Notes and Comments

North Carolina Law Review

NOTES AND COMMENTS

Constitutional Law—Price Regulation—Rationale of "Affected With a Public Interest"

The United States Supreme Court in *Olsen v. Nebraska*[1] swept away the remaining vestige of the confusing notion that legislative price fixing could only be exercised in businesses found by the Court to be "affected with a public interest". The Court upheld, against an attack founded on the due process clause, a Nebraska statute which provided that no licensed employment agency should collect from an applicant, as compensation for its services, more than the aggregate of a stated registration fee and 10% of the first month's wages.[2] The Supreme Court of Nebraska had held this legislation unconstitutional,[3] basing their decision on *Ribnik v. McBride*,[4] in which case the United States Supreme Court had declared a similar New Jersey statute invalid. However, in the instant case, the Court, in reversing the state court, unequivocally stated,[5] (1) that the *Ribnik* case had been overruled by more recent decisions; (2) "that the phrase 'affected with a public interest' can mean no more than that an industry, for adequate reason, is subject to control for the public good", and (3) that the wisdom, need and appropriateness of such legislation "should be left where it was left by the Constitution—to the states and to Congress".

The power to regulate business or economic activity for the general welfare is inherent in any government. This regulatory power, known as the police power, justifies the regulation of private enterprise when necessary for the protection and promotion of the public health, safety, morals, or general welfare. The Fifth Amendment, controlling federal action, and the Fourteenth, controlling state action, serve as limits for the exercise of the police power. They confine the exercise of the police power to its proper ends and insure that the ends shall be accomplished by methods consistent with due process. In determining whether price-fixing regulation was within the objectives of the police power[6]

[1] 61 Sup. Ct. 862, 85 L. ed. (Adv. Ops.) 820 (1941).
[2] NEB. COMP. STAT. (1929) §§48-508.
[3] State v. Kinney, 138 Neb. 574, 293 S. W. 393 (1940).
[4] 277 U. S. 350, 48 Sup. Ct. 545, 72 L. ed. 913 (1927).
[5] Olsen v. Nebraska, 61 Sup. Ct. 862, 865, 85 L. ed. (Adv. Ops.) 820, 824 (1941).
[6] It is not within the scope of this note to discuss those instances where price regulations have been upheld on some basis other than the conclusion that the business involved was "affected with a public interest", *e.g.*, Margolin v. United States, 269 U. S. 93, 46 Sup. Ct. 64, 70 L. ed. 176 (1925), upholding statute limiting amount chargeable by attorneys prosecuting various claims against the United States; and Griffith v. State of Connecticut, 218 U. S. 563, 31 Sup. Ct. 132, 54 L. ed. 1151 (1910), sustaining a state usury statute.

the courts until recently treated the right of the owner of property to fix the price at which his property could be sold or used as an inherent attribute of the property itself.[7] Accordingly some special circumstances had to exist in order to justify price regulation under the police power. Commonly where the regulation was upheld the Court drew from the circumstances the conclusion that the business was "affected with a public interest".[8] No such conclusion was necessary in order to justify many other types of police regulation; for example, health regulations could be visited upon enterprises whether or not they were "affected with a public interest".[9] However, health regulation is used to attack health problems. Hitherto it was thought that price regulation was supportable only where there were special price problems. The judicial requirement that a business be "affected with a public interest", *i.e.*, be in a special category, before price regulation was justified, was the judicial counterpart of the economic doctrine of *laissez faire*. The economic system was founded on free enterprise; price regulation was an exception requiring justification.

Looking solely to the phraseology of the courts the term "affected with a public interest"[10] eludes the grasp. The Supreme Court, by Mr. Justice Sutherland, conceded that it was undefined and indefinite.[11] Its actual effect can best be understood, so far as price legislation is concerned, by examining the situations in which the Court found the enter-

[7] Tyson v. Banton, 273 U. S. 418, 429, 47 Sup. Ct. 426, 71 L. ed. 718, 722 (1927).

[8] German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011 (1914); Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247 (1892); Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77 (1876).

[9] Maryland v. Hyman, 98 Md. 596, 57 Atl. 6 (1904) (a statute prescribing at least 400 cubic feet of air for each employee in *manufacturing* establishments was upheld); People v. Smith, 108 Mich. 527, 66 N. W. 382 (1896) (statute requiring blowers to carry dust from emery wheels).

[10] This phrase originated in Lord Hale's essay *De Portibus Maris* written in 1670. Discussing the common law duty to charge reasonable prices imposed on owners of wharves to which all must come, he remarked that, "When private property is 'affected with a public interest' it ceases to be *juris privati* only". In attempting to clarify its distinction between those businesses subject to price regulation and those not so subject the Court in Munn v. Illinois, 94 U. S. 133, 24 L. ed. 77 (1876), referred to Lord Hale's essay and concluded that prices could be regulated when a business was "affected with a public interest". However, it did not clearly decide whether the classification would be left to the legislature or to the court; subsequent cases held that the court should make this decision. In Charles Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 Sup. Ct. 630, 67 L. ed. 1103 (1923), the Court limited businesses "affected with a public interest" to three categories: (1) Where a franchise had been granted, with an affirmative duty of rendering public service. (2) Occupations long subject to exceptional regulations, such as innkeepers and cabmen. (3) Those businesses, *not public at 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 use.

[11] Tyson v. Banton, 273 U. S. 418, 430, 47 Sup. Ct. 426, 71 L. ed. 718, 722 (1927).

prises involved to be so affected. An examination of the decisions in which the "affected with public interest" doctrine has been applied, and the price regulation upheld, discloses that the element common to all is the existence of a situation or a combination of circumstances materially impairing the regulative force of competition to the extent that serious economic consequences resulted to a very large number of the community.

The decision in *Munn v. Illinois*[12] is clearly explainable on the above basis. There the Court was asked to review an Illinois statute which fixed the maximum price for storage in grain elevators in Chicago. In deciding that the grain elevators were "affected with a public interest" the Court found that because of their strategic location between rail traffic from the interior states and water traffic to the consumer world, these elevators stood in the "gateway of commerce". It also found that the owners had taken advantage of this strategic position and had formulated a single-price schedule which was followed by all, thereby creating a "virtual monopoly" affecting the whole wheat-producing middle west. Thus it was apparent to the Court that the competitive system had broken down and that prices were no longer regulated by the law of supply and demand. Consequently, because of this combination of circumstances a business, private at its inception, had become "affected with a public interest".

Subsequent cases in which price regulations have been upheld on the "affected with public interest" theory have presented situations in which the basic economic facts were the same as above, *i.e.*, there had been a breakdown of the competitive price-fixing system in a business which affected the community as a whole. Thus a Kansas statute fixing the rates of fire insurance companies was upheld.[13] The facts were that there was an almost universal need for insurance protection, and that while the insurers competed for the business they all fixed their premiums for similar risks according to an agreed schedule of rates.

Similar economic situations were presented in those cases where price fixing was upheld because some emergency had caused the law of supply and demand to become inoperative as a price regulator.[14] In

[12] 94 U. S. 133, 24 L. ed. 77 (1876).

[13] German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011 (1914). This decision was subsequently used as the basis for upholding a New Jersey statute fixing the commission of insurance agents. O'Gorman and Young v. Hartford Fire Insurance Co., 282 U. S. 251, 51 Sup. Ct. 130, 75 L. ed. 324 (1930). It was also followed in LaTourteet v. McMaster, 248 U. S. 465, 39 Sup. Ct. 160, 63 L. ed. 362 (1918) (where regulation of the relation of those engaged in the insurance business was allowed).

[14] War emergency rent statutes were upheld in: Chastleton Corp. v. Sinclair, 264 U. S. 543, 44 Sup. Ct. 405, 68 L. ed. 841 (1924); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. ed. 877 (1921); Block v. Hirsch, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. ed. 865 (1921).

Highland v. Russell Car and Snowplow Co., 279 U. S. 253, 49 Sup. Ct. 314, 73

Block v. Hirsch,[15] the first of a series of war emergency rent cases, the power of Congress to fix rents was upheld in the presence of an abnormal demand and a limited supply of housing facilities.

On the other hand, certain cases are apparently inconsistent with the above-mentioned rationale. *Brass v. Stoeser*[16] involved a North Dakota statute regulating charges of some six hundred grain elevators scattered along lines of railroad throughout a sparsely populated region. There was no strangling monopoly and no indication that the regulative power of competition had broken down, yet the legislation was upheld. This can be defended on the basis that when a business is found to be affected with a public interest all units of it are to be put in the same classification though some of them lack the distinguishing characteristics which originally had been used to justify the classification. Grain elevators had already been held subject to price regulation in the *Munn* case. But in *Ribnik v. McBride*[17] the Court failed to declare a public interest in a case involving the requisite economic factors. In that case a six-to-three decision declared unconstitutional a New Jersey statute fixing the maximum fees chargeable by employment agencies.[18] In this business also the price control could have been justified on the ground that free competition failed to fix prices adequately because in practice the agencies took advantage of the unequal bargaining power of the unemployed.

Comparison of the *Brass* and *Ribnik* cases discloses the unsatisfactory operation of the "affected with a public interest" test. In the first case price regulation was supported where there was complete freedom of competition and little apparent need for regulation; in the second, regulation was invalidated in spite of the exceptional need for it.

