala. 455, 459, 113 So. 403, 406 (1927).

[29] By the very nature of the claim, the plaintiff will ordinarily be a corporation or other type of business association. It is common knowledge that this type party defendant is jeopardized in accident litigation merely because of what it is. Would it not follow that a jury's sentiments would be against awarding excessive verdicts to that type plaintiff?

[30] Note, 64 HARV. L. REV. 317, 324 (1950).

[31] McCORMICK, DAMAGES §§ 25, 26 (1935): "This elaboration of the doctrines relating to the standard of 'certainty,' . . . is a by-product of the jury system, springing from the lack of confidence of American judges in the discretion of juries."

the standard will probably enjoy a long and productive career in our country. But realizing the enhancement of the economy by business' reliance and action on anticipated gains, the courts should continue to liberalize the requirements for satisfying the standard. This may be accomplished without invading the principles involved by an increased reliance on available economic data and a more sympathetic attitude towards efforts for progress and achievement.

RICHMOND BERNHARDT, JR.

Evidence—The Dead Man's Statute—Personal Transaction

In the recent case of *Hardison v. Gregory*[1] the North Carolina Supreme Court once again had before it the problem of deciding whether a particular fact situation constituted a "personal transaction or communication" between an interested witness and a deceased person under N. C. G. S. § 8-51, commonly referred to as "the dead man's statute."[2]

It should be noted that the statute does not disqualify all witnesses or all testimony. A very good analysis of the statute was made by Justice Ervin in the case of *Peek v. Shook*[3] as follows:

> "This statute does not render the testimony of a witness incompetent unless these four questions require an affirmative answer:
>
> "1. Is the witness (a) a party to the action, or (b) a person interested in the event of the action,[4] or (c) a person from, through or under whom such a party or interested person derives his interest or title?

[1] 242 N. C. 324, 88 S. E. 2d 96 (1955). See Case Law Survey, 34 N. C. L. REV. 53 (1955).

[2] N. C. GEN. STAT. § 8-51. "Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness in his own behalf or person, or the committee of a lunatic, or the person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication."

Exclusionary statutes of this type are in effect in all but three states: Connecticut, Massachusetts, and Rhode Island. In New Mexico, Oregon and Virginia, the interested party may testify, but his testimony uncorroborated is insufficient to support a recovery. 2 WIGMORE, EVIDENCE § 578 (3rd ed. 1940).

[3] 233 N. C. 259, 63 S. E. 2d 542 (1951). See also: Bunn v. Todd, 107 N. C. 266, 11 S. E. 1043 (1890) and STANSBURY, EVIDENCE § 66 (1946).

[4] "The interest which determines the competency of a witness under the statute is a present direct pecuniary interest." Sanderson v. Paul, 235 N. C. 56, 61, 69 S. E. 2d 156, 160 (1952). See also: Price v. Askins; 212 N. C. 583, 194 S. E. 284 (1937); Burton v. Styers, 210 N. C. 230, 186 S. E. 248 (1936); *In re* Gorham, 177 N. C. 271, 98, S. E. 717 (1919).

"2. Is the witness testifying (a) in his own behalf or interest, or (b) in behalf of the party succeeding to his title or interest?

"3. Is the witness testifying against (a) the personal representative of a deceased person, or (b) the committee of a lunatic, or (c) a person deriving his title or interest from, through or under a deceased person or lunatic?

"4. Does the testimony of the witness concern a personal transaction or communication between the witness and the deceased person or lunatic?

"Even in the instances where these four things occur, the testimony of the witness is nevertheless admissible under the exception specified in the statute itself if the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic is examined on his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction or communication."[5]

The basic reason for the rules laid down by the statute seems to be to prevent fraud, the idea being that since the deceased person is no longer able to testify as to what happened or what was said, it would be easy for the living party to give false testimony without fear of contradiction. "Death having closed the mouth of the deceased, the law closed the mouth of the other except only where the personal representative of the deceased opens up the matter by testifying himself or putting in the testimony of the deceased."[6]

It has been stated that "courts are not disposed to extend the disqualification of a witness under the statute to those not included in its express terms."[7] Testimony as to any matter other than a transaction or communication with the deceased is not prohibited by the statute;[8] nor is testimony as to transactions or communications with third persons prohibited even though they may involve or throw light upon transactions with deceased persons since the third persons, being disinterested, can be called to contradict any misstatement.[9] Testimony of an interested witness on behalf or in favor of the deceased person is not pro-

[5] 233 N. C. at 261, 63 S. E. 2d at 543.

[6] Sutton v. Wells, 175 N. C. 1, 4, 94 S. E. 688, 689 (1917). See also: Hall v. Holloman, 136 N. C. 35, 48 S. E. 516 (1904); McCanless v. Reynolds, 74 N. C. 301 (1875).

[7] Sanderson v. Paul, 235 N. C. 56, 59, 69 S. E. 2d 156, 158 (1952); Hardison v. Gregory, 242 N. C. 324, 327, 88 S. E. 2d 96, 98 (1955).

[8] *In re* the Will of Bowling, 150 N. C. 507, 64 S. E. 368 (1909); Whitesides v. Green, 64 N. C. 307 (1870).

[9] Watts v Warren, 108 N. C. 514, 13 S. E. 232 (1890); Bunn v. Todd, 107 N. C. 266, 11 S. E. 1043 (1890); Cary v. Cary, 104 N. C. 175, 10 S. E. 156 (1889).

hibited;[10] nor does G. S. § 8-51 prevent an interested party who is merely an observer from testifying as to acts of the deceased—i.e., as to independent facts based upon independent knowledge, not derived from any personal transaction or communication with the deceased.[11]

In the principal case the plaintiff, in an action for criminal conversation and alienation of affections against the co-administrators of the deceased, was allowed to testify, over the objections of the defendants, that he had: (1) walked into his own house at night and found the deceased standing in his living room close to the door of the bedroom in which his wife was dressing; (2) seen the deceased and his wife leave a cabin owned by the deceased and drive off in the deceased's Cadillac car; (3) looked through the window of deceased's office and seen the deceased hugging and kissing his wife; and (4) seen the deceased and his wife come out of a cabin and get into deceased's Cadillac, chased them, knocked out the windows of the car with a hatchet, and struck the deceased with the hatchet.

The court held that the testimony relating to what the witness had seen the deceased do was competent "because he was testifying to independent facts based upon independent knowledge, not derived from any personal transaction or communication with the deceased."[12] This much of the holding is certainly in accord with previous decisions in North Carolina[13] and in other jurisdictions.[14] However, the court disagreed as to the admissibility of the testimony in regard to the action of the plaintiff in breaking the windows of the car and hitting the deceased in the face with a hatchet. The majority held that this was admissible as testimony of independent acts, while the concurring judges[15] considered this as testimony concerning a "personal transaction" between the plaintiff and the deceased.

Exactly what may or may not constitute a "personal transaction" under any given set of facts is often hard to determine. The courts have been reluctant to formulate any specific criteria which could be followed consistently and apparently have ben satisfied to deal with each situation as the problem arose. However, the court has said, "we think a fair test

[10] Reece v. Woods, 180 N. C. 631, 105 S. E. 337 (1920); Seals v. Seals, 165 N. C. 409, 81 S. E. 613 (1914); McFarland v. Dept. of Labor and Industries, 188 Wash. 357, 62 P. 2d 714 (1936).

[11] Wilder v. Medlin, 215 N. C. 542, 2 S. E. 2d 549 (1939); Worth v. Wrenn, 144 N. C. 656, 57 S. E. 388 (1907); Costen v. McDowell, 107 N. C. 546, 12 S. E. 432 (1889); McCall v. Wilson, 101 N. C. 598, 8 S. E. 225 (1888).

[12] 242 N. C. at 329, 88 S. E. 2d at 99.

[13] See note 11 *supra.*

[14] Stiff v. Cobb, 126 Ala. 381, 28 So. 402 (1900); First Nat. Bank v. Warner, 17 N. D. 76, 114 N. W. 1085 (1908); Hanson v. Fiesler, 49 S. D. 442, 207 N. W. 449 (1926).

[15] Three judges concurred in the result because the same facts were testified to by a witness for the defendants.

in undertaking to ascertain what is a 'personal transaction or communication' with the deceased about which the other party to it cannot testify is to inquire whether, in case the witness testify falsely as to what transpired between them, the deceased, if living, could contradict it of his own knowledge";[16] and, "the transactions contemplated by the statute and concerning which a party to an action is prohibited from being examined on his own behalf against the administrator of the deceased person are such transactions as are essential and material links in the chain establishing liability against the estate of such deceased person."[17]

Specifically, courts have held that testimony concerning "personal transactions" includes testimony as to the following: money due on contract,[18] the existence of a partnership,[19] marriage,[20] delivery of written instruments or other objects,[21] and performance of personal services.[22] Also, it has been held that the statute applies to actions in tort as well as on contract.[23] Among the tort situations which have been included within the statute as "personal transactions" are: accidents involving automobiles,[24] malpractice,[25] and assault.[26]

[16] White v. Evans, 188 N. C. 212, 213, 124 S. E. 194, 194 (1924). See also: Yuritch v. Yuritch, 139 N. J. Eq. 439, 51 A. 2d 901 (1947); Tallman v. First Nat. Bank of Nev., 66 Nev. 248, 208 P. 2d 302 (1950); Wilson v. Ervin, 227 N. C. 396, 42 S. E. 2d 468 (1948); Sherrill v. Wilhelm, 182 N. C. 673, 110 S. E. 95 (1921); *In re* Wind's Estate, 27 Wash. 2d 421, 178 P. 2d 731 (1947).

[17] Davis v. Pearson, 220 N. C. 163, 165, 16 S. E. 2d 655, 656 (1941). *See also:* Boyd v. Williams, 207 N. C. 30, 175 S. E. 832 (1934).

[18] George v. McManus, 27 Cal. App. 414, 150 Pac. 73 (1915); Stanton v. Helm, 87 Miss. 287, 39 So. 457 (1905); McMichael v. Pegram, 225 N. C. 400, 35 S. E. 2d 174 (1945).

[19] Wingler v. Miller, 223 N. C. 15, 25 S. E. 2d 160 (1943); Gage v. Phillips, 21 Nev. 150, 26 Pac. 60 (1891). *Contra:* Turner v. Huggins, 130 Tenn. 181, 169 S. W. 754 (1914).

[20] "If marriage is not a personal transaction between the contracting parties, what is it?" Hopkins v. Bowers, 111 N. C. 175, 179, 16 S. E. 1, 2 (1892). See also: Smith v. Smith, 187 Ga. 743, 2 S. E. 2d 417 (1939); Catlett v. Chestnut, 107 Fla. 498, 146 So. 241 (1933); Berger v. Kirby, 105 Tex. 611, 153 S. W. 1130 (1913).

[21] Hoag v. Wright, 174 N. Y. 36, 66 N. E. 579 (1903); Lane v. Rogers, 113 N. C. 171, 18 S. E. 117 (1893).

[22] Davidson v. Barden, 139 N. C. 1, 51 S. E. 779 (1905); Gray v. Cooper, 65 N. C. 183 (1871); Pancoast v. Eldridge, 157 Okla. 195, 11 P. 2d 918 (1932). *Contra:* Will of Fuller, 190 Wis. 445, 209 N. W. 683 (1926).

[23] Leavea v. Southern Ry., 266 Mo. 151, 181 S. W. 7, Annot. 1916D L. R. A. 810 (1915); Boyd v. Williams, 207 N. C. 30, 175 S. E. 832 (1934), commented on in Note, 13 N. C. L. Rev. 230 (1934). *Contra:* Warfield Natural Gas Co. v. Clark, 257 Ky. 724, 79 S. W. 2d 21 (1934).

[24] Chapman v. Bruton, Inc., 325 Ill. App. 324, 60 N. E. 2d 125 (1945); Wells v. Wildin, 224 Iowa 913, 277 N. W. 308 (1938); Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622 (1955); Boyd v. Williams, 207 N. C. 30, 175 S. E. 832 (1934); Strode v. Dyer, 115 W. Va. 733, 177 S. E. 878 (1935); Waters v. Markham, 204 Wis. 332, 235 N. W. 797 (1937). *Contra:* Rankin v. Morgan, 193 Ark. 751, 102 S. W. 2d 552 (1937); Kinsella v. Meyer's Adm'r, 267 Ky. 508, 102 S. W. 2d 974 (1937); Rost v. Kessler, 49 N. Y. S. 2d 97 (1944). *But see:* Kilmer v. Gustason, 211 F. 2d 781 (5th Cir. 1954) (Plaintiff permitted to testify only to *his own* actions and movements of *his own* car.

[25] Barnett v. Brand, 165 Ky. 616, 177 S. W. 461 (1915).

[26] Southern v. Belleau, 203 Ky. 508, 262 S. W. 619 (1924); Maciejczak v. Bartell, 187 Wash. 113, 60 P. 2d 31 (1936).

It is apparent that any sort of action in which the deceased and the witness are involved can be called a "personal transaction" if the court so desires. At best, the distinction between what the court will hold to be a "personal transaction" in one situation and what it will hold not to be a "personal transaction" in another situation is very fine— and ordinarily the scales of justice are balanced very heavily toward the protection of the deceased, thus causing the doubtful case to be resolved against the surviving party.

The North Carolina Supreme Court, in the principal case, held that the act of the plaintiff in chasing the deceased, knocking out his car windows (with the deceased in the car with the doors locked), and hitting the deceased in the head with a hatchet was "an independent act." The court cited the cases of *Boyd v. Williams*[27] and *Davis v. Pearson*[28] and held that both cases were inapplicable. "It would seem that the ruling in these two cases was based on the fact that each plaintiff was a passenger in the car."[29] The essence of the facts in these cases was that the plaintiff was riding in a car with the deceased, and there was an accident in which the plaintiff was injured. In both cases testimony of the plaintiffs was ruled incompetent on the ground that it involved a personal transaction with a deceased person under G. S. § 8-51. The plaintiffs in these cases were not even allowed to testify that the deceaseds were driving at the time of the accident or to testify as to any facts that might indicate that they themselves were not driving.

