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Notes by Warren S. Reese, Jr., a member of the Montgomery, Ala., Bar, and by Phyllis Campbell and Henry Harkey, law students not members of the Student Board of Editors, appear in this issue.

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NOTES AND COMMENTS

Constitutional Law—Price Fixing—Power of State Legislature to Fix Charges of Ticket Brokers.

The constitutionality of legislative price-fixing under the Fourteenth Amendment has again been presented in a case¹ recently decided by the New York Supreme Court. A New York statute providing for the regulation of ticket brokers limited their charges to a maximum of seventy-five cents on each ticket. The court held that *Tyson v. Banton*,² in which a similar law had been held invalid, had been in effect (though not explicitly) overruled by a later decision of the United States Su-

¹ Kelly-Sullivan v. Moss, 22 N. Y. Supp. (2d) 491 (Sup. Ct., 1940).

² 273 U. S. 418, 47 Sup. Ct. 426, 71 L. ed. 718 (1927).

preme Court in *Nebbia v. New York*,³ in which the state's power to regulate the price of milk was upheld; and that under the rule of the *Nebbia* case price legislation was constitutional if it had a reasonable relation to a proper legislative purpose. The court said⁴ that the enactment could be defeated as violative of due process only if plaintiffs established that "no evils existed in connection with the sale of tickets, . . . or, if the evils existed, that the remedy adopted by the legislature was arbitrary, discriminatory or confiscatory." An application for a temporary injunction was denied, and appeal has been taken.

For a considerable time the price-fixing power of a state was limited to businesses "affected with a public interest". This doctrine was introduced into the interpretation of the Fourteenth Amendment in *Munn v. Illinois*,⁵ upholding an Illinois statute fixing the maximum charges for the storage of grain. The phrase was derived from an essay of Lord Hale, *De Portibus Maris*: "When private property is 'affected with a public interest', it ceases to be *juris privati* only."⁶ The court found that a "virtual monopoly" existed; the owners stood in the "gateway of commerce" and were enabled to exact a toll from the public. From these facts, it followed that they had devoted their property to a public use, thereby granting the public an interest in that use, and that they were subject to regulation to the extent of that interest.

The same line of reasoning was followed in *Budd v. New York*,⁷ but in *Brass v. Stoeser*,⁸ likewise upholding a statute limiting the charges of grain elevators, the element of monopoly was lacking and economic conditions were markedly different. The basis of that decision seems to have been that a business once found to be affected with a public interest remained so, although some of the distinguishing characteristics which had been originally used to justify the classification were absent.

Insurance was held to be a business affected with a public interest, although no public use of property was involved, in *German Alliance Insurance Co. v. Lewis*.⁹ A broad interpretation was given to the principles of *Munn v. Illinois*. Contracts of insurance, the court pointed out, were interdependent, affected a large portion of the public, and were of great public concern. Insurance was "essentially different from ordinary commercial transactions". Important also in the court's consideration was the fact that prices were fixed by schedules, and that therefore liberty of contract might be said to be illusory. The monopolistic ele-

³ 291 U. S. 502, 54 Sup. Ct. 505, 78 L. ed. 940 (1934).

⁴ See note 1, *supra*, at 500.

⁵ 94 U. S. 113, 24 L. ed. 77 (1876).

⁶ 1 HARG. LAW TRACTS 6 (1787); Note (1930) 43 HARV. L. REV. 759.

⁷ 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247 (1892).

⁸ 153 U. S. 391, 14 Sup. Ct. 857, 38 L. ed. 757 (1894).

⁹ 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011 (1914).

ment was present, but the opinion seems to imply that the police power may operate to control contract prices where exercised to promote the general welfare.¹⁰

In *Block v. Hirsch*,¹¹ the first of a series of war emergency rent cases,¹² the power of Congress to fix rents for a limited period in the District of Columbia was upheld on the ground that the normal competitive system had broken down, and that the exigency had clothed the letting of buildings with a public interest so great as to justify regulation while such exigency existed.¹³

So far, the concept of affectation with a public interest had been used to justify price legislation; but in *Charles Wolff Packing Co. v. Court of Industrial Relations*¹⁴ the doctrine was applied to hold a Kansas statute regulating wages in the meat packing industry in violation of due process. Businesses affected with a public interest were limited to three categories: (1) Where a franchise has been granted, with an affirmative duty of rendering public service. (2) Exceptional occupations long subject to such regulation, such as innkeepers and cabmen. (3) Those businesses, not public in their inception, which have come to bear such a peculiar relation to the public that they can be said to have been devoted by their owners to a public use, in effect granting the public an interest in that use, and subject to regulation to the extent of that interest. The court found that in nearly all the businesses hitherto held to come under the third classification, the public had an interest because of the "indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."¹⁵ The court admitted that it was difficult under the cases to lay down a working rule; but the determining factor was always the *nature of the business*. The nature of the meat-packing industry was not such as to bring it within the third category, and the state had no power to restrict the freedom of contract of employer and employee.

¹⁰ 233 U. S. at 409, 34 Sup. Ct. at 618, 58 L. ed. at 1020 (1914): "Against that conservatism of the mind, which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare. . . . The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired."

¹¹ 256 U. S. 135, 41 Sup. Ct. 458, 65 L. ed. 865 (1921).

¹² *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. ed. 877 (1921); *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 44 Sup. Ct. 405, 68 L. ed. 841 (1924).

¹³ 256 U. S. at 155, 41 Sup. Ct. at 464, 65 L. ed. at 870: "Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern." See *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. ed. 755, holding valid emergency wage legislation of the federal government.

¹⁴ 262 U. S. 522, 43 Sup. Ct. 630, 67 L. ed. 1103 (1923).

¹⁵ *Id.* at 538, 43 Sup. Ct. at 634, 67 L. ed. at 1109 (1923).

The exact nature of this determining factor was not made clear; it was not said what created the "peculiarly close relation" between the business and the public. The rule was thus stated in the negative: "One does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings. . . ."¹⁶ Beyond reference to previous examples of business where price regulation had been held permissible, the case seems to furnish no definitive test, except that the element of monopoly must be present.

There followed a series of decisions based on the rule as laid down in the *Wolff* case, holding wage fixing and price fixing legislation unconstitutional.¹⁷ The theory which had been formulated to uphold price regulation was now used to invalidate it. In each of these cases, with the exception of *Williams v. Standard Oil Co.*,¹⁸ in which there was one dissent and two concurrences in result only, the court was seriously divided. The majority opinions expressed the principle, rigidly interpreted, that liberty of contract is the rule, and restraint the exception, particularly with regard to price fixing since price is the "heart of the bargain". An examination of the minority views reveals that the identical rules are applied to reach contrary results. The difference lies in the approach to the basic economic problem.

Criticising the majority opinion in the *Tyson* case,¹⁹ Justice Stone first points out that the decision is broader than necessary to determine the question presented. The question is not whether the theatre business is *a priori* affected with a public interest, but whether the criterion

¹⁶ *Id.* at 537, 43 Sup. Ct. at 633, 67 L. ed. at 1109 (1923).

¹⁷ *Adkins v. Childrens Hospital*, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. ed. 785 (1923), holding a general wage fixing statute applicable to women in the District of Columbia invalid, was decided just prior to the *Wolff* case. Decided subsequently were: *Tyson v. Banton*, 273 U. S. 418, 47 Sup. Ct. 426, 71 L. ed. 718 (1927); *Ribnik v. McBride*, 277 U. S. 350, 48 Sup. Ct. 545, 72 L. ed. 913 (1927); *Williams v. Standard Oil Co.*, 278 U. S. 235, 49 Sup. Ct. 115, 73 L. ed. 287 (1929); *cf. New State Ice Co. v. Liebmann*, 285 U. S. 262, 52 Sup. Ct. 371, 76 L. ed. 747 (1931).

In *O'Gorman & Young v. Hartford Fire Insurance Co.*, 282 U. S. 251, 51 Sup. Ct. 130, 75 L. ed. 324 (1930), the fixing of insurance agents' commissions was allowed as a regulation of a business already declared within the category of those affected with the requisite public interest. *Cf. Brass v. Stoeser*, *supra*, note 8. It had already been held that a state may regulate the relations of those engaged in the insurance business. *La Tourette v. McMaster*, 248 U. S. 465, 39 Sup. Ct. 160, 63 L. ed. 362 (1918); see *Stipcich v. Metropolitan Life Insurance Co.*, 277 U. S. 311, 320, 48 Sup. Ct. 512, 515, 72 L. ed. 895, 899 (1927).

¹⁸ See note 17, *supra*. Price regulation of gasoline industry was held invalid. The state seems not to have made a sufficient showing of the necessity for and reasonableness of the regulation, which may explain the concurrences of Justices Brandeis and Stone in the result.

¹⁹ *Tyson v. Banton*, 273 U. S. 418, 47 Sup. Ct. 426, 71 L. ed. 718 (1927). The Court held that the theatre business was essentially a private business, though subject to forms of regulation other than price fixing under the police power; and that theatre ticket brokers were an appendage of the theatre business, and their charges could therefore not be regulated.

of public interest, as developed in the earlier cases and applied to the situation under consideration—the activities of ticket brokers—shows those elements present which were the basis of the right to fix prices in former cases. The inquiry is whether there are circumstances restricting the regulative force of competition so that “serious economic consequences result to a very large number of members of the community.” He concludes that the solution of the problem “turns upon considerations of economics about which there may be reasonable differences of opinion. Choice between these views takes us from the judicial to the legislative field. The judicial function ends when it is determined that there is basis for legislative action in a field not withheld from legislative power by the constitution as interpreted by the decisions of this Court.”²⁰

Justice Stone's dissent in *Ribnik v. McBride*,²¹ in which a New Jersey statute regulating charges of employment agencies was held invalid,²² adds a further criticism of the prevailing view: “I cannot accept as valid the distinction on which the opinion of the majority seems to me necessarily to depend, that granted constitutional power to regulate there is any controlling difference between reasonable regulation of price, if appropriate to the evil to be remedied, and other forms of appropriate regulation. . . . I can see no difference between a reasonable regulation of price and a reasonable regulation of the use of property, which affects its prices or economic return.”²³

Mr. Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*,²⁴ said: “The notion of a distinct category of business ‘affected with a public interest’ employing property ‘devoted to a public use’ rests upon historical error. The consequences which it is sought to draw from those phrases are belied by the meaning in which they were first used centuries ago, and by the decision of this Court, in *Munn v. Illinois*, . . . which first introduced them into the law of the Constitution. In my opinion, the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection.”

²⁰ 273 U. S. at 454, 47 Sup. Ct. at 436, 71 L. ed. at 733 (1927).

²¹ See note 17, *supra*.

²² In *Brazee v. Michigan*, 241 U. S. 340, 36 Sup. Ct. 561, 60 L. ed. 1034 (1915) the Court held that reasonable regulation of employment agencies was permissible, but did not consider the validity of a provision limiting charges. In *Adams v. Tanner*, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. ed. 1336 (1916) the Court held invalid a Washington statute forbidding agents to receive fees from workers, on the ground that it operated to destroy a legitimate business, although fees could be charged to the employers.

²³ 277 U. S. at 373, 48 Sup. Ct. at 552, 72 L. ed. at 923 (1927).

²⁴ 285 U. S. at 302, 52 Sup. Ct. at 383, 76 L. ed. at 766 (1931). The Court held invalid a statute making a certificate of public necessity and convenience a prerequisite to engaging in the business of manufacturing and distributing ice.

The majority opinion in the *Nebbia*²⁵ case is in consonance with these views. The statute involved gave a Milk Control Board power to fix minimum and maximum prices for milk,²⁶ and was based explicitly on a legislative finding of an emergency. While the court discussed the facts in support of this finding, it did not base its holding of constitutionality on the authority of the rent cases²⁷ and *Wilson v. New*,²⁸ but chose rather to make a clean sweep of the old rule and to lay down a broad new one.

Justice Roberts, speaking for the majority, said: "The thought seems to have persisted that there is something peculiarly sacrosanct about the prices . . . and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negated many years ago."²⁹ Reverting to the original application of the "public interest" rule to interpretation of the Fourteenth Amendment in *Munn v. Illinois*,³⁰ the court found that it was there understood to mean that "'affected with a public interest' is the equivalent of 'subject to the exercise of the police power' . . ."³¹ Therefore, with regard to price regulation, as well as other regulation of business under the general police power: "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied."³²

The standard indicated in the *Nebbia* case is no more than the expression of the empirical approach in empirical language. The phrase "affected with a public interest", drawn out of its original context and firmly associated in the *Wolff* and following cases with categorical limitations based on *a priori* concepts of the "nature of a business", could, as seen in Justice Stone's dissents, have been applied empirically to reach the same result; but the court chose to discard, with the categories, the language that was used to justify them, and to restate the standard in terms that eliminate entirely the old logistic ritual of rationalization.

In subsequent cases price regulation both by states³³ and by the fed-

²⁵ See note 3, *supra*.

²⁶ The Board fixed a minimum to be paid to producers and a minimum to be charged to consumers, thereby in effect setting a maximum charge for the services of intermediaries between the producer and the public.

²⁷ See notes 11 and 12, *supra*.

²⁸ See note 13, *supra*.

²⁹ 291 U. S. at 532, 54 Sup. Ct. at 514, 78 L. ed. at 954 (1934).

³⁰ "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." 94 U. S. at 126, 24 L. ed. at 84 (1876).

³¹ 291 U. S. at 533, 54 Sup. Ct. at 514, 78 L. ed. at 954 (1934).

³² *Id.* at 537, 54 Sup. Ct. at 516, 78 L. ed. at 957 (1934).

³³ *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 55 Sup. Ct. 7, 79 L. ed. 259 (1934); *Borden's Farm Products Co. v. Ten Eyck*, 297 U. S. 251, 56 Sup. Ct. 453, 80 L. ed. 669 (1936); *Highland Farms Dairy, Inc. v. Agnew*, 300 U. S.

eral government³⁴ has been upheld, on the authority of the *Nebbia* decision.

The plaintiff in the instant case, to obtain a ruling of unconstitutionality, must show that no conditions exist in the ticket brokerage business which would justify regulation in the public interest; or that, if they do exist, price regulation as a remedy does not bear a reasonable relation to the correction of those conditions, or is arbitrary or discriminatory.

As to the existence of evils arising through unrestricted sale of tickets, the New York court said that "not only has the legislature pointed to the evils, but the courts have furnished bills of particulars of them."³⁵ The court pointed to the fact that, under an agreement with the League of New York Theatres, Inc., nearly all New York theatre ticket brokers have voluntarily limited their charges, as further evidence of the necessity of regulation. There would seem to be little question, certainly, about the opportunity for exploitation of the public, since about ninety-five per cent of amusement tickets sold in the metropolitan area pass through the hands of brokers.

If the court finds that conditions are such as to justify safeguarding the public against "fraud, extortion, exorbitant rates and similar abuses", plaintiff must resort to the contention that the regulation is unreasonable, as being arbitrary, discriminatory or confiscatory. It is difficult to see how this can be sustained in view of the fact that since 1938 ticket brokers have been operating under the agreement mentioned above, which fixes the price at seventy-five cents above that charged by the producer, and which also provides that unsold tickets may be returned, thus reducing the risk of loss. It is to be noted, although the *Tyson* case did not turn on the issue of reasonableness of the price

608, 57 Sup. Ct. 549, 81 L. ed. 835 (1937). In *Mayflower Farms, Inc. v. Ten Eyck*, 297 U. S. 266, 56 Sup. Ct. 457, 80 L. ed. 675 (1936), an act which limited the benefit of a price differential to milk dealers not having a well-advertised trade name to those who were already engaged in the business at a certain date was held unconstitutional as denying equal protection of the law by an unreasonable and arbitrary classification.

In *Townsend v. Yeomans*, 301 U. S. 441, 57 Sup. Ct. 842, 81 L. ed. 1210 (1937), a Georgia statute fixing maximum charges for handling and selling leaf tobacco was held constitutional. *Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. ed. 785 (1923) was overruled by *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 57 Sup. Ct. 578, 81 L. ed. 703 (1937) which upheld a minimum wage law of Washington. In *Mayo v. Lakeland Highlands Canning Co., Inc.*, 309 U. S. 310, 60 Sup. Ct. 517, 84 L. ed. 481 (1940) a preliminary injunction against enforcement of a statute fixing prices in the citrus fruit industry was denied.

³⁴ *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346, 59 Sup. Ct. 528, 83 L. ed. 752 (1939); *United States v. Rock Royal Cooperative*, 307 U. S. 533, 59 Sup. Ct. 993, 83 L. ed. 1446 (1939). The latter case paralleled the *Nebbia* decision, as to federal power to regulate prices under the interstate commerce clause. See Polikoff, *Commodity Price Fixing and the Supreme Court* (1940) 88 PENN. L. REV. 934.

³⁵ 22 N. Y. Supp. (2d) at 500, and cases cited.

fixed, that the limitation under the former statute was fifty cents rather than seventy-five, and that the practice at that time was outright purchase of blocks of seats.

Should this case reach the United States Supreme Court, there seems small reason to believe that the court will depart from the principle of the *Nebbia* decision and the line of cases following it. Again, in the words of Mr. Justice Brandeis: "In my opinion, the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection."³⁶

CAROLINE W. CARR.

Courts—Contempt—Undue Influence to Drop Civil Action.