Gradually various members of the Court became dissatisfied with the old concept, as is evidenced by the presence in some of the more recent decisions of vigorous dissents. Criticizing the majority in *Tyson v. Banton*[19] Justice Holmes was of the opinion that "the notion that a business is clothed with a public interest and has been devoted to a public use" was "little more than a fiction intended to beautify what is

L. ed. 688 (1928) (emergency regulation of coal prices was sustained); Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. ed. 755 (1916) (federal emergency wage regulation was upheld).

[15] 256 U. S. 135, 41 Sup. Ct. 458, 65 L. ed. 865 (1921).

[16] 153 U. S. 391, 14 Sup. Ct. 857, 38 L. ed. 757 (1894).

[17] 277 U. S. 350, 48 Sup. Ct. 545, 72 L. ed. 913 (1927).

[18] LAWS OF NEW JERSEY (1918) c. 277, p. 822.

[19] 273 U. S. 418, 47 Sup. Ct. 426, 71 L. ed. 718 (1927) (the Court was asked to pass on the validity of a New York statute limiting the resale price of theatre tickets by ticket brokers. It was held that the theatre business was essentially private in nature and therefore was not subject to price regulation; by treating the theatre ticket brokers as an appendage of the theatre business it necessarily followed that their charges could not be regulated).

disagreeable to the sufferers", and further that "the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition. . . . Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain".[20] In the same case Justice Stone (dissenting) attempted to give reality to previous decisions by saying that in all those cases where price fixing had been upheld there had been a breakdown of the "regulative force of competition" affecting seriously "a large number of the members of the community". He insisted that a similar situation existed in this case, and concluded that the solution to the problem "turns upon considerations of economics about which there may be reasonable difference 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 a basis for legislative action in a field not withheld from legislative power by the Constitution as interpreted by the decisions of this Court".[21]

Justice Stone again dissenting in the *Ribnik* case added another criticism of the "affected with a public interest" view, saying that he could not distinguish a difference between "reasonable regulation of price, if appropriate to the evil to be remedied, and other forms of appropriate regulation" since either affected the economic return of a business.[22] Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*,[23] was of the opinion that "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 true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection".

As a result of their efforts, in 1929 these dissenters seem to have won a "moral victory" in *Tagg Brothers v. United States*.[24] That decision, written by Justice Brandeis, unanimously upheld the validity of an order of the Secretary of Agriculture fixing the maximum fees chargeable by marketing agencies or commission men operating in the Omaha Stockyards, which order was made pursuant to authority granted to the Secretary in the Packers and Stockyards Act.[25] The Court simply stated that the commission men enjoyed a substantial monopoly

[20] *Id.* at 446, 47 Sup. Ct. 426, 41 L. ed. at 729 (1927).
[21] *Id.* at 454, 47 Sup. Ct. at 436, 71 L. ed. at 733 (1927).
[22] 277 U. S. at 373, 48 Sup. Ct. at 552, 72 L. ed. at 923 (1927).
[23] 285 U. S. at 302, 52 Sup. Ct. at 383, 76 L. ed. at 766 (1931) (a statute making a certificate of public necessity and convenience a prerequisite of engaging in the business of manufacturing and distributing ice was held invalid).
[24] 280 U. S. 420, 50 Sup. Ct. 220, 74 L. ed. 524 (1930).
[25] Act of Aug. 15, 1921, c. 64, §§301-16, 42 Stat. 159, 163-68, 7 U. S. C. §§201-17 (1926).

and performed an indispensable service in the interstate commerce in livestock, and left undiscussed the question of whether or not the business was "affected with a public interest", even though they could have decided the case on this basis. The Court appeared ready to give the phrase "affected with a public interest" a well-earned rest. However, it was not until 1934 that the Court, in *Nebbia v. New York*,[26] finally overthrow *in toto* the idea that price control legislation could act only on businesses "affected with a public interest". This decision involved a statute giving a milk control board power to fix minimum prices for milk, and was based on the legislative finding that an emergency existed due to the oversupply of raw milk; therefore, the control of price through the law of supply and demand was no longer effective. Moreover, the circumstances were such that if the Court had desired to do so they could have upheld the statute either on the authority of the emergency rent cases or by declaring the milk industry "affected with a public interest", since competition had failed to fix a fair price and the industry was of vast public importance. Instead of this, the majority chose to abandon the *laissez-faire* idea that price regulation would be permitted only in those exceptional cases in which the Court found the business or industry "affected with a public interest". The arguments used in upholding the statute were those which had previously appeared only in dissenting opinions and the conclusion reached was that the phrase "affected with a public interest" meant only that the business so described was, for adequate reasons, subject to control for the public good. Commenting at the time on the decision, James E. Beck declared that the Court had "calmly discarded its decisions of fifty years" without even paying "those decisions the obsequious respect of a final oration".[27]

That the Supreme Court had abandoned the old method of reviewing price regulations should have been apparent to all in the *Nebbia* case. In subsequent decisions the Court has followed the new approach in approving fair trade acts (which are analagous in requiring dealers to observe minimum resale prices fixed in contracts to which they were not parties),[28] Federal milk price fixing,[29] minimum wages,[30] and state regulation of tobacco warehouse charges.[31] However, in the face of these

[26] 291 U. S. 502, 54 Sup. Ct. 505, 78 L. ed. 940 (1934).
[27] Cong. Rec., March 24, 1934, at 5480.
[28] Old Dearborn Distrib. Co. v. Seagram Distillers Corp. 299 U. S. 183, 57 Sup. Ct. 139, 81 L. ed. 109 (1936).
[29] United States v. Rock Royal Coöp., 307 U. S. 533, 59 Sup. Ct. 993, 83 L. ed. 1446 (1939).
[30] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 Sup. Ct. 578, 81 L. ed. 703 (1937) (overruling Adkins v. Childrens' Hospital, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. ed. 785 (1923), which had declared unconstitutional a minimum wage statute applied to women).
[31] Townsend v. Yeomans, 301 U. S. 441, 57 Sup. Ct. 842, 81 L. ed. 1210

decisions some authorities persisted in clinging to the old view. This attitude appeared in the decision in the state court in the instant case.[32] The effect of the decision of the Supreme Court should be to make it plain that its attitude in the *Nebbia* case is now its settled policy; that hereafter price legislation need be justified by no special circumstances under the label "affected with a public interest" or otherwise. This decision is in line with recent trends toward a controlled economy, and obviously makes it possible for governmental action to supplant free competition as our principal means of determining prices. The new approach will eliminate judicial legislation as to which businesses are suitable for price control; yet by treating price fixing as an ordinary exercise of the police power, a check against capricious and arbitrary legislation will be preserved.

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Contempt of Court—Construction of Federal Statute Concerning Punishment for Contempt

In the case of *Nye v. United States*,[1] the Supreme Court, by construction of section 268 of the judicial code,[2] has stringently abridged the power of the federal district courts[3] to punish summarily for contempt.[4]

(1937); Mayo v. Lakeland Highlands Canning Co., Inc., 309 U. S. 310, 60 Sup. Ct. 517, 84 L. ed. 481 (1940) (a preliminary injunction was denied against enforcement of a statute fixing prices of citrus juices in the citrus fruit industry). State price regulation has been upheld in the following cases: Highland Farms Dairy, Inc. v. Agnew, 300 U. S. 608, 57 Sup. Ct. 549, 81 L. ed. 835 (1937); Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251, 56 Sup. Ct. 453, 80 L. ed. 669 (1936); Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 55 Sup. Ct. 7, 79 L. ed. 259 (1934); *cf.* Mayflower Farms, Inc. v. Ten Eyck, 297 U. S. 266, 56 Sup. Ct. 457, 80 L. ed. 675 (1936) (the court held unreasonable and arbitrary a classification created by a N. Y. statute 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 milk business at a certain date).

[32] State v. Kinney, 138 Neb. 574, 293 S. W. 393 (1940).

[1] Nye v. United States, 61 Sup. Ct. 810, 85 L. ed. Adv. Ops. 733 (1941), Note (1941) 54 HARV. L. REV. 1397. Followed in Millinocket Theatre v. Kurston, 39 F. Supp. 979 (D. Me., 1941). Warring v. Colpoys, 122 F. (2d) 642 (App. D. C. 1941) (retroactive operation of *Nye* decision).

[2] 36 Stat. 1163 (1911), 28 U. S. C. A. §385 (1928) ("The said courts shall have the power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts").

[3] As to bankruptcy proceedings, see Boyd v. Glucklick, 116 Fed. 131 (D. Iowa, 1902). As to disobedience of an injunction outside the district, see Myers v. United States, 264 U. S. 95, 44 Sup. Ct. 272, 62 L. ed. 577 (D. C. W. D. Mo., 1924).

[4] This note will not deal with the constitutionality of the statute. The power

E., administrator, brought a wrongful death action against *B.* and *C.* in the federal district court for the middle district of North Carolina. *N.*, a son-in-law of one of the defendants in the wrongful death action, and *M.*, his tenant, brought *E.*, an "illiterate, and feeble in mind and body", from his home to a town at a considerable distance from the middle district. *N.* and *M.* plied *E.* with liquor, and kept him in *N.*'s home overnight. The next morning, when *E.* was sober, but still under the influence of *N.* and *M.*, they induced him to seek a termination of the action. The letter to the district court was prepared by *N.*'s lawyer and mailed by *N.* *E.* was not paid anything. The district court fined *N.* and *M.*, after summary proceeding, for contempt. The circuit court of appeals upheld this decision,[5] but the Supreme Court reversed it on the grounds that the acts were not misbehavior in the presence of the court, "or so near thereto as to obstruct the administration of justice" within the meaning of s. 268 of the judicial code.