The court in the principal case is obviously making a distinction between acts done *with* a deceased person and acts done *to* such a person, thereby placing an emphasis upon the *"personal" relationship* of the parties. Acts done *to* a deceased apparently are considered "independent acts," and not within the statutory exclusion. In the automobile cases, the testimony of the survivor relates to facts and circumstances of which he had knowledge because of his "personal" relationship with the deceased; while in the principal case, it could be said that there was no "personal" relationship between the plaintiff and the deceased.

Although there is a distinction with regard to the relationship of the parties in these cases (and thus with regard to the "personal" aspect of the phrase "personal transaction"), there is no such logical distinction as to the facts of each situation which constitutes the "transaction." It would seem that neither situation involves a "transaction." In a case involving a collision between an automobile and a truck, the Supreme Court of Arkansas stated, "Such is not the usual, common, or ordinarily accepted meaning of the word 'transaction.' The word is defined: 'A

[27] 207 N. C. 30, 175 S. E. 832 (1934).
[28] 220 N. C. 163, 16 S. E. 2d 655 (1941).
[29] Hardison v. Gregory, 242 N. C. 324, 329, 88 S. E. 2d 96, 99 (1955).

business deal; an act involving buying and selling; as the transactions on the exchange. Its synonym is negotiation.' (Webster's New International Dictionary, Second Edition)."[30]

It would seem that the *reasoning* used by the North Carolina Court in the principal case, in view of the normally accepted understanding of the wording used in the "dead man's statute," is not in keeping with the better reasoned interpretation of the statute. However, the *holding* of the Court is a good one in view of the modern trend toward the admissibility of evidence. It would seem that this holding is in keeping with the normally accepted understanding of the wording of the statute and that the holdings in the previously cited automobile cases distorted the intent of the statute.

DONALD LEON MOORE.

Flight in General: Its Effect on Procedural Rights, Constitutional Law, and the Grand Jury

The Louisiana code provides that a challenge to the array of a grand jury must be made "before the expiration of the third judicial day of the term for which said grand jury shall have been drawn, or before entering upon the trial of the case if it be sooner. . . ."[1] In the recent case of *Poret v. Louisiana*[2] this statute was involved. There, one of the defendants, Poret, fled the state after the consummation of the offense and remained outside the jurisdiction until one and one half years after the termination of the term of the grand jury which indicted him. At arraignment on October 27, 1952, assisted by his own counsel, he pleaded not guilty and was granted additional time to file a motion for severance. On November 7, 1952, after denial of his motion for severance, he moved—for the first time—to quash the indictment because of systematic exclusion of Negroes from the grand jury. The trial court denied the motion, after finding that defendant was a fugitive from justice, on the ground that it was filed more than a year and a half too late. The Supreme Courts of Louisiana[3] and of the United States[4] affirmed, the latter on three grounds. First, the court considered the defendant as having forfeited his right to challenge by his own action in voluntarily fleeing. Second, even after having returned to the state he

[30] Rankin v. Morgan, 193 Ark. 751, 753, 102 S. W. 552, 553 (1937).

[1] Michel v. Louisiana, 350 U. S. 91, 92 (1955). The phrase "third judicial day of the term" has been interpreted by the Louisiana Supreme Court to mean "the third judicial day following the term." State v. Wilson, 204 La. 24, 14 So. 2d 873 (1943).

[2] 350 U. S. 91 (1955).

[3] Poret v. State, 225 La. 1040, 74 So. 2d 207 (1954).

[4] Michel v. Louisiana, 350 U. S. 91 (1955).

[5] Agnew v. United States, 165 U. S. 36 (1896).

did not object at the first opportunity.[5] Third, under the Due Process Clause of the Fourteenth Amendment a state may attach reasonable time limitations to the assertion of federal constitutional rights. The majority, through Justice Clark, stated:

> "We do not believe that the mere fugitive status existing here excuses a failure to resort to Louisiana's established statutory procedure available to all who wish to assert claimed constitutional rights. This is not to say that the act of fleeing and becoming a fugitive deprives one of federal rights. We hold only that *due regard for the fair as well as effective administration of criminal justice gives the State a legitimate interest in requiring reasonable attacks on its inquisitorial process* and that the present case is not one in which this interest must bow to essential considerations of fairness to individual defendants."[6] [Emphasis added.]

Justice Black, dissenting, with whom Justice Douglas and the Chief Justice concurred, declared:

> "Under our system even a bad man is entitled to have his case considered at every stage by a fair tribunal."[7]

Justice Douglas, dissenting, with whom Justice Black and the Chief Justice concurred, stated:

> "But it is dangerous doctrine to deprive a man of his constitutional rights in one case for his wrongful conduct in another. That is a doctrine that currently is gaining momentum. . . . I would give every accused, regardless of his record . . . the full benefit of the constitutional guarantees of due process."[8]

A similar case is *Daniels v. Allen*,[9] considered along with a group of cases decided by the United States Supreme Court under the title of *Brown v. Allen*.[10] Petitioners objected to the systematic exclusion of Negroes from the grand jury at trial. The trial court granted them 60 days in which to appeal. On the 60th day counsel called the prosecuting attorney's office to serve him, but he was out of town for the weekend. Thus service was made on Monday, the 61st day, after the prosecuting attorney had returned to his office. The state supreme court granted the prosecuting attorney's motion to dismiss the appeal on the ground

[6] Poret v. Louisiana, 350 U. S. 91, 98 (1955).
[7] *Id.* at 104.
[8] *Id.* at 105-06.
[9] 344 U. S. 443, 484 (1952). For the North Carolina Supreme Court's treatment of this case prior to the appeal to the United States Supreme Court see State v. Daniels, 231 N. C. 17, 56 S. E. 2d 2 (1949).
[10] 344 U. S. 443, 484 (1952). See Note, 26 N. C. L. Rev. 185 (1946) and N. C. Gen. Stat. § 9-1 (1953).

that the notice was one day late, and the court refused to consider the appeal on its merits. The United States Supreme Court affirmed on the ground that the state furnished an adequate and easily complied-with method of appeal, and that habeas corpus should not be a substitute for appeal. Justice Black, dissenting, stated:

> "Although admittedly the [North Carolina] court had discretionary authority to hear the appeal, it dismissed the case. Petitioners were thereby prevented from arguing the point of racial discrimination and consequently it has never been passed on by an appellate court. This denial of state appellate review plus the obvious racial discrimination thus left uncorrected should be enough to make one of those 'extraordinary situations' which the Court says authorizes federal courts to protect the constitutional rights of state prisoners."[11]

The United States Supreme Court indicated in *Frisbie v. Collins*[12] that "special circumstances" may justify federal entry in a case where prompt federal intervention is required. Obviously, the Supreme Court did not think that "special circumstances" were present in the *Poret* and *Brown* cases, although in both cases systematic exclusion of Negroes from the grand jury was apparent. Also, several defendants were facing execution.

> Justice Black, dissenting, in the *Brown* case declared:
> "The court thinks that to review this question and grant petitioners the protections guaranteed by the Constitution would 'subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime.' I cannot agree. State systems are not so feeble."[13]

Thus it seems that a dominant consideration of the majority in both cases is the idea of maintaining a balance between state and federal power. Also, the majority, for a test, looked only at the reasonableness of the state regulation, and not at the way the regulation affected the respective petitioners.[14]

Illustrative of the ability of the court to reach an opposite conclusion with the "reasonableness test" is *Reece v. Georgia*,[15] decided

[11] Brown v. Allen, 344 U. S. 443, 553 (1952).
[12] 342 U. S. 519, 521 (1951).
[13] Brown v. Allen, 344 U. S. 443, 553 (1952).
[14] Michel v. Louisiana, 350 U. S. 91, 93 (1955): "We do not find that this requirement on its face raises an insuperable barrier to one making claim to federal rights. The test is whether the defendant had 'reasonable opportunity to have the issue as to the claimed right heard and determined' by the State Court." See also Paterno v. Lyons, 334 U. S. 314 (1947) and Parker v. Illinois, 333 U. S. 571 (1948).
[15] 350 U. S. 85 (1955).

the same day as the *Poret* case. There the state regulation provided that challenge to the composition of the grand jury must be made before indictment. The defendant was arrested three days before, and attorneys were not appointed to defend him until one day after, his indictment. Five days after appointment counsel moved to quash the indictment on the ground that Negroes had been systematically excluded from the grand jury. The motion was overruled, and the state supreme court affirmed.[16] The United States Supreme Court reversed, holding the regulation unconstitutional, saying through Justice Clark:

> "But it is utterly unrealistic to say that he had such opportunity when counsel was not provided for him until the day after he was indicted. . . . Georgia should have considered Reece's motion to quash on its merits."[17]

Compare that statement with the statement of Justice Douglas in his dissent in the *Poret* case:

> "The opportunity to raise the constitutional objection, therefore, was foreclosed before he was arraigned and, as far as the record shows, before he had any knowledge that the indictment was pending against him. It is as if the grand jury had been impaneled before the commission of the offense, and the time for raising objections to it expired with the impaneling, as was the case of *Carter v. State of Texas,* 177 U. S. 442, 20 S. Ct. 687, 689, 55 L. Ed. 839. Under these circumstances Poret had no real opportunity to challenge the constitutionality of the composition of the grand jury."[18]

Justice Clark in the *Reece* case cited and relied upon the *Carter* case as authority, saying:

> "In the present case as in *Carter,* the right to object to a grand jury presupposes an opportunity to exercise that right."[19]

It should be noted that both the majority and minority in the *Poret* case relied on many of the same cases, and Justice Clark in the *Reece* case relied on some of the same cases as the minority in the *Poret* case. One great difficulty in ascertaining what the law is on this subject is made manifest by the fact that the same cases can be relied on as authority for opposite conclusions.

In the *Reece* case nothing was said about counsel's failure to raise the federal question at the first opportunity. It should be emphasized

[16] Reece v. State, 211 Ga. 339, 85 S. E. 2d 773 (1955).
[17] Reece v. Georgia, 350 U. S. 85, 89 (1955).
[18] Poret v. Louisiana, 350 U. S. 91, 105 (1955).
[19] Reece v. Georgia, 350 U. S. 85, 89 (1955).

that counsel did not raise the point until five days after appointment, the exact number of days that the court held too late, as not made at the first opporunity, in *Agnew v. United States*.[20] The court nevertheless thought that the federal right should be protected, so the state regulation was declared unreasonable, and therefore unconstitutional. In *Michel v. Louisiana*,[21] considered along with the *Poret* case, there was a misunderstanding between the trial court and counsel as to exactly when counsel was appointed, whether when the trial court orally appointed counsel in open court or when he received formal notice of appointment some three days later. The trial court considered him appointed as of the time of the oral appointment, and a motion to quash the indictment because of systematic exclusion of Negroes from the grand jury was denied because it was four days too late, it being made seven days after oral appointment and four days after formal appointment. Despite the misunderstanding, the United States Supreme Court affirmed, accepting the trial court's theory that counsel was appointed as of the time of oral appointment in open court and stating that a motion to quash is a short, simple document, easily prepared in a single afternoon. It is true that a motion to quash could easily be prepared in a single afternoon, but to investigate and collect evidence concerning systematic exclusion of Negroes from the grand jury, so as to warrant preparation of such a motion, might take a considerable amount of time. No matter at which time one considers counsel to have been appointed in the *Michel* case, the motion was made not later than two days after the motion in the *Reece* case. If one takes the view that counsel was not empowered to act until his formal appointment, the motion was made one day sooner than the motion in the *Reece* case.

The distinction does not seem clear. Apparently, the court thought that the Louisiana regulation did not raise "an insuperable barrier to one making claim to federal rights,"[22] whereas it thought that the regulation in the *Reece* case did. Counsel in the Poret case did not file his motion to quash until twelve days after he was employed by Poret, and the court held this too late, either with or without regard to the Louisiana statute.

Aside from the position taken by the majority in the *Poret* case that the Louisiana statute was objectively reasonable, the decision seems to be based upon the voluntary flight of Poret. What, then, are the rights generally of one who evades the law by fleeing?

Generally, the law is rather harsh to persons who evade it, as is illustrated by the *Poret* case. A fleeing felon in North Carolina may be declared an outlaw, and any person can arrest him, or slay him if

[20] 165 U. S. 36 (1896).
[21] 350 U. S. 91 (1955).
[22] See note 14 *supra*.

necessary.[23] If he flees the state he may lose his state citizenship and his right to personal property exemptions.[24] If before trial, he simply flees, within or without the state, he loses his right to a speedy trial;[25] he may be denied a continuance for the purpose of obtaining witnesses, the rationale being that he did not use proper diligence;[26] and the statute of limitations is suspended.[27] If defendant flees after trial his appeal will be dismissed or his case left off the docket,[28] unless he is in actual[29] or constructive[30] custody at the time of the consideration of the appeal. It would seem that an austere stand may be justified where the defendant has already been tried and found guilty and then flees. But it seems that the court is not justified in saying that he has lost some substantial right where he flees prior to trial. As was pointed out in *Hickory v. United States:*

> "A person however conscious of innocence might not have courage to stand trial, but might, although innocent, think it necessary to consult his safety by flight."[31]

Where the defendant has fled, upon being tried he may find that

[23] N. C. GEN. STAT. § 15-48 (1953). See State v. Stancill, 128 N. C. 606, 611-12, 38 S. E. 926, 928 (1901) for vindicative language by Justice Cook: "So careful is the law to protect those who have not been tried and convicted that the 'outlaws' are entitled to be 'called upon and warned to surrender' before they are allowed to be slain."