An administrator instituted suit for wrongful death against the B-C Remedy Company in the Federal District Court for the Middle District of North Carolina. *N.*, not a party to the litigation but related to one of the owners of the defendant, sent *M.* to the South Carolina home of the administrator to bring him to the Lumberton home of *N.*, where he was entertained overnight and plied with liquor. *M.* had summarily removed the administrator, an elderly and uneducated man, from his home after having induced him to become intoxicated. The next morning, the administrator, not then under the influence of liquor but under the domination of *M.* and *N.*, signed papers, without any consultation with his attorney, dismissing the wrongful death action. Upon the attorney's disclosure of these facts, *N.* and *M.* were adjudged guilty of contempt by the Federal Court.¹

Congress has conferred on the Federal courts the power to punish as contempt "the misbehavior of any person in the presence of the court or so near thereunto as to obstruct the administration of justice".² Within this restriction, the courts determine what is a contempt.³ Dicta have prescribed that the test of a contempt is the character of the act done and its effect upon the discharge of judicial functions.⁴ The courts have determined that their first duty is to protect their litigants and to permit nothing to be done which will tend to the miscarriage of justice.⁵ On the other hand, the courts are eager to encourage compromise and amicable settlement of suits outside of court. They are also anxious to avoid interference with freedom of speech and fair comment. These considerations call for statesmanlike discrimination.

³⁶ See note 24, *supra*.

¹ *Nye v. United States*, 113 F. (2d) 1007 (C. C. A. 4th, 1940). Certiorari granted in late December, 1940.

² 36 STAT. 1163 (1911), 26 U. S. C. A. §385 (1928).

³ *United States v. McLeod*, 119 Fed. 416 (C. C. Ala. 1902).

⁴ *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 38 Sup. Ct. 560, 62 L. ed. 1186 (1918).

⁵ *Wilson v. Irwin*, 144 Ky. 311, 138 S. W. 373, 42 L. R. A. (N.S.) 722 (1911).

The contention that the court lacked power to punish acts done beyond the boundaries of the Middle District is untenable. Neither spatial nor lineal distance is determinative of such jurisdiction. The act is considered done in the presence of the court where it becomes effective, not in the jurisdiction where it was begun.⁶ Conduct wrongfully tending to obstruct the exercise of judicial power is punishable irrespective of the place of commission.⁷ "The question is not one of geography or topography or propinquity or remoteness, but one of direct influence upon the administration of justice. The administration of justice is equally obstructed wherever the act is done; and the place of solicitation is of absolutely no consequence whatever. Whether the act was done in the courthouse, or a mile, or a hundred miles away, the result is precisely the same; the disturbance to the court is the same."⁸

Did the acts of the defendants constitute contempt? The usual case of this class of indirect contempts contains an element of force,⁹ intimidation,¹⁰ threat,¹¹ or bribery¹² directed toward an officer of the court, juror, witness, or party. This case is unique in that these factors were conspicuously absent. This is a case of domination and control of a plaintiff, weakened with liquor, by stronger personalities operating on behalf of the defendant. Perhaps the nearest analogy lies in the cases where it has been held contempt to try to influence a judge or witness by conversations or editorials which create a prejudicial viewpoint toward pending litigation.¹³

⁶ *Snow v. Hawkes*, 183 N. C. 365, 111 S. E. 621, 23 A. L. R. 183 (1922).

⁷ *United States v. Huff*, 206 Fed. 700 (S. D. Ga. 1913); *In re Independent Publishing Co.*, 240 Fed. 849, L. R. A. 1917E, 703 (C. C. A. 9th, 1917); *Froelich v. United States*, 33 F. (2d) 660 (C. C. A. 8th, 1929); *Conley v. United States*, 59 F. (2d) 929 (C. C. A. 8th, 1932).

⁸ *McCauley v. United States*, 25 App. D. C. 404 (1905) (attempt to corrupt juror).

⁹ *In re Brule*, 71 Fed. 943 (D. Nev. 1895) (third party induced material witness not to appear in court); *Turk v. State*, 123 Ark. 341, 185 S. W. 472 (1916) (P. on way to court induced by threats of D. and others to leave jurisdiction); *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957, 2 L. R. A. (n.s.) 603 (1905) (third party, disliking sentence rendered in certain case, assaulted judge); *In re Fountain*, 182 N. C. 49, 108 S. E. 342, 18 A. L. R. 208 (1921) (case having been decided against him, Fountain assaulted discharged juror).

¹⁰ *Wilson v. Irwin*, 144 Ky. 311, 138 S. W. 373, 42 L. R. A. (n.s.) 722 (1911); *Snow v. Hawkes*, 183 N. C. 365, 111 S. E. 621, 23 A. L. R. 183 (1922); (P., in foreign state, forced by D.'s threats to withdraw suit); *King v. Barnes*, 113 N. Y. 476, 21 N. E. 182 (1889) (stockholder having control over officers in corporation induced them to evade carrying out court order).

¹¹ *McCarthy v. State*, 89 Tenn. 543, 15 S. W. 736 (1891) (P. kept out of court by D.'s threats).

¹² *Sneed v. United States*, 298 Fed. 911 (C. C. A. 5th, 1924) (D. gave juror \$1000 and whiskey to hang jury); *Richardson v. State*, 43 Ga. App. 229, 158 S. E. 369 (1931) (attempt to bribe witness); *Creekman v. United States*, 237 Fed. 743, L. R. A. 1917C, 845 (C. C. A. 8th, 1916), *cert. denied*, 242 U. S. 646, 37 Sup. Ct. 240, 61 L. ed. 544 (1917).

¹³ *In re Parker*, 299 Fed. 1006 (S. D. Cal. 1924), *aff'd* *Parker v. United States*, 3 F. (2d) 903 (C. C. A. 9th, 1925); *cert. denied*, 268 U. S. 694, 45 Sup. Ct. 513, 69 L. ed. 1161 (1925); *Gridley v. United States*, 44 (F. 2d) 716 (C. C. A.

The principal case reaches a desirable result and is based upon a sound policy, namely, that inducements to drop the prosecution of a pending case which go beyond the mere exercise of free speech or of a fair effort to compromise equitably outside of court, may be dealt with as contempt of court. Thus, the courts will punish such wrongful acts even where the offended litigant has condoned them. For, the powers of the court may be exerted because of the defendant's deliberate purpose to interfere with the orderly procedure of the tribunal.¹⁴

The North Carolina statute gives to the courts power to punish for contempt, acts which tend to defeat, impair, impede, or prejudice the rights or remedies of a party to the action then pending.¹⁵ Under this broad authority, it appears safe to predict that the North Carolina courts will not hesitate to go at least as far as did the instant Federal court.

PHYLLIS JANE CAMPBELL.

Criminal Law—Property Subject to Larceny in North Carolina.

Recently North Carolina's Supreme Court decreed that a tombstone erected at a grave becomes a chattel real and hence not the subject of common law larceny, if stolen by "one continuous act".¹ This suggests a profitable inquiry into the nature and types of property protected against larceny, at common law and by statute.

All authority agrees that the subject matter of common law larceny must be the personality of another,² yet this only gives rise to vexing problems, namely: (a) what is personality,³ as distinguished from realty, (b) what effect has a severance upon the character of real property, (c) what rules govern choses in action, animals, and property *sui generis*.

At common law the non-protection of land included ores and minerals beneath and growth above.⁴ Articles affixed to the land with intent of permanency lost their character as personality,⁵ but not those

6th, 1930), *cert. denied*, 283 U. S. 827, 51 Sup. Ct. 351, 75 L. ed. 1441 (1931); *Ex parte Jarvis*, 57 Cal. App. 533, 207 Pac. 494 (1922).

¹⁴ *In re Rice*, 181 Fed. 217 (C. C. Ala. 1910).

¹⁵ N. C. CODE ANN. (Michie, 1939) §985.

¹ *State v. Jackson*, 218 N. C. 373, 11 S. E. (2d) 149 (1940).

² 1 Hale, P. C. *510; 4 BL. COMM. *232; 2 BISHOP, CRIMINAL LAW (8th ed. 1892) §761.

³ What is personality varies for purposes of criminal and civil law. Loose plank is a fixture. *Bryan v. Lawrence*, 50 N. C. 337 (1858); a still fixed in masonry on land not a fixture. *Feimster v. Johnson*, 64 N. C. 259 (1870); trade fixtures, poultry houses and fences, a fixture. *Causey v. Orton*, 171 N. C. 375, 88 S. E. 513 (1916).

⁴ *State v. Foy*, 82 N. C. 679 (1880) (cabbage); 1 BISHOP, CRIMINAL LAW (8th ed. 1892) §577; Note (1914) 49 L. R. A. (N. S.) 965.

⁵ Rails, when made into a fence upon the land, become a part of the realty. *State v. Graves*, 74 N. C. 396 (1876). But the nature and strength of the union is immaterial. *State v. Martin*, 141 N. C. 832, 53 S. E. 874 (1906).

articles temporarily annexed⁶ or those used merely in connection with the realty.⁷ Documents evidencing an interest in realty⁸ and gold nuggets lying unattached on the surface⁹ were said to savor of realty and thereby to lose protection continually. But those articles adhering to the soil acquired or regained their character as personality and became the subject of common law larceny when severed by the owner or a third person, or even by the thief, provided the severance and the asportation were distinct and not parts of a continuous transaction. To constitute severance the article had to be removed from its original seat and left in a detached state, whereby it might legalistically come into the owner's possession as personality. A mere lapse of time between the severance and carrying away did not make the act larceny, if the trespasser failed to relinquish possession.¹⁰ The "one continuous act" rule is one of the most cumbersome technicalities of the common law and a constant stumbling block to justice. It has been abrogated in many states by statute as to certain types of property, and completely in several jurisdictions by judicial decision.¹¹

North Carolina statutes have redrawn the common law dividing line. In 1811, the first act abolishing the old realty rule unfortunately listed only "growing, standing, or ungathered corn or maize, cotton or rice".¹² Before 1836, "wheat and potatoes" were added,¹³ and prior to 1854, "tobacco, pulse and other grains".¹⁴ In 1868, "peanuts" were specified and also "fruits or vegetables or other product cultivated for food or market",¹⁵ a phrase which has caused most of the subsequent litigation. Thus amended, the statute remains today.¹⁶ An indictment under it for theft of "seed cotton and lent cotton" without the super-added words "growing, standing or ungathered" was held to charge no offense, since it might refer to the cotton after being picked.¹⁷ Following the literal meaning of the phrase the court has held that "figs" and

⁶ A window, fastened only by cross lathes and not hung or beaded into the frame, held not a part of realty. *Reg. v. Hedges*, 1 Leach, C. C. 201 (Crown Case) 1779.

⁷ A chapel bell if not fixed. *Rex v. Nixon*, 7 Car. & P. 442 (Nisi Prius 1836). Key, though in a house door lock, is subject of larceny. *Hoskins v. Tarrance*, 5 Blackf. (Ind.) 417, 35 Am. Rec. 129 (1840).

⁸ 2 BISHOP, CRIMINAL LAW (8th ed. 1892) §770; a commission to settle boundaries of a manor within this rule. *Reg. v. Westbeer*, 1 Leach 12 (Crown Case 1779).

⁹ Severance by nature immaterial and remains realty. *State v. Burt*, 64 N. C. 619 (1870).

¹⁰ Turpentine remaining in boxes on trees is subject of larceny. *State v. Moore*, 33 N. C. 70 (1850). Severance of ore, as of a nugget of gold, by natural causes, is not such a severance as to make it personality. *State v. Burt*, 64 N. C. 619; *State v. Graves*, 74 N. C. 396 (1876) (rail fences).

¹¹ Note (1914) 49 L. R. A. (N. S.) 969.

¹² N. C. PUB. LAWS 1811, c. 816.

¹³ Revised Code 1854, c. 34, §21.

¹⁴ N. C. CODE ANN. (Michie, 1939) §4257.

¹⁵ *State v. Bragg*, 86 N. C. 688 (1882).

¹⁶ N. C. REV. STAT. 1836-7, c. 34, §25.

¹⁷ N. C. PUB. LAWS 1868-9, c. 251.

"watermelons," not specifically named in the statute, must be averred to have been cultivated for food or market.¹⁸ In 1866, a supplementary act¹⁹ gave protection to "any wood or other kind of property whatsoever, growing or or being" on the land. It now stands as originally passed²⁰ and apparently covers the vast and valuable uncultivated vegetation of the soil, "crops" in the broad sense, not covered by the crop statute. As the preamble of the act states that its purpose is to prevent trespassing on lands and the stealing of "any kind of property therefrom" the legislature evidently intended to create a "catch-all" statute, but the wording of the act has apparently worked its own defeat.²¹ A conservative court narrowed by construction the phrase "or other kind of property whatsoever" to include only property of like character to that mentioned.²² But several years later it was decided that the addition of "whatsoever" showed a clear intention to cover "fixtures",²³ consequently, "30 lbs. of brass railing" attached to the freehold is a statutory subject of larceny. This decision by way of *dictum* says that the sole purpose of the act is to abolish the technical distinction inherent in "one continuous act". If this be held the legislative purpose, a loose gold nugget already severed from the soil by natural causes would not fall within the statute; furthermore, it might be deemed akin to treasure trove and hence not protected against theft.²⁴ Seemingly, "ginseng", which usually is found wild, would be within the statute²⁵ but in 1905 a statute was passed making it a felony to steal ginseng provided it "be in beds and the land upon which such beds are located shall be surrounded by a lawful fence"—perhaps to give specific warning against takings what is generally considered an offensive weed.

While a mere piece of paper was the subject of common law larceny, paper evidencing a chose in action, including muniments of title, lost its value and existence as property²⁶ for "though the evidence is

¹⁸ "It was never intended by this statute to make blackberries growing in fence corners or persimmons on a tree standing in an abandoned old field the subject of larceny. Figs sometimes grow uncultivated in waste places." *State v. Liles*, 78 N. C. 496 (1878); uncultivated watermelons not included. *State v. Thompson*, 93 N. C. 537 (1885). But it is not necessary to aver cultivation of corn for it is specifically listed. *State v. Ballard*, 97 N. C. 444, 1 S. E. 685 (1887).

¹⁹ N. C. PUB. LAWS, 1866, c. 60. Pointing out that growing trees, plants, shrubs, flowers, minerals and metals, fences and other erections upon the land were not covered by the Act of 1811. *State v. Vosburg*, 111 N. C. 719, 16 S. E. 392 (1892). N. C. CODE ANN. (Michie, 1939) §4259.

²⁰ Reason for statute was to deter the great numbers of shiftless people who were maliciously trespassing after the Civil War. *State v. Crawley*, 103 N. C. 353, 9 S. E. 409 (1889). Apparently theft by an invitee or mere licensee is not larceny under this statute. *State v. Boyce*, 109 N. C. 734, 14 S. E. 391 (1891).

²¹ Theft of paper money no offense. *State v. Vosburg*, 111 N. C. 719, 16 S. E. 392 (1892).

²² *State v. Beck*, 141 N. C. 829, 53 S. E. 843 (1906).

²³ *State v. Burt*, 64 N. C. 619 (1870).

²⁴ N. C. PUB. LAWS 1905, c. 211; N. C. CODE ANN. (Michie, 1939) §4258.

²⁵ *State v. Brown*, 53 N. C. 443 (1862) (bank note); *State v. Dill*, 75 N. C.

stolen the right remains the same".²⁷ But if the chose in action was void as being defective, or had been paid, an indictment would lie for stealing the paper on which it was written.²⁸ North Carolina largely repudiated this doctrine in 1811,²⁹ specifically covering by statute "any bank note, check or other order for the payment of money issued by or drawn on any bank or other society or corporation within this state or within any of the United States, or any treasury warrant, debenture, certificate of stock, or other public security or certificate of stock in any corporation, or other order, bill of exchange, bond, or promissory note or other obligation either for the payment of money or for the delivery of specific articles (notwithstanding any of the said particulars may be termed in law a chose in action)". This statute has received liberal construction and the phrase "or other obligation" has been held to embrace similar obligations to those specifically enumerated regardless of their informality.³⁰ However, a paid "due-bill"³¹ is not within the statute and apparently a deed, receipt or other instrument not embodying an existing obligation likewise are not covered. Although comprehensive on its face, this statute did not repeal the common law doctrine in toto. Foreign and territorial notes, etc., are not issued "within" any of the United States,³² but perhaps these and like items are included under "other obligations."³³ Court records have been protected since 1429,³⁴ and North Carolina by amendment to the original act included the records of the Register of Deeds and County Commissioners.³⁵ Testamentary instruments, of dead as well as living persons, are specifically protected.³⁶

North Carolina follows the common law rules closely concerning animals which were personalty and the subject of larceny. No right of

257 (1876) (currency); *State v. Campbell*, 103 N. C. 344, 9 S. E. 410 (1889); 4 BL. COMM. *234; 2 BISHOP, CRIMINAL LAW (8th ed. 1892) §769.

²⁷ *Reg. v. Watts, Dears.* C. C. 326 (Crown Case 1854).

²⁸ *State v. Campbell*, 103 N. C. 344, 9 S. E. 410 (1889); 2 WHARTON, CRIMINAL LAW (11th ed. 1912) §1115; CLARK & MARSHALL, LAW OF CRIMES (2nd ed. 1927) §311.

²⁹ N. C. PUB. LAWS 1811, c. 814, §1; N. C. CODE ANN. (Michie, 1939) §4254.

³⁰ "The phrase is used in a remedial and comprehensive sense". *State v. Campbell*, 103 N. C. 344, 9 S. E. 410 (1889).

