



NORTH CAROLINA LAW REVIEW

Volume 33 | Number 2

Article 15

2-1-1955

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Recommended Citation

Royal G. Shannonhouse, *Taxation -- Ad Valorem Tax on Flight Equipment of Interstate Airlines*, 33 N.C. L. REV. 306 (1955).

Available at: <http://scholarship.law.unc.edu/nclr/vol33/iss2/15>

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

Regardless of whether the court considers the doctrine of last clear chance to be a theory alternate to and distinct from ordinary negligence, or as merely a facet of the over-all inquiry into the proximate cause of the injury, the results are the same. A plaintiff hoping to take advantage of the doctrine is evidently no longer permitted to rely on the ordinary allegations of negligence with the privilege of getting special instructions to the jury on the issue should the evidence produce a case where the last clear chance doctrine would be applicable. The recent North Carolina decisions seem to mean that specific facts which would give rise to the operation of the doctrine should be pleaded in the complaint on an alternative basis in a separate count, or included by way of reply³⁰ to an answer which sets up a defense of contributory negligence.

ROBERT B. MILLMAN, JR.

Taxation—Ad Valorem Tax on Flight Equipment of Interstate Airlines

Interstate business must pay its way¹ and its "way" may properly be regarded as the protection, services, and other benefits afforded by those authorities through whose jurisdictions such business operates.² By daily use of airports, the aircraft of interstate carriers directly receive a major part of the services and other benefits furnished by the taxpayers of the jurisdiction in which the airports are located. It would seem to follow that such aircraft properly may be the subject of ad valorem property taxes.

²⁹ *Dowdy and Burns v. Southern Ry.*, 237 N. C. 519, 75 S. E. 2d 639 (1953).

³⁰ See *Redwine v. Bass*, 215 N. C. 467, 2 S. E. 2d 362 (1939).

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

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

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

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

³ 347 U. S. 590 (1954).

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

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

⁶ N. C. GEN. STAT. § 105-281 (1950).

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

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

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

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

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

Section 800 (1) of the Machinery Act¹² provides for the listing of all tangible property at the "residence" of the owner, defining the "residence" of a foreign or domestic corporation as its "principal office" within North Carolina. The Machinery Act furnishes neither a definition of "principal office" nor a criterion for determining its location. The corporation domestication statute,¹³ however, provides that every foreign corporation, "before being permitted to do business in this state," shall file in the office of the Secretary of State of North Carolina an attested statement setting forth, among other things, its "principal office" in North Carolina.¹⁴ The Secretary of State is directed by the statute to require every foreign corporation doing business in North Carolina fully to comply with this provision.¹⁵ Thus it appears that the principal office of a foreign airline lawfully doing business in North Carolina must be recorded in the office of the Secretary of State. It seems a logical conclusion that such principal office is the one at which the property of a foreign corporation shall be listed for taxation under Section 800 (1) of the Machinery Act. Although this analysis furnishes no satisfactory definition of "principal office," it establishes an element of certainty for tax listing purposes.

Section 800 (1) further provides, "if a corporation . . . has no principal office in this State" it may list its tangible personal property "at any place at which said property is situated." Under the preceding analysis, a foreign corporation lawfully doing business in North Carolina must have a principal office in this state, therefore it would seem clear that this provision of Section 800 (1) does not apply to such corporations.¹⁶ However, this provision does not specifically exclude foreign corporations from its application. Furthermore, Section 800 (4)¹⁷ provides that "tangible personal property shall be listed at the place where such property is situated, rather than at the residence¹⁸ of the owner if the owner or person having control thereof hires or occupies [among other things, an] office . . . therein for use in connection with such property." Thus, a significant question of construction appears unavoidable: Where would the flight equipment of a foreign airline doing business in North Carolina be "situated" for tax listing purposes?

¹²N. C. GEN. STAT. § 105-302 (1) (Supp. 1953).

¹³N. C. GEN. STAT. § 55-117 *et seq.* (1950).

¹⁴N. C. GEN. STAT. § 55-118 (1950; Supp. 1953).

¹⁵N. C. GEN. STAT. § 55-120 (1950).

¹⁶Presumably, this provision was enacted to encompass the property of domestic corporations and that of foreign corporations having property in North Carolina but doing no business in the state, *e.g.*, a tract of timber purchased but left standing by a foreign lumber company.

¹⁷N. C. GEN. STAT. § 105-302 (4) (1950).

¹⁸*I.e.*, "principal office" in the case of foreign corporations. See Machinery Act § 800 (1), discussed in the text, *supra*.

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

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

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

¹⁹ *Montague Bros. v. W. C. Shepherd Co.*, 231 N. C. 551, 554, 58 S. E. 2d 118, 121 (1950).

²⁰ *Ibid.* *Universal C. I. T. Credit Corp. v. Walters*, 230 N. C. 443, 446, 53 S. E. 2d 520, 522 (1949).

²¹ 39 WORDS & PHRASES 463 (Perm. Ed. 1953).

²² *Watson Industries v. Shaw*, 235 N. C. 203, 69 S. E. 2d 505 (1952); *Victory Cab Co. v. Charlotte*, 234 N. C. 572, 68 S. E. 2d 433 (1951).

²³ See note 20 *supra*.

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

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

It seems apparent, therefore, that the Machinery Act does not provide for taxation of the flight equipment of interstate airlines doing business in North Carolina. A valuable source of revenue²⁸ is thereby lost. What might be done to make this revenue available? There appear to be three major possibilities:

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

SECOND: The list of public service companies contained in Article

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

²⁵ N. C. GEN. STAT. § 105-280 (1950).

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

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

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

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

XVI, Section 1600 *et seq.* of the Machinery Act²⁹ might be amended to include airlines, so as to allow state assessment and certification of apportioned value to local units for taxation.

THIRD: A special statute might be enacted specifically to encompass the flight equipment of airlines operating in and through North Carolina.³⁰ Such a statute should (1) require central assessment by a state board or agency, (2) include a formula by which to determine apportioned value allocable to this state, and (3) provide for central collection of taxes and distribution thereof to local authorities. The Nebraska statute³¹ would be a valuable model for such an act because it is relatively simple and concise and because it has the sanction of the United States Supreme Court in the *Braniff* case.

ROYAL G. SHANNONHOUSE.

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

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

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

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

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

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

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