[24] Cromer v. Self, 149 N. C. 164, 62 S. E. 885 (1908). See N. C. GEN. STAT. §§ 15-55 to -84 (1953) and Notes, 10 N. C. L. REV. 292 (1931), 11 N. C. L. REV. 163 (1932), 15 N. C. L. REV. 343, 344 (1936), 41 HARV. L. REV. 74 (1927) and 31 MINN. L. REV. 699 (1947) on extradition.

[25] Chelf v. State, 223 Ind. 70, 58 N. E. 2d 353 (1945); McGuire v. Wallace, 109 Ind. 284, 10 N. E. 111 (1887).

[26] Hubbard v. State, 65 Neb. 805, 91 N. W. 869 (1902); see Stevens v. State, 49 S. W. 105 (Tex. Cr. App. 1899) where a continuance for the co-defendant of the fugitive was not granted because it was doubtful if the attendance of the fugitive could be procured.

[27] State v. Miller, 188 Mo. 370, 87 S. W. 484 (1905); *In re* Bruce, 132 Fed. 390 (C. C. Md. 1904) (1904), *aff'd* in Bruce v. Bryan, 136 Fed. 1022 (C. C. Md. 1905); State v. Pelley, 221 N. C. 487, 20 S. E. 2d 860 (1942); Streep v. United States, 160 U. S. 128 (1895).

[28] Eisler v. United States, 338 U. S. 189 (1949); Wood v. State, 61 S. W. 308 (Tex. Cr. App. 1901); Harris v. Commonwealth, 311 Ky. 429, 224 S. W. 2d 427 (1950); *cf.* Commonwealth v. Andrews, 97 Mass. 543 (1867) *held,* that the fugitive loses his right to be heard by counsel on appeal where he flees after trial.

[29] Knight v. State, 190 Tenn. 326, 229 S. W. 2d 501 (1950). But see Savage v. State, 174 P. 2d 272 (Okla. Cr. Rep. 1947) which *held,* that it is within the discretion of the Appellate Court to review where the prisoner voluntarily left the state, and Bland v. State, 224 S. W. 2d 479 (Tex. Cr. App. 1950) which *held,* that the appeal would be dismissed unless the prisoner could show good cause why it should be reinstated even where the prisoner was then in actual custody.

The rationale of the rule seems to be that the court will not consider an appeal of the defendant unless he can be made to respond to any judgment or order the court may enter in the case. Kuyendall v. State, 168 P. 2d 142 (Okla. Cr. App. 1946). In State v. Cody, 119 N. C. 908, 26 S. E. 252, 56 Am. St. Rep. 692 (1896) the convict had escaped and had been at large for two years, and still was at the time of the consideration of the appeal.

[30] People v. Cossey, 217 P. 2d 133 (Cal. App. 1950).

[31] 160 U. S. 408, 418 (1895). This case has an excellent discussion on flight.

his flight has created certain natural and non-legal presumptions against him.[32] Flight is usually easy to establish, and it is almost universally present in crimes of violence. Flight in any direction,[33] and for any amount of time or any distance[34] will warrant an instruction by the court as to flight. Though flight alone is not sufficient to establish guilt,[35] it is a legitimate ground for the inference of guilt;[36] add to this his departure immediately after the consummation of the offense, and his traveling under aliases to avoid detection, and such is in itself evidence of guilt.[37] As a matter of course, it is for the jury to determine the weight that is to be given the evidence.[38] Where the state makes no contention that defendant fled he cannot introduce evidence of voluntary surrender.[39] Although the offense be admitted,[40] or the defendant voluntarily surrendered,[41] evidence of flight may nevertheless be admitted. Thus, it seems that the state can always take advantage of flight, but that the defendant cannot take advantage of voluntary surrender or a refusal to flee[42] unless the state first enters evidence of flight, or the defendant voluntarily surrenders prior to an indictment being filed against him.[43]

Once evidence of flight is offered by the state, the defendant has the right to explain away the flight by using any evidence consistent with his innocence.[44] Evidence of a willingness to surrender voluntarily[45] is admissible where a flight instruction is given, and, in such a case, the

[32] "He who flees from trial confesses his guilt." PUBLILI SYRI, SENTENTIAE 30 (1870). "The wicked flee when no man pursueth: but the righteous are bold as a lion." PROVERBS 28:1.

[33] People v. Sanchez, 35 Cal. App. 2d 231, 95 P. 2d 169 (1939). Defendant's flight was from the presence of threatening police and not from the premises which he was charged with looting.

[34] Hamby v. State, 71 Ga. App. 817, 32 S. E. 2d 546 (1945). After the shooting the defendant ran and was apprehended at home an hour later, not having fled the community. Muse v. State, 29 Ala. App. 271, 196 So. 148, *cert. denied* 239 Ala. 557, 196 So. 151 (1940). Defendant "whirled and run" after taking the pocket book and was apprehended the next day, not having left the city.

[35] Howard v. State, 182 Miss. 27, 181 So. 525 (1938).

[36] United States v. Heitner, 149 F. 2d 105, *cert. denied* 326 U. S. 727, *rehearing denied* 326 U. S. 809 (1945); Bird v. United States, 187 U. S. 118 (1902); Allen v. United States, 164 U. S. 492 (1896).

[37] People v. Peak, 66 Cal. App. 2d 894, 153 P. 2d 464 (1944); People v. Waller, 14 Cal. 2d 693, 96 P. 2d 344 (1939).

[38] State v. Torphy, 217 Ind. 383, 28 N. E. 2d 70 (1940).

[39] Moyers v. State, 61 Ga. App. 324, 6 S. E. 2d 438 (1940); Starke v. State, 31 Ala. App. 322, 16 So. 2d 426 (1944); Slappey v. State, 64 Ga. App. 713, 13 S. E. 2d 873 (1941).

[40] State v. Hargraves, 62 Idaho 8, 107 P. 2d 854 (1941).

[41] People v. Reese, 65 Cal. App. 2d 329, 150 P. 2d 571 (1944).

[42] Moyers v. State, 61 Ga. App. 324, 6 S. E. 2d 438 (1940).

[43] People v. Martin, 380 Ill. 328, 44 N. E. 2d 49 (1942).

[44] Cavney v. State, 210 Ind. 455, 4 N. E. 2d 137 (1936); McAllister v. State, 30 Ala. App. 366, 6 So. 2d 32 (1942).

[45] People v. Zammora, 66 Cal. App. 2d 166, 152 P. 2d 819 (1942); Compton v. State, 74 Okla. Cr. Rep. 48, 122 P. 2d 819 (1942); *cf.* Moyers v. State, 61 Ga. App. 324, 6 S. E. 2d 438 (1940), which *held*, that it was not error to exclude evidence that defendant did not flee after the robbery.

court should instruct the jury as to the defendant's right to explain his flight or absence.[46] If voluntary surrender is made before an indictment is filed against the defendant, this overcomes any presumption of guilt arising from the flight.[47]

Because there is usually movement by the offender away from the scene of the crime, it seems that the state could introduce evidence of flight in most cases, from which the jury could, and it seems invariably would, draw an inference of guilt. To overcome this inference, the defendant must come forward with an explanation or suffer the risk of "non-persuasion." A maxim of the law is that a person is presumed innocent until proved guilty. For practical purposes, this maxim is rendered nugatory when evidence is admitted that the defendant "suddenly left town," for this places upon him the heavy burden of explanation.

The *Poret* case is another decision which treated the fleeing felon with harshness, but unlike the state and federal cases just referred to, it considered the defendant's flight in conjunction with a denial of federal constitutional rights in a state criminal prosecution. Though there may be strong reasons for an unsympathetic attitude toward the fleeing felon, this does not justify being extremely technical or vindictive when there are serious showings that he was denied some substantial or constitutional right at his day in court. Justice Black asked: "Could a state statute of limitations like this one declare that anyone under indictment who flees the State has thereby waived his right to counsel or his right to be tried by an unbiased judge?"[48] Unquestionably, we would all respond negatively. The great danger lies in the affirmative answer of this next question posed by Justice Black: "If Poret can be denied this constitutional right, why not others?"[49] Involved here are not only the rights of the fugitive from justice, but also those of all men accused of crime. The court should not seek to punish a defendant who is guilty of having fled either before or after trial by denying him a hearing on a constitutional question.[50] It is submitted that the minority opinion in the *Poret* case is the preferable view.

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[46] Compton v. State, 74 Okla. Cr. Rep. 48, 122 P. 2d 819 (1942); McAllister v. State, 30 Ala. App. 366, 6 So. 2d 32 (1942).

[47] People v. Martin, 380 Ill. 328, 44 N. E. 2d 49 (1942). This decision may be explained by the fact that the defendant was highly nervous and that the prosecutrix was only six years of age.

[48] Poret v. Louisiana, 350 U. S. 91, 103 (1955); *cf. In re* Murchison, 349 U. S. 133 (1955).

[49] Poret v. Louisiana, 350 U. S. 91, 103 (1955).

[50] *Id.* at 103: "Poret could have been charged with a federal crime under 62 STAT. 755, 18 U. S. C. § 1073, 18 U. S. C. A. § 1073, for fleeing from one State to another to avoid prosecution. But he could not have been convicted until after adequate notice and a fair trial on an indictment returned by a fair grand jury selected without regard to race or color."

Military Service—Judicial Review of Draft Classification

A Pennsylvania Quaker named Palmer was a member of a religious study group in California when he became subject to the Selective Service Act of 1948.[1] He wrote his California local board that his religious opposition to war was so total that he could not with conscience submit himself to military jurisdiction—not even to the extent of registering with the civilian selective service authorities.[2] Nothing happened. Upon returning to Pennsylvania in 1950, Palmer wrote the California board of his change of address; he also wrote his local board in Pennsylvania of his presence there, stating his views on refusal to register.[3] Shortly afterward, the Pennsylvania local board wrote Palmer to come to discuss the matter. He replied that he was aware of a regulation permitting him to be registered on the basis of information gained from an interview, without his signing the registration form;[4] therefore he declined to be interviewed. As a result, Palmer was convicted of the crime of refusal to register, and served a year and a day in federal prison.

Under a regulation making prison wardens draft registrars of inmates never previously registered,[5] Palmer was registered against his will the day he left prison and the form was forwarded to his Pennsylvania board.[6] The board sent Palmer in December, 1951, the standard classi-

[1] 62 STAT. 604 (1948) (later amended by 65 STAT. 75 (1951), 50 U. S. C. APP. §§ 451-73 (1952), as amended, 50 U S. C. A. APP. §§ 454, 454a, 454c-54e, 456, 459, 467 (Supp. August 1955)). The 1951 amendment changed the name of the act to Universal Military Training and Service Act.

[2] The Society of Friends has made the following statements as a result of official meetings: "We believe that every young man who, under a sense of religious compulsion, feels that he must refuse to comply with the Draft Law, at any point, should follow the supreme authority of his inner guide." Also: ". . . Friends are urged . . . to support Young Friends and others who express their opposition to conscription either by non-registration, or by registration as conscientious objectors . . . . Nevertheless, we hold in respect and sympathetic understanding all those men who in good conscience choose to enter the armed forces." United States v. Palmer, 122 F. Supp. 938, 941, n. 7 (E. D. Pa. 1954). *Cf.* Gara v. United States, 178 F. 2d 38 (6th Cir. 1949), *aff'd by an equally divided court* 340 U. S. 857, *rehearing denied* 340 U. S. 893 (1950) (defendant was convicted of knowingly counseling and aiding and abetting another to refuse or evade registration).

[3] Palmer wrote that he was "a Quaker and a Christian pacifist." "[I] feel that I should inform you of my presence in the area of your jurisdiction, in case any inquiries should be made on my case, or any action is desired to be taken against me." United States v. Palmer, 223 F. 2d 893, 903 (3d Cir. 1955) (appendix to opinions).

[4] 32 C. F. R. § 1613.13 (c) (1954).

[5] 32 C. F. R. §§ 1611.6, 1613.41 (a) (1954).

[6] 32 C. F. R. § 1613.41 (d) (1954). In the light of § 1642.31, however, it would seem §§ 1611.6 and 1613.41 were primarily intended to apply to those who were in prison when they first became subject to registration. Section 1642.31 provides for more than mere registration; it requires also the filling out of all forms (including the special one for conscientious objectors) and permits a physical examination to be given. This is to be done when the prisoner is *first* taken into custody. If a man will not sign the forms, the warden may sign for him. Had this procedure been followed, Palmer might have been spared later grief. *But see* § 1642.3 (compliance with any or all the procedures of Part 1642 not a condition procedent to prosecution).

fication questionnaire,[7] which was forwarded from his home address to him in Oberlin, Ohio, where he was a student in the Graduate School of Theology of Oberlin College. The next day after receiving the questionnaire, Palmer returned it unexecuted but with an accompanying letter informing the board of his student status. He said in the letter that his refusal to execute the questionnaire was but a continuation of his prior refusal to register;[8] that he was sorry to hamper the board members in doing what they conceived to be their duty.[9] Since one of the items on the questionnaire concerned religious beliefs, he also enclosed a lengthy "court statement" that he had made during his trial for refusal to register concerning the exact nature of his religious beliefs. Two days after Palmer mailed this letter, the Dean of the Graduate School of Theology at Oberlin wrote the local board to clarify Palmer's selective service status.[10] The Dean said that Palmer was a first year student who had entered the school on a competitive scholarship, and that he was taking a full time regular course.[11]

In January, 1952, the board ordered Palmer to report on February 15 for a pre-induction physical examination. On February 12, however, the board on its own motion sent him the special classification form for conscientious objectors.[12] Yet on February 14, without waiting for the return of the new form or to see if he would report for the physical examination, the board classified Palmer I-A.[13] He did not, of course, report for the examination; instead, that day he mailed to the board his conscientious objector questionnaire unexecuted but with another accompanying letter. The letter answered substantially every item of

[7] SSS Form No. 100. See 32 C. F. R. § 1621.9 (1954).

