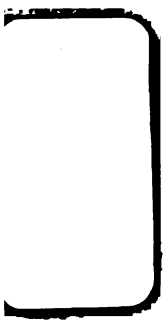

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PREFACE

This volume has been prepared, primarily, for use in a class studying the relations of government to industry, a subject just now in that eager ferment through which all important issues pass before reaching even a temporary equilibrium.

We are in the midst of swift changes affecting business and property, changes that touch the daily activities of everyone at the bread-and-butter point. We cannot be said to have reached a fixed policy. Even the courts, those sanctuaries of stability, are groping their way along the new paths of "police power" and are attempting the difficult task of reconciling our constitutional traditions with new administrative functions.

There can be, therefore, very little permanent literature upon so shifting a subject. But there is a vast amount of current literature, and this volume attempts to bring together some of the most significant of these current discussions.

Inasmuch as the question of the relation of government to business and property is principally one of constitutional and legal relations, the articles here reprinted are largely of a legal nature, and most of them have been taken from a source heretofore almost entirely neglected by the lay student, the law journals, repositories of much careful research and concise thinking on this subject.

While attempting to avoid controversial material, it has been necessary to present various phases of issues still in the propagandist stage.

The arrangement of the material has followed a seemingly natural sequence. One necessarily begins with the presentation of the changing conceptions of property obligations and of governmental functions; this leads to a discussion of the expanding police power, as sanctioned by state and federal courts. The problem of the control of corporations, the financial enginery of all our important industries to-day, directs one's attention to the organization, functions, and powers of commissions — the device we have adopted for making governmental regulation of public utilities effective. The development of labor laws further affects profoundly our ideas of property obligations and the functions of government. Perhaps we should expect that all these tendencies lead to the centralization of federal control over state business. The new amendments to the Anti-trust Law and the new Federal Trade Commission [illegible]are at present the apex of this centralization. From the testimony [illegible]ore the Senate committee, in the investigation which was a

prelude to the framing and passing of these laws, excerpts are reproduced, reflecting the varying opinions of diverse authorities on this subject.

It is not an easy task to compile such a volume. There are not merely the difficulties of the selective process; one has also the ever-present consciousness that he is dealing with other men's opinions — manhandling viewpoints and jostling them together into a juxtaposition for which they were never designed. In this instance, the task has been greatly lightened by the cordial permission of the authors to reprint their articles or portions of their books, and the liberal consent of the journals and publishers who hold the copyrights.[1]

To all these — authors, editors, and publishers — I wish to express my heartiest thanks; and also to my colleagues, Professor Walter F. Willcox and Professor A. A. Young, for their helpful suggestions and painstaking assistance.

S. P. O.

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I

THE CHANGING CONCEPTIONS OF PROPERTY AND THE FUNCTIONS OF GOVERNMENT

THE CONSTITUTIONAL POSITION OF PROPERTY IN AMERICA

By Arthur Twining Hadley, President of Yale University

(From the *Independent*, April 16, 1908)

The basis of the expansion of governmental functions in relation to industry and property is the changing opinion regarding property obligations and vested rights. The statement by President Hadley may well be called the classic pronouncement upon this subject. — Editor's Note.

European observers who study either the specific industrial questions which have come before the American people for their solution, or the general relation between the industrial activity of the Government and that of private individuals, are surprised at a certain weakness of public action in all these matters. Our legislatures are often ready to pass drastic measures of regulation; they are rarely willing to pursue a consistent and carefully developed policy for the attainment of an industrial end. The people often declaim against the extent of the powers of private capital; they are seldom willing to put that capital under the direct management of the government itself. The man who talks loudest of the abuses of private railroad management shrinks from the alternative of putting railroads into the direct control and ownership of the State.

The fact is, that private property in the United States, in spite of all the dangers of unintelligent legislation, is constitutionally in a stronger position, as against the Government and the Government authority, than is the case in any country of Europe. However much public feeling may at times move in the direction of socialistic measures, there is no nation which by its constitution is so far removed from

socialism or from a socialistic order. This is partly because the governmental means provided for the control or limitation of private property are weaker in America than elsewhere, but chiefly because the rights of private property are more formally established in the Constitution itself.

This may seem a startling proposition; but I think a very brief glance at the known facts of history will be sufficient to support and sustain it. For property in the modern sense was a comparatively recent development in the public law of European communities. In the United States, on the contrary, property in the modern sense represents the basis on which the whole social order was established and built up.

Down to about the thirteenth century the system of land tenure in every country of Europe was a feudal one. It was based upon military service. A man held a larger or smaller amount of land on account of his larger or smaller amount of fighting efficiency. There were many rival claimants for the land. The majority of those who wanted to cultivate the soil were unable to protect themselves against the dangers of war. In the absence of an efficient protector or overlord no amount of industry was effective and no large accumulation of capital was possible. The services of the military chief were indispensable as a basis for the toil of the laborer or the forethought of the capitalist. It was the military chief, therefore, who enjoyed not only the largest measure of respect, but the strongest position under the law. As the conditions of public security grew better these things changed. From the fourteenth century to the nineteenth Europe has witnessed the gradual substitution of industrial tenures for military tenures, the gradual development of a system of property law intended to encourage the activities of the laborers and the capitalists, rather than to reward the services of the successful military chieftain. But down to the end of the eighteenth century this new sort of private property represented a superadded element rather than an integral basis of the constitution of society. And even the developments of the last hundred years in constitutional law and industrial activity have not been able to obliterate a certain sense of newness when we contrast the position of the aristocracy of wealth with that of the aristocracy of military rank.

In the American colonies, on the other hand, where the public law of the United States first took its rise, conditions were wholly different. People wanted no military chieftain to protect them, no overlord to rule them. Each man was familiar with the use of a gun — how familiar, the overwhelming losses of the British troops in the Revolutionary War, when brought face to face with untrained farmers, testify very clearly — and was ready to take his share in protecting the community against the attacks of the Indians or their French leaders.

There was plenty of land for all — plenty of opportunity for the exercise of labor and the use of capital. That man did the most for society who worked hardest and saved most. Under such circumstances the laws were so framed and interpreted as to give the maximum stimulus to labor and the maximum rights to capital. There was no military aristocracy which stood in the way. Governors were at times sent over from England who tried their best to assert Crown rights for themselves and their subordinates. But the net effect of the activity of these governors was probably to weaken rather than to strengthen the claims of feudal authority, because they made themselves so unpopular that they united the spirit of the colonists in their resistance to all such claims and pretensions.

At the time, therefore, when the United States separated from England, respect for industrial property right was a fundamental principle in the law and public opinion of the land. It was natural enough that this should be so at a period when every man either held property or hoped to do so. The strange thing is that this principle should have survived with so little change down to the present day. But there were certain circumstances connected with the adoption of the Constitution of the United States which provided for the perpetuation of this state of things — which made it difficult for public opinion in another and later age, when property holding was less widely distributed, to alter the legal conditions of the earlier period.

During the War of the Revolution, from 1775 to 1782, and in the years immediately thereafter, the American Union had been a league of independent States, and a very loose one. They had formed an organization for mutual protection in carrying on the war. But this organization, even while the war lasted, was very weak indeed. The imminence of a common danger, which threatened to involve all, and the personality of a few leaders, of whom George Washington was the most conspicuous, were the only things that enabled the different colonies to act together. When independence was conceded by England in 1782, and the restraints of common danger were removed, the hopeless weakness of the central government became obvious. From 1783 to 1789 the United States had no means of securing concert of action at home or respect and consideration abroad. Clear-headed men felt the absolute necessity of centralization. The Constitution of 1788 was the result of a set of contracts, agreements, and compromises between two pretty evenly balanced parties — a States rights party, which wished to limit the powers of the Federal Government, and a national party, which was anxious to set some practical control on the autonomy of the State government.

The delegates to the convention of 1787 were concerned with questions of constitutional law in the narrower sense. They were not thinking of the legal position of private proverty. But it so happened

that in making mutual limitations upon the powers of the Federal and the State government they unwittingly incorporated into the Constitution itself certain very extraordinary immunities to the property holders as a body.

It was in the first place provided that there should be no taking of private property without due process of law. The States Rights men feared that the Federal Government might, under the stress of military necessity, pursue an arbitrary policy of confiscation. The Federalists, or national party, feared that under the influence of sectional jealousy one or more of the States might pursue the same policy. This constitutional provision prevented the legislature or executive, either of the nation or of the individual States from taking property without judicial inquiry as to the necessity, and without making full compensation even in case the result of such inquiry was favorable to the government. No man foresaw the subsequent effect of this provision in preventing a majority of voters, acting in the legislature or through the executive, from disturbing existing arrangements with regard to railroad building or factory operation until the railroad stockholders or factory owners had had the opportunity to have their case tried in the courts.

There was another equally important clause in the Constitution providing that no State should pass a law impairing the obligation of contracts. In this case also a provision which was at first intended to prevent sectional strife and to protect the people of one locality against arbitrary legislation in another became a means of strengthening vested rights as a whole against the possibility of legislative or executive interference. Nor was the direct effect of these two clauses in preventing specific acts on the part of the legislature the most important result of their existence. They were a powerful means of establishing the American courts in that position of supremacy which they enjoy under the Constitution. For whenever an act of the legislature or the executive violated, or even seemed to violate, one of these clauses, it came before the courts for review. If the Federal courts said that the act of a legislature violated one of these provisions it was blocked — rendered powerless by a dictum of the judges. I do not mean that these two clauses in the Constitution were the chief source of judicial power. That power has been due primarily to the traditional respect for the judicial office exsting in the United States, which has rendered it almost impossible for any but men of learning and character to aspire to it, and, secondarily, to the very great ability that certain of the early American judges — notably Marshall, Story and Kent — showed in expounding the law in such manner as to command universal approval. But if these provisions did not lie at the foundation of the positive authority of the judges, they were unquestionably a most powerful instrument in practically limiting the

authority of legislatures, and to that extent in strengthening the rights of the property holders.

The rights of individual owners against legislative interference were thus most fully protected. But how was it when property was in the hands of corporations?

Here also the power of control by the Government was weakened and the rights and immunities of the property holders correspondingly strengthened by two events, whose effect upon the modern industrial situation may be fairly characterized as fortuitous. One of these was the decision of the celebrated Dartmouth College cause in 1819; the other was the passage of the Fourteenth Amendment to the Constitution of the United States in 1868.

I call their effect fortuitous, because neither the judges who decided the Dartmouth College case nor the legislators who passed the Fourteenth Amendment had any idea how these things would affect the modern industrial situation. The Dartmouth College case dealt with an educational institution not with an industrial enterprise. The Fourteenth Amendment was framed to protect the negroes from oppression by the whites, not to protect corporations from oppression by the legislature. It is doubtful whether a single one of the members of Congress who voted for it had any idea that it would touch the question of corporate regulation at all. Yet the two together have had the effect of placing the modern industrial corporation in an almost impregnable constitutional position.

In 1816 the New Hampshire Legislature attempted to take away the charter rights of Dartmouth College. Daniel Webster was employed by the college in its defense, and his reasoning so impressed the court that they committed themselves to the position that a charter was a contract; that a State, having induced people to invest money by certain privileges and immunities, could not at will modify those privileges and immunities thus granted. Whether the court would have taken so broad a position if the matter had come before it thirty or forty years later, when the abuses of ill-judged industrial charters had become more fully manifest, is not sure; but, having once taken this position and maintained it in a series of decisions, the court could not well recede from it. Inasmuch as many of the corporate charters granted by State legislation had an unlimited period to run, the theory that these instruments were contracts binding the State for all time had a very important bearing in limiting the field within which a legislature could regulate the activity of such a body, or an executive interfere with it.

Again, by the Fourteenth Amendment to the Constitution of the United States every State was forbidden to interfere with the civil rights of any person or to treat different persons in an unequal way. This amendment to the Constitution, passed just after the close of the

Civil War, was intended to prevent the Southern States readmitted, or on the point of being readmitted, to the Union from abridging the rights of the negro members of the commonwealth. A number of years elapsed before the effect of this amendment upon the constitutional position of railroad and industrial corporations seems to have been fully realized. But in 1882 the Southern Pacific Railroad Company, having been, as it conceived, unfairly taxed by the assessors of a certain county in California, took the position that a law of the State of California taxing the property of a corporation at a different rate from that under which similar property of an individual would be taxed was in effect a violation of the Fourteenth Amendment to the Constitution, because a corporation was a person and therefore entitled to equal treatment. This view, after careful consideration, was upheld by the Federal courts. A corporation, therefore, under the law of the United States, is entitled to the same immunities as any other person; and, since the charter creating it is a contract, whose obligation cannot be impaired by the one-sided act of the legislature, its constitutional position as a property holder is much stronger than anywhere in Europe.

Under these circumstances, it is evident that large powers and privileges have been constitutionally delegated to private property in general and to corporate property in particular. I do not mean that property owners, and specifically the owners of corporate property, have more *practical* freedom from interference in the United States than they do in some other countries, notably in England. Probably they do not have as much. But their theoretical position — the sum of the conditions which affect their standing for the long future and not for the immediate present — is far stronger in the United States. The general status of the property owner under the law cannot be changed by the action of the legislature or the executive, or the people of a State voting at the polls, or all three put together. It cannot be changed without either a consensus of opinion among the judges, which should lead them to retrace their old views, or an amendment of the Constitution of the United States by the slow and cumbersome machinery provided for that purpose, or, last — and I hope most improbable — a revolution.

When it is said, as it commonly is, that the fundamental division of powers in the modern State is into legislative, executive and judicial, the student of American institutions may fairly note an exception. The fundamental division of powers in the Constitution of the United States is between voters on the one hand and property owners on the other. The forces of democracy on one side, divided between the executive and the legislature, are set over against the forces of property on the other side, with the judiciary as arbiter between them; the Constitution itself not only forbidding the legislature and executive

to trench upon the rights of property, but compelling the judiciary to define and uphold those rights in a manner provided by the Constitution itself.

This theory of American politics has not often been stated. But it has been universally acted upon. One reason why it has not been more frequently stated is that it has been acted upon so universally that no American of earlier generations ever thought it necessary to state it. It has had the most fundamental and far-reaching effects upon the policy of the country. To mention but one thing among many, it has allowed the experiment of universal suffrage to be tried under conditions essentially different from those which led to its ruin in Athens or in Rome. The voter was omnipotent — within a limited area. He could make what laws he pleased, as long as those laws did not trench upon property right. He could elect what officers he pleased, as long as those officers did not try to do certain duties confided by the Constitution to the property holders. Democracy was complete as far as it went, but constitutionally it was bound to stop short of *social* democracy. I will not go so far as to say that this set of limitations on the political power of the majority in favor of the political power of the property owner has been a necessary element in the success of universal suffrage in the United States. I will say unhesitatingly that it has been a decisive factor in determining the political character of the nation and the actual development of its industries and institutions.

