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NOTES

CONSTITUTIONAL LAW — MINIMUM WAGE LEGISLATION. — In this field of constitutional law which today has advanced to one of the-greatest importance to the people of this country, three leading cases have become the guiding lights for discussion. The first of these passed upon the power of Congress to regulate minimum wages for women in the District of Columbia and was considered by the United States Su-

preme Court in *Adkins v. Children's Hospital*.¹ After much study of this decision by the proponents of the law, the Legislature of New York passed a minimum wage law, which was tested in the second of the three "beacon light" cases, *Morehead v. People of New York*.² In both of these decisions the sponsors of the idea of minimum wage were disheartened by decrees of unconstitutionality. However, in the latest of these basic cases, the Washington's minimum wage law, which was not unlike the New York Law, was declared constitutional.³ There was a strong dissenting opinion in each instance.

Before tracing the reasoning through which the same idea was finally considered by the highest court of the land to be within the confines of the Federal Constitution, a brief sketch of the history of these laws finds as early as 1912 such a statute was passed in Massachusetts. Concerning this law, which was purely directory in form, it is of importance to note that the highest court of that State sustained the statute, and, since then, has gone uncontested. However, an early Oregon law, mandatory in form, was declared unconstitutional in *Stettler v. O'Hara*.⁴ In the statute books of many states can be found such a law as this which has never been enforced or repealed because of this decision.

It was in 1923 that the Congressional Act, an ordinance for the city of Washington, was considered, as to its constitutionality, in the *Adkins* case. The Fifth Amendment of the Federal Constitution provides, in part, that no person "shall be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use without just compensation." The basis of this Congressional Act was that the police power granted to Congress the power to maintain the health and morals of these women and that the only manner in which this was possible was the maintenance of a living wage upon which to exist. The attempt to place this ordinance within the "health doctrine" was refused by the Supreme Court in a five-to-three decision (Judge Brandeis not sitting). The law provided that a commission formed by authority of this Act could make regulations as to the amount of minimum wages to be paid and if this recommendation were violated, the unlawful act would be duly considered and a punishment placed on the wrongdoer. In sustaining the view that the freedom of contract had been set out by an ever-increasing line of decisions the court stated that "the right to contract about one's affairs is a part of the liberty of the individual protected by this clause [due process clause] is settled by the decisions of this court and is no longer open to question." The police power to protect health was declared to be of no importance in respect to the supervening right of protection of the liberty of contract.

1 261 U. S. 525 (1922).

2 56 S. Ct. 918, 80 L. Ed. 1347 (1935).

3 *West Coast Hotel Co. v. Parrish*, 57 S. Ct. 578, 81 L. Ed. 455 (1937).

4 139 Pac. 743 (Ore. 1914).

In answer to the ethical argument briefed by the counsels for the state, that a woman must be paid sufficiently to maintain her health, morals, and general welfare, the court states that there is a stronger ethical argument and requisite understood between the parties to the employment contract, namely, that the amount to be paid by the employer and the work to be rendered by the employee must have a relation of equivalence to one another. This was completely ignored by those proponents of this ordinance.

Consider now for a moment the *Morehead* case, which declared unconstitutional the statute of the state of New York, that set a minimum wage for women and minors. In this Statute the Legislature not only attempted to base the theory of the law on the necessity to maintain the women's health and morals but also upon the idea of "fair wages." This latter idea was much more predominate in the argument of counsels which endeavored to differentiate this law from the Congressional Ordinance for the District of Columbia. The court, in refusing to accept this difference, pointed out in the *Morehead* case that the same freedom of contract had been violated. Just as the Fifth Amendment forbids Congress to impair "life, liberty, or property, without due process of law," so, also, does the Fourteenth Amendment forbid the states to do so. Much weight was given in the discussion to the reasoning that the ability to determine a fair wage was given a commission. Just what is a *fair wage*? Is this not legislative power delegated to that branch of the government and not to a body appointed by the governor? In answering the defense's theory of argument that there is a difference between the *living wage* as set out in the *Adkins* case and the *fair wage* of the New York Law, the United States Supreme Court quotes from the opinion of the New York Court of Appeals in *Morehead v. People of New York*: "The minimum wage must include both. What was vague before has not been made clearer. One of the elements therefore in fixing the fair wage is the very matter which was the basis of the congressional act." The United States Supreme Court does not consider the factual viewpoint of this statement but merely suggests that it is not within the province of the highest court of the land to interpret a state law but it must be accepted as though it had been specifically set out in the act.⁵ Those framing the New York rule obviously thought it sufficient to avoid the error made in the constitutional basis of the Washington Ordinance to designate "fair wages" for it was in this that the argument for ethics had more support. No statement to the effect that there must be an equality between the wages paid and work expended by the employee could now be used. The ethical argument would seem to be more forceful, but the court decreed that

⁵ Supreme Lodge of K. P. v. Meyer, 265 U. S. 30, 32 (1924).

there was no difference between a group of people fixing a fair wage and a minimum wage.

Noticing that neither the "health doctrine" based on police power, or the "fair wage doctrine" could be maintained, the attorneys acting for the State of Washington in presenting that case, testing their minimum wage law, based their argument upon the theory of the inequality of the parties to the contract. The economic basis of this has long been recognized. There is a certainty that the employer can state his demands and ask for long hours and low wages, but on the other hand the laborer, competing against a supply of labor which far exceeds the demand for it, must either comply with the employer's terms or not work. Is this, then, with things under such conditions, freedom of contract? It is contended that this inequality precipitates the necessity for the entrance of the police power into this field to protect the welfare of the nation. It is a philosophical principle that the component parts make up the whole and therefore there must be protection for each member of society to maintain the general welfare and common defense of the state. It is a legislative prerogative to determine whether the police power is an essential for the protection of the welfare of the people. Some criticism of the law, which was claimed had not an iota of constitutional basis, was the fact that men were excluded from the protection of the law. The answer of the court is that the Statute is "not unconstitutional notwithstanding it did not extend to men, since legislative authority acting within its proper field is not bound to extend its regulation to all cases which it might possibly reach," but can restrict itself to those evils which are clearest, it should not be overthrown because it does not seek out those people not so obviously oppressed.

An apparently abrupt reversal of a former ruling appears in the *West Coast Hotel* case. However, for years such rules have been achieving precedence by decisions of the court which have overthrown the theory of absolute freedom of contract. Even in the opinion in the *Adkins* case it is said that "there is, of course, no such thing as absolute freedom of contract. It is subject to a variety of restraints. But freedom of contract is nevertheless the general rule, and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by existence of exceptional circumstances." The law has regulated public utilities; the peculiar nature of the business and its close relation to the public furnishes the basis for the precedent that these utilities' contracts can be controlled.⁶ *Munn v. Illinois*⁷ opens

⁶ *Ohio Bell Telephone v. Public Utilities Commission*, 131 Ohio St. 539, 3 N. E. (2d) 475 (1936).