Ever since Congress, in 1831, as the result of the acquittal of a federal judge who punished summarily a critical newspaper editor,[6] passed the ancestor of the present statute, limiting the power to punish for contempt, the construction of the language used has been a judicial problem of no mean proportions. On the one hand the courts are faced with a loss of control over indirect contempts if they construe the statute geographically; on the other hand, a cause and effect interpretation runs afoul of the policy of strict construction of a criminal statute and of the literal congressional language.

The Supreme Court has at various times used both tests. In cases involving the influencing of a witness to disobey a subpoena[7] and an altercation with a judge after court had adjourned,[8] for examples, the Supreme Court has construed the language in question in a spatial sense. But in cases involving the shadowing of a juror outside the courthouse,[9] adverse criticism of the court in a pending matter,[10] an

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of Congress to regulate contempts in the lower federal courts has long been recognized. Michaelson v. United States, 266 U. S. 42, 45 Sup. Ct. 18, 69 L. ed. 162 (1924); Atwell v. United States, 162 Fed. 79 (C. C. A. 4th, 1908); *Ex parte* Robinson, 19 Wall. 505, 510, 22 L. ed. 205, 207 (1874). See article by Frankfurter and Landis, cited *infra* note 6.

[5] Nye v. United States, 113 F. (2d) (C. C. A. 4th, 1940), Note (1941) 19 N. C. L. Rev. 219.

[6] See Stansbury, Report of the Trial of James H. Peck (1833); *Ex parte* Shenck, 65 N. C. 354 (1871); Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in the Separation of Powers* (1924) 37 Harv. L. Rev. 1010.

[7] *Ex parte* Robinson, 19 Wall. 505, 22 L. ed. 205 (1874).

[8] *Ex parte* Bradley, 7 Wall. 364, 19 L. ed. 214 (1869).

[9] United States v. Sinclair, 279 U. S. 749, 49 Sup. Ct. 471, 73 L. ed. 938 (1929).

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

attempt to influence a witness outside of the courtroom,[11] an attempt to influence a prospective juror before he was drawn,[12] and lynching a prisoner after an appeal had been allowed,[13] the language was construed in a causal sense.

The lower federal courts have been equally confused. The bribing of a witness,[14] service of a witness with a civil process after court had adjourned,[15] corrupting a juror,[16] publication of a newspaper article concerning a pending matter,[17] and a letter written to a special assistant attorney general charging the judge in a pending matter with bias,[18] have all been held to be contempt within the meaning of the statute, even though the offense in each case originated at a point geographically removed from the court. On the other hand, in cases involving a newspaper article about a pending matter,[19] service of a writ of garnishment on a witness during a recess of court,[20] a letter to a litigant criticizing the procedure in a pending matter,[21] sale of assets by a bankrupt,[22] and wrongfully inducing a trustee in bankruptcy to pay out money,[23] the language of the statute was construed to deprive the court of jurisdiction over such distant misconduct.

Oddly enough each of these decisions, including the principal case—no matter which of the views it upholds—seems to reach its conclusion by reasoning along one or both of two lines. They seek to interpret the history of the statute and to determine the legislative intent therefrom; or they attempt to construe the words "so near thereto".

The court in the instant case, speaking through Mr. Justice Douglas, said: "Congress was responding to grievances arising out of the exercise of judicial power as dramatized by the Peck proceedings. . . . The two sections of the Act of March 2, 1831 . . . clearly indicate that the category of criminal cases which could be tried without a jury was narrowly confined".[24]

[11] Savin, Petitioner, 131 U. S. 267, 9 Sup. Ct. 703, 33 L. ed. 150 (1889).
[12] Cuddy, Petitioner, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. ed. 150 (1889).
[13] United States v. Shipp, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. ed. 319 (1906).
[14] *In re* Brule, 71 Fed. 943 (D. Nev., 1895).
[15] United States v. Zavelo, 177 Fed. 536 (C. C. N. D. Ala., 1910).
[16] Kirk v. United States, 192 Fed. 273 (C .C. A. 9th, 1911).
[17] *In re* Independent Publishing Co., 240 Fed. 849, (C. C. A. 9th, 1917).
[18] Froelich v. United States, 33 F. (2d) 660 (C. C. A. 8th, 1929).
[19] *Ex parte* Poulson, 19 Fed. Cas. 1205, No. 11,350 (C. C. E. D. Pa., 1835) (the first case decided construing the Act of 1831); Morse v. Montana Ore Purchasing Co., 105 Fed. 337 (C. C. D. Mont., 1900).
[20] *Ex parte* Schulenberg, 25 Fed. 211 (C. C. E. D. Mich., 1885).
[21] Hillman v. Insurance Co., 79 Fed. 749 (C. C. D. Kan., 1897).
[22] *In re* Probst, 205 Fed. 512 (C. C. A. 2nd, 1913).
[23] Morgan v. United States, 95 F. (2d) 830 (C. C. A. 8th, 1938).
[24] Nye v. United States, 61 Sup. Ct. 810, 815, 85 L. ed. Adv. Ops. 733 (1941); *see,* 1 KENT'S COMMENTARIES (11th ed. 1867) 301, n.; Frankfurter and Landis, *Power of Congress Over Procedure in "Inferior" Federal Courts—A Study in the Separation of Powers* (1924) 37 HARV. L. REV. 1010, 1031; Nelles and King, *Contempt By Publication* (1928) 28 CALIF. L. REV. 525.

The opposite view is typified by the statement of District Judge Jones:[25] "It is doubtful, to say the least of it, whether any of the eminent lawyers in the Congress which adopted this provision . . . had in mind anything more than to prevent the punishment, as for contempt, of the exercise of the right of free speech and liberty of the press in criticizing and denouncing judicial acts".[26]

When judicial interpretations of the clause "misbehavior . . . in their presence, or so near thereto as to obstruct the administration of justice" are looked at, an equally wide divergence of attitudes is seen. Mr. Justice Douglas, in the instant case, said: "The question is, whether the words 'so near thereto' have a geographical or causal connotation. Read in their context, and in the light of their ordinary meaning, we conclude that they are to be construed as geographical terms".[27] But Mr. Chief Justice White, in the *Toledo Newspaper* case,[28] said, "The test, therefore, is the character of the act done, and its direct tendency to prevent and obstruct the discharge of judicial duty".[29]

It is submitted, however, that in the instant decision the court need not have responded to either of these arguments. The coerced letter seeking dismissal of the action was received by the court in the middle district. It was the fulfillment of a chain of acts, all intended to obstruct the administration of justice. No part of the operation would have been effective unless the letter had been received by the court. The Supreme Court might have applied the doctrine of constructive presence as enunciated in the criminal law; *i.e.,* that an act is committed at the place where it takes effect.[30] The proceedings in question were for criminal and not civil contempt.

In the light of this unsettled state of the law, the court seems to have based its decision on grounds of policy. It was apparently moved by the thought that it would be more compatible with democratic insti-

[25] *Ex parte* McLeod, 120 Fed. 130, 137 (D. Ala. 1903).

[26] United States v. Huff, 206 Fed. 700 (S. D. Ga., 1913); Kirk v. United States, 193 Fed. 273 (C. C. A. 9th, 1911); United States v. Anonymous, 21 Fed. 61 (C. C. W. D. Tenn., 1884).

[27] Nye v. United States, 61 Sup. Ct. 810, 815, 85 L. ed. Adv. Ops. 733 (1941). *See,* Toledo Newspaper Co. v. United States, 247 U. S. 402, 422, 38 Sup. Ct. 560, 565, 62 L. ed. 1186 (1918) (Mr. Justice Holmes dissenting); Cuyler v. Atlantic & N. C. Ry., 131 Fed. 95 (C. C. E. D. N. C., 1904). See *supra* notes 7, 8, 9, 19, 20, 21, 22, 23.

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

[29] Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, 38 Sup. Ct. 560, 564, 62 L. ed. 1186 (1918); United States v. Craig, 206 Fed. 230 (S. D. N. Y., 1920); McCaulley v. United States, 25 App. D. C. 404 (1905). See *supra* notes 9, 10, 11, 12, 13, 14, 15, 16, 17, 18.

[30] *In re* Independent Publishing Co., 240 Fed. 849 (C. C. A. 9th, 1917); Keeney v. United States, 17 F. (2d) 976 (C. C. A. 7th, 1927); *accord,* Snow v. Hawkes, 183 N. C. 365, 111 S. E. 621 (1922). This point was raised in the Brief for the United States, p. 40, Nye v. United States, 61 Sup. Ct. 810, 85 L. ed. Adv. Ops. 733 (1941).

tutions to insure to the accused in such cases jury trial and the other protections afforded by criminal prosecution. Thus, the court says: "If petitioners can be punished for their misconduct, it must be under the criminal code, where they will be afforded the normal safeguards surrounding criminal prosecutions".[31]

There are, however, countervailing considerations, as pointed out by Mr. Justice Stone (now Mr. Chief Justice Stone) in the dissent.[32] The criminal process is slow and cumbersome and likely to be defeated by sundry interferences. The danger of judicial tyranny in summary contempt proceedings is less than the danger that a weakened judiciary will be unable to protect its litigants against outside obstructions of justice. It is therefore urged that Congress amend the statute. Unless this action is taken such offenses as trial by newspaper of pending causes and noncorrupt influencing of witnesses and jurors will, under the present ruling, escape punishment altogether, either as contempts or as crimes.