CONFUSION OF PROPERTY WITH PRIVILEGE: DARTMOUTH COLLEGE CASE

By Jesse F. Orton of the New York Bar

(From the *Independent*, August 19 and 26, 1909)

I. Historical

The Dartmouth College case was essentially a personal and political controversy between comparatively small factions at an early day in one of the smaller states of the Union. But it has made law in regard to the most solemn and vital interests of a great nation and is still, in spite of strong efforts to evade its consequences, a mighty force in the economic and social institutions of the country. Probably its most striking results were never dreamed of by the scheming college trustees, the adroit and partisan counsel, or the justices of imperious

will, when they were playing their evanescent rôles and giving rein to the political passions and prejudices of the hour.

Justice Cole, of the Iowa supreme court, said in 1874 that "the practical effect of the Dartmouth College decision is to exalt the rights of the few above those of the many," and that "under the authority of that decision more monopolies have been created and perpetuated, and more wrongs and outrages upon the people effected, than by any other single instrumentality in the government." [1]

* * * * * * *

The late George P. Wanty, of Michigan, afterward appointed federal judge by President McKinley, said with reference to this decision: "No court may promulgate a doctrine which is not founded in the good sense of the people and have it respected." [2]

What is there in this celebrated case to call forth such emphatic expressions of opinion from jurists and students of government? It is the purpose of this article to show briefly the results of the decision and the influences which brought it about. In the second article the case will be considered from the legal standpoint.

The result of the Dartmouth College decision has been the confusion of privilege with property. Being the basis of the doctrine that a few lawmakers, clothed with authority for a day, may barter away forever the sovereign rights and powers of the people, it has proved a prolific source of corruption in legislation. Among the fruits of this doctrine are such privileges as perpetual exemption from the common burden of taxation and never-ending possession of public highways by street railways and other corporations run for private profit. It is true that the force of Marshall's decision has been greatly impaired by his successors. In 1895 Judge Wanty was moved to say that the most casual observer could not fail to see that its authority was "fast passing away." Yet this alien growth, engrafted upon the Constitution in 1819, soon assumed such huge proportions that its "passing" was not the work of a year or a decade. Chief Justices Taney and Waite hewed off mighty limbs, but the gnarled trunk still stands as one of the chief bulwarks of privilege.

The causes which produced the Dartmouth College decision have never been set forth in such form as to penetrate the public consciousness. It has been taken by many, along with the Declaration of Independence and the Constitution, as the work of the fathers of the republic, who, actuated by patriotism and guided by an almost divine inspiration, wrought only for the future weal of their country. In this instance the dream is rudely shattered by the pick and shovel of

[1] Dubuque *vs.* Railroad Co., 39 Iowa 95–96.
[2] *Michigan Law Journal*, Vol. IV, p. 260.

the historian. To understand this decision, we must dig down to its roots.

Dartmouth College was founded in 1769 by a charter granted by Governor Wentworth, of New Hampshire, in the name of the English king. Twelve trustees were named to have full control of the college, except that the first president was named in the charter and was to have the privilege of appointing his successor. The first president, Eleazer Wheelock, died in 1779, having appointed his son, John Wheelock, to succeed him. Some years before 1800, the Wheelock "dynasty" became distasteful to certain ruling spirits on the board of trustees, and in 1809 the president's enemies secured a majority of the board.

All parties to the trouble were originally Federalists, but Wheelock was a Presbyterian, while his opponents adhered to Congregationalism, then practically the established state church in New Hampshire. In 1815 there came a war of pamphlets, with bitter charges and counter charges. Gradually the struggle assumed a political cast. Wheelock appealed to the legislature to investigate and reform alleged abuses of management. The legislature, then a Federalist body, investigated the college through a committee, but went out of office before positive action could be taken. The feeling between the factions had now become so intense that the trustees, without even waiting for the report of the investigating committee, removed President Wheelock from office. Thomas W. Thompson, a leading trustee and strongly hostile to Wheelock, was then the most prominent politician of the Federalist party in New Hampshire. The president's enemies being in possession of one party, his friends tended to become identified with the other; and in this movement they were joined by the opponents of the established church. With these new elements of support, the anti-Federalists in 1816 elected William Plumer to the office of governor, together with a friendly legislature. The contest was very bitter, and before it ended, the identification of the Wheelock faction with anti-Federalism had become complete. The new governor and legislature passed acts amending the college charter, the principal changes being an increase of the number of trustees from twelve to twenty-one and the creation of a board of overseers having a veto on the more important acts of the trustees. The new trustees were to be appointed by the governor and council, and then the board was to be self-perpetuating as before. One result of these legislative acts was the restoration of Wheelock to the position of president, with his friends in practical control of the institution. The old anti-Wheelock trustees largely contributed to this result by refusing to take any part in reorganizing the college under the new laws. Regarding the charter amendments as unconstitutional, they brought suit in the state court to test their validity. Until the final decision in 1819 the university,

as the reorganized college was called, and the college, maintained by the old trustees as a separate institution, were rival seats of learning.

Daniel Webster, a graduate of the college, had been retained by President Wheelock about a year before the passage of the acts, but was persuaded by personal and political friends to abandon Wheelock. Later he appeared as chief counsel for the trustees. The acts were attacked as being opposed to general principles of government, as contrary to various provisions of the New Hampshire constitution, and as in violation of the federal constitution in that they impaired the obligation of a contract contained in the college charter of 1769. The highest state court, then composed of three judges of exceptional ability, decided against the old trustees on every point,[1] and the case was taken to the United States supreme court solely on the point pertaining to the federal constitution.[2]

Senator Henry Cabot Lodge, in his biography of Webster, has summarized so clearly and forcibly the facts relating to the conduct of this case in the supreme court that I shall take the liberty of quoting from his work. Mr. Lodge speaks with authority, for he wrote this biography, as he tells us, only after he had "carefully examined all the literature, contemporary and posthumous, relating to Mr. Webster."[3] Webster, when publishing his supreme court argument in the college case, had admitted that "something was left out." Referring to this, Mr. Lodge says:

> That something, which must have occupied in its delivery nearly an hour, was the most conspicuous example of the generalship by which Mr. Webster achieved victory, and which was wholly apart from his law. . . .
>
> Mr. Webster was fully aware that he could rely, in any aspect of the case, upon the sympathy of Marshall and Washington (Associate Justice Bushrod Washington). He was equally certain of the unyielding opposition of Duvall and Todd; the other three judges, Johnson, Livingston and Story, were known to be adverse to the college, but were possible converts. The first point was to increase the sympathy of the Chief Justice to an eager and even passionate support. Mr. Webster knew the chord to strike, and he touched it with a master hand. This was the "something left out," of which we know the general drift, and we can easily imagine the effect.

* * * * * * *

In the midst of all the legal and constitutional arguments, relevant and irrelevant, even in the pathetic appeal which he used so well in behalf of his alma mater, Mr. Webster boldly and yet skillfully introduced the political view of the case. So delicately did he do it that an attentive listener did not realize that he was straying from the field of "mere reason" into that

[1] 1 N H. 111. The report of this case is reprinted, with arguments of counsel, in 65 N. H. 473.
[2] 4 Wheaton 518.
[3] Life of Webster (in American Statesmen Series), p. 1.

of political passion. Here no man could equal him or help him, for here his eloquence had full scope, and on this he relied to arouse Marshall, whom he thoroughly understood. In occasional sentences he pictured his beloved college under the wise rule of Federalists and the church. He depicted the party assault that was made upon her. He showed the citadel of learning threatened with unholy invasion and falling helplessly into the hands of jacobins and free-thinkers.[1]

Of course, the jacobins were the followers of Jefferson, and the free-thinkers were Governor Plumer and his supporters, who were then carrying on an unprecedented struggle for the legal equality of all religious denominations in New Hampshire. In the following year they were successful in depriving the Congregational Church of the tax-exemption privilege theretofore accorded to its clergy, and in actually enacting a law that no citizen should be compelled to contribute to any religious society "without his consent first had and obtained." History records that the supporters of these revolutionary measures were termed "infidels, — enemies of God and religion."

Mr. Lodge, speaking of Webster's address, proceeds:

As the tide of his resistless and solemn eloquence, mingled with his masterly argument, flowed on, we can imagine how the great Chief Justice roused like an old warhorse at the sound of the trumpet. The words of the speaker carried him back to the early years of the century, when, in the full flush of manhood, at the head of his court, the last stronghold of Federalism, the last bulwark of sound government, he had faced the power of the triumphant Democrats. Once more it was Marshall against Jefferson — the judge against the president. Then he had preserved the ark of the Constitution. Then he had seen the angry waves of popular feeling breaking vainly at his feet. Now, in his old age, the conflict was revived. Jacobinism was raising its sacrilegious hand against the temples of learning, against the friends of order and good government. The joy of battle must have glowed once more in the old man's breast as he grasped anew his weapons and prepared with all the force of his indomitable will to raise yet another constitutional barrier across the path of his ancient enemies.

* * * * * * *

We cannot but feel that Mr. Webster's lost passages, embodying this political appeal, did the work, and that the result was settled when the political passions of the Chief Justice were fairly aroused. Marshall would probably have brought about the decision by the sole force of his imperious will. But Mr. Webster did a good deal of effective work after the arguments were all finished, and no account of the case would be complete without a glance at the famous peroration with which he concluded his speech and in which he boldly flung aside all vestige of legal reasoning, and spoke directly to the passions and emotions of his hearers.

[1] Ibid. p. 87.

Mr. Lodge quotes from a description of Webster's peroration by Professor Goodrich, an eye-witness of the scene. Goodrich tells us that Webster, after finishing his legal argument, stood silent a few moments and then went on to speak personally of the college and to predict great disaster for all colleges and for the private rights of individuals if the legislative acts of New Hampshire should be upheld. While speaking in a personal way of his alma mater, he broke down and had to pause to compose himself. In "broken words of tenderness" he then went on to speak of his attachment to the college. Goodrich continues his description thus:

> The court room during these two or three minutes presented an extraordinary spectacle. Chief Justice Marshall, with his tall and gaunt figure bent over as if to catch the slightest whisper, the deep furrows of his cheek expanded with emotion and his eyes suffused with tears; Mr. Justice Washington, at his side, with his small and emaciated frame, and countenance more like marble than I ever saw on any other human being — leaning forward with an eager, troubled look; and the remainder of the court at the two extremities, pressing, as it were, to a single point, while the audience below were wrapping themselves round in closer folds beneath the bench, to catch each look and every movement of the speaker's face.

This peroration had been used by Webster four months before in the state court, with similar effect upon a sympathetic audience, but not upon the court, although two of the three judges were graduates of Dartmouth. It is not recorded that they were moved to tears.

Mr. Lodge comments further on the part Webster played in this forensic contest:

> Great lawyer as he undoubtedly was, he felt on this occasion that he could not rely on legal argument and pure reason alone. Without appearing to go beyond the line of propriety, without indulging in a declamation unsuited to the place, he had to step outside of legal points and in a freer air, where he could use his keenest and strongest weapons, appeal to the court not as lawyers, but as men subject to passion, emotion and prejudice. This he did boldly, delicately, successfully, and thus he won his case.

In confirmation of Mr. Lodge's view of the matter, we may quote the opinion of Mr. Joseph P. Cotton, Jr., the editor of a recent edition of "The Constitutional Decisions of Marshall." In his comment on this case he says:

> The inference is unavoidable that in that hour he (Webster) argued, and the court listened, outside the record. There can be little question that, by the influence of counsel, by some subtle influence of politics or friendships, there seems to have crept into the consideration of the Dartmouth College case a distinct bias in favor of the college.[1]

[1] The Constitutional Decisions of Marshall, Vol. I, p. 347.

Webster devoted most of his legal argument to questions which, as he acknowledged, were not in any way before the court. The only point of which the federal supreme court had jurisdiction was the alleged violation of the federal constitution with reference to impairing the obligation of contracts. To this point Webster devoted six pages of his published argument, as compared with thirty pages given to points on which the last judicial word had been spoken by the state court.[1] Any modern court would have required him to speak only on the question of which the court had jurisdiction.

Even in the state court the plaintiffs had had a great advantage in the superior ability and astuteness of their counsel. In addition to Webster's wonderful powers as an advocate and orator, they had the services of Jeremiah Mason and Judge Jeremiah Smith, then leaders of the profession in New England. At Washington the defendant's interests were intrusted to John Holmes, of Maine, a scheming politician, who is said to have been a "noisy eulogist and reputed protégé of Jefferson," representing "in politics, law and statesmanship every thing that the soul of Marshall loathed."[2] His argument occupied about three hours, and seems to have been a compound of legal misapprehension and ranting declamation. William Wirt, Monroe's brilliant attorney-general, was employed to assist Holmes; but the case was not much benefited by his appearance, for he was not in harmony with his associate and was so overburdened with the duties of his office that he made practically no preparation on the case and presented a sorry spectacle in the argument. He was known to be the favorite adviser and confidant of Jefferson. After the case had been argued at Washington, additional counsel was employed, on behalf of the State of New Hampshire, in the person of William Pinkney, of Maryland, then the recognized leader of the bar in the United States. Mr. Pinkney tried to obtain the privilege of rearguing the case, but it was too late; the Chief Justice would give him no opportunity for making the motion.

But even with the many advantages, fair and unfair, on the side of the plaintiffs, after the case was submitted to the court, a majority of the seven justices were not ready to say that the obligation of any contract, in the constitutional sense, had been impaired by the amendments to the college charter. On the following day the Chief Justice announced that the court could agree on nothing and the case would be continued for a year, until the next term. Mr. Lodge comments as follows:

> The fact probably was that Marshall found the judges five to two against the college, and that the task of bringing them into line was not a light one.

[1] Timothy Farrar, Report of Darmouth College *vs.* Woodward (1819).
[2] John M. Shirley, Dartmouth College Causes (1879), p. 231.

If Mr. Lodge is right, we have here established a novel rule of judicial procedure, namely, that when seven judges, after full argument, stand five to two in favor of one party, if a Chief Justice with an "imperious will" is one of the two, the proper course is to adjourn the case and bring the five "into line."

Mr. Lodge gives us some light on the getting "into line" process. He tells us how the batteries of the Federalist press, of printed pamphlets, letters and essays, which had already been brought into action for the college under the stress of party influence, were now trained upon the opposing side "with increased eagerness" in order to assist Marshall in his "task." The object, he says, was to "sway the judges without their being aware of it." The printed arguments of the plaintiffs' counsel and other documents "were carefully sent to certain of the judges, but not to all." With Story, whom Mr. Lodge describes as "a Democrat by circumstances, a Federalist by nature," the trustees had "little difficulty"; but "to reach Livingston and Johnson was not so easy, for they were out of New England, and it was necessary to go a long way round to get at them." Mr. Lodge explains one of the circuitous ways pursued in order to reach these two judges. It lay through Chancellor Kent, "the great legal upholder of Federalism in New York." Justice Livingston was from New York, and had sat on the same state bench with Kent, and Justice Johnson, of South Carolina, was a close friend of the Chancellor.

Kent's first impression, like that of Story, was decidedly against the college, but after much effort on the part of the trustees and their able allies Kent was converted, partly through his reason, partly through his Federalism.

Mr. Lodge says that "the whole business was managed like a quiet, decorous political campaign."