⁷ 94 U. S. 113 (1877).

an even broader field which considered that although the elevator business is not a public utility, yet it is so cloaked with a public interest that the storage rates can be regulated. So also are such things as regulation for the size of bread,⁸ lard containers,⁹ insurance rates,¹⁰ and even regulation of hours.¹¹

A definite new trend to judicial interpretation has been set out in the Washington minimum wage law case. Previously, the fundamental right of "liberty" was interpreted to give persons the right of freedom of contract. However, the historical idea of liberty as set out in the Magna Carta, and that which was in the minds of the writers of the Federal Constitution, comes into the foreground in the statement that "in prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people."¹² In this opinion, therefore, we see the recognition of the fact that the only true liberty is that which is, in a sense, guarded and restricted. When the Federal Constitution was framed certain restrictions were placed on the states in the various articles, and before it was ever presented for adoption, restrictions, even though understood to be in existence on the Federal Government — being an organization of granted powers — were reiterated in the Bill of Rights. Do these restrictions exist upon any other legislative body in the world, or upon any other government? Not in the least, yet, who is to deny that the greatest liberty upon this earth exists in this country. Other governments, confined to no constitution, impose on their subjects such rules that their liberty is questioned. In a like manner certain curbs upon the liberty to contract were certainly intended in the penning of the Fifth and Fourteenth Amendments. Without restrictions interpreted here, there would be no freedom of contract.

Conservative Associate Justice Fields, in his dissenting opinion in the *Munn* case, considers piecemeal the due process clause of the Federal Constitution. Justice Fields asserts: "By the term 'life,' as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to every one with life, for

⁸ *Schmidinger v. Chicago*, 226 U. S. 578 (1913).

⁹ *Armour & Co. v. North Dakota*, 240 U. S. 510 (1916).

¹⁰ *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U. S. 251 (1931).

¹¹ *Atkin v. Kansas*, 191 U. S. 207 (1904).

¹² *West Coast Hotel Co. v. Parrish*, *op. cit. supra* note 2, at 581.

its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision." The majority opinion in *MacMullen v. City of Middletown*,¹³ citing the opinion of Justice Fields, sustains this idea and adds that not only does the due process clause refer to judicial proceedings but also to administrative and executive phases of government. These observations substantiate the argument for the necessity for a minimum wage based on the police power because good health is an absolute requisite for life. A normal life must be considered only in the light of everyday existence and to make this more than an animal's existence, a "fair wage" must be granted. Never has the constitutionality of a living wage been upheld on this idea; but God, who gave us "life," provided a certain amount of the earth's bounties for all mankind, and in an attempt to distribute this more evenly the government's laws on minimum wages could accordingly be held constitutional. For this reason we see that not only is there liberty in curtailing freedom of contract, but also enforcement of a provision of the Constitution, that is to provide for a normal life. Both of these ideas have as an essential off-spring, the power to declare a minimum wage. Therefore past decisions have enabled the proponents of the minimum wage law to find one that has been declared effective according to the Constitution by showing that the police power to protect health and general welfare of the women has reached all fields cloaked with a public interest, and also that further provisions to aid labor — which are sure to be presented before the forthcoming Special Session of Congress is well under way — can be upheld on the theory that to maintain freedom of contract certain restrictions must be placed on the contracting parties, and lastly, on the constitutional guarantee to protect the people so they may live a normal life.

John De Mott.

CONSTITUTIONAL LAW—THE PROPOSED CHILD LABOR AMENDMENT. —Should the proposed Child Labor Amendment be accepted? For almost fourteen years this question has been argued pro and con by eminent authorities. The Amendment was proposed in 1924, and up to June 1, 1937, only twenty-eight states had ratified the Amendment. It is very improbable that the necessary remaining eight states will ratify it in the near future in spite of a plea on January 8, 1937, by President Roosevelt, in which, in personal letters to the governors of all those states still rejecting the proposed Amendment, the President urged its adoption.

Why was such an amendment ever proposed? Why do some so vigorously oppose it? In the light of recent Congressional legislation,

¹³ 98 N. Y. S. 145, 150 (1906).

and still more recent Supreme Court interpretations, is such an amendment still necessary to accomplish the desired purpose? These are the questions we will attempt to answer in the following composition. The text of the 1924 proposed Child Labor Amendment is as follows:

"Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

"Section 2. The power of the several states is unimpaired by this article except that the operation of state laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

Let us consider the above mentioned questions in the order in which they were presented. First, why was such an amendment ever proposed? It would seem quite superfluous here to deal with the social and economic aspects of this question. I believe we all agree on these. Suffice it to say that it is highly desirable, in such a civilized world as we are supposed to be living in now, to keep our children in school and in childly pursuits during their immature years, rather than having them confined in industry which will often endanger their future health and happiness. The legal circumstances which necessitated the proposed Amendment interests us much more.

In the early years of the twentieth century there was much propaganda against the hire of children in industry. The Congress of the United States realized the evil of this practice, and under its right granted in the Constitution of the United States, to regulate interstate and foreign commerce, the Congress passed the Act of September 1, 1916, which intended to prevent interstate commerce in the products of child labor. The constitutionality of this Act of Congress came before the United States Supreme Court in 1918, in the case of *Hammer v. Dagenhart*.¹ The first and material section of the Act is as follows: "That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock post-meridian, or before the hour of six o'clock antemeridian." In a five-to-

¹ 247 U. S. 251 (1918).

four decision, by a sharply divided court, the Act of 1916 was held to be unconstitutional. Knowing that Congress was seeking to regulate child labor through the power given to it in the Constitution to regulate interstate and foreign commerce, the majority of the court said: "The Act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. . . . When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce clause." Thus Congress was denied the right to regulate child labor. This problem was declared to be one of those powers which the states reserved for themselves, and if Congress was to ever obtain this power it would have to be through a constitutional amendment. Such an amendment was the one proposed to the states in 1924. We will not question the wisdom of the majority opinion in the *Hammer* case. But let us remember that it was a five-to-four decision and that the very vigorous dissent was led by the late Mr. Justice Holmes and by Mr. Justice Brandeis. We would not speculate as to how the present day Supreme Court would rule if a similar question is ever brought before it. The Supreme Court has overruled itself before. We must mention in passing, however, that the Supreme Court has upheld the right of Congress to prohibit from interstate commerce stolen motor vehicles,² lottery tickets,³ products owned by the carriers carrying them,⁴ adulterated and misbranded articles,⁵ women for immoral purposes,⁶ and kidnaped persons.⁷ Perhaps if the question of the *Hammer* case was ever revived the minority contention in this case would be adopted, in the light of all these later opinions.

Let us now see why the proposed Child Labor Amendment, after over thirteen years, is still unratified. Why do some so vigorously oppose it? We only have to read it over carefully to see what might be wrong. Its provisions are far too sweeping and general in their effect. Dr. Nicholas Murray Butler, Chairman of the New York State Committee Opposing Ratification, called the proposal the "Youth Control Amendment." Its purpose and effect would be to put some 42,000,000 of the nation's population, being all those less than eighteen years of age, under the direct control of Congress, thus depriving the home,

² *Brooks v. United States*, 267 U. S. 432 (1925).

³ *Champion v. Ames*, 188 U. S. 321 (1903).

⁴ *United States v. Delaware & Hudson Co.*, 213 U. S. 366 (1909).

⁵ *United States v. Sixty-five Casks Liquid Extracts*, 170 Fed. 449 (D. C. N. D. W. Va. 1909), *affirmed*, *United States v. Knowlton Danderine Co.*, 175 Fed. 1022 (C. C. A. 4th, 1910).

⁶ *Wilson v. United States*, 232 U. S. 563 (1913).

⁷ *Gooch v. United States*, 297 U. S. 124 (1936).

the school, and the church of the protection they have always enjoyed under American tradition and principles and place them at the mercy of Congress. The Catholic Church has opposed the proposed Amendment, rightly claiming it would empower Congress to interfere with parochial schools. The only wish and desire, even of the staunchest reformers, is to prohibit child labor, which is oppressive, unhealthful, and socially undesirable. Why then, should we open the possibility for extensions of power by Congress to supervise and direct closely all activities of the youth of our land? Briefly, these are the reasons why the proposed Amendment has been so vigorously opposed, so that after a thirteen-year struggle, and after a personal appeal from the President, there still seems no near probability for the ratification of the proposed Child Labor Amendment.