FRED R. EDNEY, JR.

Elections—Federal Laws Applied to Primaries

Defendants, election officials, were charged with having altered, falsely counted and certified the returns of ballots cast in a Democratic primary election in Louisiana. The primary was held for nomination of a candidate for Representative in Congress. By Louisiana law no candidate unsuccessful in the primary could receive any votes in the general election, "write-in" votes for such persons being disqualified as having been cast for an ineligible candidate.[1] Because of these laws and the one party character of Louisiana politics, the outcome of the Democratic primary has always been tantamount to election. Indictments were secured under statutes providing penalties for injury or oppression of any citizen in the free exercise of rights secured to him by the Constitution or laws of the United States. *Held:* (1) Congress has the power to control fraud in such a primary election, and (2) it had exercised that power through Sections 19[2] and 20[3] of the Criminal Code, under which the indictments were secured.[4]

[31] Nye v. United States, 61 Sup. Ct. 810, 817, 85 L. ed. Adv. Ops. 733.

[32] *See,* Nye v. United States, 61 Sup. Ct. 810, 818, 85 L. ed. Adv. Ops. 733 (1941) (Mr. Justice Stone dissenting: "The question is important, for if conduct such as the record discloses may not be dealt with summarily the only recourse of a federal court for the protection of integrity of proceedings pending before it, from acts of intimidation and corruption outside the court room, is to await the indictment of the offender, with or without adjournment of the pending proceedings as the exigencies of the case might require").

[1] Serpas v. Trebucq, (La. app.) 1 So. (2d) 346 (1941); rehearing denied with opinion, 1 So. (2d) 705 (1941).

[2] R. S. §5508; c. 321, §19, 35 Stat. 1092; 18 U. S. C. A. §51 (1927).

[3] R. S. §5510; c. 321, §20, 35 Stat. 1092; 18 U. S. C. A. §52 (1927).

[4] United States v. Classic, 61 Sup. Ct. 1031, 85 L. ed. Adv. Ops. 867 (1941).

The second section of Article 1 of the Constitution provides that the House of Representatives shall be "composed of members *chosen* every second year *by the people* of the several States. . . ." The fourth section of Article 1 further provides that, "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."[5]

Manifestly these sections invest Congress with power to control general federal elections.[6] This power is recognized to be restricted only in the sense that Congress has *permitted* the states to regulate federal elections held within their borders.[7] It was long tacitly assumed that the power of Congress to control elections if it saw fit did not extend to primaries. The question was expressly reserved[8] until presented to the Supreme Court in *Newberry v. United States* in 1921.[9] Federal legislation purporting to regulate primaries as well as general elections was declared unconstitutional.[10] But in the instant case the court unanimously asserts the Congressional power to regulate primaries involving a federal office where by state law the primary is constituted an integral part of the election or, as a practical matter, almost invariably controls the outcome of the general election.[11]

In the *Newberry* case the issue was directly presented by indictment under the Federal Corrupt Practices Act.[12] The court divided four to four, a ninth judge reserving his opinion on the Congressional power over primaries under the Seventeenth Amendment but declaring the

[5] U. S. CONST. AMEND. XVII providing for popular election of Senators instead of appointment by the various state legislatures eliminates any distinction between Senators and Representatives as to the question of federal control of elections.

[6] Devoe v. United States, 103 F. (2d) 584 (C. C. A. 8th, 1939); *Ex parte* Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. ed. 274 (1888); *Ex parte* Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. ed. 274 (1884); *Ex parte* Clarke, 100 U. S. 399, 25 L. ed. 715 (1879); *Ex parte* Siebold, 100 U. S. 371, 25 L. ed. 717 (1879).

[7] Lackey v. United States, 107 F. 114 (C. C. A. 6th, 1901); *Ex parte* Siebold, 100 U. S. 371, 25 L. ed. 717 (1879); for collected cases see Note (1902) 53 L. R. A. 660.

[8] Blair v. United States, 250 U. S. 273, 39 Sup. Ct. 468, 63 L. ed. 979 (1919); United States v. Gradwell, 243 U. S. 476, 37 Sup. Ct. 407, 61 L. ed. 857 (1917); affirming United States v. O'Toole, 236 F. 993 (D. C. S. D. W. Va. 1916).

[9] Newberry v. United States, 256 U. S. 232, 41 Sup. Ct. 489, 65 L. ed. 913 (1921); Notes (1921) 92 CENT. L. J. 445, (1922) 22 COL. L. J. 54, (1921) 19 MICH. L. REV. 860.

[10] Federal Corrupt Practices Act, c. 392, 36 Stat. 822-824 (1910); c. 33, 37 Stat. 25-29 (1911) (regulation of primary and general election campaign expenditures).

[11] The words "primaries" and "elections" as used in this note apply only to those primaries or elections where a federal office is involved. There will be no mention of primaries or elections other than these.

[12] See *supra* note 10.

Act unconstitutional in that it was passed before the Amendment was ratified.[13] The otherwise even division of the court was rooted in the philosophical question of whether the above-mentioned sections of Article 1 of the Constitution were grants of power from individual states to the Federal Government, or from the Federal Government to the states. Four justices considered Article 1, Sections 2 and 4 as grants to the states of part of the inherent power of the Federal Government, and therefore urged that powers not granted (over primaries) were reserved to the granting government. Moreover, that the Constitution should not be narrowly construed, but rather that the word "elections" in the latter section should be recognized as including *any process or phase* in the designation of representatives by popular choice. The remaining four justices maintained conversely that the Federal Government could control elections only in so far as the power was directly conferred by Article 1, Section 4. For, as they urged, this being a grant of power from the states, no implied or inherent power could be said to exist outside of the technical words of the grant. The framers of the Constitution had no knowledge of primaries and therefore they must have intended the term "elections" to apply only to the final act in the designation of the officeholder. These justices considered it immaterial that the primary might have a pronounced effect on the outcome of the general election.

Admirably, the court in the instant case, faced only with the complete diversity of opinion in the *Newberry* case, acted as a whole in deciding that Congress did have the power in question. Following closely the ideas of one bloc of justices in the *Newberry* case, the court reasoned as follows: Article 1, Section 4, as a grant from the Federal Government to the states, expressly reserves to Congress the power to regulate the manner of holding "elections". This power is not lost by permitting the states to split their federal elections into two or more steps, nor is its application in any way limited to the final step in such elections. The Louisiana primary, statutes having eliminated defeated primary candidates from the general election and in effect made the primary an integral part of the election,[14] was an "election" within the meaning of the term as used in Article 1, Section 4, and is therefore subject to Congressional regulation. However, the court did not stop at that point but went on to base their decision on grounds more fundamental in political philosophy: Article 1, Section 2 provides that Representatives shall be "*chosen* . . . by the people. . . ." As a practical matter the choice of Representative in Louisiana is always made in the

[13] See *supra* note 5.

[14] La. Act No. 46, Regular Session, 1940, §87; Serpas v. Trebucq, 1 So. (2d) 346 (1941), rehearing denied with opinion 1 So. (2d) 705 (1941).

Democratic party primary—the election being a mere formality ratifying the results of the primary. Such being the case, Congress should be permitted to see to it that Representatives are in fact "chosen" by the people, and to protect the integrity of the step in which actual choice is made, as well as the final step which only confirms that choice.[15]

A further question presented to the court in the instant case was: Conceeding the power of Congress to maintain the integrity of the Louisiana primary, has it exercised this authority by appropriate legislation? Sections 19 and 20[16] of the Criminal Code are the only applicable statutes.[17] The former section penalizes acts of conspiracy to injure and oppress any citizen in the free exercise of rights "secured to him by the Constitution or laws of the United States." During its history the rights to testify before a land office,[18] to be secure in federal custo-

[15] This recognition of the political potency of the primary in one party states undermines the status of the notorious Texas racial discrimination cases. In Texas the political party is not supported by state funds or connected with state control. Grovey v. Townsend, 295 U. S. 45, 55 Sup. Ct. 622, 79 L. ed. 1292 (1935) therefore found the party to be a purely private organization and, as such, able to prescribe any qualifications it deemed expedient for membership or participation in the primary. The Democratic party in Texas found it advisable to permit only white voters to take part in the primary. Since the Fourteenth and Fifteenth Amendments prohibiting racial discrimination do not apply to the acts of purely private individuals or organizations the *Grovey* case allowed this arbitrary exclusion of negroes. Though the Texas primary has not been constituted an integral part of the election by law, its practical effect is the same as in Louisiana. In Texas the Democratic nomination is always tantamount to election. Unfortunately, the terrific practical significance of the primary failed to influence the decision. As a result the negro was almost completely disfranchised in Texas. The instant case considers such a primary of sufficient public importance to warrant its subjection to federal control, even though it is not conducted in connection with state laws. With proper application of this decision the Texas negro will get his vote back, at least in federal elections. Notes (1935) 35 COL. L. REV. 106, (1935) 2 U. OF CHI. L. REV. 640, (1935) 48 HARV. L. REV. 1436, (1935) 33 MICH. L. REV. 935, (1935) 22 VA. L. REV. 91.

