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Notes and Comments

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Anti-trust Laws—Sherman Anti-trust Act—Professional Sports

The Supreme Court, in *Radovich v. National Football League*,[1] has added another professional sport to the growing list[2] of those which are now subject to the provisions of the Sherman Anti-trust Act.[3] In this case, plaintiff, a former professional football player for a member of the defendant league, sued to collect treble damages under the Clayton Act[4] for a violation by the defendant of the Sherman Anti-trust Act.[5] He alleged that through a method of blacklisting[6] he was prevented from becoming player-coach on a team of an affiliated league,[7] and that the result of this blacklisting was to prevent his employment in organized football in the United States. He further alleged that the defendant league scheduled football games in various cities and that a significant portion of gross receipts was derived from the transmission of these games over radio and television.[8] The defendant contended that the organization of professional football had been patterned after that of professional baseball and that since baseball had been exempted from these laws, the doctrine of stare decisis should apply. The court held that the business of football came within the meaning of the act and further stated that the rule which had been established in the earlier

[1] 352 U.S. 445 (1957).

[2] Boxing and basketball have been held to constitute interstate commerce within the meaning of the act. United States v. International Boxing Club, 348 U.S. 236 (1954); Washington Professional Basketball Corp. v. National Basketball Ass'n, 147 F. Supp. 154 (S.D.N.Y. 1956).

[3] 26 STAT. 209 (1890); 15 U.S.C. §§ 1, 2 (1952).

[4] 38 STAT. 731 (1914); 15 U.S.C. § 15 (1952).

[5] 26 STAT. 209 (1890); 15 U.S.C. §§ 1, 2 (1952), reading in pertinent parts as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

[6] This is the commonly used term denoting that a player is no longer eligible to play.

[7] The Pacific Coast League, which was not in competition with the National Football League, offered plaintiff this job, but withdrew the offer when the defendant advised them that plaintiff was blacklisted and that severe penalties would be imposed on the league if he were signed. 352 U.S. at 448.

[8] Through the use of these two conveyances, the narratives and the pictures of the spectacle itself are transmitted across the state lines. For this reason radio and television have played a major role in the recent decisions for violations of the anti-trust laws. The first court to recognize their importance was Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949).

baseball cases[9] was specifically limited to the business of baseball and was not controlling insofar as any other sport was concerned.[10]

Professional sports, and the applicability of the anti-trust laws to them, have had an interesting history in the courts with results as unpredictable as the athletic events themselves. The first case to reach the Supreme Court regarding this subject was *Federal Baseball Club v. National League*.[11] Here, plaintiff had been a member of the Federal Baseball League. Through a pre-arranged plan of all the members except plaintiff, this league was dissolved in 1915 and the American and National Leagues were formed. Plaintiff was not included in either of these leagues. It brought its action under the Sherman Act alleging that the defendants had conspired to monopolize the business of giving baseball exhibitions. The Court, in a unanimous decision, held that the business was that of giving exhibitions of baseball, that the travel from state to state in order to give these exhibitions was a mere incident of the game itself,[12] and that personal effort, not related to production, was not a subject of commerce.[13]

Following this decision, baseball enjoyed more than twenty years without interference from the courts. But in 1946 efforts to lure players from the major leagues into the newly formed "Mexican League" prompted the Commissioner of Baseball to take drastic action, and the anti-trust problem, which had remained dormant since 1922, was reopened. The players who "jumped" to the Mexican League were suspended from organized baseball[14] for five years.[15] After playing for a

[9] Toolson v. New York Yankees, 346 U.S. 356 (1953); Federal Baseball Club v. National League, 259 U.S. 200 (1922).

[10] The dissenting Justices, being unable to distinguish football from baseball, felt that they were bound by those two decisions. 352 U.S. at 455, 456.

[11] 259 U.S. 200 (1922).

[12] That this statement is no longer true cannot be denied. In 1956 the Chicago White Sox, a baseball team of the American League, spent $91,059 for the transportation of its players to the various cities to participate in these "local exhibitions." *Hearings Before the Anti-Trust Subcommittee of the House Committee on the Judiciary*, 85th Cong., 1st Sess., ser. 8, pt. 2, at 2044 (1957).

[13] Personal effort has now been made the subject of commerce. United States v. Shubert, 348 U.S. 222 (1955) (performances on the stage were held to constitute commerce); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950) (business of a real estate broker was held to be trade under the act).

[14] There are now approximately 400 baseball teams under the jurisdiction of organized baseball. This includes the American and National Leagues, commonly known as the major leagues, and 40 other leagues which compose the minor leagues. In 1956 there were fifty million spectators who paid one hundred million dollars to see ten thousand players perform in thirty thousand games. 103 CONG. REC. A5325 (daily ed. July 3, 1957).

[15] Major League Rule 15 was amended to authorize the suspension which the Commissioner had already imposed. *Hearings, supra* note 12, at 61. These rules have now been revised and the penalty of five years mandatory ineligibility for a major league player who jumps his contract or reservation has been completely eliminated. *Hearings, supra* note 12, at 122. Rule 15 (d) now provides that such ineligibility, reinstatement, or complete disqualification, is in the sole discretion of the Commissioner of Baseball in the major leagues and the President of

short time in Mexico they applied for re-instatement. When the Commissioner refused to lift the suspension, a few of these players turned to the courts for relief. The most important of these cases was *Gardella v. Chandler*,[16] in which an action was initiated under the illegality of restraint clause of the Sherman Act.[17] It was dismissed in the district court for want of anti-trust allegations, but the Court of Appeals for the Second Circuit voted two to one to send the case back for a trial on the merits. Chief Judge Learned Hand stated that if the business of television and radio, in addition to the personal effort and travel which had been insufficient in the *Federal Baseball* case, were enough to give the business an interstate character, plaintiff had stated a valid claim for relief. Judge Frank felt that the business was a monopoly which, with the reserve clause,[18] possessed characteristics repugnant to the moral principles of the thirteenth amendment condemning involuntary servitude.[19] Judge Chase dissented, saying that he was bound by the *Federal Baseball* case, and that radio and television were comparable to the telegraph wires which had been used earlier to transmit reports of the games.[20] Baseball, not anxious to have the Supreme Court rule on this decision after such distinguished judges had spoken in the lower court,[21] settled with Gardella.[22]

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the National Association if it concerns a minor league player. *Hearings, supra* note 12, at 1675.

[16] 172 F.2d 402 (2d Cir. 1949).

[17] 26 STAT. 209 (1890); 15 U.S.C. § 1 (1952).

[18] The reserve clause in its present form is a clause in the contract between the club and a player which gives the club an option on the player's services in organized baseball for life. The player, once he has signed his first contract, becomes the sole property of that club and he may be traded or sold by the club at any time. Furthermore, he is at the mercy of the club owner with regards to his salary, except that in the major leagues, salaries may not be less than $6,000.00 per year, nor may a player's salary be reduced more than 25% of that which he earned during the preceding year without his consent. *Hearings, supra* note 12, at 1493. Football contracts, contrary to common belief, do not have this perpetual option to renew. Since 1947, the standard player contract has contained only a modified reserve clause giving the club the right to renew the contract for one year at a salary not less than 90% of that received by the player the preceding year. Nor may the club exercise its option for more than one year. *Hearings, supra* note 12, at 2750. But football has a selective draft system which prevents eligible college players from acting as free agents even before they sign their first professional contract. The purpose of this system is to produce evenly matched teams and keener competition so as to give the fans a better exhibition. This is accomplished by having each team submit a list of the eligible players which it desires to have, and at a meeting of all the clubs a drawing is held commencing with the reverse order of the championship standings of the preceding year so that the team finishing last will get first choice, the team finishing second from last second choice, and so on until all the eligible players desired have been chosen. *Hearings, supra* note 12, at 2580s.

[19] 172 F.2d at 409.

[20] *Id.* at 404.

[21] Commissioner Chandler, being questioned on this subject said, "I do not think our lawyers thought we could win." *Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 82d Cong., 1st Sess., ser. 1, pt. 6, at 290 (1951).

[22] Two other suits, involving Max Lanier and Fred Martin, were also settled

Immediately following these cases, legislation was urged by friends of baseball to exempt professional sports from the anti-trust laws. Bills were introduced in the House of Representatives to this effect.[23] A subcommittee was appointed to study organized baseball as a monopoly power. After extensive hearings in which many persons connected with baseball testified, the subcommittee submitted a report to Congress[24] which concluded that baseball in all probability could not operate successfully without some form of a reserve clause, that they disapproved of exempting baseball from the anti-trust laws and recommended that no legislative action be taken at that time. The subcommitee indicated that Congress should not pass any legislation until the Supreme Court had made clear its position.

The chance for the Supreme Court to state its position came in 1953 in *Toolson v. New York Yankees*.[25] But in a per curiam decision of one paragraph, the Court examined the holding in the *Federal Baseball* case, the fact that Congress had not passed any legislation on the subject since that case, and then said: "Without re-examination of the underlying issues, the judgments below [dismissing the complaint] are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs* . . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal anti-trust laws."[26] Mr. Justice Burton wrote a strong dissenting opinion, stating that "the present popularity of organized baseball increases, rather than diminishes, the importance of its compliance with standards of reasonableness comparable with those now required by law of interstate trade or commerce."[27]

It would seem that this decision clearly indicated the Court's position. Yet in 1955, in a suit initiated by the Government,[28] the Court held that professional boxing was within the meaning of the act and that the *Toolson* case neither affirmed nor overruled the *Federal Baseball* case and was not authority for exempting other businesses.[29]

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when Commissioner Chandler reinstated all eighteen players who had violated the reserve clause of their contracts after three years of their suspension had been served. *Hearings, supra* note 21, at 343.

[23] H.R. 4229, 4230, 4231, 82d Cong., 1st Sess. (1951).

[24] H.R. No. 2002, 82d Cong., 2d Sess. (1952).

[25] 346 U.S. 356 (1953).

[26] 346 U.S. at 357.

[27] *Id.* at 364-65.

[28] United States v. International Boxing Club, 348 U.S. 236 (1955).

[29] "It would baffle the subtlest ingenuity to find a single differentiating factor between other sporting exhibitions, whether boxing or football or tennis, and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to a 'trade or commerce.'" Mr. Justice Frankfurter dissenting in United States v. International Boxing Club, 348 U.S. 236, 248 (1955).

Earlier, in *United States v. Shubert*,[30] the Court had stated that *Toolson* was a narrow application of stare decisis.

The only other professional sport which has been ruled on is basketball. In a district court decision,[31] it was held that professional basketball as conducted by the defendant on a multi-state basis caused this sport to be subject to regulation by the Sherman Act. Here again, the sale of radio and television rights was given great weight in reaching the decision.

The present situation places the Court in an unenviable position. As a result of its decisions, baseball, the originator of the reserve clause and agreements among clubs to blacklist, and whose organization has expanded to the point that it embraces every section of the United States, is exempt from the anti-trust laws. Football and basketball, whose organizations were patterned after baseball, and which are relatively small enterprises when compared to that sport, are not favored by such an exemption. The Court recognized that its decisions might be considered inconsistent in the *Radovich* case when it said: "If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts."[32] There is, however, some justification for the method the Court has used in handling the problem. When the *Federal Baseball* case was decided, the Court was dealing with a problem of congressional intent. It was decided that baseball was not intended to be covered by the anti-trust laws. After a long period of inaction by Congress, there was good reason for the Court to affirm its stand in the *Toolson* case. But in dealing with other professional sports, the Court is free to apply stare decisis narrowly and approach the problem more realistically, in accordance with changed conditions.

Congress is making another attempt to solve the problem at this time. There are now a total of seven bills before the House. These bills fall into three categories which present the possible solutions: (1) exempt all professional team sports from the anti-trust laws;[33] (2) place baseball under the act;[34] or (3) place the four major team sports under the act, but specifically exempt from anti-trust enforcement certain practices considered essential to the successful operation of these

[30] 348 U.S. 222 (1955).
[31] Washington Professional Basketball Corp. v. National Basketball Ass'n, 147 F. Supp. 154 (1956).
[32] 352 U.S. at 452.
[33] H.R. 5383, 85th Cong., 1st Sess. (1957).
[34] H.R. 5307, 5319, 85th Cong., 1st Sess. (1957).

sports.[35] The hearings of the subcommittee have been completed, but as of this writing, no report has been published of its recommendations.

ROBERT G. WEBB

Constitutional Law—Limits on Power of Congressional Investigation

In *Watkins v. United States*[1] the Supreme Court of the United States again considered the constitutional limits on the power of congressional investigation. In that case a labor union organizer was questioned by a subcommittee of the House Committee on Un-American Activities. The Committee's authorizing resolution[2] directed it to investigate "un-American propaganda activities." The witness was willing to and did divulge his past political activities and the activities of those whom he believed were still members of the communist party. However, while disclaiming the privilege against self-incrimination, he refused to tell whether he knew certain named persons (some of whom were not connected with labor) to have been members of the communist party, because he believed that they were not members at the time of the investigation. He was indicted and convicted for "contempt of Congress."[3] The Court of Appeals for the District of Columbia affirmed[4] the conviction and held that it was proper for the trial court to exclude evidence[5] offered by the defendant to prove that the Committee claimed a power of exposure independent of the legislative function and was interrogating him pursuant to this claimed power. The Supreme Court reversed the court of appeals on other grounds.[6]

In the trial court and in the court of appeals the defendant argued

[35] H.R. 6876, 6877, 8023, 8124, 85th Cong., 1st Sess. (1957). These four sports are baseball, football, basketball, and hockey.

[1] 354 U.S. 178 (1957).

[2] Act of Aug. 2, 1946, c. 753, 60 STAT. 812 (codified in scattered sections of 2, 5, 15, 31, 33, 34, 40, 44 U.S.C.).

[3] 52 STAT. 942 (1938), 2 U.S.C. § 192 (1952).

[4] 233 F.2d 681 (D.C. Cir. 1956).

[5] The trial court excluded statements from house committee reports, house committee hearings, the Congressional Record, and newspapers to the effect that the Committee asserted an independent power of exposure. Also excluded was evidence offered to prove that the Committee already had in its possession the information that it sought to acquire from defendant.

[6] There were two principal reasons for reversal. First, the vagueness of the Committee authorizing resolution inadequately safeguarded against the dissipation of constitutional freedoms because of the impossibility of: (1) weighing congressional need against private rights; (2) determining pertinency; (3) the Committee's limiting its questioning to statutory pertinency. Second, the vagueness of the authorizing resolution denied the witness notice of the subject of the investigation with the same degree of exactness required by the due process clause in the expression of any element of a criminal offense.

This latter reason raises a question of comparing investigating committee hearings with criminal trials for purposes of the due process requirement of certainty in criminal statutes. See 26 GEO. WASH. L. REV. 98 (1957); 106 U. PA. L. REV. 124 (1957).

that the exposure motive of the committee negated a valid legislative purpose for investigation. This theory has been argued in the lower federal courts with conflicting results, raising the questions of whether: (1) a congressional investigation may have exposure as its principal goal;[7] (2) a court has authority to scrutinize congressional or committee motives;[8] (3) a legitimate purpose is conclusively presumed when the subject of the investigation is one concerning which Congress may validly legislate;[9] (4) the validity of the legislative purpose can be determined by committee motives;[10] (5) a committee investigation is invalidated by an improper committee purpose.[11]

The *Watkins* case only partially answered these questions. In commenting on the exclusion of the evidence, the Court indicated that although there is no power in Congress to expose for exposure's sake, the purpose of Congress is not to be tested by examining committee motives. The Court then asserted that committee "motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served."[12] The statement by its terms applies only when the legislative purpose is served. Thus it sheds little light on the problem of determining whether the Supreme Court will recognize improper committee motivation as being so gross that the legislative purpose is not being served. The historical development of limitations on the power of investigation may illuminate this problem.

More than three quarters of a century ago in *Kilbourn v. Thompson*[13] the Court pointed out that Congress does not "possess the general power of making inquiry into the private affairs of the citizen."[14] Thus if a witness is to be compelled to answer there must be a valid legisla-

[7] In United States v. Josephson, 165 F.2d 82, 89 (2d Cir. 1947), the court refused to decide "whether a congressional investigation may have exposure as its principal goal."

[8] In Eisler v. United States, 179 F.2d 273 (D.C. Cir. 1948), *cert. dismissed per curiam,* 338 U.S. 883 (1949), the court ruled that it had no authority to scrutinize congressional or committee motives.

[9] In Morford v. United States, 176 F.2d 54 (D.C. Cir. 1949), the court ruled that a legitimate purpose is presumed when the subject of investigation is one concerning which Congress can validly legislate. *Cf.* Barenblatt v. United States, 240 F.2d 875 (D.C. Cir. 1957), *rev'd per curiam,* 354 U.S. 930 (1957), where the court ruled that evidence of a committee exposure motive, which does not negate other legitimate purposes of inquiry, does not rebut the presumption that congressional investigations have valid legislative purposes.

[10] In United States v. Icardi, 140 F. Supp. 383 (D.C. Cir. 1956), the Committee called a witness for an improper purpose and the court held that the Committee was not pursuing a valid legislative purpose and directed a verdict of acquittal.

[11] See Watkins v. United States, 354 U.S. 178 (1957).

[12] *Id.* at 200.

[13] 103 U.S. 168 (1880).

[14] *Id.* at 190.

tive purpose,[15] and questions asked must be pertinent to the matter under inquiry.[16] When the investigation is by committee, the pertinency of questions is "determined by reference to the scope of the authority vested in the committee"[17] by its authorizing resolution. Also, the congressional need for the information sought must be weighed against rights secured to the witness by the first amendment.[18]

It seems logical that there would be no congressional need for an investigation if the principal goal of the committee were public exposure of the individual's political beliefs or past associations. Since Congress has no power to expose for exposure's sake, *this should be true* because Congress ought not to be able legally to conduct an investigation by committee which it could not legally conduct itself. Congress could have no legitimate need for information which it could not legally acquire. By this view, *Watkins* might have been decided on the ground that the evidence of improper committee motivation should have been admitted in order to give the defendant an opportunity to prove that he was convicted pursuant to an invalid investigation.

GASTON H. GAGE

Criminal Law—Offense of Driving Under the Influence of Intoxicating Liquor When Vehicle Is Motionless

In 1955, 1,165 persons met death by accident on North Carolina highways.[1] This placed North Carolina eighth in the nation in total highway accident deaths, and eleventh in deaths per vehicle-miles traveled[2]—figures which are representative of North Carolina's accident rate for recent years.[3] Of these 1,165 accidental deaths, approximately ten per cent may be attributed to the effects of alcohol.[4] These simple figures indicate the gravity of North Carolina's highway "alcohol-accident" problem and the pressing need for some effective corrective action. It will be the purpose of this Note to consider one area of the

[15] Sinclair v. United States, 279 U.S. 263 (1929); Barry v. United States *ex rel.* Cunningham, 279 U.S. 597 (1928); McGrain v. Daugherty, 273 U.S. 135 (1926); *In re* Chapman, 166 U.S. 661 (1896).

[16] McGrain v. Daugherty, 273 U.S. 135 (1926).

[17] Sinclair v. United States, 279 U.S. 263, 299 (1929); Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 613 (1928) (dictum).

[18] Bridges v. California, 314 U.S. 252 (1941); Thornhill v. Alabama, 310 U.S. 88 (1939); Cantwell v. Connecticut, 310 U.S. 296 (1939); Abrams v. United States, 250 U.S. 616 (1919); Shenck v. United States, 249 U.S. 47 (1918).

[1] NEW YORK HERALD TRIBUNE, THE WORLD ALMANAC 367 (1957).

[2] *Ibid.*

[3] *Id.*, 1945-55.

[4] The ingestion of enough alcohol to give a blood content of between 0.10 and 0.15 per cent alcohol (which is for most people five or six cocktails) multiplies the chances of a person's having an accident by three. If the blood content of alcohol goes above 0.15 per cent, a person's chances of having an accident are multiplied by ten. Traffic Review & Digest, Aug. 1954, p. 2.

law where some such corrective action might appropriately be taken.

A situation which involves great potential danger to the highway public and which has given the courts of other states considerable difficulty is this: The defendant is found alone in the front seat of an automobile, obviously intoxicated. The car is stopped on a public thoroughfare at night; the lights are on, but the engine is dead. There is no evidence as to how the car got there, or how long it or the defendant has been there. The controlling statute makes it unlawful to operate or drive an automobile while under the influence of alcohol.[5]

The question is, should the defendant be convicted on these facts of driving or operating a car while intoxicated? Do the foregoing facts constitute proof beyond a reasonable doubt that the defendant operated his car while intoxicated?

There have been four cases decided where the facts were essentially those given above,[6] and the result is an even split as to what conclusions should be drawn from the facts.