And now for our last and perhaps most important question. In the light of recent Congressional legislation, and still more recent Congressional interpretations, is such an amendment still necessary to accomplish the desired purpose? In attempting to answer this vital question we will use as a basis a very recent decision of the United States Supreme Court in the case of the *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*⁸ This case related to the constitutional validity of the Act of Congress of July 24, 1935, known as the "Ashurst-Sumners Act."⁹ The court said: "The Act makes it unlawful knowingly to transport in interstate or foreign commerce goods made by convict labor into any state where the goods are intended to be received, possessed, sold, or used in violation of its laws." Here was an attempt by Congress to regulate in interstate commerce certain products merely because they were produced by a particular class of labor. What difference would it make if it were convict labor or child labor? The Court here, in spite of its decision in the *Hammer* case, concluded that the *Ashurst-Sumners Act* was constitutional, basing its decision on the fact "that where the subject of commerce is one as to which the power of the state may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the state policy."

It may be pointed out that the decision in the *Hammer* case was aimed at a law which absolutely prohibited the products of child labor in interstate commerce, while the Act in question in the *convict labor* case prohibited the transportation of convict-made goods into states where they were intended to be received, possessed, sold, or used in violation of the state laws. However, in both instances Congress was exercising regulation in interstate commerce of products, not in them-

⁸ 299 U. S. 334 (1937).

⁹ 49 STAT. 494.

selves harmful, but only because they were manufactured by a particular class of laborers, in the *Hammer* case by child labor, and in *Ashurst-Sumners Act* by convict labor. Fundamentally, there was the same type of problem in each case; and they surely do not seem to be reconcilable. This argument was raised in the *Kentucky Whip & Collar* case, and the court disposed of it very unsatisfactorily by merely saying: "The ruling in *Hammer v. Dagenhart*, upon which petitioner relies, in no way contravenes or limits the principle of this decision. In the *Hammer* case the Court concluded that the act of Congress there under consideration had as its aim the placing of local production under Federal control." Why the *Hammer* case does not contravene or limit the principle of the later decision the court does not point out, but very tactfully evades—perhaps they themselves did not know.

In conclusion, therefore, we are faced with this situation. There is present in our country an evil which all agree should cease, namely, child labor. In 1918 the United States Supreme Court held, in the *Hammer* case, that Congress could not relieve this. Then Congress presented for ratification an amendment to the United States Constitution which would give it the power to correct the evil, but the proposal was far too general in its aspects, so that it is unlikely, even with recent suggested amendments to the amendment, that a sufficient number of states will ratify the proposed Amendment at any reasonably early time. But now comes a decision of the Supreme Court in 1937 (the *Kentucky Whip & Collar* case), which declares that Congress has the right to regulate in interstate commerce goods made by a particular class of laborers when those goods are to be received, possessed, sold, or used in violation of the state laws. There seems to be a new field opened for the foes of child labor. Why could not Congress pass an act making it unlawful knowingly to transport in interstate or foreign commerce goods made by child labor into any state where the goods are intended to be received, possessed, sold, or used in violation of state laws? Under the ruling of the *convict labor* case such a law would probably be upheld by the Supreme Court. Many states already have child labor restrictions, and surely all twenty-eight states which have already ratified the Amendment would be favorable to such child labor restrictions. Surely the manufacturers who now employ child labor would rather conform to the minimum age requirements of the states rather than lose their markets altogether. Of course, there might be some difficulty in obtaining uniform state child labor restrictions; but this mere question of detail would no doubt reach an early satisfactory solution. Such a method of attack offers the possibility of quick action, and this too is important when we consider the years of struggling over the proposed Amendment. Such a bill was passed by the United States Senate on August 16, 1937; it is the Wheeler-Johnson Bill (S. 2226). If this Bill is passed by Congress, it will probably be the solution to the long and bitter controversy over the child labor problem.

Joseph B. Shapiro.

CONTEMPT—VIOLATION OF A COURT ORDER BY REPORTERS AND PHOTOGRAPHERS—COMMENT ON PENDING CASES AND DECIDED CASES.—Holding one for contempt of court when the alleged contempt has been a publication in a newspaper has been criticized because it is said to interfere with the guaranty of freedom of speech or of the press, as provided for in the First Amendment to the Federal Constitution.¹ This freedom of the press, however, does not mean the liberty or license, "or the unrestricted right to do and say what one pleases at all times and under all circumstances."² A few of the limitations upon this freedom are things which adversely affect the promotion of justice,³ obscene matters,⁴ advocacy of revolt against the government,⁵ which includes such things as seditious utterances,⁶ syndicalism,⁷ and sabotage.⁸ Many of the states have statutes prohibiting such things as these, and Kansas has a statute in which all unlawful teachings, writings and unlawful publications are made a felony and punishable by fine and imprisonment.⁹ Other things besides these statutory limitations limit the press, such as the printing of libelous matter,¹⁰ invasions of the right of privacy,¹¹ contempt,¹² and blasphemy.¹³ From these limitations we can see that the freedom of the press is apparently but a group of privileges hemmed in by many limitations on their use.

The newspapers of today are our most widespread method of communicating to the masses of the people the news of the day. Because of this, the freedom of speech and press are most frequently associated with them. The purpose of this Note is to show what they can and what they cannot do in relation to contempt of court.

Newspaper contempt may be divided into two main classes: (1) Direct contempt, such as the violation of a court order and anything done in the presence of the court; and (2) Indirect contempt (by publication). Under the second class a recent case¹⁴ has further divided contempt into three classes: (1) Publications which tend to scandalize the court; (2) Publications concerning pending cases, which tend to influence the court, advise disobedience, or take a violent partisan stand,

1 U. S. CONST. Amend. I.

2 *Warren v. United States*, 183 Fed. 718 (C. C. A. 8th, 1910).

3 *Warren v. United States*, *op. cit. supra* note 2.

4 ILL. REV. STAT. (1937) c. 38, § 468.

5 ILL. REV. STAT. (1937) c. 38, § 559.

6 *Masses Publishing Co. v. Patton*, 246 Fed. 24 (C. C. A. 2nd, 1918).

7 KAN. GEN. STAT. (1935) § 21-301.

8 KAN. GEN. STAT. (1935) § 21-302.

9 KAN. GEN. STAT. (1935) § 21-303.

10 *May v. Syracuse Newspapers, Inc.*, 294 N. Y. S. 867 (1937).

11 *Binns v. Vitagraph Co. of America*, 210 N. Y. S. 51, 103 N. E. 1108 (1913).

12 *In re Independent Pub. Co.*, 228 Fed. 787 (D. C. D. Mont. 1915).

13 *R. W. Lee, The Law of Blasphemy*, 16 MICH. L. REV. 149, 152.

14 *State v. American News Co.*, 266 N. W. 827 (S. D. 1936).

or which by their nature, tend to impede the administration of justice and which make it necessary to dismiss the jury; and (3) False, inaccurate or garbled reports of the proceedings.

