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Recommended Citation

Morton L. Kaplan, Tort Immunity of Minor Governmental Officers, 14 Clev.-Marshall L. Rev. 365 (1965)

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Tort Immunity of Minor Governmental Officers

Morton L. Kaplan*

THIS NOTE CONCERNS the issues which the courts, both state and federal, have considered in proffering the cloak of immunity to minor public officers, and the current trends toward the extension, narrowing or maintenance of the doctrine of immunity.

Public Policy

The rationale which underlines the protection of government officers from civil suit is public policy.¹

Every act executed by the officer may well affect some citizen adversely, and ultimately result in some real or fancied injury. Whether such injury deserves redress cannot be determined until the case has been litigated.² To submit every act and officer to the burden of impending suit would very likely produce chaos, and would certainly result in some dereliction of duty.³

It is felt that to let the guilty go unpunished and the injured suffer in silence is preferable to subjection of both guilty and innocent public officers to the threat of suit.⁴

The conflict then, is between the protection of the private citizen from the acts of the public officer in the malicious, negligent, or even faultless performance of his duties, and the harassment of the public officer by the actually injured, vindictively impelled, or paranoically motivated private citizen.⁵

The case for the protection of governmental officers under the cloak of immunity is set forth by Judge Learned Hand in *Gregoire v. Biddle*:

The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as

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¹ *Norton v. McShane*, 332 F. 2d 855 (5th Cir. 1964).

² *Gregoire v. Biddle*, 177 F. 2d 579 (2d Cir. 1949).

³ *Rottkamp v. Young*, 21 A. D. 2d 373, 249 N. Y. S. 2d 334 (1964); *Phelps v. Dawson*, 97 F. 2d 339 (8th Cir. 1938).

⁴ *Blitz v. Boog*, 328 F. 2d 596 (2d Cir. 1964).

⁵ *Norton v. McShane*, *supra* n. 1.

the guilty, to the burden of trial and to the inevitable danger to its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties . . . In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.⁶

Scope of Authority

Again and again the cases turn on the sometimes delicate question of whether the officer was acting within the scope of his duty.⁷ Immunity does not protect the officer who acts outside the scope of his duty or authority, and he is liable as if he were a private citizen.⁸ However, acts which are performed within the scope of authority or duty do not subject the officer to liability for injuries incurred as a result of that act.⁹ The officer is protected from suit in his personal capacity under these circumstances.¹⁰

The federal courts seem to give a liberal interpretation of the scope of an officer's duty or authority.¹¹ It is sufficient if the act be more or less within the officer's authority, that it be done under color of his office,¹² and that the act be not clearly and obviously beyond his sphere of control.¹³ Nor is it necessary that the act be dictated by statute or be the result of a directive from a superior, but it is considered sufficient if the act in question is required in view of the officer's duties.¹⁴ Even acts done or statements made in "the outer perimeter" of an officer's duty will be protected.¹⁵ Similarly, the state courts also seem to give a broad interpretation to an officer's scope of authority. For

⁶ *Gregoire v. Biddle*, *supra* n. 2 at 581.

⁷ *Hughes v. Johnson*, 305 F. 2d 67 (9th Cir. 1962); *Colpoys v. Gates*, 118 F. 2d 16 (D. C. Cir. 1941); *Thibodeaux v. Thibodeaux*, 46 La. Ann. 1528, 16 So. 450 (1894); *Thurlow v. Crossman*, 336 Mass. 248, 143 N. E. 2d 812 (1957).

⁸ 67 C. J. S., *Officers* § 126; *Garrett v. Jones*, 200 Okla. 696, 200 P. 2d 402 (1948); *Robinson v. Johnson*, 239 F. 671 (8th Cir. 1917).

⁹ *Morris v. Nowotny*, 323 S. W. 2d 301 (Tex. Civ. App. 1959).

¹⁰ 67 C. J. S., *Officers* § 125.

¹¹ *Preble v. Johnson*, 275 F. 2d 275 (10th Cir. 1960); *Gregoire v. Biddle*, *supra* n. 2.

¹² *Smith v. O'Brien*, 88 F. 2d 769 (D. C. Cir. 1937); *DeBusk v. Harvin*, 212 F. 2d 143 (5th Cir. 1954).