Supporting the view that a set of facts such as outlined above is sufficient to go to the jury, and therefore sufficient to support a conviction of drunken driving, is *State v. Baumgartner*.[7] There, the defendant was found at about midnight in his truck, stopped in the proper traffic lane on a main street. His lights and ignition were on, but the engine was off. The defendant was slumped over the wheel, unconscious. On appeal from a conviction of drunken driving, the defendant contended there was no evidence that he had driven the truck while drunk. The court rejected the argument, stating:

> It is true that no one actually saw defendant driving his truck, but the evidence amply supports the conclusion that he actually did so. From the undisputed facts in the case the inference is inescapable that defendant operated his truck while under the influence of intoxicating liquor.[8]

[5] N.C. GEN. STAT. § 20-138 (1953) provides as follows: "It shall be unlawful and punishable . . . for any person . . . who is under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within this State."

[6] State v. McDonough, 129 Conn. 483, 29 A.2d 582 (1942); State v. Hazen, 176 Kan. 594, 272 P.2d 1117 (1952); State v. Baumgartner, 21 N.J. Super. 348, 91 A.2d 222 (App. Div. 1952); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955). For cases involving the question of what constitutes "driving" or "operation," see 5A AM. JUR., *Automobiles & Highway Traffic* §§ 1161, 1162 (1956); 61 C.J.S., *Motor Vehicles* §§ 628, 633 (1949). For cases discussing "intoxication," see 5A AM. JUR., *Automobiles & Highway Traffic* § 1159 (1956); 61 C.J.S., *Motor Vehicles* §§ 625, 627 (1949). For cases on attempts to drive, see 5A AM. JUR., *Automobiles & Highway Traffic* § 1167 (1956); 61 C.J.S., *Motor Vehicles* § 630 (1949). For a comprehensive discussion of the various aspects of the subject, see Annot., 47 A.L.R.2d 570 (1956).

[7] State v. Baumgartner, *supra* note 6.

[8] *Id.* at —, 91 A.2d at 223.

In accord with the foregoing case is *State v. Hazen*,[9] where the court said,

> For all the record shows, the jury reached the obvious conclusion that the defendant drove the vehicle to the place where it was found, and that at the time was under the influence of intoxicating liquor, on the theory that a sober person would not park his car in the middle of the highway with the lights off, after dark . . . . [T]he circumstantial evidence above related was sufficient to withstand the demurrer and to support the verdict of guilty.[10]

In contrast to these cases is *State v. Hall*.[11] Again the facts were those of the hypothetical,[12] but on appeal from a conviction this court stated:

> [T]here is no evidence that he had operated his automobile while intoxicated. He was not seen driving the car; the car was not seen in motion prior to the time the officers found it; no one knew how long it had been there; the defendant was seated on the passenger side . . . . The inferences that may be drawn from the circumstantial evidence are as consistent with innocence as with guilt.[13]

In *State v. McDonough*,[14] the court reversed a conviction with this language:

> Our law is settled that the proof of guilt must exclude, not every possible, but every reasonable supposition of the innocence of the accused . . . . We conclude that the evidence in the instant case does not exclude every reasonable supposition of the innocence of the defendant.
>
> . . . . A rational and reasonable conclusion would be that another person had driven the car and had gone to secure assistance in extricating the wheel from the wire.[15]

[9] 176 Kan. 594, 272 P.2d 1117 (1954). The defendant in this case was found on a rural road instead of in the city, and his lights were off instead of on.

[10] *Id.* at 595, 272 P.2d at 1118.

[11] 271 Wis. 450, 73 N.W.2d 585 (1955).

[12] In this case, the car was stopped at night with the lights burning and the engine running. The right front door was open, and it appeared that the defendant had gotten out to answer a call of nature. When found, he was in the passenger's seat.

[13] State v. Hall, 271 Wis. 450, 452, 73 N.W.2d 585, 586 (1955).

[14] 129 Conn. 483, 29 A.2d 582 (1942). This case differs from the preceding cases in that the car was in a ditch on the right-hand side of the road with a wheel over a wire of a fence.

[15] *Id.* at 485, 29 A.2d at 583. For cases involving slight variations on the facts of the principal cases given above and which uphold a conviction, see: State v. Elliott, 13 N.J. Super. 432, 80 A.2d 473 (App. Div. 1951) (Defendant was seen drunk, and a short time thereafter his car was seen being driven into his backyard with only one occupant. Shortly after this the defendant was found slumped over its steering wheel; *held*, logical conclusion that the defendant was driving under the influence of alcohol.); Hughes v. State, 161 Tex. Crim. 300, 276 S.W.2d

Drunken driving in North Carolina is prohibited by G.S. § 20-138,[16] which defines three distinct elements of the offense: (1) driving a vehicle, (2) on the highway,[17] (3) while under the influence of intoxicating liquor.[18] In the situation hereinbefore presented, the latter two elements would not be in issue. As to the first, the North Carolina Supreme Court has held that "driving" imports motion,[19] and, therefore, sitting at the wheel of a standing car would not, as such, violate the statute.

No North Carolina case has been found which has presented the hypothetical fact situation under consideration, but in a case bearing some analogy to the present situation,[20] the state's evidence showed that the defendant's truck ran into *A*'s car, and that the defendant was "in the truck going off."[21] *A* got a policeman and they found the defendant alone in his truck a short time later about six-tenths of a mile from the scene of the accident. On the defendant's motion for nonsuit, the court held the evidence sufficient to support a conviction of operating a vehicle while under the influence. This case differs from the principal cases discussed herein in that there was some direct evidence that the de-

813 (1955) (Witness saw car being driven erratically; only one person in it. Car stopped, witness went on for eleven miles and informed patrolman who found defendant as reported. Conviction upheld.).

For similar cases refusing to uphold a conviction, see People v. Kelly, 27 Cal. App. 753, 70 P.2d 276 (App. Dep't 1937) (Two cars collided; when witness appeared defendant and a young woman were standing at the scene. Appellate court reversed a conviction; driver could have been either party.); Kelley v. State, 294 S.W.2d 404 (Tex. Crim. 1956) (Witness wakened by sound of crash outside home; dressed and went to scene immediately. Found defendant in car alone, with the left front door open. Conviction reversed on appeal; state did not disprove hypothesis that car could have been driven by another.); Spinks v. State, 156 Tex. Crim. 418, 243 S.W.2d 173 (1951) (Witness heard crash and went to investigate. Found defendant climbing out left side of front seat. Conviction reversed for insufficient evidence.). For an extreme case upholding conviction, see Lytle v. State, 299 P.2d 175 (Okla. 1956) (Witness saw a car ahead of him speeding and apparently trying to hit another car. Witness took license number, and saw car parked; there was only one occupant. He then notified policeman, who found car as reported. Policeman then went into nearby pool hall where he found defendant, owner of car, who had the keys to the car. Policeman had seen defendant drive car "previously," but defendant was not identified by witness. A conviction of drunken driving was upheld.).

[16] N.C. GEN. STAT. § 20-138 (1953).

[17] For a discussion of this element of the offense, see State v. Perry, 230 N.C. 361, 53 S.E.2d 288 (1949).

[18] For a discussion of the tests of intoxication in North Carolina, see State v. Willard, 241 N.C. 259, 84 S.E.2d 899 (1954). For a discussion of the sufficiency and admissibility of the evidence of intoxication, see State v. Willard, *supra;* State v. Warren, 236 N.C. 358, 72 S.E.2d 763 (1952); State v. Newton, 207 N.C. 323, 177 S.E. 184 (1934). For a definition of "under the influence," see State v. Lee, 237 N.C. 263, 74 S.E.2d 654 (1953); State v. Biggerstaff, 226 N.C. 603, 39 S.E.2d 619 (1946); State v. Carroll, 226 N.C. 237, 37 S.E.2d 688 (1946).

[19] State v. Hatcher, 210 N.C. 55, 185 S.E. 435 (1936).

[20] State v. Nall, 239 N.C. 60, 79 S.E.2d 354 (1953).

[21] *Id.* at 61, 79 S.E.2d at 355. The reported evidence did not make this point entirely clear.

fendant who was found in the truck had been "in the truck going off" only a short time previously.[22]

The traditional rule governing the sufficiency of circumstantial evidence to go to the jury in North Carolina is stated in the leading case of *State v. Matthews*:[23] "[T]he true rule is that the circumstances and evidence must be such as to produce a moral certainty of guilt and to exclude any other *reasonable hypothesis*."[24] The differing functions of the court and the jury were explained in *State v. Prince*:[25] "The sufficiency of proof in law is for the court—the moral weight of legally sufficient proof is for the jury."[26] Applying the North Carolina rule as stated in the preceding cases to the hypothetical situation earlier stated, there is at least some doubt that the North Carolina Supreme Court would allow such a case to go to the jury under the existing statute.[27]

Ten states[28] now have statutes making it unlawful to drive *or to be in actual physical control* of a vehicle while intoxicated,[29] and both Canada and England have long had such statutes.[30] Only four cases have been found involving the construction of state statutes prohibiting *control* of a vehicle while intoxicated.[31] In *State v. Webb*,[32] after first deciding that the Arizona statute[33] defined a new crime, the court remarked,

> It appears to us to be even more important for the legislature to prevent operators of cars who are under the influence of intoxicating liquors . . . from entering upon the highways and into the stream of traffic than to permit them to enter thereon and after a tragic accident has happened to punish them for maiming

[22] *Cf.* State v. Newton, 207 N.C. 323, 177 S.E. 184 (1934).
[23] 66 N.C. 106 (1872).
[24] *Id.* at 115.
[25] 182 N.C. 788, 108 S.E. 330 (1921).
[26] *Id.* at 791, 108 S.E. at 331. For a collection of cases on the sufficiency of circumstantial evidence to go to the jury, see State v. Smith, 236 N.C. 748, 73 S.E.2d 901 (1952).
[27] N.C. GEN. STAT. § 20-138 (1953).
[28] Ariz., Ark., Fla., Idaho, Mont., Neb., N.M., Tenn., Utah, and Wash.
[29] A typical statute is that of Arizona, which provides in pertinent parts: "It is unlawful and punishable . . . for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any vehicle within this state." ARIZ. REV. STAT. ANN. § 28-692 (1956).
[30] CAN. REV. STAT. c. 36, § 285(4) (1927); Road Traffic Act, 1930, 20 & 21 GEO. 5, c. 43, § 15.
[31] State v. Webb, 78 Ariz. 8, 274 P.2d 338 (1954); Uldrich v. State, 162 Neb. 746, 77 N.W.2d 305 (1956); State v. Wilgus, 31 Ohio Op. 443 (C.P. 1945); State v. Mason, 89 S.E.2d 425 (W. Va. 1955). West Virginia and Ohio have since amended their statutes eliminating the "control" provisions. OHIO REV. CODE ANN. § 4511.19 (Page 1954); W. VA. CODE ANN. § 1721(331) (1955).
[32] State v. Webb, *supra* note 31.
[33] ARIZ. REV. STAT. ANN. § 28-692 (1956).

or causing the death of those who are lawfully in the use of such highways.[34]

Two of the other decisions[35] are of similar import; the third, however, holds that a statute similar to that of Arizona defined but one crime,[36] *viz.*, drunken driving.

The English and Canadian cases seem now to be wholly agreed that statutes imposing criminal liability for being in the "actual physical control" of a vehicle while intoxicated defined a new crime.[37] Prior to the statutory amendment in 1947,[38] there was disagreement among the Canadian cases on whether *mens rea* was an essential element of the crime,[39] but the amendment seems to have effectively established that being in control of a vehicle while intoxicated ipso facto constitutes the crime.[40] Furthermore, it places the burden on an intoxicated person found in the driver's seat to prove that he was not in control.[41]

The English courts have gone even further in their decisions on this question. In a case decided in 1952,[42] the defendant had come out of a pub, and was walking toward a van parked nearby. He was observed by an officer, who inquired if the defendant was going to drive the van home. Upon receiving an affirmative answer, the officer arrested the defendant for being in charge of a vehicle while intoxicated. The case was dismissed below, but on appeal, the court said, in abrupt language clearly indicative of its feelings on the matter, "I cannot understand the difficulty which the justices of Middlesex . . . found in this case."[43] Whereupon it reversed the dismissal and remanded the case for trial.[44]

In view of the gravity of the "alcohol-accident" problem in North Carolina, and the probability that the North Carolina court would not

[34] State v. Webb, 78 Ariz. 8, 11, 274 P.2d 338, 339 (1954), quoting from State v. Harold, 74 Ariz. 210, 215, 246 P.2d 178, 181 (1952).

[35] State v. Wilgus, 31 Ohio Op. 443 (C.P. 1945); State v. Mason, 89 S.E.2d 425 (W. Va. 1955).

[36] Uldrich v. State, 162 Neb. 746, 77 N.W.2d 305 (1956).

[37] Rex v. Crowe, [1941] 76 Can. Crim. R. 170, 4 D.L.R. 82; Jowett-Shooter v. Franklin, [1949] 2 All E.R. 730 (K.B.).

[38] Criminal Code, 1947, 11 GEO. 6, c. 55, § 10 (Canada).

[39] See Rex v. Crowe, [1941] 76 Can. Crim. R. 170, 4 D.L.R. 82; Rex v. Thomson, [1941] 75 Can. Crim. R. 141, 1 D.L.R. 516.

[40] Rex v. Johnston, [1950] 97 Can. Crim. R. 345, 3 D.L.R. 48.

[41] The present Canadian statute reads, in part, as follows: "[W]here a person occupies the seat ordinarily occupied by the driver of a motor vehicle or automobile he shall be deemed to have the care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion." CAN. REV. STAT. c. 36, § 285(4) (1927) (later amended, Criminal Code, 1954, 2-3 ELIZ. 2, c. 51, §§ 222-24 (Canada)).

[42] Leach v. Evans, [1952] 2 All E.R. 264 (Q.B.).

[43] *Ibid.*

[44] *Ibid.* An interesting development of the English law was the extension of the provisions of their comparable law to include the operation of bicycles. Road Traffic Act, 1930, 20 & 21 GEO. 5, c. 43, § 15 (later amended, 4 & 5 ELIZ. 2, c. 67, § 11 (1956)).

sustain a conviction in the hypothetical hereinbefore presented, it is suggested that a statute such as that in force in Canada[45] is desirable. Under the Canadian statute, the elements of the offense are two: (1) impairment of the defendant's ability to drive a motor vehicle by alcohol; and (2) having the care or control of a motor vehicle during such impairment. Such a statute properly relieves the courts of the burden of trying to reconcile the need for full proof of guilt of the accused with the conflicting need for protection of the public on the highways. It properly raises a presumption against one who is found in such circumstances, yet it does not foreclose a showing by the defendant that he was not actually in control[46] of the vehicle, and was not, therefore, creating the danger which is to be obviated.

LUKE R. CORBETT

Criminal Procedure—Arrest Without a Warrant—Informer's Tip as Constituting Reasonable Grounds

In *Draper v. United States*[1] a federal narcotics agent was notified by a hired informer that defendant was peddling dope to several addicts in the Denver area. Four days later the informer revealed that defendant would go to Chicago to get heroin on a certain day and that he would return on a morning train on either of two given days. The informer's tips had always been reliable in the past. The agent had never heard of defendant before and it was not shown whether or not he had a criminal record. A complete description of physical characteristics, clothing, and manner of walking was given. On the morning of the second day the agent saw a man leaving the Chicago train who matched the description given by the informer. Defendant was approached and seized by the agent. When he gave a name which did not correspond with the tip his wallet was taken and his true identity learned. He was placed under arrest and a search of his person revealed two ounces of heroin and a syringe. The agent had no warrant.

Before trial[2] defendant moved to suppress the evidence on the ground that the search was unreasonable under the fourth amendment[3] because made incident to an unlawful arrest. Thus the sole issue on the

[45] CAN. REV. STAT. c. 36, § 285(4) (1927) (later amended, Criminal Code, 1954, 2-3 ELIZ. 2, c. 51, §§ 222-24 (Canada)).

[46] Rex v. Johnston, [1950] 97 Can. Crim. R. 345, 3 D.L.R. 48 (dictum). *Cf.* Jowett-Shooter v. Franklin, [1949] 2 All E.R. 730 (K.B.) (Defendant who got into a car, but not under the steering wheel, and not intending to drive, found to be in charge of vehicle, but driving permit not suspended because no intent to drive).

[1] 248 F.2d 295 (10th Cir. 1957).

[2] United States v. Draper, 146 F. Supp. 689 (D. Colo. 1956).

[3] U.S. CONST. amend. IV.

defendant's motion was the lawfulness of the arrest. The motion was denied and defendant was tried and convicted. The court of appeals, in affirming, found the arrest valid because "the information furnished, together with the verification thereof after appellant alighted from the train, was sufficient to give the agent reasonable grounds to believe that appellant was committing a violation of the Narcotics Act."[4]

A strong dissenting opinion argued that the arrest was unlawful because, *inter alia,* hearsay information alone, with no other indication of guilt within the officer's knowledge, is not a reasonable ground for belief of guilt.[5] This contention presents a problem which has not infrequently been before the federal courts, *viz.,* the weight to be given an informer's tip in determining whether an officer arresting without a warrant had "reasonable grounds."[6]

To be given any effect at all the information must come from one who is reliable. An uncorroborated tip by an informer whose identity

[4] 248 F.2d at 299.

[5] Judge Huxman, writing the dissent, also stated that the arrest was unlawful because the exigencies of the situation did not call for arrest without a warrant. Such a requirement is not generally said to be a prerequisite for a valid arrest. The common law rule is that "where an officer, in good faith, believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise, he has such probable cause for his belief as will justify him in arresting without a warrant." 6 C.J.S., *Arrest* § 6, at 596 (1937). No case has been found where it was held that the fourth amendment required any more where the issue was the validity of an arrest. Some jurisdictions have, by statute, added the requirement that there be a danger that the suspected felon will escape if not arrested. See, *e.g.,* N.C. GEN. STAT. § 15-41 (Supp. 1957). Federal narcotics agents are not common law peace officers, but the statute under which the agent in the principal case acted authorizes arrest without a warrant where the agent has "reasonable grounds" to believe that the person to be arrested has violated the narcotics laws. Narcotic Control Act of 1956, 70 STAT. 567, 26 U.S.C. § 7607(2) (Supp. 1957). This in effect gives narcotics agents the same power that common law peace officers have to arrest without a warrant. The two cases on which Judge Huxman relied on this point, McDonald v. United States, 335 U.S. 451 (1948), and United States v. Vleck, 17 F. Supp. 110 (D. Neb. 1936), dealt with searches of dwellings without warrants and the federal courts have been consistently critical of invasion and search of houses without a warrant in the absence of exceptional circumstances requiring immediate action. Johnson v. United States, 333 U.S. 10 (1948). In Agnello v. United States, 269 U.S. 20, 32 (1925), the Court said: "[I]t has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein." See also Worthington v. United States, 166 F.2d 557 (6th Cir. 1948).

[6] The question is usually presented by the defendant's pre-trial motion to suppress evidence seized incident to the allegedly unlawful arrest. At least two cases have rejected such information altogether on the ground that the arresting officer must be possessed of facts that would be competent evidence in a jury trial and not mere hearsay information. Grau v. United States, 287 U.S. 124 (1932); Worthington v. United States, *supra* note 5. But this view, as pointed out by the district judge in the principal case, was disapproved in Brinegar v. United States, 338 U.S. 160 (1949), on the ground that the issue on defendant's motion was not his guilt or innocence but was rather the reasonableness of the officer's belief in guilt at the time of the arrest.

and reliability are unknown is not considered.[7] In *United States v. Blich*[8] the arrest was invalidated because the source of the information was not given so that the court could pass on its reliability, while in *Ard v. United States*[9] the implication is that it was sufficient that the officer considered the source reliable.

In a few cases there is dicta to the effect that reliable information alone would be sufficient grounds on which to base an arrest without a warrant.[10] But the general rule is that such information, unless supplemented by further facts, is insufficient.[11] In a majority of the cases where arrests prompted by tips were upheld, the "further facts" were things observed by the officers which of themselves tended to indicate guilt independent of the informer's tip.[12] In several cases the only supplementary information the officers had was a knowledge of prior criminal activity and the arrests were held lawful.[13] Two district court cases stand in opposition to the two last-mentioned views, however. In *United States v. Clark*[14] the officers knew that a grocery store was illegally selling narcotics, saw defendant enter the store with the informer, and by pre-arranged signal were tipped off by the informer that defendant had narcotics in her possession when she came out. The arrest was held unlawful because there was no showing (to the officers) that "the informer's information was itself more than mere guess-work

[7] Contee v. United States, 215 F.2d 324 (D.C. Cir. 1954).