³¹ *State v. Campbell*, 103 N. C. 344, 9 S. E. 410 (1889).

³² An indictment charging the theft of a bank note without averring by what authority it was issued was held fatally defective. *State v. Brown*, 53 N. C. 443 (1862). But as the statute is silent as to necessary authority, National Bank Notes, issued under authority of an act of Congress, are included for they were issued geographically "within" one of the United States, to-wit, New York. *State v. Banks*, 61 N. C. 577 (1869).

³³ Treasury Notes, issued as a class since enactment of statute, included *State v. Thompson*, 71 N. C. 146 (1874). Also a United States pension check, undorsed. *State v. Bishop*, 98 N. C. 773, 4 S. E. 357 (1887).

³⁴ 8 Henry VI, c. 12, §3 (1429).

³⁵ N. C. PUB. LAWS 1881, c. 17; N. C. CODE ANN. (Michie, 1939) §4255.

³⁶ N. C. CODE ANN. (Michie, 1939) §4256.

property was recognized in animals, *ferae naturae*, including wild fish and birds, while in their natural state, yet they became personalty by being killed, confined, tamed or otherwise reclaimed if fit for food³⁷ or the production of food,³⁸ or perhaps for any useful purpose.³⁹ The "one continuous act" applied to animals *ferae naturae* as to realty.⁴⁰ The marking of a whale reclaims it, and possibly the mere chasing of a wounded fox is sufficient, but the taming of wild animals does not give possession of their young unless they are also under the owner's physical restraint.⁴¹ As a general rule, eggs partake of the status of the animal laying them.⁴² The flesh⁴³ and hides⁴⁴ of dead animals, whether *ferae naturae* or tame, was the subject of larceny, but living dogs, even though tamed, were deemed base in nature and consequently unprotected.⁴⁵ Late cases adhere to this rule, although for civil purposes dogs are treated as personalty.⁴⁶ A North Carolina tax statute has made licensed dogs the subject of larceny,⁴⁷ but where the tax is not required for pups under six months of age or hunting dogs in packs of over six, the law governing them is in doubt. The North Carolina Court in a *dictum* has regarded oysters similar to realty,⁴⁸ but shellfish in beds are the subject of larceny by statute.⁴⁹ To take "any fish from any net of any kind" is a misdemeanor.⁵⁰

Even though the property be personalty, it was mandatory that it be determinate, legally the subject of ownership. Therefore, the theft of treasure trove, a wreck not seized, seaweed, and things abandoned

³⁷ State v. Krider, 78 N. C. 481 (1878) (fish). But "the turkey is a domestic animal, and not a creature *ferae naturae*." State v. Turner, 66 N. C. 618 (1892); 1 Hale, P. C. 510; 4 BL. COMM. *235; 2 BISHOP, CRIMINAL LAW (8th ed. 1892) §771; 2 WHARTON, CRIMINAL LAW (11th ed. 1912) §1104.

³⁸ State v. Murphy, 8 Blackf. (Ind. 1847) 498 (reclaimed bees).

³⁹ Repudiates the English Doctrine that animals unfit for food if generous in nature are protected, but not if base, by declaring "the true criterion is the value of the animal, whether for the food of man, its fur, or otherwise". State v. House, 65 N. C. 315, 6 Am. Rep. 744 (1871).

⁴⁰ CLARK & MARSHALL, LAW OF CRIMES (2nd ed. 1927) §308.

⁴¹ 2 BISHOP, CRIMINAL LAW (8th ed. 1892) §§776, 778.

⁴² 2 WHARTON, CRIMINAL LAW (11th ed. 1912) §1105.

⁴³ But an indictment for theft of "one pound of meat of the value of 5c" held fatally defective for uncertainty. State v. Patrick, 79 N. C. 655 (1878); 2 WHARTON, CRIMINAL LAW (11th ed. 1912) §1109.

⁴⁴ 2 BISHOP, CRIMINAL LAW (8th ed. 1892) §772.

⁴⁵ State v. Holder, 81 N. C. 527, 31 Am. Rep. 517 (1879). Also cats, bears, foxes, apes, polecats, monkeys, ferrets, squirrels, parrots, singing birds, martens, and coons. 2 WHARTON, CRIMINAL LAW (11th ed. 1912) §1107.

⁴⁶ State v. Lathan, 35 N. C. 33 (1851) (action for malicious mischief).

⁴⁷ N. C. PUB. LAWS 1917, c. 206, §9; 1919, c. 116, §10; N. C. CODE ANN. (Michie, 1939) §§1683, 1693, 4263.

⁴⁸ Makely v. Boothe Co., 129 N. C. 11, 39 S. E. 582 (1901). Considered as animals fit for food when planted in beds capable of identification. State v. Taylor, 27 N. J. Law (Sup. Ct., 1858) 117; or as domestic animals when planted. Fleet v. Hegeman, 14 Wend. 42 (N. Y. 1837).

⁴⁹ N. C. PUB. LAWS 1887, c. 119, §15; N. C. CODE ANN. (Michie, 1939) §1945.

⁵⁰ N. C. PUB. LAWS 1883, c. 137, §5; N. C. CODE ANN. (Michie, 1939) §1971.

by the owner⁵¹ was not larceny. This was also true of a dead human being, in which the criminal law recognized no property, but otherwise as to a coffin, grave clothes, or other articles upon or interred with a dead body.⁵² However, there could be larceny of buried animals.⁵³ Goods unlawfully acquired or possessed and lost property were also the subject of larceny.⁵⁴ The slightest value was sufficient even if it be value to the possessor alone.⁵⁵ The stealing of a slave was early held to be larceny under the view that a slave is a personal chattel, and that protection should extend "to every species of personal property, though not admitted and known as a subject of larceny when the law was formed."⁵⁶ Had this maxim been followed the perennial search for rules and much litigation could have been avoided.

Statutory changes, whose treatment is beyond the scope of this note, have expanded the crime, for example: the altering of timber trade marks;⁵⁷ taking of horses, mules, automobiles, electric vehicles, and aircraft for temporary purposes only;⁵⁸ and the mere pursuing or killing of live stock with felonious intent.⁵⁹ Recently protection has been given the complete stock in museum and libraries,⁶⁰ and even discarded soft drink bottles and containers.⁶¹

Piecemeal statutory enactments mingled with remnants of ancient common law have left confusion in their wake. North Carolina may well discard unreasoning technicalities in favor of a modern and intelligent restatement.

HENRY L. HARKEY.

⁵¹ *State v. Hathway*, 150 N. C. 798, 63 S. E. 892, (1909) (abandoned fish slide).

⁵² The property interred with deceased is not regarded as abandoned property, the title is in the estate or person who buried him. 2 WHARTON, CRIMINAL LAW (11th ed. 1912) §1098; CLARK & MARSHALL, LAW OF CRIMES (2nd ed. 1927) §307.

⁵³ *Reg. v. Edwards*, 13 Cox. C. C. (Cr. App. 1777) 384 (pigs).

⁵⁴ "It is larceny to steal stolen goods from a thief; and generally whatever is produced by wrong is the subject of this offense the same as are the products of right." 2 BISHOP, CRIMINAL LAW (8th ed. 1892) §781; 2 WHARTON, CRIMINAL LAW (11th ed. 1912) §1118. But one finding and concealing a lost carpet bag, having been directed to recover it, is not guilty of larceny, but breach of trust. *States v. England*, 53 N. C. 399 (1861).

⁵⁵ Indictment for theft of "one-half ten-shilling bill of the currency of the state" quashed for such bill is destitute of both artificial and intrinsic value. *State v. Bryant*, 4 N. C. 249 (1815); 2 WHARTON, CRIMINAL LAW (11th ed. 1912) §1119; CLARK & MARSHALL, LAW OF CRIMES (2nd ed. 1927) §312. But anything animate or inanimate while on exhibition at fairs is the subject. N. C. Pub. Laws 1870-1, c. 184, §4; N. C. CODE ANN. (Michie, 1939) §4335.

⁵⁶ *State v. Hall*, 1 N. C. 168 (1779). For statute see, N. C. PUB. LAWS 1779, c. 142, §2; N. C. REV. STAT. 1836-7, c. 34, §9; Revised Code 1854, c. 34, §10.

⁵⁷ N. C. CODE ANN. (Michie, 1939) §§3991, 3992.

⁵⁸ N. C. CODE ANN. (Michie, 1939) §4261 (horses and mules), §4262 (automobiles and electric vehicles), §191(y) (aircraft).

⁵⁹ N. C. CODE ANN. (Michie, 1939) §§4264, 4265.

⁶⁰ N. C. PUB. LAWS 1935, c. 300; N. C. CODE ANN. (Michie, 1939) §4511.

⁶¹ N. C. PUB. LAWS 1937, c. 322, §§1, 2; N. C. CODE ANN. (Michie, 1939) §4265(a).

Judgments—Constitutional Exemptions.—Set-Off Against Claims Which Are Exempt Property.

P holds a judgment against *D* for \$385.00 and *D* holds judgment against *P* for \$316.47. *P* alleges *D* to be insolvent and prays for a set-off. *D* asks that his judgment against *P* be allotted as his personal property exemption claimable under the Constitution.¹ The court, believing *D* entitled to have his judgment exempt from sale under execution, dismissed *P*'s motion of set-off, which dismissal was affirmed on appeal.² Thus the North Carolina court has forced one man to pay his entire debt to a person who in turn owes him an amount which will never be collectible in full, due to the latter's insolvency. This refuses to recognize that in fairness the only debt really due is the difference in the amounts owed.

The decision of the principal case follows the almost universal rule of construction that exemption statutes are designed to protect the debtor from absolute poverty and the likelihood of becoming a charge upon the state, and accordingly are to be liberally construed.³ Infrequently such statutes have been strictly construed on the theory that they are in derogation of the common law.

Some statutes exempt from execution certain specific articles of personal property.⁴ Where there is a wrongful levy of execution upon such property pursuant to a judgment, and subsequently the injured party obtains a judgment for the wrongful conversion, a motion for set-off of the former judgment⁵ against the latter judgment will be denied.⁷ For to allow such a set-off would be to defeat the statute,

¹ N. C. CONST. art. X, §1. ("The personal property of any resident of this state, to the value of five hundred dollars, to be selected by such resident, shall be and is hereby exempted from sale under execution or other final process of any court issued for the collection of any debt.")

² Egerton v. Johnson, 218 N. C. 300 (1940).

³ Picknell v. Jerauld, 1 Ind. App. 10, 27 N. E. 433 (1891); Kendrick v. Hudson, 86 Mo. App. 501 (1900); State v. Bank of Crab Orchard, 122 Neb. 210, 239 N. W. 836 (1932); Cleveland v. McCanna, 7 N. D. 455, 75 N. W. 908 (1898); Bradley v. Earle, 22 N. D. 139, 132 N. W. 660 (1911); Rookard v. Atlanta & C. Air Line Ry., 89 S. C. 371, 71 S. E. 992 (1911).

⁴ Beaupre v. Scott, 3 Minn. 419; Mallory v. Norton, 21 Barb. 424 (N. Y. 1856); Knobb v. Drake, 23 Pa. St. 489 (1854).

⁵ I.e. Tools necessary for a laborer's work; specified number of horses, household articles, etc.

⁶ I.e. Judgment pursuant to which wrongful execution levied is still in existence since wrongful execution does not satisfy or extinguish it.

⁷ *Ex parte* Hunt, 62 Ala. 1 (1878); Ray v. Gregory, 120 Ark. 50, 178 S. W. 405 (1915); Treat v. Wilson, 65 Kan. 729, 70 Pac. 893 (1902); Elder v. Fremont, 18 Nev. 446, 5 Pac. 69 (1884); Cleveland v. McCanna, 7 N. D. 453, 75 N. W. 908 (1898); Duff v. Wells, 7 Heisk. 17 (Tenn. 1871); Cone v. Lewis, 64 Tex. 331 (1885); Howard v. Tardy, 79 Tex. 450, 15 S. W. 578 (1891); Snow v. West, 37 Utah 528, 110 Pac. 52 (1910); Below v. Robbins, 76 Wis. 600, 45 N. W. 416 (1890); cf. Johnson v. Hall, 84 Mo. 210 (1884) (if a replevy is obtained and also a judgment of damages for the wrongful levy, the latter is subject to set-off); State v. United States Fidelity and Guaranty Co., 135 Mo. App. 160, 115 S. W. 1081 (1909) (allowing a set-off of a judgment obtained for the breach of an attach-

since the judgment creditor even though prohibited from directly executing against this exempt property, has already converted the property and a set-off would in result be equivalent to sustaining a direct levy on the exempt property.⁸ Other courts⁹ allow a set-off of such judgments on the theory that the plaintiff in the wrongful conversion suit might have elected to obtain the specific property by replevin or its value by trover and if he elects to sue for damages rather than to recover the specific article, the law will not later exempt the judgment for him since the exemption law is designed to protect only the specific article.¹⁰ This view is rejected in most states, because inconsistent with a liberal interpretation of exemption statutes, since it defeats the purpose of the statute and sanctions the wrong,¹¹ especially where there was no true election of remedies because of the inability of the impoverished debtor to post a replevin bond.¹²

Where specific claims are exempt, as claims for wages¹³ or compensation under the Workmens' Compensation Act,¹⁴ there will be no set-off of a judgment against such exempt claim, especially if the judgment is assigned.¹⁵

Then there is the type of provision involved in the principal case which exempts from execution personal property to be selected by the debtor, up to a specified value. Under facts similar to those of the principal case, the rule adopted by the great majority of courts is that of the principal case—a denial of the set-off.¹⁶ The leading case is

ment bond against the judgment under which attachment was made, due to the court's construction of Missouri's "set-off of mutual debts" statute as paramount to the right of exemption).

⁸ *Atkinson v. Pittman*, 47 Ark. 464, 2 S. W. 144 (1886) (set-off does indirectly what the prohibited final process does directly); *Coppage v. Gregg*, 1 Ind. App. 112, 27 N. E. 570 (1891) (same); *Beattyville Co. v. Sizemore*, 203 Ky. 7, 261 S. W. 620 (1924) (sale under execution); *First Nat. Bank of Cushing v. Funnell*, 144 Okla. 188, 290 Pac. 177 (1930) (final process); *Collier v. Murphy*, 90 Tenn. 300, 16 S. W. 465 (1891) (seizure); *Atlantic Life Ins. Co. v. Ring*, 187 S. E. 449 (Va. 1936) (attachment).

⁹ See note 4, *supra*.

¹⁰ *Tally v. Palmer*, 112 Kan. 391, 210 Pac. 1104 (1923) (while not allowing the judgment for wrongful conversion to be forever exempt, will allow it to be exempt for a time sufficient to realize on it and to buy more exempt property with the proceeds).

¹¹ *Howard v. Tardy*, 79 Tex. 450, 15 S. W. 578 (1891); dissent to *Cardwell v. Ryan*, 210 Mo. 17, 108 S. W. 533 (1908).

¹² *Tally v. Palmer*, 112 Kan. 391, 210 Pac. 1104 (1923).

¹³ *Banks v. Rodenback*, 54 Iowa 695, 7 N. W. 152 (1880); *Millington v. Launer*, 89 Iowa 322, 56 N. W. 533 (1893); *Bauer v. Teasdale*, 25 Mo. App. 25 (1887); *William Deering Co. v. Ruffner*, 32 Neb. 845, 49 S. W. 771 (1891); *Collier v. Murphy*, 90 Tenn. 300, 16 S. W. 465 (1891); *Dempsey v. McKennell*, 2 Tex. Civ. App. 284, 23 S. W. 525 (1893).

¹⁴ *Beattyville Co. v. Sizemore*, 203 Ky. 7, 261 S. W. 620 (1914).

¹⁵ *Bauer v. Teasdale*, 25 Mo. App. 25 (1887).

¹⁶ *Atkinson v. Pittman*, 47 Ark. 464, 2 S. W. 114 (1886); *Butner v. Bowser*, 104 Ind. 255, 3 N. E. 889 (1885); *Junker v. Hustes*, 113 Ind. 524, 16 N. E. 197 (1887); *Picknell v. Picknall*, 1 Ind. App. 10, 27 N. E. 433 (1891); *Grant v. Phoenix-Jellico Coal Co.*, 155 Ky. 585, 159 S. W. 1161 (1913); *Wylie v. Grundysen*, 51 Minn. 360, 53 N. W. 805 (1892); *Smith v. McMillian*, 84 N. C. 593

Curlee v. Thomas.¹⁷ There separate judgments had been obtained in separate actions on co-existent claims (thus potential though unutilized counterclaims), and upon execution pursuant to one judgment there was a motion for set-off, but the owner of the judgment under which execution was to be made claimed¹⁸ it as exempt; consequently, the motion was denied.

Ohio,¹⁹ by interpreting their statute,²⁰ providing "when cross demands have existed between persons under such circumstances, that if a person had brought an action against the other a counterclaim or set-off could have been set up . . . the two demands must be deemed compensated so far as they equal each other," as applying also to cross judgments which are proper subjects of set-off, has reached a different result and allows a set-off in spite of a claim of exemption. In other words they have adopted by statute the rule of the civil law system on this point. Nebraska,²¹ confronted with a similar statute and the precedent of the Ohio court, recognized this as the civil law rule but refused to adopt it.