¹³ *Denman v. White*, 316 F. 2d 524 (1st Cir. 1963).

¹⁴ 43 Am. Jur., *Public Officers* § 273; *Papagianakis v. The Samos*, 186 F. 2d 257 (4th Cir. 1950).

¹⁵ *Barr v. Matteo*, 360 U. S. 564, 79 S. Ct. 1335 (1959).

example, officers who are immune do not lose this immunity when they act in concert with persons not protected.¹⁶ Acts which are tangential to, but which nevertheless promote the ultimate accomplishment of the principal purpose, are included, as well as those falling squarely within the scope of duty.¹⁷

It should be noted in this connection that acting within his power (to be entitled to immunity) cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.¹⁸

In some states, no distinction is drawn between acts done *colore officii*, or *virtute officii*.¹⁹

Malice or Ulterior Motives

The question here considered is: how broadly has the term "scope of authority" been interpreted by the courts, state and federal? Can the malicious act of a government officer be interpreted as being within the scope of his authority?

Within the federal courts the issue appears to be clearly resolved. In 1896 the Supreme Court of the United States in the leading case of *Spalding v. Vilas*,²⁰ held that an officer deserving of the cloak of immunity is so clothed in spite of his act or acts being maliciously motivated. From this initial foundation, succeeding cases have been heaped one upon the other, building up a wall of immunity which cannot be surmounted by allegations of malice or ulterior motive for acts done in the performance of duty.²¹ Consider the practical application of this situation in *Taylor v. Glotfelty*,²² where a psychiatrist in the employ of the federal government was found to be immune from civil suit brought by a patient whom the psychiatrist, impelled by (alleged) ulterior motives, declared mentally incompetent.

¹⁶ *Hardy v. Vial*, 48 Cal. 2d 577, 311 P. 2d 494 (1957).

¹⁷ *White v. Towers*, 37 Cal. 2d 727, 235 P. 2d 209 (1951).

¹⁸ *Hardy v. Vial*, *supra* n. 16 at 497.

¹⁹ *Reckman v. Keiter*, 107 Ohio App. 81, 164 N. E. 2d 448 (1959).

²⁰ 161 U. S. 483, 16 S. Ct. 631 (1896).

²¹ *Harwood v. McMurtry*, 22 F. Supp. 572 (W. D. Ky. 1938); *Brewer v. Mellon*, 18 F. 2d 168 (D. C. Cir. 1927); *Jones v. Kennedy*, 121 F. 2d 40 (D. C. Cir. 1941); *Carson v. Behlen*, 136 F. Supp. 222 (D. C. R. I. 1955); *Laughlin v. Rosenman*, 163 F. 2d 838 (D. C. Cir. 1947); *De Arnaud v. Ainsworth*, 43 Fed. Dig. 425, 24 App. D. C. 167 (1904); *Yaselli v. Goff*, 12 F. 2d 396 (2d Cir. 1926).

²² 201 F. 2d 51 (6th Cir. 1952).

The state courts are not *quite* as generous in offering unqualified immunity to the maliciously impelled official tortfeasor. The majority of the states do protect their public officers from suit for official acts which are tainted by malice.²³ However, a few state courts will throw to the wolves the vindictive official who was motivated maliciously.²⁴

Discretion

Discretion is defined as the power of free decision, of exercising individual judgment and undirected choice.²⁵ Officers vested with the power of discretion are required to exercise reason in the determination of how, when, or where a given act shall be done in the pursuance of their official duties.²⁶ Such an officer is deemed to function in a quasi-judicial manner and is therefore immune from civil suit, at least in the absence of a showing of malice, based upon the public policy discussed above.²⁷

In *Ove Gustavsson v. Floete*,²⁸ it was said that government officers are not personally liable for alleged torts based upon acts done within the scope of their duties which involve the exercise of discretion which public policy requires be made without the fear of personal liability.

The construction of a fill in the Missouri River authorized by Congress in a flood control project and carried out by the Corps of Engineers was held to be discretionary and the officer immune.²⁹ Failure to provide medical service to an army officer's wife was held to be immune because the obligation to

²³ Note, Public Officers Not Liable for Malicious Acts, 21 Md. L. Rev. 178 (1962).