[16] Originally R. S. §5508 (Act May 31, 1870, c. 116, 16 Stat. 141) and R. S. §5510 (Act May 31, 1870, c. 116, 16 Stat. 144). Repealed (1909) c. 321, §341, 35 Stat. 1153. Reenacted without significant change (1909) c. 321, §19, 35 Stat. 1092, and (1909) c. 321, §20, 35 Stat. 1092, 18 U. S. C. A. §§51 and 52. Originally passed as part of extensive Reconstruction legislation to protect the civil rights of the then recently freed negroes, these statutes were left in force when the other sections were repealed in 1894. *See* United States v. Bathgate, 246 U. S. 220, 225, 38 Sup. Ct. 269, 270, 62 L. ed. 676, 679 (1918); United States v. Gradwell, 243 U. S. 476, 483, 37 Sup. Ct. 407, 410, 61 L. ed. 857, 863 (1917); United States v. Moseley, 238 U. S. 383, 388, 35 Sup. Ct. 904, 906, 59 L. ed. 1355, 1357 (1915) (dissenting opinion). The applicable portion of §20 punishes the same acts which are prohibited under §19 when they are perpetrated under color of law. Although the last portion of §20 applies specifically to racial discrimination, it was held in the instant case that the first clause extends protection to all classes of citizens. Both sections protect the same rights; *i.e.*, those secured by the Constitution or laws of the United States, and statutory construction seems identical as to whether or not the particular privilege is in fact protected.

[17] Though both sections protect rights secured by the Constitution *or laws* of the United States they themselves are the only laws in point with the offense alleged. The Hatch Act, c. 410, §1, 53 Stat. 1147, 18 U. S. C. A. §61, *et seq.*, does not regulate primaries in this respect, and applies only to persons or organizations receiving federal funds.

[18] Foss v. United States, 266 F. 881 (C. C. A. 9th, 1920).

dy,[19] to inform officers of the commission of a federal crime,[20] to prove up a federal homestead,[21] to be free from involuntary servitude,[22] to enforce obedience to a decree of a federal court,[23] among others, have been held to be secured by the Constitution or laws of the United States, and so to fall within the meaning and protection of the statute.[24] In many of these cases the rights protected were founded on implication from the Constitution and not secured by express words.[25] Applying the statute to elections, it has been held to protect the right to cast a vote in a general election,[26] and to have that vote counted as cast.[27] However, in *Gradwell v. United States,* the court refused to extend these decisions to a primary election and gave as their reason the fact that the primary had only an indirect effect on the results of the general election.[28] The theory of the court was that, regardless of the injury to the public, the statute had no application where no definite personal right had been invaded by the acts of the defendants.[29]

The majority of the court in the principal case, in holding that Congress had exercised its power to control primaries through the above-

[19] Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. ed. 429 (1892).

[20] Motes v. United States, 178 U. S. 458, 25 Sup. Ct. 993, 44 L. ed. 1150 (1900); *In re* Quarles, 158 U. S. 532, 15 Sup. Ct. 959, 39 L. ed. 1080 (1895).

[21] United States v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. ed. 673 (1884).

[22] Smith v. United States, 157 Fed. 721 (C. C. A. 8th, 1907).

[23] United States v. Lancaster, 44 Fed. 885 (C. C. W. D. Ga. 1890).

[24] For collected cases see Note (1937) 107 A. L. R. 1363.

[25] Nicholson v. United States, 79 F. (2d) 387 (C. C. A. 8th, 1935); Hoffman v. United States, 68 F. (2d) 101 (C. C. A. 10th, 1933); *In re* Quarles, 158 U. S. 532, 15 Sup. Ct. 959, 39 L. ed. 1080 (1895) (right to inform of crime); Foss v. United States, 266 F. 881 (C. C. A. 9th, 1920) (right to testify); Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. ed. 429 (1892) (right to be secure in custody).

[26] Guinn v. United States, 238 U. S. 347, 35 Sup. Ct. 926, 59 L. ed. 1340 (1915) (grandfather clause); *Ex parte* Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. ed. 274 (1884) (Ku Klux cases); United States v. Pleva, 66 F. (2d) 529 (C. C. A. 2d, 1933); Aczel v. United States, 232 Fed. 652 (C. C. A. 7th, 1916); Felix v. United States, 186 Fed. 685 (C. C. A. 5th, 1911).

[27] United States v. Moseley, 238 U. S. 383, 35 Sup. Ct. 904, 59 L. ed. 1355 (1915); Devoe v. United States, 103 F. (2d) 584 (C. C. A. 8th, 1939); United States v. Clark, 19 F. Supp. 981 (D. C. W. D. Mo. 1937); Diulius v. United States, 79 F. (2d) 371 (C. C. A. 3d, 1935); Connelly v. United States, 79 F. (2d) 373 (C. C. A. 3d, 1935); United States v. Pleva, 66 F. (2d) 529 (C. C. A. 2d, 1933).

[28] Gradwell v. United States, 243 U. S. 476, 37 Sup. Ct. 407, 61 L. ed. 857 (1917), affirming United States v. O'Toole, 236 Fed. 993 (D. C. S. D. W. Va. 1916). *Held:* no injury to rights of primary candidates where persons unsuccessful in the primary could be nominated by certificate signed by at least five percent of the entire vote polled at the last preceding general election. Notes (1917) 31 HARV. L. REV. 302, 313, (1917) 3 VA. L. REG. (n. s.) 131, (1917) 27 YALE L. J. 137.

[29] United States v. Bathgate, 246 U. S. 220, 38 Sup. Ct. 269, 62 L. ed. 676 (1918) (bribery at general election held injury to public and no invasion of personal rights); United States v. Kantor, 78 F. (2d) 710 (C. C. A. 2d, 1935) (mere inclusion of disqualified votes without subtraction of votes already cast held no invasion of personal rights).

detailed section, was able to impliedly distinguish the *Gradwell* case on the grounds that the Louisiana primary was an integral part of the election. The court reasoned: Since this statute secured the right to vote and to have ballots correctly counted in a general election, the acts of defendants, if committed in a general election, would have been within the statute. Since the primary before the court was an integral step in the election and an indispensable part thereof, both by state law and practical local politics, it followed that the false counting of the primary ballots was an act within the purview of the statute.[30] It was said that in view of the broad language of the statute its protection should not be denied merely because fraud in some primaries might be no interference with a Constitutional right—implying that the statute would not apply where the primary was not an integral part of the election.

On this phase of the case the majority met with vigorous opposition. The minority of the court pointed out the maxim that penal statutes are to be strictly construed.[31] The statute in question was intended to protect rights *secured* by the Constitution and therefore the court must find more in the Constitution than the power to afford protection—it must find the protection itself.[32] Finally the dissent interpreted legislative intent as limiting the application of the statute to rights involved in general elections only, because primaries were almost unknown when the statute was passed.[33] In rebuttal of the dissent it is tenable to argue that, though penal statutes are to be construed in favor of the accused, this rule is not strictly applied as was true in the old days when capital offenses were common.[34] Many rights have been protected by the statute which were only impliedly secured by the Constitution.[35] Furthermore, regardless of legislative intent, even penal statutes have been construed to cover everything subsequently falling within their scope.[36]

The principal objection to the conclusion that Sections 19 and 20 apply to offenses of the type charged in the instant case is seen in the fact that *this application seems dependent on the existence of the primary as an integral part of the election.* In order to determine whether there is any offense at all, the court must first determine that this is, in

[30] The court did not pass on the rights of candidates to run for office and to have ballots cast in favor of their nomination counted as cast. *See* Morris v. United States, 261 Fed. 275 (C. C. A. Ill. 1919) and *supra* note 28.

[31] United States v. Wiltberger, 5 Wheat. (U. S.) 76, 105, 5 L. ed. 37, 45 (1820).

[32] United States v. Sanges, 48 Fed. 78 (C. C. N. D. Ga. 1891). *Contra:* Foss v. United States, 266 Fed. 881 (C. C. A. 9th, 1920).

[33] *See* United States v. Moseley, 238 U. S. 383, 388, 35 Sup. Ct. 904, 906, 59 L. ed. 1355, 1357 (1917) (dissenting opinion).

[34] MAXWELL, INTERPRETATION OF STATUTES (6th ed. 1920) 462.

[35] See *supra* note 22.

[36] Browder v. United States, 312 U. S. 335, 61 Sup. Ct. 599, 85 L. ed. Adv. Ops. 537 (1941); Note (1940) 9 GEO. WASH. L. REV. 234.

fact, the status of the particular primary. Making the existence of the crime dependent on judicial research subsequent to the offense is highly undesirable where the sovereign has no common law criminal jurisdiction.[37] The accused has a right to be put on notice by statute as to whether particular acts constitute a federal offense. Where there are no laws making the primary an integral part of the election, fraud in the primary of the dominant party, under the strict language of the principal case, would constitute a federal offense, whereas the same acts in the primary of the minority party would not. The determination of whether there was a federal offense would necessitate judicial research into local laws and political customs—in effect, judicial legislation—in every case presented.[38] The majority in the instant case dismissed this seemingly powerful objection lightly by declaring that it presented a difficulty inherent in the judicial application of every federal criminal statute, since none could be extended beyond the limits prescribed by the Constitution.