A kindred subject is involved where *P*, in the enforcement of a claim, gets a judgment against *D*, and in a prior suit on the same claim *D* had recovered a judgment for costs against *P*. In such a case when the exemption is asserted by *P* a motion for set-off has been both allowed²² and disallowed.²³ Missouri, having reversed its original stand, now allows set-off, saying that it is against all equities to let *D* lose from *P*'s error in bringing the first action.²⁴

Where an action is brought and the defendant counterclaims, the majority of courts hold that even though under the applicable statute it be a proper counterclaim it will be denied if the plaintiff asks that his claim be exempt under the personal property exemption statute.²⁵ Only in North Carolina,²⁶ Ohio,²⁷ and Missouri²⁸ has such a counterclaim

(1881). But *cf.* *Hogan v. Kirkland*, 64 N. C. 251 (1870) (exemption not claimed). See *Coppage v. Gregg*, 1 Ind. App. 112, 27 N. E. 570, 571 (1891); *Butler v. Stainback*, 87 N. C. 216 (1882).¹⁷ 74 N. C. 51 (1876).

¹⁸ See *Hogan v. Kirkland*, 64 N. C. 251 (1870).

¹⁹ *Serhart v. Pearce*, 73 Ohio St. 250, 76 N. E. 943 (1906).

²⁰ OHIO REV. STAT. 1880, §5073.

²¹ *State v. Bank of Crab Orchard*, 122 Neb. 210, 239 N. W. 836 (1932).

²² *Wabash R. R. v. Bowing*, 103 Mo. App. 158, 77 S. W. 106 (1903).

²³ *Bowen v. Holden*, 95 Mo. App. 1, 75 S. W. 686 (1901); *Rookard v. Atlanta & C. Air Line Ry.*, 89 S. C. 371, 71 S. E. 992 (1911).²⁴ See note 22, *supra*.

²⁵ *Smith v. Sills*, 126 Ind. 205, 25 N. E. 881 (1890); *Coffing v. Durgon*, 6 Ind. App. 386, 33 N. E. 815 (1893); *First National Bank of Cushing v. Funnell*, 144 Okla. 188, 290 Pac. 177 (1930); *Bradley v. Earle*, 22 N. D. 139, 132 N. W. 660 (1911); *Collier v. Murphy*, 90 Tenn. 300, 16 S. W. 465 (1891); *Atlantic Life Ins. Co. v. Ring*, 187 S. E. 44 (Va. 1936).

²⁶ *Lynn v. Cotton Mills*, 130 N. C. 621, 41 S. E. 877 (1902).

²⁷ *Pierce v. Kepner*, 52 Ohio St. 615 (1894); see *Serhart v. Haker*, 73 Ohio St. 250, 255, 76 N. E. 943, 944 (1906).

²⁸ See *Cardwell v. Ryan*, 210 Mo. 17, 108 S. W. 533 (1908) (Statute provides for "set-off of mutual debts.").

been allowed where the exemption was pleaded. However, Arkansas²⁹ holds with this minority in all cases where the counterclaim arises out of the same transaction, arguing that neither party has ever had the right to claim his right of action against the other party as exempt from the other's claim against him, for the simple reason that the two causes of action having grown out of the same transaction, one extinguishes the other *pro tanto*. In other words it reduces each party's right to recover the amount of his debt from the other and never forms a part of his constitutional exemption. Another sound technical argument is that of the North Carolina court, which states that "exemption is not available before judgment so as to destroy the right of counterclaim or set-off,"³⁰ because there has been no execution or final process in setting off two claims neither of which are reduced to judgment, and the Constitution provides only for exemption against "sale under execution or final process issued upon judgment recovered on any debt."³¹ "Otherwise one could recover judgment when on a balance struck nothing is due him."³² Thus the North Carolina court recognizes the injustice of allowing *A's* exempt claim to prevail against *B* regardless of a claim of *B* against *A* not recoverable because *A* is insolvent. But when the claims are reduced to judgment the court has felt bound by the constitutional provision as to "sale under execution or final process issued upon a judgment recovered on any debt."³³

By far the most advisable means of aiding the courts around this obstacle is to adopt either by statute or judicial decision the civil law rule, discussed by Justice Story,³⁴ "that cross demands may compensate each other by deducting the lesser from the greater, and that the difference is the only sum which can be justly due."³⁵ He regrets and wonders why the rule was adopted "for the sake of the form of proceeding and convenience of trial . . . that each must sue and recover separately in separate actions."³⁶ Thus, if we should adopt the civil law on this point, the debts would mutually extinguish each other as a matter of law, so that as soon as mutual debts came into existence the only "property" would be the difference between them, and that part of the debts extinguished would be no longer "property" which could be claimed as exempt.³⁷

Another solution, which is akin to the civil law, is to allow mutual demands or judgments to be liens upon each other. The rationale is

²⁹ *Harry v. Williams*, 122 Ark. 148, 182 S. W. 546 (1916).

³⁰ *Lynn v. Cotton Mills*, 130 N. C. 621, 622, 41 S. E. 877 (1902); see *Egerton v. Johnson*, 218 N. C. 300, 302 (1940).

³¹ See note 1, *supra*.

³² *Lynn v. Cotton Mills*, 130 N. C. 621, 622, 41 S. E. 877 (1902); see *Egerton v. Johnson*, 218 N. C. 300, 302 (1940).

³³ See note 1, *supra*.

³⁴ STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (2d ed. 1839).

³⁵ *Id.* at 656.

³⁶ *Ibid.*

³⁷ Ohio, by statute, has obtained such a result. See note 22, *supra*.

that up to the point that mutuality exists, each has an interest in the other's claim against him, and each should be allowed to protect the interest by receiving first payment out of the money due to the other. Thus would be reached an equitable result without attendant inequities, and it could be done by judicial decision without the aid of a statute.

The possible solution of amending the constitution, to provide that where mutual demands exist one may not claim his demand as exempt against the other's demand, is undesirable because amendment is difficult, and would yield no more than the result afforded by the civil law. A statute could not be used in lieu of the above amendment since it would be unconstitutional as restricting the debtor's choice of exemption.³⁸

Of course, the legislature might possibly evade the Constitution by enacting that a judgment is not personal property subject to exemption, on the theory that the Constitution intended that only tangible property would be exempt. However, such a statute, while removing the instant inequity would give birth to an even greater one, for then not only where mutual claims exist but in all cases there would be no exemption. Thus all of a person's property might consist of judgments, leaving him entirely vulnerable to creditors without any exempt property to claim, and so open to possible impoverishment. Such a result is not to be encouraged. Moreover, there is obviously no reason why, as a general rule, a judgment should not be exempt as personal property, because such an exemption just as effectively removes assets from the creditors.

Therefore, it is recommended that our court adopt either the civil law rule or the mutual lien rule, preferably the former. If they adopt neither, then a statute should be enacted embodying the civil law rule on this point.

J. KENYON WILSON, JR.

Labor Law—Constitutional Law—Employer's Freedom of Speech Under the Wagner Act.

The Circuit Court of Appeals denied enforcement of that part of the National Relations Board's order directing the Ford Motor Company to cease and desist from . . . "interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act by circulating, distributing or otherwise disseminating among its employees statements or other propaganda which disparage or criticize labor organizations or which advise its employees not to join such organizations. . . ."³⁹ Section 7 provides that employees shall have

³⁸ *Comm'rs v. Riley*, 75 N. C. 144 (1876); see *Scott v. Kenan*, 94 N. C. 298, 303 (1886).

the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through their own representatives, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Suppression of "freedom of speech" has been one of the most widely discussed issues raised by the National Labor Relations Act. The present decision was a culmination of a question of employer's rights which has been hanging fire, through a storm of criticism and litigation, for over three years. However, it may not be a final disposition, for the Board has indicated that it will petition the Supreme Court for review.²

For a complete understanding, it will be necessary to delve into the background of facts giving rise to the instant decision. In the spring of 1937, the United Automobile Workers of America was conducting a union drive in the plant of the Ford Motor Company. In April, the management distributed in the plant copies of the *Ford Almanac* containing a column of anti-union satire and in May reprints of several anti-union interviews of Mr. Ford, together with a card of "Fordisms", a compilation of anti-labor organization statements of Mr. Ford.³ Contrary to the usual policy of leaving this material at the gates for the employees to take or leave as they chose, members of the Ford Service Department were on hand to thrust the propaganda into the hands of any who seemed disposed to ignore it. This bitter campaign was climaxed by a riot⁴ in which several organizers and union members were severely beaten by the Ford police while engaged in a peaceable attempt to distribute union literature. Upon complaints to the Board regarding the riot, dissemination of the Ford publications, discriminatory discharges, and other unfair labor practices as defined by the act,⁵ the

² N.L.R.B. v. Ford Motor Company, 114 F. (2d) 905 (C. C. A. 6th, 1940). The complete order of the Board is found in *In the Matter of Ford Motor Company*, 14 N.L.R.B. 346, 379.

³ Such an appeal is to be approved, not only because of the constitutional importance of the decision, but also because the reasoning of the circuit court is ambiguous and not particularly definitive of the issues in the case, which simply stated, appear to be: (1) was the propaganda coercive *per se*, or only coercive if considered with its contextual background? (2) if coercive *per se*, is it prohibitable under the act? (3) is such prohibition constitutional?

⁴ From the "Ford Gives Viewpoint on Labor" interview: "... We think our men ought to consider whether it is necessary for them to pay some outsider every month for the privilege of working at Ford's. Or whether any union can do more for them than we are doing.

"If the union leaders are sincere, they should go into business for themselves. "... I have always made a better bargain for our men than an outsider could. We never have had to bargain with our men, and we don't expect to begin now." (Italics supplied.)

From the "Fordisms": "Figure it out for yourself. If You go into a union they have Got You,—but what have You Got?"

"What was the result of these strikes—merely that numbers of men put their necks in an Iron Collar. I'm only trying to Show Who Owns the Collar."

⁵ River Rouge plant, May 26, 1937. A vivid account of the viciousness of the riot can be found in the Board's order, 14 N.L.R.B. 346, 354 to 376.

⁶ Section 9. 49 STAT. 452 (1935), 29 U. S. C. A. §158 (Supp. 1940).

Board held hearings, made findings of fact, and issued orders. These orders, though subsequently withdrawn for modification, were re-incorporated in the order of August 9, 1939, which the court upheld in all particulars except the above-quoted cease and desist provision.

The present case is unique in that it constitutes the first use by the Board of a cease and desist order *specifically* directed against propaganda, written or oral. Formerly only a general order to cease and desist from interfering with the right of self-organization and collective bargaining has been used. Furthermore, it seems to be the first case in which the narrow question of employer freedom of speech under the act, *independent of any other anti-union coercive activities*, has been raised. To visualize the principles involved here, it is necessary to project the present case upon a background of the theories developed by the Board and the courts in the most nearly analagous situations arising under the act.

The attitude of the Board: The Board's attitude regarding the employer's freedom of speech under the act has always been relatively clear.⁶ A majority of circuit court decisions have liberally interpreted the powers of the Board and have sustained the Board's orders, no one of which, however, went so far in denying employer rights as the present one. The Board insists that all expressions of employer opinion hostile to unions and accompanied by overt acts of discrimination or intimidation are clearly violative of the act, and prohibitable.⁷ The courts have concurred thus far. Where the employer's language has *plainly* threatened plant removal or shutdown in the event of unionization, the Board has consistently declared such language an unfair labor practice.⁸ How-

⁶ Series of closely analagous situations provoking Board orders are collected in Rosenfarb, *THE NATIONAL LABOR POLICY* (1940) 73 to 76; Myers, *"Interference" in Labor Relations Acts* (1939) 19 B. U. L. REV. 209, 211; Wettach, *Unfair Labor Practices under the Wagner Act* (1938) 5 LAW & CONTEMP. PROB. 223, 230; Note (1938) 32 ILL. L. REV. 568, 589; C. C. H. 1 Labor Law Service §2625 (1940). "... The Board has found an unfair labor practice under section 8(1) in employer statements to employees describing union organizers as 'racketeers,' 'parasites' . . . ; statements asserting that union dues are used by organizers to buy clothes, get drunk, or to purchase big black cigars; . . . statements disparaging the effectiveness of the Act in protecting employees and in according them rights have been held a violation.

"In some cases the statements are not made by the employer himself or through persons in his employ, but through third persons, such as civic officials, whom the employer utilizes for such purpose. This also has been held a violation." *Third Annual Report*, N.L.R.B. 1938 (pages 59, 60).

⁷ C. C. H. 1 Labor Law Service §2625 (1940); Note (1940) 1 BILL OF RIGHTS REVIEW 44, 45. The latter note also discusses the advisability of a Board order depriving an employer with a record of coercion of even his right to express an opinion, and concludes that, even if the administrative difficulties were superable, such a procedure would probably be unconstitutional.

⁸ Note (1938) 48 YALE L. J. 54, 72, 79: "... the gravest difficulty for both the Board and the courts . . . appears to be that of determining whether a given statement by an employer at a given time is a mere expression of opinion or whether it implies a threat as well." In resolving such difficulty, the court has

ever, at times the Board has gone beyond these circumstances, and declared that "because of the employer's 'superior economic power' any expression to employees of hostility to unionism is necessarily 'coercive' and therefore constitutes unlawful 'interference' by the employer." Support for this view is found in *Virginia Ry. v. Union Federation No. 40*,⁹ where it is said: "Any sort of influence exerted by an employer upon an employee, dependent upon his employment for means of livelihood, may very easily become undue in that it will coerce the employee's will in favor of what the employer desires against his better judgment".¹⁰ To evaluate the court's finding of the non-coercive character of the statements in the Ford case, it is only necessary to ask: Were the "Fordisms" an appeal to the employee's mind and judgment, or were they an appeal to his fear and necessity?¹¹

Receding somewhat from its most extreme position that any hostile expression was coercive, the Board in the present case held that the rights guaranteed by the First Amendment are qualified and not absolute, and that under certain circumstances an employer's expressions of opinion on labor policies is not permissible under the statute because coercive and intimidatory. The Board feels that the Ford situation, with its background, comes within the forbidden territory, and directs its desist order not against mere employer opinion but, as stated in a recent pro-union comment, against speech "upon which was stamped the whole pattern of ruthless suppression of unionism. The more one comprehends the threads in that pattern,—incredible brutality and systematically inspired fear of economic degradation,—the more accurately . . . does one take the measure of the Ford utterances as 'expressions of opinion' ".¹²

Although granting the view in the *Virginia Ry.* case quoted above, the circuit court declared that the Board's ruling holds the employer forever suspect and, practically applied, necessarily silences him whose opinion may be the best informed, no matter how honest his views or how truthful his observations.

The Board might agree that *theoretically* an employer should be

perform had to resort to such criteria as the background of the case and its relationship thereto, the time, place, and the emotional state of the speaker.

⁹ 84 F. (2d) 641 (C. C. A. 4th, 1936) *aff'd* 300 U. S. 515, 57 Sup. Ct. 592, 81 L. ed. 789 (1937).

¹⁰ Leading cases in which protection of the First Amendment has been denied to coercive speech made by supervisory officials to employees are: *N.L.R.B. v. Union Pacific Stages, Inc.*, 99 F. (2d) 153 (C. C. A. 9th, 1938) (local supervisors used threats to prevent unionization); *Virginia Ferry Corp. v. N.L.R.B.*, 101 F. (2d) 103 (C. C. A. 4th, 1939) (superintendent warned employees against joining an outside union); *N.L.R.B. v. The Falk Corporation*, 102 F. (2d) 383 (C. C. A. 7th, 1939) (dictum).

¹¹ Greene, *Civil Liberties and the N.L.R.B.* (1940) 8 I. J. A. BULL. 100 (address).

¹² Note (1938) 7 I. J. A. BULL. 38.

privileged to attempt, by use of argument and reason, to influence his employees against joining a union; but *in practice* the Board feels that such influence may never be divorced from some shadow of coercion.¹³ "Whenever an employer addresses himself to his employees on the subject of unionism, orally or in writing . . . economic compulsion comes in through the door and freedom of speech flies out the window."¹⁴

Constitutionality of the order if viewed as prohibiting only those expressions of opinion accompanied by overt coercive acts: It is not perfectly clear whether the Board meant to prohibit the anti-union statements of the employer only in so far as *per se* or by their accompaniment of hostile acts they constituted coercion, or whether they intended to forbid altogether future expression of opinion hostile to unions. It is immediately apparent that there is a vast difference. As before mentioned, the Board and the courts agree that the employer's freedom of speech is constitutionally prohibitible when coercive *per se*, or when unequivocally¹⁵ accompanied by other hostile activities. There seems to have been no decision in which the forbidden remarks were not a part of a campaign involving other and more obviously intimidatory tactics.¹⁶ The courts have apparently felt that in the usual case the record of threats, discharges, violence, and circulation of anti-union propaganda were so interwoven as parts of a unified campaign that it would defeat the purpose of the act to attempt to label some practices coercive and others harmless. However, if the instant Board order be interpreted as preventing all expressions of employer opinion, even when not accompanied by other acts of hostility, the Supreme Court is presented with perhaps the most fundamental freedom of speech controversy since the World War Sedition Acts. On this particular issue the arguments for both sides are weighty.¹⁷

Constitutionality of the order if viewed as prohibiting all expressions

¹³ Note (1938) 48 YALE L. J. 54, 72, 78 (footnote 35).

¹⁴ Rosenfarb, *op. cit. supra* note 7, at 79.

¹⁵ In the Ford case, the court found other overt activities for the purpose of upholding the Board's order as to other features of the case, but found *insufficient accompaniment* of other hostile activities to make the employer's statements coercive!