[8] 45 F.2d 627 (D. Wyo. 1930).

[9] 54 F.2d 358 (5th Cir. 1931), *cert. denied,* 285 U.S. 550 (1932). See also Cannon v. United States, 158 F.2d 952 (5th Cir. 1946), *cert. denied,* 330 U.S. 839 (1947).

[10] Cannon v. United States, *supra* note 9, at 954; United States v. Heitner, 149 F.2d 105, 106 (2d Cir. 1945), *cert. denied,* 326 U.S. 727 (1945); Somer v. United States, 138 F.2d 790, 791 (2d Cir. 1943).

[11] United States v. Bianco, 189 F.2d 716, 720 (3d Cir. 1951) (dictum); United States v. Sebo, 101 F.2d 889, 891 (7th Cir. 1939) (dictum); Wisniewski v. United States, 47 F.2d 825, 826 (6th Cir. 1931) (dictum); United States v. Turner, 126 F. Supp. 349, 352 (D. Md. 1954) (dictum); MACHEN, SEARCH AND SEIZURE 51, 52 (1950).

[12] Husty v. United States, 282 U.S. 694 (1931) (two passengers fled when officers stopped defendant's car); United States v. Bianco, *supra* note 11 (defendant carried abnormally large suitcase for one day trip and was seen with two known offenders); United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945) (defendant dropped a bottle of opium wine on being approached by the officer); United States v. Heitner, 149 F.2d 105 (2d Cir. 1945), *cert. denied,* 326 U.S. 727 (1945) (defendants drove away rapidly after seeing the officers); Stobble v. United States, 91 F.2d 69 (7th Cir. 1937) (defendant seen carrying two small envelopes of the usual size and color in which heroin is contained); Coupe v. United States, 113 F.2d 145 (D.C. Cir. 1940), *cert. denied,* 310 U.S. 651 (1940) (officers saw what looked like "numbers" pads through the window of defendant's car); Wisniewski v. United States, *supra* note 11 (officers saw defendant get a jug and burlap bag out of a known bootlegger's car and put them in his own car).

[13] United States v. Walker, 246 F.2d 519 (7th Cir. 1957); Ard v. United States, 54 F.2d 358 (5th Cir. 1931), *cert. denied,* 285 U.S. 550 (1932); United States v. Turner, 126 F. Supp. 349 (D. Md. 1954).

[14] 29 F. Supp. 138 (W.D. Mo. 1939).

and speculation."[15] In *United States v. Baldocci*[16] narcotics agents were informed that defendant, a known previous offender, was throwing dope over a prison's walls to inmates at night. The agents hid by the wall and arrested defendant when he drove up in a car. The arrest was invalidated because made "merely upon suspicion."

In the principal case there were no "further facts" within the agent's knowledge. Nothing the defendant did independently aroused suspicion and the agent had no knowledge of any past criminal activity. "Reasonable grounds" consisted of the tip plus the fact that defendant's appearance and movements conformed with the information given. At least four cases would seem to be in accord. In *Brady v. United States*[17] the defendants' vehicles were stopped and arrests made after the movements and makes of the vehicles had been checked against the information supplied. In *King v. United States*[18] the movements of defendant's auto were consistent with the tip. In *White v. United States*[19] defendant was arrested as he walked up to a house where addicts were said to be awaiting his arrival with a quantity of narcotics. In *United States v. Hill*[20] the court paid lip service to the rule laid down in the *Clark* case, *viz.*, that information from third persons, no matter how reliable, must be shown to be more than mere speculation, but then proceeded to hold that personal verification by the officers of defendants' movements as described by the informer was sufficient. The quantum of guilt-indication required by these cases was described in the *Hill* case when the court said that reliable information alone was not sufficient but that reasonable grounds existed when "the information received . . . was verified, insofar as it could be, by personal observation and found to be accurate in its particulars."[21] The facts of these cases show that the verification does not have to extend to conduct which would tend of itself to indicate guilt of the crime.

While this line of cases, including the principal case, constitutes a liberal departure from the reliable information plus further facts rule, the decisions are considered sound.[22]

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[15] *Id.* at 140. The fact that the search turns up evidence of guilt has no bearing on the question of whether the arresting officer had "reasonable grounds" at the time of the arrest. United States v. Di Re, 332 U.S. 581 (1948); Byars v. United States, 273 U.S. 28 (1927).

[16] 42 F.2d 567 (S.D. Cal. 1930).

[17] 300 Fed. 540 (6th Cir.), *cert. denied*, 266 U.S. 620 (1924).

[18] 1 F.2d 931 (9th Cir. 1924).

[19] 16 F.2d 870 (9th Cir. 1926), *cert. denied*, 274 U.S. 745 (1927).

[20] 114 F. Supp. 441 (D.D.C. 1953).

[21] *Id.* at 442.

[22] It would appear that the views best illustrated by the following quotation have some support.

"As we look at some of the uses which the criminal classes have made of

Fair Labor Standards Act—Belo Contracts—Hours Guaranteed and Actually Worked

In the 1956 case of *Mitchell v. Hartford Steam Boiler Inspection & Ins. Co.*[1] defendant was engaged in the casualty insurance business, primarily the insuring of steam boilers, pressure vessels, and machinery. The company employed some six hundred inspectors throughout the United States. Their duties necessitated irregular hours of work, usually fluctuating between thirty-five and fifty hours per week. The company paid the inspectors under individual guaranteed wage contracts which provided for an hourly rate of pay in excess of the statutory minimum for the first forty hours in each workweek, time and one-half for each hour over forty, and a weekly guarantee of an amount equivalent to the sum payable if sixty hours were actually worked. It was not contemplated that any inspector would have to work more than sixty hours in any one workweek, and each inspector was required to get special permission before doing so. Actually, only one-fourth of one percent of the workweeks over a two-year period exceeded sixty hours. The Secretary of Labor sought to enjoin the alleged violations of the overtime provisions of the Fair Labor Standards Act.[2] He maintained that the guaranteed wage contract was invalid because the hours worked did not exceed the hours guaranteed in a substantial number of workweeks. The Court of Appeals for the Second Circuit held that the contract was valid under section 7(e)[3] of the FLSA.

The FLSA specifies in section 7(a) that an employee covered by the act must be paid "at a rate not less than one and one-half times the regular rate at which he is employed"[4] for all hours worked in excess of forty for any one workweek. Because of the multitudinous methods of wage compensation used throughout the industries and trades covered by the FLSA, the courts have refrained from giving "regular rate" a rigid interpretation, but have consistently said that the rate the em-

constitutional provisions, one might suppose that the far-seeing barons who wrung the Great Charter from King John at Runnymede were intent upon safeguarding the twentieth century racketeer, gangster, kidnaper, gunman and corrupt political leader in the prosecution of their sinister vocations. It ought to be possible to find a way, by judicial interpretation, to use these constitutional provisions for the protection of liberty without giving them such fanciful and far-fetched interpretations as to convert them into a weapon by which criminals can make war safely upon organized society and its law-abiding members." Address by Judge Samuel Seabury, ALI Annual Meeting, May 7, 1932.

[1] 235 F.2d 942 (2d Cir.), *cert. denied,* 352 U.S. 941 (1956).

[2] Fair Labor Standards Act, 52 STAT. 1060 (1938), as amended, 29 U.S.C. §§ 201-19 (1952), as amended, 29 U.S.C. §§ 204-06, 208, 210, 213, 216 (Supp. IV, 1957), hereinafter referred to as the FLSA or the act.

[3] Fair Labor Standards Act § 7(e), 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 207(e) (1952).

[4] Fair Labor Standards Act § 7(a), 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 207(a) (1952).

ployer and employee fix must be realistic and not artificial or fictitious.[5]

In seeking a method to stabilize wage costs and still comply with the overtime provisions of section 7(a) of the act, some employers have made guaranteed wage contracts with their employees. In their usual form, these contracts provide a basic hourly rate with at least 150 percent of the basic hourly rate for all hours in excess of forty. In addition, the contracts provide a fixed guaranteed salary per week, regardless of the number of hours worked up to a specified maximum. The guaranteed wage is computed from the hourly rate and overtime rate specified in the contract. No additional compensation is paid the employee unless the maximum hours are exceeded, and from that point overtime is computed from the specified contractual rate.

The above type of contract was given a judicial test for the first time in *Walling v. A. H. Belo Corp.*,[6] where the employer, a newspaper publisher, made contracts with some of his employees specifying a basic hourly rate and time and one-half for overtime. The contract, in addition, provided the employees with a guarantee of a fixed income each week comparable to fifty-four and one-half hours worked at the contractual hourly rates. The contracts were in writing and whenever a change was made in the guaranteed wage, a corresponding change was made in the basic hourly rate. The United States Supreme Court, in a five to four decision, upheld the contracts as complying with the FLSA. The majority noted that the contracts provided security and regularity of income for employees whose work necessitated irregular hours, and said that when such a contractual arrangement proved mutually satisfactory to employer and employee, "[W]e should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours."[7]

Guaranteed wage agreements since the *Belo* decision have generally been referred to as "Belo" contracts. In three cases after *Belo,* the Supreme Court rejected purported "Belo" contracts.[8] In each case the

[5] "But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes." Mitchell v. Youngerman-Reynolds Hardware Co., 235 U.S. 419, 424 (1945), quoting from Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 42 (1944).

[6] 316 U.S. 624 (1942).

[7] *Id.* at 635.

[8] In Walling v. Helmerich & Payne, Inc., 323 U.S. 37 (1944), the employees were paid at a "regular rate" for one-half the working day and at an "overtime rate" for the remaining one-half of the day. An employee would thus have to work for eighty hours before he could complete forty hours of regular time and qualify himself for full overtime. The Court said: "Even when wages exceed the minimum . . . the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours

Court said that it was not overruling the *Belo* decision, but the effect seemed to be that *Belo* was restricted to its particular facts. In 1947 the Administrator made an unsuccessful attempt to have the *Belo* decision overruled in the case of *Walling v. Halliburton Oil Well Cementing Co.*[9] In that case, an oil well cementing company had Belo-type contracts with its employees. The employees were paid a guaranteed wage which would not be exceeded unless they worked eighty-four hours a week, but it was shown that in twenty percent of the weeks worked, the eighty-four hour week was in fact exceeded. The Court again found a reasonable relationship between the hourly rate and the overtime paid, and rejected the Administrator's contention that the regular rate should be the quotient of the amount of the guarantee, divided by the number of hours *actually worked* in each workweek. Thus, *Belo* was again sustained.[10]

Although disappointed by the Court in his attempt to determine the "regular rate" by taking the total guarantee and dividing it by the hours worked in any given week and computing overtime with this rate as the base, the Administrator sought a narrow construction of the *Belo* and *Halliburton* cases. He felt justified in advocating as the test for the validity of Belo contracts a rule which would require that the hours guaranteed must be exceeded in a "substantial number of workweeks." He reasoned that *only* if the guaranteed hours are exceeded could the regular rate be put into actual operation. In both the *Belo* and *Halliburton* cases, the employees worked *more* than the number of hours guaranteed in *some* weeks. Whether or not these cases provided grounds for such a test is arguable, but the Administrator successfully

actually worked in excess of 40." *Id.* at 42. In Walling v. Youngerman-Reynolds Hardware Co., 325 U.S. 419 (1945), the Court rejected a contract which provided for an hourly rate of thirty-five cents with time and one-half for hours worked over forty, but with a guarantee based on a piece rate of eighty cents per 1000 feet of lumber stacked and seventy cents per 1000 feet of lumber ricked. The evidence showed the guarantee would in practical effect greatly exceed the stipulated hourly rate. The Court said: "The [*Belo*] case is no authority however, for the proposition that the regular rate may be fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees." *Id.* at 426. In Walling v. Harnischfeger Corp., 325 U.S. 427 (1945), a collective bargaining contract with an electrical equipment manufacturer provided both an hourly rate and job prices. If the job prices exceeded the hourly rate, which the evidence showed they did 98.5% of the time, the employees were paid at the job price. Overtime, however, was computed on the basis of the stipulated hourly rate. The Court held that the bonus derived from the job prices must be included in determining the regular rate on which overtime was computed.

[9] 331 U.S. 17 (1947).

[10] *Ibid.* It is interesting to note the language of the Court with reference to the *Belo* decision. "Even if we doubted the wisdom of the *Belo* decision as an original proposition, we should not be inclined to depart from it at this time." *Id.* at 26.

invoked it in cases in two different courts of appeals;[11] however, the Seventh Circuit upheld a Belo contract where the employees never exceeded the hours guaranteed,[12] and the Second Circuit upheld such a contract without reference to the number of workweeks in which the hours guaranteed were exceeded.[13]

The FLSA was extensively amended in 1949,[14] and among the amendments modifying the strict application of section 7(a) was the provision now found in section 7(e) of the act.[15] In substance, this provision lays down the tests which Congress has established for the legality of a particular Belo contract. Four separate tests are included, and all of them must be met if a guaranteed wage contract is to be valid. *First,* the duties of the employee must necessitate irregular hours; *second,* the arrangement must be based on a *bona fide* contract; *third,* the contract must provide a *regular rate* not less than the minimum wage, and at least one and one-half times this rate for *all* hours over forty a week; and *fourth,* the guarantee must cover *not more* than *sixty* hours at the rate specified.

Following the enactment of section 7(e), the Administrator continued to apply the "substantial number of workweeks" test. His position was that by use of the phrase "regular rate," this section incorporated by implication the "substantial number of workweeks" requirement which had been applied to some "Belo" contracts by judicial interpretation prior to the 1949 amendments.[16]

[11] McComb v. Sterling Ice & Cold Storage Co., 165 F.2d 265 (10th Cir. 1947); McComb v. Roig, 181 F.2d 726 (1st Cir. 1950). In the latter case, the court stated: "It is possible, of course, that the relation between the hourly rate and the guaranty might be set by the employer with reference . . . to what the employer supposes would be the maximum possible workweek. In such a case . . . the workers would never exceed their guarantees, the purported hourly rate would never control the amount of the weekly pay and would pretty surely be found to be fictitious." *Id.* at 729-30.

[12] McComb v. Pacific & Atlantic Shippers Ass'n, 175 F.2d 411 (7th Cir. 1949).

[13] McComb v. Utica Knitting Co., 164 F.2d 670 (2d Cir. 1947).

[14] Fair Labor Standards Amendments of 1949, 63 STAT. 910 (1949), 29 U.S.C. §§ 201-08, 211-17 (1952), amending 52 STAT. 1060 (1938).

[15] Fair Labor Standards Act § 7(e), 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 207(e) (1952), which provides: "No employer shall be deemed to have violated subsection [7](a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract . . . if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay not less than the minimum hourly rate provided in section 206(a) of this title and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guarantee of pay for not more than sixty hours based on the rates so specified."

[16] "In order for a contract to qualify as a bona fide contract . . . the number of hours for which pay is guaranteed must bear a reasonable relation to the number of hours the employee may be expected to work. A guarantee of pay for 60 hours to an employee whose duties necessitate irregular hours of work which can reasonably be expected to range no higher than 50 hours would not qualify as a bona fide contract under this section. The rate specified in such a contract would be

The courts of appeals have consistently rejected the Administrator's test in all cases which have been decided since the 1949 amendments to the FLSA. In *Tobin v. Little Rock Packing Co.*[17] an action was brought to enjoin the company from violating overtime and record keeping provisions of the act. The case involved employees (meat processors) of the company who were paid a guaranteed wage based on a fifty hour week. Although none of the employees ever worked in excess of fifty hours, the contract was held to be valid. After stating that the FLSA imposed no inflexible form of contract, the court ruled that the test in each case is whether the wage rate (for non-overtime work) is "fictitious" or whether it is in fact the actual rate paid. The "substantial number of workweeks" test is not mentioned, and section 7(e) is not relied upon to justify the decision. The court said: "Contracts in which, as in the present case, the guaranteed compensation is actually predicated upon and computed by the stipulated wage rate meet all requirements of the Act. This was true before as it is after the amendment of the Act in 1949 to recognize the validity of such contracts."[18]

In *Mitchell v. Brandtjen & Kluge, Inc.*[19] the First Circuit summarized the judicial history of Belo contracts prior to the 1949 amendments, and said that the passage of section 7(e) means that courts are no longer "groping in the dark . . . without statutory guidance . . ."[20] but rather that "the new § 7(e) enables the courts to make a fresh start . . . ."[21] The court distinguished the case of *McComb v. Roig*,[22] which it had decided in 1950 under the pre-1949 act, where the contract was held invalid because, among other reasons, it did not comply with the "substantial number of workweeks" test. The court said that reading a substantial number of workweeks test into section 7(e) as the Administrator proposed would be unwarranted judicial legislation.

Mitchell v. Adams,[23] pending appeal at the time of the *Brandtjen*

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wholly fictitious and therefore would not be a 'regular rate' . . . ." 29 C.F.R. § 778.18(f) (1956). See also 29 C.F.R. § 778.18(g) (1956).

[17] 202 F.2d 234 (8th Cir.), *cert. denied*, 346 U.S. 832 (1953).

[18] *Id.* at 238.

[19] 228 F.2d 291 (1st Cir. 1955), *cert. denied*, 352 U.S. 940 (1956). Here, erectors of printing presses were working under a guarantee of a forty-eight hour week. They exceeded the hours guaranteed in about 3% of the workweeks. The court upheld the contracts and specifically rejected the contention that although the contract otherwise qualified, it was still invalid since the employees did not exceed the hours guaranteed in a "substantial" or "significant" number of workweeks. The Administrator's requirement that the guarantee be based on a weekly "average" was rejected. The court said Congress has chosen not to put the "substantial number of workweeks" test in the Belo contract section of the act. Rejecting the Administrator's contention that the workweeks must be averaged, the court stated that Congress had only restricted the contracts to guarantees of pay for "not more than sixty hours."

[20] *Id.* at 295.

[21] *Id.* at 296.

[22] 181 F.2d 726 (1st Cir. 1950).

[23] 230 F.2d 527 (5th Cir. 1956).

decision, was decided by the Fifth Circuit in 1956. The result was that still another circuit rejected the Administrator's test. In the *Adams* case a shirt manufacturer made the following contract with some of his employees:

> The Employer agrees to employ the Employee at a regular hourly rate of pay at *$1.36* per hour for the first 40 hours in any workweek and at a rate of *$2.04* per hour for all hours in excess of 40 in any workweek, with the guarantee that the employee will receive, in any week in which he performs any work for the Company, the sum of *$95.20* as total compensation, for all work performed up to and including 60 hours in such workweek.[24]

In this case only one employee during one week worked in excess of sixty hours during the five years the contracts were in operation. The Administrator argued that in order to *demonstrate* good faith and show that the regular rate of $1.36 was not fictitious it must be *actually* put into operation in a "substantial number of workweeks" by having the sixty hours exceeded. The court said: "But what was mentioned by the Supreme Court [in the *Belo* case] as merely specific *proof* of good faith . . . the Secretary now turns into an indispensable ingredient of the contractual operations."[25] And also, "We think this misreads both the *Belo* decisional law and the specific 1949 Amendment and is again the search for the handy, arbitrary rule-of-thumb criteria, displacing inquiry and deliberative judgment, leaving it all to the wisdom of the Administrator."[26] The court implies that it could decide the case as it does even without invoking the aid of section 7(e), but cites the *Brandtjen* case with approval. There was no request for certiorari from the *Adams* decision.

In *Mitchell v. Hartford Steam Boiler Inspection & Ins. Co.,* the principal case, the Second Circuit, in rejecting the "substantial number of workweeks" test and sustaining the contracts, summarizes the law of Belo contracts. *First,* the court denies the assertion that this test was established by pre-1949 case law. The court found nothing in either *Belo* or *Halliburton* to substantiate such a test, and although admitting that two courts of appeals had followed this test prior to the 1949 Amendments,[27] called attention to others which did not follow that test.[28] *Second,* the court states that judicial interpretation of section 7(e) has been contrary to the Administrator's position, citing the *Little Rock, Brandtjen,* and *Adams* cases discussed above. The court rejects

[24] *Id.* at 528.
[25] *Id.* at 530.
[26] *Id.* at 529.
[27] See note 11 *supra.*
[28] See notes 12 and 13 *supra.*

the cases on which the Secretary relied[29] (all of them in the district courts) as being either distinguishable on their facts or erroneously decided. *Third,* the court interpreted the legislative history of section 7(e) as indicating congressional unwillingness to adopt the test advocated by the Secretary. The court said that Congress had all the conflicting views on Belo contracts presented to it in 1949 and bills were presented which "(1) expressly outlawed guaranteed wage contracts; (2) permitted their use, but subject to specific limitations including a 'significant number of workweeks' test; (3) permitted their use, without limitation as to the relation between hours worked and hours guaranteed."[30] The court felt that "Congressional adoption of the third alternative . . . suggests . . . that it did not intend their [Belo contracts] use in the manner suggested by the Secretary."[31] To reinforce its view, the

[29] Sikes v. Williams Lumber Co., 123 F. Supp. 853 (E.D. La. 1954); Tobin v. Keystone Mfg. Co., 143 F. Supp. 231 (W.D. Ark. 1952); Tobin v. Ewbank Motor Freight Lines, Inc., 23 CCH Lab. Cas. ¶ 67411 (W.D. Tenn. 1952); Tobin v. Wenatchee Air Service, Inc., 21 CCH Lab. Cas. ¶ 67019 (E.D. Wash. 1952); Tobin v. Morristown Poultry Co., 21 CCH Lab. Cas. ¶ 66798 (E.D. Tenn. 1952); Tobin v. Aronow, 96 F. Supp. 279 (D. Mont. 1951).