Under the first class the general rule is that the court may protect itself by orders restraining publication or preventing the reporters from discussing the trial of a case. There are many times when proceedings in a cause should not be published, even though accurate, while the case is pending. In that case the court can make a special rule forbidding or limiting the publication, and a violation of this will be contempt;¹⁵ the court can make all rules to protect itself, and this includes the power to prevent publication of any article the court sees fit to prevent, such as evidence and other matters while the case is pending. An example of this power is illustrated in a Maryland case,¹⁶ where a reporter and camera-man were held in contempt for taking photographs in a court-room after the court had made an order forbidding the taking of pictures in the court-room. But this power should rarely be exercised and only to promote the ends of justice, the mode of preventing the publication being left largely in the discretion of the trial judge. "It is in its nature and manner of its exercise without the possibility of control by a supervising court." This is generally accomplished by suspending publication until the trial is complete.¹⁷ It is also further regulated by the power of the court to regulate the admission of persons to the court-room; so the court can exclude anyone who comes into court to report the testimony during the trial.¹⁸ The court may also enjoin any publication that would be prejudicial to the case,¹⁹ though the courts will be slow to punish the press further than censure them for commenting on the pending proceedings until previous warning has been given to abstain therefrom.²⁰ Though the court has made an order forbidding access to some papers in the case if the newspaper has obtained information from another source as to what was in the papers and has published the information there is no contempt.²¹

The determination of contempt in the first class then is relatively easy; but in the second class there is much difficulty and diversity of opinion as to what constitutes contempt. Under the old common-law rule, any publication "scandalizing the courts" was treated as contempt. In England and the minority of jurisdictions in this country it is still so treated, but the modern tendency in this country is that it is

¹⁵ *Stuart v. People*, 3 Scam. (Ill.) 395 (1841).

¹⁶ *Ex parte Sturm*, 152 Md. 114, 136 Atl. 312 (1927).

¹⁷ *State v. Galloway & Rhea*, 45 Tenn. 326, 98 Am. Dec. 404 (1868).

¹⁸ *United States v. Holmes*, Fed. Cas. No. 15,383 (C. C. E. D. Pa. 1842).

¹⁹ *Kitcat v. Sharp*, 48 L. T. 64 (1882); *Brook v. Evans*, 2 L. T. 74 (1860).

²⁰ *Dunham v. The State of Iowa*, 6 Iowa 245 (1858); *Queen v. O'Daugherty*, 5 Cox C. C. 348.

²¹ *In re Times Publishing Co.*, 267 N. W. 858 (Mich. 1936).

not contempt but that the judge is left to his remedy of suing for damages for libel.²² The law in determining what is contempt in these cases distinguishes between attacks on the judge and attacks on the tribunal. The former may be libelous, and, if so, the remedy is by civil action; the latter is contempt according to its purpose and effect, and when so, the offender is subject to punishment. In our jurisprudence the action of contempt of court does not lie to heal the wounded sensibilities of a judge; it may be invoked only when the offending act impedes or disturbs the administration of justice.²³

A distinction must be made, though, between discussions of cases that have been decided and discussions of those that are pending. In upholding the old common-law rule as to publications "scandalizing the courts," some of the courts have made no distinction between cases that have been decided and those that were pending. In one case²⁴ the court said that as long as the position of the court was correctly stated and that its official integrity was unimpeached, then the newspapers could print what they wished, but when the articles got beyond the point of honest criticism then they were subject to liability for contempt. In a Wisconsin case²⁵ the court held that comment on previously decided cases was not contempt, and to punish it as such would be an infringement of the constitutional guaranty of freedom of the press. So then the general rule is that the judge is left to his remedy of civil action where the comments are on previously decided cases; such comments do not impede the administration of justice. When the case is decided then the courts are subject to the same criticism as other people.²⁶ In a recent New York case²⁷ it was held that comment on the behavior of the court in cases that had been fully decided in the particular court that was criticized is unrestricted under the constitutional guaranty of liberty of press and freedom of speech.

Neither does the criticism of the ministerial acts of the judge constitute a contempt. This is because the ministerial act does not come within the purview of the word "proceeding," which is the regular and usual mode of carrying on a suit by due course at the common-law.²⁸

Where a publication will impede the course of a trial or justice in any way then it is clearly contempt. This brings us to the second class of cases under contempt, that is, contempt by publication. In this type of cases it does not matter that the court or jury did not see the publication, or even that any actual obstruction be established; the test

²² *State v. Sweetland*, 3 S. D. 503, 54 N. W. 415 (1893).

²³ *Francis v. People of Virgin Islands*, 11 Fed. (2d) 860 (C. C. A. 3d, 1926).

²⁴ *People v. Wilson*, 64 Ill. 195 (1892).

²⁵ *State v. Circuit Court*, 97 Wis. 1, 72 N. W. 193 (1897).

²⁶ *Patterson v. Colorado*, 205 U. S. 454, 463 (1906).

²⁷ *Supreme Court v. Albertson*, 275 N. Y. S. 361 (1934).

²⁸ *Statter v. United States*, 66 Fed. (2d) 819 (C. C. A. 9th, 1933).

is whether the publication *tends* to obstruct justice.²⁹ Neither does the alleged contempt have to *actually* obstruct justice or bring the court into disrepute; all that is necessary is that the publication be of a character *calculated* to produce such an effect.³⁰ In the Federal courts, before the passage of the Act of March 2, 1831,³¹ the courts had the power to punish all contempts of authority, and this was in the discretion of the court. So any publication³² criticizing the decision of the judge, or reflecting on the parties to the suit, was a contempt. The Act of March 2, 1831, however, limited this authority of the courts until today the generally accepted view is that the publication must tend to obstruct justice³³ or the administration of the law. The comment on judicial proceedings must be argued from truthful and not false premises. This is illustrated in the case of *Francis v. People of Virgin Islands*,³⁴ where the publication complained of the writer's trial and conviction without a jury, it was held to be contempt as calculated to prejudice the court in the public eye and mind.

Two old cases illustrate the old common-law rule as to this point, one where the defendant was held in contempt because he had published an article vilifying the plaintiff and asserting that the jury had given an infamous verdict. In the modern rule the plaintiff would have been left to his action for libel if published after the trial was finished and if published during the trial it would have been contempt by having the effect of impeding justice.³⁵ In another the defendant was held in contempt because he imputed fraud and ill faith to directors of a company who was party to a trial.³⁶ There the effect was also to prejudice the directors in the eyes of mankind and create prejudice against them.

The place of the publication is not controlling either; it is the place where the effect of the publication is felt. The intent to publish the article is all that is necessary because the publisher knows that the trial is going on and one of the jurors would probably read it and its probable consequence would be to impede justice.³⁷

A few of the things that have been held to be contempt are such things as a publication made before the trial consisting of evidence which made it difficult to select a jury that would be impartial,³⁸ a publication charging that one sitting as a grand juror was incompe-

²⁹ *United States v. Toledo News Co.*, 247 U. S. 402 (1918).

³⁰ *Kilgallen v. State*, 192 Ind. 531, 132 N. E. 683, 137 N. E. 178 (1922).

³¹ U. S. C. A. Tit. 28, § 385.

³² *Hollingsworth v. Duane*, Fed. Cas. No. 6,616 (C. C. D. Pa. 1801).

³³ *United States v. Toledo News Co.*, 220 Fed. 458 (D. C. N. D. Ohio 1918).

³⁴ *Op. cit. supra* note 23.

³⁵ *United States v. Duane*, Fed. Cas. No. 14, 997 (C. C. D. Pa. 1801).

³⁶ *In re Cheltenham & Swansea*, L. R. 8 Eq. 58 (1869).

³⁷ *In re Independent Publishing Co.*, 228 Fed. 787 (D. C. D. Mont. 1915).