At the present time counsel who should, after the argument of a case, send any document "to certain of the judges, but not to all," or who should submit any paper to the judges without giving it also to opposing counsel, would be courting proceedings for their disbarment; and any judge who could be "reached" by the imperceptible methods described by Mr. Lodge, without "being aware of it," would be considered fit only for the next world.

The quotations which have been made from Mr. Lodge with reference to the means used to bring about a decision favorable to the college, are amply supported by known facts and documents, many of which have been industriously collected by Mr. John M. Shirley, who published in 1879 a history of "The Dartmouth College Causes." That Marshall's "imperious will" was a tremendous force in producing judicial results, is well recognized. Sometimes he rendered a decision and entered judgment without taking the trouble to find out whether

his view was supported by a majority of the judges, and in certain cases a minority thus dictated the action of the court.[1] In the language of Professor James B. Thayer, in his Marshall Day address, the Chief Justice "was sometimes curiously regardless of conventions."[2]

As to evidence of the "decorous political campaign," much of it has been destroyed, scattered or suppressed. Judge Smith's voluminous correspondence with Webster and other prominent actors in the struggle, was destroyed by him in 1824, and many of Thompson's letters went "to the paper mill." But a few letters have been left for the historian. Francis Brown, the new president of the college, went to Albany and had conferences with Chancellor Kent and Governor Clinton. The latter was one of the leading Federalists of the country and readily lent his aid against the followers of Plumer, who were especially antagonistic to him. In letters to Webster President Brown speaks of dining with Kent and discussing the college case and of learning that Justice Johnson had visited Kent and talked of the case with him. Brown had discovered "from other sources" that Johnson had "requested the Chancellor's opinion." He suggests that Webster get Chief Justice Isaac Parker, of Massachusetts, to write to the Chancellor. He speaks of "the half secret and cautious manner" in which printed copies of Webster's argument had been distributed. On September 19, 1818, President Brown expressed the opinion, "New England and New York are gained," meaning that Story and Livingston had been reached.[3] Mr. Shirley says that in August, 1818, copies of the arguments of plaintiffs' counsel were furnished by Webster to Justice Story, "to be distributed by him to a portion of the judges."[4] At the reassembling of the supreme court, in February, 1819, about eleven months after the arguments, all were in line for the college except Justices Duvall and Todd. Duvall dissented without filing an opinion, and Todd was absent on account of illness.

The trustees of Dartmouth College did not carry on this politico-legal struggle because they feared any disastrous results to the college from a participation by the state in its control. While the amending statutes were under consideration, three of the leading trustees, Thompson, Paine and McFarland, presented a memorial to the legislature, in which they said they would have no objection, and believed their fellow trustees would have no objection, "to the passage of a law connecting the government of the state with that of the college, and creating every salutary check and restraint upon the official conduct of the trustees." They proposed a plan by which the higher state officials

[1] As in Rose *vs.* Himley, 4 Cranch 241. See Hudson *vs.* Guestier, 6 Cranch 281.
[2] Dillon, Memorial Addresses of 1901, Vol. I, p. 232.
[3] Shirley, op. cit. pp. 265, 271.
[4] Ibid. p. 201.

would constitute a board of overseers having an absolute veto on all acts of the trustees. As Mr. Shirley says, "the trustees were willing that almost any amendment should be made to the charter, if so framed that they could exclude Wheelock and his friends from any share in the government of the college, and could retain possession for themselves and their friends." [1]

There are those who consider the Dartmouth College decision as an important bulwark of property. Their error lies in the confusion of the idea of privilege with the idea of property. Privilege is the antithesis of property, a special favor, an exception to the rule of competition and the law of private property. It enables favored individuals and classes to levy tribute upon the property of others. When crystallized into law and made perpetual, a privilege may be capitalized and treated, in form, as property. It is property in the same sense in which the slaves were property.

Those who deplore the results of the Dartmouth College decision need not yield to any in their devotion to the principle of private property. That a man should enjoy the fruits of his own labor is a fundamental postulate of the human mind. Their objection to this decision is not that it supports the rights of property, but that it enables privilege to masquerade in the garments of property.

II. Legal

The doctrine that corporate charters and franchises are contracts and not subject to repeal, has been in some measure evaded in many of the states by reservation of the power of repeal or amendment. Yet the statement of Mr. Cotton is still true, that the doctrine of the sacredness of charters, and franchises, growing out of the Dartmouth College decision "has woven itself into the tissue of our law, as has, perhaps, no other paper-made doctrine of constitutional law." [2]

One of Marshall's eulogists has said that the effect of this decision was "to withdraw the obligations of contracts from the power of the state legislatures to impair their validity, and to place them also beneath the protecting ægis of the Constitution." In truth, it did nothing of the sort. The protection of ordinary contracts from impairment by the states was effectively secured by the words of the Constitution. What Marshall and his associates did was, by a forced and unheard-of construction, to include, under the term "contracts," certain acts of legislation which ought to be at all times open to repeal or amendment. The royal charter given to Dartmouth College in 1769, providing that the college should always be governed by a self-perpetuating board of twelve trustees, was declared to be forever

[1] Shirley, op. cit. p. 10.

[2] Ibid. Vol. I, p. 347.

binding on the State of New Hampshire. Under the clause in the federal constitution forbidding any state to pass laws "impairing the obligation of contracts," it was held that the legislature could not increase the number of trustees to twenty-one and provide temporarily for the appointment of new trustees by the governor and council.

The chief question in the case was thought to be, whether this institution was public or private. The highest court of New Hampshire had pronounced it public. Chief Justice Marshall admitted that the purpose of the institution was public, that "education is an object of national concern" and that "there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government." His decision was based on the conclusion that this institution was founded by private parties with private funds and that the incorporation did not change its character except to make it "immortal" and its management more convenient. He took no account of the principle, declared by one of his successors in 1876, that certain institutions or enterprises, conducted exclusively with private funds but having a purpose "affected with a public interest," are proper subjects for state regulation and control.

Among the mistakes of law and fact contained in the reasoning of the court, there are two very serious ones which relate to the particular facts of this case. First, Dartmouth College was in fact public in its foundation and endowment as well as in its purpose; and, second, the college charter contained no such contract as the court assumed to find and enforce.

(1) Unfortunately, counsel for the state were outgeneraled and did not get all important facts into the record sent to Washington. But many additional facts were brought to the attention of the supreme court in connection with the three additional cases begun in the United States circuit court and certain motions made before the supreme court in the college case proper. Mr. Shirley concludes that Marshall knew the essential facts. This author shows that the large sums of money collected in Great Britain and America by Eleazer Wheelock, which Marshall says were paid to the corporation "on the faith" of the "contract" between "the donors, the trustees and the crown," were never contributed or paid to Dartmouth College at all, but to Moor's Indian Charity School. This school, founded by Wheelock and already endowed by Josiah Moor, although carried on by Wheelock on the same grounds as those occupied by the college, was kept entirely separate from Dartmouth College in management and financial support. It appears almost certain that the first endowment of the college was the gift of the public land presented on behalf of New Hampshire by John Wentworth, colonial governor, soon after he issued the charter. Other public donations by the state

followed, as well as certain private donations. The massive structure of conclusions based by the court on the alleged "private foundation" falls to the ground.

"The Earl of Dartmouth and the other trustees in England," whom Marshall names as probably "the largest contributors," on April 25, 1771, wrote to Dr. Wheelock:

> We shall expect that you keep a regular and distinct account of all moneys laid out in erecting the school, educating Indian youths, and equipping and maintaining missionaries agreeable to the design of our institution, and that you do not blend them with your college, and other matters foreign to and separate from our undertaking.[1]

On November 9, 1770, Dr. Wheelock had written to one of these English trustees:

> The charter was never designed to convey the least power or control of any funds collected in Europe, nor does it convey any jurisdiction over the school to the trustees of the college. . . . If I resign my office as president of the college, I yet retain the same relation to the school and control of it as ever.[2]

It is supposed that the college was named after the Earl of Dartmouth, instead of after Governor Wentworth, its real benefactor, in order to mollify the displeasure felt by the noble Earl and his co-trustees at Wheelock's failure to stick to the original plan and confine his attention to the Indian Charity School, a purely missionary enterprise.

(2) The Chief Justice said: "It can require no argument to prove that the circumstances of this case constitute a contract."[3] The contract which Marshall enforced against the State of New Hampshire was a supposed agreement, by the English king, that the charter should not be repealed or amended in essential particulars by any future legislative act. But the late Chief Justice Charles Doe, delivering the opinion of the New Hampshire supreme court in 1886 in the case of Dow *vs.* Railroad Company,[4] has shown that if George III had attempted to make the contract which Marshall enforced, he would probably have lost his crown and the agreement would have been plainly illegal and void under the English Bill of Rights of 1689 and the Act of Settlement of 1701. James II had been deposed in 1688 for making contracts of this sort, that is, for assuming to suspend or nullify the legislative authority of Parliament. While the college charter contains suitable language to indicate that the grant, so far as the king was concerned, was to be permanent rather than for a term of years and would not be revoked or changed by him, it contains no

[1] Shirley, op. cit. p. 42.
[2] Ibid. p. 41.
[3] 4 Wheaton, p. 627.
[4] 67 N.H. 27–54.

word suggesting that the king or his agent, Governor Wentworth, had any intention of promising exemption from legislative authority and control.[1] The English parliament has always had, and on occasion has exercised, the power to repeal and amend corporate charters.

Even though the supreme court erred in treating Dartmouth College as a "private school," and in enforcing a so-called contract which no one ever dreamed of making, the question of chief importance remains: If a corporation is "private" in the sense in which Marshall used the term, and if a state legislature has unequivocally attempted to make its charter and privileges irrepealable, is such an act a contract protected by the federal constitution from change by any future legislature?

The prohibition against "laws impairing the obligation of contracts" had its origin in the provision of the "ordinance of 1787" for the government of the Northwest Territory, to the effect that no law should be made interfering with or affecting "private contracts or engagements" previously formed. The proceedings of the Constitutional Convention indicate that the purpose of modifying this language was to restrict rather than to enlarge its scope.

Very important evidence as to the intended meaning of this provision is found in a report made to the Maryland legislature by Luther Martin, a distinguished member of the convention from that state. He said he had opposed this "contract" clause of the Constitution because he thought the states should have the power, in times of public calamity or distress, to pass laws "totally or partially stopping the courts of justice, or authorizing the debtor to pay by installments, or by delivering up his property to his creditors, at a reasonable and honest valuation." These were the practices, theretofore common in the states, which the clause was designed to prohibit. If Luther Martin had known of any claim that its scope was wider than private contracts and that it would forbid the repeal or alteration of numerous legislative acts, it is not conceivable that he would have neglected to state the fact to his state legislature. It is no more conceivable that such an intended invasion of the rights of the states could have crept into the Constitution without the strongest opposition.

That the term "contracts" was designed to include only agreements between private parties, is most probable. If any agreements by states were held to be contracts in the constitutional sense, none could reasonably be included except agreements made by the state in its private capacity, as when, for example, it should borrow money, employ workmen or contract for the erection of a public building. Acts of legislation, done in the public capacity of the state, were excluded by reason, sound policy and the general understanding of men.

If the power of individuals to organize themselves into a corporation

[1] Farrar, op. cit. pp. 2–16.

is not to be considered a special privilege conferred by the state, but is a common right regulated by general laws, no legislative act relating to incorporation can be considered a "contract." It is only with reference to special powers, not possessed by all citizens in common, that the "contract" claim is made. But if we conclude that the mere right to exist as a corporation is a franchise or special privilege, and if we admit that sovereign states have authority to grant special privileges to individuals, such a grant must of necessity be only temporary.

That a special privilege, once granted, cannot be withdrawn, is a contradiction of the original powers of sovereignty and is abhorrent to the intellectual perceptions as well as to moral principle. If a state is to grant privileges to some, it must have the power to do so by withdrawing privileges from others. The result of any "contract," therefore, which makes a special privilege irrevocable is to subtract a portion of sovereignty from the state and confer it upon individuals. But sovereignty, in its very nature, is continuous and indestructible. If a part of it may be lost, the whole may be lost by successive losses of different parts, a result absurd and unthinkable. This principle is well stated by Chief Justice Doe: "The agents' authority to make law does not enable them to suspend their own duty, and bind their principals, by agreeing with a third party that law shall not be made." [1] The prohibition in the federal constitution against "impairing the obligation of contracts" was never intended, could not in logic or reason have been intended, to prevent a state from preserving its own integrity, from retaining the power to legislate as fully and completely next year as it can legislate this year, from withdrawing any special privilege which it has granted.

If the mere right to be a corporation is a special privilege which a present legislature cannot guarantee against repeal or change by a future legislature, much more is this true of those immensely valuable privileges, so often granted in corporate charters or elsewhere, by which the most important powers of sovereignty are claimed to have been "contracted" away to private parties. These powers vary from the most trifling up to some of the very highest and most essential, among which are the power of maintaining the existence of the government by taxation and the power of protecting citizens from the extortions of monopoly.

The chief precedents for the decision in the Dartmouth College case were two cases in which Marshall had delivered the opinion of the court. In one of them, Fletcher *vs.* Peck (1810), the court extended the "contract" clause of the federal constitution to prevent an act of alleged confiscation by the legislature of Georgia.[2] There are few lawyers who will not admit that this was a judicial amendment of the Constitution by means of a clever legal fiction. This case is

[1] 67 N.H. 46. [2] 6 Cranch 87.

generally regarded as having been collusive, a mere sham battle in which both parties desired to obtain the same decision. The evidences of collusion were so plain, upon the face of the record, that they were remarked by Justice Johnson in his opinion. In New Jersey *vs.* Wilson (1812) Marshall had held that the State of New Jersey had contracted away forever the right to tax certain private lands and that this "contract" was protected by the United States Constitution.[1] This case also is open to grave suspicion of collusion, and practically no lawyer now defends the decision on any ground.

The principle assumed to have been established in the Dartmouth College case has been refuted and repudiated many times by the federal supreme court. The case still has the force of law within a narrowed scope, and it is often referred to in terms of great politeness. But when the court musters up the courage to overrule it, few arguments will be needed in addition to its own opinions. Certain of the state supreme courts, notably that of Ohio, long and persistently stood out against a recognition of the doctrine of this case.

Before Marshall's death in 1835, he and Story were sharply overruled by a majority of the court in Ogden *vs.* Saunders, in which it was decided that the prohibition against laws impairing the obligation of contracts does not apply to contracts made subsequent to the enactment of the law in question.[2] Mr. Cotton, referring to Marshall's dissenting opinion in this case, says: "It is hard to see that it is anything more than ingenious and fantastic."[3]

In the Charles River Bridge case (1837) the court, under the leadership of Chief Justice Taney, decided that though legislative "contracts" may be protected by the Constitution, such alleged contracts must be construed according to a rule directly opposite to the rule applicable to private contracts; in other words, grants of privileges by the state are to be construed strongly in favor of the granting party, while private grants are construed strongly in favor of the grantee.[4] This doctrine, that nothing can be taken from the state unless it is expressly granted, led the court to hold that no exclusive franchise had been granted to the bridge company. Justice Story dissented earnestly, and logically if the doctrine of the college case was sound.