[8] United States v. Palmer, 223 F. 2d 893, 895, 897 (3d Cir. 1955) (both majority and dissent agreed that failure to register and failure to report for induction were separate crimes).

[9] *Id.* at 904 (appendix to opinions): "Please understand that this was not, and is not, intended personally, that I sympathize with your desire to follow the regulations which you are set up to enforce. I do not intend by my actions any criticism whatever of you in your position."

[10] 32 C. F. R. § 1621.12 (b) (1954): "Any person other than the registrant may request the deferment of a registrant by filing such request in writing with the local board together with any information in support of his request. . . ." This section is probably not applicable, however, because the Dean did not label his letter as a request. *But cf.* United States v. Vincelli, 215 F. 2d 210, *rehearing denied* 216 F. 2d 681 (2d Cir. 1954) (board should have known from context of letter that "appeal" meant request that classification be re-opened rather than an actual appeal).

[11] 62 STAT. 611 (1948), as amended, 50 U. S. C. APP. § 456 (g) (1952), grants full time students in recognized theological schools a full exemption from training and service.

[12] SSS Form No. 150. See 32 C. F. R. § 1621.11 (1954).

[13] 32 C. F. R. § 1622.1 (c) (1954): ". . . registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established . . . ." Section 1623.1 (b): ". . . and in the absence of any other information, when the registrant has failed to furnish such information within the time prescribed, [board has the power] to classify the registrant as available for military service."

information required on the official form,[14] referring to the "court statement" previously submitted as containing the necessary detailed statement of his religious concepts.[15]

In April he was again ordered to report for a physical examination; the order was ignored. In May he was ordered to report for induction into the armed services; Palmer failed to report. Except for copies of the board's letters and orders to Palmer and correspondence between the board and the Department of Justice concerning Palmer's prior criminal status, the above mentioned letters and the registration form completed by the prison warden[16] comprised the only information in his selective service file.[17]

The Department of Justice indicted Palmer for refusal to submit to induction[18] in compliance with the May order. The district court convicted; on appeal, the court of appeals sitting *en banc* affirmed[19] the conviction in a four-to-three decision.[20] The United States Supreme Court denied Palmer's petition for a writ of certiorari.[21]

Before discussing the reasoning of the opinions in this case, it is helpful to investigate some of the legal background having a bearing on the decisions reached. World War I draft cases established that no one has any constitutional right to exemption from the draft.[22] Exemptions, whether for public officials, factory workers, ministers of religion, or conscientious objectors, are purely a matter of legislative grace. As a practical matter, exemptions have always been granted certain classes; nevertheless Congress may exempt or refuse to exempt

[14] United States v. Palmer, 122 F. Supp. 938, 939 (E. D. Pa. 1954).

[15] See Witmer v. United States, 348 U. S. 375, 378 (1955).

[16] See 32 C. F. R. § 1613.41 (b) (1954): ". . . warden . . . shall be careful not to indicate that the immate was registered in an institution or by an official thereof. . . ."

[17] 32 C. F. R. § 1623.1 (b) (1954): "The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; . . . oral information shall not be considered unless it is summarized in writing and the summary placed in the registrant's file. . . ."

[18] 62 STAT. 622 (1948), 50 U. S. C. APP. § 462 (a) (1952).

[19] United States v. Palmer, 223 F. 2d 893 (3d Cir. 1955), *affirming* 122 F. Supp. 938 (E. D. Pa. 1954).

[20] The majority opinion was written by Goodrich, Circuit Judge, in which concurred Biggs, Chief Judge, and Kalodner and Staley, Circuit Judges. The dissenting opinion was written by Maris, Circuit Judge, in which concurred McLaughlin and Hastie, Circuit Judges.

[21] Palmer v. United States, 350 U. S. 873 (1955).

[22] Selective Draft Law Cases, 245 U. S. 366 (1918). No cases testing the constitutionality of conscription reached the U. S. Supreme Court during the Civil War. Lincoln, speaking of the express constitutional power to raise and support armies, said this: "The power is given fully, completely, unconditionally. It is not a power to raise armies if State authorities consent; nor if the men to compose the armies are entirely willing; but it is a power to raise and support armies given to Congress by the Constitution without an if." George v. United States, 196 F. 2d 445, 455, n. 3 (9th Cir.), *cert. denied* 344 U. S. 843 (1952).

whomever it chooses.[23] Congress sold exemptions for three hundred dollars during the Civil War.[24] As early as colonial times legislatures have exempted conscientious objectors from service in the militia.[25] Yet Congress later could validly require civilian or non-combatant military service from the conscientious objector rather than grant a complete exemption.[26]

Congress may also forclose judicial review of any draft classification.[27] The current Universal Military Training and Service Act, like the acts of 1917 and 1940, makes classification by the local board "final," subject to appeal within the selective service system; and where there is an appeal, the classification resulting from this is "final" too.[28] The object of Congress in providing for this administrative finality is to prevent any court action from impeding swift and steady conscription during wartime or any time of emergency.[29] This object is legitimate under the war powers of the Constitution of the United States; with the power existing, it may be exercised in peacetime in contemplation of any future emergency.[30]

Nevertheless, the federal courts have not completely given up their power to aid draft registrants deprived of substantial due process by the selective service authorities. The Selective Draft Act of 1917[31] was construed to allow federal courts to review by writ of habeas corpus the draft status of those who claimed that they had been illegally drafted. The theory used was analogous to that employed by the courts in granting habeas corpus writs to aliens under deportation orders and to military prisoners whose court martial had lacked jurisdiction.[32] Under the 1917 Act the registrant became subject to military law immediately upon receiving his notice to report; failure to report was the offense of

[23] United States v. Sugar, 243 Fed. 423, 429-30 (E. D. Mich. 1917) (exemption of certain classes from military service does not make conscription laws invalid as class legislation).

[24] Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409, 418 (1952).

[25] Russell, *supra* note 24, at 412-14. The conscientious objector, however, often had to provide a substitute or pay a commutation fee.

[26] The 1863-64 Act provided for either noncombatant service or payment of the commutation fee; the 1917 Act provided for noncombatant service; the 1940 Act provided for either noncombatant service or civilian work of national importance; the 1948 Act (during peacetime) granted complete exemption, but the 1951 amendment substantially restored the provisions of the 1940 Act. Russell, *supra* note 24, at 418-28.

[27] *Cf.* Yakus v. United States, 321 U. S. 414 (1944).

[28] 62 STAT. 620 (1948), as amended 50 U. S. C. APP. § 460 (b) (3) (1952).

[29] Falbo v. United States, 320 U. S. 549 (1944).

[30] United States v. Henderson, 180 F. 2d 711 (7th Cir.), *cert. denied* 339 U. S. 963, *rehearing denied* 340 U. S. 846 (1950).

[31] 40 STAT. 76 (1917).

[32] See United States *ex rel.* Toth v. Quarles, 350 U. S. 11 (1955); *cf.* Shaughnessy v. Pedreiro, 349 U. S. 48 (1955); Davis, *Unreviewable Administrative Action*, 15 F. R. D. 411, 433-39 (1954).

desertion, to be tried before a military court.[33] Although the temper of the times had infected even the judiciary to the extent that it was generally futile to ask for a writ of habeas corpus, the registrant was able to do so immediately upon being subjected to military jurisdiction by receipt of the notice to report.[34]

The Selective Service and Training Act of 1940[35] changed procedure, however. Military jurisdiction did not attach until the actual induction.[36] Failure to report for or submit to induction was made a felony to be tried in the federal courts. The first cases, though, tended to apply the World War I precedents; it was generally held no defense to this newly created crime that the classification and resulting induction order may have been issued contrary to the regulations.[37] Congress had said the classification by the selective service authorities was final, and the courts interpreted this to mean that the registrant must first be inducted and then ask for a writ of habeas corpus before any sort of judicial review was possible.[38]

The United States Supreme Court did not treat the issue of invalidity of classification and the resultant induction order raised as a defense in the criminal trial until 1944 in *Falbo v. United States*.[39] Falbo contended that as a Jehovah's Witness he was a minister; he disputed his classification as a conscientious objector, and refused to report to the civilian public service camp to do work of national importance. At the time Falbo was ordered to report, he *might* have been rejected either at a military induction center or at a work camp as the result of his physical examination; the order to report was not the last possible step in the draft process. Stress was laid upon the "connected series of steps"[40] contemplated by the statute which was not to be broken by any

[33] Franke v. Murray, 248 Fed. 865 (8th Cir. 1918). The 1917 Act said those *lawfully* classified became subject to military jurisdiction upon receipt of the draft notice. The court did not investigate the merits of the classification; the only question was whether the military had gained jurisdiction through lawful classification procedure on the part of the draft authorities.

[34] See Billings v. Truesdell, 321 U. S. 542, 546 (1944); United States *ex rel.* Feld v. Bullard, 290 Fed. 704 (2d Cir. 1923) (notice language in the latter case at page 710 as to "waiver" resulting from failure to claim exemption).

[35] 54 STAT. 885 (1940).

[36] Billings v. Truesdell, 321 U. S. 542 (1944).

[37] See *Ex parte* Catanzaro, 138 F. 2d 100 (3d Cir. 1943) *cert. denied* 321 U. S. 793 (1944).

[38] See Billings v. Truesdell, 321 U. S. 542 (1944) (registrant at induction center refused to take oath; oath was read to him; *held,* the military did not acquire jurisdiction). *But see* Russell, *supra* note 24, at 424, n. 65, saying regulations were changed shortly after this case to circumvent that result. *Quaere* whether voluntary submission to induction would be a waiver of the right to challenge the validity of the draft classification; *cf.* Gibson v. United States, 329 U. S. 338 (1946) (involved reporting to civilian camp rather than military center and the Government claimed waiver).

[39] 320 U. S. 549 (1944).

[40] Falbo v. United States, 320 U. S. 549, 553 (1944).

"litigious interruption";[41] there was to be no "judicial intervention before final acceptance"[42] of the registrant. The Court said that even if the defense of invalidity were admissible, Falbo's refusal to obey had been premature and was a failure to exhaust his administrative remedies. The case did not specify how far the registrant would have to go to exhaust his remedies. However, this case was universally interpreted by the lower federal courts as holding that the registrant would have to go at least as far as submitting to induction and that the only possible judicial review of a draft classification could be by writ of habeas corpus after induction.[43]

Then in 1946, the war being over, *Estep v. United States*[44] announced a doctrine permitting review of the draft classification upon the felony trial. Mentioning that the defendants had pursued their administrative remedies to the point of going to the induction center (but refusing to be sworn in), the Court held that it was proper to consider whether the local board had had jurisdiction in the premises.[45] Saying that the writ of habeas corpus would be available to the defendant in jail after conviction because of the invalidity of all subsequent proceedings stemming from an invalid classification, the majority thought it would be foolish to put a man in jail one day only to have to let him out the next.[46] The test announced was this: "The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."[47]

Subsequent cases have refined the rule permitting this limited judicial review. When the regulations were changed to provide for pre-induction physical examinations, the Court found it was no longer necessary to report to the induction center to exhaust administrative remedies.[48]

[41] Falbo v. United States, 320 U. S. 549, 554 (1944).

[42] *Id.* at 554.

[43] United States v. Flakowicz, 146 F. 2d 874 (2d Cir.), *cert. denied* 325 U. S. 851 (1945); Rinko v. United States, 147 F. 2d 1 (7th Cir.), *cert. denied* 325 U. S. 851, *rehearing denied* 325 U. S. 894 (1945); *cf.* Sunal v. Large, 332 U. S. 174 (1947); Gibson v. United States, 329 U. S. 338 (1946).

[44] 327 U. S. 114 (1946).

[45] The Court said that *Falbo v. United States, supra* note 39, had been construed to mean more than it had actually held.

[46] *But see* Sunal v. Large, 332 U. S. 174 (1947) (defendants who had exhausted their administrative remedies and were convicted under the "erroneous" view of *Falbo v. United States, supra* note 39, yet were denied habeas corpus because they had not appealed—despite the fact that an appeal seemed absolutely futile at the time).

[47] Estep v. United States, 327 U. S. 114, 122-23 (1946). This "basis in fact" test of jurisdiction seems broader than that applied in some of the wartime habeas corpus cases, which did not review facts but merely looked to see if procedural opportunity to a hearing had been afforded the registrant. Moreover the registrant carries a greater burden of proof in the habeas corpus proceedings; since *Estep v. United States, supra,* the remedy has been little used. See Tietz, *Jehovah's Witnesses: Conscientious Objectors,* 28 So. CALIF. L. REV. 123, 134 (1955).

[48] Gibson v. United States, 329 U. S. 338 (1946).

The Court soon held that whether or not the local board had any "basis in fact" for making the classification was a matter of law for the judge, rather than a jury, to determine.[49] In reviewing the classification, the court may not review additional evidence not considered by the local board and made part of the registrant's file.[50] But where all the evidence in the file supports the registrant's claim, the board may not deny the classification "solely on the basis of suspicion and speculation";[51] the board must have affirmative evidence in the file showing why it disbelieves the claim.[52] The more recent cases have stressed procedural due process, requiring local boards and appeal boards to give the registrant notice of any adverse information so that he may rebut it.[53] Where a local board failed to notify the registrant that it had declined to re-open his classification as requested and kept him in the same category, it was held that this deprived him of procedural rights.[54] And the "basis in fact" test has been broadened to the extent that convictions have been reversed where, even though the board may have had some factual basis

[49] Cox v. United States, 332 U. S. 442 (1947). But even where the court finds some basis in fact for the classification, the jury may determine whether the board had acted arbitrarily or capriciously. Imboden v. United States, 194 F. 2d 508 (6th Cir.), *cert. denied* 343 U. S. 957 (1952).

[50] Cox v. United States, 332 U. S. 442 (1947).

[51] Dickinson v. United States, 346 U. S. 389, 397 (1953).