³⁸ *Globe Newspaper v. Commonwealth*, 188 Mass. 449, 74 N. E. 682 (1905).

tent,³⁹ a publication consisting of things that would not be admissible at the trial,⁴⁰ and where the defendant in contempt proceedings sent a letter to the prosecuting attorney advising him that the trial judge was prejudiced and biased.⁴¹ It must be noticed, though, that the last illustration is one where the case was pending, because if it had been decided the judge would be left to his remedy by civil action for libel. In a South Dakota case⁴² the defendant had written an article in the newspaper commenting on the fact that the prisoner and the jury and the judge were members of same political faiths thus said to indirectly show bias. This was held not to be a contempt because nowhere did it appear that the article would prejudice the cause. Only such publications as are calculated to influence, intimidate, impede, embarrass, or obstruct the courts in the due administration of justice in matters pending before them are contempt.

Now we come to the third class — that of false, inaccurate or garbled reports of judicial proceedings. The right to publish reports of judicial proceedings is conditionally privileged and the reports must conform to certain rules. It must be strictly confined to judicial proceedings; the report must be fair and accurate; it must have been made in good faith, that is, it must be free from malice in the sense of malice in fact; it must be a report as distinguished from comment. It is not necessary that the entire proceedings be published word for word as they transpired, but what is necessary to make the report privileged is that the report must be sufficiently full so that no erroneous or false impressions be created, and that it be fair and accurate. As shown before, a court proceeding is the usual and regular mode of carrying on a suit at common law. So any proceeding that is not a judicial proceeding is not privileged, such as the finding of a secret indictment by a grand jury. Judicial proceedings are to be distinguished from reports of legislatures, councils and committees.

However privileged a report may be, when there is a mistake in it and an erroneous impression is created there is liability even though the publisher has made a reasonable effort to ascertain the facts, as where the publication has made a mistake in the names of the persons that have been charged by an indictment of the grand jury.⁴³ At all times the publisher holds himself out to be equipped to undertake the work of publication and it is undertaken at his peril. "It is the right of a newspaper, as of any private citizen, in public or in private, to discuss the opinions of the court, to criticize their reasoning, or to

³⁹ *Matter of Van Hook*, 3 City Hall Rec. (N. Y.) 64, 13 C. J. 38, n. 29.

⁴⁰ *Herald-Republican Publishing Co. v. Lewis*, 42 Utah 188, 129 Pac. 642 (1913).

⁴¹ *Froelich v. United States*, 33 Fed. (2d) 660 (C. C. A. 8th, 1929).

⁴² *State v. Edwards*, 15 S. D. 383, 89 N. W. 1011 (1902).

⁴³ *Sweet v. Post Publishing Co.*, 215 Mass. 450, 120 N. E. 660 (1913).

question by sober argument the soundness of their conclusions, but not to misstate these conclusions." ⁴⁴

Report must be distinguished from *comment*. That which is privileged is an account of what transpired in a case as distinguished from comment thereon and inferences drawn therefrom. In one case the plaintiff brought an action for libel; the proceedings in the case had been told truthfully and all facts had been categorically stated, but each statement of fact was accompanied by a comment, inference, or insinuation directly tending to throw ridicule on the plaintiff and deprecate his character. The court said: "To a fair and true publication of his case the litigant must submit, but this principle does not give the right to prejudice a case, misstate it, or hold up to scorn or ridicule, either directly or indirectly or by natural implication from the language, a party who is pursuing his legal remedies in court." ⁴⁵

William Langley.

SURETYSHIP—PLEDGING PROPERTY AS SECURITY FOR THE DEBT OF ANOTHER.—An interesting phase of the law of suretyship that is seldom recognized is the similarities and differences between the ordinary suretyship contract and the contract whereby one pledges his property as security for the debt of another. Generally in the ordinary suretyship contract one becomes personally liable for the debt or legal obligation of another, depending, of course, upon the terms of the contract. However, when one pledges his property as security for the debt of another, it is generally true that the property so pledged is bound for the payment of the debt, but the pledgor is not necessarily personally bound. This, too, depends upon the terms of the contract entered into.

With regard to the pledging of property as security for the debt of another it is interesting to note that the courts are at variance as to who or what is the surety. Some of the courts hold that the property pledged is the surety,¹ while others say that the pledgor of the property is the surety.² An example of the former is *In re Blanchard*,³ in which case stock was pledged as security for the same debt as that

⁴⁴ *In re Providence Journal Co.*, 28 R. I. 489, 68 Atl. 428 (1907).

⁴⁵ *Brown v. Providence Tel. Pub. Co.*, 25 R. I. 117, 54 Atl. 1061 (1903).

¹ *In re Blanchard*, 253 Fed. 758 (D. N. J. 1918); *Price v. Reed*, 124 Ill. 317, 15 N. E. 754 (1888); *Hinton v. Greenleaf*, 113 N. C. 6, 18 S. E. 56 (1893); Note, 15 N. C. L. REV. 209.

² *Cross v. Allen*, 141 U. S. 528 (1891); *Eberhart v. Eyre-Shoemaker, Inc.*, 70 Ind. App. 658, 134 N. E. 227 (1922); *Matthews v. Matthews*, 128 Me. 495, 148 Atl. 796 (1930); *Knight v. Whitehead*, 26 Miss. 245 (1853); *Stevens v. First National Bank of Muskogee*, 117 Okla. 148, 245 Pac. 567 (1926).

³ 253 Fed. 758 (D. N. J. 1918).

for which the sons of the owner of the stock became surety, and at the same time. It was held that the stock and the sons were cosureties, and as such required to bear a proportionate share of the loss.

In *Fowler v. Barlow*⁴ the statement is made that "one who pledges or mortgages his property to secure the debt of another, without becoming personally bound for the payment, is, as to that debt, a surety. . . . It is sometimes said that, in such a situation, it is the property pledged or mortgaged that stands in the position of a surety." However, whether it is the pledgor or mortgagor, or the property pledged or mortgaged that is recognized as the surety, it is held that anything that would release a personal surety will release and discharge the surety where property is pledged.⁵

Apparently this distinction as to who or what is considered to be the surety is of little consequence. It is not controlling as to the extent of liability because this depends upon the terms of the suretyship contract, which is generally *strictissimi juris*, especially in the case of an accommodation surety. Some courts hold, however, that the surety's promise is to be construed just as any other contract is construed.⁶ Neither is the distinction material, in the majority of the states, with regard to the statute of limitations, a matter upon which it might conceivably have some bearing. In *Corpus Juris*⁷ it is said: "In the greater number of jurisdictions if the statute of limitations has not barred the remedy on a mortgage or deed for security, such remedy may be enforced, although action on the debt secured or the evidence thereof is barred. . . ." As the statute of limitations does not start running in favor of the mortgagor until the time the mortgagee's right of action accrues, that is, from the time the condition of the mortgage is broken,⁸ the mortgagee has the statutory period, dating from that time, in which to foreclose the mortgage, regardless of whether the property or the mortgagor is considered the surety.

Generally, it makes no difference whether it is property or personal liability that is pledged for the debt of another, so far as the rights of the surety are concerned.⁹ However, the *Negotiable Instruments Law* has created some exceptions to this general statement. In the majority of the states that have passed upon the matter it has been held that under the *Negotiable Instruments Law* an accommodation maker

⁴ 102 Vt. 99, 146 Atl. 77 (1929).

⁵ *Hinton v. Greenleaf*, 113 N. C. 6, 18 S. E. 56 (1893); *Cross v. Allen*, 141 U. S. 528 (1891); *Stevens v. First National Bank of Muskogee*, 117 Okla. 148, 245 Pac. 567 (1926).