[30] 235 F.2d at 945.

[31] *Ibid.* Recourse to the bills introduced in both houses of Congress reveal that H.R. 2033, 81st Cong., 1st Sess. § 7(c) (1949), and S. 653, 81st Cong., 1st Sess. § 7(c) (1949), would have outlawed Belo contracts. H.R. 3190, 81st Cong., 1st Sess. § 7(c) 1949, would not have outlawed Belo contracts, but would have made them meet the specifications of regulations promulgated by the Secretary of Labor.

In its reference to congressional rejection of a bill that permitted the use of Belo contracts "subject to certain limitations including a 'significant number of workweeks' test," the court was probably referring to H.R. 5856, 81st Cong., 1st Sess. (1949), which was introduced by Congressman Lesinski on August 2, 1949. This bill was cited by appellee in his brief before the Second Circuit at pages 9-11. Letter from Stuart Rothman, Solicitor of Labor, to J. Halbert Conoly, February 27, 1958.

The Lesinski bill was removed from committee and debated on the floor of the House. The Lesinski bill provided in part in section 7(c):

> "[I]n the case of an employee in an occupation in which hours of work necessarily vary from week to week, employed in pursuance of a written contract . . . which expressly provides, in conformity with regulations of the Secretary—
>
> "(1) a bona fide hourly rate of pay specified and actually used as the basis on which all compensation . . . is computed;
>
> "(2) a guarantee of compensation to the employee for each hour in excess of forty worked by him in any workweek, in an amount not less than one and one-half times such bona fide hourly rate; and
>
> "(3) a specified minimum number of hours (not less than forty and not more than sixty, and bearing a reasonable relationship to the range of weekly hours customarily worked in such occupation during a representative period of time) for which such employee is guaranteed employment or pay in each workweek at the rates specified in the contract;
>
> nothing in this subsection shall be deemed to require the payment by the employer to such employee of a greater amount of overtime compensation under this section than is provided by such written contract."

The Lesinski bill was amended by the Lucas bill, and in place of section 7(c) above, the provision found in section 7(e) of the present law was passed by the House. See note 15 *supra.*

This portion of the 1949 Amendments received very little attention on the floor of the House. Congressman Combs, speaking on behalf of the Lesinski bill

court applied two guides of statutory construction. First, that the inclusion of express limitations on the use of Belo contracts in section 7(e) indicates limitations not expressed were not intended, and second, the inclusion of a requirement in section 7(f) (3) similar to that advocated by the Secretary in section 7(e) would support a similar inference.[32] The court in *Hartford* felt that the legislative history of section 7(e) indicated that Congress rejected any "substantial number of workweeks" test.

However, it is difficult to find any clear congressional intent on this subject. It is doubtful whether Congress was sufficiently concerned with this issue to either affirm or reject such a test. With the exception of limiting a Belo contract to a maximum guarantee of sixty hours, Congress adopted the *Belo* case as set out by the Supreme Court. This could indicate that the Congress in general was satisfied with the judicial interpretations of guaranteed wage contracts. Congress may have lacked any specific intention to incorporate by implication a "substantial number of workweeks" test into the FLSA by the use of the term "regular rate." It would be just as doubtful that Congress intended to authorize a wage contract where the hourly rate was fictitious and unrealistic. The use of the words "regular rate" in the light of judicial interpretation would seem to reject any such intention. The better reasoning would be that Congress left this question to be determined by the courts in the light of the earlier cases dealing with Belo contracts.[33]

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and against the Lucas substitution, said, "The Lesinski bill authorizes the Secretary to issue regulations setting forth the conditions under which such contracts may be used, and how they have to work. The Lucas bill . . . fails to define the terms, fails to set real restraints, and fails to authorize the Secretary to issue regulations." 95 CONG. REC. 11221 (1949). If H.R. 5856, as originally proposed by Lesinski, is the bill referred to by the court in the *Hartford* case as incorporating the "substantial number of workweeks" test, the court's conclusion is open to the criticism that Congress merely may have refused to allow the Secretary such broad rule-making authority. Neither H.R. 3190 nor the Lesinski version of H.R. 5856 specifically sets out the "substantial number of workweeks" test.

[32] The court appears to be applying its rules of construction to a situation where they are inapplicable. In most of the 1949 amendments to § 7 of the act, Congress was seeking to deal with problems created by specific decisions. The amendments sought to adjust § 7 to the realities of the industrial world by permitting wage plans that complied with the spirit of the act if not its technical language. Since the purpose of § 7(a) would still apply to the exceptions such as § 7(e), the application of a strict technical construction as in the *Hartford* case is unjustified. Furthermore, the analogy the court attempts to make between §§ 7(e) and 7(f)(3) is unjustified since § 7(e) was aimed at employees whose *hours* of employment were irregular, and § 7(f)(3) was designed for employees whose hourly *rate* was subject to unusual fluctuations such as salesmen on salary and commission.

[33] Several articles and publications after the 1949 amendments indicate approval of the "substantial number of workweeks" test. See Brewer, *A "Belo" Primer for 1950*, 1 LAB. L.J. 94 (1949); Note, 98 U. PA. L. REV. 264 (1949); LIVENGOOD, THE FEDERAL WAGE AND HOUR LAW 143 (1952).

The Second Circuit followed its decision in *Hartford* when it was confronted with *Mitchell v. Feinberg*,[34] where a group of delivery men, working under a collective bargaining contract, was guaranteed a forty-eight hour week, and the hours worked did not exceed the hours guaranteed in a substantial number of workweeks. In addition to the guarantee, the contract provided that one-fifth of the guarantee was to be deducted for each day the employee missed work during the five-day week, for any reason other than lack of work. The district court had held the contract invalid.[35] The court of appeals in a per curiam opinion reversed, relying on the *Hartford* case, and saying with regard to the one-fifth deduction provision, "It is true that under the Feinberg contract an employee may receive greater compensation, in terms of hourly rates, for weeks in which he works four days (or less) than in weeks in which he works five days. This incident, however, is not violative of the Act and constitutes, in our judgment, insufficient ground to differentiate the case from Hartford." The judge who wrote the *Hartford* decision concurred in holding that the "substantial number of workweeks" test was no basis for saying the contract was invalid, but dissented from the view of the majority that *Hartford* was a ground for saying a deduction from the guarantee could be validly made.[36]

In spite of its rejection by the courts, there is merit in the Administrator's argument. If the courts are going to approve contracts similar to those in the *Hartford* case, the overtime policy of the FLSA is being defeated. It would seem that any basic or overtime rates specified in such contracts have no meaning and are completely fictitious. An attorney for an employer whose employees work irregular hours but never in excess of sixty could advise the employer to set the maximum hours covered by the guaranteed wage contract at sixty per week. The employer could determine a "regular rate" sufficient to guarantee a weekly wage the employee is willing to accept. It is obvious in such a case that the specifying of an hourly regular rate is nothing more than creating an arbitrary figure to satisfy a technical requirement of the FLSA. The employees will always receive the same amount of pay,

[34] 236 F.2d 9 (2d Cir.), *cert. denied*, 352 U.S. 943 (1956).

[35] Mitchell v. Feinberg, 123 F. Supp. 899 (E.D.N.Y. 1954).

[36] 236 F.2d at 13. "I contend that the Act requires the employer . . . to pay the guaranteed sum in compliance with § 7(e), or . . . to pay his employees in accordance with the 'regular rate' specified in the agreement as required by § 7(a) and reiterated in § 7(e). I reach this conclusion reluctantly because of the obvious benefits to employees of such a practice as the daily crediting of overtime." The dissent relied on a pre-amendment case, 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199 (1947). The idea expressed was that it should be a case of either pay the guarantee regardless of days missed, or use the regular rate without the overtime in workweeks of less than forty hours. The act does not permit the payment of daily overtime, which this contract permits, and this practice would undermine the "regular rate" language of the act.

exactly as though they were being paid a weekly salary without regard to an hourly rate.

The courts have consistently rejected Belo wage plans where no hourly rate is specified or where the fixed wage is changed without a corresponding change in the hourly rate. Assume a plan that specified no hourly rate, but merely guaranteed a fixed wage for sixty hours work,[37] and the employer testified at the trial of the case that neither he nor the employees felt it necessary to specify any hourly rate since none of the employees exceeded sixty hours of work per week. If a court should hold such a contract invalid and yet hold the contract in *Hartford* valid, it would in effect be saying that it was looking only to the technical form of the contract, and not to its substance, since in either situation the wages paid the employees would be the same. It is difficult to believe that Congress in enacting section 7(e) intended such a result.

Although the "substantial number of workweeks" test so persistently advocated by the Administrator has not survived judicial scrutiny,[38] it is submitted that the overtime provisions of the FLSA are being circumvented by Belo-type contracts where the hours guaranteed are not exceeded. If the "regular rate" set in these contracts is truly bona fide, it is difficult to perceive how employers could afford to pay such high wages for hours not spent on the job. Perhaps this is another reason why the Administrator looks upon these contracts with a jaundiced eye.

J. HALBERT CONOLY
JAMES F. SMITH

Marriage—Annulment—Doctrine of Relation Back

In October 1952 a widow was entitled to benefits under the Social Security Act[1] as the unremarried widow of a deceased wage earner. These benefits were terminated because of her marriage in June 1954. In November she filed for annulment on the ground of fraud in that the husband never intended to consummate the marriage. The husband

[37] See Sikes v. Williams Lumber Co., 123 F. Supp. 853 (E.D. La. 1954), where the district court rejected a purported Belo contract which provided $75.00 for fifty-three hours work, with no regular rate stated in the contract. The court said that since no hourly rate was specified in the agreement, the rate alleged by the defendant was fictitious.

[38] Although there have been no revisions of the Administrator's Interpretative Bulletins published since the *Hartford* and *Feinberg* decisions, the public is currently being advised on request that the "substantial number of workweeks" test is no longer the sole criterion in adjudging the validity of a particular Belo-type contract, but may be given weight in determining the bona fide nature of the contract. Interview with Pauline W. Horton, North Carolina Federal Representative for the Wage and Hour and Public Contracts Division of the United States Department of Labor, February 13, 1958. This position has some support in the language of the court in the *Adams* case. See notes 23-26 *supra*.

[1] 49 STAT. 623 (1935), 42 U.S.C. § 402 (1952).

defaulted and the court issued a decree of annulment in December 1954. After the decree of annulment the widow requested reinstatement of her benefits. Her application for reinstatement was denied by the Bureau of Old Age and Survivors Insurance, Social Security Administration. After exhausting her administrative remedies, she commenced this action for review of the administrative decision. The district court held that her benefits should be reinstated[2] and the court of appeals affirmed.[3] The appellate court's decision turned on the legal effect given to an annulment under California law and on the meaning of the word "remarriage." In California the legal effect of an annulment is that no valid marriage ever existed, even though the marriage is only voidable.[4] The court looked to workmen's compensation cases[5] and applied the meaning there given to the word remarriage, *viz.*, a valid and subsisting marriage and not a void or voidable marriage.

From the standpoint of legal theory, it would appear that if a subsequent marriage is void the doctrine of relation back should always apply (in the absence of a statute); but, if the subsequent marriage is only voidable, the doctrine of relation back should not apply as such marriages are deemed valid until avoided.[6] Nevertheless, there are cases within the same jurisdiction holding that the doctrine does apply and cases holding that it does not apply where the marriage is voidable.[7] Some courts make it clear that whether or not they will apply the doctrine will depend upon whether it effects a result which conforms to the sanctions of sound policy and justice as between the parties, their property rights, and the rights of their offspring.[8] Other courts seem to reach the same conclusion without expressly indicating that their decision is based upon the equities of the situation rather than upon strict legal theory.[9]

[2] Pearsall v. Folsom, 138 F. Supp. 939 (N.D. Cal. 1956).

[3] Folsom v. Pearsall, 245 F.2d 562 (9th Cir. 1957).

[4] Millar v. Millar, 175 Cal. 797, 167 Pac. 394 (1917); Goff v. Goff, 52 Cal. App. 2d 23, 125 P.2d 848 (1942).

[5] Eureka Block Coal Co. v. Wells, 83 Ind. App. 181, 147 N.E. 811 (1925); First Nat'l Bank v. North Dakota Workmen's Compensation Bureau, 68 N.W.2d 661 (N.D. 1955); Southern Ry. v. Baskette, 175 Tenn. 253, 133 S.W.2d 498 (1939); Southern Pac. Co. v. Industrial Comm'n, 54 Ariz. 1, 91 P.2d 700 (1939) (dictum).

[6] MADDEN, PERSONS AND DOMESTIC RELATIONS 9 (1931).

[7] Price v. Price, 24 Cal. App. 2d 462, 75 P.2d 655 (1938) (does not apply); Millar v. Millar, 175 Cal. 797, 167 Pac. 394 (1917) (does apply); Williams v. State, 175 Misc. 972, 25 N.Y.S.2d 968 (Ct. Cl. 1941) (does not apply); Sleicher v. Sleicher, 251 N.Y. 366, 167 N.E. 501 (1929) (does apply).

[8] Sefton v. Sefton, 45 Cal. 2d 872, 291 P.2d 439 (1955).

[9] People *ex rel.* Byrnes v. Retirement Bd. of Firemen's Annuity & Benefit Fund, 272 Ill. App. 59 (1933); Callow v. Thomas, 322 Mass. 550, 78 N.E.2d 637 (1948); Huntington Hospital Ass'n v. Halaby, 204 Misc. 745, 124 N.Y.S.2d 791 (County Ct. 1953); National City Bank v. Lowenstein, 197 Misc. 707, 99 N.Y.S.2d 608 (Sup. Ct. 1950); Zuckerman v. Zuckerman, 66 N.Y.S.2d 18 (Sup. Ct. 1946), *aff'd*, 271 App. Div. 814, 66 N.Y.S.2d 410 (1st Dep't 1946).

The question of whether an annulment decree has the effect of rendering a voidable marriage void from the beginning often arises in those cases where a separation agreement or an alimony decree calls for payments to terminate upon remarriage. In these cases relation back has sometimes been applied, thereby reinstating alimony payments when the marriage was subsequently annulled.[10] But in New York a statute[11] gives the wife the right to receive support from the husband of the annulled marriage, thus removing the reason for reviving the obligation of the first husband; and California has refused to apply the theory of relation back to reinstate alimony payments on the ground that the divorced husband after her remarriage has the right to recommit his assets.[12]

The question of relation back also arises in cases where the question is the validity of a second marriage entered into prior to the annulment of the first marriage. In the North Carolina case of *Taylor v. White,*[13] where a first marriage was annulled on the ground of duress, the court allowed the decree to relate back and declared the marriage void *ab initio,* thereby making a second marriage entered into prior to the annulment a valid marriage.[14] The *Taylor* case illustrates the violence done to other legal principles when the doctrine of relation back is applied to a voidable marriage. One legal principle is that a voidable marriage is valid until avoided;[15] another is that a second marriage entered into while a valid marriage exists is bigamous and absolutely void.[16] Thus it would appear that the second marriage in *Taylor* was absolutely void. Yet, it is made valid by the application of the doctrine of relation back.

Although it may be desirable for the court to apply or refuse to apply the doctrine of relation back depending upon the equities of the case,

[10] Sutton v. Leib, 199 F.2d 163 (7th Cir. 1952) (applying Illinois law); Brenholts v. Brenholts, 19 Ohio L. Abs. 309 (1935); Sleicher v. Sleicher, 251 N.Y. 366, 167 N.E. 501 (1929). *But see* Linneman v. Linneman, 1 Ill. App. 2d 48, 116 N.E.2d 182 (1953) (alimony was not reinstated when wife got annulment in California on grounds of impotency, since in Illinois impotency is not a ground for annulment).

[11] N.Y. Civ. Prac. Act § 1140-a, Gaines v. Jacobsen, 308 N.Y. 218, 124 N.E.2d 290 (1954).

[12] Sefton v. Sefton, 45 Cal. 2d 872, 291 P.2d 439 (1955). See also Price v. Price, 24 Cal. App. 2d 462, 75 P.2d 655 (1938); *In re* Gosnell's Estate, 63 Cal. App. 2d 38, 146 P.2d 42 (1944) (dictum).

[13] 160 N.C. 38, 75 S.E. 941 (1912).

[14] Marriages entered into through duress are voidable in North Carolina. The only void marriages are interracial marriages and bigamous marriages. N.C. Gen. Stat. § 51-3 (Supp. 1957), State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890).

[15] Scarboro v. Scarboro, 233 N.C. 449, 64 S.E.2d 422 (1951). There is language in the *Scarboro* case which casts some doubt on whether or not *Taylor v. White* is still the law in North Carolina, but it does not overrule *Taylor v. White.*

[16] N.C. Gen. Stat. § 14-183 (1953). This sets out the crime of bigamy and bigamous cohabitation. See also State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890).

this creates uncertainties and sometimes does violence to sound legal theory. Some of the uncertainties might be avoided if the legislative bodies drafting statutes involving remarriage and if the judges drafting alimony decrees would spell out to a greater extent what is meant by remarriage.

KARL N. HILL, JR.

Searches and Seizures—Description in Warrant—Limits of Curtilage

A recent North Carolina case has presented some unique problems in the admissibility of evidence found in the process of an unreasonable search and seizure.[1] Within the same yard were two buildings, some thirty feet apart. The first building was a house, owned and occupied by a third party. The second building was a former filling station, rented from the third party and occupied by the defendant. A search warrant was obtained for the house against the third party and another for the filling station against the defendant. The affidavit described the defendant's "dwelling, garage, filling station, barn and outhouses and cars and premises . . . ."[2] The officer searched the filling station. While searching the house of the third party the sheriff discovered, for the first time, that the defendant also rented a back porch room of the house. Despite the fact that neither the owner of the room nor the defendant gave his consent, the officer searched the room under the warrant for the house. The court excluded the evidence found in the room because it was seized in the course of an unreasonable search.

The court reached this decision upon the grounds: (1) that as between the third party and the defendant, the defendant had the right to invoke the constitutional protection against unreasonable search and seizure, (2) the warrant for the search of the house did not authorize a search of the back porch room. Thus the decision of the court did not turn upon the question of search within the curtilage. But the facts of the case necessarily suggest this problem. The room was close enough to be said to be in the defendant's curtilage, being within the same yard and within thirty feet of his dwelling. There was a path from the filling station to the room and it would appear that the room was used by the defendant in connection with the filling station as a habitation.[3] That this problem presented itself to the minds of the

[1] State v. Mills, 246 N.C. 237, 98 S.E.2d 329 (1957).
[2] *Id.* at 240, 98 S.E.2d at 331.
[3] Apparently the limits of the curtilage are set by two primary elements: the use of the lands and buildings in connection with the dwelling for ordinary habitation and the proximity to the dwelling. State v. Lee, 120 Ore. 643, 253 Pac. 533 (1927). There is no longer any requirement that this area be enclosed by a wall or fence, as was the case in England. Bare v. Commonwealth, 122 Va. 783, 94 S.E. 168 (1917).

court is indicated by the fact that at the outset of the decision the court adumbrated the point. But the court refused to hold the room an outhouse within the curtilage of the defendant's dwelling because "outhouse" was not a proper description of the room.[4] The holding of the court is in line with the policy of strict interpretation of the unreasonable search and seizure protection in favor of the defendant.[5]

But what are some of the problems involved in the relation of the search warrant to the curtilage? It is well settled that the concept of curtilage applies only to enlarge the protection afforded the defendant against search without a warrant.[6] It does not serve to extend the bounds of a search warrant which does not specify a particular building within the curtilage.[7] The theory of curtilage can not be transplanted from the realm of protecting the defendant against search without a warrant to extending the bounds of the warrant. Search with a warrant is limited to those premises specifically described in the warrant, not the premises so described plus their curtilage.[8]

This conclusion may lead to some difficulty if the officer finds it necessary to search the entire property of the defendant who owns a house near which are several structures and outlying fields. The outlying fields may be searched up to the bounds of the curtilage without a search warrant, since the constitutional protection extends only to "persons, houses, papers and effects."[9]

How may the warrant describe the house and its curtilage so as to achieve a legal search of the entire area? There are some cases which allow a very limited search within the curtilage of dwellings not specifically described in the warrant. In one case the search warrant called for the search of "one frame house, barns, smokehouse, and other out-

[4] Another element which seemed to play a part in the court's refusal to uphold the filling station warrant as good against the search of the room was the fear that by doing so there would be an invasion of the rights of another property owner. Search of two separate yards has been permitted, when connected by a path and owned by one person. People v. Taylor, 2 Mich. 250 (1851). But this has not been permitted where the two yards belong to two different people. When there was such a search, even when specified in the warrant, it was held invalid as a general search. State v. Duane, 100 Me. 447, 62 Atl. 80 (1905).