[52] Dickinson v. United States, 346 U. S. 389 (1953). The board here was determining the "objective fact" whether or not the registrant was a regular or duly ordained minister. Conscientious objection, however, is a matter of personal belief and the board's decision necessarily rests in part upon the appearance and conduct of the registrant and the credibility of his claim—whether contradicted or not. Because of this personal element, the appeal procedure for a conscientious objector is different from that for all others, with an F. B. I. report being a standard feature. The courts, though, seem to require the affirmative evidence in conscientous objector cases as well as any others, perhaps mainly so that the courts will have a written record to review. Weaver v. United States, 210 F. 2d 815 (8th Cir. 1954). *But see* Campbell v. United States, 221 F. 2d 454 (4th Cir. 1955) (relying in part on United States v. Simmons, 213 F. 2d 901 (7th Cir. 1954), *rev'd on other grounds* 348 U. S. 397 (1955)). It has been suggested the board might satisfy the affirmative evidence requirement merely by indicating in the file its unfavorable reaction to the registrant's behavior or demeanor or to certain inconsistencies of the evidence supporting his claim. Witmer v. United States, 348 U. S. 375, 382 (1955); United States v. Hagaman, 213 F. 2d 86, 89 (3d Cir. 1954).

[53] Gonzales v. United States, 348 U. S. 407 (1955); Simmons v. United States, 348 U. S. 397 (1955); United States v. Nugent, 346 U. S. 1 (1953) (registrant had no right to see the adverse information contained in confidential F. B. I. reports, but that he did have the right to a "fair résumé"). Problems have arisen as to whether the résumé given was a fair one; thus one court ordered the report into evidence (with names deleted) for the purpose of comparison. United States v. Stasevic, 117 F. Supp. 371 (S. D. N. Y. 1953), *rev'd on other grounds sub nom* United States v. Vincelli, 215 F. 2d 210, *rehearing denied* 216 F. 2d 681 (2d Cir. 1954).

[54] United States v. Vincelli, 215 F. 2d 210, *rehearing denied* 216 F. 2d 681 (2d Cir. 1954) (there was strong basis in fact for disbelieving the claim, but the procedural error was held to warrant acquittal). *But cf.* Campbell v. United States, 221 F. 2d 454, 458 (4th Cir. 1955) (held board was justified in refusing to re-open classification under parallel regulation).

for denying the claim, it appeared the selective service authorities acted upon mistaken assumptions of law.[55]

It would seem clear that the courts have greatly relaxed much of the former strictness shown in reviewing draft classifications.[56] Nevertheless there are still only two ways in which the registrant may obtain this judicial review: (1) submit to induction and apply for a writ of habeas corpus; (2) refuse to submit and raise the defense of invalid classification in the felony trial.

In the principal case of *United States v. Palmer*,[57] the four-to-three split of opinion emphasizes the growing inclination of the courts to broaden the scope of their review. The dissenting opinion could cite no holdings really in point, but relied upon tendencies found in series of cases or upon analogous decisions.[58] The majority did cite a case which had bare facts more or less similar to those here, but there was at least a vast psychological difference between the two cases.[59]

The majority thought that it seemed somewhat strange to talk of exhausting administrative remedies since Palmer had not availed himself of any at all, and expressly affirmed the conviction upon policy grounds reminiscent of the *Falbo* decision. (The district court had held the exhaustion of remedies the controlling factor.) Whether the local board's classification was arbitrary or illegal was an issue not reached under this disposition. Instead, the majority spoke of the vital importance of a procedure for the efficient and orderly conscription of millions of men, and that no one man may set himself above the necessary and reasonable procedures of the selective service system.[60]

[55] Annett v. United States, 205 F. 2d 689 (10th Cir. 1953); *cf.* Sicurella v. United States, 348 U. S. 385 (1955) (selective service authorities thought as a matter of law a member of the Jehovah's Witnesses could not be a conscientious objector because of their belief in self defense and "theocratic wars"; *held:* Congress had meant present day wars fought with real bullets).

[56] Shipley, *Conscientious Objection: A Problem of Proof*, 25 OKLA. B. A. J. 1596 (1954).

[57] 223 F. 2d 893 (3d Cir. 1955), *affirming* 122 F. Supp. 938 (E. D. Pa. 1954), *cert. denied* 350 U. S. 873 (1955).

[58] See *Ex parte* Fabiani, 105 F. Supp. 139 (E. D. Pa. 1952) (registrant was permitted judicial review by writ of habeas corpus although under no restraint; "constructive custody" theory applied).

[59] Doty v. United States, 218 F. 2d 93 (8th Cir. 1955). Doty and his three brothers were convicted of refusal to register; out of prison on parole, the Doty brothers ignored the correspondence from the local board. Doty wrote the board only once, saying they were "not subject to whims of the local board" since they were on parole. Doty's form filled out by the warden gave his occupation as "rail"—meaning locomotive fireman. Shortly before Doty reached his 26th birthday, the board deferred him as a "locomotive engineer." The granting of this temporary deferment rendered Doty subject to the draft for nine more years, until the age of 35. Doty claimed the board was "acting out of pique." The board then classified Doty and his brothers all I-A and ordered them to submit to induction. In affirming the conviction, the court mentioned, among other things, that the Doty brothers had failed to exhaust their administrative remedies.

[60] "There were on June 30, 1954, about fifteen and a half million young men registered . . . [with] boards . . . composed of citizens only some of whom are

The dissenting judges thought the affirming of the conviction exalted form above substance, pointing out that Palmer did in fact supply the board with enough information to have received one of several classifications lower than I-A.[61] Since he was a ministerial student, he would have been properly placed in Class IV-D (complete exemption)[62] or Class I-S (student deferment until end of academic year).[63] Since he had served more than a year in prison, the board could, in its discretion, have placed him in Class IV-F (complete deferment; physically, mentally, or morally unfit).[64] Since he was a complete conscientious objector, he could have been placed in Class I-O (available for civilian work contributing to the maintenance of the national health, safety or interest)[65] or, failing that, Class I-A-O (induction into the military service as a noncombatant).[66]

The dissenting opinion indicated that the classification by the local board was positively illegal, since the regulations required the board in classifying to "receive and consider"[67] all pertinent information submitted—both that on the official forms and "other written information"[68] in the file. The dissent thought that the exclusion of remedies doctrine

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lawyers and all of whom serve without pay . . . . It . . . demands a high degree of co-operation from everyone involved . . . . No man has a constitutional right to be free from a call to military service. . . . However, a sympathetic Congress, desirous to afford a maximum of freedom of conscience, has provided for [exemptions and deferments]. It has also provided for a rather elaborate machinery for appeal . . . . If rules must be laid down for the handling of court business, as they are, and the proceedings of administrative bodies, as they are, there is even greater reason for the establishment of orderly procedure with nearly four thousand volunteer boards handling the cases of more than fifteen million young men. . . . It would only be a step further for this or some other young man to say that he is so much against war that he will not pay taxes to a government which spends the majority of its income to maintain a military establishment. It is only one step further . . . to say . . . that he feels no moral obligation to obey anything [the government] says. . . . In other words, he wants this department of the government run his way. . . . We do not say for a moment that this defendant is like the rat-like characters who so often come into criminal courts. He may be the prophet of a new day or he may be more dangerous than some of the rat-like characters because his type of refusal to co-operate, if sufficiently widespread, would make organized society impossible." United States v. Palmer, 223 F. 2d 893, 895-97 (3d Cir. 1955); *cf.* Hamilton v. Regents of the University of Cal., 293 U. S. 245, 265-68 (1934) (concurring opinion of Cardozo, J.).

[61] A person with grounds for more than one classification is to be placed in the lowest one. 32 C. F. R. § 1623.2 (1954).

[62] 32 C. F. R. § 1622.43 (a) (3) (1954).

[63] 32 C. F. R. § 1622.15 (b) (1954). Palmer was ordered to report May 20, 1952; this was shortly before the end of his academic year.

[64] 32 C. F. R. § 1622.44 (c) (1954). But it would be strange to say that one of Palmer's moral fibre is morally unfit because of the prison sentence.

[65] 32 C. F. R. § 1622.14 (1954).

[66] 32 C. F. R. § 1622.11 (1954). But it is hardly likely that Palmer would have submitted to noncombatant service—or even civilian service under the aegis of the selective service.

[67] 32 C. F. R. § 1622.1 (c) (1954).

[68] 32 C. F. R. § 1623.1 (b) (1954). *But see* § 1621.12 (a) (anyone asking for a deferment must present written information to be "included in or attached to" the official form).

should be relaxed in hardship cases, but did not really apply here. In support of this thesis, it pointed out that in the *Falbo* case the language as to the exhaustion doctrine had been applied to the situation where further possible remedies were open to the registrant at the time the order had been disobeyed.[69] Yet by the time Palmer refused to obey the order the classification had become final and unappealable within the selective service system, thereby making Palmer's case ripe for judicial review.[70]

Both the majority and dissent in the principal case are persuasive.[71] They illuminate problems of construing the Universial Military Training and Service Act[72] that will continue to perplex the courts. Congress adopted the basic act in 1948 during peacetime, retaining substantially the same language as that in the 1940 Act as to the finality of classification by the draft authorities. The legislative history shows this was expressly done so that the *Falbo* and *Estep* doctrines of limited court review would continue to apply.[73]

The 1951 amendments, enacted during the Korean War, changed the name of the act from "selective" to "universal"; also, conscientious objectors were deprived of the complete exemption granted in 1948 and the "work or fight" provision was restored.[74] On the basis of legislative intent it might seem that Congress meant for courts to interfere only to a very limited extent with the selective service machinery—machinery to be kept in readiness for high speed functioning without any clogs or obstructions. Although the 1951 amendments did not change the language relating to administrative finality, at that time *Falbo* and *Estep* were still substantially unmodified.[75] It was only later that the crop of Korean War cases began reaching the appellate level with the result that inroads were made upon the original strict doctrine.[76]

Viewed as a matter of policy, apart from any assumed Congressional

[69] But the language used by the Court there and in succeeding decisions was broad enough (and often harsh enough) to include a case of this type.

[70] 32 C. F. R. § 1641.2 (b) (1954) (waiver of rights not exercised). The limited right of appeal for special reasons after the expiration of the time limit exists only until the order to report for induction is mailed. 32 C. F. R. § 1626.2 (d) (1954). The same is true of the right to request that the classification be re-opened. 32 C. F. R. § 1625.2 (Supp. 1955).

[71] It should be repeated that the majority opinion did not affirm on the technical basis of the exhaustion of remedies rule but rather for pure policy reasons. The dissent, on the other hand, used "legal" reasoning in determining that Palmer should not have been convicted.

[72] 62 STAT. 604 (1948), as amended, 50 U. S. C. APP. §§ 451-73 (1952), as amended, 50 U. S. C. A. APP. §§ 454, 454a, 454c-54e, 456, 459, 467 (Supp. August 1955).

[73] S. REP. No. 1268, 80th Cong., 2d Sess. 2008 (1948).

[74] 65 STAT. 86 (1951), 50 U. S. C. APP. § 456 (j) (1952).

[75] *E.g.*, Dickinson v. United States, 346 U. S. 389 (1953) (note date; settled that boards must "build" a record for review).

[76] For example, the principal case was not finally decided until 1955, although Palmer's refusal to report was in May, 1952.

intent,[77] there would seem to be some need for court review on an expanded basis. Court opinions are carefully read in the Department of Justice, which plays a major part in the draft process.[78] This unquestionably has had the effect of reducing arbitrary decisions and potential administrative tyranny.[79] Even under emergency conditions the concept of certain minimum standards of due process and fair dealing, for the nonconformist as well as the conformist, forms a part of our tradition of liberty.[80]

LEWIS POINDEXTER WATTS, JR.

Operation of Pathological and X-Ray Facilities by Charitable Hospital as Corporate Practice of Medicine

A decision[1] of national significance was recently handed down by the district court of Iowa in an action involving the right of 170 hospitals, which comprise plaintiff—Iowa Hospital Association, to continue to operate pathology and X-ray laboratories and collect for these services from patients.[2] The court ruled that the hospitals, in purveying these services to patients, were illegally engaged in the practice of medicine.

[77] 62 STAT. 620 (1948), as amended 50 U. S. C. APP. § 460 (b) (3) (1952), has not been changed insofar as it relates to administrative finality; yet Congress has amended or added several sections to the act, *e.g.*, 1955 Amendments to the Universal Military Training and Service Act, Act of June 30, 1955, c. 250, 69 STAT. 223 (codified in scattered sections of 50 U. S. C. APP.). Note also 69 STAT. 602 (1955), 50 U. S. C. A. APP. §§ 454 (d) (3), 456 (c) (2), (d) (1)-(2) (Supp. August 1955).

[78] Shipley, *Conscientious Objection—A Legal Right,* 13 FED. B. J. 282, 286 (1953) (Mr. Shipley is listed as a Special Assistant to the Attorney General of the United States).

[79] *Cf.* United States v. Hagaman, 312 F. 2d 86, 89 (3d Cir. 1954): "[I]n recent months Courts of Appeals have had to consider a whole series of rather similar cases where unexplained orders of the national board changing the classification of Jehovah's Witnesses from 1-0 to 1-A make sense only if they represent a consistent administrative application of this understandable, if mistaken, legal theory [that Jehovah's Witnesses are as a matter of law not conscientious objectors because of their belief in 'theocratic war']." See note 55 *supra.*

Tietz, *Jehovah's Witnesses: Conscientious Objectors,* 28 So. CALIF. L. REV. 123, 135-36 & nn. 38-39 (1955), tells of the use of suspended sentences to prevent injustice. The District Court suspended Palmer's sentence rather than send him to prison a second time. Tietz mentions that one Jehovah's Witness has been prosecuted four times.

[80] See Falbo v. United States, 320 U. S. 549, 555-61 (1944) (dissenting opinion of Murphy, J.).