⁶ ARANT ON SURETYSHIP § 39.

⁷ 37 C. J. 703.

⁸ 2 JONES ON MORTGAGES (8th ed.) § 1550.

⁹ *Gahn v. Niemcewicz's Executors*, 11 Wend. 312 (1833); *Hinton v. Greenleaf*, 113 N. C. 6, 18 S. E. 56 (1893); *Cross v. Allen*, 141 U. S. 528 (1891); *Stevens v. First National Bank*, 117 Okla. 148, 245 Pac. 567 (1926).

or surety on a negotiable instrument is not discharged from liability thereon by a binding extension of time granted to the principal maker without the consent of the surety or accommodation maker.¹⁰ Thus, in *Cellers v. Meachem*¹¹ it was held that under the *Negotiable Instruments Law* an accommodation maker of a promissory note who signs the note as a co-maker thereof is primarily liable thereon even though he places the word "surety" after his name, and even though the payee and holder of the note knows the true relation between the parties. It was said that since such an accommodation maker is primarily liable on the note he is not discharged or relieved from liability by a binding extension of time of payment by his co-maker without his consent.

The theory of the cases is that the surety or accommodation maker is primarily liable.¹² Being primarily liable he is discharged only by the methods provided in the act for a discharge of the instrument itself.¹³ Since an extension of time is not one of the methods provided for a discharge of the instrument, it follows that a surety or accommodation maker is not thus discharged.

Again, a material alteration of the original agreement or instrument of indebtedness without the consent of the surety generally discharges the surety.¹⁴ Where, however, the instrument is a negotiable instrument and is in the hands of a holder in due course the accommodation maker or surety remains liable according to the original tenor of the note.¹⁵

It has also been held that where a mortgage is given as collateral, a material alteration of the instrument of indebtedness without fraudulent intent will not avoid the mortgage which will still remain a valid security for the original consideration.¹⁶

Another situation in which there is a difference, in some states at least, between the two kinds of suretyship contracts arises from the husband and wife relationship. In *Goll v. Fehr*¹⁷ a married woman joined with her husband in executing a note secured by a mortgage on her separate property as collateral to the husband's indebtedness to a bank. It was held that the mortgage was enforceable in equity to the

¹⁰ *Cellers v. Meachem*, 49 Ore. 186, 89 Pac. 426 (1907); *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679 (1912); *Richards v. Market Exch. Bank Co.*, 81 Ohio St. 348, 90 N. E. 1000 (1910).

¹¹ 49 Ore. 186, 89 Pac. 426 (1907).

¹² NEGOTIABLE INSTRUMENTS LAW §§ 29, 192.

¹³ NEGOTIABLE INSTRUMENTS LAW § 119.

¹⁴ ARANT ON SURETYSHIP § 67.

¹⁵ NEGOTIABLE INSTRUMENTS LAW § 124; *Thorpe v. White*, 188 Mass. 333, 74 N. E. 592 (1905); *Packard v. Windholz*, 84 N. Y. S. 666 (1903); *Wash. Finance Corp. v. Glass*, 74 Wash. 653, 134 Pac. 480 (1913).

¹⁶ *Fowler v. Barlow*, 102 Vt. 99, 146 Atl. 77 (1929).

¹⁷ 131 Wis. 141, 111 N. W. 235 (1907).

extent of the value of the property so charged, though the wife was not personally liable on the collateral note.

As has been said, however, whether it is a personal surety or a property surety the law with regard to liability, notice, discharge, etc., is substantially the same. For example, what will operate to discharge one surety will do likewise to the other. Thus, a binding agreement for the extension of the time of payment of the principal debt without the consent of the accommodation mortgagor discharges the property mortgaged.¹⁸ The same is true generally where collateral of any kind is given to secure the debt of another,¹⁹ subject, of course, to the exceptions, already noted, created by the *Negotiable Instruments Law*.

Rex E. Weaver.

TAXATION—IMMUNITY OF STATE AGENCIES AND EMPLOYEES FROM FEDERAL INCOME TAX.—As early as 1819, in *McCulloch v. Maryland*,¹ the United States Supreme Court held that a state had no power to pass a law imposing a tax upon the operations of a national bank. The result of this decision has been a general doctrine that a state has no power to tax the agencies and instrumentalities of the Federal Government. The immunity of national property from state taxation is founded upon the decision in the *McCulloch* case.² In accordance with the doctrine of this case, it has been held that a state tax imposed upon the salaries or compensation of a postal clerk, a regional attorney for the United States Veterans Administration, and a stockman upon an Indian Reservation is invalid, on the theory that if these employees of the Federal Government are not, in a limited sense, governmental agencies or instrumentalities, they are necessary parts of such, and their income from the Federal Government for such services cannot be taxed by the state.³

The converse of the foregoing doctrine is true, also. State instrumentalities and agencies have similarly been protected from federal taxation. In 1871 the United States Supreme Court held, in *Buffington v. Day (The Collector v. Day)*,⁴ that Congress was not entitled, under the Federal Constitution, to impose a tax upon the salary of a judicial officer of a state. In this case Justice Nelson admitted that there is no express provision in the Federal Constitution that prohibits the Federal

¹⁸ *Hinton v. Greenleaf*, 113 N. C. 6, 18 S. E. 56 (1893).

¹⁹ *Eberhart v. Eyre-Shoemaker, Inc.*, 70 Ind. App. 658, 134 N. E. 227 (1922); *Van Hoesen v. Gelfen*, 103 N. J. Eq. 234, 143 Atl. 137 (1928).

¹ 4 Wheat. 316 (1819).

² See *South Carolina v. United States*, 119 U. S. 437 (1905). See 11 *TEMPLE L. Q.* 383.

³ *Schlosser v. Welsh*, 5 F. Supp. 993 (D. S. D. 1934).

⁴ 11 Wall. 113 (1871). See: 37 *COL. L. REV.* 1019; 12 *IND. L. J.* 421.

Government from taxing state agencies and instrumentalities, and that there was no express provision in the Federal Constitution prohibiting a state from taxing federal agencies and instrumentalities. He said that in both cases the exemption rests upon necessary implication, the implication being that, since the power to tax involves the power to destroy, the law of self-preservation upholds the exemption in each instance. The late Justice Holmes emphatically asserted that the power to tax is not the power to destroy.⁵ Taxation, however, if not restrained by reasonable limits, would probably lead to destruction of government. If the exemption is founded on the reason that the power to tax is the power to destroy, then the exemption itself might seriously impair the functioning of the governments of the various states. The Federal Government has recently entered many fields of endeavor formerly engaged in by private enterprise, and the property used therein, which is exempt from state taxation, causes millions of dollars to be withdrawn from state taxation.⁶ A survey of the Federal governmental agencies and enterprises shows the following:⁷ (1) *Electricity and water power*, either existing or proposed (Arkansas Valley Authority, Arkansas River, Bonneville Dam, Boulder Canon Project, Casper-Alcova Dam, Electric Home and Farm Authority, Fort Peck Dam, Grand Coulee Dam, Missouri and Mississippi Valley Authority, and the Tennessee Valley Authority); (2) *Housing* (Federal Home Loan Banks, Federal Housing Administration, Federal Savings and Loan Insurance Corporation, Federal Subsistence Homestead Corporation, Home Owners' Loan Corporation, and Public Works Emergency Housing Corporation); (3) *Agriculture* (Commodity Credit Corporation, Federal Farm Mortgage Corporation, Federal Surplus Relief Corporation, and Production Credit Corporation); and (4) *Finance* (Emergency Public Works and Construction Projects, Export-Import Banks of Washington, Federal Deposit Insurance Corporation, and Reconstruction Finance Corporation). The franchises, capital stock, and securities of the corporations created in connection with these agencies and instrumentalities are exempt from taxation, as well as any income derived therefrom.⁸ Also, these agencies and instrumentalities are more or less competing with heavily taxed private industries.