[5] 79 C.J.S., *Searches and Seizures* § 4 (1952).

[6] State v. Harrison, 239 N.C. 659, 80 S.E.2d 481 (1954); Kisselburg v. State, 56 Okl. Cr. 46, 33 P.2d 236 (1934).

[7] People v. Bawiec, 228 Mich. 32, 199 N.W. 702 (1924).

[8] MACHEN, THE LAW OF SEARCH AND SEIZURE 35, 36 (1950).

[9] Hester v. United States, 265 U.S. 57 (1924); State v. Harrison, 239 N.C. 659, 80 S.E.2d 481 (1954). However, in some states even the open fields are held to be within the protection against search without a warrant. These states have interpreted the inclusion of "possessions" among the list of things protected in the state constitutions to mean that anything possessed by the defendant is protected from search without a warrant. Miller v. State, 174 Md. 362, 198 Atl. 710 (1938); Helton v. State, 136 Miss. 622, 101 So. 701 (1924). At least one state, with such a provision in its constitution, has expressly repudiated this doctrine and held that open fields may be searched without a search warrant. Robie v. State, 117 Tex. Cr. 283, 36 S.W. 2d 175 (1931).

buildings . . . ."[10] There was no reference in the warrant to the grounds on which these buildings stood. But when illegal whiskey was found in a garden ten to twenty feet from the dwelling, the court held that the whiskey was found in a search authorized by the warrant. In holding the search to be reasonable the court said: "[T]he description as a whole means rather the premises occupied by the defendant as a residence, including the named buildings, as well as such adjacent lands as were necessary parts of the 'premises . . . .' "[11] But the same court, in a later case, indicated that it would not be so liberal if the omitted place were a building. When the warrant merely specified the dwelling, the same court did not allow any portion of the curtilage to be searched.[12] A Tennessee case illustrates the furthest extension of an allowance to search the curtilage when the warrant specifies only the dwelling.[13] The warrant authorized a search of the premises at "2706 Coward Street." Within three feet of the main building was a coal house also marked "2706." The court allowed the search of the coal house under the warrant because there was a search "of an outhouse so clearly appurtenant to and a part of the same precises . . . ."[14] But it would appear that this court did not hold that the curtilage can be searched when only the house is described, but rather that the coal house was constructively the same building as the house.

Since search within the curtilage when only the dwelling is described in the search warrant is so strictly limited, the officer has no alternative but to specify all objects within the curtilage which he wishes to search.[15] It is submitted that the officer would be well advised to inform himself of as many details of the layout of the premises to be searched as possible. When he finds a peculiar situation, like that in the prin-

[10] Ingram v. Commonwealth, 200 Ky. 284, 286, 254 S.W. 894, 895 (1923).
[11] *Id.* at 286, 254 S.W. at 895.
[12] Fleming v. Commonwealth, 217 Ky. 169, 289 S.W. 212 (1926).
[13] Seals v. State, 157 Tenn. 538, 11 S.W.2d 879 (1928).
[14] *Id.* at 545, 11 S.W.2d at 881.

The term "premises" in itself presents a problem when applied to search warrants. In trespass cases and litigation over deeds or wills it would seem that the term may be used in its broadest sense to include the entire property appurtenant to a specified building or general site. Winlock v. State, 121 Ind. 531, 23 N.E. 514 (1890). But when the term is used in a search warrant it is more strictly construed as the approximate equivalent of the curtilage. Ratzell v. State, 27 Okl. Cr. 340, 228 Pac. 166 (1924). But "premises" standing alone in a search warrant is not sufficiently specific to permit a search. Its meaning, unaccompanied by qualifying words or phrases, is so indefinite that the premises to be searched are not specified adequately. Humes v. Taber, 1 R.I. 464 (1850); Rignall v. State, 134 Miss. 169, 98 So. 444 (1923). But "premises" plus a street address authorizes a search of a garage on the same lot as the house. Comeaux v. State, 118 Tex. Cr. 223, 42 S.W.2d 255 (1931).

[15] It has been held that a single search warrant may specify not only a dwelling, but also buildings and land within the same curtilage. Caudill v. Commonwealth, 198 Ky. 695, 249 S.W. 1005 (1923). See Annot., 31 A.L.R.2d 864 (1953), as to the propriety of issuing only one search warrant to search more than one place or premise occupied by the same person.

cipal case, specific details should not be used to the exclusion of general terms. General terms such as "out houses," "yard," and "garden" are common and have proved effective.[16]

JAMES W. KIRKPATRICK, JR.

Taxation—Barred Claims—Equitable Recoupment

Plaintiff, as administratrix, paid estate tax on her deceased husband's estate. After the period of limitations on claim for refund of the estate tax had expired, the Commissioner assessed against the estate a deficiency assessment for income taxes and penalties. The plaintiff paid same and sought a refund of estate tax to accord with the resultant decrease of the taxable estate, but was denied recovery in the district court[1] because of a three year statute of limitations on refund of estate tax.[2] The plaintiff then brought suit for refund of income tax, seeking to recoup the estate tax overpayments against the income tax deficiency assessments, a refund of which the statute of limitations had not yet barred. The court allowed full recovery with interest.[3]

The doctrine of recoupment, an equitable remedy of common law origin, is the act of rebating a part of a claim on which one is sued, by means of a legal or equitable right resulting from a counterclaim arising out of the same transaction.[4] In *Bull v. United States,*[5] the first case in which this remedy was extended to federal taxation, the United States Supreme Court limited recoupment to situations arising out of "some feature of the same transaction upon which the plaintiff's claim is grounded."[6] The basic problem in recoupment cases stems from the difficulty in determining what constitutes the same transaction.

Four times the Supreme Court has considered the matter of recoup-

[16] Here follow some examples of descriptions in search warrants that were held valid:
"a certain dwelling house, barn, garage, outbuildings and sheds located at . . . ." People v. Holton, 326 Ill. 481, 158 N.E. 134 (1927); "room, house, outhouse, yard, garden and appurtenances thereto . . . ." Rose v. State, 171 Ind. 662, 87 N.E. 103 (1909); "building and all out buildings commonly known as . . . ." Thomson v. State, 196 Ind. 229, 147 N.E. 778 (1925); "one story frame house and all outbuildings appurtenant thereto . . . ." Goodman v. State, 201 Ind. 189, 165 N.E. 755 (1929).

[1] Herring v. United States, 131 F. Supp. 536 (E.D.N.C. 1955).
[2] Int. Rev. Code of 1939, § 910, 53 STAT. 138 (now INT. REV. CODE OF 1954, § 6511).
[3] United States v. Herring, 240 F.2d 225 (4th Cir. 1957).
[4] 80 C.J.S., *Set-Off and Counterclaim* § 2 (1953).
[5] 295 U.S. 247 (1935). Decedent's estate was substituted in decedent's place in a partnership and received income therefrom. The Commissioner first incorrectly levied estate tax on the sum so received and, after suit for refund of this tax was barred, he levied income tax on the same sum. The Court allowed the taxpayer to recoup the barred estate tax overpayment against the income tax deficiency correctly due on the sum.
[6] *Id.* at 262.

ment in tax cases, twice allowing the remedy—*Bull v. United States* and *Stone v. White*[7]—and twice denying it—*McEachern v. Rose*[8] and *Rothensies v. Electric Storage Battery Co.*[9] The *McEachern* case, decided squarely on the basis of statutory provisions,[10] presents a situation similar to that in the *Bull* case, yet the statutes applied in the former were never mentioned in the latter opinion, though they were in effect at the time involved. It is possible to argue that the *McEachern* and *Electric Storage Battery* cases do not present same-transaction situations such as are found in the *Bull* and *Stone* cases.[11] Literally this is true in that in the latter two cases the taxable event was a single one—the receipt of a sum of money by the taxpayer—while in the other two cases there was no such receipt of a single fund of money. But to adopt this criterion is to confine the doctrine of recoupment to an area well within the boundaries established by the lower courts. Rather, the *McEachern* case may be distinguished from the *Bull* case in that in the former (1) recoupment was not pleaded, though the courts have held that, to be applied, it must be pleaded,[12] and (2) the Commissioner did not introduce into evidence the amount sought to be recouped.[13] Furthermore, the Court never mentioned the *McEachern* case in the *Electric Storage Battery* decision, which leads one to suspect that the Court

[7] 301 U.S. 532 (1937). Testamentary trustees paid tax on trust income which should have been paid by the beneficiary. After the statute had run on an action by the government to collect the tax from the beneficiary, the trustees brought an action to recover their erroneous tax payment. The Court allowed the government to recoup the barred amount due from the beneficiary against the refund of the erreoneous payment by the trustees.

[8] 302 U.S. 56 (1937). Decedent sold a block of stock and agreed to be paid in equal yearly payments. The administrator, plaintiff in this action, erroneously reported as income of the estate each installment in the year received, instead of cumulating the remaining installments and reporting them as estate assets. After the statute of limitations had run on the year in which the estate tax was paid, the plaintiff brought this action to recover the income tax paid as a result of reporting the installments as yearly income. The Court refused to allow the government to recoup the barred estate tax deficiency of the earlier year against the refund of income tax paid in the later years.

[9] 329 U.S. 296 (1946). Plaintiff paid excise tax which was not due under the statute although assessed by the Commissioner. Subsequently the Commissioner realized that the tax was illegal and refunded the amounts paid in years not yet barred. Plaintiff owed income tax on this refund but sought to recoup the amount of barred excise tax overpayments against the income tax deficiency. The Court denied recoupment.

[10] If a tax may not be refunded or collected because barred by statutes of limitations, a credit or debit therefor may not be made by the Commissioner. Revenue Act of 1928, §§ 607-609, 45 STAT. 874, 875 (now INT. REV. CODE OF 1954, §§ 6401(a), 6514(a), (b)). "These provisions preclude the government from taking any benefit from the taxpayer's overpayment by crediting it against an unpaid tax whose collection has been barred by limitation." 302 U.S. at 60.

[11] 329 U.S. at 299-300.

[12] Herring v. United States, 131 F. Supp. 536 (E.D.N.C. 1955); First Nat'l Bank v. United States, 131 F. Supp. 647 (W.D.S.C. 1954); *cf.* Bull. v. United States, 295 U.S. 247, 263 (1935).

[13] McConnell, *The Doctrine of Recoupment in Federal Taxation*, 28 VA. L. REV. 577, 594 (1942).

may not regard *McEachern* as limiting the scope of recoupment. Moreover, in the *Eletcric Storage Battery* case, the Court expressly stated that its intention was to narrow the scope of the recoupment doctrine in the tax field, and it rested the decision on the grounds that (1) there were separate transactions here, and (2) the age of the barred claim was too great.[14] It is possible to infer from the language of the Court that the compelling reason for the denial of recoupment was that it would be unwise policy to allow claims over twenty years old to be asserted in recoupment.[15] In any event, both cases denying recoupment are frequently cited and are strongly relied upon by the lower courts and the Commissioner to defeat recoupment even in situations where the remedy seemingly should be applied.[16]

Recoupment is invariably applied where the fund of money is the same in the main claim as in the one asserted in recoupment. This situation occurs most frequently where, as in the principal case, an estate is diminished by a deficiency income tax assessment after the estate tax thereon has been paid and suit is brought to recoup the barred estate tax overpayment against the income tax deficiency payment.[17] There must always be some obligation on which the statute has not run against which the barred estate tax overpayment may be recouped.[18] Both claims, moreover, must be between the same parties,[19] except in the trust situation hereinafter considered. Although there is no case authority to support such a position, the Commissioner has indicated that recoupment will not be allowed even where all of these requirements are met.[20]

The trust cases offer an interesting variant in that the parties to the transaction are not literally the same. Nonetheless, the government in the *Stone* case recouped a barred deficiency of the beneficiary against a recovery by the trustees on the ground that any recovery by the latter

[14] 329 U.S. at 302-03.

[15] McConnell, *Recoupment—Dead or Alive,* 26 TAXES 1059, 1060 (1948).

[16] Rev. Rul. 226, 1955-1 CUM. BULL. 469.

[17] United States v. Herring, 240 F.2d 225 (4th Cir. 1957); Dunigan v. United States, 87 Ct. Cl. 404, 23 F. Supp. 467 (1938). Recoupment was denied in Herring v. United States, 131 F. Supp. 536 (E.D.N.C. 1955), and in a case cited therein, First Nat'l Bank v. United States, 131 F. Supp. 647 (W.D.S.C. 1954), because the plaintiff brought suit for a refund of estate tax rather than a recoupment of an estate tax overpayment against the still open income tax. *Contra,* Reeves v. United States, 154 F. Supp. 673 (W.D. Pa. 1957).

[18] United States v. Frauenthal, 138 F.2d 188 (8th Cir. 1943) (estate decreased by an obligation to a party other than the government).

[19] Wells Fargo Bank & Union Trust Co. v. United States, 245 F.2d 524 (9th Cir. 1957) (court refused to recoup a barred deficiency of a widow's estate against a claim for refund due the widow's husband's estate, even though the beneficiaries of each were the same).

[20] Rev. Rul. 226, 1955-1 CUM. BULL. 469.

would inure automatically to the benefit of the former.[21] Conversely, recoupment was not applied to offset a barred deficiency of the trustees against an overpayment by the beneficiary.[22] Moreover, the settlor is considered a separate entity from both the trustee and the beneficiary, thus precluding recoupment.[23] Although there is an early decision to the contrary,[24] it seems erroneous to consider all relations between the trust and any other entity a single transaction merely because the trust involved is the same.

The courts appear very reluctant to grant recoupment where there has been procedurally inconsistent tax treatment of the same property as distinguished from essentially inconsistent treatment of the identical fund of money as in the *Bull* case. Recoupment has been denied the government where the taxpayer incorrectly treated the receipt of property as a gift[25] or as incidental to a tax-free reorganization,[26] thus avoiding the payment of income tax in the year of receipt and then, after that year was barred, correctly viewing the receipt transaction so as to effect a substantial reduction in the capital gains tax due as a result of subsequent sale. Likewise the government was not allowed to recoup the income tax due in several barred years of receipt against a refund of income tax resulting from the incorrect cumulative reporting of the income, theretofore unreported, in the current year.[27] But where the Commissioner approved taxpayer's erroneous method of computing gain from liquidating dividends and subsequently reversed his earlier decision, thereby causing an income tax overpayment in the now barred year of receipt and an income tax deficiency in open years, recoupment was allowed the taxpayer.[28]

However, the taxpayer was not allowed to recoup the income tax he would have saved in a now barred year if he had correctly reported certain deductions against the additional income tax owed because of a disallowance of the deduction in an open year,[29] even though, in one

[21] Stone v. White, 301 U.S. 532 (1937); First Nat'l Bank v. United States, 12 F. Supp. 301 (N.D. Ala. 1935).

[22] Lyman v. United States, 22 F. Supp. 14 (D. Mass. 1938).

[23] Silverthau v. United States, 26 F. Supp. 242 (D. Conn. 1938).

[24] Lit v. United States, 18 F. Supp. 435 (E.D. Pa. 1937). The barred deficiency was a gift tax due on the establishment of the trust and the overpayment was in connection with an incorrect valuation of a reversionary interest in the trust which settlor had at his death.

[25] Crawford v. Heiner, 23 F. Supp. 240 (W.D. Pa. 1938).

[26] American Light & Traction Co. v. Harrison, 142 F.2d 639 (7th Cir. 1944); Rotenberg v. Sheehan, 48 F. Supp. 584 (E.D. Mo. 1943), *appeal dismissed,* 144 F.2d 992 (8th Cir. 1944).

[27] Grand Central Public Market v. United States, 22 F. Supp. 119 (S.D. Cal. 1938), *aff'd,* 98 F.2d 1023 (9th Cir. 1938).

[28] Mills v. United States, 35 F. Supp. 78 (M.D.N.Y. 1940).

[29] Wood v. United States, 213 F.2d 660 (2d Cir. 1954); Longyear Realty Co. v. Kavanagh, 156 F.2d 462 (6th Cir. 1946); Hall v. United States, 95 Ct. Cl. 539, 43 F. Supp. 130, *cert. denied,* 316 U.S. 664 (1942).

of the cases,[30] the Commissioner had refused to allow the deductions when they were properly put forth. But the government was allowed to recoup a barred corporate income tax deficiency resulting from the taxpayer's deduction in a single year of tooling costs properly depreciable over three years against the total overpayments of corporate income tax which resulted from later assigning the deduction proportionately to the proper years which were still open.[31]

On one occasion the taxpayer was allowed to recoup barred overpayments resulting from an erroneously assessed excise tax against open income tax deficiencies resulting from the refund of that portion of the excise tax paid and not yet barred.[32] In another case the taxpayer was allowed to recoup an income tax deficiency in open years resulting from an erroneous allocation of an excess profits tax compromise.[33] In these two cases the courts reason that both deficiencies and overpayments are caused by a single erroneous act, either by the Commissioner or the taxpayer, and therefore arise out of the same transaction. This ground for allowing recoupment was not considered in two subsequently decided, widely cited cases.[34]

Recoupment is an equitable remedy and will be denied if the party seeking to have it applied is guilty of fraud.[35] Nor may the remedy be applied by the Tax Court, since its jurisdiction is limited to the single year under consideration at that time.[36] Furthermore, recoupment will not be granted if there is any other adequate remedy.[37] In this regard it is interesting to note that for twenty years there have been statutory provisions apparently intended and able to rectify many of the situations described above, but the courts have not referred to these provisions in the later recoupment cases.[38]

[30] Hall v. United States, *supra* note 29.
[31] Crosley Corp. v. United States, 229 F.2d 376 (6th Cir. 1956).
[32] Dixie Margarine Co. v. Commissioner, 115 F.2d 445 (6th Cir. 1940).
[33] Pond's Extract Co. v. United States, 133 Ct. Cl. 43, 134 F. Supp. 476 (1955).
[34] Rothensies v. Electric Storage Battery Co., 329 U.S. 296 (1946); Lynchburg Coal & Coke Co. v. United States, 97 Ct. Cl. 517, 47 F. Supp. 916 (1942).
[35] J. J. Dix, Inc. v. Commissioner, 233 F.2d 436 (2d Cir. 1955); Elbert v. Johnson, 164 F.2d 421 (2d Cir. 1947). *But see* United States v. Herring, 240 F.2d 225 (4th Cir. 1957), where fraud penalties were assessed.
[36] Commissioner v. Gooch Milling & Elevator Co., 320 U.S. 418 (1943).
[37] Wells Fargo Bank & Union Trust Co. v. United States, 245 F.2d 524, 536 (9th Cir. 1957).
[38] Revenue Act of 1938, § 820, 52 STAT. 581 (now INT. REV. CODE OF 1954, §§ 1311-1314), which provides for the suspension of the bar of limitations on a claim where the party in whose favor the statute has run seeks (1) a double inclusion or exclusion of an item in or from gross income, (2) a double allowance or disallowance of a deduction or credit, (3) the allowance or disallowance of correlative deductions or inclusions for certain related taxpayers, or (4) a different determination of basis after the erroneous treatment of a prior transaction. In the *Wells Fargo* case, *supra* note 37, the court stated one of its reasons for denying recoupment to be the existence of these provisions affording a statutory remedy.

CONCLUSION

In spite of frequent statements to the contrary,[39] the doctrine of recoupment in federal taxation still lives, as evidenced by the many recent cases which employ it to effect an equitable result seemingly otherwise unobtainable because of the specific language of the statutes barring the claim. The taxes must arise out of the same transaction and the parties in interest must be the same. The longer the period of time which the transaction covers, the more doubtful is the application of the doctrine by the courts. If fresh claims could be created by act of one of the parties in favor of the other to enable the creator to recoup barred claims, the whole policy of barring claims would be defeated and no equities demand the application of the remedy.[40] Like most other problems in law, questions such as "What constitutes a single taxable event or the same transaction?" and "How long is too long?" may never be finally answered but can only be circumscribed by recurring decisions.