In West River Bridge Company *vs.* Dix[5] (1848) it was settled that a state may, by the power of eminent domain, take back any property, franchise or privilege which it has bargained away in a corporate charter or otherwise, making compensation for the value of what it takes. This doctrine is directly inconsistent with the college case decision, as Justice McLean forcibly pointed out in his opinion in the

[1] 7 Cranch 164.
[2] 12 Wheaton 213, decided in 1827.
[3] Op. cit. Vol. II, p. 176.
[4] 11 Peters 420.
[5] 6 Howard 507.

Charles River Bridge case.[1] A violation of contract does not become less a violation by reason of the fact that the protesting privilege-holder is given money on being deprived of what he contracted for.

In the "Granger cases" (1876) it was decided that though a railway corporation is authorized by its charter to make "reasonable charges," the state may by law say what charges are reasonable; and that when property, corporate or otherwise, is devoted to a use which affects "the community at large," such as transportation or storing grain, the conduct of the enterprise, and the charges to be paid by the public are matters for legislative regulation.[2] The sacredness of corporate charters was quietly ignored. By rejecting the logic of the Dartmouth College decision, Chief Justice Waite made it possible to control public utility monopolies, such as transportation, telegraphs, telephones, electric and gas lighting, etc., in cases where the charter does not definitely fix the rates that may be charged.

In repeated decisions the supreme court has held that the "police power" of the state is held in trust by the legislature and cannot be contracted away, even by the most solemn and formal agreement ever put in a corporate charter. The police power "extends to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals." Under this doctrine, the legislature may prohibit lotteries, the manufacture and sale of liquor, the carrying on of noxious trades in populous centers, etc., in spite of charters which expressly authorize the doing of the things prohibited. Yet Justice Strong spoke truly when, in his dissenting opinion in the case of the Northwestern Fertilizing Company, he said: "The police power of a state is no more sacred than its taxing power." He might safely have said, "than any other legislative power."[3] The majority of the court overruled the Dartmouth College case in principle, though not in name.

Marshall's doctrine that the taxing power can be bartered away by special contracts of private parties with the legislature, has not escaped violent assault in the supreme court, though its undoing has been thus far delayed by the fact that it rests on a definite precedent which cannot be dodged, but must be followed or overruled. In State Bank of Ohio *vs.* Knoop (1853) Justice Catron, dissenting, said: "The soverign political power is not the subject of contract so as to be vested in an irrepealable charter of incorporation, and taken away from, and placed beyond the reach of, future legislatures. . . . The taxing power is a political power of the highest class, and each succeeding legislature having vested in it, unimpaired, all the political

[1] 11 Peters 577–578. Justice McLean concurred in the West River Bridge case on the theory that it was the property of the Bridge Company that was taken, not its franchise.
[2] 94 U.S. 113–187.
[3] 97 U.S. 679.

powers previous legislatures had, is authorized to impose taxes on all property in the state that its Constitution does not exempt." [1]

In Washington University *vs.* Rouse (1869) Chief Justice Chase and Justices Miller and Field, dissenting, said, through Justice Miller, that to hold that a legislature "can, by contract, deprive the state forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve." In the words of Justice Miller, the doctrine of irrepealable tax exemptions "must finally be abandoned," but no more certainly than the entire doctrine of irrepealable special privileges to individuals or corporations must be abandoned.[2]

In the Chicago Lake Front case (1892) it appeared that in 1869 the legislature granted to the Illinois Central Railroad Company a tract of more than one thousand acres under Lake Michigan, the principal part of Chicago's harbor, extending a mile into the lake. The grant having been repealed in 1873, this suit was brought to see if the repealing law was void, as "impairing the obligation" of the original grant. It was decided, four against three, that the repealing law was valid on the ground that the legislature held the title to submerged land under navigable waters in trust for the people and could not alienate it except in such small parcels, or in such reasonable and limited ways, as might serve the public purposes of navigation, commerce, etc. Justice Field, giving the opinion of the court, said: "The power to resume the trust whenever the state judges best, is, we think, incontrovertible. The position advanced by the railroad company . . . would place every harbor in the country at the mercy of a majority of the legislature of the state." [3] True as this is, it is no less true that the legislature holds in trust for the people other public property and privileges, and that the Dartmouth College decision, in utter disregard of this principle, has placed, for example, the streets of every city at the mercy of a majority of the state legislature or of the municipal body to which legislative power has been delegated.

By acts passed in 1856 and 1865, the Minnesota legislature incorporated a railroad which later became the Great Northern, and gave it almost unlimited authority to consolidate with other railroads; but it was provided that the charter could be amended "in any manner not destroying or impairing vested rights." In 1874 a law was passed prohibiting the consolidation of parallel and competing railroads. In 1895 the federal circuit court in Minnesota was called on to decide whether the act of 1874 impaired the contract contained in the charter, the Great Northern having attempted, after 1874, a consolidation with the Northern Pacific. It was claimed that the right to consolidate did not become "vested" until it was exercised, and therefore the act did not "destroy or impair" any "vested right." The circuit

[1] 16 Howard 404. [2] 8 Wallace 443–444. [3] 146 U.S. 455.

judge held that "there is no distinction, in reason or in the authorities, between the right to a franchise that has been and the right to one that has not been used," unless there has been a forfeiture for non-user; and that "the franchise to consolidate with another railroad corporation was a vested right of this defendant from the time of the acceptance of its grant." [1]

The circuit judge was right — if there is any virtue in the Dartmouth College decision. But the supreme court of the United States, only two dissenting, decided that he was wrong, that the right to consolidate did not become "vested" until used.[2] That they did not do the logical thing and overrule the college case decision, is to be regretted; but that they refused to apply it, even though using a distinction that does not distinguish, is cause for satisfaction and hope. Justice Brown, giving the opinion of the court, said: "We think it was competent for the legislature, out of due regard for the public welfare, to declare that its charter should not be used for the purpose of stifling competition and building up monopolies. In short, we cannot recognize a vested right to do a manifest wrong." [3] These are brave and just words. When courageously and consistently applied to the whole field of constitutional law, they will destroy the last vestige of the doctrine resting on the Dartmouth College decision and will restore to the people of the states that complete and continuous control of legislation which the Constitution gave them.

In his dissenting opinion in the Charles River Bridge case, Justice Story expressed the opinion that an exclusive franchise to build and maintain a bridge across a river between two cities, did not constitute "a monopoly." [4] His definition of monopoly was, "An exclusive right granted to a few, of something which was before of common right," such as, for example, an exclusive right to navigate a river. Because special legislative authority was necessary for individuals who would build a bridge, an exclusive franchise to build one would not deprive any citizen of an already existing right. By the same test, an exclusive franchise to run a street railway or lay gas pipes or string electric wires, would not establish a monopoly. From judges so utterly incapable of economic reasoning or of taking a long look ahead, we should not expect very good law on economic subjects. We should not judge them too harshly, for they were trained and lived in a different age. But that we should allow their mistakes of fact, their legal misconceptions, their economic obtuseness, their partisan passions and prejudices, to reach down through the decades and make law for us in regard to some of our most vital interests — this is hard to explain on the theory that we are an intelligent, self-governing people.[5]

[1] 73 Fed. Rep. 944–945. [2] 161 U.S. 646. [3] Ibid. p. 675. [4] 11 Peters 606.

[5] The point has frequently been made by members of the legal profession that the Dartmouth College decision has ceased to be of practical importance on account of the general

THE RENEWED EXTENSION OF GOVERNMENT CONTROL OF ECONOMIC LIFE

ANNUAL ADDRESS OF THE PRESIDENT OF THE AMERICAN ECONOMIC ASSOCIATION

By David Kinley, of The University of Illinois

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For some twenty-five years there has been a marked recession among English-speaking peoples from the strong individualism of the early 19th century towards a gradual extension of government authority in economic matters. Laissez-faire has been discredited both as a principle of political philosophy and as a rule of conduct. Whether we should try to restore its prestige or with what other principle we shall replace it, however, are matters concerning which current discussion is somewhat confused. On the one hand are those who declare that competition has broken down, and has produced a monopolistic system which will in time completely supplant it, and which is of such tremendous extent and power that it can be managed only by the government. On the other hand are those who believe that competition is a force which should be preserved as a ruling power in economic life, and would therefore prevent by government action the establishment of monopolies and break them up where they are already established. This, in substance, is the policy that our own federal government has been pursuing since the enactment of the Interstate Commerce Law in 1887. Still others urge that all we need to do is to prevent the evils of excessive competition by setting limits within which competitive forces must work. The first group of thinkers take the socialistic view and call for government ownership or at least for direct government management. The second group are still in effect believers in the laissez-faire principle, and think to restore it by destroying monopoly. The third group also are still faithful to their belief in the efficacy of competition but would restrict its field of operation at the bottom so as to prevent industrial degradation.

reservation, in state constitutions or statutes, of the power to repeal or amend corporate charters. These reservations, while of considerable value, have not been entirely effective to safeguard the public interest. A corporation may be killed, but its privileges usually survive its death and inure to the benefit of the incorporators. A curious example of the far-reaching influence of this decision is found in Muhlker *vs.* N.Y. and Harlem R.R. Co., 197 U.S. 544, 571. According to this and other similar cases, a state judicial decision merely declaring the law or interpreting a constitution or statute, may be held to be a violation of the prohibition forbidding a state to "*pass any . . . law* impairing the obligation of contracts." See also an article by W. F. Dodd on "Impairment of the Obligation of Contracts by State Judicial Decisions," in *Illinois Law Review*, October, 1909.

A centralizing tendency, that is, a departure from the principle of individual liberty and a return to the principle of authority, is to be seen in many if not all domains of thought at the present time. Therefore, to understand properly what is going on in industrial life we need to look at the change that is going on in other life spheres. The terms laissez-faire and competition are commonly used to describe the policy more properly called economic liberalism. But economic liberalism is more than a political platform or an economic formula. It is a system of culture that has given character to the life of a great people for more than two centuries. It is a superstructure erected on the principle of personal liberty in religious and political matters. The 17th century was an era of religious contest that resulted in the establishment of ecclesiastical independence, which in turn carried the rule of individualism to constitutional and political emancipation. Once established in religion and politics, the principle of personal independence found its way into economic conduct, and the system was thereby made complete. Just as in its upbuilding it was closely connected with personal liberty in other spheres of life, so the present alleged breakdown of competition — the principle of personal liberty in economic life — and the alleged restoration of the principle of authority finds its counterpart in the movement towards church unity, uniformity of creed, the extension of state as against local authority over education, the extension of the federal principle in politics, and the widening censorship of morals. The application of the authoritarian principle is being made in these lines for reasons quite similar to those that are causing its application in industrial affairs. The excesses of the personal liberty system in morals, religion and literature, have produced results that are shocking the sensibilities and shattering the ideals of multitudes of people. Hence, the demand for control. In politics the extreme application of the principle of local government has rendered equity, justice, and efficiency impossible in a multitude of ways. Hence, the demand for state and federal control.

Under no system of government regulation of conduct, however extensive or intensive, has competition or personal initiative been entirely absent, unless, indeed, under a system of slavery; and at no time, under the most extended system of competitive action, has it been possible to do away entirely with government supervision and regulation. Even among the English-speaking peoples in the past two centuries, when the laissez-faire aspects of economic liberalism have seemed to predominate, it has not been possible to get on without government regulation and supervision. The reason is that the knowledge and resources underlying any political and social system are constantly changing. Whether the principle of personal liberty, expressed through competition, or the principle of authority, expressed through government regulation, shall be the dominating principle

of civilization at a particular period, depends on which one of them is likely, under existing conditions of knowledge and resources, most largely to promote welfare. When evils flow from the too extensive application of the prevailing principle, or, when, in new circumstances, it is less productive of welfare, emphasis is gradually shifted until the other principle occupies the foreground and becomes the dominating force. Such is the situation now. Conditions have changed so that the necessity and value of regulation are emphasized again. The régime of personal freedom of competition under the conditions of rapid scientific discovery and material growth has failed to preserve, or perhaps to produce, the equality necessary for success among competitors. Growing population, the development of vast resources, the great size of units of industry, have made the application of the competitive principle in many ways impracticable. Competition has degenerated at many points from a struggle between equals to an exploitation of the weak by the strong. Industry has been swallowed up by industry until in many lines a practical monopoly exists, so that prices, wages, terms of employment, and the welfare of large numbers of people, are in the control of comparatively few. The benefits of the common heritage of natural resources have passed too largely from the people at large. On all sides we find private monopolies and a natural system of capitalistic industry, involving large control of the opportunity for livelihood for the many. These evils have been produced, under conditions favorable to the acquisition of great wealth and its massing under the corporate principle, by a system that gave the world a "democratic constitution," "the same law for all," "toleration," "capitalistic competition," "individual initiative," and the other benefits of liberalism. In more general terms, the causes for the extension of government control are: the ill-doing of some under the competitive system; our desire for rapid national development, which led us to give large powers to those who were to assume the risks of frontier promotion — powers which, then innocuous, have now become dangerous —; a demand for a better standard of living by the great body of the working class, who are asking with some show of reason what the advances in science and industry have done for them. Moreover, there is a feeling of resentment of control by others of their opportunity to make a living.

The demand for state regulation either for the purpose of restoring the competitive principle in industry, or frankly supplanting it with the principle of authority, finds some justification, too, in the belief, not altogether ill founded, that the economic evils of great industry have arisen in part from the treatment of the modern form of the corporation by our courts of law. They have given it in a measure the attributes of a natural person, without imposing upon it the consequences of personal responsibility. Hence, it has frequently been

impossible to reach the misdeeds of individuals because of their attribution to non-personal agents. Penal remedies and preventive measures alike have been often ineffective to protect the public. Consciousness of this evil is seen in the demand for holding directors of corporations to personal responsibility for the acts of the corporation, and in the movement for the disruption of "corporations of corporations."

From all these causes arises the demand for government protection for the weak in industry; and some people appear to think that unless the right to make a living is in a reasonable measure provided, the next step may be an attack on the institution of private property itself. In consequence, "to-day a great economic movement is going on which aims at reorganizing the entire industrial system from the social standpoint." The call is for the state to look after the conditions of living and work of workers, the management of prices and output of large enterprises, or to take them over and thereby free the many from a virtual economic control of the few, and reëstablish, supposedly for all, a proper standard of welfare.

An explanation of the establishment of economic liberalism as a system, in the extreme form in which it has existed for more than a century, is found in the abnormal condition of the four centuries succeeding the discovery of America. Since that discovery the life of the world has been abnormal in the sense that it has been in a state of unstable equilibrium because of the existence of opportunities for personal initiative, personal gain, and individual expansion under conditions that yielded larger rewards than ever before. Economic pressure in the old world could be relieved by overflow into the new world. The great advantage that came from this situation is now reduced by the substantial occupation of this continent. The fact that our continent is, in the present stage of the arts, substantially occupied, indicates that the world is about to return to a more stable economic equilibrium. The development of the industrial evils of to-day and the consequent demand for regulation are simply an unconscious acknowledgment that, all things considered, we have reached in this country a stage of relatively diminishing returns in our economic activity. It is a recognition of the truth of the law of diminishing returns and of the Malthusian doctrine of population, that unless the arts progress more rapidly than population there is bound in time to be a relative pressure of population on subsistence.

