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Public Officials -- Liability for Breach of Statutory Duty

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Therefore it is submitted that section 7 of the NLRA would not preclude the use of the Anti-Racketeering Act against racketeering unions.

For these various reasons it is believed that the appeal of the principal case now pending before the United States Supreme Court[28] may be successful. However, in the event that a reversal of this decision is not obtained, it is submitted that Congress should amend the Anti-Racketeering Act, perhaps by tacking a proviso onto the proviso to section (d), *supra,* which might read, "provided further, that nothing in this proviso, or anywhere else in this act, shall be construed as exempting any labor organization from the terms of this act when such organization is using or attempting to use or threatening to use coercion for the purpose of obtaining anyone's consent to the taking of his valuable considerations or other properties and rights as set out in sections (a) and (b) of this act, or for the purpose of taking such considerations, properties, and rights without the owner's consent."

MILTON SHORT.

Public Officials—Liability for Breach of Statutory Duty

In an action by a town against all members of its board of aldermen, with the exception of the mayor, the complaint alleged that the mayor, as tax collector and waterworks superintendent, had been able to embezzle funds of the town because of the negligent breach of statutory duties on the part of the aldermen; *i.e.,* to require a bond of the mayor and periodic accountings by him. However, since neither a corrupt or malicious motive nor any statutory provision for personal liability was alleged, a demurrer to the complaint was sustained and later affirmed on appeal.[1] In a companion case, by the same town against the same aldermen, with the exception of one of their number whom they had elected chief of police during the time he was serving as alderman, the complaint alleged the violation of a statute forbidding a public officer to hold more than one office, and a consequent loss to the town in the amount of the salary paid to the chief of police. Likewise, demurrer to this complaint was sustained and later affirmed because of the failure of the complaint to allege corrupt motive or a statutory provision for liability.[2] Thus in both of these civil actions against public officers for negligent breach of non-discretionary duties, the court takes the view that a corrupt motive or a statutory provision for liability is necessary to the statement of a cause of action.

These cases involve breaches of duty by public officers. The courts of this state have had occasion to consider these basic facts in several

[28] Announcement of the granting of this certiorari was made October 13, 1941.

[1] Town of Old Fort v. Harmon, 219 N. C. 241, 13 S. E. (2d) 423 (1941).
[2] Town of Old Fort v. Harmon, 219 N. C. 245, 13 S. E. (2d) 426 (1941).

variations, and in doing so they have made distinctions as to the liability attaching thereto.

The most prominent distinctions are (1) that between *ministerial* or *non-discretionary* and *quasi-judicial* or *discretionary* duties, and (2) that between the motives with which duties are violated, *i.e.*, whether the officer is (a) merely careless, mistaken, or negligent, or (b) corrupt or malicious.

The courts of this state have never questioned the proposition that officers are free from both civil[3] and criminal[4] liability when they have negligently, carelessly, or mistakenly breached a discretionary duty provided they acted with good faith and without corrupt or malicious motive.[5] On the other hand it is almost as clear that where an officer has corruptly or maliciously abused his discretion he is liable both civilly and criminally.[6]

In the case of a negligent breach of ministerial or non-discretionary duties, it is well settled in this state that public officers are not individually liable in a civil suit in absence of express statutory provision for such liability.[7] Where there is a statutory duty, a distinction is sometimes made between duties imposed for the benefit of an individual and those imposed for the benefit and protection of the general public, which is all a matter of construction of the statute.[8] In the former instance the person to whom the duty is owed has sometimes been allowed recovery for injuries sustained by an officer's breach of duty,[9] but in the latter instance the general rule is that even though an individual has suffered loss he cannot recover from the negligent public officer.[10]

[3] Moye v. McLawhorn, 208 N. C. 812, 182 S. E. 493 (1935); Hipp v. Farrell, 173 N. C. 167, 91 S. E. 831 (1917); Templeton v. Beard, 159 N. C. 63, 74 S. E. 735 (1912); Hannan v. Grizzard, 99 N. C. 161, 6 S. E. 93 (1888).

[4] State v. Powers, 75 N. C. 281 (1876); State v. Williams, 34 N. C. 172 (1851).

[5] Notes (1926) 40 A. L. R. 1358, (1928) 53 A. L. R. 381 (personal liability of municipal officer or employee for negligence in performance of duty).