JOEL L. FLEISHMAN

Tort Claims Act—Distinction between Nonfeasance and Misfeasance

In *Flynn v. State Highway Comm'n*,[1] plaintiff's intestate was killed when the truck in which he was a passenger was wrecked as a result of its wheel striking a hole in the road, causing its driver to lose control. In plaintiff's action against the state for negligence in leaving the road in disrepair, the Supreme Court affirmed the lower court, which had affirmed the Industrial Commission, holding that the Tort Claims Act covers only negligent *acts* by state employees and not negligent *omissions*. In reaching this decision the court stated:

> In order to authorize the payment of compensation, the Industrial Commission's finding must include (1) a negligent act, (2) on the part of a state employee, (3) while acting in the scope of his employment, etc. The first requirement is that the claimant show a *negligent act*. Is a failure to repair a hole in the highway caused by ordinary public travel a negligent act? The requirement of the statute is not met by showing negligence, for negligence may consist of an act or an omission. Failure to act is not an act. We think it was the intent of the legislature to permit recovery only for the negligent acts of its employees, for the things done by them, not for the things left undone. If the intent had been otherwise, it would have been easy to permit recovery for the negligent acts *and omissions* of State employees.[2]

[39] Wood v. United States, 213 F.2d 660, 661 (2d Cir. 1954).
[40] St. Louis Union Trust Co. v. Finnegan, 53-1 CCH U.S. TAX CAS. ¶9299 (E.D. Mo. 1953).

[1] 244 N.C. 617, 94 S.E.2d 571 (1956).
[2] *Id.* at 620, 94 S.E.2d at 572.

The provision of the Tort Claims Act that recovery may be had only for a negligent *act*[3] considerably limits the state's tort liability. Negligence is usually defined as the failure to use due care, or to act as a reasonably prudent man would act under the same or similar circumstances.[4] It is generally recognized that negligence may consist of either a negligent act or a negligent omission to act.[5] Indeed, the court in the principal case recognized as much in the language quoted above.

The distinction between acts and omissions seems not to have penetrated the field of municipal liability for torts committed by its agents either in North Carolina or other states. There is accord among the courts as to the rule of liability of municipal corporations.[6] A municipality is generally held liable for failure to maintain its streets, even though maintenance of streets is a governmental and not a proprietary function; liability does not usually attach to negligent performance by a municipality of a governmental function.[7] By statute[8] in North Carolina there is imposed on municipalities the positive duty to maintain streets in a reasonably safe condition for travel, and negligent failure to do so will result in liability for proximate injury.[9] Many of the cases arising against municipalities have concerned negligent omissions[10] rather than negligent acts. If these actions had been brought under the Tort Claims Act there seems no reason to doubt that the plaintiff would have had no chance of recovery.

It is very hard to find fault with the decision in the *Flynn* case. The court has in the past committed itself to a strict construction of

[3] N.C. GEN. STAT. § 143-291 (1952).

[4] Barnes v. Caulbourne, 240 N.C. 721, 83 S.E.2d 898 (1954); Rea v. Simowitz, 225 N.C. 575, 35 S.E.2d 871 (1945); PROSSER, TORTS § 31 (2d ed. 1955).

[5] "If the defendant enters upon an affirmative course of conduct affecting the interest of another, he is regarded as assuming a duty to act, and, will therefore be liable for negligent acts or *omissions*." (Emphasis added.) PROSSER, TORTS § 38c (2d ed. 1955). Mikeal v. Pendleton, 237 N.C. 690, 75 S.E.2d 756 (1953); Diamond v. McDonald Service Stores, 211 N.C. 632, 191 S.E. 358 (1937); Hamilton v. Southern Ry., 200 N.C. 543, 158 S.E. 75 (1931).

[6] "Apart from statute late decisions in a majority of the states affirm implied municipal liability to private actions for injuries resulting from defective public ways. In other words, the right to recover against a city for actionable negligence for defects in its streets and sidewalks is based on the common law, and requires no statute to proclaim it." 7 McQUILLIN, MUNICIPAL CORPORATIONS § 2901 (rev. ed. 1945).

[7] Glenn v. Raleigh, 246 N.C. 469, 479, 98 S.E.2d 913, 920 (1957) (concurring opinion); Note, 36 N.C.L. REV. 97 (1957).

[8] N.C. GEN. STAT. § 160-54 (1952).

[9] Hunt v. High Point, 226 N.C. 74, 36 S.E.2d 694 (1946); Millar v. Wilson, 222 N.C. 340, 23 S.E.2d 42 (1942); Bunch v. Edenton, 90 N.C. 431 (1884).

[10] Hunt v. High Point, 226 N.C. 74, 36 S.E.2d 694 (1946) (failure to provide handrail and to furnish adequate lighting); Beaver v. China Grove, 222 N.C. 234, 22 S.E.2d 434 (1942) (failure to erect caution signs; manhole cover allowed to protrude); Waters v. Belhaven, 222 N.C. 20, 21 S.E.2d 840 (1942) (wire hoops not removed from street); Love v. Asheville, 210 N.C. 476, 187 S.E. 562 (1936) (failure to clear ice from bridge).

the act.[11] Our court is not alone in this view,[12] the reason being that a statute creating sovereign liability is in derogation of the common law and grants a right not naturally accorded the citizens of a state.[13]

Argument cannot validly be based on the proposition that the legislature intended the act to include negligent omissions as well as negligent acts. As is pointed out in the *Flynn* case, the legislature amended the Tort Claims Act in March 1955 by inserting the words "or omission" after the words "negligent act."[14] This amendment may indicate that the legislature did not consider them as part of the original act. In May 1955 the act was again amended to strike out the words "or omission" from the amended version.[15] These two amendments indicate the unmistakable intent of the legislature to exclude state liability for negligent omissions, so that the court's interpretation of legislative intent is unimpeachable.

Many fears account for continuation of the principle of governmental immunity. Perhaps the chief one is the fear that the public coffers cannot stand the strain which would be thrust upon them by the institution of many suits demanding damages for torts. Time has shown that this fear is not valid. In allowing recovery for torts all states have found that this expense constitutes but a very minute part of total annual expenditures.[16] This fear coupled with reluctance to depart from a well worn path are, perhaps, why the legislature let caution be its watchword. There is an obvious inequality in allowing the plaintiff injured by a negligent act to recover, while denying recovery to the plaintiff injured as a result of an equally negligent omission to act. It is submitted that the act should be amended so as to make the state liable for the negligence of its employees "in accordance with the same rules of law as applied to action . . . against individuals and corporations."[17] The adoption of this amendment would bring North Carolina in line with the New York and federal view of governmental liability, which is that the government is liable the same as private parties.[18]

JESSE M. HENLEY, JR.

[11] Jenkins v. Department of Motor Vehicles, 244 N.C. 560, 94 S.E.2d 577 (1956), 35 N.C.L. REV. 564 (1957); Floyd v. State Highway Comm'n, 244 N.C. 461, 85 S.E.2d 703 (1955).

[12] Borchard, *Government Liabiilty in Tort,* 34 YALE L.J. 1 (1924).

[13] Borchard, *supra* note 12, at 9.

[14] N.C. Sess. Laws 1955, c. 400.

[15] N.C. Sess. Laws 1955, c. 1361.

[16] Anderson, *Recovery from the United States Under the Federal Tort Claims Act,* 31 MINN. L. REV. 465 (1947).

[17] N.Y. CT. CL. ACT § 8.

[18] 60 STAT. 842 (1946), 28 U.S.C. §§ 2671-2674 (1952); N.Y. CT. CL. ACT § 8. There has been little or no symmetry in the adoption by the states of tort claims acts. Indeed there are few states that have a unified act or group of statutes which might be termed a tort claims act. Many states have constitutional provisions which prohibit the state from being made a defendant in a tort action.

Torts—Libel and Slander—Extemporaneous Defamatory Remarks Over Television

In *Shor v. Billingsley*[1] the defendant made extemporaneous defamatory statements on a television program. Plaintiff pleaded three causes of action for defamation. All alleged the statements were false and uttered for the express purpose of injuring the plaintiff in his business. The first cause of action presented the principal problem in the case: Whether extemporaneous defamatory words in a telecast constitute libel or slander.[2] The defendants argued that no cause of action was stated[3] because there was no permanent physical form present in an extemporaneous telecast[4] and that the application of the law of libel to broadcasting or telecasting without a script must be made (if at all) by the legislature rather than by the courts.[5] The court denied the defendants' motion to dismiss for insufficiency and held that the defamatory telecast would be treated as libel. Thus, no special damages need be alleged.

The civil action of libel was first announced in 1670 by Lord Chief Baron Hale in *King v. Lake*[6] in the Exchequer.[7] A distinction was drawn between the old civil action for slander and the new tort of libel on the basis of permanence or nonpermanence of form. Written defamation, being of more permanent duration, was considered the more harm-

The majority of these states, however, allow the legislature to waive this immunity. Leflar and Kantrowitz, *Tort Liability of the States,* 29 N.Y.U.L. REV. 1363 (1954).

[1] 4 Misc. 2d 857, 158 N.Y.S.2d 476 (Sup. Ct. 1956).

[2] The second cause of action alleged that the statements were read from a prepared script or notes. The court held this to be libel and relied on Hartmann v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947). The third cause of action alleged that a motion picture was made of the telecast which was later exhibited. This, the court held, was also libel, citing Brown v. Paramount-Publix Corp., 240 App. Div. 520, 270 N.Y. Supp. 544 (3d Dep't 1934), and Ostrowe v. Lee, 296 N.Y. 36, 175 N.E. 505 (1931). A fourth cause of action was for invasion of privacy and was considered separately by the court.

[3] The defendants apparently contended that if there was an action it was in slander and that the remarks were not slanderous per se. Therefore, it was contended, the plaintiff failed to state a cause of action for failure to allege special damages.

[4] To support this propositon the defendants cited the words of Chief Justice Cardozo in Ostrowe v. Lee, 256 N.Y. 36, 38, 175 N.E. 505, 506 (1931): "The schism in the law of defamation between the older wrong of slander and the newer one of libel is not the product of mere accident. . . . It has its genesis in evils which the years have not erased. Many things that are defamatory may be said with impunity through the medium of speech. No so, however, when speech is caught upon the wing and transmuted into print. What gives the sting to the writing is its *permanence of form.* The spoken word dissolves, but the written one abides and 'perpetuates the scandal.'" (Emphasis added.)

[5] Such legislation has been enacted in England. Defamation Act, 1952, 15 & 16 GEO. 6 & 1 ELIZ. 2, c. 66; see Note, 66 HARV. L. REV. 476 (1953).

[6] Hardres 470, Skinner 124 (1670).

[7] Veeder, *The History and Theory of the Law of Defamation,* 3 COLUM. L. REV. 546, 569-70 (1903).

ful and was labeled libel. The lesser tort of oral defamation remained the tort of slander, it being of temporary duration and thus less harmful. Libel was held to be a wrongful act per se, damage being presumed.[8]

The permanence of form test was followed in the common law courts and was finally settled in 1812 by Lord Mansfield in *Thorley v. Lord Kerry*,[9] on the ground that though indefensible in principle, the distinction was too well established to be repudiated.[10]

The customary distinctions between libel and slander were readily adapted to new conditions with relatively little difficulty until the courts were confronted with defamation through radio[11] and television.[12] Initially the problem was resolved within the traditional bounds of defamation, since the earlier cases involved reading from a prepared script and the courts could draw an analogy to the reading aloud of a defamatory writing, which has long been considered libelous.[13]

The courts encountered their greatest difficulty in cases where the words broadcast were extemporaneous. The law in this area remains in a state of flux, and three views have evolved.

Locke v. Gibbons[14] represents one view. There the court reasoned that not only should the potentiality for harm be considered, but the element of permanence of form as well. The court likened a radio broadcaster's extemporaneous speech to a speech delivered over an amplifier to a vast audience in a stadium and concluded that both involve the spoken word and that both are slanderous.

Summit Hotel Co. v. National Broadcasting Co.[15] announced a second view. The court concluded that defamation by radio was a new tort with rules of its own, since it did not fall within the traditional rules of libel or slander. The court failed to indicate what the rules for the new tort would be and decided the case on the question of negligence in leasing the transmitting facilities.

A third view, long advocated by legal writers on the subject,[16] was given substance in a concurring opinion in *Hartmann v. Winchell*.[17]

[8] For a discussion of the history of defamation, see Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903). See also PROSSER, TORTS c. 19 (2d ed. 1955); Barry, *Radio, Television and the Law of Defamation*, 23 AUSTR. L.J. 203 (1949); PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 454 (4th ed. 1948); 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 536-38 (2d ed. 1898); Note, 69 HARV. L. REV. 875 (1956).

[9] 4 Taunt. 355, 128 Eng. Rep. 367 (C.P. 1812).

[10] RESTATEMENT, TORTS § 568, comment *b* (1938).

[11] Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82 (1932), *appeal dismissed per curiam*, KFAB Broadcasting Co. v. Sorensen, 290 U.S. 599 (1933).

[12] Remington v. Bentley, 88 F. Supp. 166 (S.D.N.Y. 1949).

[13] Forrester v. Tyrrell, 9 T.L.R. 258 (1893).

[14] 164 Misc. 877, 299 N.Y. Supp. 188 (Sup. Ct. 1937), *aff'd mem.*, 253 App. Div. 887, 2 N.Y.S.2d 1015 (1st Dep't 1938).

[15] 366 Pa. 182, 8 A.2d 302 (1939).

[16] PROSSER, TORTS § 93, p. 595 (2d ed. 1955).

[17] 296 N.Y. 296, 300, 73 N.E.2d 30, 32 (1947) (concurring opinion).

There Justice Fuld argued that the primary reason for broader liability for libel than slander has been the greater capacity for harm that a writing is assumed to have because of its wide range of dissemination consequent upon its permanence of form; that the audience of radio is often greater than that of the nation's largest newspapers; that the fact that defamation by radio in the absence of a script or transcription lacks the measure of durability possessed by libel in no way lessens its capacity for harm; that the element of damage is historically the basis for a common law action for defamation; and that it is as reasonable to presume damage from the nature of the medium employed when defamation is broadcast by radio as when published by writing. On these grounds Justice Fuld concluded that both logic and policy point to the result that defamation by radio is actionable per se.[18]

In the principal case the court, in disposing of the defendants' contention that no cause of action was stated because there was no permanence of form in an extemporaneous telecast, concluded that *Locke v. Gibbons* was not controlling because of circumstances, indicating that the lower court's dismissal in that case was affirmed on the ground that the words complained of were not set forth in the complaint;[19] adopted the reasoning of the concurring opinion in the *Hartmann* case;[20] cited the work of legal writers in support of that reasoning;[21] and regarded the language of Chief Justice Cardozo in *Ostrowe v. Lee*[22] as not precluding recovery since the court there was not restricting the law of libel, but extending it. The "permanence of form," the court said, was not historically a prerequisite to libel, but was one factor which justified an extension of liability.[23]

In rejecting the defendants' argument that the application of the law of libel to extemporaneous broadcasting must be made by the legislature, the court observed that it is the duty of the courts to extend an established rule of law to new technological developments.[24] The court pointed out that a case of first impression does not always present a problem for the legislature nor does it follow that there is no remedy for a wrong done, "because every form of action, when brought for the first time, must have been without a precedent to support it."[25] Furthermore, said the court, "We act in the finest common-law tradition

[18] *Id.* at 304, 73 N.E.2d at 34.
[19] Shor v. Billingsley, 4 Misc. 2d 857, 860, 158 N.Y.S.2d 476, 480 (Sup. Ct. 1956).
[20] *Id.* at 861, 158 N.Y.S.2d at 480-81.
[21] *Id.* at 861-63, 158 N.Y.S.2d at 481-83.
[22] 256 N.Y. 36, 38, 175 N.E. 505, 506 (1931). See note 4 *supra.*
[23] Shor v. Billingsley, 4 Misc. 2d 857, 864, 158 N.Y.S.2d 476, 484 (Sup. Ct. 1956).
[24] *Ibid.*
[25] *Id.* at 866, 158 N.Y.S.2d at 486, quoting from Kujek v. Goldman, 150 N.Y. 176, 178, 44 N.E. 773, 774 (1896).

when we adapt and alter decisional law to produce common-sense justice."[26]

The court cast aside the ancient technical distinctions between libel and slander based upon permanence of form and based its decision on the capacity for harm. In so doing, the court has taken a great stride forward in adapting the common law to the changing nature of human affairs.

MAX D. BALLINGER

Torts—Res Ipsa Loquitur—Malpractice Cases

The plaintiff's arm was fractured during electro-shock treatment administered by the defendant psychiatrist. His suit for damages was on two different theories: breach of warranty and negligence. Defendant psychiatrist moved for summary judgment. The court in *Johnston v. Rodis*[1] granted the motion.

The court disposed of the breach of warranty theory by saying, "An expression of opinion on the part of a physician that a particular course of treatment is safe, does not constitute a warranty . . . . [H]e is answerable only for negligence."[2]

The negligence theory also failed as the court also held that no specific negligence was charged and that *res ipsa loquitur* was inapplicable. In order to have the doctrine of *res ipsa loquitur* applied, the plaintiff must show the existence of three conditions.[3] The accident or injury must be of a kind which ordinarily does not occur in the absence of someone's negligence,[4] there must be a reasonable inference that the defendant is responsible for the negligence which caused the injury,[5] and it must not have been due to any voluntary action or contribution on the part of the plaintiff.[6] The malpractice cases in which plaintiffs

[26] *Ibid.*, quoting from Woods v. Lancet, 303 N.Y. 349, 354-55, 102 N.E.2d 691, 694 (1951).

[1] 151 F. Supp. 345 (D.C. 1957), *rev'd*, —F.2d — (D.C. Cir. 1958). The court reversed on the warranty theory but upheld the district court on the negligence theory and agreed that *res ipsa loquitur* was inapplicable.

[2] *Id.* at 348.

[3] PROSSER, TORTS § 42 (2d ed. 1955).

[4] Mitchell v. Saunders, 219 N.C. 178, 13 S.E.2d 242 (1941) (*res ipsa loquitur* applied where gauze sponge was left buried in plaintiff's hip).

[5] "The control at one time or another of one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant or of his employees or temporary servants. This we think places on them the burden of initial explanation." Ybarra v. Spangard, 25 Cal. 2d 486, 492, 154 P.2d 690 (1944) (non-suit reversed); Ybarra v. Spangard, 93 Cal. App. 2d 43, 208 P.2d 445 (1949) (on re-trial judgment for plaintiff against all defendants affirmed, defendants offered no explanation of injury). See also Armstrong v. Wallace, 8 Cal. App. 2d 429, 47 P.2d 740 (1935) (gauze sponge left in abdominal cavity following Caesarean section); PROSSER, TORTS § 42 (2d ed. 1955).

[6] Ybarra v. Spangard, 25 Cal. 2d 286, 154 P.2d 687 (1944) (injury while patient was unconscious).

have relied on *res ispa loquitur* divide into two main groups. There are "those in which the action is based solely upon the unsuccessful or bad result of the diagnosis or treatment,[7] and those in which the action is based on specific acts by or omission of the physician or surgeon."[8] In the former group there is generally no recovery, while in the latter, *res ipsa loquitur* is frequently applied by the courts.

Within the latter group, the application of *res ipsa loquitur* is generally limited to some variation of two basic fact situations. One situation arises where a foreign object left in the body of the plaintiff causes the injury.[9] The other is where there is a "distinct injury to a healthy part of the body not the subject of treatment nor within the area covered by the operation."[10]

In the principal case the court, in following the common law of Maryland, stated that "the doctrine of *res ipsa loquitur* may not be invoked in an action for malpractice against a physician or surgeon,"[11] and that the only exception to the above rule "consists of cases where the undesirable result is such that it is evident even to a layman and could not have occurred except for the doctor's negligence."[12] The stated exception is a not uncommon test used by those courts which ostensibly support the doctrine in malpractice cases to determine whether *res ipsa loquitur* will apply in the particular case.[13] It seems on close analysis that the court in the principal case, while outwardly rejecting the doctrine in actions for malpractice, might actually apply it: (1) where a foreign object left in the body caused the injury, and (2) where the injury was to a healthy part of the body not involved in treatment.

In addition to *Bettigole v. Diener*,[14] on which the court relied in the instant case as stating the law in Maryland, the court also leaned heavily on two cases on all fours with the principal case. In *Farber v.*

[7] Lippard v. Johnson, 215 N.C. 384, 1 S.E.2d 889 (1939) (administration of local anesthetic); Davis v. Pittman, 212 N.C. 680, 194 S.E. 97 (1937) (X-ray burn); see Annot., 27 A.L.R. 1250 (1923), stating that "the general practitioner of medicine or of surgery does not, in the absence of his special contract, impliedly warrant the success of his treatment or operation, but does guarantee to possess and carefully to apply such professional skill and learning as are ordinarily possessed by general medical practitioners in the locality in which he practices."