Man is so constituted that when he feels the evils of an existing system he is likely to adopt measures of reform which will produce evils as great as those he is seeking to remedy. That danger exists now. We need to look very closely at the tendency towards the extension of the authority of government into the details of our economic life. The principle of competition, the system of economic liberalism, has been too helpful to the progress of mankind to be given up alto-

gether. It has become an enduring part of our civilization and philosophy of life. We cannot deny that the competitive system has promoted liberty and welfare, initiative and perseverance, industry and success, wealth and culture, an abundance that has relieved poverty, has exploited to human benefit the resources of nature more abundantly than ever before, has enlarged knowledge, has provided for the possibility of a greatly increased population, and, generally, has uplifted the life of the people. No system which will deprive mankind of these advantages is likely to promote welfare unless it supplies other motives to the same results. For competition has been a developing force, even if it has failed somewhat as a controlling one. The motive power to action is of more importance in the long run than the regulation of action.

In order to judge clearly the reasonableness of this demand for wider government control of economic life, and possible results of acquiescence in it, we must recall for a moment the ultimate purpose of government. It is, undoubtedly, the promotion of the welfare of the people who organize it. In the words of Justice Gray, "The prosecution of the safety, health, the morals, good order and the general welfare is the chief end of government," and the general welfare includes protection of opportunity to make a living. This is not a new maxim in the jurisprudence of the English-speaking peoples. The system of personal liberty and the system of government control, or any combination of them, has always had, and must always have, as its ultimate aim, among these peoples, the establishment of welfare. All social institutions, including the system of private property, are encouraged, or permitted, for this end. As Justice Bruce of the Supreme Court of North Dakota has put the matter: "It can now be safely said that the courts and the public generally have come to see and to hold that a right to property and liberty should never be guaranteed in matters and things which are injurious to the public health, the public welfare, or the public morality, or even to the convenience of the public as a whole."

As we have seen, the call for the application of the power of government assumes several forms. Some call upon it to restore the competitive principle by breaking up large industries, and so to regulate business that competition will operate within certain assigned limits. This is the neomercantilism that is sweeping over the world. Some call upon it to assume that competition as a regulative force is dead, and therefore to permit monopoly under supervision. Others insist that since competition is dead and monopoly established the government itself shall take over and manage the greatest of these monopolies. This is the demand of the socialists.

It is not worth our while to consider the last proposal. There is no evidence worth considering that the American people have yet

reached the point where they desire the establishment of the socialistic state. The principles of individual liberty and the rights that have been established upon them through the long struggle of four centuries will not be abandoned. Economic liberalism in the large sense is and will remain a living faith among the English-speaking peoples, even though they may see fit to establish what is called the new "social state."

It is impossible, of course, to discuss now all the projects put up, either for the complete restoration of competition, or for its partial restoration under government regulation. I invite your attention, therefore, to a few of the proposed lines of action. It is urged, first, that the government promote welfare by general social legislation; second, that the government regulate wages, particularly by establishing a general minimum wage; third, that the government regulate prices, particularly in those articles that may be regarded as the products of monopolistic, or partly monopolistic, industries; fourth, that the government determine in some way the form and size of business organizations; fifth, that the action of government be confined to supervision of business as it is carried on in order to prevent infractions of the law and give full publicity to the methods of so-called "big business"; and finally, that the right of society in great accumulations of property shall be more clearly defined and enforced either by taxation or other means.

The proposal for what is called welfare legislation, for such purposes as the prevention of accidents, sanitary conditions of work, due limitation of hours of work, the protection of women and children in industry, and all similar legislation, has long passd out of the stage of debate. Formerly governments busied themselves in enacting labor laws against labor. Now they busy themselves in the enactment of laws interfering with labor in the interest of labor. The principle of this legislation is accepted, however men may differ about details.

When we come to the proposition to fix a minimum wage, we are confronted with more debatable questions. In so far as the wages actually paid in so-called sweated and parasitic industries are below what the employer could afford to pay while still making a proper profit — in so far, in other words, as they are due to exploitation —; in so far as wages paid are insufficient to afford a decent living in any industry in which profits are large from some monopolistic advantage; — in short, in all cases in which wages are below what is necessary for a decent living in any employment because of "exploitation" — there can be but one opinion of the desirability of insisting upon a minimum. It would be a mistake, however, either to insist upon a minimum wage in all industries, or to compel the payment of a minimum wage which, as a matter of fact, is more than the value pro-

duced by the person receiving it if the returns to entrepreneur and capitalist are but fair, or to insist upon a minimum wage in any case without providing for its constant readjustment. To justify these statements we must consider some of the effects of such an action. In the discussion I repeat that I am leaving out all cases of mere exploitation, assuming that in these a compulsory standard is economically justifiable.

If a minimum wage is established larger in amount than the product of the marginal workers, they are bound to be thrown out of work. It is easy to say that if an industry is not able to pay a "living wage" it had better not exist. But a "living wage" is a very variable thing, and the fact that some people are living on the wage they get may be regarded as evidence that to them it is a living wage, although not a desirable living wage. The question to be considered is not whether such an industry is worth while, but whether, if we by election abolish it, those who are thrown out of work can find other employment at as good or better wages. It is difficult to see where they would find it if, in economic terminology, they are "the marginal workers," and are already getting what they produce.

The imposition of a minimum wage under such circumstances would make it necessary for employers in many cases to raise the margin of industry and discharge their present marginal workers. Otherwise the business would not be profitable. This is only another way of saying what has already been said, that insistence upon the minimum wage would doubtless reduce to idleness all below the new margin, unless, indeed, as might happen in some cases, the improvement in the standard of living of the lowest workers increased their efficiency, or unless the imposition of the additional burden on industry stimulated the discovery of new methods of resources. In the one case we should have an increase of productivity of labor; in the other, of capital. In either case the industry could pay the wage imposed. But we could not hope that such a result would be general.

Looking at the matter from another angle, a minimum wage which was not earned at the margin would reduce profit or interest, or both, and react on the accumulation and investment of capital. In time there would be inevitably a slackening of industry and a reduction of employment. I see no logical escape from the conclusion that a general minimum wage, or a minimum wage imposed widely, if it were higher than the product of the marginal worker, would act to curtail industry, check accumulation and investment and induce unemployment.

Moreover, we must remember that if the state insists upon a minimum wage and guarantees it, it also should guarantee efficiency. There is no more justice in compelling the employer or investor to abandon his profit or interest, if it is only legitimate in amount, in

order to raise wages than there is in permitting unduly low wages to be paid in order to increase profit.

Any effort of the government to regulate prices, except to see that they are not monopolistic or are not fixed by agreement among other agents, is open to criticism for reasons somewhat similar to those given against the minimum wage proposition. There is no more economic reason for fixing prices to enable labor to get a fair wage or the consumer to get a "fair price" than there is to fix prices in order to enable the investor to get a "fair interest." There may be reasons for doing both, if it were practicable. But the practicability is doubtful because of the complexity and changeableness of the factors involved. The government and its agents have no means of determining beforehand the effects of any particular line of action on prices. They could not fix prices fair to investors, workers, and consumers without knowing costs and conditions of markets and a multitude of other things which are changing from day to day, and which, if they could be discovered and set down in figures, would be beyond the understanding of anybody but the expert in business. Nor could they allow for foreign competition. The attempt would very likely check accumulation and investment. We have a good illustration of the possible effects of such an attempt in the railroad situation in the United States at present.

If the application of the minimum wage doctrine and price regulation in any large way should curtail industry and increase unemployment, the government would be called on to provide for an increasing number of people out of work. The number thus to be taken care of would doubtless grow in time, not only from industrial causes, but from the stimulation to population which would come from a lowering of the moral fiber of the people. For the easier it is made for one part of society to get a living at the expense of another part of society, the larger will be the demand for it and the lower the moral tone of those who demand it. A recent illustration of this fact is found in the effects of Germany's thirty years' experience with insurance against sickness and accidents. Cheating, malingering, and even a certain physical degeneration, have become widespread, so that many thoughtful people are alarmed at the weakening of the moral fiber of the nation, and the sapping of its physical vigor.

From the point of view of economic theory, the proposals, especially with reference to the minimum wage, involve a new ethics and a new economic law of distribution. Broadly speaking, every theory of wages is, first, an explanation of existing conditions, and, second, an attempted justification of them. Each theory has been accepted so long as its practical result was consonant with the prevailing ideal of the general welfare, which means acceptable to the multitude or group or class in power.

The productive theories have led us to say that each partici-

pant in production is entitled to and gets what he produces, for the reason that this has seemed to us good ethics. Now society, in establishing a standard of wages, would assume the theory that each must get what is necessary to enable him to attain a living conformable to the dignities and requirements of citizenship. The proposal is not, "to each one what he produces," but, "to each one what he needs," on a minimum basis. The British Minimum Wage Law for miners frankly recognizes this fact. The ideal of the federation of miners was defined by its representative in these words: "What their demands stipulated was that when a man went into the pit to work . . . he should be assured of a day's wage, fixed and agreed to, and if this was not granted it should be recoverable through a court of law. No matter what the collier's failure or difficulty might be in earning his money, whether it be through faults, breakages in machinery, inundations of water, shortage of tubs, overcrowding, or a walk of long distances to the face; if he was not addicted to idleness, then he should be allowed a fixed minimum wage." "The descending of the pit and the remaining at the coal face to do a day's work shall establish the right of the workman to receive the average wage of the district."

If this policy should become general, the ultimate result would be the elimination of those who cannot earn the minimum and the rising of the margin of production for labor to a point where the product of labor will be equal to the minimum wage fixed by law. In other words, we will have a return to the theory of specific productivity. No other result is possible.

In passing from my criticism of these proposals, however, I would remind you that it does not involve the regulation of wages and prices where these are themselves subject to control by any class to the detriment of another. Aside from this limitation the wisdom of government interference in these directions is more than doubtful.

There is ground for more favorable comment on proposals that the government shall, within limits, determine the form of organization and the size of business enterprises. Industries which are monopolistic in their character are now by general consent regarded as properly subject to government supervision. It is not necessary here to discuss the methods or extent of this supervision further than to say that if it is to be permanently successful it must aim to protect the interests of wage earners, the investing public, and the general public, alike. It must not permit undue profit from excessive rates, or from exploitation of labor. In this field, however, the limits and methods of government intervention are being slowly worked out, although, of course, with considerable friction and many jars. The regulation of public utilities and industries of similar economic character is an illustration in point.

Supervision may take the form either of inspection and publicity of procedure, or of direct attempts to influence the form of organization. The former method has been recommended by President Taft's Railroad Securities Commission, and wherever it has been applied its results have been good, even if they have not cured all the evils. But we may reasonably ask for more than this, at any rate in many cases. The prohibition of what we may call interlocking directories, of stock watering, rebates, price discrimination, and the holding of the stock of one corporation by another, and the elimination or limitation of holding companies, are some of the things that may well be accomplished.

Aside from industries that are clearly monopolistic by nature the whole aim of government interference should be to establish conditions which will induce healthy competition. The government should attempt to determine what constitutes, under existing conditions, an efficient unit, or an efficient size, of a business. It has been claimed for the trusts that they were more efficient as producers and distributors than similar enterprises in the same line. I do not feel that this claim has been established, and think that there are signs that it is largely untrue. The economies of big business have been secured at an economic and social cost that has not been fully evident or fully understood. There is reason for thinking that the dissolution of the tobacco trust has already recovered to society some valuable entrepreneur's talent which was being suppressed by the discharge of clerical duties under the trust, and has induced competition among those of this order of business talent with some resulting shaving of prices to the consuming public. Even if it were true that the biggest business is the most efficient in the sense that the cost of its unit output is lowest, it does not follow that we should permit that system of industry to exist. For we can tolerate only that system which, whatever its mere economic merits, is not likely to destroy political liberty or economic opportunity. "The best size of unit for general welfare is the thing for us to establish, not necessarily the one which has the largest output or the lowest unit cost."

Moreover, there is justification for fixing a maximum financial unit of business, aside from the question of greatest operating efficiency. For even if competition, working as it does with considerable friction, fixes a price that is a fair return of capital invested, this is not enough for the protection of the public if the capital invested becomes larger than is adequate to perform the total service needed. If it goes beyond this, a "fair" return necessitates a price larger than the value of the product to the community, and economic friction, to say nothing of monopolistic control, sometimes makes it possible to secure such a price.

The fifth proposal in the program of government extension policy

is the imposition of greater burdens upon the accumulated wealth. This means a renewed emphasis on the social origin and character of property and therefore on the right of limiting it, not only to prevent unjust accumulation, but any accumulation which in character or amount threatens the welfare of society. This question is before the country now in the suit against the Harvester Trust. According to the prosecution in this case, the organization and power of the trust are such that "if the International Harvester Company were disposed to exercise the power its enormous wealth gives, and if it were left unrestrained to do so, it could drive every competitor it has from the field." It is necessary to notice that there is no new legal, ethical, or social principle involved in this doctrine, although the wisdom of extending the principle at present may be an open question.

Some general consequences of these proposals must not pass unnoticed. Undoubtedly, a certain amount of good can be done by proper supervision to prevent the oppression of the weak by the strong and the impairment of the public welfare. It may be true that, as one writer puts the matter, the present movement is an attempt by the community to resume sovereign power in order to conserve the right of the individual to make his living. But bureaucratic supervision can never be a permanent substitute for proper standards of righteousness among men in their dealings with one another. We may have an honest and efficient officialdom that puts the common weal above corporate and personal interest, but we cannot have it for very long. The inherent weakness of wide and intense government regulation is its lack of motive to take advantage of new conditions to further progress; whereas the inherent strength of a system of individual initiative is the presence of that motive.

If any of the proposed policies is to win final success in improving the condition of any class of society, or of all classes, it can do so only by increasing the sense of responsibility of those directly affected. For those who have made any study of attempts to improve human society through long periods must feel very deeply "how great is the ignorance of the wise, the weakness of the strong, the folly of the prudent and the helplessness of the well-meaning." They will realize that we "cannot sweep away any one thing without upsetting innumerable other things, good, bad, and indifferent."

The adoption of the policies that we have been discussing may mean a period of comparatively stationary economic life. In so far as we clip the wings of motive we impede rapidity of motion. Yet it may be well sometimes to do this. For abundance, irrespective of distribution, will not necessarily produce welfare. What a nation may need may be an abundance sufficient for social welfare according to definite ideals, even though it may not be so great an abundance as with different ideals might be obtained.

It is true that progress in invention and discovery may still go on if bureaucratic oversight should check industry. It will do so, however, only if a sufficient margin of advantage is left with the enterprising pioneer in the future as in the past. A return to the intensive, minute, supervision over industry which prevailed under the old mercantile system would defeat its own purpose. Yet it is hard to tell where to stop when once we use the arm of government for economic purposes. It is doubtful whether in this country the public will endure the menace to liberty involved in very intensive supervision. It is doubtful whether, if the supervision were successful, we should be better off in the long run, and we should have lost all the advantages that have accrued to us under the great system of economic liberalism.