¹⁶ " . . . in every case the employer's speech, written or oral, was projected on a background of vigilantism, physical molestation of organizers, spying activities, so-called citizens' committees, company unions, or discriminatory discharge of union officials and union members,—in short, part of the whole paraphernalia of guerrilla anti-unionism. In each of these cases, the Board held no more than that the employer distribution of anti-union propaganda was so colored by the whole factual setting of employer coercion that the propaganda itself might properly be considered coercive." Greene, *op. cit. supra* note 11, at 100.

¹⁷ The Committee on the Bill of Rights of the American Bar Association had voted, subject to the court's ruling in this case, to ask leave to file a brief *amicus curiae* in an appropriate test case in the Supreme Court concerning the constitutional right of employers to express opinions adverse to unionization. Such a brief had been filed in the circuit court, and may again be filed before the Supreme Court if the Board's petition for *certiorari* is granted.

of employer opinion even unaccompanied by overt coercive acts: An attorney for the Board argues:

"An employer's 'opinion' about unionism expressed to his employees is not the same as his opinion on what doctor to use or about the international situation. Power in the plant is shut off, the employees are told to attend certain meetings and some are discharged, not for the purpose of expressing his views on the weather . . . but for the purpose of expressing his antagonisms to unionism. . . . And [the workers] know that the employer has the power to back up his 'opinions' . . . there is always implicit the threat of economic compulsion if his wishes are not heeded. The employer's 'advice' not to join a union is a command, disobedience to which entails not only frequent danger to one's anatomical integrity but also loss of one's job. . . . Freedom of speech is possible only among those who approximate each other in equality of position."¹⁸

To this contention, the court has replied that, assuming that formerly an employer's expression to his employees might have been coercive, the act itself, liberally interpreted and strictly enforced, put an end to such a possibility. In other words, the employment relationship is declared to be immaterial, since under the act the servant no longer has occasion to fear the master's frown of authority or threats of discrimination. To this idealistic statement, the Board might reply: "In theory, yes; in practice, no!"

The Board has further contended that the guarantee of the right of self-organization would be entirely ineffectual if the employer, under the guise of exercising his constitutional right of free speech, were free to coerce employees into refraining from the exercise of the rights vouchsafed them by the act. They find it impossible to believe that statements denouncing labor organizations, characterizing union leaders as insincere, and warning employees that by joining a union they pay money for nothing, are merely "directed to the reason of the employee", and have no intimidatory effect. But another circuit court has declared that it was never the intention of Congress to curtail freedom of speech or to deprive an employer of his right to express an honest opinion.¹⁹ And the principal case merely quotes from a recent Supreme Court opinion: "To persuade others to his point of view the pleader . . . at times, resorts to exaggeration, to vilification of men . . . and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."²⁰

¹⁸ Rosenfarb, *op. cit. supra* note 7, at 78.

¹⁹ *Jefferson Electric v. N.L.R.B.*, 102 F. (2d) 949, 956 (C. C. A. 7th, 1939).

²⁰ *Cantwell v. Connecticut*, 310 U. S. 296, 310, 60 Sup. Ct. 900, 84 L. ed. 1213 (1940).

Dicta of other circuit courts is indeterminative. It has been said that "The position . . . of the employer . . . carries such weight and influence that his words may be coercive when they would not be so if the relation of master and servant did not exist", but in the same breath the court points out that the employer has a right to his views which would be valueless unless coupled with the right to express them.²¹ Also opposed to the attitude of the Board is a statement from the *Union Pacific Stages* decision: "It is difficult to think that Congress intended to forbid an employer from expressing a general opinion that an employee would find it more to his advantage not to belong to a union. Had Congress attempted so to do it would be in violation of the First Amendment."²² And lastly, the very recent *Midland Steel Products* case²³ declares that . . . "Unless the right of free speech is enjoyed by employers as well as employees, the guaranty of the First Amendment is futile, for it is fundamental that the basic rights guaranteed by the Constitution belong equally to every person."

Reviewability of the Board's findings of fact under the "substantial" evidence rule: Section 10(f) of the act provides that the findings of the Board as to the facts shall be conclusive, *if supported by "evidence"*. This has been construed to necessitate "substantial" evidence.²⁴ In the present case, the circuit court declared that the Board's finding that the words of the employer were coercive due to their context was not supported by "substantial" evidence, and that actually there were no discriminatory discharges or other overt acts of hostility of sufficient notoriety, together with the printed words, to cause the employees to feel any coercion. That the circuit courts have been too free in seizing the device of "substantial" evidence to review the evidence before the Board has been realized by the Supreme Court. Justice Black recently decided that the failure of the court to enforce the Board's order "resulted from the substitution of its judgment on disputed facts for the Board's judgment—and power to do that has been denied the courts by Congress".²⁵ He emphasized the idea that Congress, in setting up the Board, sought to expedite administration by more specialized and experienced fact-finding experts than the courts afforded. Justice Black's criticism may well apply to the principal case, for the Board's

²¹ N.L.R.B. v. Falk Corporation, 102 F. (2d) 383, 389 (C. C. A. 7th, 1939).

²² N.L.R.B. v. Union Pacific Stages, Inc., 99 F. (2d) 153, 178 (C. C. A. 9th, 1938).

²³ Midland Steel Products v. N.L.R.B., 113 F. (2d) 800, 804 (C. C. A. 6th, 1940).

²⁴ Appalachian Electric Power v. N.L.R.B., 93 F. (2d) (C. C. A. 4th 1938). Strict interpretation of the statute would, of course, have necessitated the ruling that any evidence at all would conclusively support the Board's findings.

²⁵ N.L.R.B. v. Waterman Steamship Corporation, 309 U. S. 206, 60 Sup. Ct. 95, 84 L. ed. 704 (1940). See also dissent by Justice Black in N.L.R.B. v. Columbian E. & S. Co., 306 U. S. 292, 59 Sup. Ct. 501, 83 L. ed. 660 (1939).

prohibitory order appears warranted by "substantial" evidence. It found that Ford waged a *unified* campaign of intimidation and coercion: a hard-pressing company union, company inspired vigilantism, systematic discharge of pro-union employees, and finally, circulation inside the plant of anti-union pamphlets by which the company made its antagonism to labor organizations so manifest that no employee whose economic life was at its mercy could fail to comprehend it. Here was speech implemented by force and directly addressed to fear of physical violence. Truly such "'speech' rode on the heels of terror and repression."²⁶ For the circuit court to hold that such patent evidence revealed no accompaniment of other coercive activities appears to have been unwarranted.

What will be the attitude of the Supreme Court? The highest tribunal has maintained that the constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that have all the effect of force".²⁷ To refute a contention of the Board that the "potentiality of opinion to coerce is to be tested by whether it did in fact coerce", the circuit court cited *Hague v. C. I. O.*²⁸ to the effect that every expression of opinion on matters of importance had the potentiality of inducing action in the interest of one group rather than another, but that the group in power at any moment might not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely by showing that others might thereby be persuaded to take action inconsistent with its interests.

In *Thornhill v. Alabama*,²⁹ in which a state statute prohibiting picketing was held unconstitutional, the Supreme Court declared that the freedom of speech and press guaranteed by the Constitution embraced at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment, and that under modern circumstances the dissemination of information concerning labor union disputes must be regarded as within that area of free discussion guaranteed by the Constitution. Although this case specifically concerned freedom of speech of union members, it has been predicted that it may open a new era of freedom for employers as well.³⁰

²⁶ Notes, (1938) 7 I. J. A. BULL. 38; (1938) 48 YALE L. J. 54, 72, 75. For the Board's account of the unfair practices of Ford, see 14 N.L.R.B. 346, 352 to 380.

²⁷ *Gomper's v. Buck's Stove & Range Company*, 221 U. S. 418, 439, 31 Sup. Ct. 492, 55 L. ed. 797 (1911). In *Aiken v. Wisconsin*, 195 U. S. 194, 25 Sup. Ct. 3, 49 L. ed. 154 (1904), Justice Holmes said: "No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

²⁸ 307 U. S. 496, 59 Sup. Ct. 954, 83 L. ed. 1423 (1939).

²⁹ 310 U. S. 88, 60 Sup. Ct. 736, 84 L. ed. 1093 (1940).

³⁰ Labor Relations Reporter, Supplement (April 29, 1940).

In consistently invalidating municipal ordinances which prohibited the distribution of pamphlets on public streets without a permit, the Court has said that liberty of the press extends to pamphlets and leaflets and to all publications which afford a vehicle of information and opinion.³¹ Following this lead, the *Schneider* case³² held that the right to house to house distribution of literature was constitutionally protected, and that no distinction existed between giving a pamphlet to a workman at the factory gate and delivering one to his home.

Apparently there is no clear-cut precedent to force a particular solution upon the Supreme Court—especially upon a Court which has demonstrated no great reverence for *stare decisis*.³³ At least four alternatives are available. First, and most unlikely, the Court might uphold the Board's order *in toto*, and declare that any expression of employer opinion hostile to labor organizations was coercive *per se* from the very nature of the employer-employee relationship, and its suppression was not therefore in contravention of constitutional guaranties. But such a policy, if originally intended, should have been clearly embodied in the act by Congress; and had it been so embodied, the Court's traditional reluctance to restrict basic rights, coupled with an awareness of adverse public opinion, would logically prompt it against such a decision. A second alternative, more deserving of consideration, would be to prohibit only those words of the employer which were clear threats in themselves; yet this attitude, being contrary to the Court's previous liberal treatment of the Board, is likewise unlikely. As a third alternative, the Court may find that the Board's deliberate use of the specific order, under the circumstances of the case, implied that the Board intended future prohibition of speech even when free of a hostile background, and squarely declare that such an order is unconstitutional.

Finally, and apparently the most practicable, the Supreme Court could rule that the Board's findings of fact *were* supported by "substantial" evidence, and hold that the Board's order, *insofar as it was designed to prevent statements by employers when accompanied by other anti-union activities*, was valid. By this latter solution, the Court might avoid the necessity for a direct decision upon the narrow issue so imperfectly presented here, and at the same time curb the idea spreading among employers that the practical effect of the circuit court's ruling was to unconditionally pave the way for employers to circulate any hostile expression of opinion among employees by way of pamphlets personally distributed.

CHARLES EDWIN HINSDALE.

³¹ *Lovell v. Griffin*, 303 U. S. 444, 58 Sup. Ct. 666, 82 L. ed. 949 (1938).

³² 308 U. S. 147, 60 Sup. Ct. 146, 84 L. ed. 155 (1939).

³³ *Erie Ry. v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188 (1938); *Graves v. New York*, 306 U. S. 466, 59 Sup. Ct. 595, 83 L. ed. 927 (1939); *Helvering v. Hallock*, 309 U. S. 106, 60 Sup. Ct. 444, 84 L. ed. 382 (1940).

Labor Law—Wagner Act—Refusal to Hire.

X and Y while in the employ of another mill applied for work at the Waumbec Mills, but after some discussion as to their union activity and leadership were not hired. The National Labor Relations Board found that but for the respondent's knowledge of their past union leadership they would have been employed. This was held to constitute an unlawful discrimination. The company was ordered to offer them immediate employment and to pay them back wages from the time of the discrimination to the time of the offer of employment less net earnings during the period.¹ On appeal the order was upheld by the Circuit Court of Appeals.²

Section 8(1) (3) of the National Labor Relations Act³ provides: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to *hire* or tenure of employment . . . to encourage or discourage membership in any labor organization."⁴ The court, in upholding the board, declared that the natural meaning of this provision would encompass applicants for employment as well as employees. Further this interpretation is consistent with the legislative history⁵ of the act and consonant with its declared policy.⁶ Section 10(c) of the act provides: "If the board shall be of the opinion that the person named in the complaint has engaged . . . in any such unfair labor practices . . . then . . . the board shall issue . . . an order . . . requiring such person to cease and desist from such unfair labor practices, and to take such

¹ Waumbec Mills, Inc., 15 N.L.R.B. 37 (1939); Note (1939) 53 HARV. L. REV. 141.

² 114 F. (2d) 226 (C. C. A. 1st, 1940).

³ Act of July 5, 1935, 49 STAT. 449 (1935), 29 U. S. C. A. §151 (Supp. 1940).

⁴ 49 STAT. 449 (1935), 29 U. S. C. A. §158 (Supp. 1940).

⁵ The report of the House committee on labor (H. Rep. No. 1147, 74th Cong., 1st Sess. (1935), p. 19) in referring to section 8(3) states: "The third unfair practice prohibits an employer by discrimination in regard to *hire* or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization. This spells out in greater detail the provisions of section 7(a) (N.I.R.A.) prohibiting 'yellow dog' contracts and interference with self organization. This interference may be present in a variety of situations in this connection, such as discrimination in discharge, lay off, demotion or transfer, *hire*, forced resignation, or division of work; in reinstatement or *hire* following a technical change in corporate structure, a strike, lock-out, temporary lay-off, or a transfer of the plant." Report of Senate Committee: "But if the right to be free from employer interference in self organization or join or refrain from joining a labor organization is to have any practical meaning it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of opportunity for work." Sen. Rep. No. 573, 74th Cong., 1st Sess. (1935) p. 11 (italics supplied) Note 1939 WIS. L. REV. 445.

⁶ Section 1: "It is hereby declared to be the policy of the United States to eliminate the causes of certain obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of employment." 49 STAT. 449 (1935), 29 U. S. C. A. §151 (Supp. 1940).

affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this chapter."⁷ To the contention that "reinstatement of employees" excluded those who were not employees as defined in section 2(3)⁸ the court answered that this clause was illustrative rather than exclusive and that any "affirmative action" that would effectuate the policies of the act was proper.⁹ Payment of back wages to an applicant for employment was within the scope of the general relief which the board may order.¹⁰

This case appears to be the first clear-cut example of entire lack of past or present employment relationship which the board or the courts have passed on. However, periodically from its inception the board has compelled the hiring of those who have in the past been employees of the employer accused of discrimination¹¹ and the courts have passed on two of these cases reaching a result contrary to the principal case.

The first case arose in the second circuit.¹² Several months before the effective date of the act six men were discharged. It was not contended that it was unfair to discharge them but that discriminating

⁷ 49 STAT. 452 (1935), 29 U. S. C. A. §160(c) (Supp. 1940).

⁸ "The term 'employee' shall include . . . any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment." 49 STAT. 449 (1935), 29 U. S. C. A. §152 (3) (Supp. 1940).

⁹ Note (1939) 8 GEO. WASH. L. REV. 1116; (1939) 27 CALIF. L. REV. 470.

¹⁰ The facts of the principal case raise an interesting question as to the affirmative action which the board may take. At the time of the discrimination these two men had jobs with another mill some distance from their homes which was near the Waumbec Mill. The board's order for back pay takes net earnings which are computed by taking the actual earnings less expense on the other job which would not have been sustained while working for the respondent. Thus the board's order would include the expense of commuting while they were working for the other mill. *Matter of Crossett Lumber Co.*, 8 N.L.R.B. 440 (1938) (Order to pay expense of trips to other places in order to get work after discriminatory dismissal.).

Could the board order such an expense to be paid if their jobs had continued throughout until the time of the board's order? It might depend on the board's determination of whether the employment with the other mill is "substantially equivalent" under the statute. *Supra* note 8. If it is there would be no basis for such an order. If it is not then an order to hire should follow as in the principal case with the expense of commuting constituting the sole back wage assuming no other expenses. Note (1939) YALE L. J. 1265.

However, if the relief allowed in section 10(c) does not depend on the definition of "employee" in section 2(3) then query, should the relief always depend on an order to reinstate or hire? Note (1940) 49 YALE L. J. 953.

¹¹ *Alonquin Printing Co.*, 1 N.L.R.B. 264 (1936) (Refusal to rehire after shutdown of plant); *Appalachian Electric Power Co.*, 3 N.L.R.B. 240 (1937), *rev'd* on other grounds, 93 F. (2d) 985 (C. C. A. 4th, 1938) (Employee status previously terminated by shutdown); *Montgomery Ward & Co.*, 4 N.L.R.B. 115 (1938) (Refusal to give further work to one who had at intervals been employed as extra); *Kelly-Springfield Tire Co.*, 6 N.L.R.B. 325 (1938), consent decree filed, 97 F. (2d) 1007 (C. C. A. 4th, 1938) (Refusal to rehire furloughed workers by successor in bankruptcy); *Cherry Cotton Mills*, 11 N.L.R.B. 478 (1939) (Previous position with same employer voluntarily relinquished).

¹² *National Casket Co. v. N.L.R.B.*, 107 F. (2d) 992 (C. C. A. 2d, 1939).

against them when they applied for their old jobs (after the effective date of the act) was an unfair practice. The court answered this contention by saying: "The purpose of the act is not to compel an employer to hire members of one union rather than another, or union men rather than non-union men." The employer may use any test he sees fit as to an applicant for work but he may not impose by the contract of employment any limitation in respect to union or anti-union activities during the term of employment. This would seem to be no more than a reiteration of the policy against the "yellow dog" contract.¹³ The court seems to see a result inimical to the policies of the act in ordering the hiring of a union applicant because it will necessarily follow that the board may upon occasion have to order the hiring of a non-union applicant as a result of the provision that the employer shall neither discourage or encourage unionization save in the manner specified in the act, i.e., enter into a closed shop agreement under the provisions of the act.¹⁴ This reasoning is used to bolster the idea that there is a distinction between employees and applicants for employment but it is hard to see how that result should bring any such distinction. If the literal terms of the act are followed the board should enforce the rights of a non-union man when there is discrimination, although this situation is not likely to arise.