[1] Iowa Hospital Association, et al., v. Iowa State Board of Medical Examiners; et. al, Iowa State Medical Society, Intervenor, an unreported decision of the District Court, Ninth Judicial District of Iowa, Des Moines, Iowa, No. 63095, Equity, decided 28 Nov., 1955.

[2] Plaintiffs, because of a ruling of the Attorney General of Iowa dated 19 February, 1954, to the effect that operation by hospitals of laboratory and X-ray facilities, with billing of the patients by the hospitals, violated the Iowa Medical Practice Acts (Iowa Code, ch. 147), sought a declaratory judgment. In addition to the defendant and intervenor, the suit was defended by the Attorney General of Iowa.

The court found as a fact that the arrangements employed in operating these laboratory and X-ray services have been almost universally adopted by hospitals throughout the United States.[3]

The facts giving rise to the controversy may be summarized as follows:[4] In all plaintiff-hospitals, operated as non-profit corporations, pathology laboratory procedures of a routine nature[5] are undertaken by lay technicians employed by the hospitals. This work is done only at the request of the attending physician, to whom the technician reports his findings. In 127 of the 170 hospitals there is no full-or-part-time pathologist, but the routine laboratory work is done under the supervision of a physician, and those laboratory procedures requiring more highly skilled determinations are accomplished on a mail or delivery basis by a pathologist in a nearby city. The hospital collects the charges from the patient for these services, including those of the pathologist, and compensates the pathologist on a per case or per examination basis. In those hospitals having a full-or-part-time pathologist, the billing arrangement is the same, the only difference being that the laboratory is under the supervision of the pathologist, and he is compensated on a salary or percentage of laboratory income basis, the latter being more common. The plaintiffs, in supplying X-ray services, employ X-ray technicians and all have either a full-or-part-time radiologist, with a system of billing of patients and compensation of radiologists substantially like the arrangements with the pathologists.

It was agreed that there had been no actual interference by the hospital trustees or administrators with the professional services of the pathologists and radiologists and that the dispute did not involve the quality of laboratory and X-ray services.[6]

Upon these facts, the court concluded that: (1) the work done by the pathologists, radiologists, *and the technicians working in the pathology and X-ray laboratories* (italics supplied) constitutes the practice of medicine; (2) under Iowa law the privilege of practicing medicine

[3] At the conclusion of the trial, the house of delegates of the American Medical Association approved a resolution congratulating the physicians who had labored to bring about the initial phase of what they described as a decision which will have a far reaching effect upon the practice of medicine throughout the nation. Vol. 86, The Modern Hospital, 49, January 1956.

[4] From the statement of facts, opinion of the court.

[5] Procedures undertaken are in seven categories, to wit: 1) bacteriology, 2) blood bank and serology, 3) biochemistry, 4) hematology, 5) urinalysis, 6) special tests, and 7) pathologic anatomy, although in many hospitals facilities are available for only a portion of these. The work in the first six categories is considered of a routine nature, and comprises about 90-95% of all laboratory work.

[6] Indeed all defendant's testified that they were well satisfied with their relationships with the hospitals, and that their concern was only with the system of billing. *Conclude Hearings in Iowa,* Vol. 86, *The Modern Hospital,* Dec. 1955.

The court remarked that, under all arrangements, the doctor and the hospital do very well financially.

is a personal one requiring qualifications which cannot be met by a corporation; and (3) plaintiff-hospitals are not excluded from the provisions of the Iowa Practice Acts because they are non-profit corporations, or because of long standing custom, or public policy, and therefore have been engaged in the unauthorized, unlicensed and illegal practice of medicine.

The case has been appealed by the plaintiff-Iowa Hospital Association.[7] Because of the possible far reaching effects of the decision, it may be worthwhile to examine the court's reasoning and authorities to determine the probable outcome on appeal.

(1) In support of its finding that the work done by the pathologist and radiologist constitutes the practice of medicine, the court cited the cases of *State v. Hughey*[8] and *State v. Howard*[9] for the proposition that one who diagnoses is engaged in the practice of medicine. The court also cited with approval the case of *Granger v. Adson,*[10] in which a layman was conducting a health audit. For a fee of $10 a year, plaintiff contracted to furnish four urinalyses and a blood pressure test to his subscribers. It appeared that a Dr. Graves, a pathologist, had been hired by plaintiff to perform these tests. After holding that the pathologist was engaged in practicing medicine, the Minnesota court said:[11] "If Dr. Graves was practicing medicine in what he did and in determining for the plaintiff whether the condition of the urine was normal or abnormal, then, in our opinion, the plaintiff was practicing medicine when he passed on to his subscribers the result of the analysis. . . ."

In finding that the work done by the hospital technicians constitutes the practice of medicine,[12] the court relied upon a broad interpretation of the Iowa Medical Practice Act,[13] and reasoned that from the work

[7] At a general assembly meeting of the Iowa Hospital Association the vote was unanimous to appeal the ruling. A. A. Herrick and Herschel G. Langdon, attorneys for the plaintiff, estimated the appeal would take one year. Vol. 86, *The Modern Hospital,* 51, Jan. 1956.

[8] 208 Iowa 842, 226 N. W. 371 (1929). This case involved a "magnetic healer" who laid on hands to cure after purporting to determine the physical ailment.

[9] 216 Iowa 545, 249 N. W. 391 (1933). In this case defendant was enjoined from practicing medicine after 21 years practice of naprapathy, a supposed science by which the defendant purported to diagnose illnesses, previously unknown to medical science, and then to cure them.

[10] 210 Minn. 113, 250 N. W. 722 (1933).

[11] 210 Minn. 113, 115, 250 N. W. 722, 723 (1933).

[12] In Chicago at a special meeting of the American Hospital Association called to discuss the ruling in the instant case, attorneys for the Association agreed that the most damaging aspect of the decision, as well as the one most likely to be overruled on appeal, was the ruling that laboratory and X-ray technicians are engaged in the practice of medicine. *The Modern Hospital,* note 7, *supra.*

[13] Iowa Code, ch. 148.1, is the relevant portion. *Persons engaged in Practice.* For the purpose of this title, the following classes of persons shall be deemed to be engaged in the practice of medicine and surgery:

(1) Persons who publicly profess to assume the duties incident to the practice of medicine or surgery.

of these technicians a conclusion would be reached by the pathologist, radiologist or physician in charge, hence a diagnosis, and that they were "serving as the hands of the pathologist, radiologist, or physician in charge."

This holding that hospital laboratory technicians are practicing medicine is not without judicial dissent. In the only decision in whch this issue has been squarely presented, the question before the New York court[14] was whether a test by a laboratory technician for the RH blood factor of the hospital patient was a medical act or an administrative act for which the hospital could be held liable. The court held that the act was, as a matter of law, an administrative act of fact finding which bore some relation to the field of medicine, but was not a part of it. One writer[15] has emphatically expressed this view as follows:

> "To say that a hospital may not operate an X-ray department or a clinical laboratory because in so doing it is engaged in the practice of medicine is, of course, perfectly absurd and unreasonable. It so happens that in these two fields the technicial procedures employed are almost entirely the products of learning of the sciences of physics, chemistry and biology, and this knowledge belongs to the general field of learning and not to the medical profession alone. . . . Indeed, this work is commonly performed by lay technicians and medical training is not necessary. . . ."

Whether the technicians working in the pathology and X-ray laboratories are engaged in the practice of medicine or not, it is to be emphasized that the issue of unqualified persons practicing medicine on the public was not involved, since the defendants did not seek a change in the manner of doing the work or of the personnel who performed it. It would seem the only evil which the defendants sought to have corrected was the billing of patients and the setting of fees by the hospitals instead of by the pathologist and radiologists.[16]

(2) and (3) In reaching its decision that by employing these persons which the court found to be practicing medicine the charitable hospital corporations were thus engaged in the illegal practice of medicine, the

(2) Persons who prescribe or prescribe and furnish medicine for human ailments or treat the same by surgery.

(3) Persons who act as representatives of any person in doing any of the things mentioned in this section.

[14] Berg v. New York Society for relief, 136 N. Y. S. 2d, 258 (1954).

[15] *Medical Education and the Public,* Earl D. McKinley, M. D., Dean of George Washington School of Medicine.

[16] The issue, as seen by Dr. Snoke, president of the American Hospital Association, and a witness for plaintiff, was tersely expressed: "It involves a handful of dirty bills. If the pathologist gets them, then he is legitimate. If he draws a check, then he is illegitimate. It doesn't make sense." *The Burning Question in Iowa,* Vol. 81 Hospital Management 58 (Jan. 1956).

trial court gave a literal construction to the Iowa Practice Act, the relevant portion of which follows:[17]

> "*Qualifications:* No person shall be licensed to practice a profession under this until he shall have furnished satisfactory evidence to the department that he has attained the age of 21 years and is of good moral character. . . ."

The court reasoned that under this act, a corporation, not being a "person," could not qualify, and stated that Iowa is in accord with the general rule that a corporation cannot practice a profession.[18] The court quoted from the case of *Dr. Allison, Dentist v. Allison.*[19]

> "It (a corporation) can have neither honesty nor conscience, and its loyalty must, in the very nature of its being, be yielded to its managing officers, its directors, and its stockholders. Its employees must owe their allegiance to their corporate employer, and can not give the patient anything better than a divided loyalty."

The court felt that the charitable nature of these plaintiff-hospitals had no bearing on the application of the practice acts, citing cases in which collection agencies, organized as non-profit corporations to collect for non-profit corporations were held to be engaged in the illegal practice of law.[20] The court stated that good motives did not provide an immunity from the application of the practice acts, and that the reasons given in the decisions condemning corporate practice generally are applicable to non-profit corporations.

This challenge of the right of hospitals to operate laboratory and X-ray facilities is one of first impression and, in fact, no reported cases

[17] Iowa Code, ch. 147.3.

[18] The court cited the following authority and cases in support of the general rule that a corporation cannot practice a profession: 13. Am. Jur. 838; People by Kerner v. United Medical Services, Inc. 362 Ill. 442, 200 N. E. 157, 103 ALR 1229 (1936), (operation of a clinic for profit by a corporation of laymen); State v. Kindly Optical Co., 216 Iowa 1157, 248 N. W. 332 (1933), (corporation of laymen operating an optical business for profit and employing optometrist); State v. Baker, 212 Iowa 571, 235 N. W. 313 (1931) (lay clinic for cancer cure); State v. Bailey Dental Co., 211 Iowa 781, 234 N. W. 260 (1931), (corporation of laymen who operated a dental business for profit by employing licensed dentists); People v. Painless Parker Dentists, 85 Colo. 304, 275 Pac. 928 (one of a series of actions brought against a dentist who changed his named to "Painless" and established a network of corporations to pratice dentistry).

[19] 360 Ill. 638, 196 N. E. 799, 800 (1935).

[20] People ex rel. Chicago Bar Association v. Motorist Association of Illinois 354 Ill. 595, 188 N. E. 827 (1933); Hospital Credit Exchange v. Shapero, 59 N. Y. S. 2d 812 (1946).

In the latter case, the court stated at page 816, "not so easily is the law circumvented . . . any organization could thus become a charitable corporation if it organized under the membership corporation law instead of under the stock exchange law, if it undertook to serve only charitable corporations, and if after remunerating its staff however handsomely it distributed its so called profits among its clients." The court quoted this in the principal case.

have been found where courts have directly prevented "corporate practice of medicine"[21] by a charitable institution. An examination of this area of the law should be useful in determining the probable result on appeal. At the outset it should be noted that while numerous state statutes directly forbid the corporate practice of law,[22] express prohibition of the corporate practice of medicine is rare. Instead, denial is based, as in the instant case, upon those statutes regulating the licensing of persons practicing medicine and surgery,[23] with which provisions corporations can not comply.[24] While broad expressions abound which catagorically deny to corporations the right to practice medicine,[25] an observation should be made that these decisions, chiefly involving the practice of dentistry and optometry, concern corporations operated for profit, and underlying most all of them, as well as those decisions cited by the trial court,[26] is an unmistakable element of quackery.

While it is clear that by any construction of state practice acts, a corporation itself could never be licensed to practice one of the learned professions, the inference that they automatically forbid any utilization of the corporate device is not so patent. It has been suggested,[27] that as the judiciary has no intrinsic power to regulate the medical profession as it does the legal profession, since judicial power over the legal profession rests on the status of the lawyer as an officer of the court,[28] the validity of the viewpoint that the state licensing statutes forbid any corporate practice of medicine depends upon the soundness of the inference that they automatically forbid utilization of the corporate device.

By any view, a proper construction and application of these statutes would seem to require that regard be had for their purpose. Uniformly, the function of these laws has been said to be the protection of the

[21] Exception has been taken to the use of the term "corporate practice of medicine." In 6 LAW AND CONTEMPORARY PROBLEMS 225 (1931), the writer points out that the phrase conceals faulty analysis. It is pointed out that it is not the act of the agent which is imputed to the corporate employer, but rather its consequences, so that by a proper application of these principles, if the act of the agent in furnishing medical services has been within the proper scope of professional conduct, there is no liability consequent upon it to be imposed on the corporation, and hence no occasion for use of the term corporate practice of medicine. It seems a nice distinction.

[22] Typical Statutes are: Ill. Ann. Stat. (Smith-Hurd, 1935), c. 32, 411; Mass. Gen. Laws (1932) c. 221, 846; N. Y. Penal Law 280.

[23] Laws and Board Rulings Regulating the Practice of Medicine in the United States (abstract published by American Medical Association, containing in convenient form the legislation pertaining to the practice of medicine in every state).

[24] Pacific Employees Ins. Co. v. Carpenter, 10 Cal. App. (2d) 592, 52 P 2d 992 (1925); People v. United Medical Service, 362 Ill. 442, 200 N. E. 157, (1936).

[25] See the numerous cases cited in 102 ALR 343 (1936); 103 ALR 1240 (1936); 119 ALR 1290 (1936).