Although, then, there is good in the proposition for the extension of government activity into business, the field of its operation must be carefully limited. Can we, in conclusion, lay down briefly some of the limits within which it should be confined?

I venture to suggest, first, that reasonable welfare legislation, as has already been remarked, is accepted by the American public as proper, and that our various governments may concern themselves with extending this without objection.

In the second place, government may properly attempt a delimitation and regulation of industries which are monopolies by nature. It may also segregate those, if any, which are likely to be most serviceable to the public and to their owners when treated as monopolies. Although there is room for difference of opinion on details, the principle is generally accepted now that the private enterprises which commonly go under the name of public utilities are best treated as monopolies to be carried on under proper reasonable supervision.

In the next place, the government may properly continue its policy of compelling the trusts to dissolve into their component industries and of requiring big business enterprises to resolve themselves into units of the most efficient size. To accomplish this purpose properly, the government should undertake an investigation of what constitutes a unit of greatest efficiency in the more common big businesses. Having determined this, the law should prevent the organization of businesses which will exceed this most efficient unit in size unless the advance in the arts makes it possible to prove that some larger or different organization is better, in which case the law should be adapted to the new conditions.

Again, the utmost publicity compatible with the rights of business should be given to the transactions of corporations, whether monopolistic or other. But it is hard to justify the minuteness of the inquiries which some of our commissions now propose into various lines of business.

In the next place, the law may very properly forbid agreements

fixing prices by producers or distributors of goods. The law may further properly provide a minimum standard of wages for industries in which labor is obviously exploited. Still further, few will object to reasonable increase in the burdens imposed upon great aggregations of wealth for the general welfare, especially when these aggregations of wealth have come from sources that give them a large social element.

Finally, the attitude of our courts towards the character and acts of corporations needs readjustment. There is some ground for believing that from the point of view of the interests of society, it was a mistake to give corporations the attributes of personality. In any event, there is a demand that personal responsibility for corporate acts shall be fixed upon the officers in such ways as to prevent the recurrence of some of the evils that have given rise to the hostility towards corporations.

One inevitable consequence of the establishment of the principle of government control of economic life must not be lost sight of even if its early appearance is unlikely. Regulation by a government which is the people, for the people, tends to be regulation of the people by a government in spite of the people. Regulation of industrial life in behalf of some means repression of the activities of some others. The government, as such, once recognized as having a right to regulate economic conditions, will be pushed by the ruling class or classes towards regulation or control of the rights of others in politics, religion, and other ways; for economic privileges or rights cannot crystallize into custom and be cast into law in behalf of some as against others without imposing upon the "some" corresponding duties which become privileges or rights of the "others." This process means a slow crystallization of economic status and the production of classes in society.

These, then, are the principal lines of proposed wider government activity at present before the public, in this country and in England. Their significance is far reaching. While declaring no new legal principle, they gave a different color to accepted doctrine. The emphasis is now to be put upon the rights of the community in private property and to private property, rather than on those of the individual owner. The movement means that the acquirement of property to an extent that may endanger the public welfare is to be restricted. Laws should be framed, we are told, to care for the worker rather than for industry. In other words, the new movement is an attempt to establish by authority the individualism — conditions of welfare — which individual action itself has failed to achieve. The whole movement imports a lessening of the importance of private property, and a strengthening of the importance of men; an emphasis of public weal as against private gain; a demand for more equality in economic conditions, and greater social responsibility for wealth.

BUSINESS ENTERPRISE AND THE LAW

By Gilbert Holland Montague, of the New York Bar

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From the end of the Civil War until the passage of the Interstate Commerce Act and the Sherman Anti-Trust Act, popular faith in competition, unhindered by governmental interference, continued practically undisturbed. "In the early history of railroad transportation," said Attorney-General Moody, later Justice of the Supreme Court of the United States, in his annual report for 1906, "the practice of rebating was common, well understood, and not prohibited by any Federal statute. It was regarded as one aspect of the spirit of competition which the common law cherished." The last century conception of competition and freedom of contract and absolute individualism of conduct, unhampered by any legal restrictions, was rooted in the theory of the Declaration of Independence and the Constitution, and fostered by the tremendous commercial progress which it had produced. Against this principle, the Interstate Commerce Act, which prohibited private bargaining between the railroad and the shipper, and the Sherman Anti-Trust Act, which forbade the attainment of industrial dominance, toward which all competition aimed, seemed incongruous and irrational contradictions, — weapons pusillanimously seized by the industrially unfit against their superiors.

The spiritless enforcement of these statutes, from the time of their enactment until 1903, shows how pharisaical they were generally considered by the community. "A careful examination," to quote again from Attorney-General Moody, "discloses that there were in those years seventy-nine indictments (under the Interstate Commerce Act), upon which the Government failed in sixty-two and succeeded in seventeen. No sentences of imprisonment were executed and the total fines amounted to $16,376. It is safe to say that these penalties, distributed over many years, were, as deterrents from the commission of prohibited offenses, a negligible factor." The indifferent enforcement of the Sherman Anti-Trust Act was still more conspicuous. Attorney-General Olney, in his annual report for 1893, protested "that as all ownership of property is of itself a monopoly, and as every business contract or transaction may be viewed as a combination which more or less restrains some part or kind of trade or commerce, any literal application of the provisions of the statute is out of the question." Reviewing the prosecutions, brought under the Sherman Anti-Trust Act during this period, Attorney-General Moody stated: "From the date of the enactment of the law to the beginning of

President Roosevelt's administration in 1901, sixteen proceedings were begun and have been concluded — five of them indictments, in all of which the Government has failed, and eleven of them petitions in equity, in which the Government prevailed in eight and failed in three. . . ." The apathetic enforcement of the Interstate Commerce Act and the Sherman Anti-Trust Act, during this period, was due not so much to reluctance on the part of the prosecutors as to the conviction of the community that a vigorous enforcement of these statutes was contrary to the approved mode of business competition.

During the decade immediately succeeding the war with Spain, a series of events occurred which shook this long-cherished popular belief. Investigation into the management of certain railroads, insurance companies, and street railways revealed startling corruption and dishonesty. Newspapers and magazine-writers attacked methods of business competition which previously had never been questioned. The indignation thus engendered stirred depths of popular conscience which had never been aroused by the agitation for the Interstate Commerce Act, nor by the clamor for the Sherman Anti-Trust Act. The opinion grew that business competition, at least in some of its manifestations, was a crude and unjust force in the social economy.

In 1903, the Roosevelt administration had practically only two statutes through which the Federal Government could exercise any control or interference with competition. These statutes were the Interstate Commerce Act and the Sherman Anti-Trust Act.

In response to increasing popular demand, Congress appropriated, in 1903, $500,000 to be expended by the Attorney-General in prosecutions under these statutes. At the same time, acts were passed facilitating trials under these statutes, and particularly strengthening the hands of the Government in dealing with discriminatory practices of railroads. The Department of Commerce and Labor was created, and invested with abundant powers to investigate large business concerns everywhere.

In 1903, the Interstate Commerce Commission stated that discriminatory practices were no longer characteristic of railroad operations, and that never before had the law been so strictly observed.

In 1905, however, came the revelations of the collusion between certain freight shippers and several high officials of the Pennsylvania Railroad. About the same time came the disclosures regarding conspicuous breaches of trust on the part of certain officers of the largest life-insurance companies in the country.

Responding again to popular demand, each Federal prosecuting officer was instructed, in a circular letter from the Attorney-General, to proceed in each case brought to his attention showing a violation of the Interstate Commerce Act and the Sherman Anti-Trust Act. As a result, seventy-seven indictments were returned under the In-

terstate Commerce Act, upon which thirteen corporations and seventeen individuals were found guilty. The corporations were fined in sums ranging from $15,000 to $108,000 each, and the individuals were fined in sums ranging from $1,000 to $10,000 each. During the succeeding year several sentences of imprisonment were inflicted, and fines aggregating $416,125 were imposed. Equal activity was displayed in the enforcement of the Sherman Anti-Trust Act. Proceeding upon the construction of the Act which the Government had successfully applied in the Northern Securities Case, the Government procured the dissolution of the "Beef Trust," composed of Swift & Co. and its allied concerns, and began proceedings against the General Paper Company and its associated companies, familiarly called the "Paper Trust," and against various combinations in the grocery, beef, lumber and transportation business. By the close of 1906, the Roosevelt administration had a record of twenty-three proceedings commenced under this Act, seven of which had been successfully concluded and the rest still pending. These included proceedings against the American Tobacco Company and several other corporations interested in the tobacco and licorice business, against thirty-one corporations and twenty-five individuals engaged in the manufacture of fertilizer, against the Standard Oil Company and seventy other corporations and individuals concerned in the manufacture of refined oil and petroleum products, and against combinations in transportation, paper, groceries, elevators, salt, meat, lumber, drygoods, oil, tobacco, fertilizer and ice. Before the close of the administration thirty-seven such proceedings had been begun under the Sherman Anti-Trust Act.

The activity of the Federal administration was exceeded by the zeal of the State Legislatures. In 1899, Texas had passed laws relieving persons purchasing goods of a trust from liability to pay the purchase price, and requiring every corporation that owned or leased the patent of a machine to offer such machines for sale, instead of reserving them for exclusive use. In 1905, Arkansas relieved persons purchasing goods of a trust from liability to pay therefor, and authorized such persons to recover from the trust any money or value paid on account of such goods. Arkansas also enacted that in the prosecution of any trust the prosecuting attorney might compel any nonresident to appear with his books and papers, within six days and the necessary time required to travel; and in the event of his failure to appear, the trust was made liable to judgment on default. In 1907, the Governor of Texas recommended a law empowering the Attorney-General to have "full and free access to all the works, plants, offices, books, vouchers and papers" of any corporation doing business in Texas without reference to whether such works, offices and papers were within the State or without it. Legislation in accordance with this

recommendation was adopted, with the added provision that if access to works, offices and papers outside the State were denied, judgment might be rendered against the trust. At the same time, Texas increased the penalty for violation of its anti-trust act to imprisonment for ten years. Already a number of States had imposed enormous penalties upon the sale of commodities at less than the "cost of manufacture," or at a price greater or less than their "fair market value," or at a price greater or less than such commodities were sold for in any other place "under like conditions." These penalties were fines varying from $1,000 to $10,000 and terms of imprisonment running from one year to ten years. In 1907 such statutes had been enacted in specially drastic form in Indiana, Mississippi, Arkansas, Missouri, Minnesota, North Carolina, Kansas, Iowa, South Carolina, Texas and North Dakota; and similar legislation had been recommended by the Governors of California and Colorado.

Meanwhile the railroads had not escaped attention. In 1903, ten States enacted statutes giving to their railroad commissions increased powers to fix freight and passenger rates and to supervise the details of operation. These States were Kansas, Arkansas, Florida, Missouri, North Carolina, South Carolina, North Dakota, Texas, Virginia and Wisconsin. In 1905, the powers of the railroad commissions were greatly increased in Georgia, Minnesota, Illinois, California, South Carolina, Kansas, Indiana, Washington and Wisconsin. In 1906, Ohio, Nebraska, Georgia, Louisiana, South Carolina, Kentucky and Wisconsin increased still further the powers of their railroad commissions. In 1907, railroad commissions were either created or vested with increased powers in Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Minnesota, North Carolina, Missouri, North Dakota, South Dakota, Alabama, Colorado, Montana, Pennsylvania, New York, New Jersey, Nevada, Michigan, Nebraska and Oregon. At the same time statutes of more arbitrary character were also enacted. In 1905, the Legislatures of Kansas, Washington, Missouri and Oklahoma passed laws fixing rigid regulations regarding freight rates, car service, demurrage and storage charges upon all railroads operating within their limits; and North Carolina enacted that if a consignee claimed damages on a shipment, and the claim remained unpaid for sixty days, and the consignee recovered the full amount by suit, the railroad should pay a penalty of fifty dollars. Florida prescribed a somewhat similar penalty in analogous circumstances. In 1906, Ohio, Virginia and Maryland adopted laws limiting passenger rates, except in minor exceptions, to two cents per mile. Similar bills were adopted in at least nine other States. Arkansas enacted that every railroad train passing through a town within half a mile of the State line should stop for passengers, unless it stopped within three hundred feet on the other side of the line; and also provided

that the consignee might collect any damage claim, not exceeding ten dollars, from the railroad agent at the destination, provided that he presented to the agent an itemized and verified statement of the damage within three days after the goods were received; and in the event that payment were refused, he might recover treble damages. Georgia required that claims for damages be paid by the railroad within sixty days under penalty of fifty dollars and interest.

In 1907, the passion for arbitrary legislation against railroads became almost national. Recommendations for the statutory regulation of railroad rates were made by the Governors of Alabama, California, Missouri, Arkansas, Colorado, Kansas, Massachusetts, Minnesota, Nebraska, North Dakota, West Virginia and Wisconsin. Maximum rates for passenger traffic — generally two cents a mile — were urged by the Governors of Indiana, Iowa, Kansas, Michigan, Minnesota, North Carolina, Pennsylvania and Texas. Statutes in accordance with the latter recommendations were passed by Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Carolina, North Dakota, Pennsylvania, South Dakota, West Virginia and Wisconsin. Maximum rates for particular articles of freight were enacted in Alabama, Kansas, Minnesota, Missouri, Nebraska, North Carolina and North Dakota. Alabama took a leaf from the experience of North Carolina, Florida, Arkansas and Georgia and passed statutes similar to those of the latter States requiring substantially immediate payment by the railroads for all claims for damages under very heavy penalties.

This hostility toward large corporations was cleverly invoked by the Federal administration in support of measures conferring increased supervisory powers upon the Federal branch of the Government. In May, 1906, while the Hepburn Railroad Rate Bill was being debated in the Senate, the President sent a special message to Congress denouncing the "unfair advantage over its competitors" enjoyed by the Standard Oil Company, and declaring that the enactment of a law, giving the Interstate Commerce Commission the right to fix railroad rates, was necessary in order to prevent such abuses. In the storm of popular feeling aroused by this message, the bill was passed. While the Pure Food Bill and Meat Inspection Bill were meeting opposition in Congress, the President made public the report of the investigation of the Chicago packing establishments. In the national revulsion aroused by this disclosure, these bills were passed. While the passion for Federal control was highest, an Employers' Liability Law[1] (since declared to be an unconstitutional exercise of Federal power) was enacted, a National Child's Labor Bill was agitated, and the Federal regulation of large businesses generally was vigorously

[1] An amended employers' liability law has since been upheld. — EDITOR'S NOTE.

urged in Presidential messages and in the various reports of the Commissioner of Corporations.

The extreme to which this spirit of governmental interference was pushed would have been inconceivable a generation ago. In 1907, the Commissioner of Corporations in a report upon a private industrial enterprise, repeatedly spoke of "reasonable commercial return," "average competitive profit," "average business return," and "normal rate of profit," meaning to describe his personal standard for determining the degree in which the prices and profits of a private enterprise were "reasonable" or "unreasonable." Inferentially, the Commissioner indicated that this standard of "reasonable commercial return" was about ten per cent, that any profit upon business investment in excess of this return proved that prices were unreasonable, and that the concern obtaining such profits was oppressive and illegal.