The dissenting opinion of Judge Learned Hand reserves the question of whether these men should have been hired if they were strangers and says that they were employees according to the definition given that word by the act. He concluded that their work had ceased as a consequence of a labor dispute¹⁵ and even though prior to the effective date of the act they were still employees after the effective date of the act. He says that the question turns on how the courts apply the definition of the word "employee" and that the language and purpose of the act would include these men: "... the line between them and the others [who lose their job after the act has become effective] is purely adventitious and without basis in any stateable policy; and I cannot doubt what Congress would have done, had the situation been presented to it."

In the other case¹⁶ involving the point the court merely refused to

¹³ Magruder, *A Half Century of Legal Influence upon the Development of Collective Bargaining* (1937) 50 HARV. L. REV. 1071.

¹⁴ "... nothing in this chapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment therein, if such labor organization is the representative of the employees (as provided by the act)," 49 STAT. 449 (1935), 29 U. S. C. A. §158(3) (Supp. 1940).

¹⁵ "The term 'labor dispute' includes any controversy concerning terms, tenure or condition of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 49 STAT. 449 (1935), 29 U. S. C. A. §152(9) (Supp. 1940).

¹⁶ *Phelps Dodge Corp. v. N.L.R.B.*, 113 F. (2d) 202 (C. C. A. 2d, 1940).

execute the order for reinstatement for two of the men involved where it was found that they had not been employees under the circumstances. Two judges of the three judge court relied on the case discussed above as authority. Judge Learned Hand concurring, because he felt bound by the prior decision, said: "If I were free to decide, I should hold that it was an 'unfair labor practice' to discriminate against anyone whether an 'employee' or not. Section eight has five subdivisions and two of them—two and three—do not use the word. Moreover, not only does the text for that reason not require that these subdivisions shall be limited to employees, but the predominant purpose of the act as a whole requires an opposite construction. One can as effectively interfere with the rights which section 7¹⁷ secures by refusing to hire as by discharging; that is, unless we interpret 'employees' in section 7, as limited to persons actually employed at the moment, which would certainly mutilate the act. Nor am I moved by the argument that the employer must be free to hire whom he will. The whole purpose is to limit his liberty so far as its exercise may invade the new rights created; and I can see no greater limitation in denying him the power to discriminate in hiring than in discharging."

The Supreme Court has not passed on this problem. There is language in *National Labor Relations Board v. McKay Radio & Tel. Co.*¹⁸ which might mean that they uphold reinstatement in *National Labor Relations Board v. Jones & Laughlin Steel Co.*¹⁹ as a reasonable regulation of existing contractual relationships. If this is true then the Supreme Court will still have the constitutional question of freedom of contract to consider. However, the authority of the cases declaring it unconstitutional to make it a misdemeanor for an employer to require a "yellow dog" contract as a condition of employment²⁰ is now doubted.²¹ The court in a recent decision²² said that section 8(3) of the act is ". . . not limited so as to outlaw discrimination only where there is in existence a formal contract or relation of employment between employer and employee. They embrace, as well all elements of the employment relationship which in fact customarily attend employment and with re-

¹⁷ "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." 49 STAT. 449 (1935), 29 U. S. C. A. §157 (Supp. 1940).

¹⁸ N.L.R.B. v. MacKay Radio & Tel. Co., 304 U. S. 333, 347, 58 Sup. Ct. 904, 911, 82 L. ed. 1381, 1391 (1938).

¹⁹ N.L.R.B. v. Jones & Laughlin Steel Co., 301 U. S. 1, 57 Sup. Ct. 615, 81 L. ed. 893 (1937).

²⁰ *Coppage v. Kansas*, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. ed. 441 (1915); *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. ed. 436 (1908).

²¹ See note 13, *supra*; Note (1937) 37 COL. L. REV. 816.

²² N.L.R.B. v. Waterman S. S. Corp., 309 U. S. 206, 60 Sup. Ct. 493, 84 L. ed. 704 (1940).

spect to which an employer's discrimination may as readily be the means of interfering with employee's right of self organization as if these elements were precise terms of a written contract of employment." Precedent for ordering two strangers to contract with each other is found where refusal to contract will result in a monopoly under the Sherman act,²³ where states have ordered a vessel coming into harbor to take the first pilot to apply or pay him his wages,²⁴ and where an employer was ordered to take out insurance for his employees.²⁵

If an employer is allowed to discriminate in this fashion considering it in the light of effect, it would seem that the discrimination against the stranger is only incidental to the result engendered. Discrimination in such case would relate to all the employees of this particular employer. It would be extremely coercive when they realized that the moment the contract relation was legitimately terminated the employer might apply any criterion he saw fit in rehiring. Since the board is given the general power to take affirmative action with only the limitation that it effectuate the policies of the act it would seem that the order in the principal case was justified. The effect of an order to hire plus payment of wages which would have been earned will be to negate the discrimination and restore the condition which existed prior to such discrimination.²⁶

A final result along the lines laid down in the instant case would give effective aid to the generally inept²⁷ blacklisting statutes.²⁸ It would

²³ *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. ed. 1490 (1914); *Ramsay Co. v. Associated Bill Posters*, 260 U. S. 501, 43 Sup. Ct. 167, 67 L. ed. 369 (1923).

²⁴ *Ex parte McNeil*, 13 Wall 236, 20 L. ed. 624 (U. S. 1871); *Perkins v. O'Mahoney*, 131 Mass. 546 (1881).

²⁵ *N. Y. Cent. R. R. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. ed. 667 (1917).

²⁶ The definitive interpretation of this section by the Supreme Court limits it to "remedial, not punitive (action) . . . to be exercised in and of the board's authority to restrain violation. . . ." *Consolidated Edison Co. v. N.L.R.B.*, 305 U. S. 197, 59 Sup. Ct. 206, 83 L. ed. 131 (1938); *N.L.R.B. v. Fansteel Metallurgical Co.*, 306 U. S. 240, 59 Sup. Ct. 490, 83 L. ed. 627 (1939). This section was taken largely from the experience of the Railway Labor Act, 45 U. S. C. A. §§151-163. In the course of administering that act it had been found that efficient protection of labor's right to organize demanded increased legal sanction. In the course of events, a federal equity court ordered a railroad, which was in contempt for refusing to obey an order to respect its employees' right to organize, to purge such contempt by rehiring several persons discharged for union membership. That act itself did not provide for such an order; it was an invention of the court as a reasonable means for enforcing the employer's duty of non-interference with self-organization of employees. *Brotherhood of Ry. Clerks v. Texas & N. O. Ry.*, 24 F. (2d) 426 (S. D. Texas, 1928). The legislative history of the act indicates that it was used to prevent or remedy injury to the public rather than to punish the employer. *H. R. Rep. No. 1147, 74th Cong., 1st Sess. (1935)*.

²⁷ Until 1933 only two criminal prosecutions and less than twelve civil suits against blacklisting had been successful. DAUGHERTY, *LABOR PROBLEMS IN AMERICAN INDUSTRY* (1933), 390.

²⁸ See note 21, *supra*. Thirty-five states now have some form of blacklisting statutes.

lay at rest any doctrinaire question on freedom of contract for the purpose of the act, thus allowing it to be administered freely.²⁹ Its main effectiveness should be to convince employers that the sooner they recognize and fully appreciate the policies for which the act stands the sooner that modicum of peace may be reached which is possible when employees and employers sit down at the conference table and deal as equals. The employer who accepts the law as it is in this situation will remove the stigma which attaches to one who is continually opposing his employees as to their right to organize and he should find that he still has the normal power to hire and fire. The practical result of refusal will be that he is apt to have somewhat less than that normal power where the board is able to amass copious evidence as to his opposition to the act³⁰ even where he has a right to oppose upon some such doctrine as freedom of speech.³¹

ROBERT CRAIG MCINNES.

Torts—Charitable Institutions—Effect of Liability Insurance.

Plaintiff, injured by falling on slippery hallway at defendant Y. W. C. A., while there to receive paid swimming lessons, brought an action for damages resulting from the fall, alleging negligence in allowing the hallway to be in a dark, damp, and slippery condition. Plaintiff further alleged that defendant was insured against such liability. On motion of the defendant,¹ the court struck out as irrelevant the allegations as to insurance, and ruled that the institution, being a charitable one, was not liable to *beneficiaries* for the negligence of its agents or employees where it had exercised reasonable care in their selection and retention. *Held*, judgment affirmed.²

That a Y. W. C. A. or a Y. M. C. A. is a charitable institution of a public nature is now clearly recognized.³ The mere fact that it is not almsgiving in character, is not controlling. Charity in the legal sense is not confined to the relieving of poverty and distress, but has assumed a wider significance which embraces the improvement and promotion of the happiness and well-being of mankind.⁴ Furthermore, the fact that its privileges are restricted in part to its members does not change

²⁹ Magruder, *supra* note 13, at 1106.

³⁰ Daykin, *The Employers Right to Discharge Under the Wagner Act* (1939) 24 Iowa L. Rev. 660.

³¹ Note (1938) 48 YALE L. J. 72.

¹ Pursuant to North Carolina Statutes providing for striking irrelevant or redundant evidence. N. C. CODE ANN. (Michie, 1939) §§510, 537.

² Herndon v. Massey, 217 N. C. 610, 8 S. E. (2d) 914 (1940).

³ Eads v. Y. W. C. A., 325 Mo. 577, 29 S. W. (2d) 701 (1930); Bruce v. Y. M. C. A., 51 Nev. 372, 277 Pac. 798 (1929); Betts v. Y. M. C. A., 83 Pa. Super. 545 (1924).

⁴ Andrews v. Y. M. C. A., 226 Iowa 374, 284 N. W. 186 (1939); Sanitarium v. Stoneham, 205 Mass. 335, 91 N. E. 385 (1910).

its status as a public charity, since the privilege of membership is open to all, without restriction other than sex and age.⁵

Ordinarily, the payment of a fee by one served by the charity has no effect upon the eleemosynary character of the institution.⁶ However, if, although organized as a charity, the institution makes a profit from total receipts from patients, over and above the cost of maintenance, then it loses its charitable immunity.⁷ The principal case seems undoubtedly correct in holding that the plaintiff's paying for the swimming lessons had no effect on the liability of the charity, since the nominal fee charged by no means reimbursed the Y. W. C. A. for the benefits received.

Charities have long been favored by the law. Various theories have been advanced by courts as attempted explanations for the partial or complete non-liability of charities for torts of their employees.⁸ It is significant that all of the following theories for restricting the liability of charities for torts of their employees have met with disapproval, both by courts favoring liability and by courts which, while favoring exemption, have adopted a theory acceptable to the particular court and dismissed the others as unsatisfactory: (1) The *trust fund* established by the benefactors of the charity may not be diverted from the purpose for which it was set apart.⁹ (2) One who accepts the benefits of a char-

⁵ *Little v. Newburyport*, 210 Mass. 414, 96 N. E. 1032 (1912).

⁶ "Better facilities for the care, cure, and treatment of the sick, both of the poor, and of those who are able to pay are secured by the establishment of (charities). These facilities are increased by the receipt of money from those who are able to pay in whole or in part for the benefits received." *Downs v. Hospital*, 101 Mich. 555, 560, 60 N. W. 42, 43 (1894); *Powers v. Hospital*, 109 Fed. 294 (C. C. A. 1st, 1901); *Parks v. University*, 218 Ill. 381, 75 N. E. 991 (1905); *Schloendorff v. Hospital*, 211 N. Y. 125, 105 N. E. 92 (1914); *Green v. Biggs*, 167 N. C. 417, 83 S. E. 553 (1914); *Hospital v. Thompson*, 116 Va. 101, 81 S. E. 13 (1914).

⁷ *Mulliner v. Evangelischer Diakonissenverein*, 144 Minn. 392, 175 N. W. 699 (1920).

⁸ In what has been accepted as the leading article on this subject, Mr. Carl Zollman writes: "... the cases on this subject present an almost hopelessly tangled mass of reason and unreason such as is not often encountered in the law. . . . The question is one on which the courts have been fertile in drawing subtle distinctions, many of them irrelevant to the point for discussion, or, at least, leading to no principle by which the conclusions reached can be reconciled. Many of the opinions rest on reasons or grounds which may well be challenged as fallacious." Zollman, *Damage Liability of Charitable Institutions* (1921) 19 MICH. L. REV. 395, 408.

⁹ Reasons given are: To allow recovery for tort out of the trust funds is to allow the trustees to do indirectly that which they cannot do directly. To allow such diversion might well result in the destruction of the charity, both by exhausting the funds, and by making potential benefactors unwilling to set up funds which might be so destroyed. This theory was first stated in the United States in *McDonald v. Hospital*, 120 Mass. 432 (1876). That case was decided on a misapprehension of the law, in that, although the Massachusetts court based its decision on the case of *Heriot's Hospital v. Ross*, 12 C. & F. 507 (1848), that English case did not involve a tort claim, and furthermore, the principle upon which it had been decided had already been overruled in the House of Lords by *Mersey Docks v. Gibbs*, (1866) L. R. 1 H. L. 93. The absurd end reached by

itable institution thereby impliedly *waives* any claim for damages or impliedly contracts to exempt the charity from any liability for the negligence of its employees.¹⁰ (3) The doctrine of *respondeat superior* is *inapplicable* to charitable institutions.¹¹ (4) *Public policy* extends either total or partial non-liability to charitable institutions.¹² A leading

the application of this doctrine is illustrated by *Foley v. Wesson Memorial Hospital*, 246 Mass. 363, 141 N. E. 113 (1923), in which recovery was denied absolute strangers to the charity when its ambulance was negligently allowed to run over the curbing and strike them while they were walking on the sidewalk. In its true application, as that case shows, the trust-fund theory denies recovery for tort to servants and strangers as well as to beneficiaries of the charity. The criticism heaped upon the courts applying this theory is emphasized in *Putnam Memorial Hospital v. Allen*, 34 F. (2d) 927 (C. C. A. 2d, 1929), in which the court calls it a "monstrous doctrine," saying that "no adequate reason . . . can be advanced for allowing the purpose of the settlor of trust funds to introduce into the law a principle which . . . appears so anomalous and so unjust." As a result of such criticism, some courts have limited the trust-fund theory to exempting charities from tort liability only to beneficiaries. See *Parks v. University*, 281 Ill. 381, 75 N. E. 991 (1905). However, such a refusal to apply this theory to its fullest extent reveals its weakness—that it proves too much. Many courts have discarded it entirely, to bring forth new theories of non-liability.

¹⁰ In *Powers v. Hospital*, 109 Fed. 294 (C. C. A. 1st, 1901) the oft quoted illustration was given, that "it would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger," and that "One who accepts (such) benefits . . . enters into a relation which exempts his benefactor from liability for the negligence of his servants. . . ." The usual criticism of this theory is that it hardly seems applicable to those cases where the beneficiary does not comprehend the situation, as where he is temporarily unconscious, in a demented condition, too young to understand, or simply has no knowledge of legal principles. See *Gamble v. University*, 138 Tenn. 616, 200 S. W. 510 (1918); and *Zollman*, *supra* note 8, at 407. Nevertheless, many courts continue to follow this theory, realizing and accepting it as a fiction. Many courts so holding require that the charity use ordinary care in the selection of its employees. See *Brice v. Y. M. C. A.*, 51 Nev. 372, 277 Pac. 798 (1929).

¹¹ *Hearnes v. Hospital*, 66 Conn. 98, 33 Atl. 595 (1895) holds that a charity "does not come within the main reason for the rule of public policy, which supports the doctrine of respondeat superior. It derives no benefit from what its servant does, in the sense of that personal and private gain which was the real reason for the rule." See also *Railroad v. Artist*, 60 Fed. 365, 367 (C. C. A. 8th, 1894). In Note (1910) 58 U. of Pa. L. Rev. 426, 428, this theory is criticized. The doctrine of respondeat superior is not based on benefit or profit. One who undertakes the performance of a duty is liable for his negligence or that of his employees in such performance, even though his motive in undertaking the duty is charitable. The theory is also weak in that, logically, it goes further than most courts are willing to go, since it exempts the charity from liability to strangers as well as beneficiaries. As to this, Mr. Zollman says "A charity thus freed from legal restraint instead of being a blessing might very well become a curse." *Zollman*, *supra* note 8, at 406.

A recent extension of the above theory, which has been applied mainly in exempting charitable hospitals from liability, is that, once the charity has exercised due care in selection of its physicians, surgeons, and their helpers, it is relieved of further responsibility for their actions, on the theory that they are not, in the true sense, servants of the charity. It is said that they are not under the direction of the charity, but become and remain the servants of the patient as long as they remain in attendance upon him. See *Schloendorff v. Hospital*, 211 N. Y. 125, 105 N. E. 92 (1914); *Basabo v. Salvation Army*, 35 R. I. 22, 85 Atl. 120 (1912). Although this extension of the above theory has met with approval by some authorities, it seems that it is subject to the same objections that have been made to the *waiver theory*, *supra*.