[8] Mitchell v. Saunders, 219 N.C. 178, 13 S.E.2d 242 (1941); Pendergraft v. Royster, 203 N.C. 384, 166 S.E. 285 (1932) (broken glass left in woman's body after operation); Annot., 162 A.L.R. 1265 (1946).

[9] Mitchell v. Saunders, 219 N.C. 178, 13 S.E.2d 242 (1941), 19 N.C.L. Rev. 617. See also Meredith, *Responsibility of Surgeons*, 34 Can. B. Rev. 1192 (1956).

[10] Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944). See also Notes, 18 Miss. L.J. 448 (1947), 9 U. Det. L.J. 51 (1945), 63 Harv. L. Rev. 643 (1950).

[11] 151 F. Supp. at 347. [12] *Id.* at 348.

[13] See Farber v. Olkon, 40 Cal. 2d 503, 510, 254 P.2d 520, 524 (1953).

[14] 210 Md. 537, 124 A.2d 265 (1956) (plaintiff suffered facial paralysis due to nerve damage following a mastoidectomy in which the facial nerve was exposed, verdict directed for defendant).

Olkon[15] and *Quinley v. Cooke*,[16] electro-shock treatment resulted in fractures and *res ipsa loquitur* was held inapplicable. In considering these two cases, the reason for not applying the doctrine becomes apparent. In both cases defendant introduced evidence on trial tending to negate the condition that the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence.[17] In both cases expert testimony brought out the fact that fractures were "calculated risks of the treatment"[18] which involved the entire body, and that such accidents do happen without negligence. It is worthy of mention that the *Bettigole* case and all the cases therein cited[19] as authority to support the result involved fact situations falling within the first general group of cases where the action was based solely on the bad result of treatment and in which it is doubtful that any court would apply the doctrine.[20]

It appears that no malpractice case has reached the North Carolina Supreme Court since 1941 in which *res ispa loquitur* was relied on and applied. To date, this bears out the prediction in this *Law Review*[21] that the formula announced in *Covington v. James*[22] probably would not be widely extended. This formula would allow the application of *res ipsa loquitur* "in any case where the result reached was 'grotesquely contrary to all human experience.' "[23] Since then, the doctrine has been mentioned in several opinions involving malpractice, but in none of these opinions does it appear that the plaintiff expressly relied on it, and it was ruled inapplicable in all cases.[24]

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[15] 40 Cal. 2d 503, 254 P.2d 520 (1953).
[16] 183 Tenn. 428, 192 S.W.2d 992 (1946).
[17] 25 Cal. 2d at 489, 154 P.2d at 689.
[18] 40 Cal. 2d at 511, 254 P.2d at 525.
[19] State v. Baltimore Eye, Ear, and Throat Hospital, 177 Md. 517, 10 A.2d (1940) (patient died of a blood clot on the lungs following a tonsillectomy, verdict directed for defendant); Fink v. Steele, 166 Md. 354, 171 Atl. 49 (1934) (dentist filled a tooth which later abscessed, was entitled to a directed verdict); Street v. Hodgson, 139 Md. 137, 115 Atl. 27 (1921) (plaintiff burned by X-ray, no inference of negligence from burn alone); Augalo v. Hallar, 137 Md. 227, 112 Atl. 179 (1920) (dentist attempted to remove roots of tooth, plaintiff's infected jaw became worse); Miller v. Leib, 109 Md. 414, 72 Atl. 466 (1909) (plaintiff alleged specific negligence); State v. Housekeeper, 70 Md. 162, 16 Atl. 382 (1889) (woman operated on for breast cancer later died).
[20] *Cf.* Hunt v. Bradshaw, 242 N.C. 517, 88 S.E.2d 762 (1955) (metal sliver lodged near the base of plaintiff's neck, nerve injured in removal caused loss of use of one hand); Hawkins v. McCain, 239 N.C. 160, 79 S.E.2d 493 (1953) (plaintiff while being treated for a skin condition through the use of arsensic developed other symptoms alleged to be caused by arsenic); Nance v. Hitch, 238 N.C. 1, 76 S.E.2d 461 (1953) (X-ray burn). In none of the above cases was *res ipsa loquitur* found applicable.
[21] Note, 19 N.C.L. REV. 617 (1941). [22] 214 N.C. 71, 197 S.E. 701 (1938).
[23] Note, 19 N.C.L. REV. 617, 619 (1941) quoting 214 N.C. at 76, 197 S.E. at 701.
[24] See cases cited note 20 *supra*.

Torts—Statutory and Common Law Duty to Label Poisons

In *Porter v. Yoder & Gordon Co.*[1] the plaintiff contracted to paint municipal water tanks and acting pursuant to a provision therein ordered from defendant litharge[2] in powdered form to mix with red lead paint. The only labeling on the litharge containers was "Lev-L-Lite Paint Products-Litharge-Manufactured by Yoder & Gordon Company—Established 1904—Norfolk, Virginia." In mixing the litharge with the paint, the plaintiff and four of his employees sustained lead poisoning. Basing his action solely upon a poison labeling statute,[3] plaintiff sued the defendant for negligence in failing to label its product as poison. By this theory plaintiff was attempting to establish defendant's violation of the statute as negligence per se.[4] The jury found the defendant negligent and the plaintiff not contributorily negligent.

The supreme court reversed and entered a nonsuit against plaintiff, holding as a matter of law that the statute was inapplicable as it related to "Pharmacy" and to the sale of medicines containing poisonous ingredients.[5] There had been no previous litigation in the North Carolina Supreme Court in regard to this statute.[6]

[1] 246 N.C. 398, 98 S.E.2d 497 (1957).

[2] Litharge is principally lead monoxide, which is dangerous if inhaled or ingested. In powdered form, it is even more dangerous because of the susceptibility of being breathed. When mixed with paint, litharge dries the paint quickly and gives it hardness.

[3] N.C. GEN. STAT. § 90-77 (1950). "Poisons; sales regulated; label; penalties.—It shall be unlawful for *any persons* to sell or deliver to any person any of the following described substances or any poisonous compound, combination or preparation thereof, to wit: The compounds and salts of arsenic, antimony, *lead,* mercury, silver, zinc, . . . except in the manner following: It shall first be learned by due inquiry that the person to whom delivery is made is aware of the poisonous character of the substance, and that it is desired for a lawful purpose, and the box, bottle, or other package shall be labeled with the name of the substance, the word 'Poison' and the name of the person or firm dispensing the substance . . . . : Provided further, that it shall not be necessary to place a poison label upon, or to record the delivery of, the sulphide or antimony or the *dioxide* or *carbonate* of zinc or *lead,* or of colors ground in oil and intended for use as paint . . . .

"If any person shall sell or deliver to any person any poisonous substance specified in this section without labeling the same and recording the delivery thereof in the manner prescribed, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars." (Emphasis added.)

It is obvious that litharge is not expressly exempted by the statute from being labeled "poison." Logically it would seem to follow that litharge is enumerated by statute as requiring a "poison" label.

[4] Violation of a criminal statute unless otherwise provided is negligence per se in a civil action. Hinson v. Dawson, 241 N.C. 714, 86 S.E.2d 585 (1955); Aldridge v. Hasty, 240 N.C. 353, 82 S.E.2d 331 (1954).

[5] Chapter 90 of the *General Statutes of North Carolina* is entitled "Medicine and Allied Professions." Article 4 is entitled "Pharmacy." Part 2 of the article is captioned "Dealing in Specific Drugs Regulated."

[6] This fact may have helped the defendant. "Long acquiescence in the practical interpretation of a statute is entitled to great weight in arriving at its meaning. It is not thought that the real intent of the enactment could have been so generally misunderstood for years on end." State v. Emery, 224 N.C. 581, 587, 31 S.E.2d 858, 862 (1944).

Under the doctrines of *ejusdem generis*[7] and strict construction of penal statutes[8] the meaning of the statute was restricted so as not to apply to the sale of this commercial paint ingredient. Once strict construction is adopted, the decision is sound.[9] There is no North Carolina case in point, so the court used two extra-jurisdictional cases, *Boyd v. Frenchee Chemical Co.*[10] and *McClaren v. G. S. Robins Co.*,[11] as authority.

The *Boyd* case lends support to the decision of the court in the principal case. Plaintiff's intestate, nineteen months old, drank a bottle of shoe cleaner labeled only by its trade name. Action was brought under a Pennsylvania statute under the "Pharmacy" section requiring labeling of poisons. The court held for defendant, stating that although the definition of poison contained in the statute could include the shoe cleaner, the statute could not be construed to regulate the sale of products having no connection with pharmacy. Possibly a distinguishing factor in this case is the statement that "the very name of the product must have brought home to the parents the knowledge that it was a 'fabric cleaner' and not something that their child should drink, and certainly the word 'poison,' even though it was carried

[7] "The statutory construction of the 'ejusdem generis' rule is that, where the general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." John L. Roper Lumber Co. v. Lawson, 195 N.C. 840, 846, 143 S.E. 847, 850 (1928). "The rule of ejusdem generis is based on the theory that if the legislature had intended general words to be used in their unrestricted sense, it would have made no mention of particular classes." *In re* Bush Terminal Co., 93 F.2d 659, 660 (2d Cir. 1938). Thus in the principal case the words "any persons" mean any persons within the practice of pharmacy according to the *ejusdem generis* construction.

[8] State v. Jordon, 224 N.C. 579, 42 S.E.2d 674 (1947); State v. Heath, 199 N.C. 135, 153 S.E. 855 (1930); Hines v. Wilmington & W.R.R., 95 N.C. 434 (1886).

[9] McGee v. Bennett, 72 Ga. App. 271, 33 S.E.2d 577 (1945) (the doctrine of *ejusdem generis* applied to statutes prescribing label of fungicides). "The construction and operation of penal statutes relating to poisons are governed by the general principles applicable to all statutes, and such statutes, where penal in nature, are strictly construed and will not be extended by implication beyond their express terms." 72 C.J.S., *Poisons* § 4 (1951).

[10] 37 F. Supp. 306 (D.C.N.Y. 1941).

[11] 349 Mo. 653, 163 S.W.2d 856 (1942). Deceased, a workman, was cleaning a boiler with carbon tetrachloride. Breathing the fumes caused his death. It seems that he did not use proper care in procuring adequate ventilation. Wrongful death action was brought by administratrix under a statute requiring "every druggist or other person who shall sell . . . any arsenic, strychnine . . . or other substance . . . usually denominated as poisonous, without having the word 'poison' . . . thereon, shall be fined $25." ILL. REV. STAT. c. 38, § 184 (1937). There are other cases which support the North Carolina court's decision. Levin v. Musser, 110 Neb. 515, 194 N.W. 672 (1923) (deceased drank poisonous non-medicinal oil. The regulatory statute applied only to poisons if they were articles of medicine); Victory Sparkler & Specialty Co. v. Price, 146 Miss. 192, 111 So. 437 (1927) (sparkler fireworks were eaten by a child. The statute was held to apply only to sale of poisons by druggists, thereby exempting defendant).

on the package, would not have deterred a nineteen month old infant from drinking the substance."[12] In the principal case plaintiff used the product for its intended purpose. The *McClaren* case is similar factually, but the statute there does not specifically enumerate carbon tetrachloride as requiring a label, while the North Carolina statute by its terms seemingly requires a label for lead monoxide.[13]

Legislative purpose is heavily relied on by the court and it is correctly stated that the purpose of the act was to regulate the practice of pharmacy.[14] Not involving itself with the text of the statute, the court devotes its attention to the context and title in reaching its conclusion. If the statute applies only to the sale and labeling of poisons by pharmacists, why does the statute contain clauses excepting lead dioxide, lead carbonate, and colors ground in oil and intended for use as paint from being labeled? The defendant offered perhaps the most plausible explanation and one which plaintiff did not contest, *viz.*, that "it is a matter of common knowledge that paint dyes as we know them today were undiscovered in 1905 and that drugstores generally sold the only two paint pigments then available . . . ."[15]

A more liberal construction of a similar statute was given in *Stone v. Shaw Supply Co.*,[16] where plaintiff was injured by yellow phosphorous sold by defendant dealer (not a pharmacist) to one of plaintiff's friends, who gave the substance to the plaintiff. Action was brought under a statute making it unlawful to sell a deadly poison (which included yellow phosphorous) to anyone not aware of its poisonous character. Deciding against defendant's contention that the statute applied only to pharmacy, the court said that the statute should be applied against a dealer not a pharmacist in order to protect the public. Such an approach seems much more realistic in effecting what the statute ostensibly intends—the protection of public health.

Since there is no statutory remedy, the next question is whether the plaintiff has a common-law remedy.[17] Can plaintiff sue the manu-

[12] 37 F. Supp. at 308.

[13] See note 3 *supra*.

[14] N.C. Public Laws (1905), c. 108, §§ 20, 28, entitled, "An Act to Revise, Consolidate, and Amend the Pharmacy Law." N.C. Public Laws (1905), c. 108, § 2 reads, "That the object . . . is to unite the pharmacists and druggists of this state for mutual aid, encouragement and improvement, to encourage scientific research, develop pharmaceutical talent, to elevate the standard of professional thought and ultimately restrict the practice of pharmacy to properly qualified druggists and apothecaries."

[15] Brief for Appellant, p. 18, Porter v. Yoder & Gordon Co., 246 N.C. 398, 98 S.E.2d 497 (1957).

[16] 148 Ore. 416, 36 P.2d 606 (1934).

[17] If plaintiff could prove a cause of action for breach of warranty, he could maintain such action against the manufacturer because of privity of contract between the parties, which North Carolina, in accord with the majority view, requires. Caudle v. F. M. Bohannon Co., 220 N.C. 105, 16 S.E.2d 680 (1941); Thomason v. Ballard & Ballard Co., 208 N.C. 1, 179 S.E. 30 (1935). *But see*

facturer for common-law negligence for failure to warn of the danger? Generally a seller of inherently dangerous articles, known to be dangerous,[18] is under a duty to warn of the danger by labeling or otherwise conveying knowledge of the hazard to persons *likely* to be harmed.[19] However, notice or warning of danger is not required where no danger is reasonably to be anticipated because of the special knowledge or experience of the user.[20] In the principal case plaintiff was a college graduate,[21] an experienced paint contractor,[22] and a buyer of paint products from the defendant for years.[23] It seems that plaintiff could recover for common-law negligence only if a jury should find that an ordinary, reasonable and prudent man of his knowledge and experience would not have known what litharge was.

Davis v. Radford, 233 N.C. 283, 286, 63 S.E.2d 822, 825 (1951) (dictum), 30 N.C.L. REV. 191 (1952). But in this case there was no breach of warranty. Since the goods were asked for by name, the only implied warranty is that of merchantability, which means that the substance sold is reasonably fit for the ordinary uses it was manufactured to meet. Giant Manufacturing Co. v. Yates-American Machine Co., 111 F.2d 360 (8th Cir. 1940). 46 AM. JUR., *Sales* § 351 (1943); 77 C.J.S., *Sales* § 327 (1952). For convenient groupings of cases in this regard see Annot., 59 A.L.R. 1180 (1929); Annot., 90 A.L.R. 410 (1934); Annot., 135 A.L.R. 1393 (1941). In the principal case defendant would be liable for breach of warranty only if the litharge were unfit for its ordinary use, and there was no evidence to that effect. Simmons v. Rhodes & Jamieson, Ltd., 46 Cal. 2d 190, 293 P.2d 26 (1956).

[18] Guyton v. S. H. Kress & Co., 191 S.C. 530, 5 S.E.2d 295 (1939).

[19] Farley v. Edward E. Tower & Co., 271 Mass. 285, 171 N.E. 639 (1930); Orr v. Shell Oil Co., 352 Mo. 288, 177 S.W.2d 608 (1943); Corum v. R. J. Reynolds Tobacco Co., 205 N.C. 213, 173 S.E. 78 (1933) (dictum); 65 C.J.S., *Negligence* § 100 (1950); RESTATEMENT, TORTS § 388 (1934); Dillard and Hart, *Product Liability, Directions for Use and Duty to Warn*, 41 VA. L. REV. 145 (1955); James, *Products Liability*, 34 TEX. L. REV. 44, 192 (1956); Wilson, *Products Liability*, 43 CALIF. L. REV. 614, 809 (1955). Poisons are included within the rule. McCrossin v. Noyes Bros., 143 Minn. 181, 173 N.W. 566 (1919). Sale of the poisonous substance without labeling it as such must be the proximate cause of injury. Levin v. Musser, 110 Neb. 515, 194 N.W. 672 (1923).

[20] Howard Stores Corp. v. Pope, 1 N.Y.2d 110, 150 N.Y.S.2d 792, 134 N.E.2d 63 (1956); Parker v. State, 201 Misc. 416, 105 N.Y.S.2d 735 (Ct. Cl. 1951); Harper v. Remington Arms Co., 156 Misc. 53, 280 N.Y.S. 862 (Sup. Ct. 1935); Rosebrock v. General Electric Co., 236 N.Y. 227, 140 N.E. 571 (1923); Thrash v. U-Drive It Co., 93 Ohio App. 451, 113 N.E.2d 650 (1951). RESTATEMENT, TORTS § 388 (b) (1934) requires that defendant have no reason to believe that those for whose use the chattel is supplied will recognize its dangerous condition. Two cases do not even require special knowledge of the buyer when the goods are asked for by name. The court laid down the rule in Gibson v. Torbert, 115 Iowa 163, 88 N.W. 443 (1901), that when a person has reached the age of discretion and is apparently in possession of his mental faculties and asks a druggist for a certain drug, he impliedly represents to the druggist that he knows its qualities. Unless there is something to indicate to the druggist that the purchaser cannot be safely entrusted with the drug, the seller is not liable in damages for injuries to the purchaser resulting from the improper use or handling of the article, no matter how little knowledge the purchaser may in fact have had of its qualities. The vendor's only duty, according to the court, is to supply the buyer with the identical substance asked for. *Accord*, Forney v. Sears, 153 Wash. 615, 280 Pac. 56 (1929).

[21] Transcript of Record, p. 116, Porter v. Yoder & Gordon Co., 246 N.C. 398, 98 S.E.2d 497 (1957).

[22] *Id.* at 55.

[23] *Id.* at 20.

The unfortunate plaintiff in the principal case is without a statutory remedy and probably without a common-law remedy. However, the case can serve a much greater purpose than food for torts' thought.

Despite whatever logic there may have been in including the sale of lead compounds used in paint under the "Pharmacy" caption of the *North Carolina General Statutes,* section 90-77 is now in an anomalous position. It would seem to be as much in the public interest and safety to have legislation regulating the sale of lead compounds used as paint ingredients as it is now for public safety that we have legislation regulating the sale of insecticides, fungicides, and rodenticides.[24] The only existing regulatory legislation in the general area of paint products applies to the sale of linseed oil[25] and turpentine.[26] In view of the inherently dangerous quality of lead compounds used as paint ingredients, the slight cost to the manufacturer in placing appropriate labels on containers,[27] and the welfare of the public, it is submitted that the duty to warn should be made statutory.

WILLIAM H. MCCULLOUGH

Wills—Devises and Bequests by Implication

In *Finch v. Honeycutt*[1] the testator declared in his will: "My estate is a community estate[2] with my wife Georgia Greer Honeycutt and has been held as such for several years when paying Federal and State Income Tax.

"Therefore it is my will that my half of my and her (wife) estate be given to my three children."[3] No further mention of the other half of the estate was made anywhere in the will. *Held,* a half interest of all the real and personal property of the deceased went to the wife in fee under the will by virtue of the doctrine of devises and bequests by implication.

In an earlier North Carolina case, *Burcham v. Burcham,*[4] the testator willed his wife "support" and expressed his desire that she should have

[24] N.C. GEN. STAT. § 106-65.1 (1952). This is the insecticide, fungicide and rodenticide act.

[25] N.C. GEN. STAT. § 106-285 (1952).

[26] N.C. GEN. STAT. § 106-303 (1952).

[27] The insecticide, fungicide, and rodenticide act requires the labeling of the enumerated poisons with a skull and crossbones symbol and a "poison" label in red letters against a differently colored background. N.C. GEN. STAT. § 106-65.3 (3) (1952). This would seem to be an appropriate label to place on containers of lead compounds used as paint ingredients.

[1] 246 N.C. 91, 97 S.E.2d 478 (1957).

[2] The doctrine of community property is given effect in only seven states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, and Texas. 41 C.J.S., *Husband and Wife* § 462(c) (Supp. 1957).

[3] 246 N.C. at 92, 97 S.E.2d at 480.