²⁴ *Gilbeau v. Tate*, 94 So. 2d 866 (La. App. 1957); *Morris v. Nowotny*, *supra* n. 9; *Caton v. Jasper*, 303 Ky. 598, 198 S. W. 2d 322 (1946); *Pridgen v. Giles*, 267 S. W. 2d 187 (Tex. Civ. App. 1954); *Dallas County Flood Control District v. Fowler*, 280 S. W. 2d 336 (Tex. Civ. App. 1955); *Peterson v. George*, 168 Neb. 571, 96 N. W. 2d 627 (1959); *Eliason v. Funk*, 196 A. 2d 887 (Md. App. 1964); *Bedrock Foundations v. Brewster*, 31 N. J. 124, 155 A. 2d 536 (1959); *List v. O'Connor*, 21 Ill. App. 2d 399, 158 N. E. 2d 103 (1959); *Campbell v. Jones*, 153 Tex. 101, 264 S. W. 2d 425 (1954).

²⁵ Webster's Collegiate Dictionary, *Discretion*, p. 288 (1936).

²⁶ *Mid-Central Fish Co. v. U. S.*, 112 F. Supp. 792 (W. D. Mo. 1953).

²⁷ *State to Use of Ferling*, 220 Md. 109, 151 A. 2d 137 (1959); *Hoffman v. Hoffman*, 61 Ohio App. 371, 22 N. E. 2d 652 (1939); *Peterson v. George*, 168 Neb. 571, 96 N. W. 2d 627 (1959).

²⁸ 299 F. 2d 655 (2d Cir. 1962).

²⁹ *Danner v. U. S.*, 114 F. Supp. 477 (W. D. Mo. 1953).

provide service was discretionary.³⁰ Officers of the Alaska Housing Authority were said to have exercised discretion in causing the plaintiff's land to be taken and her building destroyed.³¹ The opening of floodgates by the United States Fish and Wildlife Service, damaging plaintiff's property, was held to be discretionary and therefore protected from liability.³²

Acts which do not require the officer to exercise any judgment at all are termed *ministerial*, and he may be held liable for damages resulting from the wrongful performance of such an act.³³

The difficulty inherent in the application of the terms *discretionary* and *ministerial* lies in attempting to determine into which of these categories a given act shall fall.³⁴ Every act of an officer requires him to exercise some modicum of discretion in its performance. There must be some overlapping of ministerial and discretionary duties, and the differences between the two are often so subtle as to render them indistinguishable.³⁵ There is no litmus paper test to simplify the distinction.³⁶ However the difficulties existing in the application of these terms are no more problematic than in other areas of the law where decisions are based upon concepts which are not amenable to precise definition.³⁷

Historical Development

The doctrine of immunity as applied to governmental officers is not as hoary with age as other legal doctrines; however, it can be said to have come over on the Mayflower. Absolute immunity arising out of judicial proceedings existed at least as early as 1608 in England.³⁸ Absolute legislative privilege dates back to 1399.³⁹

³⁰ *Denny v. U. S.*, 171 F. 2d 365 (5th Cir. 1948).

³¹ *Bridges v. Alaska Housing Authority*, 375 P. 2d 696 (Alaska 1962).

³² *Olson v. U. S.*, 93 F. Supp. 150 (N. W. D., N. D. 1950).

³³ *Somers v. Osterheld*, 335 Mass. 24, 138 N. E. 2d 370 (1956); 67 C. J. S., Officers § 127; 43 Am. Jur., Public Officers § 274.

³⁴ *Dick, Federal Officer's Liability for Damage Done to Property Pursuant to Statutory Authority*, 38 Mich. L. Rev. 1344 (1940).

³⁵ *Jarrett v. Wills*, 235 Ore. 51, 383 P. 2d 995 (1963).

³⁶ *Ove Gustavsson Contracting Co. v. Floete*, *supra* n. 28.

³⁷ *Jarrett v. Wills*, *supra* n. 35.

³⁸ Cited in *Phelps v. Dawson*, *supra* n. 4.

³⁹ *Veeder, Absolute Immunity in Defamation, Legislative and Executive*, 10 Columbia L. Rev. 131 (1910).