On the other hand, a number of recent decisions will show the extent to which the courts have gone in holding state officials exempt from the Federal Income Tax. The income of the Chief Engineer of the Bureau of Water Supply of the City of New York was held exempt from the Federal Income Tax, on the ground that the acquisition and distribution by a city of the supply of water is a governmental function,

⁵ *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 223 (1928).

⁶ 11 TEMPLE L. Q. 383, 384.

⁷ 11 TEMPLE L. Q. 383, 384.

⁸ 11 TEMPLE L. Q. 383, 384.

and, as a necessary corollary, the salaries paid in connection with the rendition of this service are likewise exempt.⁹ The wages of an employee of a street railway owned and operated by a municipality have been held exempt from the Federal Income Tax.¹⁰ The compensation of a manager of a cafeteria operated by a school district has been held exempt from federal taxation on the theory that such taxation would be an interference with a state governmental function.¹¹ The salary of a state bank liquidator has been held not subject to federal taxation on the ground that he was an instrumentality of the state in aiding it in the administration of its banking laws.¹² These few decisions indicate the trend in the matter of exemption of state employees from federal taxation. In view of the fact that approximately 5,000,000¹³ state employees are exempt from federal taxation, the importance of this problem can very well be realized by those taxpayers who are not employed by a state or a municipality.

The immunity does not exist, however, unless the federal tax imposes a real burden upon, or constitutes an impediment to, the normal exercise by the state of its sovereign power.¹⁴ Accordingly, the salary of an attorney employed by the state of New York as a liquidating agent in the Bureau of the State Insurance Department was held not exempt from federal taxation, since the federal tax did not impose a burden on the exercise of state sovereignty.¹⁵ Where the state has departed from its usual governmental function and engaged in a business enterprise for the public benefit,¹⁶ and where persons subjected to the federal taxation are neither officers of nor regular employees of the state, but are so-called independent contractors, the federal tax does not impose a burden upon the normal exercise by the state of its sovereign powers.¹⁷

The cases do not establish any precise formula by which we can determine with precision and in advance the difference between the

⁹ *Brush v. Commissioner of Internal Revenue*, 57 S. Ct. 495 (1937).

¹⁰ *Frey v. Woodworth*, 2 Fed. (2d) 725 (D. C. Mich. 1924), *writ of error dismissed*, 270 U. S. 669.

¹¹ *Hoskins v. Commissioner of Internal Revenue*, 84 Fed. (2d) 627 (C. C. A. 5th, 1936).

¹² *Therrel v. Commissioner of Internal Revenue*, 88 Fed. (2d) 869 (C. C. A. 5th, 1937).

¹³ *N. Y. Times*, March 21, 1937, p. 2, col. 5.

¹⁴ *McLoughlin v. Commissioner of Internal Revenue*, 89 Fed. (2d) 699 (C. C. A. 2nd, 1937).

¹⁵ *McLoughlin v. Commissioner of Internal Revenue*, *op. cit. supra* note 14.

¹⁶ *South Carolina v. United States*, *op. cit. supra* note 2; *State of Ohio v. Helvering*, 292 U. S. 360 (1933).

¹⁷ *Metcalf v. Mitchell*, 269 U. S. 514 (1925).

governmental and proprietary functions of a state. The United States Supreme Court refuses to be bound by any local rule governing with respect to municipal liability in tort.¹⁸ In that field no definite rule can be extracted from the cases. The line of distinction is shadowy and difficult to draw in many instances.

George E. Murphy.

TAXATION—THE "USE" TAX.—To support an expanding bureaucracy various methods of taxation are necessarily employed. Among them appears a novelty, a "use" tax. Generally utilized as a correlative of the much criticized sales tax, it has been adopted in California, Oklahoma, and Washington in 1935, Ohio and North Carolina in 1936, and in Michigan during the recent meeting of its legislators. To curb legal escapes from payment of sales taxes through out-of-state purchases by large consumers, legislators have slapped a tax upon the consumption of goods within the state. The tax, being the same rate as the sales tax, is not levied upon goods bought in the state—the statute, to avoid double taxation, exempting such goods—but is aimed primarily at interstate commerce. Several questions at once arise. Is this tax constitutional? Is it a burden upon interstate commerce? Is it discriminatory?

To understand intelligibly the problems faced and conclusions reached by the courts passing upon the "use" tax statute, a history of Supreme Court decisions demonstrating the development of state taxing power is essential. *Brown v. The State of Maryland*¹ was the first to deal with the problem. The state of Maryland enacted a statute compelling all importers of foreign articles, commodities, etc., as a condition precedent to selling, to procure a license. The appellant attacked the Act as a violation of the constitutional clause prohibiting any state from "levying any imposts or duty upon imports or exports, except what may be absolutely necessary for executing its inspection laws." Chief Justice Marshall, in his opinion, invoked principles which control foreign commerce to this day, the most frequent and best known being the "original package" doctrine. The Supreme Court held that no state has the power, either directly or indirectly, to tax or burden foreign imports as long as they remain in the hands of the importer in their original packages;² that it can tax only after the importer has so acted

¹⁸ *Brush v. Commissioner of Internal Revenue*, *op. cit. supra* note 9.

¹ 12 Wheat. 419 (1827).

² "Original package," from the composite definition of several courts, "means that package, which, according to custom respecting the particular articles shipped, is usually delivered by the vendor to the carrier for transportation, and delivered as a unit to the consignee." Annotation, 26 A. L. R. 971.

upon his imports that they no longer retain their character as such but become incorporated and mixed up in the mass of property within the country. But in concluding his opinion Chief Justice Marshall said: "It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles." What was actually meant by these words is a matter of conjecture. Did he intend to forbid the taxation of all interstate commerce? Or was he merely referring to foreign goods imported from another state? The former is the more plausible; at least the plaintiff argued it in *Woodruff v. Parham*.³

In *Woodruff v. Parham*⁴ the city of Mobile, Alabama, placed a tax on all goods sold at auction sales, sales of merchandise, real and personal property, capital employed in business and incomes. The plaintiff, engaged in selling goods at auctions, was willing to pay taxes upon goods bought in Alabama but objected to taxes imposed upon articles brought into the State and sold in their original packages. The Supreme Court, sustaining the action of the tax collector, based its decision on social justice, holding that since the term "imports," properly applied, did not include interstate commerce, the State had the power to tax. It dismissed Chief Justice Marshall's remarks as mere dicta. The problem of interstate commerce was up for consideration for the first time.

This distinction between imports and interstate commerce was affirmed in *Brown v. Houston*⁵ in 1884. The plaintiff, seeking to restrain the defendant tax collector from levying upon certain coal in Louisiana for nonpayment of the general property tax, contended that the coal was brought there from Pennsylvania, and was not subject to state regulation. The court stated that the coal, having come to rest in Louisiana, even though still in original packages, was a part of the general mass of property. The mere fact that it was subsequently exported, although not intended to be exported at the time of taxation, did not change its character or deprive the state of its power to tax. The court said: "But certainly, where a general tax is laid on all property alike, it cannot be construed as a duty on exports when falling upon goods not then intended for exportation, though they should happen to be exported afterwards."