[6] State v. Glasgow, 1 N. C. 264 (1800) (the Secretary of State was found guilty of issuing land warrants which he knew were valueless); Moore v. Lambeth, 207 N. C. 23, 175 N. C. 714 (1934) (the city councillors of Charlotte in a civil action were held personally liable to the taxpayers for wrongfully, willfully, and knowingly disbursing public funds without adequate consideration moving to the city).

[7] Noland v. Board of Trustees of Southern Pines School, 190 N. C. 250, 129 S. E. 577 (1925); Fore v. Feimster, 171 N. C. 551, 88 S. E. 977 (1916); Hudson v. McArthur, 152 N. C. 445, 67 S. E. 995 (1910); *see* Hipp v. Farrell, 173 N. C. 167, 169, 91 S. E. 831, 832 (1917); Templeton v. Beard, 159 N. C. 63, 65, 74 S. E. 735, 736 (1912).

[8] *See* Hipp v. Farrell, 173 N. C. 167, 170, 91 S. E. 831, 833 (1917); Hudson v. McArthur, 152 N. C. 445, 450, 67 S. E. 995, 997 (1910).

[9] Amy v. Barkholder, 78 U. S. 136, 20 Law. Ed. 101 (1871); Holt v. McLean, 75 N. C. 347 (1876); *see* Hipp v. Farrell, 173 N. C. 167, 170, 91 S. E. 831, 833 (1917); Hudson v. McArthur, 152 N. C. 445, 450, 67 S. E. 995, 997 (1910).

[10] Hudson v. McArthur, 152 N. C. 445, 67 S. E. 995 (1910).

Brown, J., dissenting with Walker, J., criticizes the latter proposition in *Hudson v. McArthur*,[11] a case in which the majority of the court held that county commissioners were not civilly liable to sureties who had been forced to pay on a sheriff's bond because of the sheriff's embezzlement of tax receipts. There it was contended by the sureties that this result would not have been possible had the county commissioners performed their statutory duty and taken up the tax receipts at the end of the sheriff's first term. Brown argues,[12] however, that they should be held liable to the sureties, rationale being that a duty to the individual plaintiff is not necessary, but rather, direct injury to some special interest of plaintiff is sufficient, even though the main purpose of the imposition of the duty was the protection of the public, and even though a failure in performance is also a penal offense.

However, the decision in *Hipp v. Farrell*[13] distinguishes between the personal liability of those who have both administrative and discretionary duties, as county commissioners and aldermen, and those officers who carry out solely administrative duties, as subordinate officers in physical charge of work, declaring that the latter should be personally liable for the negligent failure to perform his duty even in the absence of a provision imposing such liability.[14] Whether there is valid ground for this distinction is at least open to question since there seems to be just as much reason for holding an alderman to a personal responsibility as there is for holding an administrative officer such as a road overseer.

On the other hand, a public officer is criminally liable for the negligent breach of a ministerial duty even in the absence of statute.[15] *State v. Haywood*[16] involved the indictment of city commissioners for negligent failure to keep the streets in repair as they were "empowered and required" to do by statute. This statutory duty was held to be non-discretionary and the commissioners were held criminally liable, the court saying there that "whenever a duty is imposed by law, the performance of which concerns the public, the omission to perform it is an indictable offence." Although this language is broad enough to include discretionary duties, the decision is authority only for the rule that negligent breach of a ministerial duty creates criminal responsibility.

In the case of corrupt or malicious dereliction of a ministerial duty, as in the corresponding breach of a discretionary duty, the officer is liable both civilly and criminally.[17]

[11] *Ibid.*
[12] *See id.* at 452, 67 S. E. 995, 998 (dissent).
[13] *See* Hipp v. Farrell, 173 N. C. 167, 169, 91 S. E. 831, 832 (1917).
[14] *See* Hathaway v. Hinton, 46 N. C. 243, 247 (1853).
[15] State v. Commissioners of Fayetteville, 4 N. C. 419 (1816).
[16] State v. Haywood, 48 N. C. 399 (1856).
[17] *See* State v. Powers, 75 N. C. 281, 284 (1876).

However, where there are statutory provisions which make negligent breach of ministerial duties a misdemeanor or which impose a penalty, the courts do not hesitate to enforce them. The trouble is that the legislature has failed to enact enough of these provisions, with the result that the courts are forced to fall back upon the previously discussed general principles which apply in absence of statute. It is submitted that these principles are sometimes inadequate, not only in failing to keep public officers in line, but also in failing to provide an adequate remedy for the individual who suffers from the breach of duty.

Nevertheless, in North Carolina there are a number of statutes imposing various types of liability for the breach of the several kinds of duties, but because of the various effects given these statutes by the courts, it is necessary to look to the cases construing each of them in order to learn their full significance.