Apparently the earliest English case dealing squarely with the issue of immunity outside the legislative and judicial branches in *Sutton v. Johnson*,⁴⁰ decided in 1786, where a naval commander-in-chief was extended the protection of executive immunity for maliciously causing the captain of a warship to be arrested and court martialed. The decision was later reversed because of lack of jurisdiction. *Chatterton v. Sec'y of State*⁴¹ marked the active birth of executive immunity in England, and was closely followed in this country by *Spalding v. Vilas*⁴² in 1896. However, the courts of the United States did not depend entirely upon England to blaze a trail. Cases dealing with the doctrine in this country can be found from 1802 through to the present.⁴³

Trends

The issues of scope of authority and duty, malice, ulterior motives, and discretion are considerations greatly affecting the doctrine of immunity of government officers. Does this immunity apply to every officer from the lowest to the highest echelon? Where do the courts draw the line in terms of hierarchy?

The rule as it originally developed was limited to cabinet members, department heads and judges,⁴⁴ although it had its genesis in actions against judicial officers.⁴⁵ At an early date the rule was extended to protect legislative and administrative officers.⁴⁶ Since *Spalding v. Vilas* the federal courts have included many inferior executive positions within the protection of the principle, while the state courts have been more selective in extending the rule.⁴⁷

Federal Officers

The cases clearly indicate a definite trend in the federal courts to extend the doctrine of immunity to lower government officers, no matter what their rank,⁴⁸ dating back to 1938:

⁴⁰ Cited in *Barr v. Matteo*, *supra* n. 15.

⁴¹ *Chatterton v. Secretary of State*, 2 Q. B. 89 (1895).

⁴² *Supra*, n. 20.

⁴³ *Bershad v. Wood*, 290 F. 2d 714 (9th Cir. 1961).

⁴⁴ *Gamage v. Peal*, 217 F. Supp. 384 (N. D. Calif. 1962).

⁴⁵ *Bradley v. Fisher*, 13 Wall. 335 (U. S. 1871).

⁴⁶ *Spalding v. Vilas*, *supra* n. 20.

⁴⁷ *Montgomery v. Philadelphia*, 393 Pa. 178, 140 A. 2d 100 (1958).

⁴⁸ *Carr v. Watkins*, 227 Md. 578, 177 A. 2d 841 (1962).

During recent years however, a trend is definitely observable extending the application of the rule to minor executive officers. It is obvious that the effect of this trend is to cut down proportionately the scope of the general rule which makes officials liable for tortious injuries and which denies to them the immunity of the sovereign.⁴⁹

The courts have said that the immunity of a government official does not depend upon rank, but upon the "nature of the function" exercised. Should the officer act beyond the scope of his authority, he is and should be liable; otherwise the immunity of the minor government official is well established.⁵⁰

Recent cases have repeatedly mentioned, and overwhelmingly confirmed the extension of the immunity doctrine from the higher to the lesser ranks,⁵¹ and were preceded by numerous cases which indicated the trend.⁵²

In *Hartline v. Clary*,⁵³ the briefs of both plaintiff and defendant conceded that judicial officers, quasi-judicial officers, judges, prosecuting attorneys, executive and ministerial officers of the government are immune from civil suit for acts committed by them in the performance of their duties, and these concessions were confirmed by the court in its official opinion.

Immunity has been extended to such minor officers as a postal inspector,⁵⁴ agents of the Internal Revenue Service,⁵⁵ a

⁴⁹ *Cooper v. O'Connor*, 99 F. 2d 135, 142 (D. C., C. A. 1938).

⁵⁰ *O'Campo v. Hardisty*, 262 F. 2d 621 (9th Cir. 1958).