¹² It has been held that it is better for the individual to suffer injury without

authority on Trusts suggests that the true reason for denying recovery is a belief on the part of the courts that many tort claims against charities are unfounded, although the one asserting injury is able to gather evidence in his behalf; and thus principles of non-liability are imposed to prevent the plaintiff from getting before a sympathetic jury.¹³

The courts, as seen above, disagree as to the grounds upon which non-liability should be placed. More important, there is conflict as to just how far charities should be exempt from the normal liability of a master for torts of his servant. Mr. Zollman summarizes the status quo as follows: "A number of states have, following English *dicta*, exempted charities from all tort liability against beneficiaries as well as others on the ground that public policy demands that the trust fund be not diverted to pay damages. The great majority of the courts, however, do justice to employees, strangers, and invitees by holding the charity to the same degree of care exacted from other entities. In regard to beneficiaries they hold the charity liable for injuries resulting from the negligence of the trustees or managers in selecting incompetent servants, but not for the negligence of servants carefully selected."¹⁴ There now seems to be a growing sentiment and trend, especially by writers, in favor of holding charities to the same degree of tort liability as non-charitable institutions, as to all persons.¹⁵

compensation than for the public to be deprived of the benefit of charities. In organized society the rights of the individual must, in some instances, be subordinated to the public good. *Vermillion v. College*, 104 S. C. 197, 88 S. E. 649 (1916). Underlying all the theories of non-liability, is said to be this matter of public policy. "A policy of the law which prevents him who accepts the benefit of a charity from suing it for the torts of its agents and servants . . . carries on its face its own justification, and, without the aid of metaphysical reasoning, commends itself to the wisdom of mankind." *Ettlinger v. Trustees*, 31 F. (2d) 869 (C. C. A. 4th, 1929). See also *Duncan v. Association*, 92 Neb. 162, 137 N. W. 1120 (1912). However, it has been just as vigorously argued that tort immunity should not be granted to charities in addition to the many special privileges which they receive from the courts and the legislatures. 2 BOGERT, TRUSTS AND TRUSTEES (1935) §401. The institution, whose negligent servant injures an inmate so that he may become a burden on society, has failed to carry out the purposes for which the public policy supports charities. So it might be that public policy would better be served by imposing liability in such cases, for such a move would tend to increase efficiency and benefit the public as well as the persons so injured. "It is almost contradictory to hold that an institution organized to dispense charity shall be charitable and extend aid to others, but shall not compensate or aid those injured by it in carrying on its activities." *Geiger v. Church*, 174 Minn. 389, 219 N. W. 463 (1928).

¹³ 3 SCOTT, TRUSTS (1939) §402.

¹⁴ Zollman, *supra* note 8, at 412. For collections of cases, see Notes (1921) 14 A. L. R. 572, (1923) 23 A. L. R. 923, (1924) 30 A. L. R. 455, (1924) 33 A. L. R. 1369, (1926) 42 A. L. R. 971, (1929) 62 A. L. R. 724, (1937) 109 A. L. R. 1199; 2 BOGERT, TRUSTS AND TRUSTEES (1935) §401; see Appleman, *The Tort Liability of Charitable Institutions* (1936) 22 A. B. A. J. 48, for comprehensive survey of holdings of all individual states on this problem, and the theories upon which the courts proceed.

¹⁵ *Glavin v. Hospital*, 12 R. I. 411 (1879), although later specifically overruled by statute in that state, is the leading case for this spreading idea. Therein, pp. 425-426, it was said: "The public is doubtless interested in the maintenance of a . . . public charity . . . ; but it also has an interest in obliging every person and

In the principal case, North Carolina continues its adherence to the doctrine of partial immunity approved by the majority of jurisdictions.¹⁶ The closely allied cases of *Green v. Biggs*¹⁷ and *Hoke v. Glenn*¹⁸ decided that, as to *beneficiaries*, a charity is not liable for the torts of its servants or agents when due care has been exercised in their selection or retention. In the latter case, Justice Allen, after adverting to all the theories of liability and non-liability, says "We prefer to adopt the middle course, which exempts from liability for the negligence of employees and requires the exercise of ordinary care in selecting them, as more consonant with . . . the purposes for which such institutions are established."¹⁹ The scope of the North Carolina rule is indicated in *Cowans v. Hospitals*²⁰ where an *employee* of a charity was allowed recovery for negligent injury. It logically follows therefrom that charities in this state would also be liable to *strangers* to the charity. For no case has been found in which a jurisdiction has allowed tort recovery to employees of a charity and then denied similar recovery to strangers to the charity.

North Carolina has not seen fit to base its "middle course" on any definite theory. However, it appears evident that the court has been strongly persuaded by the argument of public policy, for in *Hoke v. Glenn* it is said: "The beneficiaries of charitable institutions are the poor, who have very little opportunity for selection, and it is the purpose of the founders to give to them skillful and humane treatment. If they are permitted to employ those who are incompetent and unskilled, funds bestowed for beneficence are diverted from their true purpose,

every corporation which undertakes the performance of a duty to perform it carefully, and to that extent, therefore, it has an interest against exempting any such person and any such corporation from liability for its negligences. The court cannot undertake to say that the former interest is so supreme that the latter must be sacrificed to it. Whether it shall be or not is not a question for the court, but for the legislature."

If the charity is to be so continuously negligent as to have its treasury depleted by a series of law suits, is it not in the public interest to have it dissolved? In *Geiger v. Church*, 174 Minn. 389, 219 N. W. 463 (1928) it was said that charities "are generally favored by being relieved, partly or wholly, from the burden of taxation. We do not think it would be good public policy to relieve them from liability for torts or negligence." For further amplification of this theory of non-exemption, see 2 BOGERT, TRUSTS AND TRUSTEES (1935) §401. Also, in New Hampshire, complete recovery is allowed against charities the same as all other corporations, the courts stating that the legislature should determine the policy of exemption from liability as to tort, if any is to exist. *Hewett v. Hospital*, 73 N. H. 556, 64 Atl. 190 (1906); *Welch v. Hospital*, 9 A. (2d) 761 (N. H. 1939).

¹⁶ This rule of partial immunity is approved by the American Law Institute. RESTATEMENT, TRUSTS (1935) §402.

¹⁷ 167 N. C. 417, 83 S. E. 553 (1914). This rule was earlier stated in North Carolina in *Barden v. Coast Line Ry.*, 152 N. C. 318, 67 S. E. 971 (1910); but in that case the court became involved in another problem, and this and the following case contain superior reasoning and better statements of the rule.

¹⁸ 167 N. C. 594, 83 S. E. 807 (1914).

¹⁹ *Id.* at 597, 83 S. E. at 809.

²⁰ 197 N. C. 41, 147 S. E. 672 (1929).

and, under the form of a charity, they become a menace to those for whose benefit they are established."²¹

The effect of the existence of liability insurance on the right of a beneficiary to recover from a charity is widely debated. The principal case follows long established North Carolina doctrine that evidence of liability insurance is ordinarily incompetent.²² As a general rule the existence of liability insurance may not be shown for the purpose of creating liability where none existed previously.²³ A great majority of courts have applied this rule to charities, generally saying that if a trustee is allowed indirectly to create liability or waive an exemption by procuring indemnity insurance, the protection afforded charities would be virtually destroyed.²⁴ No reasons are given for such a view; but fear probably exists that if the partial exemption which remains for charitable institutions is forfeited where liability insurance exists, the wall of public policy which affords exemption will be weakened until eventually charities lose all immunity.

On the other hand, such argument by no means disposes of those cases in which exemption is justified on the grounds of public policy (and it has been said that this public interest underlies all theories of partial or total exemption). North Carolina apparently denies recovery to a tortiously injured beneficiary on the ground that public policy favors keeping the charity intact. Such being the case, it seems that where liability insurance exists the reasons for exempting charitable institutions have disappeared, at least to the extent that recovery would be covered by such insurance. For it is admittedly a public policy that charities should be just before being generous—this has simply been

²¹ 167 N. C. 594, 597, 83 S. E. 807, 809 (1914).

²² In a very similar case (decided on procedural points), *Duke v. Comm'r*, 214 N. C. 570, 199 S. E. 918 (1938), in which beneficiary brought action for tort of employee of charity and alleged that recovery would not impair or diminish the trust property since the defendant carried liability insurance, the supreme court reversed the ruling of the lower court denying defendant's motion to strike evidence of insurance. The supreme court said that the same was entirely foreign to the case and incompetent. As to incompetence of evidence of liability insurance in general in such cases, see *Lytton v. Mfg. Co.*, 157 N. C. 331, 72 S. E. 1055 (1911); *Starr v. Oil Co.*, 165 N. C. 587, 81 S. E. 776 (1914); *Holt v. Mfg. Co.*, 177 N. C. 170, 98 S. E. 369 (1919); *Stanley v. Lumber Co.*, 184 N. C. 302, 114 S. E. 385 (1922); *Bryant v. Furniture Co.*, 186 N. C. 441, 119 S. E. 823 (1923); *Allen v. Garibaldi*, 187 N. C. 798, 123 S. E. 66 (1924); *Fulcher v. Lumber Co.*, 191 N. C. 408, 132 S. E. 9 (1926); *Luttrell v. Harding*, 193 N. C. 266, 136 S. E. 726 (1927); *Scott v. Bryan*, 210 N. C. 478, 187 S. E. 756 (1936). See also *White v. McCabe*, 208 N. C. 301, 180 S. E. 704 (1935).

²³ 2 WIGMORE, EVIDENCE (3rd ed. 1940) §282a.

²⁴ *Levy v. Superior Court*, 74 Cal. App. 171, 239 Pac. 1100 (1925); *Williams' Adm'x. v. Church Home*, 223 Ky. 355, 3 S. W. (2d) 753 (1928); *Enman v. Trustees*, 270 Mass. 299, 170 N. E. 43 (1930); *McKay v. Morgan Memorial*, 272 Mass. 121, 172 N. E. 68 (1930); *Mississippi Baptist Hospital v. Moore*, 156 Miss. 676, 126 So. 465 (1930); *McLeod v. Hospital*, 170 Tenn. 423, 95 S. W. (2d) 917 (1936).

held subordinate to the policy that, because of their value to the public, charities should be kept intact.

A desirable solution where insurance exists is reached in Colorado²⁵ and Tennessee,²⁶ whose courts rule that non-liability extends no further than necessary to protect the charitable trust from diversion; so that a tort judgment may be allowed against the institution, though only to be satisfied to the extent of the insurance, which will not affect or deplete the trust property.²⁷ Such a view is more consonant with progressive decisions permitting the existence of liability insurance to remove like disabilities, created by public policy, in other fields.²⁸

HARVEY A. JONAS, JR.

Wages and Hours Law—Concurrent Jurisdiction of State and Federal Courts Under Section 16(b).

GENERAL SCOPE

The Fair Labor Standards Act of 1938,¹ commonly known as the Wage and Hour Law, has given rise to confusion as to the proper

²⁵ *O'Connor v. Ass'n.*, 96 P. (2d) 835 (Colo. 1939).

²⁶ *University v. Henderson*, 23 Tenn. App. 135, 127 S. W. (2d) 284 (1938).

²⁷ It has been suggested that some difficulty might be met in satisfying such a judgment where the policy is one of "loss" rather than "liability" insurance. An eminent authority on trusts says, as to this problem: "Although without express statements to such an effect, a policy for general indemnity might be interpreted as to save harmless from such claims as could be enforced against it if it were not a charitable institution." 3 SCOTT, TRUSTS (1939) §402.

The courts have not yet been faced with the problem of the effect, on the trust fund, of increasing insurance rates caused by the imposition of ordinary liability on charities carrying insurance.

²⁸ In the analogous field of parent-child relationships, the general rule is that no action may be maintained against the parent, by a minor child, for a personal tort. Notes (1924) 31 A. L. R. 1157, (1931) 71 A. L. R. 1071. A new trend is shown, however, in *Dunlap v. Dunlap*, 84 N. H. 352, 150 Atl. 905 (1930) (favorably commented on in Note (1930) 15 MINN. L. REV. 126); *Lusk v. Lusk*, 113 W. Va. 17, 166 S. E. 538 (1932) (decision called "as logical as it is laudable" in Note (1933) 11 N. C. L. REV. 352; see favorable comment also in Note (1932) 33 COL. L. REV. 360); and *Worrell v. Worrell*, 174 Va. 11, 4 S. E. (2d) 343 (1939) (which is said to be "in line with a growing tendency to allow recovery where an insurance company will ultimately bear the loss", in Note (1939) 26 VA. L. REV. 235). In all of these cases recovery was allowed for tort of parent where there was liability insurance in existence. Admittedly, this is a new development in the law. The general rule, and that followed by N. C., remains that the slightest intimation of the existence of liability insurance in such a case may be grounds for mistrial (*Lytton v. Mfg. Co.*, 157 N. C. 331, 72 S. E. 1055 (1911)), and that, certainly, it will not remove exemption from liability. For a review of this subject in N. C., see *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12 (1923) in which a child was denied recovery, even though liability insurance existed, for injuries resulting from negligent driving of her parent. There, in a searching and vigorous dissent, Justice Clark urged that the insurance company be not allowed to hide behind the "camouflage" that the suit is against the parent; that "It is the essential function of courts to administer justice . . . they should not hesitate to overrule a precedent to attain that end when it has not become a rule of property."

¹ 52 STAT. 1060 (1938), 29 U. S. C. A. §201 (Supp. 1940).

courts in which to institute employee actions provided for by the act. The section relating to jurisdiction of employee suits is as follows: "Any employer who violates the provisions of Section 6 or Section 7 of this act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained *in any court of competent jurisdiction*² by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated."³ This will hereafter be referred to as Section 16(b).

The wording of the statute that such suits may be maintained "in any court of competent jurisdiction" has been variously construed. The federal courts have been fairly consistent in assuming jurisdiction regardless of the amount involved or whether diversity of citizenship existed.⁴ These courts decided that the Fair Labor Standards Act was legislation for the regulation of interstate commerce. Thus, the federal courts have jurisdiction under the provision of the Judicial Code creating an exemption to the requirement of minimum sum involved in cases arising under laws regulating interstate commerce.⁵ Diversity of citizenship is not necessary when the suit arises under the Constitution or laws of the United States.⁶ However, one federal court arrived at the conclusion that the act was not a law regulating commerce in the jurisdictional sense.⁷ The court held that the employee's suit was not of the class attributable to some violation of an act designed to regulate commerce and, therefore, did not come under the provision of the Judicial Code that the cases above relied on. In this case, jurisdiction was also denied on the ground that the suit was not one to enforce a criminal penalty provided for by an act of Congress and, thus, not within the general grant to federal courts of exclusive jurisdiction to enforce such penalties.

A greater variety of opinion exists as to whether state courts have jurisdiction over employee actions. In the case of *Anderson v.*

² Italics supplied.

³ 52 STAT. 1069 (1938), 29 U. S. C. A. §216(b) (Supp. 1940).

⁴ *Rogers v. Glazer*, 32 F. Supp. 990 (W. D. Mo. 1940); *Gates v. Graham Ice Cream Co.*, 31 F. Supp. 854 (D. Neb. 1940); *Lengel v. Newark Newsdealers' Supply Co.*, 32 F. Supp. 567 (D. N. J. 1940); *Fishman v. Marcouse*, 32 F. Supp. 460 (E. D. Pa. 1940); *Campbell v. Superior Delcalcominia Co.*, 31 F. Supp. 663 (N. D. Texas 1940); see *Ricciardi v. Lazzara Baking Corp.*, 32 F. Supp. 956, 957 (D. N. J. 1940).

⁵ 38 STAT. 219 (1913), 28 U. S. C. A. §41(8) (1927).

⁶ 36 STAT. 1091 (1911), 28 U. S. C. A. §41(1) (1927).

⁷ *Robertson v. Argus Hosiery Mills*, 32 F. Supp. 19 (E. D. Tenn. 1940).

Meacham,⁸ the Georgia court held that the suit was one for a penalty over which only the federal courts have jurisdiction. A New York inferior court⁹ held the suit was not one for a penalty, following the case of *Cox v. Lykes Bros.*,¹⁰ which arose under a similar act, and also supported its conclusion on the fact that Congress denominated the recovery as "liquidated damages". In comparison with this, another inferior court of the same state¹¹ said that it was immaterial whether the suit was for a penalty or not because their interpretation of "in any court of competent jurisdiction" gave that court the right to try the case. To the same effect was an unreported case in the Chancery Court of Tennessee¹² where jurisdiction was assumed since no reason could be seen for the use of the terminology in the act unless it was meant to confer jurisdiction on the state courts. Unreported cases in Minnesota,¹³ Alabama,¹⁴ Tennessee,¹⁵ and New Jersey¹⁶ inferior courts have found no penalty involved. However, an inferior court of another circuit in Alabama¹⁷ came to the opposite result as did similar courts of Texas¹⁸ and Florida.¹⁹ The North Carolina Supreme Court stated: "We take it that there is no question as to the jurisdiction to sue in the state court."²⁰ Jurisdiction was assumed to have been unquestionably granted. In *Campbell v. Superior Delcalcominia Co.*,²¹ a federal case, the court implied that it believed the state courts also had jurisdiction by saying that the fact that the suit could have been brought in the state court did not preclude a suit in the federal court. The option was for the benefit of the laborer.

The United States Supreme Court has not yet passed on this phase of the act. Consequently, in the light of the uncertainty which seems to exist, the average practitioner is at a loss as to whether to bring such action in the state or federal court. If he tries the former, success will be problematical since in some states the inferior court of one circuit has held one way while the equivalent court of another circuit has held otherwise.

⁸ 8 S. E. (2d) 459 (Ga. 1940). The court also found that the defendant was within one of the exemptions to the act.