In the same spirit, Representative Hepburn, at the suggestion of President Roosevelt, in 1908 prepared a bill to amend the Sherman Anti-Trust Act, and introduced it into Congress. This bill proposed to leave it to the Bureau of Corporations to define what combinations were guilty of crime. The original mischief of the Sherman Anti-Trust Act, in outlawing organized capital and organized labor, was sought to be tempered by a system of special immunity. The dispensation of this immunity was not intrusted to the courts, but to a bureau in the Department of Commerce and Labor. Under such a statute, every business man making contracts relating to interstate commerce, and desiring to escape the penalties of the law, was required to file his contract with a Government bureau and then wait for sixty days before completing or executing the contract! But the bill died in the committees of the House and the Senate.

These proposals of strict governmental control have not always originated among legislators and Government officials. The Hepburn Bill of 1908 was drafted with the assistance of Mr. Francis Lynde Stetson, chief counsel of the United States Steel Corporation, and Mr. Victor Morawetz, chairman of the board of directors of the Atchison, Topeka & Santa Fe Railway. Such a plan had frequently been urged before popular audiences by Judge Elbert H. Gary and Mr. George W. Perkins, of the United States Steel Corporation, and was informally put in practice for their benefit during the panic of 1907, when the administration, acting under the belief that it was saving a great financial institution, virtually granted a special amnesty and dispensation of the Sherman Anti-Trust Act to the United States Steel Corporation by permitting the acquisition by that company of the Tennessee Coal & Iron Company. Through a similar dispensation, no less substantial because it was tacit, the United States Steel Corporation and the larger independent steel companies, without effort at concealment and without fear of prosecution, united during

the year that followed to "maintain the stability of their market, working together for one another" — to use Judge Gary's phrase — "as opposed to the unreasonable and destructive competition of the past." Only a year ago the Standard Oil Company proposed to the State of Missouri, as a desperate alternative to exclusion from the State, that a new Missouri corporation be formed to take over all the property and business of the Standard Oil Company, in the State and that the new corporation should be controlled by two trustees, one selected by the State and one by the Company, in such manner that "a fair, just, lawful and proper treatment" should be secured to the public as well as to the owners. A similar suggestion was made to the State of Kansas by the International Harvester Company, which had been convicted in that State of a violation of its anti-trust law. Such a régime of governmental benevolence and paternalism is only a step removed from the fulfillment of Mr. Andrew Carnegie's prophecy that a "supreme industrial court will have to be created and eventually will have to pass upon prices."

The reasons underlying these radical proposals seem to be these: Upon their face the anti-trust statutes of the United States and of the several States are so indefinite as to be open to the most arbitrary and capricious interpretation. So long as these statutes continue in force, these corporations do business only upon the sufferance and personal whim of the prosecuting authorities and the judges and juries charged with enforcing the law. To avoid this peril — the corporation managers reason — these laws should be enforced, not by judges and juries, but by experts.

In the main, all statutes in the direction of these radical proposals have been disappointing. As regards the railroads, drastic legislation has practically abolished discriminatory practices, and has thus kept the word of promise to the ear. But so far as decreasing or readjusting freight rates is concerned, it has broken the promise of hope to the heart. In this respect the Interstate Commerce Commission and the various State railroad commissions have done little more than demonstrate the reasonableness of the rates which the railroads themselves had previously established. The State of Virginia invoked the aid of the Federal courts to restrain its own Railroad Commission from enforcing rulings which permitted an increase of rates for the improvement of transportation conditions in Virginia, until in 1908 the Supreme Court of the United States refused to permit such interference. Meanwhile, legislation arbitrarily fixing railroad rates and service has been a failure. In 1906, the United States Supreme Court declared unconstitutional the Texas statutes compelling railroads to furnish a certain number of cars on any specified date. In 1908, the Supreme Court of Pennsylvania declared unconstitutional the two-cent-rate-fare law of that

State. In the same year the United States Supreme Court declared unconstitutional the rate acts adopted by Minnesota and North Carolina, on the ground that they were confiscatory, and that the enormous penalties which they imposed were unjust. Litigation regarding the constitutionality of the two-cent-rate-fare legislation is pending in half a dozen other States, and several decisions of the lower courts — notably in Missouri — have held such rates to be confiscatory. In States where the severest laws have been enacted, railroad extension and improvement have practically ceased. The Attorney-General of Missouri recently declared that the enforcement of the anti-trust laws of that State would paralyze one-third of the entire business of the State. Missouri, Kansas and several of the Southern and Southwestern States are now experiencing a reaction from radical legislation. During the past six years anti-trust laws in five States have been declared by the highest courts to be unconstitutional because they unfairly discriminated against corporations in favor of certain privileged classes in the community.

Still more disappointing has been the operation of the Sherman Anti-Trust Act. Judge Lacombe, in his opinion in the "Tobacco Trust" case, stated the consequences of the Act in vivid language:

> The act may be termed revolutionary because before its passage the courts had recognized a "restraint of trade" which was held not to be unfair, but permissible, although it operated in some measure to restrict competition. By insensible degrees, under the operation of many causes, business, manufacturing, and trading alike has more and more developed a tendency toward larger and larger aggregations of capital and more extensive combination of conditions. In that way only can production be increased and cheapened, new markets opened and developed, stability in reasonable prices secured, and industrial progress assured. But every aggregation of individuals or corporations formerly independent, immediately upon its formation terminates an existing competition; whether or not some other competition may subsequently arise, the act, as above construed, prohibits every contract or combination in restraint of co npetition. Size is not made the test. Two individuals, who have been driving rival express-wagons between villages in contiguous States, who enter into a combination to join forces and operate a single line, restrain an existing competition, and it would seem to make little difference whether they make such a combination more effective by partnership or not.

The same logic determined the recent decision of the United States Circuit Court in the Standard Oil case. By the same logic, as Judge Lacombe points out, the smallest combination affecting trade between two States is subject to the same penalty that is prescribed for the most oppressive monopoly. In his annual message in 1906 President Roosevelt said:

The actual working of our laws has shown that the effort to prohibit all combination, good or bad, is noxious where it is not ineffective. . . . No more scathing condemnation could be visited upon a law than is contained in the words of the Interstate Commerce Commission when, in commenting upon the fact that the numerous joint traffic associations do technically violate the law, they say: "The decision of the United States Supreme Court in the Trans-Missouri case and the Joint Traffic Association case has produced no practical effect upon the railway operations of the country. Such operations, in fact, exist now as they did before these decisions and with the same general effect. In justice to all parties we ought probably to add that it is difficult to see how our interstate railways could be operated with due regard to the interest of the shipper and the railway without concerted action of the kind afforded through these associations." This means that the law as construed by the Supreme Court is such that the business of the country cannot be conducted without breaking it.

In his annual message in 1907 and in his special messages of January 31, 1908, and March 25, 1908, President Roosevelt repeated the same criticism. Similar strictures have repeatedly been uttered by President Taft and by Attorney-General Wickersham.

At the present time, the normal transactions of business are forbidden by highly penal statutes. Business men now enjoy liberty only according as the prosecuting authorities indulge them in the open breach of the law. Plainly, our legislation respecting large business must be confessed to be a failure.

The causes of this failure are simple. The legislation upon which we heretofore have relied has been directed toward two absolutely inconsistent purposes: the furtherance of free competition, and at the same time the prohibition of the very agencies and organizations in which free competition most normally expresses itself. The Sherman Anti-Trust Act and the anti-trust laws of most of the States are striking illustrations of this hopeless contradiction of purpose.

Every one agreed that these laws were enacted to further free competition. Every one knows that no business man would undertake the strife of competition without the assurance that he may enjoy the price if he wins it. In order to preserve healthy competition, the legitimate growth and lawful extension of the business of the successful trader must be protected.

Now, the large business of the successful competitor, which the law logically must protect, presumes the disappointment of unsuccessful competitors. As Mr. Justice Holmes said in the Northern Securities case, "every concern monopolizes whatever business it does." Large business, for the time being at least, is the subjugation of competition, the victorious appropriation of the prize, and the exclusive enjoyment of it, subject only to the chance of losing it through the same rigor of competition by which it was won.

Just here is where the mistake of so much futile legislation has

arisen. Because a business becomes large — and every successful business grows large — and because the large business temporarily displays the characteristics of a kind of monopoly, we have hastily concluded that every business, as soon as it becomes large, is a monopoly, actual or incipient, and must be cudgelled and cuffed, and either repressed or regulated, in the same manner and with the same rigor as monopolies which have arisen unnaturally through unlawful methods of competition, or which have arisen inevitably because the nature of their particular business made competition impossible.

Repressive and prohibitory legislation has its place in the field of business competition. It should be directed, however, not against the form of a business organization, nor yet against the power which its efficiency may develop; but only against the use of unlawful means of competition. "Destroying or restricting free competition," "smothering competition," "extinguishing competition," "stifling competition," "eliminating competition," "preventing competition," "annihilating competition" and "suppression of competition" are practices subversive of healthy business rivalry. They are sometimes resorted to by the obscure and unsuccessful competitor, as well as by his conspicuous and successful rival. These practices should be specifically forbidden to large and small competitors alike. Whether the concern which resorts to these practices exerts great or little restraint upon commerce should be immaterial.

Regulation by governmental commission has its place in the industrial world. As a remedy for the abuses of business competition and of industrial trusts, however, it is destined to more disastrous failure than has overcome the prohibitory anti-trust laws.

In the control of public-service companies — such as railroads, street railways, water, gas, electric-light and water companies, public warehouses, stock-yards, and the like — which enjoy exclusive franchises granted by law or extraordinary powers conferred by the State, such as eminent domain, or which, by the very nature of their being, constitute a natural monopoly permitting of no competition, regulation by governmental commission has amply justified itself. In these anomalous businesses, which really are governmental functions entrusted to private capitalists to insure the most enterprising development, the Government very properly enforces the same principles that control the police and fire service. The duty to serve all, with adequate facilities, without discrimination, and at a reasonable price, is enjoined upon such businesses. Just as the administration of the police force and the fire department is naturally deputed to individual officials or commissioners responsible to the community, so the enforcement of the duty of public-service companies is properly vested in governmental commissions. Very naturally, the powers of both classes of commissions include the right absolutely to prescribe the

character of the facilities and the price of the service, subject only to the limitation that, in so doing, the legal rights of the persons affected by their orders shall not be molested. Regulation by commission, however, is only necessary where the law or the nature of the business virtually prohibits competition. In fixing the price and conditions of service in these businesses, the law seeks merely to levy an equitable tax to defray a public expense. It presumes that competition — which in ordinary businesses adjusts the character of the facilities and the price of the service — is extinct, and, in fact, would be harmful, if revived. The effect, therefore, is to render real competition impossible in business which it regulates.

To extend regulation by governmental commission to businesses which do not enjoy exclusive franchises granted by law, or extraordinary powers granted by the State, or a monopoly arising from the nature of the business, and to apply regulation by commission wherever a business has developed large size, is to deny the efficacy of competition in its most normal working, and to hamper competition in every branch of industry. In such businesses, competition naturally exists, and, in order to maintain a healthy condition, should be encouraged. Interference with prices and with the form of organization of such businesses only creates artificial barriers, behind which lurk forms of privilege quite as dangerous as monopoly. Such interference stultifies the avowed purpose of all anti-trust legislation, and violates the first principle of economic progress, and subverts the fundamental proposition of individual liberty upon which this Government was founded.

The abuses of business competition are real and serious, and must be cured by legislation. The remedy, however, lies in the direction of free competition, rather than paternal control. Every statute which furthers free competition, and strikes specifically at the various forms of unlawful competition and fraud which impede it, will hasten the cure. Any statute which imposes governmental interference upon a business merely because it is large — whether that interference be indiscriminate prohibition, or the more insidious form of regulation by governmental commission — will delay the cure, and prolong the uncomfortable situation in which business has stood before the law for the past twenty years. The principle which should guide all legislation upon this intricate subject was tersely expressed by the committee which drafted the Corporation Law of Massachusetts in 1903: "So far as purely business corporations are concerned, and excluding insurance, financial and public service corporations, the State cannot assume to act directly or indirectly as guarantor or sponsor for any organization under corporate form. . . . The State should permit the utmost freedom of self-regulation, if it provides quick and effective machinery for the punishment of fraud. . . ."

II

THE RESPONSE OF LEGISLATURES AND COURTS TO THE NEWER DEMANDS

AMERICAN LEGISLATION ON PROPERTY RIGHTS[1]

By Frederic Jesup Stimson, of the Harvard Law School

(Chap. VII of "Popular Law Making," published by Charles Scribner's Sons, Copyright 1910)[1]

There are two processes by which the changing public opinion on property relations become fixed: legislation and adjudication. Under a written constitution the latter is scarcely a flexible, while under a democracy the former is a constantly and easily changing, process. The following articles indicate the extent to which recent legislation has responded to popular demand and the attitude of the courts toward changing conditions. — Editor's Note.

When we come to the vast field of legislation in the United States, comprising the law-making of forty-six States, two Territories, the National Congress, and the Federal District, it is difficult to decide how to divide the subject so as to make it manageable. The division made by State codes and revisions, and the United States Revised Statutes, hardly suits our purpose, for it is made rather for lawyers than sociologists or students in comparative legislation. The division made by the valuable "Year Book of Legislation," published by the New York State Library, comprises some twenty subjects: Constitutional Law; Organic Law; Citizenship and Civil Rights; Elections; Criminal Law; Civil Law; Property and Contracts; Torts; Family; Corporations; Combinations and Monopolies; Procedure; Finance; Public Order; Health and Safety; Land and Waters; Transportation; Commerce and Industry; Banking; Insurance; Navigation and Waterways; Agriculture; Game and Fish; Mines and Mining; Labor; Charities; Education; Military Matters; and Local Government. This division, however convenient in practice, crosscuts the various fields of legislation as divided in any logical manner. The same criticism may be applied to a somewhat simpler

division I have used in tabulating State legislation for the last twenty years into thirteen columns, the titles of these being, roughly speaking, Property and Taxation; Regulation of Trades and Commercial Law; Personal Liberty and Civil Rights; Labor; Criminal Law, Health and Morality; Government; Elections and Voting; Courts and Procedure; Militia and Military Law; Women, Children, Marriage and Divorce; Charities, Education, Religion and Jails; Agriculture, Mining and Forestry; Corporations, Trusts and Interstate Commerce. Is it not possible to begin with a broader and more simple division?