⁵¹ *Eliason v. Funk*, *supra* n. 24. Extension of the rule is to be particularly noted in the federal courts; *Carr v. Watkins*, *supra* n. 48. Recognizing, but refusing to accept the extension of immunity to government officers no matter what their rank; *Bedrock Foundations v. Brewster*, *supra* n. 24. Judicial immunity has been extended to lesser administrative officials who are called upon to exercise discretion; *O'Campo v. Hardisty*, *supra* n. 50. It is well established that minor officials are within the scope of immunity; *Craig v. Doak*, 171 A. 2d 259 (Mun. App., D. C., 1961). The court recognizes the trend to extend immunity to lower officers, but chooses not to so act in this case; *Cooper v. O'Connor*, *supra* n. 49. A forerunner, mentioning a trend toward extending immunity to lower government officers; *Harwood v. McMurtry*, *supra* n. 21. The extended rule now reaches to subordinate government officers who are acting within their scope of duty; *Barr v. Matteo*, *supra* n. 15. A landmark case in extending immunity to lower government officers; *Hartline v. Clary*, 141 F. Supp. 151 (E. D. S. C. 1956); *Gamage v. Peal*, *supra* n. 44. Extends the rule of immunity by implication, stating that it is no longer confined to cabinet members, judges, or department heads.

⁵² *Handler and Klein, The Defense of Privilege in Defamation; Suits Against Government Executive Officials*, 74 Harv. L. Rev. 44 (1960).

⁵³ 141 F. Supp. 151 (E. D. S. C. 1956).

⁵⁴ *Kelly v. Dunne*, 230 F. Supp. 969 (D. C. Mass. 1964).

⁵⁵ *Bershad v. Wood*, *supra* n. 43; *Harwood v. McMurtry*, *supra* n. 21; *Hartline v. Clary*, *supra* n. 53; *O'Campo v. Hardisty*, *supra* n. 50.

deputy marshal,⁵⁶ government contract inspectors,⁵⁷ a naval officer,⁵⁸ the dietician in a V. A. hospital,⁵⁹ a psychiatrist employed by the government,⁶⁰ and federal game wardens.⁶¹

The courts, in pursuing this policy of extension, have not done so without some misgivings. The dissenting opinion in one case condemns the entire doctrine of immunity, stating that "it rests upon a rotten foundation, and should be placed in the judicial garbage can where it belongs."⁶² In another case, the court mentions that the doctrine has been extended to the point where "many feel that the delicate balance is in danger of being upset." However the opinion then goes on to confirm and even further extend the doctrine.⁶³

The job of governments is to govern, and that can only be accomplished in so large and complex a structure as our federal system by a delegation and redelegation of responsibility. The courts have justly concluded that they cannot determine that one act is less important than another merely because its performance is in the hands of one who stands low on the governmental ladder of rank.⁶⁴

The growth of our governmental activities has long since prevented the head of a department from performing the many activities and duties within its sphere. Of necessity there must be a delegation of authority. And when the act done by a subordinate official occurs in the course of official duty of a person clothed with authority and subject to the duty to act, it is the act of the department, just as though performed by the head of the department. Thus the same reason for immunity from civil liability exists with respect to the acts of a subordinate official done in the exercise of his or her official functions.⁶⁵

⁵⁶ *Phelps v. Dawson*, 97 F. 2d 339 (8th Cir. 1938).

⁵⁷ *Ove Gustavsson Contracting Co. v. Floete*, *supra* n. 28.

⁵⁸ *Miles v. McGrath*, 4 F. Supp. 603 (Md. 1933).

⁵⁹ *Carson v. Behlen*, *supra* n. 21.

⁶⁰ *Blitz v. Boog*, 328 F. 2d 596 (2d Cir. 1964); *Taylor v. Glotfelty*, *supra* n. 22.

⁶¹ *Hughes v. Johnson*, 305 F. 2d 67 (9th Cir. 1962). For further list of officers who have been held to be protected by the immunity doctrine see James Jr., *Tort Liability for Governmental Units and Their Officers*, 22 U. Chi. L. Rev. 610 (1955).

⁶² *Hardy v. Vial*, *supra* n. 16.

⁶³ *O'Campo v. Hardisty*, *supra* n. 50.

⁶⁴ *Barr v. Matteo*, *supra* n. 15.

⁶⁵ *Carson v. Behlen*, *supra* n. 21 at 224.