However, a finding that the legislation was inappropriate would have made it unnecessary to pass on the question of Congressional power to control primaries. If the question had remained undecided, as after the *Gradwell* case, Congress might have hesitated to pass more specific legislation of this nature for fear that it would be ruled unconstitutional under the *Newberry* case. It is possible, therefore, that the majority deemed itself compelled by reason of public necessity to "stretch an old statute to new uses" in order to establish an unequivocal holding that Congress *had the power* to control primaries involving federal offices.

Though the instant case settles the question of federal power to control primaries which are an integral part of the election by law, or are equivalent to election by local custom, its future application may present many problems. The court might deny the power of Congress to regulate minority party primaries not integral parts of the election by law. Such a view could be taken under the instant case by limiting its authority to facts such as were there directly presented. A ruling denying protection to minority party primaries would burden the courts with determining whether any particular primary was of sufficient im-

[37] United States v. Hudson, 7 Cranch (U. S.) 32, 3 L. ed. 259 (1812) (no common law offense against the United States).

[38] *Id.* at 34, 3 L. ed. at 260 (act must be made a crime by statute); *accord,* United States v. Lacher, 134 U. S. 624, 628, 10 Sup. Ct. 625, 626, 33 L. ed. 1080, 1083 (1890) (acts must be plainly and unmistakably within criminal statute); James v. Bowman, 190 U. S. 127, 23 Sup. Ct. 678, 47 L. ed. 979 (1903); United States v. Reese, 92 U. S. 214, 221, 23 L. ed. 563, 566 (1875) "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." Also see U. S. CONST. AMEND. VI.

portance to warrant federal control. This determination would be especially difficult in multi-party states. It seems evident that even the minority party primary has some effect on the general election.[39] The extension of protection to primaries equivalent to election because of the character of local politics, while denying protection to the minority party primaries, might be arbitrary discrimination in violation of the due process and equal protection clauses of the Constitution.[40] And though one party may have dominated a state for many years, and so brought its primaries under federal protection, a political upheaval might put the other party in power and its candidates in office, even though its primaries had not been under federal supervision. These questions must be resolved by future legislation or judicial decree. This decision, the court being divided four to three on the question of statutory construction, stands in danger of being overruled unless more definite laws are passed. Specific statutes would eliminate the idea of judicial legislation and greatly lighten the burden which the instant case places on the judiciary. Therefore it is submitted: (1) An appropriate Federal Primary Control Act should be enacted settling the difficulties inherent in the application of the instant case. (2) Full protection of the public in elections demands, in the event such legislation is passed, that the court shall not find it repugnant to the Constitution when applied to minority party primaries not integral parts of the election by law, but shall take the further necessary step of holding that federal control may extend to *all* primaries where a federal office is involved.

JOHN T. KILPATRICK, JR.

Evidence—The Opinion Rule—Use of Hypothetical Question as Basis of Expert Opinion

The *P*'s intestate was thrown to the center of the highway when the auto in which she was riding as a passenger failed to make a turn in the road and struck a bridge abutment. One of the *D* motor lines' trucks was immediately behind the car. *P*'s contention is that the truck ran over the girl's body, thereby contributing to her death. The *D* contends that its truck passed to the left of the prone figure. On trial, the *D* motor lines offered testimony of a physician who had examined the girl, and proposed to ask him the following question:

[39] See concurring opinion of Mr. Justice Pitney in Newberry v. United States, 256 U. S. 232, 275, 41 Sup. Ct. 469, 480, 65 L. ed. 913, 928 (1921).

[40] Defendants raised this point in their petition for rehearing. (Rehearing denied Oct. 14, 1941, 10 LAW WEEK 3125); Brief in support of petition for rehearing, p. 8, United States v. Classic, 61 Sup. Ct. 1031, 85 L. ed. Adv. Ops. 867 (1941).

"Dr. T, from your examination of the body of Mildred Catherine Hester, before her death, as you have testified, and the examination of the injuries such as you have found, do you have an opinion satisfactory to yourself as to whether or not any of those injuries were caused by the body coming into contact with the Horton Motor Company's truck?"

The answer, as reported out of the hearing of the jury, was:

"I do not believe that any of her injuries were sustained by being struck by the Horton Motor Lines' truck."

The trial judge excluded the question and answer, presumably on the ground that it was opinion evidence invading the province of the jury. Thereafter, the jury found for the *P* and rendered a substantial verdict against the trucking concern, the driver of the truck, and the driver of the wrecked car. On appeal by the *D* motor lines; *held*[1] that the exclusion of the proposed question and answer constituted reversible error.[2]

The instant case raises two problems which will be dealt with in this note: (1) The extent of the rule against invading the province of the jury in cause and effect cases—cases where given a particular hurt, expert opinion evidence is offered as to the contributing causes. (2) The permissible wording of such a question, opinion evidence being admissible.

Among the foremost of the exclusionary rules of evidence is the so-called "opinion" rule. The substance of it and the original foundation of the rule, to use Wigmore's terminology, is the requirement of "Testimonial Knowledge". The witness must know from a factual basis whereof he speaks, and must not be merely hazarding a guess.[3] In addition, the rule is held to cover the inferences drawn by witnesses who have had personal observation.[4] A recognized exception exists where the witness has some special skill or experience which would aid the tribunal in arriving at its conclusions from the operative facts and the subject is one that requires special knowledge, skill, experience, or training.[5] However, there has been a tendency to limit the scope of this exception by, in turn, grafting an exception on it. That is, American courts have shown an inclination to exclude even the opinion of expert witnesses, on the issue or issues which ultimately go to the jury.[6]

[1] Hester v. Motor Lines, 219 N. C. 14 S. E. (2d) 794 (1941).

[2] Even though, previously, the Doctor was permitted to testify that the girl's injuries were produced by her striking the concrete roadbed.

[3] 2 WIGMORE, EVIDENCE (3d. ed. 1923) §§657, 557. RESTATEMENT, CODE OF EVIDENCE (Tent. Draft No. 4, 1933) §501.

[4] WIGMORE, EVIDENCE (student's Textbook 1935) §127.

[5] RESTATEMENT, CODE OF EVIDENCE (Tent. Draft No. 4, 1933) §502; 2 WIGMORE, EVIDENCE (3rd ed. 1940) 557; State v. Hightower, 187 N. C. 300, 121 S. E. 616 (1926); State v. Bowman, 78 N. C. 509 (1878).

[6] Keefe v. Amour & Co., 258 Ill. 28, 101 N. E. 252 (1913); Yost v. Conroy,

The theory followed is that such testimony would usurp the function of the jury.

While it is difficult to harmonize the decision in this state where the jury-province rule has been applied, the North Carolina court has consistently paid lip service to it. Our court, however, in a majority of the cases, has indicated that the rule's objection is avoided (and expert opinion evidence is admissible): (1) If the opinion is based upon facts admitted or found, as contrasted with facts which are controverted;[7] (2) if all the surrounding facts are known to the expert from personal observation;[8] or (3) if, where the facts are controverted, the opinion is presented as the answer to a hypothetical question, even though the question may present the identical problem as the ultimate issue for the jury.[9]

In the cases placed by the court in the third category, a considerable emphasis is directed to the wording of the hypothetical question.[10] It

92 Ind. 464 (1883); United States v. Steadman, 73 F. (2d) 704 (C. C. A. 10th, 1934).

[7] *See*, Summerlin v. Carolina & N. W. R. Co., 133 N. C. 550, 555, 45 S. E. 898, 900 (1903) where the court suggested that even in this instance the question should be hypothetical because the jury must still pass upon the credibility of the witness.

[8] At this point the cases are difficult to follow. The proposition was clearly sustained in the following cases: George v. Winston-Salem Southbound Ry., 215 N. C. 773, 95 S. E. 2d 373 (1939); Keith v. Gregg, 210 N. C. 802, 188 S. E. 849 (1936); Shaw v. National Handle Co., 188 N. C. 222, 124 S. E. 325 (1924); State v. Hightower, 187 N. C. 300, 121 S. E. 616 (1923) (the court did suggest in this case that the better practice would have been to question the expert in hypothetical form); Ferebee v. Norfolk & So. Ry., 167 N. C. 290, 83 S. E. 360 (1914). But the distinction between cases where the court has required the use of the hypothetical question and the cases above cited is slight. In each of the cases cited in footnote 10 *infra*—cases where the hypothetical question was required—it is submitted that the expert based his opinion as much upon personally observed facts as the experts testifying in the cases listed here—category (2). What seems to bother the court in these latter cases is not so much whether the opinion was based upon observed facts, but whether the witness's opportunity of observation sufficiently put him in command of the circumstances that he should be permitted to give a definite opinion as to the producing cause of the injury. This is to say that, if the expert did not examine the injured party until a considerable time after the accident, such as was true in the *Summerlin* case, 133 N. C. 550, 45 S. E. 898, there is a strong possibility that other factors could have produced or aggravated the injury. Apparently, the court wishes this possibility of error brought to the attention of the jury at the time the jury receives the opinion.

[9] State v. Carr, 196 N. C. 129, 144 S. E. 698 (1928); Hill v. Louisville Ry., 186 N. C. 475, 119 S. E. 884 (1923); Plummer v. Seaboard Airline, 176 N. C. 279, 96 S. E. 1032 (1918); Lynch v. Rosemary Mfg. Co., 167 N. C. 98, 82 S. E. 6 (1914); Herring v. Atl. Coastline Ry. Co., 160 N. C. 252, 74 S. E. 8 (1912); Parrish v. High Point Ry. Co., 146 N. C. 125, 59 S. E. 348 (1907); State v. Wilcox, 132 N. C. 1120, 44 S. E. 625 (1903); Summerlin v. Carolina & N. W. R. Co., 133 N. C. 550, 45 S. E. 898 (1903); State v. Cole, 94 N. C. 959 (1886); State v. Bowman, 78 N. C. 509 (1878).