[26] See footnotes 8, 9, 10, and 18, *supra.*

[27] 48 Yale Law Journal 346 at 347 (1938).

[28] Ex Parte Wall, 107 U. S. 265, 273 (1882); People ex rel. Ill. State Bar Ass'n v. Peoples Stockyards State Bank, 334 Ill. 462, 474, 176 N. E. 901, 906 (1931). No similar basis has been claimed over the medical profession.

public from quacks and charlatans, and the preservation of the public health by exclusion from medical practice of persons with inadequate ability, morality, and training.[29] One writer has suggested[30] that as the corporation itself would be unable to perform any of the purely personal functions of practicing medicine, there would seem to be no valid reason, within the intent of the licensing statutes, to require that the corporation be licensed so long as all the individuals administering to the public are licensed. The ultimate issue would then become whether in each individual case those licensed persons are controlled in their professional functions by unlicensed persons in such manner as to nullify the purpose of the licensing statutes. However, as has been pointed out,[31] this oversimplication ignores a public policy objection to corporate practice of medicine which lies within the sphere of individual motivation. Other of the most common public policy objections to the corporate practice of medicine have been stated to be impairment of the intimate doctor-patient relationship and commercialization of the medical profession.[32]

In any event, it is common knowledge that many forms of corporate practice of medicine are employed.[33] Railroads and large industrial concerns have long employed doctors to administer to their employees. Hospitals all employ interns and resident physicians on salary; group health plans have been organized to provide services of physicians to members in plans analogous to hospital insurance programs, and more recently, physicians have themselves incorporated in large clinics to avoid liabilities for acts of member physicians attendant to partnerships. Although for the most part their legal status has not been determined, those decisions which have dealt with the matter have by no means been unanimous in holding the activity illegal.

Without adopting the view that the licensing statutes do not forbid per se the utilization of the corporate power, it is impossible to reconcile the decisions which allow some corporate forms of medical practice to exist in the face of decisions denying it in others. It is submitted that underlying the decisions in the better reasoned cases which do not talk

[29] Laws and Board Rulings Regulating the Practice of Medicine in the United States, note 23, *supra.*

[30] *Op. cit.,* note 27, *supra.*

[31] Laufer, *Ethical and Legal Restrictions on Contract and Corporate Practice of Medicine,* 6 LAW AND CONTEMPORARY PROBLEMS, 525 at 527 (1939).

[32] People v. Pacific Health Corp., 200 Cal. 160, 82 P. 2d 429 (1938); People v. United Medical Service Inc. 362 Ill. 422, 455, 200 N. E. 157, 163 (1936). Plaintiffs argued that because of the lack of profit motive of the corporate employer, and because pathologist and radiologist are doctors's doctors, these public policy objectives were inapplicable.

[33] See, generally, 1 Fletcher, Corporations (perm. ed. 1931) 897, Davis, Do Corporations Practice Medicine? Proceedings 1932, 88, *et seq.;* 17 N. C. L. REV. 183 (1939); 37 MICH. L. REV. 961 (1939).

in broad terms of "illegal corporate practice of medicine," is the judge's concept of how the arrangement in controversy actually operates, as against a background of the purposes of the medical practice acts and public policy objections to the corporate practice of medicine.

In a California decision[34] a stock corporation operated by laymen for a profit sold contracts which entitled the holder to medical services by a designated physician. The court held this to constitute the unlawful practice of medicine. Emphasis was placed by the court on the profit motive of the corporation.[35] In a District of Columbia case,[36] an opposite result was reached. In that case, a Group Health Association, a non profit corporation, was organized by federal employees to provide medical service on a monthly payment basis. The court distinguished the admittedly illegal practice of medicine by a corporation from merely furnishing medical services, and found the corporation to be legal.

Since neither of the corporations in the foregoing cases actually sought to "practice medicine" but rather both were "furnishing medical services," any distinction which does not take the public policy merits of the two cases into consideration must be indeed fanciful.[37]

In *United States v. American Medical Association,*[38] the court observed:

> "In all the cases we have examined in which the practice (of medicine by a corporation) has been condemned, the profit object of the offending corporation has been shown to be its main purpose, and in no case were the circumstances precisely like those described in the indictment, i.e., a non-profit organization conducted so that the proper doctor-patient relationship is preserved. . . ."

While the issue was decided on the pleadings, the court stated that it considered the corporation, similar to that described in the District of Columbia case, to be legal.

New York decisions are clearly committed to the proposition that

[34] People v. Pacific Health Corp., note 32, *supra.*

[35] *Ibid.,* at p. 166, the court stated, "Such activities are not comparable to those of private corporations operated for profit and, since the principal evils attendant upon corporate practice of medicine spring from the conflict between the professional standards and obligations of the doctors and the profit motive of the corporation employer, it may well be concluded that the objections of policy do not apply to non-profit institutions. This view seems implicit in the decisions of the courts and it has certainly been the assumption of the public authorities, which have, as far as we are advised, never molested these organizations."

[36] Group Health Ass'n v. Moor, 24 Fed. Supp. 445 (D. C. D. C. 1938).

[37] *Ibid.,* p. 446, clearly enunciates as the basis for its decision,

"The question here is one of statutory construction. It is evident that the purpose of the statute was to protect the public from quacks, from the ignorant and incompetent. The actions of the plaintiff in no way tend to commercialize the practice of medicine."

[38] 110 F. 2d 703, 714 (C. A. D. C. 1940), *cert. denied,* 310 U. S. 644, 605 S. Ct. 1096.

charitable and public institutions in corporate form may practice medicine.[39] In the case of *Goldwater v. Citizens Casualty Co. of New York*,[40] the issue was the right of plaintiff-hospital to collect for surgical fees for an operation performed by a staff surgeon. It was not alleged that the laboratory and X-ray services provided by the hospital constituted the practice of medicine, but it was argued that actual surgical services performed by physicians working for the hospital did constitute the practice of medicine and was unlawful under the New York Medical Practice Act. The court stated:[41]

> "It is common knowledge that in addition to maintenance, hospitals provide a multitude of other services such as X-rays, laboratory tests, physical therapy, medicines, the use of their medical and surgical treatment. . . .
> "The general rule that a corporation may not practice medicine has its exception in charitable hospital corporations which are organized for the express purpose and are sanctioned by law to treat the sick and injured. . . ."

Thus it will be observed that the courts have in many instances recognized the social utility of a particular corporate form and found the general rule inapplicable.

The social utility of operation by hospitals of laboratory and X-ray services would seem to be well worth consideration. The trial judge in his decree stated that nothing therein should be construed so as to deny to the hospitals the right to own these laboratory and X-ray facilities. Since the hospitals, by this decree may own, but not operate these facilities, they are faced with two alternatives. They may either sell these facilities outright and contract the work outside, thus losing 24 hour-a-day standby service, or they may lease these facilities to the pathologists and radiologists. The latter alternative could lead to complications of no small proportions. Some of the possible complications which have been suggested[42] are:

(1) Many state supreme courts have held that county facilities may not be leased, and a number of county hospitals are involved in the action.

(2) The Code of Iowa, 1954, as well as most state laws, exempts from

[39] Goldwater v. Citizens Casualty Co. of New York, 7 N. Y. S. 2d 242 (1938); Jewish Hospital of Brooklyn v. Doe, 252 App. Div. 581, 300 N. Y. S. 1111 (1937); People v. John H. Woodbury Dermatological Institute, 192 N. Y. 454, 85 N. E. 697 (1908); Messer Co. v. Rothstein, 129 App. Sev. 215, 113 N. Y. S. 772, aff. 198 N. Y. S. 32, 92 N. E. 1107 (1910).

[40] 7 N. Y. S. 2d, 242 (1938). The trial court conceded that if the Goldwater case is the law of Iowa, the plaintiffs must prevail.

[41] *Ibid.*, p. 246.

[42] *The Burning Question in Iowa*, note 16, *supra*.

taxation grounds and buildings of charitable hospitals used solely for their appropriate objects, and not leased or otherwise used with a view to profit. Thus a lease to a private practitioner, engaged in practice for a profit, presents the problem of a possible loss of tax exemption.

(3) Under the Hill-Burton Act, which provides for federal grant in aid to hospitals, a hospital must be entirely non-profit to qualify, and some fear that a lease of facilities to a profit-making group may make the leasing hospital ineligible.

In view of the long standing and almost universal practice of operation by hospitals of these facilities, and the tremendous degree of public interest involved,[43] it is to be hoped that whatever the outcome, the decision will be fashioned from the court's consideration of whether the arrangement in controversy offends either the purposes of the medical practice acts or is attended by any of the common public policy objections to the corporate practice of medicine.

It is hoped that the Iowa court will reconsider the broad maxim condemning all corporations alike. While it undoubtedly served satisfactorily in the past when it was invoked against anti-social activities exclusively, it becomes oppressive when applied to corporations operated for the public benefit.

JACK T. HAMILTON.

Sales—Breach of Warranty—Allergies

A condition diagnosed as weeping dermatitis appeared on plaintiff's scalp and neck after she had used defendant's hair rinse.[1] She sued for breach of warranty of fitness for the purpose intended. There was no evidence of deleterious or poisonous substances in the product. The evidence introduced was that plaintiff applied the rinse to her hair; that as a result she contracted dermatitis, and that a friend had a similar experience with the same rinse. The court refused recovery, indicated that her injury might have been caused by an allergy, and added: ". . . in an action by the buyer of a product against the seller for breach of warranty to recover damages for injuries resulting from the use of the product, there is no liability upon the seller, where the buyer was allergic or unusually susceptible to injury from the product, which fact was wholly unknown to the seller and peculiar to the buyer."[2]

[43] Of especial interest to the public is the effect upon the various Blue Cross plans of hospital insurance, which now insure and pay for laboratory and X-ray services furnished by hospitals, since it is a part of the hospital bill. Some fear this plan may be impaired and disrupted if the charges are made by the doctor.

[1] Hanrahan v. Walgreen Co., 243 N. C. 268, 90 S. E. 2d 392 (1955).
[2] *Id.* at 269.

North Carolina has not been wholly consistent in determining whether there is an implied warranty of fitness for the purpose intended in the sale of goods. Earlier cases held that there was no warranty and applied the rule of *caveat emptor*,[3] but the trend in recent cases has been toward holding there is such a warranty. In only two cases did the court indicate there must be reliance on the seller's skill and judgment.[4] Other cases do not raise such a condition.[5] These latter cases are inconsistent with the weight of authority in other states in that the majority of courts recognize an implied warranty if the goods are sold for a particular purpose, but only if the buyer relies on the seller's skill and judgment.[6] The *Uniform Sales Act* also provides that if the article is sold for a particular purpose and the buyer relies on the seller's skill and judgment, there is an implied warranty of fitness.[7] Often the particular purpose is commensurate with the general purpose, in which case the buyer will not be required literally to communicate the particular purpose to the seller.[8]

In the light of the foregoing it is seen that North Carolina is liberal in extending the implied warranty. Actions against seller for injuries to the buyer can also be grounded on negligence[9] or false representation.[10]

The implication of the principal case is that a buyer can never re-

[3] Dickson v. Jordan, 33 N. C. (11 Ired.) 166, 53 Am. Dec. 403 (1850); Wooldridge v. Brown, 149 N. C. 299, 62 S. E. 1076 (1908).

[4] Stokes v. Edwards, 230 N. C. 306, 52 S. E. 2d 797 (1949); Poovey v. International Sugar Feed No. 2 Co., 191 N. C. 722, 133 S. E. 12 (1926).

[5] See Note, 32 N. C. L. REV. 351 (1949) for an excellent discussion of the development of implied warranties in North Carolina.

[6] 46 AM. JUR., *Sales* §§ 346, 348 (1943); 77 C. J. S., *Sales* §§ 315(b), 325(b) (1952); 1 WILLISTON, SALES §§ 206, 235 (Rev. ed. 1948).

[7] UNIFORM SALES ACT § 15 (1). The *Uniform Sales Act*, which has been adopted in 37 States, but not in North Carolina, also includes one unfortunate provision which has caused buyers and courts much consternation. It provides that if the article is sold under a "patent or other trade name" there is no implied warranty. This phrase would deny the warranty even though there was reliance by the buyer on the seller's skill and judgment. Comment, 57 YALE L. J. 1389, 1393-1395 (1948); UNIFORM SALES ACT § 15 (4). The *Uniform Revised Sales Act* has omitted this provision. UNIFORM REVISED SALES ACT § 39.

[8] Clover Cutting Die Co. v. Sam Smith Shoe Corp., 96 N. H. 491, 79 A. 2d 8 (1951); Libke v. Craig, 35 Wash. 2d 870, 216 P. 2d 189 (1950); Vaccarino v. Cozzubo, 181 Md. 614, 31 A. 2d 316 (1943); Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A. 2d 913 (1942).

[9] Bennett v. Pilot Products Co., 120 Utah 474, 235 P. 2d 525 (1951); Annot., 26 A. L. R. 2d 958, 973 (1951); Rulane Gas Co. v. Montgomery Ward & Co., 231 N. C. 270, 56 S. E. 2d 689 (1949); Dalrymple v. Sinkoe, 230 N. C. 453, 53 S. E. 2d 437 (1949); Caudle v. F. M. Bohannon Tobacco Co., 220 N. C. 105, 16 S. E. 2d 680 (1941); Corum v. R. J. Reynolds Tobacco Co., 205 N. C. 213, 171 S. E. 78 (1933); Cashwell v. Fayetteville Pepsi Cola Bottling Works, 174 N. C. 324, 93 S. E. 901 (1917).