Since the court ruled that the original package doctrine did not apply to interstate commerce, and that the states have the power to tax, it was faced with the dilemma presented by *Leisy v. Hardin*⁶ and *Lyng*

³ 75 U. S. 123 (1869).

⁴ *Op. cit. supra* note 3.

⁵ 114 U. S. 622 (1884).

⁶ 135 U. S. 100 (1889).

v. Michigan.⁷ In the former a Peoria company sued to recover liquor confiscated by an Iowa officer acting under an Iowa statute forbidding the sale of intoxicating liquors. The court held that to prohibit sale of merchantable goods brought into one state from other states, as long as they remained in the original packages, would be a regulation of interstate commerce; that only after the original package was broken and the goods intermingled with the general mass of property within the state could any form of regulation be applied. Similarly, the court in latter case held that the state could not classify out-of-state manufacturers of liquors as wholesalers for the purposes of taxation, since, the goods still remaining in original packages, they were subject to the control of Congress and free from all state regulations.

Although *Leisy v. Hardin* and *Lyng v. Michigan* appeared to overrule *Woodruff v. Parham* and *Brown v. Houston*, the court has applied the doctrine of the latter cases as authority in subsequent cases, notably, *Emert v. Missouri*⁸ and *Kelley v. Rhoads*.⁹ The former held that a tax upon peddlers was valid, even though the goods sold were manufactured out of state and sold in their original packages. *Kelley v. Rhoads* cited *Brown v. Houston* as upholding the rule that goods brought to a state of rest could be taxed, but distinguished the case where the goods were in transit at all times.

Since the application of the "original package" doctrine baffled attorneys and lower court judges, the Supreme Court, in *American Steel & Wire Co. v. Speed*¹⁰ attempted to reconcile the apparently conflicting rulings of *Leisy v. Hardin* and *Lyng v. Michigan* on the one hand and *Woodruff v. Parham* and *Brown v. Houston* on the other. The court distinguished an absolute, express constitutional prohibition upon the states from an implied prohibition. In *Brown v. The State of Maryland* the tax considered was expressly prohibited by the Constitution as it was a tax upon imports. The above four controversial cases dealt with no absolute or positive inhibition against the exercise of the taxing power. *Woodruff v. Parham* and *Brown v. Houston* determined whether a particular exertion of the taxing power so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. *Brown v. Maryland* settled that where goods were imported from one state into another they preserved their character as imports as long as they remained unsold in their original packages, and were, accordingly, not subject to direct or indirect state taxation as long as they remained unsold in the original package (in which they were imported). This case fixed the period when interstate commerce terminated. In *Leisy v.*

⁷ 135 U. S. 161 (1889).

⁸ 156 U. S. 296 (1894).

⁹ 188 U. S. 1 (1902).

¹⁰ 192 U. S. 500 (1903).

Hardin and *Lyng v. Michigan* the goods had reached their destination and the question was not the power of the state to tax them, but its authority to treat the goods as not the subject of interstate commerce, and to prohibit their introduction or sale. This was held to be a regulation, within the constitutional sense, and therefore void. Both cases conceded that interstate commerce was terminated only after the sale at the point of destination in the original package; they did not determine that interstate commerce was to be considered as having completely terminated at one time for the purposes of import taxation, and at a different period for the purposes of interstate commerce.¹¹ These "cases, therefore, did not decide that interstate commerce was to be considered as having completely terminated at one time for the purposes of import taxation, and at a different period for the purposes of interstate commerce. But both cases [*Leisy v. Hardin* and *Lyng v. Michigan*], whilst conceding that interstate commerce was completely terminated only after the sale at the point of destination in the original packages, were rested upon the nature and operation of the particular exertion of state authority considered in the respective cases."¹²

Having established the power of the state to tax the original packages of goods imported from other states, even though it may indirectly burden interstate commerce, the court advanced forward in *Gregg Dyeing Co. v. Query*,¹³ where it upheld a statute providing an excise tax upon gasoline to be used for consumption within the state twenty-four hours after it is brought into the state and stored. This tax was imposed only if the goods had not already been taxed under a different statute. The South Carolina Supreme Court had interpreted the statute as complementary to the regular gasoline tax collected at all filling stations; therefore, no discrimination existed against interstate commerce.

Developing further this taxing power of the state, the United States Supreme Court upheld, in *Nashville, C. & St. L. R. Co. v. Wallace*,¹⁴ the right of the state to place a consumption or *use* tax upon the storage of gasoline within the state, even though it may subsequently be used for interstate commerce. The plaintiff, railroad company, stored gas in Tennessee for use in trains operating in interstate. The court reasoned that the storing of the gas destroyed its character as interstate commerce and also its immunity from state taxation. This principle was upheld and extended in *Edelman v. Boeing Air Transport, Inc.*,¹⁵ in which the respondent, operating an interstate air line, imported gasoline into Wyoming for storage until further use in its planes. The right of the state to tax the "use" of this gasoline,

¹¹ See *American Steel & Wire Co. v. Speed*, *op. cit. supra* note 10, at 521, 522.

¹² *American Steel & Wire Co. v. Speed*, *op. cit. supra* note 10, at 522.

¹³ 286 U. S. 472, 84 A. L. R. 831 (1931).

¹⁴ 288 U. S. 249 (1933).

¹⁵ 289 U. S. 249 (1933).

despite the fact that it was to be used in interstate commerce, was upheld on the grounds that "use" is measured at the time of withdrawal from storage and not while it is combusted in the plane; thus the "use" is completed entirely within the state. The Court in the latter case, in commenting on the *Wallace* case, said: "As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations."

Keeping this history and development of taxation in mind the position of the "use" tax is clearly sighted. Such "use" tax statutes are constructed as complementary to the sales tax enactments. They provide, in effect, that all property used within the state, if it has not already been taxed under the sales tax statute, shall be assessed a "use" tax. What effect a failure to include this provision would have upon the constitutionality is speculative. It might easily be held double taxation on goods bought within the state. If it named only interstate commerce it might be ruled discriminatory and therefore invalid.

To date two cases have dealt with this statute. *Powell v. Maxwell*¹⁶ upheld the constitutionality of such a tax statute, providing a tax upon automobiles *used* within the state. This North Carolina Statute required every person to remit the tax with his application for license and certificate of title, but excepted persons furnishing a statement from a dealer in North Carolina showing that the sales tax had been paid. The court held this tax law not to be discriminatory.

While *Southern Pacific Co. v. Corbett*¹⁷ is not authoritative, it will be interesting—if it should go higher—to watch the final determination. The tax collector applied the California use tax to the storage of equipment to be used in interstate commerce. The trial court held that although the tax was proper upon goods brought into the state for consumption, yet it should not be applied to goods intended for an interstate use. The court, contrary to the belief of the writer, distinguished *Nashville v. Wallace* and *Edelman v. Boeing Air Transport* for the reason that it was not contended or proved that the gasoline was set aside or allocated for an interstate use. In the writer's opinion such contention and proof were made, but the tax was upheld, as resting upon the storage or withdrawal from storage, which enjoyed the protection of the state, and not upon the lack of proof of interstate use. It is doubtful whether the Supreme Court will accept that distinction upon review, but due to the growing liberality toward state taxing powers, it will in all probability reverse the decision and uphold the state's power to tax storage of equipment as well as the "use" tax in general.

¹⁶ 210 N. C. 211, 186 S. E. 326 (1936), *commented on*, 15 N. C. L. REV. 75.

¹⁷ U. S. L. Week, Vol. 5, No. 7, p. 15 (N. D. Cal. 1937).