[10] See particularly: Summerlin v. Carolina & N. W. R. Co., 133 N. C. 550, 45 S. E. 898 (1903); Parrish v. High Point Ry. Co., 146 N. C. 125, 59 S. E. 348 (1907); Herring v. Atl. Coastline Ry. Co., 160 N. C. 252, 74 S. E. 8 (1912); State v. Bowman, 78 N. C. 509 (1878).

is said that the question should contain a statement of facts which might have been testified to by witnesses or which may be found by the jury from the evidence.[11] "The party propounding the question may, it is true, so array the facts in the question as to present fully his contention in regard to them, provided there be evidence legally sufficient to sustain a finding of them by the jury. The proper form of the question is: If certain facts assumed in the question to be established by the evidence should be found by the jury, what would be the witness's opinion upon the facts thus found of the matter involved and to which the inquiry is directed?"[12] Some cases have stressed the point that the question should conclude with a clause: "might these factors have produced this result",[13] or "could the injury have been caused by these factors".[14] However, this requirement has not been consistently applied. In later cases, generally, the wording of the hypothetical question was examined less technically then in the earlier cases.[15]

Judged by these standards, the action of the trial judge in the principal case in excluding the question submitted was entirely correct, as the record shows the question did not follow the prescribed lines, and the issue of the truck striking *P*'s intestate was a fundamental issue in the case against the motor lines. However, it is submitted that the position taken by the appellate court is the more sensible one.

The theory behind the use of the hypothetical question is sound. A means is provided by which the trier of fact may determine the value of the opinion by comparing and evaluating the facts in its premises with the facts as ultimately found from all the evidence.[16] Yet, sound as it may seem theoretically, many abuses have been committed in its name. There is always a tendency on the part of the courts (this is true in this state)[17] to adopt one form of wording as a formula—a breach of which constitutes reversible error. In addition, clever lawyers often conceal the real significance of the evidence by unduly emphasizing certain data. Often they are able to distort the expert's opinion in such a manner that his answer to a complicated question may not express his actual opinion to the actual facts.[18] Because of these abuses,

[11] See note 12 *infra*.
[12] Summerlin v. Carolina & N. W. R. Co., 133 N. C. 550, 45 S. E. 898 (1903).
[13] Parrish v. High Point Ry. Co., 146 N. C. 125, 58 S. E. 348 (1907).
[14] Herring v. Atl. Coastline Ry. Co., 160 N. C. 252, 74 S. E. 8 (1912). It is submitted that this requirement springs from the same proposition as was discussed in footnote 9 *supra*.
[15] The court has been more ready to say that an expert is basing his opinion upon sufficient personal observation. George v. Winston-Salem Southbound Ry. Co., 215 N. C. 773, 95 S. E. (2d) 373 (1939); Keith v. Gregg, 210 N. C. 802, 188 S. E. 849 (1936).
[16] Rosenthal, *The Development of the Use of Expert Testimony* (1935) 2 LAW AND CONTEMP. PROB. 403.
[17] See cases cited in footnote 9 *supra*.
[18] See 2 WIGMORE, EVIDENCE (3rd ed. 1940) §686.

most authorities advocate that the expert witness be permitted to give his opinion without the use of a hypothetical question.[19] It is their contention that cross-examination could be successfully employed to bring out the exact facts upon which the opinion is based, and that therefore there is no need for posing a time-consuming hypothetical question as a preliminary to the opinion.

As for the rule excluding evidence which the court deems as usurping the province of the jury, it seems unreasonable that the admissibility of expert opinion should be dependent on any such meritless and nebulous standard. As pointed out in a previous case comment in this REVIEW:[20] "Evidence of the very point in issue would seem to be of the highest pertinency. Thus a strict application of the rule leads to the absurd result that admissibility varies in inverse proportion to relevancy". This policy is often defended in that it is said to be necessary to prevent the jury from giving unmerited weight to such an opinion instead of giving the question that independent consideration to which a party is entitled in a jury trial. However, this argument is difficult to follow for, by hypothesis, the subject is one with which the jury is incapable of dealing. It is submitted that a more productive approach would be simply to ask whether, under the circumstances of the case, the opinion would aid the jury in arriving at a sound decision.

E. W. COLE, JR.

Labor Law—Applicability of Anti-Racketeering Act to Certain Practices of Labor Unions

Convicted under the Federal Anti-Racketeering Act,[1] defendant, a truck drivers' union in New York City, appealed to the federal circuit court. Evidence was that the union sought to control all hauling in New York City; that it posted members on the edge of the city, who attempted to commandeer incoming trucks, drive them within the city, and do any necessary loading and unloading; that various breaches of the peace and acts of violence resulted when the truck operators resisted the labor unions; that in most cases the union men exacted up to $9.42 (a day's wages) from each incoming truck, regardless of the length of time involved in driving or "standing by";[2] and that the union

[19] 2 WIGMORE, EVIDENCE (3d ed. 1940) §686; RESTATEMENT, CODE OF EVIDENCE (Tent. Draft No. 4, 1933) §509; *Tentative Draft of Model Expert Testimony Act*, 11.
[20] Note (1938) 16 N. C. L. REV. 180.

[1] 48 Stat. 979 (1934), 18 U. S. C. A. §420a-e (Supp., 1940).
[2] As the name implies, a stand-by is a local union member who is present at a particular job-site and is paid a full salary, because of pressure exerted on the employer by a labor union, but who does practically no work, due to the

members probably would have done any and all the truck driving if given a chance to. *Held*, that a logical and prudent interpretation of the clause of the Anti-Racketeering Act which reads, "not including, however, the payment of wages by a bona fide employer to a bona fide employee", and also an examination of the legislative history of the statute, lead to the conclusion that Congress intended thereby to exempt labor disputes generally from the purview of the Act; and, this being a labor dispute, defendant is not guilty of the violation charged, even though its conduct is very questionable.[3]

This case is by no means unique. Various contemporary writers have gathered an alarming number of examples of "rackets" being operated by labor unions. In most such cases force and violence are not used, so that these unions are not subject to attack by injunction under the Federal Anti-Injunction Act.[4] Practically every exhibit at the New York World's Fair was forced to pay tribute to the local unions in the form of hiring stand-bys. Stand-bys had to be hired even for extremely technical jobs which none of the local men possibly could have done. Several workers sent as stand-bys for some noted mural painters, turned out to be only house painters when unexpectedly asked to do some work.[5] Painters' unions in various sections of our country forbid the use of spray guns—handbrush painting increases the time involved, and so proportionately the cost.[6] Because the local builders' unions refuse to work with prefabricated materials, FHA records reveal that, instead of more positions being created for carpenters, plumbers, masons, and laborers, the number of homes constructed in Cleveland, Ohio, for example, is greatly reduced.[7] Chicago grocers, wishing to pass on to the public the savings in delivery charges of cash-and-carry milk, were prevented from so doing by the local milk-wagon drivers' union.[8] In various parts of the country, union men will not work under the direct supervision of the person having the work done, but will force the hiring of many unneeded supervisors and "straw bosses".[9]

Such examples could be cited almost *ad infinitum*, but it will suffice to say that because of the very union under indictment in the principal case, it costs $112.00 more to distribute a load of vegetables in New

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fact that the employer uses his own previously employed workers even though he has to pay double for so doing.

[3] United States v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, 118 F. (2d) 684 (C. C. A. 2d, 1941). *Contra:* Nick et al. v. United States, 122 F. (2d) 660 (C. C. A. 8th, 1941).

[4] 47 Stat. 70 (1932), 29 U. S. C. A. §101-115 (Supp., 1940).

[5] Stanley High, *Labor in the World of Tomorrow*, Reader's Digest, Nov., 1939.

[6] Thurman Arnold, *Labor's Hidden Holdup Men*, Reader's Digest, June, 1941.

[7] *Ibid.*

[8] *Ibid.*

[9] William Hard, *Labor and National Unity*, Reader's Digest, Nov., 1939.

York than in other comparable cities. A farmer bringing in his own produce on his own truck must hire one of the stand-bys as the price of unloading the truck.[10]

It is believed that the problem thus seen to exist is not adequately dealt with by any of the existing labor acts, or any other federal statutes, unless it is the Anti-Racketeering Act. A survey of the most important labor legislation shows that in the last decade Congress has without exception been affording increased powers and protection to labor. First, the Norris-LaGuardia, or Federal Anti-Injunction Act outlawed the "yellow dog" contract, thus eliminating the practice followed by many employers of hiring only those workers who would sign a contract not to join a union or engage in union activities; and also prevented the abuse of the strike injunction by prohibiting the enjoining of peaceful picketing, and strike practices not accompanied by force or violence.

Second, the Wagner, or National Labor Relations Act[11] guaranteed the right of workers to organize and bargain collectively, provided machinery for protection against unfair labor practices of employers, and provided that no employer could refuse to bargain collectively with a bargaining unit for labor selected under the provisions of the Act.