Where a statute[18] makes it a misdemeanor for officers named therein to fail to perform the duties prescribed, *State v. Foy*[19] confined the operation of the statute to ministerial duties.

Another statute[20] creates two offenses and penalties: (1) The willful omission, neglect, or refusal to discharge the duties of an office, which is punishable by fine and imprisonment. (2) The willful and corrupt action of an officer, which is punishable by removal as well as fine and imprisonment. *State v. Hatch*[21] makes county commissioners criminally liable under the first section for selling shingles worth $70.00 at the "grossly inadequate" price of $21.00 without making reasonable efforts to drive a better bargain. The court begins by saying that "the first offence is for negligence, or other misconduct in official duties, without corrupt intent, and is *simple* malfeasance, misfeasance, or nonfeasance." In another part of the opinion, the court says that the indictment under the first clause of the act lies against officers for *willful* neglect of duty, not mere mistakes of judgment. Finally, no error is found in the trial judge's charge that a negligent *and* willful breach of duty or abuse of discretion was necessary for conviction. The opinion, taken as a whole and in connection with the facts on which it is based, seems to indicate that negligence in the performance of discretionary duties so extreme as to warrant an inference of willfulness constitutes a misdemeanor under the first section, although the language used does not exclude the possibility that ordinary negligence should be enough.

In our statutes there are examples of general provisions which im-

[18] N. C. Code (1883) §765.
[19] State v. Foy, 98 N. C. 744, 3 S. E. 524 (1887).
[20] N. C. Code (1883) §1090; compare N. C. Code Ann. (Michie, 1939) §4384.
[21] State v. Hatch, 116 N. C. 1003, 21 S. E. 430 (1895).

pose liability upon certain classes of officers for breach of "duty". One of these is C. S. 1302[22] which reads "any [county] commissioner who shall neglect to perform any duty required of him by law, as a member of the board, shall be guilty of a misdemeanor and shall also be liable to a penalty of $200.00 for each offence, to be paid to any person who shall sue for the same", but in a civil action[23] to recover the penalty imposed by this section, it was held that defendant's failure to construct a draw in a bridge, as required of him by another statute, did not render him liable for the penalty. The statute alleged to be violated required draws only when necessary; hence, the duty was discretionary, and this section is held to apply to breach of *discretionary* duties only when willfulness or gross carelessness is involved. In another case,[24] one, but only one, penalty was allowed under this statute where defendant commissioner failed to perform his ministerial duty and remove a sheriff when the latter failed to renew his bond or report collections.

Other statutes provide liability for the breach of a particular duty.[25] For example, C. S. 335[26] provides that county commissioners who knowingly approve an *insufficient* bond shall be liable as sureties thereon. In *Moffitt v. Davis*[27] this provision is construed as applicable in the case of a failure to take a bond in the first instance. Here the language of the court indicates the complex predicament in which they find themselves when liability for the breach of a statutory duty is inadequately defined, and the rusulting necessity for reading into the statute the measure of liability commensurate with the breach of the duty which it sets forth.[28]

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[22] N. C. Code Ann. (Michie, 1939) §1302.
[23] Staton v. Wimberly, 122 N. C. 107, 29 S. E. 63 (1898).
[24] Bray v. Barnard, 109 N. C. 44, 13 S. E. 729 (1891).
[25] N. C. Code Ann. (Michie, 1939) §1301 (having been on the books since 1869 or 1870 and making a county commissioner who approves a bond he knows or has reason to believe is insufficient in sum or security guilty of a misdemeanor, liable to removal, and permanently disqualified from state office).
[26] N. C. Code Ann. (Michie, 1939) §335.
[27] Moffitt v. Davis, 205 N. C. 565, 172 S. E. 317 (1933).
[28] All cases require that defendant's breach of duty be the proximate cause of plaintiff's injury or loss. Ellis v. Brown, 217 N. C. 787, 9 S. E. (2d) 467 (1940). What might almost be called an eagerness not to impose liability on public officers seems to have led the courts in many cases to hold that no proximate cause exists. For example, the court in the first principal case held proximate cause not to exist. *See* Town of Old Fort v. Harmon, 219 N. C. 241, 245, 13 S. E. (2d) 423, 426 (1941). However, if bond had been required the town would have suffered no loss, and, furthermore, a reasonable man could have foreseen that loss might occur where no bond was exacted and no periodic accountings were required of a tax collector.