[4] 219 N.C. 357, 13 S.E.2d 615 (1941).

anything she wanted, and could live anywhere she wanted to, and have a good time for the remainder of her life so long as she did not marry again. The court found from these expressions of the testator that his intent was that the entire property be used for his wife's benefit during her lifetime or widowhood and found the inference so strong as to necessarily give the widow a power of disposition.[5]

In another case, *Efird v. Efird*,[6] the testator stated in his will that the homeplace where he and his wife lived was owned by them as tenants by the entirety, and that "upon my death . . . she will automatically own" it. In fact, the testator owned the property individually. In later sections of the will the testator made provisions to be carried out "after the above properties shall have been *given* to my wife." (Emphasis added.) The court said this language referred back to the testator's previous statement that the wife would automatically own the homeplace at his death, and held that the will manifested an intent that the homeplace should go to the wife.

In the principal case the testator made no reference to any part of the estate that might be given or allotted to his wife. There were no words sufficient to tie the testator's statement that his wife owned an interest in the estate into an expression of intent that any interest should pass to her under the will, as was found in the *Efird* case. If he were under the impression that his wife owned half the estate in her own right, then it appears illogical that he intended such half to pass to her under his will.

A search of the authorities has revealed only a few holdings from other jurisdictions on this issue. In *In re Boehm's Will*[7] the will stated: "There are other pieces of real estate in my name only . . . . However, the ownership of them represents the joint efforts of my husband and myself in work, savings, improvement, care, and management. It would be fair, I believe to consider and say that his interest is half and mine half, and I so declare."[8] The New York court held that such declaration did not constitute a devise to the husband.[9] The court said that it would be absurd to find that the testatrix intended to dispose of property which she declared she did not own.

In *Hatch v. Ferguson*[10] the testator made a devise to his children of

[5] The testator also made certain provisions for disposal of the property after the wife's death.

[6] 234 N.C. 607, 68 S.E.2d 279 (1951).

[7] 198 Misc. 994, 101 N.Y.S.2d 812 (Surr. Ct. 1951), *aff'd*, 281 App. Div. 1069, 121 N.Y.S.2d 766 (4th Dep't 1953).

[8] 101 N.Y.S.2d at 813-14.

[9] See Williams v. Allen, 17 Ga. 81 (1855), where the court stated that recitals by the testator in his will that erroneously declared title to property to be in a third person, which, in fact, belonged to the testator, did not amount to a devise or bequest of such property by the will.

[10] 68 Fed. 43 (9th Cir. 1895).

all his estate, describing it as "being the one-half interest in the community property now owned by me and my said wife." It was found that the testator owned the property individually, and the court held that his descriptive language could only be regarded as the expression of his opinion and did not convert the property into community property or operate as a devise of half thereof to his wife. The children took all.[11]

By the holding in the principal case it is apparent that the North Carolina Supreme Court has extended the doctrine of devises and bequests by implication further than it had yet done. The result it reaches is in conflict with the holdings of the jurisdictions discussed above. Yet it seems that the result may well be the more desirable one, since it more probably accords with the testator's intent as to whom the property should go.

PAUL MCMURRAY

Workmen's Compensation—Injuries Sustained by Employee While Going to and from Work

In *Hardy v. Small*[1] deceased, a thirteen year old boy, lived with his family on the farm of defendant under an arrangement whereby the family paid no rent, but was allowed to occupy a house owned by defendant in return for farm labor supplied by the family. Deceased lived on the east side of a public highway which ran through defendant's farm, and he had the duty of feeding defendant's livestock at a barn located 350 to 400 feet from his home on the west side of the highway. Deceased was required to feed the livestock twice a day and was paid $1.50 per week for this service. On November 30, 1955, deceased had crossed the highway, gone to the barn, fed the livestock, and was returning to his home when he was struck by an automobile on the highway and killed. Compensation proceedings were instituted.[2] The Industrial Commission found that the death was by accident rising out of and in

[11] See Circuitt v. Perry, 23 Beav. 275, 53 Eng. Rep. 108 (Rolls 1856). Where *X* willed all his real and personal property to *Y* but stated that on his death, part of his father's property would, under his father's will, devolve upon his nephews, when in fact the property then belonged to *X*, held, the property of the father's estate did not pass to the nephews under *X*'s will.

[1] 246 N.C. 581, 99 S.E.2d 862 (1957).

[2] N.C. GEN. STAT. § 97-13 (b) (1950) expressly excepts farm labor from the provisions of the Workmen's Compensation Act, but provides that if any employer of farm labor has purchased workmen's compensation insurance or insurance to cover his compensation liability the employer shall be conclusively presumed, during the life of the policy, to have accepted the provisions of the act. Defendant in this case had such a policy which was active at the time of the death of the decedent.

the course of the employment[3] within the purview of the Workmen's Compensation Act[4] and granted compensation. On appeal this was affirmed by the superior court and the supreme court.

The opinion recognized the general rule that an injury by accident is not compensable if sustained by the employee while on his way to or returning from the premises where the work of his employment is performed.[5] However, exceptions to this rule have developed in North Carolina and compensation has been allowed where the employee was going to or returning from the place of his employment if: the employer either expressly[6] or impliedly[7] furnished a vehicle for that purpose; the employer pays the expense of transportation;[8] the employer provides a method for transportation of the employees as an incident of the contract of employment;[9] the employee was performing a "special mission"

[3] The court rejected the contention made by defendant that the employee was an independent contractor. See McCraw v. Calvine Mills, Inc., 233 N.C. 524, 64 S.E.2d 658 (1951); Hayes v. Elon College, 224 N.C. 11, 29 S.E.2d 137 (1944).

[4] N.C. GEN. STAT. §§ 97-1 to -122 (1950).

[5] Bryan v. T. A. Loving Co. & Associates, 222 N.C. 724, 24 S.E.2d 751 (1943); Lassiter v. Carolina Tel. & Tel. Co., 215 N.C. 227, 1 S.E.2d 542 (1939); Bray v. W. H. Weatherly & Co., 203 N.C. 160, 165 S.E. 332 (1932); Hunt v. State, 201 N.C. 707, 61 S.E. 203 (1931); 1 LARSON, WORKMEN'S COMPENSATION LAW § 15.10 (1952); 8 SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 1710 (1951).

[6] Phifer's Dependents v. Foremost Dairy, Inc., 200 N.C. 65, 156 S.E. 147 (1939). Employer provided employee with a truck to be used for the purpose of going to and coming from work. Employee was killed in a collision while on his way from his home to the employer's plant. Compensation award was affirmed.

[7] Smith v. Gastonia, 216 N.C. 517, 5 S.E.2d 540 (1939). Employee, a motorcycle policeman, was assigned a motorcycle with the understanding that he could leave it at city hall or ride it home. Employee had made a practice of riding the motorcycle home at night. On one such trip he was struck by an automobile and killed. *Held,* compensation allowed. *But see* Alford v. Quality Chevrolet Co., 246 N.C. 214, 97 S.E.2d 869 (1957) (an unreasonable interval of time lapsed between employee's departure and his trip home so that no compensation was awarded, even though employer had furnished employee an automobile for the purpose of coming to and going from the place of employment).

[8] Puett v. Bahnson Co., 231 N.C. 74, 58 S.E.2d 633 (1950). Employer paid automobile expenses and employee drove his own car to the place of employment. An accident occurred on one such trip and employee was injured. The award of compensation was affirmed. *But see* Hunt v. State, 201 N.C. 707, 161 S.E. 203 (1931) (compensation was not allowed when the employer only paid employees wages during the trip, and employee paid his own automobile expenses). The question of injuries sustained by an employee while using public transportation at the employer's expense has not arisen in North Carolina.

[9] Edwards v. T. A. Loving Co., 203 N.C. 189, 165 S.E. 356 (1932). Employer furnished a truck which picked the employees up and transported them from their homes to the place of employment. Employees were entitled to use the conveyance by virtue of their contract of employment. Employee was allowed compensation when injured while on the conveyance being transported to work. *But see* Lassiter v. Carolina Tel. & Tel. Co., 215 N.C. 227, 1 S.E.2d 203 (1931) (compensation was refused when the transportation was furnished gratuitously or as a mere accommodation). See also Mion v. Atlantic Marble Co., 217 N.C. 743, 9 S.E.2d 501 (1940). Employer-provided conveyance was overcrowded. Employer's foreman gave employee the option of "crowding in" or riding with another employee who had driven his own car for personal convenience. Employee chose the latter and was fatally injured when that automobile had an accident. *Held,* compensation allowed.

at the request of the employer;[10] the employee makes use of the streets after the hours of his regular employment in the performance of a duty connected to the employment, as shown by an established custom.[11]

The question presented in the *Hardy* case was one of first instance in North Carolina and, by affirming the award of compensation, the court aligned itself with other jurisdictions which on one of several theories have allowed compensation in specific instances for street injuries[12] and closely analogous railroad crossing injuries sustained by an employee while going to or coming from work.[13] Most of the cases have adopted the theory that if the point at which the injury occurred, even though it is not on the premises of the employer, lies on the only route, or at least the normal route, which the employees must traverse to reach the place of employment, then the hazards of that route become the hazards of the employment.[14] The North Carolina Supreme Court

[10] Massey v. Board of Education, 204 N.C. 193, 167 S.E. 695 (1933). Claimant was employed as a janitor at a rural school and had been instructed by the principal to stop by a grocery store and purchase cleaning supplies. Claimant left his home on the way to work and was crossing a street to the grocery store when he was struck by an automobile. Compensation award affirmed. *But see* Davis v. North State Veneer Corp., 200 N.C. 263, 156 S.E. 859 (1931). The employee made a voluntary "special errand" during his off duty hours, and it was held that injury occasioned when the employee was struck by an automobile and killed while on this mission was not an injury arising out of and in the course of the employment. See also Wilkie v. Stancil, 196 N.C. 794, 147 S.E. 296 (1929).

[11] Hinkle v. Lexington, 239 N.C. 105, 79 S.E.2d 220 (1953), 32 N.C.L. REV. 372 (1954). Employee was a cemetery keeper for the city. His duties were to care for the city cemeteries, to cut the grass, sell cemetery lots, dig graves, remove surplus dirt, and perform such other duties as were incidental to the position of cemetery keeper. It was his custom nearly every evening, and had been for many years, to visit the funeral homes of the city to learn if any graves were to be dug, funerals arranged, or cemetery lots sold. On the night of his death employee had finished his duties at the cemetery and set out on his usual rounds from his home to the funeral homes, but in crossing a street he was struck by an automobile and killed. Compensation was awarded on the ground that the injury arose out of and in the course of the employment.

[12] Canoy v. State, 113 W.Va. 914, 918, 170 S.E. 184, 186 (1933), is closely analogous to the *Hardy* case. In the *Canoy* case the employer operated a mine, with the mine site located on one side of the highway and housing owned by the employer located on the other side. An employee was killed by an automobile as he crossed the highway while returning from his day's work at the mine. Compensation was allowed. The court stated, "[W]e are of the opinion that the use of the place of injury at the time thereof is shown to have been within the course of and resulting from the employment of claimant's decedent, by an express or implied requirement of the contract of employment of its use by the workman in going to and returning from his work." It was shown that crossing the road was the only method by which the employee could reach his home.

[13] A somewhat related problem, on the question of the extent of coverage afforded "travelling employees" under the workmen's compensation laws, is the subject of a Note appearing in 23 N.C.L. REV. 159 (1944).

[14] Judson Mfg. Co. v. Industrial Comm'n, 184 Cal. 300, 184 Pac. 1 (1919); Jaynes v. Potlach Forest, Inc., 75 Idaho 297, 271 P.2d 1016 (1954); Fennimore v. Union Constr. & Holding Co., 22 N.J. Misc. 33, 35 A.2d 32 (1943); 1 LARSON, WORKMEN'S COMPENSATION LAW § 15.13 (1952). Two Utah cases, Bountiful Brick Co. v. Industrial Comm'n, 68 Utah 600, 151 Pac. 555 (1926), and Cudahy Packing Co. v. Industrial Comm'n, 60 Utah 161, 207 Pac. 148 (1922), are based

recognized, but refused to adopt this theory in *Bryan v. T. A. Loving Co. & Associates.*[15] A second theory for allowing compensation in the going and coming cases is based upon the concept that the premises of the employer should be extended for a "reasonable time and distance" to afford the employee protection after he has come within the "zone" of employment.[16] This theory is troublesome in its application and gives inconsistent results, as there is no established basis for determining what is a reasonable distance.[17] The third theory allows compensation whenever the employee is injured by employment hazards which extend beyond the premises of the employer.[18] The fourth theory

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on this theory. In both cases the employee was killed as he crossed a railway track in order to reach his employer's premises. From a judgment in each case awarding compensation, appeal was taken to the United States Supreme Court, where the cases were heard as Bountiful Brick Co. v. Giles, 276 U.S. 154 (1928), and Cudahy Packing Co. v. Parramore, 263 U.S. 418 (1923), respectively. The cases were appealed on the ground that an award of compensation in these circumstances was in violation of the due process clause of the fourteenth amendment of the United States Constitution. The court rejected this contention, and in affirming the holding of the *Parramore* case said: "Here the location of the plant was at a place so situated as to make the customary and only practicable way of ingress and egress one of hazard. Parramore could not, at the point of the accident, select his way. He had no other choice than to go over the railway tracks in order to get to his work; and was in effect invited to do so. And this he had to do regularly and continuously as a necessary concomitant of his employment, resulting in a degree of exposure to the common risk beyond that to which the public generally was subjected." *Id.* at 426. The *Giles* case was also affirmed even though there were other routes of entrance available.

[15] 222 N.C. 724, 24 S.E.2d 751 (1943). The employee, who worked as a guard at the gate of a marine base, arrived at work on a bus which discharged him across the highway from the entrance. He was killed by an automobile as he attempted to cross to the gate. A part of the employee's duties included directing traffic in the highway during rush hours. The court specifically held that defendant's premises did not include the street where the employee sometimes worked. In reversing the judgment awarding compensation the court held that the employee was subjected to no more extraordinary risk than any other person using the highway. *Cf.* Guient v. Mathieson Chemical Corp., 41 So. 2d 493 (La. App. 1949). In the *Bryan* case the court discussed Bountiful Brick Co. v. Giles, *supra* note 14, as precedent but rejected that case on the grounds that: (1) the Utah Workmen's Compensation Act makes injuries arising out of *or* in the course of employment compensable, whereas the North Carolina Act requires the injury to arise out of *and* in the course of the employment, and that because of this difference the Utah courts interpreted "in the course of" the employment to include "a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done"; and (2) the United States Supreme Court only decided that the Utah Workmen's Compensation Act as so applied does not contravene the due process clause of the fourteenth amendment.

[16] Barnett v. Britling Cafeteria Co., 225 Ala. 462, 143 So. 813 (1932) (this case was also rejected in the *Bryan* case on the grounds that it was in direct conflict with prior North Carolina decisions); Leatham v. Thurston & Braidich, 264 App. Div. 449, 35 N.Y.S.2d 887 (1942); Industrial Comm'n v. Barber, 117 Ohio St. 373, 159 N.E. 363 (1927).

[17] *Compare* Barnett v. Britling Cafeteria Co., *supra* note 16, in which the employee was "immediately" outside of the entrance to the employer's premises and preparing to enter, *with* Boles v. Service Club, 208 Ark. 692, 187 S.W.2d 321 (1925), where employee was 31 feet from the entrance.

[18] Freire v. Matson Navigation Co., 19 Cal. 2d 8, 118 P.2d 809 (1941). This was a common law action in which employee was injured by a taxicab in a

allows compensation where the employee travels along or across a public road between two portions of his employer's premises, whether going or coming or pursuing his active duties.[19] The reasoning here is that once the employee has come onto the premises of the employer he is within the scope of his employment and subject to the control of his employer. Thus if while in the performance of his duties he is required to cross a highway or railroad track which runs through his employer's premises he does so as an incident of the employment, and if injured while negotiating the hazard, then such injury is within the scope of his employment and compensable.[20] This theory, apparently the one adopted in the *Hardy* case,[21] has been applied in allowing compensation in cases where an employee is injured while crossing a highway or railroad track which separates the employer's plant from company owned housing[22] or from a parking lot[23] maintained by the employer for the convenience of the employees. But in *Horn v. Sandhill Furniture Co.*[24] the employee was

public street while on the way to work. As the traffic congestion was created by vehicles and persons which had come to do business with the employer, it was held that the employee's exclusive remedy was under the Workmen's Compensation Act. The argument of the *Freire* case is based on much the same reasoning as was rejected in the *Bryan* case. In the *Bryan* case the hearing commissioner found that more than 90% of the traffic where employee was working was composed of employees of defendant employer and other workmen who were erecting the marine base and that employee was subjected to an extraordinary and greater hazard of being injured by an automobile than that to which the public generally was subjected or that was common to the neighborhood. This reasoning was adopted by the full Industrial Commission, which found that the employee was in the "ambit" of his employment and affirmed the hearing commissioner. The supreme court rejected this argument and held that on the contrary, he was at the time on the way to his place of employment. The *Freire* case, cited in the opinion, was held to be factually distinguishable, as the hazard in that case was created by other employees of the company as such and not as members of society at large. See also 1 LARSON, WORKMEN'S COMPENSATION LAW § 15.31 (1952).

[19] Kuharski v. Bristol Brass Corp., 132 Conn. 563, 46 A.2d 11 (1946); 1 LARSON, WORKMEN'S COMPENSATION LAW § 15.14 (1952).

[20] Corvi v. Stiles & Reynolds Brick Corp., 103 Conn. 449, 130 Atl. 674 (1925); McMillin v. Calco Chemical Co., 157 N.J. Misc. 68, 188 Atl. 694 (1936); Texas Employer's Ins. Ass'n v. Anderson, 125 S.W.2d 674 (Tex. Civ. App. 1939). See also Meissner v. Good Samaritan Hospital, 271 App. Div. 1041, 68 N.Y.S.2d 507 (Sup. Ct. 1947). Employee slept in one building owned by employer and worked in another. He was killed as he crossed a street between the two buildings. The award of compensation was affirmed in a per curiam opinion on the grounds that an "inference" could be drawn that decedent was "in the precinct of his employment" when the accident occurred. *Compare, supra* note 18, "precinct" as used in this case with "ambit" in the *Bryan* case, and "zone" in Barnett v. Britling Cafeteria Co., 225 Ala. 462, 143 So. 813 (1932). All of these terms are used by the courts to denote instances where the compensation laws are broadened beyond the premises of the employer.

[21] In the *Hardy* case the court, though citing *American Law Reports* notes, did not cite specific cases from other jurisdictions, and for that reason it is difficult to ascertain the exact theory adopted, but the case seems to fit in this category.

[22] See note 12 *supra.*

[23] Pacific Indemnity Co. v. Industrial Accident Comm'n, 28 Cal. 2d 329, 170 P.2d 18 (1946); McCrae v. Eastern Aircraft, 137 N.J. Misc. 244, 59 A.2d 376 (1948).

[24] 245 N.C. 173, 95 S.E.2d 521 (1956).

injured while crossing a public highway which separated the employer's plant from a parking lot which was owned by the employer and used by the employees with its consent. Compensation was refused on the grounds that the injury did not arise out of and in the course of the employment, as the employee's duties as a laborer in the plant did not require him to be in the highway at the place where the automobile struck him.[25]

The decision in the *Hardy* case is another, but it is believed reasonable, step in the general trend[26] of broadening the concept of injuries arising out of and in the course of the employment. It does not abrogate the rule regarding injuries sustained by employees while going to and coming from the premises of the employer, but allows an exception which is not so broad as to open a gap which would let in a flood of other "off the premises injuries cases."

GILES R. CLARK

[25] In the *Horn* case employee was injured as he crossed the street to eat his lunch which he had left in his automobile. He was not paid during his lunch hour and the court held that he was on a "personal errand" at the time of his injuries. If going to and from the place of employment for lunch is not to be distinguished from going to and from work in general, it would seem that the holding of this case is somewhat weakened by the holding of the *Hardy* case.

[26] Probably the best example of this trend is found in two Idaho cases. In State *ex rel.* Gallet v. Clearwater Timber Co., 47 Idaho 295, 274 Pac. 802 (1929), employee was killed by a train as he attempted to cross a railroad track lying across the only road giving access to the employer's plant. Compensation was denied on the grounds that employee was not on the premises of the employer at the time of his death, but rather was coming to work, and as he had not actually reached the premises he had not come into the area where protection was given. In Jaynes v. Potlach Forest, Inc., 75 Idaho 297, 271 P.2d 1016 (1954), a similar accident happened at the same location. The court in allowing compensation expressly overruled the *Gallet* case declaring that changing trends in the workmen's compensation law justified such a change.