Third, the Fair Labor Standards, or Wages and Hours Act[12] provides that wages shall be kept above a certain minimum; that hours shall in the main be kept below a certain maximum, or that "time-and-a-half" shall be paid for overtime; that no employee shall be discriminated against by his employer for seeking his rights under the Act; and that the courts may enforce the Act by injunction.

None of these acts would seem to deal with the conduct of the New York truckers' union, and other racketeering unions, except in the cases where these unions resort to outright violence, which can be enjoined under the Norris-LaGuardia Act.

It seems conceivable that the Sherman Anti-Trust Act,[13] which outlaws combinations in restraint of trade and imposes a penalty of treble damages upon violators of the act, would be an effective weapon for eliminating these insidious union activities. But in the recent *Apex Hosiery* case,[14] the United States Supreme Court held that labor disputes are not violative of the Sherman Act unless their purpose is to affect prices or otherwise to destroy free commercial competition in the open market. This Act is thus obviously emasculated insofar as the problem under discussion is concerned.

[10] Thurman Arnold, *Labor's Hidden Holdup Men*, Reader's Digest, June, 1941.
[11] 49 Stat. 449 (1935), 29 U. S. C. A. §§151-156 (Supp. 1940).
[12] 52 Stat. 1060 (1938), 29 U. S. C. A. §§201-219 (Supp. 1940).
[13] 26 Stat. 209 (1890), 15 U. S. C. A. §§1-7 (1941).
[14] Apex Hosiery Co. v. Leader, 310 U. S. 469, 60 Sup. Ct. 982, 84 L. ed. 1311 (1940).

Obviously the Department of Justice is in need of some weapon capable of controlling those unions, which, though not using violence, nevertheless are victimizing the consumer and the public. But for the present decision, an ideal weapon might be found in the Anti-Racketeering Act, which provides that one who, acting so as to affect trade or commerce, obtains or attempts to obtain money or valuable considerations or property belonging to another with his consent, if such consent is induced by wrongful use of force or fear or threats, is guilty of a felony. It is submitted that labor unions are just as capable of extortion and racketeering as any other group, and that there is no sound reason or doctrine that should exclude them from conviction under the Anti-Racketeering Act when it is proved beyond reasonable doubt in open court that they are engaging in these practices.

In the first place, it could be urged on good authority that the instant situation in New York did not involve simply "the payment of wages by a bona fide employer to a bona fide employee", as was held in the principle case. Unless the hirer has the right to discharge, then the worker cannot be considered an "employee".[15] That term means a person employed to labor for the pleasure or interest of another, or one employed to render service or assistance in some trade or vocation; one whom the employer retains the right to direct not only as to what shall be done, but how it shall be done;[16] and one whom the employer has the right to hire, *and discharge even short of the completion of the work.*[17] (This is of course subject to the provisions of the NLRA, that an employer cannot make union activity on the part of a worker the basis for discharging him, or for refusing to hire him in the first place.)[18] Furthermore, it has been held that workers who are guilty of acts of violence against the interests of their employers cannot be considered as employees either for the purpose of securing reinstatement by the NLRB, or of being considered as members of the union for the purpose of collective bargaining.[19] It is submitted that in the light of these holdings the members of the New York truckers' union cannot be considered as "bona fide employees" of the truck

[15] Lillibridge v. Industrial Accident Com., 4 Cal. App. (2d) 237, 40 P. (2d) 856 (1935); Bernal v. Star Chronicle Pub. Co., 84 S. W. (2d) 429 (Mo. 1935); Mitchell v. Maytag-Pacific-Intermountain Co., 184 Wash. 342, 51 P. (2d) 393 (1935); RESTATEMENT, AGENCY (1933) §221.

[16] Simmons v. Kansas City Jockey Club, 334 Mo. 99, 66 S. W. (2d) 119 (1933).

[17] Liberty Mutual Ins. Co. v. Boggs, 66 S. W. (2d) 787 (Tex. 1933).

[18] Phelps Dodge Corp. v. National Labor Relations Board, 61 Sup. Ct. 845, 85 L. ed. (Adv. Ops.) 753 (1941); National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U. S. 1, 57 Sup. Ct. 615, 81 L. ed. 893 (1937); Associated Press v. National Labor Relations Board, 301 U. S. 103, 57 Sup. Ct. 650, 81 L. ed. 953 (1936).

[19] Standard Lime & Stone Co. v. National Labor Relations Board, 97 F. (2d) 531 (C. C. A. 4th, 1938).

owners. It is a strange law that would compel a businessman to accept as his employee and the operator of his expensive machinery and equipment those who have used malicious coercion in foisting themselves upon him.

A second point is that there is a growing tendency in modern judicial thought to construe criminal statutes in a manner consistent with the intent of the legislature, and most conducive to social protection, rather than to follow the old hornbook rule that a criminal statute is to be construed strictly and in the light most favorable to the accused.[20] Social protection certainly seems to demand the conviction of the truckers' union here. Channels of transportation would be totally obstructed if truckers' unions in every town took similar liberties, for a trucking concern would be forced to pay a day's union wages every time one of its trucks entered the limits of any city.

Third, Congress believes in the policy that labor and employer should be on a parity for free and gentlemanly bargaining, as shown by section 1 of the NLRA. It is not intended that either group shall crack the tyrannical whip over the other.[21] On this hypothesis, for union operatives to fortify themselves on the public highway and suddenly assault passing truck drivers, and demand wages for driving the trucks thus taken over, is obviously nothing short of racketeering. It is certainly not settlement of labor disputes by parity bargaining.

Still a fourth idea that should be stressed is the quite obvious fact that labor as a whole is not benefited by most of this pernicious racketeering which certain unions are carrying on. For when the electricians at the New York World's Fair demanded that all electrical equipment used be wired and assembled at the Fair grounds rather than in the home state or factory,[22] the New York electricians were simply depriving other electricians throughout the country of work.[23] When certain

[20] United States v. Classic, 61 Sup. Ct. 1031, 85 L. ed. (Adv. Ops.) 867 (1941). (For discussion of this case, see case comment, page 93, *supra*); Braffith v. People, 26 F. (2d) 646 (C. C. A. 3d, 1928); Chapman v. Lake, 112 Fla. 746, 151 So. 399 (1932); State *ex rel.* Kurth v. Grinde, 96 Mont. 608, 32 P. (2d) 15 (1934); People v. Clark, 242 N. Y. 313, 151 N. E. 631 (1926); Thomas v. State, 40 Okla. Crim. Rep. 204, 267 Pac. 1040 (1928); Wilson v. State, 26 Ohio App. 7, 159 N. E. 585 (1927).

[21] In Swing v. American Federation of Labor, 372 Ill. 91, 22 N. E. (2d) 857 (1939), *rev'd on other grounds*, 61 Sup. Ct. 568, 85 L. ed. (Adv. Ops.) 513 (1940), involving a place of business being picketed because employees themselves unanimously preferred to remain non-union, Justice Shaw said, "The right of one group to organize for the advancement of its own ends is exactly equal to but no greater than the right of other citizens peaceably to pursue their own lawful occupations."

[22] Stanley High, *Labor in the World of Tomorrow*, Reader's Digest, Nov., 1939.

[23] The state of Nevada, according to the authority cited above, withdrew from the Fair partially because the local electricians' union demanded that its gigantic electrically operated model of Boulder Dam should be rewired by the locals—which would have involved wrecking the costly model almost entirely.

musicians' unions fight against non-local musicians performing in their "territory",[24] musicians in general are the principal sufferers. When certain unions in Belleville, Illinois and in Cleveland, Ohio, prevent the use of prefabricated materials,[25] factory workers in general suffer. The same is true when plumbers in Washington refuse to use pipe threaded at the factory; and when a Chicago buildings trade council prohibits the use of stone polished at the quarry in Indiana.[26] Congress has granted labor some very strong weapons. Section 1 of the NLRA, *supra,* shows that these weapons were intended to be used in removing labor from the inequitable domination of employers to which it had for centuries been subjected. There was never any intention that a few labor groups should turn these weapons upon their fellow workers, and exploit labor in general for their mere individual gain.

Finally, there is nothing in the wording of the Anti-Racketeering Act itself that would preclude its use in cleaning up this problem. At the end of section (d) of the Act is a proviso that "no court of the United States shall construe or apply any of the provisions of sections (a) to (e) of this act in such manner as to impair, diminish, or in any manner affect the rights of bona fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States." However, this would not prevent using the Act against racketeering unions. The rights of labor unions as expressed in the existing federal statutes have been sketched above, and it was seen that nothing therein makes *illegal* the practices of "labor's hidden hold-up men". But it is equally obvious, that none of the labor legislation makes these practices *legal.* Labor union racketeering has apparently not been considered by Congress, except in the Anti-Racketeering Act. There have been some suggestions that section 7 of the NLRA, which reads, "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," would legalize the actions of the New York truckers' union.[27] It is believed that Congress intended by this section to list certain broad purposes for which labor unions were empowered to strive. It is inherent in this provision that only *legal* means of obtaining these purposes shall be used. It is believed, as pointed out, that the methods of the racketeering unions are not legal means of obtaining the purposes of collective bargaining, mutual aid, and protection.

[24] Stanley High, *Labor in the World of Tomorrow,* Reader's Digest, Nov., 1939.
[25] Thurman Arnold, *Labor's Hidden Holdup Men,* Reader's Digest, June, 1941.
[26] *Ibid.*
[27] Note (1941) 54 HARV. L. REV. 1400.

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.