⁹ *Moreno v. Picardy Mills, Inc.*, 173 Misc. 528, 17 N. Y. Supp. (2d) 848 (1939).

¹⁰ 237 N. Y. 376, 143 N. E. 226 (1924).

¹¹ *Emerson v. Mary Lincoln Candies, Inc.*, 173 Misc. 531, 17 N. Y. Supp. (2d) 851 (Sup. Ct., 1940).

¹² *Tapp v. Price-Bass Co.*, Tenn. Chancery Ct.

¹³ *House v. McKeown*, Minn. District Ct.

¹⁴ *Forsyth v. Central Foundry Co.*, Ala. Circuit Ct.

¹⁵ *Johnson v. Jackson & Son*, Tenn. Circuit Ct. of Law.

¹⁶ *Eichorn v. Kilkenny*, N. J. Ct. of Common Pleas.

¹⁷ *Bazanov v. Cudahy Packing Co.*, Ala. Circuit Ct.

¹⁸ *Stringer v. Griffin Grocery Co.*, Texas County Ct.

¹⁹ *Duval v. Florida Light & Power Co.*, Florida Circuit Ct.

²⁰ *Hart v. Gregory*, 218 N. C. 184, 189, 10 S. E. (2d) 644, 647 (1940).

²¹ 31 F. Supp. 663 (N. D. Texas 1940).

It is, therefore, the purpose and scope of this comment to endeavor to clear up the uncertainty by showing not only that it was the intent of Congress to confer jurisdiction on both federal and state courts under this act, but that it effectively did so.

STATE COURTS HAVE CONCURRENT JURISDICTION OF SUITS TO ENFORCE
RIGHTS GROWING OUT OF LAWS OF THE UNITED STATES

Any impression that only United States courts have exclusive jurisdiction of suits of a civil nature arising out of or under federal laws is erroneous. Such restriction is applicable to criminal penalties for violations of the laws of the United States.²² As will be shown hereinafter, the action under Section 16(b) is not an action for a criminal penalty. Assuming the action is civil, it is a principle not open to question that unless Congress specifically restricts jurisdiction to the United States courts, the state courts have concurrent jurisdiction of suits of a civil nature, arising out of or under federal laws. The rule was enunciated at an early date in *Clafin v. Houseman* where it was said: "If an act of Congress gives a penalty (meaning civil and remedial) to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. . . ."²³ This doctrine of dual jurisdiction has uniformly been approved and followed.²⁴

Conceding that state courts have jurisdiction to enforce rights and liabilities arising under federal laws where there is no express grant of jurisdiction, then *a fortiori*, they have jurisdiction of actions under Section 16(b) of the act which specifically confers jurisdiction upon all courts of "competent jurisdiction".

FEDERAL DISTRICT COURTS HAVE JURISDICTION OF SUITS ARISING
UNDER ANY LAW REGULATING COMMERCE REGARDLESS OF
THE CITIZENSHIP OF THE PARTIES OR THE VALUE
OF THE MATTER IN CONTROVERSY

Jurisdiction is expressly conferred upon district courts of all suits arising under the laws of the United States regulating commerce, re-

²² 42 STAT. 635 (1922), 28 U. S. C. A. §371 (1928).

²³ 93 U. S. 130, 136, 23 L. ed. 833, 838 (1876).

²⁴ *Mondou v. New York, New Haven & Hartford R. R.*, 233 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327 (1912); *Missouri ex rel. St. Louis B. & M. Ry. v. Taylor*, 266 U. S. 200, 45 Sup. Ct. 47, 69 L. ed. 247 (1924); *Grubb v. Public Utilities Commission*, 281 U. S. 470, 50 Sup. Ct. 374, 74 L. ed. 972 (1940).

ardless of the citizenship of the parties or the value of the matter in controversy. Section 41 of the Judicial Code²⁵ provides: "The district courts shall have original jurisdiction as follows: (1) of all suits of a civil nature, at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3000, and (a) arises under the Constitution or laws of the United States. . . . The foregoing provisions as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section." One of the succeeding paragraphs is paragraph (8), which provides: "Suits under interstate commerce laws. . . . Of all suits and proceedings arising under any law regulating commerce."²⁶ It is to be noted that diversity of citizenship is not required where the suit arises under the Constitution or laws of the United States.

In the absence of a decision of the United States Supreme Court that the act is a valid and constitutional exercise by Congress of the power to regulate commerce, it can only be a matter of opinion that it is. However, it does not seem that this contention can seriously be denied in view of the decisions of federal courts so holding.²⁷ The recent liberal tendency of the Supreme Court to give a very broad construction to the word "commerce" is also to be considered as giving effect to the validity of this act.²⁸ The findings of Congress²⁹ and the declaration of policy by that body³⁰ as well as the substantive provisions of the act show undoubtedly that the act was intended to be passed under the commerce power.

STATE COURTS ARE COURTS OF COMPETENT JURISDICTION WITHIN THE PURVIEW OF THE ACT

(A) Congressional Records Show an Intention to Confer Jurisdiction upon State and Federal Courts Alike.

The original Black-Connery Bill,³¹ as introduced in both houses of Congress on May 24, 1937, contained provisions giving to an employee a right to sue for the difference between what was due and what had been paid him. These sections did not specifically designate the court

²⁵ 36 STAT. 1091 (1911), 28 U. S. C. A. §41(1) (1927).

²⁶ 38 STAT. 219 (1913), 28 U. S. C. A. §41(8) (1927).

²⁷ *Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Division*, 111 F. (2d) 23 (C. C. A. 5th, 1940); *Andrews v. Montgomery Ward & Co.*, 30 F. Supp. 380 (N. D. Ill. 1939); *United States v. Walters Lumber Co.*, 32 F. Supp. 65 (S. D. Fla. 1940); *Jacobs v. Peavy-Wilson Lumber Co.*, 33 F. Supp. 206 (W. D. La. 1940).

²⁸ *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1, 57 Sup. Ct. 615, 81 L. ed. 893 (1937).

²⁹ 52 STAT. 1060 (1938), 29 U. S. C. A. §202(a) (Supp. 1940).

³⁰ 52 STAT. 1060 (1938), 29 U. S. C. A. §202(b) (Supp. 1940).

³¹ 81. CONG. REC. 4961, 4998 (1937).

or courts which should have jurisdiction of such actions, but Section 26 of the bill contained a provision expressly conferring such jurisdiction upon state and federal courts: "The district courts of the United States shall have jurisdiction of violations of this act or orders thereunder, and, concurrently with state and territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by or to enjoin any violation of, this act or the regulations or orders thereunder." The section on jurisdiction of the courts remained the same in the bill passed by the Senate on July 31, 1937.³²

The provisions regarding employee suits and jurisdiction remained virtually unchanged in subsequent bills presented to the House until February 18, 1938, when a bill was presented which omitted any provision for employee suits. However, Section 26 of the original Black-Connery Bill, dealing with jurisdiction of courts, was not changed.

A bill presented to the House on April 13, 1938, amended the provision regarding jurisdiction so as to read: "The district courts of the United States and the United States courts of the Territories shall have jurisdiction for cause shown, and subject to the provisions of section 17 . . . to restrain violations of section 13." It will be noted that this section of the bill was substantially the same as Section 17 of the act as finally enacted. This bill, as so amended, was passed by the House on May 24, 1938.

Thus, the situation before the conference committee of the two houses with respect to employee suits and jurisdiction was briefly as follows: The Senate bill provided for suits by employees and conferred jurisdiction of such suits upon federal and state courts; the House bill made no provision for employee suits and simply conferred jurisdiction upon federal courts to enjoin violations.

On June 14, 1938, the conference committee presented a report which contained Sections 16 and 17 of the act as subsequently enacted.³³

An examination of the legislative history of the act shows that the conference report, which was afterwards enacted by Congress,³⁴ adopted the Senate's views with respect to employee suits and jurisdiction. The sections of the original bill providing for employee suits and vesting in state courts concurrent jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by this act", obviously were designed to afford workers an effective remedy for the enforcement of their right. The House rejected the provision for employee suits altogether and thereby, of course, rejected as well the provision for concurrent jurisdiction over them. The conference committee restored the employee suits, and, it is submitted, restored with them

³² 81 CONG. REC. 7957 (1937).

³³ 83 CONG. REC. 9158, 9246 (1938).

³⁴ 83 CONG. REC. 9267, 9178 (1938).

the concurrent jurisdiction. The concurrent jurisdiction was restored by the use of the term "any court of competent jurisdiction" as effectively as if the exact words of the original bill were used.

(B) The Three Jurisdictional Provisions of the Act Providing for its Enforcement Considered in *Pari Materia*, Show the Intention of Congress that State and Federal Courts Should Have Concurrent Jurisdiction of Action under Section 16(b).

The terminology "court of competent jurisdiction," is made clearer by considering Section 16(b) in the light of the two sections providing public remedies for enforcement. Section 16(a) imposes criminal penalties for violations of the act, but makes no provision for jurisdiction to enforce such penalties.³⁵ Such provision was wholly unnecessary, however, because the Judicial Code gives the federal courts sole jurisdiction of criminal actions arising under the laws of the United States.³⁶ In providing for enforcement by injunction, Congress in Section 17 specifically limits jurisdiction of such proceedings brought by the United States to the federal courts.³⁷ However, when Congress came to consider private rights and remedies under the act, it departed from the pattern of Sections 16(a) and 17 and provided for the enforcement of such rights in all courts of "competent jurisdiction".

Here we have three jurisdictional variations in reference to three distinct methods of enforcing the act, Sections 16(a), 16(b), and 17. In view of this it could hardly be doubted that Congress realized the need for the three different methods of dealing with violators and for appropriate jurisdictional grants in connection with each. Since employee suits are for the enforcement of private rights, there was no reason for the restriction of jurisdiction over them. Rather there was adequate reason for the extension of such jurisdiction. To all intents and purposes, actions under Section 16(b) are suits for wages and as such are perhaps more familiar to state courts than federal. Such suits are often for small amounts. Federal courts may be at a substantial distance from the worker, while state courts are easily accessible. The procedure in the state court is generally simpler, particularly in the case of smaller amounts since they can be handled by inferior courts. Then too, the lawyer with the type of practice that caters to cases of this nature is more familiar with state courts. Added to this is the fact that in many states, particularly southern ones, no prepayment of court cost is required, as in federal courts. Thus, there were practical reasons to persuade Congress that it was desirable that state courts also have

³⁵ 52 STAT. 1069 (1938), 29 U. S. C. A. §216(a) (Supp. 1940).

³⁶ 42 STAT. 635 (1922), 28 U. S. C. A. §371 (1928).

³⁷ 52 STAT. 1069 (1938), 29 U. S. C. A. §217 (Supp. 1940).

jurisdiction under Section 16(b). Indeed, to have confined jurisdiction to the federal courts would often have the practical effect of depriving the poorer type of worker of the benefits of the act, unless he joined in a group suit with others, which experience shows to be an uncommon practice. One of the most important means of enforcing the act would have been greatly hampered. To circumvent such handicap, Congress must have used the term "any court of competent jurisdiction" intending to vest state and federal courts with concurrent jurisdiction.

ACTIONS UNDER SECTION 16(B) OF THE ACT ARE NOT SUITS TO
INVOKE PENALTIES OR FORFEITURES WITHIN THE MEANING
OF SECTION 256 OF THE JUDICIAL CODE

It is true that the United States courts have exclusive jurisdiction "of all suits for penalties and forfeitures incurred under the laws of the United States".³⁸ However, the liability imposed by Section 16(b) in an amount equal to the unpaid wages due the employee is not a penalty but is designed to redress the private injury done to the worker. The term "penalties and forfeitures" as used in Section 371 of the Judicial Code³⁹ has acquired a narrow and technical meaning by interpretation of the Supreme Court. Since the term appears in several federal statutes, an examination of them and their construction will prove helpful in defining the exact limits of this phrase. For example, it is provided: "No suit or prosecution for any penalty or forfeiture . . . accruing under the laws of the United States shall be maintained . . . unless the same was commenced within five years from the time when the penalty or forfeiture accrued. . . ." ⁴⁰ In *Meeker & Co. v. Lehigh Valley R. R.*, the Supreme Court said with respect to this provision: "The words 'penalty and forfeiture' in this section refer to something imposed in a punitive way for an infraction of a public law and do not include a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act be a public offense and punishable as such."⁴¹ Was not Section 16(b) enacted for the purpose of redressing a private injury? Further, the Supreme Court has held the triple damages recoverable in a civil action under the Sherman Anti-Trust Act not to be a penalty under the same statute of limitations as to penalties and forfeitures above referred to.⁴² The double liability imposed by statute upon stockholders of national banks was held not a penalty.⁴³

³⁸ 42 STAT. 635 (1922), 28 U. S. C. A. §371 (1928).

³⁹ *Ibid.*

⁴⁰ REV. STAT. 1047 (1875), 28 U. S. C. A. §791 (1928).

⁴¹ 236 U. S. 412, 423, 35 Sup. Ct. 328, 332, 59 L. ed. 644, 654 (1915).

⁴² *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. ed. 241 (1906).

⁴³ *McClaine v. Rankin*, 197 U. S. 154, 25 Sup. Ct. 410, 49 L. ed. 702 (1905).

Now, it must be presumed that Congress was acquainted with the construction of the term "penalty and forfeiture" at the time it enacted the Fair Labor Standards Act.⁴⁴ It is manifest, therefore, that Congress advisedly used the term "liquidated damages" in describing the double wages recoverable from the employer. The use of that term rather than the term "penalty" shows that Congress intended to impose liability for double wages solely for the purpose of compensating the employee for the private injury suffered. The denomination of the extra compensation as "liquidated damages" should itself be conclusive. This reasoning is strengthened by the fact that in Section 16(a) Congress provides criminal penalties for violations of the act.

A state statute creating a private right of action and fixing a measure of recovery different from and greater than the common law affords a private remedy to a person injured. Therefore, it can be enforced in the courts of other states, if not contrary to their public policy.⁴⁵ A close analogy to Section 16(b) on this point is the statute which provides that when the master or owner of a vessel refuses to make payment in the manner provided by the statute regulating the wages of seamen, he shall pay a sum equal to two day's pay for each day during which pay is delayed.⁴⁶ The jurisdiction of state courts of actions under this section has never been denied. Justice Cardozo, speaking for the New York Court of Appeals, stated: "Congress has expressly said that the extra compensation, when due, 'shall be recoverable as wages'. This would seem decisive, without more, that in determining the bounds of jurisdiction it is not to be classified as a penalty. There was no thought that state courts, which have undoubted jurisdiction to give judgment for wages in the strict sense, should be shorn of jurisdiction to give judgment for the statutory incidents. This conclusion is fortified when we search for the purpose of the statute. The purpose or at least the predominant one, was, not punishment of the master or owner, but compensation to the seamen. . . . 'How much this extra amount should be would often be a troublesome question if it were left open in every case. Hence it might be deemed advisable to have this indefinite element made definite by general law with reference to which the parties may conclusively be presumed to have contracted, and which therefore should be taken to be the law of the contract'."⁴⁷ The logic and validity of this

⁴⁴ It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. *Virginian Ry. v. System Federation*, 300 U. S. 515, 57 Sup. Ct. 592, 81 L. ed. 789 (1937); *Kepner v. United States*, 195 U. S. 100, 24 Sup. Ct. 797, 49 L. ed. 114 (1904).

⁴⁵ *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123 (1892).

⁴⁶ 38 STAT. 1164 (1915), 46 U. S. C. A. §596 (1928).

⁴⁷ *Cox v. Lykes Bros.*, 237 N. Y. 376, 143 N. E. 226 (1924).

decision has never been questioned and the case has been cited with approval by the United States Supreme Court.⁴⁸

No essential difference is perceivable between the act involved in the above case and Section 16(b) of the Fair Labor Standards Act. Indeed, the jurisdiction of state courts under Section 16(b) is even more clear than in the act involved in the New York case. The statute defining the rights of seamen is silent on the question of jurisdiction, but in Section 16(b), Congress has specifically authorized suit "in any court of competent jurisdiction".

Even assuming the liability for extra compensation imposed by Section 16(b) of the act to be a penalty, it by no means follows that the question of jurisdiction of state courts to enforce such liability is determined by Section 256 of the Judicial Code. A penalty imposed by federal statute may be enforced in the state courts where jurisdiction is granted by Congress.⁴⁹ It may well be argued that Congress made such a grant of jurisdiction by the words "in any court of competent jurisdiction".

CONCLUSION

From the foregoing analysis, it seems apparent that Congress intended to give jurisdiction to both state and federal courts. Not only is this conclusion indicated by the sounder legal reasoning but also by practical considerations. Since the correct interpretation of this phase of the act is of utmost importance in securing the uniformity which is necessary to its effectual enforcement, it is hoped the courts will take cognizance of the many reasons existing for their jurisdiction, whether they be state or federal courts.

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⁴⁸ *Life & Casualty Ins. Co. v. McGray*, 291 U. S. 566, 54 Sup. Ct. 486, 78 L. ed. 987 (1934).

⁴⁹ *First National Bank v. Morgan*, 132 U. S. 141, 10 Sup. Ct. 37, 33 L. ed. 282 (1889); *Ingraham v. Merchants' Nat. Bank*, 153 Iowa 408, 132 N. W. 869 (1911); *Endres v. First Nat. Bank*, 66 Minn. 258, 68 N. W. 1092 (1896); *McCreary v. First Nat. Bank*, 109 Tenn. 128, 70 S. W. 821 (1902).