[10] American Laundry Machinery Co. v. Skinner, 225 N. C. 285, 34 S. E. 2d 190 (1945); Hill v. Snider, 217 N. C. 437, 8 S. E. 2d 202 (1940); Cleary v. John M. Maris Co., 173 Misc. 954, 19 N. Y. S. 2d 38 (1940); Drake v. Herrman, 261 N. Y. 414, 185 N. E. 685 (1933); Corley Co. v. Griggs, 192 N. C. 171, 134 S. E. 406 (1926); Flynn v. Bedell Co., 242 Mass. 450, 136 N. E. 252 (1922).

cover for breach of warranty if the injury results from his own hypersensitive or allergic condition and this condition is unknown to the seller. The inquiry of this note is whether or not there is or should be a distinction drawn between common allergies and those that are rare.

Several cases have discussed the ratios of allergic to non-allergic persons with respect to various products,[11] but none have based their holdings on the ratio. Those courts denying recovery have simply said there is no warranty of fitness to allergic persons;[12] and those allowing recovery have made the seller liable for injuries to the hypersensitive as well as the normal person.[13]

The rationale for refusing to extend the warranty to idiosyncratic persons is that a seller is not bound to anticipate injury to the small group injured. This reasoning would be valid in actions based on negligence because of the requirement of foreseeability; but warranty, even though closely allied with tort,[14] should not be based on prevision of harm. Negligence should not be the test in an action for breach of warranty.

An interesting case arising in Massachusetts, *Bianchi v. Denholm McKay Co.*,[15] held that if the product was known to be injurious to "some" persons, even though admittedly in a "non-average" class because of their peculiar sensitivity or allergy, the seller could not be heard to say the warranty did not extend to them. This class of "non-average" persons was not designated by numbers or percentage. The *Bianchi* case has struck a medium between the two extremes mentioned above but the liability of the seller is based on scienter in that the seller must know the product is injurious to a class of persons. There are probably many substances that will produce adverse reactions in a comparatively

[11] Zirpola v. Adam Hat Stores, Inc., 122 N. J. L. 21, 4 A. 2d 73 (1939) (4 or 5 in 100); Hesse v. Travelers' Ins. Co., 299 Pa. 125, 149 Atl. 96 (1930) (1 in 1,000,000); Antowill v. Friedmann, 197 App. Div. 230, 188 N. Y. Supp. 777 (1921) (1 in 200, or 300); Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N. W. 48 (1913) (1 in 100).

[12] Longo v. Touraine Stores, Inc., 319 Mass. 727, 66 N. E. 2d 792 (1946); Stanton v. Sears Roebuck & Co., 312 Ill. App. 496, 38 N. E. 2d 801 (1942); Zager v. F. W. Woolworth Co., 30 Cal. App. 2d 324, 86 P. 2d 389 (1939); Ross v. Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A. 2d 650 (1939). Of course where there is a toxic chemical, or the product is adulterated, the warranty will extend. Rogiers v. Gilchrist Co., 312 Mass. 544, 45 N. E. 2d 744 (1942) (toxic chemical); Sapiente v. Waltuch, 127 Conn. 224, 15 A. 2d 417 (1940) (food infested with bugs); Pietrus v. Watkins Co., 229 Minn. 179, 38 N. W. 2d 799 (1949) (excessive amount of alkali); Smith v. Burdine's Inc., 144 Fla. 500, 198 So. 223 (1940) (poison in lipstick).

[13] Reynolds v. Sun Ray Drug Co., 135 N. J. L. 475, 52 A. 2d 666 (1947); Kurriss v. Conrad & Co., 312 Mass. 670, 46 N. E. 2d 12 (1942) (Here although there was evidence that contact dermatitis was classified in the "allergy" group of disturbances, the recovery by the buyer was allowed even though the court did not refer to any showing that the dye contaned any poisonous substances); Zirpola v. Adam Hat Stores, Inc., 122 N. J. L. 21, 4 A. 2d 73 (1939).

[14] 1 WILLISTON, SALES § 195 (rev. ed. 1948).

[15] 302 Mass. 469, 19 N. E. 2d 697 (1939).

large class of sensitive persons,[16] and yet the seller is likely to have no knowledge of this and, under the holding of the *Bianchi* case, will not be liable. An earlier case in Massachusetts, *Flynn v. Bedell*,[17] flatly refused recovery to the plaintiff on the ground that the idiosyncrasy was "wholly unknown" to the seller. The words in the principal case are in part identical with those used by the Massachusetts court in the *Flynn* case.[18] It remains to be seen whether our court will follow the *Bianchi* case if a set of facts arises whereby the seller knows the product will produce inflammation in those with hypersensitive skins. Sometimes a "spot patch" test can be used to determine one's susceptibility to certain products, and dealers usually give directions for such a test if there is a known irritant in the product.[19] For goods taken internally, however, there can, of course, be no spot test.

The principal case is one of first impression in North Carolina and the court went along with the majority view in saying breach of warranty does not extend to persons having allergies. The court, citing *Ross v. Porteous, Mitchell & Braun Co.*[20] said, "It would seem that the cause of plaintiff's dermatitis remains a matter of doubt and conjecture."[21] The *Ross* case denied recovery on the ground that by the evidence presented it was conjectural whether the plaintiff had an allergy, in which case there would be no recovery, or whether the product was adulterated; and that the court would not deal with conjecture nor attempt to guess the cause of the injury. The language of the principal case is that if the buyer has an allergy he cannot recover; yet, as pointed out earlier, the court stated the qualification that the allergy of the buyer must be wholly unknown to the seller.[22] A negative inference from this would seem to be that if the seller *knew* of the possible ill effect on the buyer, *i.e.*, knew of any buyer who was allergic to the product, the seller would be liable on his warranty. It is hoped the court did intend to place this qualification on the decision in the principal case. It is also submitted that if the allergy to the product is of the more common type the seller should be liable on his warranty even though the seller has no actual knowledge of the product's possible ill

[16] Zirpola v. Adam Hat Stores, Inc., 122 N. J. L. 21, 4 A. 2d 73 (1939) (hat dyes); Drake v. Herrman, 261 N. Y. 414, 185 N. E. 685 (1933) (hair dyes); Flynn v. Bedell Co., 242 Mass. 450, 136 N. E. 252 (1922) (fur dyes); Antowill v. Friedmann, 197 App. Div. 230, 188 N. Y. Supp. 777 (1921) (x-rays).

[17] 242 Mass. 450, 136 N. E. 252 (1922).

[18] Compare "an implied warranty of fitness does not extend to fitness in respect to matters wholly unknown to the dealer and peculiar to the individual buyer," with the North Carolina Court's language above.

[19] N. C. GEN. STAT. § 106-136 (1939) is a statutory example which provides that if the seller properly labels his product as to the injurious substance it will not be deemed adulterated.

[20] 136 Me. 118, 3 A. 2d 650 (1939).

[21] Hanrahan v. Walgreen Co., 243 N. C. 268, 269, 90 S. E. 2d 392, 393 (1955).

[22] *Ibid.*

effects on the sensitive buyer. Of course if the allergy is to common and well known substances such as strawberries, tomatoes, and pollen, a different legal consequence should naturally follow. In such cases the buyer can be expected to avoid the common substances to which he is allergic.

HAMLIN WADE.

Trade Regulations—Section 7 of the Clayton Act

Section 7 of the Clayton Act as originally passed in 1914 read, in part:

> "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[1]

The original Section 7 was passed to supplement the Sherman Act[2] by forestalling restraints of trade and monopolization at an earlier stage than did that act. By judicial interpretation, an actual showing of conspiracy,[3] monopolization,[4] predatory practices,[5] or an intent to restrain trade[6] was held necessary in order to invoke the restraints of the Sherman Act. By the time this evidence was available to the government, the merger involved had already taken place, and the government then faced the difficult task of breaking up a corporation already integrated into one operating unit. The original Section 7 of the Clayton Act was intended "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."[7] Since the most prevalent method of corporate merger at that time was the acquisition of the *stock* of one corporation by another, the original act was aimed at such acquisitions. By judicial interpretation,[8] mergers were held not to be within the purview of the statute if the acquiring corpora-

[1] 38 STAT. 730 (1914), 15 U. S. C. § 18 (1914).
[2] 26 STAT. 209 (1890), 15 U. S. C. §§ 1-7 (1951).
[3] American Tobacco Co. v. United States, 328 U. S. 781 (1946).
[4] United States v. Aluminum Co. of America, 149 F. 2d 416 (2d Cir. 1945).
[5] Schine Chain Theatres, Inc. v. United States, 334 U. S. 110 (1948).
[6] Great Atlantic and Pacific Tea Co. v. United States, 227 Fed. 46 (2d Cir. 1915).
[7] H. R. Rep. No. 698, 63d Cong., 2d Sess. 6553 (1914).
[8] Swift and Co. v. Federal Trade Commission, 272 U. S. 554 (1926). *A* Company acquired the stock of *B* Company. The government brought suit under the old Section 7. Prior to judgment *A* Company used the stock to acquire the assets of *B* Company. The court held that the acquisition of the assets was a legal transaction and that *A* Company could be required to divest itself only of the now worthless stock. This became known as the "jurisdictional loophole" and relegated old Section 7 to insignificance.

tion acquired the assets of the acquired corporation as well as its stock. Thus the original Section 7 lost most of its effectiveness, and corporate mergers continued unabated through the use of this so-called "jurisdictional loophole."

Obviously any amendment to the statute would be concerned primarily with plugging this loophole. A comparison of Section 7 of the Clayton Act as amended in 1950 with the original version bears this out. The section as amended reads:

> "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets* of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[9] (Emphasis added.)

A reading of this section shows that in attempting to solve one problem, Congress has created another. Note that if *assets* are acquired, there is little doubt that the section is not applicable unless the acquired corporation is engaged in commerce.[10] This much is clear. The section expressly provides that "no corporation . . . shall acquire the whole or any part of the assets of another corporation engaged also in commerce. . . ." However, in transactions involving the purchase of stock, the section is vague in regard to whether the corporation whose stock is acquired must be engaged in interstate commerce. One eminent authority[11] has taken the position that the acquired corporation need not be engaged in commerce where stock is acquired in order for the act to apply, on the grounds that it would be a *grammatical* strain to attempt to construe the words "of another corporation engaged also in commerce" as referring back and qualifying the words "of the stock or other share capital." He contends that if Congress did intend for the phrase to qualify both stock and asset acquisitions, it should have inserted a comma after the word "assets" thus making it grammatically possible. However, a diagram of the sentence shows that with or without such comma it is grammatically impossible for "of another corporation engaged also in commerce" to modify "the stock or other share capital." Therefore, since no court has yet construed this section, any reasonable interpretation must result from the evident congressional intent as seen in the light of common English usage.

[9] 38 STAT. 730 (1914), as amended, 15 U. S. C. § 18 (1951).
[10] "Commerce," as used in the act, means interstate commerce.
[11] McElroy, *Section 7 of the Clayton Act*, 5 BAYLOR L. REV. 121 (1953).

A comparison of the old section with the amended version shows that Congress re-enacted Section 7 using the identical language of the original section except that the phrase "and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the *assets*" (emphasis added) was inserted into the body of the paragraph. Thus it can be seen that Congress intended the act to read in effect as follows:

> "That no corporation engaged in commerce shall acquire . . . the whole or any part of the stock or other share capital of another corporation engaged also in commerce and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire . . . the assets of another corporation engaged also in commerce. . . ."

The phrase "of another corporation engaged also in commerce" clearly was intended to relate back and qualify the prohibition against the acquisition of both stock and assets just as the qualifying clause that follows ("where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition. . . .") also relates back and qualifies both types of prohibitions.

Furthermore, an interpretation of the Act in the light of common English usage gives a result in accord with the obvious intent of Congress regardless of the *grammatical* strain referred to previously. If the alternate construction (that "of another corporation engaged also in commerce" does not relate to stock acquisitions) were attempted, it would result in a sentence the meaning of which would be left to conjecture—*i.e.:*

> "That no corporation engaged in commerce shall acquire . . . the stock or other share capital where in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition. . . ."

In reading this sentence and arriving at "the stock or other share capital," the quaere immediately arises, "The stock or other share capital of what?" The use of the adjective "the" before the noun "stock" clearly indicates that the stock or other share capital of something specific is necessary in order to give significance to the sentence. "[T]he" specific "stock or other share capital" referred to necessarily must be that "of another corporation engaged also in commerce."

Of course, it is possible that Congress did desire to distinguish between stock and asset acquisitions. It may be that there was an intention to prohibit the buying up of stock of both interstate and intrastate

corporations while prohibiting asset acquisitions only if the acquired corporation was of an interstate nature. If this be so, a look at paragraph two of Section 7 shows that Congress probably has enacted a provision in excess of its powers. Paragraph two reads:

> "No corporation shall acquire the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce where the effect of such acquisition may be substantially to lessen competition. . . ."

Note that in this situation the *acquiring* corporation does not have to be engaged in commerce. Congress, by paragraph two, obviously wished to prohibit a lessening of competition in the competitive pattern of the market area where interstate firms are acquired by intrastate firms. Thus, if the phrase "of one or more corporations engaged in commerce" does *not* relate back and qualify the prohibition of *stock* acquisitions, the following construction will result:

> "No corporation shall acquire the whole or any part of the stock or other share capital where . . . the effect of such acquisition . . . may be substantially to lessen competition. . . ."

The net result of such a construction is the highly dubious condemnation of an acquisition by a firm not engaged in commerce of the stock of a firm also not engaged in commerce. Surely it cannot be contended that the authority of Congress extends that far, or that such was the result intended by an act whose sponsors asserted would not injure small business.[12]

Therefore, while faulty draftsmanship of Section 7 of the Clayton Act leaves it open to a possible dual construction, it appears that there is only one which is both reasonable and in accord with what seems to be the legislative intent. However, in order to insure future effectiveness of this section, Congress should redraft the statute in clear language lest it again be adjudicated into obscurity as was the old section.

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[12] The act was designed "to limit the future increases in the level of economic concentration resulting from corporate mergers . . . and thereby aid in preserving small business as an important competitive factor in the American economy." S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950).