State Officers

The states are more loath to extend the doctrine, and show a tendency to be selective in determining what officer and which acts are to be protected.⁶⁶ They adhere closely to the rule that immunity from civil liability is limited to high executive officers, judges, and legislators.⁶⁷ The state courts recognize the current trend in the federal courts, but the majority are not inclined to follow suit so wholeheartedly.⁶⁸ For example, many officers will not be protected, because the act was done maliciously and is therefore no longer within the scope of the officer's authority.⁶⁹ Unlike comparable federal officers, a minor state official will be held more strictly liable for the damages resulting from the negligent or erroneous performance of a purely ministerial act.⁷⁰ In a typical case, a court clerk was held liable for negligently issuing a warrant for the arrest of the plaintiff charging that he failed to pay a parking fine which had in fact been paid.⁷¹ The duties of the clerk were ministerial and he was not entitled to immunity. Nor are the members of such subordinate legislative bodies as municipal councils or town councils entitled to absolute immunity, but protection from civil suit is conditioned on their acting in good faith.⁷² However, this holding is not unanimous, and several states do protect the officers of such legislative bodies with absolute privilege.⁷³

Finally, there are some states that, emulating the federal courts, do proffer the shelter of unqualified immunity to their officers who act within the scope of their authority.⁷⁴ California

⁶⁶ *Montgomery v. Philadelphia*, *supra* n. 47.

⁶⁷ *Yasaki*, *Civil Liability of Subordinate State Officers Under the Federal Civil Rights Acts, and the Doctrine of Immunity*, 44 *Calif. L. Rev.* 887 (1956).

⁶⁸ *Craig v. Doak*, 171 A. 2d 259 (Mun. App., D. C. 1961).

⁶⁹ *Matson v. Margiotta*, 371 Pa. 188, 88 A. 2d 892 (1952).

⁷⁰ *Trum v. Paxton*, 329 Mass. 434, 109 N. E. 2d 116 (1952); 67 C. J. S., *Officers* § 127.

⁷¹ *Stine v. Shuttle*, 186 N. E. 2d 168 (Ind. App. 1962).

⁷² *Prosser on Torts* § 109 (3rd ed. 1964); *McClendon v. Coverdale*, 203 A. 2d 815 (Del. Super. Ct. 1964).

⁷³ *McClendon case*, *supra* n. 72; *Larson v. Doner*, 32 Ill. App. 2d 471, 178 N. E. 2d 399 (1961); *Tanner v. Gault*, 20 O. App. 243, 153 N. E. 124 (1925).

⁷⁴ *Morris v. Nowotny*, 323 S. W. 2d 301 (Tex. Civ. App. 1959); *Guilbeau v. Tate*, 94 So. 2d 866 (La. App. 1957); *Bedrock Foundations v. Brewster*, 31 N. J. 124, 155 A. 2d 536 (1959); *Eliason v. Funk*, 196 A. 2d 887 (Md. App. 1964); *Carr v. Watkins*, *supra* n. 48.

recognizes the same wide extension of immunity as do the federal courts, and New York appears to be leaning toward a similar position.⁷⁵

Conclusion

The extension of the doctrine of immunity, although widespread in the federal courts, cannot be considered unanimously confirmed in the state courts. It is conjectured that if the current trend is to continue the rights of the private citizen will be greatly imperiled.⁷⁶ In one dissent, the very public policy upon which the doctrine rests is challenged by the contention that not only will the ardor of our public officers not be dampened by their loss of immunity, but that they are likely to be more responsive to the wishes of the public and less likely to act maliciously with the Damocletian sword of retribution by civil suit hanging over their heads.⁷⁷

However, the public policy underlying the doctrine continues to be sufficient justification for the judges who administer and extend it.

⁷⁵ *Hardy v. Vial*, 48 Cal. 2d 577, 311 P. 2d 494 (1957); *White v. Towers*, 37 Cal. 2d 727, 235 P. 2d 209 (1951); *Mills v. Smith*, 355 P. 2d 1064 (Okla. Sup. Ct. 1960); *Coverstone v. Davies*, 38 Cal. 2d 315, 239 P. 2d 876 (1952); *White v. Brinkman*, 23 Cal. App. 2d 307, 73 P. 2d 254 (1937); *Gilberg v. Goffi*, 21 A. D. 2d 517, 251 N. Y. S. 2d 823 (1964); *Segal v. Jackson*, 183 Misc. 460, 48 N. Y. S. 2d 877 (1944).

⁷⁶ *Hartline v. Clary*, 141 F. Supp. 151 (E. D. S. C. 1956).

⁷⁷ *Sheridan v. Crisona*, 198 N. E. 2d 359 (N. Y. 1964).