Now all statutes are limitations on a state of pure individualism, defining this latter word to mean a state of society recognizing personal liberty and private property, and allowing all possible freedom of action and contract relating thereto; with a court administration for the purpose of protecting such liberty and enforcing such contracts in the courts. The usual rough division of our constitutional rights, following the phraseology of the Fourteenth Amendment, is that of life, liberty, and property; but the rights to life and liberty obviously belong to the same broad field. Our first division, therefore, may well be that which divides life and liberty rights from property rights; although in some cases, notably in the earnings of labor, they would be found to run together. Liberty rights are multifarious and indefinite; we may, therefore, first take the field of property as presenting, after all, a more simple subject. Considering all possible organizations of human society from this point of view, we shall find that all may be expressed, all at least that have hitherto been conceived, under the systems of anarchism, individualism, and socialism, these words expressing all possible states of human society when expressed in terms of individual liberty, that is to say, the free exercise of the individual will. Either one of these may exist either with or without the notion of private property; though, of course, one's action as to property would be controlled under a system of socialism, and property itself would have no legal protection under a system of anarchism. Nevertheless, the notion of property might still exist and be recognized by the custom of mankind without any sanction or enforcement from the entire community, *i.e.*, what people call the state. When we are speaking in terms of property, we use the word *communism* — meaning that state of society where the conception of property exists, but the law or custom will not recognize individualism. Communism, therefore, usually implies ownership by the entire community, while in anarchism there is no property at all. There has been much confusion in the use of these terms in the popular mind, and even in ordinary writing. Many people have confounded, for instance, socialism with anarchism or nihilism, when the two things are whole poles apart. In the same manner, communism

has been confounded with socialism, although the term should be used in entirely different connections — communism when we are speaking in terms of property, socialism when we are speaking in terms of individual liberty. The word *individualism* was used by the present writer in a series of articles entitled "The Ethics of Democracy," beginning in 1887, as the most convenient term for describing that state of society where the greatest possible individual liberty is conjoined with a strong recognition of the right of private property, substantially the *laissez faire* school as it existed in England in the first half of the last century; "the distinction between communistic and socialistic laws being, that the former are concerned solely with the taking and redistribution of money or property; the latter regulate or prohibit men's mode of life, acts, or contracts, either among themselves or as concerning the state." [1]

Now, property is but the creature of law; and that is to say, in those of our States which have no common law, of statute. Jurists and communists are alike agreed on this. "Property is robbery," said Proudhon; property is but the creature of law, all English jurists admit. It is, of course, possible to conceive of a social system which recognizes no right of property, or one which makes all property belong to the community, or a middle ground which admits the institution, but holds that every individual holds property subject to the state's, that is, the organized community's, regulation and control. A convenient term for this state of affairs to which, perhaps, in our statutes, we are approaching, is "allowable *socialism*"; private property is recognized, but its use is regulated. In England they call it "gas-and-water socialism"; but this term, though picturesque, is not sufficiently comprehensive, relating, as it does, only to municipal activities. There is a third variety, the latest and perhaps the most intelligent of all, that believed in by leading modern German and American socialists, which we will call nationalism — the nationalization or municipalization of productive industry — the science of this doctrine being that private property may exist in all personal belongings, articles of pleasure, or domestic necessity, but not in lands, mines, works, or other instrumentalities used for the further production of wealth.

Whatever the future may bring, we must start with the institution of private property recognized to its fullest extent. It is expressly guaranteed in our Federal Constitution, as for the matter of that it was also in Magna Charta, as clearly as the right to liberty, and usually in the very same clause. Not only that, but when we adopted our first State constitutions, from 1776 to 1788, and the Federal Constitution in 1789, every one of them made express guarantee of this right. One or two, following the lead of Massachusetts and Virginia, recog-

[1] *Scribner's Magazine*, Vol. XV, p. 653.

nized equality also, or, at least, equality by birth and before the law; but without exception property was expressly recognized as one of two leading constitutional rights, and even in some States, like Virginia, it was termed a natural right. The same thing is true of the Massachusetts Bill of Rights and in the Federal Fifth Amendment, though it is significant that the Declaration of Independence omits the word *property*, and only mentions among unalienable rights, life, liberty, and the pursuit of happiness — which some courts have held to include private property.[1] Nevertheless, under our constitutions to-day, the right is not only doubly, but even triply guaranteed; that is to say, by all State constitutions against State action; by the Federal Constitution against national action; and finally, by the Federal government in the Fourteenth Amendment as against State action also. This is the reason why, in any case affecting a cardinal liberty or property right, a litigant may carry his case not only through the State courts, which have sole jurisdiction of ordinary business and domestic matters, but to the courts of the United States as well.

When we come to legislation on the subject, or to modern State constitutions, there is hardly a change in this particular. Naturally, we find no new legislation confirming the right of property abstractly, or restating that that institution is part of our civilization. There is but one significant exception to this statement. While most of the States in their constitutions declare that men have a natural right to acquire, possess, and protect property, and Kentucky and Arkansas go to the length of saying that the right of property is "before and higher than any constitutional sanction" — which latter statement is a legal hyperbole — Oklahoma in its recent constitution, North Carolina, and Missouri state only that men have a natural right to the enjoyment of the fruits of their own labor; on the other hand there are recent intimations coming from Federal sources that individualism or private property rights, at least, and not anarchism or socialism, are part of our constitutional system. Before 1907 a Texas district judge refused to naturalize an immigrant on the ground that he was a socialist and that socialism was inconsistent with the Federal Constitution; and in that year Congress passed an act to regulate all immigration of aliens, which excluded, among other classes, persons who believe in or advocate the overthrow by force or violence of the government of the United States or of all government,

[1] Justice Brewer, *Yale Law Review*, June, 1891. He holds that under "the pursuit of happiness" comes the acquisition, possession, and enjoyment of property, and that they are matters which even government cannot forbid nor destroy. That, except in punishment for crime, no man's property can be taken without just compensation, and he closes: "Instead of saying that all private property is held at the mercy of the public, it is a higher truth that all rights of the state in the property of the individual are at the expense of the people."

or of all forms of law — a definition which would exclude anarchists, but not socialists; and in the case of South Carolina *vs.* United States (199 U.S. 437), the Supreme Court of the United States gave serious consideration to the question whether State socialism was compatible with a republican form of government. This is all, so far as I am aware, that a century and a half of legislation has given us affirming the abstract right of property, though there are several constructive statutes and constitutional provisions applied to the general right to trade or labor, which we shall consider when we come to that subject.

When a right is expressly guaranteed by the Constitution we need ordinarily have no affirmative legislation about it. Liberty and property being always guaranteed by the State constitutions, it has not been necessary for the States to legislate to protect them.

Our study of this subject, therefore, will be confined to the restrictive or limiting legislation affecting private property or property rights, and of this we shall find plenty. Now there are four, and only four, methods by which the state, that is to say, American society as organized into governments, interferes with the right to property or the enjoyment and use thereof; that is to say, taxation, which is, of course, general; eminent domain, a peculiarly American doctrine; the police power; and the regulation of rates and charges. Some authorities place the last under the police power; but it does not seem to me that it historically, if logically, belongs there.

Starting with the simplest first — eminent domain, an American doctrine which, in its simplest form, subjects the land of any one to the need of the state, or, in cases authorized by the Federal Constitution, of the nation. It is questionable whether it applies to personal property. It is an American doctrine, for in England where the king remained in theory the feudal over-lord, it was not necessary for him or the sovereign Parliament, wishing to take or control land, and having no constitution protecting property rights against such action, to invent any new doctrine; but with us all land is allodial. The old charters of the original States creating tenures in free and common socage are, of course, obsolete. Everybody is a freeholder, and the States are not, still less the Federal government, a feudal over-lord. Nevertheless, the property of every one must be subject to the supreme common necessity; and the right is absolute in the States, although limited in the national government by the Federal Constitution. It is an American constitutional principle; and this principle also provides, as does Magna Charta and the early charters of England as to *personal* property seized by royal purveyors, that full damages must be paid; and to this general principle our constitutions have added that the damages must be paid at the time of the taking and the amount be determined by due process of law; that is to say, in most cases by a jury. Blackstone says: "So great is the regard of the

law for private property that it will not authorize the least violation of it; not even for the general good of the whole community";[1] a new road, for instance, cannot be made without consent of the owner of the land, and the words "eminent domain" do not appear in the text of his book. But though we hold the contrary doctrine, the rights of the property owner are sufficiently protected when the taking is directed by the State, or even by a city or town. The menace to property here, with the increasing bulk of legislation, comes in the number of new *uses*, not only directly for the State or for cities and towns, but for public-service corporations, or often other private corporations, and associations of persons, who are permitted by legislation to take land under eminent domain, or, what is often worse, to acquire easements over it. Most of the States give damages for land not actually taken, but damaged, though our Federal courts have not held this to be necessary under the Fourteenth Amendment; but although land can still, in theory, only be taken for a public use, the number of uses which our legislation makes public is being enormously increased. The usual national purposes are forts, magazines, arsenals, dockyards, and other needful buildings. Independent of some express permission in the Constitution, the Federal government has no power to take, or even to own, land at all within the State limits. Therefore, it is questioned whether land may be taken for national parks or forest reservations except in the Territories, where title still remains with the Federal government. But the State's power of eminent domain is unlimited, although it began only with the towns or counties taking roads for highways, and cities and towns appropriating lands for schools and other public buildings. Probably the only serious addition of a wholly public use is covered by the general expression, parks and playgrounds; but the analogy of the highway led to the taking of land under eminent domain for railroads when they were first invented, then for street railways, then for telegraph, telephone, and electric-light lines, underground pipe-lines or conduits of all sorts, and finally, for drains, sewerage districts, public, and often private irrigation purposes. Most of the more complex State constitutions define at great length to the extent of some twenty or thirty paragraphs just what purposes shall be considered a public use under eminent domain. In the absence of such definition, or without such definition, the number of such uses is being enormously increased by statute. Thus, reservoirs, storage basins, irrigation canals, ditches, flumes, and pipes for water drainage, or mining purposes, working mines, as dumps, hoists, shafts, tunnels, are made a public use by the constitutions of the arid States, Idaho and Wyoming. So as to water only in Montana, but in Idaho also to any other use "necessary for the complete development of the material resources of the State or the preservation of the health of its

[1] Book I, p. 139.

inhabitants."[1] And even by private parties, land may be taken for ways of necessity in many States, and for drains, flumes, and aqueducts by the constitutions of the arid States.

At common law, of course, a man or a set of men, who happen to be neighbors, would have had no right to take my land for a private way, or for drainage or irrigation purposes, however beneficial to their land; still less to take water from my stream across my land to their fields. But this precise thing can be done in an increasing number of States, although it has been held unconstitutional in the courts of one or two of the far Western States, and has even yet not been decided by the Supreme Court of the United States as to the powers of the Federal government. Under the broad definition given in Idaho and Wyoming, you can probably take land to establish a municipal coal-yard, or dispensary, or anything else that the legislature might suppose to be for the general health or benefit of the people. Yet a hotel company would not as yet be considered a public use, nor, probably, a private recreation park. And land taken for one use may be subjected to other and totally distinct uses without giving any new right of damages, as was decided in Massachusetts, at least, when land given or taken for an ordinary city street was afterward occupied by a steam railroad. A notable limitation on the use of streets, however, we find imposed by the statutes of New York and many other States, which provide that no railway shall be placed therein without the consent of a majority of the property owners or abutters. There is frequent legislation providing that the betterment taxes collected in case of public improvement shall not exceed the damages given for the property actually taken. In the last two or three years there has been an extension of the doctrine, authorizing cities and towns to take more land than is actually needed, for the purpose of convenience, or in order to get a better bargain, and then sell the surplus; but such laws may be unconstitutional.

Land may, of course, be taken for all municipal purposes, including public squares or parks, playgrounds, reformatories and penal institutions, levees, ditches, drains, and for cemeteries; and the right is being granted to private companies other than those above mentioned, in Colorado, to tunnel, transportation, electric power, and aërial tramway companies; in North Carolina to flume companies; in many States for private irrigation districts; in the West generally to mining or quarrying companies; in West Virginia and other States to electric power, light, or gas companies; while in North Carolina, Washington, and Wisconsin, we find the dangerous grant of this great power to electric-power companies, which are, in Wisconsin at least, expressly permitted to flood lands by right of eminent domain in order to form ponds for power purposes. It is easy to see that under such

[1] These provisions are collated in Federal and State Constitutions, p. 159.

legislation everybody holds his land not only subject to public need, but to the greed of any designing neighbor. Perhaps the most important question of eminent domain is or was whether it authorized general schemes of internal improvement made by the State or by a municipality, or, worse still, by a private corporation chartered for the purpose. The Constitution of Michigan, with those of the Dakotas and Wyoming, provides that the State cannot be interested in works of internal improvement, nor, in North Dakota and Wyoming, engage in them except on two-thirds vote of the people; nor, in Alabama, may it loan its credit in support of such works; nor, also, in Maryland, Minnesota, Ohio, and Wisconsin, create or contract debts for them; nor, in Kansas and Michigan again, be a party to carrying on such works. But the Tennessee Constitution declares that a well-regulated system of internal improvement should be encouraged by the legislature. So, in Virginia, no town or county may become a party to any work of internal improvement except roads, and they are frequently forbidden from borrowing money for such purposes. There is, therefore, considerable constitutional check to legislation in this direction.[1]

Taxation, of course, has from all time been the universal limitation upon property rights, though it is important to remember that until the present budget there has not in modern times been an attempt at direct taxation of the capital value of land in England; Cobbett records many "aids" of a few shillings per hide of land in Anglo-Norman times. The earliest taxation was the feudal aids imposed purely for defensive purposes, for building forts and bridges; later for foreign wars or crusades. We have traced the origin of the scutage tax as a substitute for military service and the two great constitutional principles that all taxation must be with the common consent of the realm; that is to say, of Parliament, later of the House of Commons; and must also and equally be for the common benefit. Theorists have argued, particularly with us, that under the latter principle protective tariffs are unconstitutional; but even if it be admitted that they are not for the benefit of the whole people, the exception is as old as the rule; protective tariff laws, and, earlier still, laws absolutely prohibitive of importation, being plentiful on the English statute-books before and at the time this earliest of constitutional principles appeared. There is a step beyond the protective tariffs, however, which is naturally mentioned in this connection, and that is the bounty — sums of money paid to certain interests and derived from the general taxes fund. Under the Acts of Congress there has been, I think, only one instance of a bounty; that is in the case of the Louisiana sugar-growers. In State legislation it has been a little more usual. Foreign countries, notably Germany and France, as to beet sugar, etc., have

[1] See Federal and State Constitutions, Book III, sects. 92, 324, 345, 370, 391, 395.

been in the habit of giving bounties. This precedent undoubtedly suggested it; but these countries do not enjoy our constitutional principles. There has hardly been a direct decision on the constitutionality of the Federal bounty, but as to State bounties we find several, with an increasing tendency to hold void such laws. There can be no question that they are utterly against our whole constitutional system. The Supreme Court, when considering sugar-bounty laws, seems to have thought that it might be sustained as a compensation made for a moral obligation, the Louisiana planters having been led into industries from which the protection was suddenly removed; of such nature must be the justification, if any, for bounties given in times of flood, fire, or public disaster, which, however, are really sustained only in the absence of objection and on the principle *lex non curat de minimis*. The most insidious form of the bounty, however, is that of exemption from taxation, or, still worse, granting subsidies or subscribing to the stock and bonds of public-service, or even ordinary private, corporations. Undoubtedly the exception has been established in the case of railroads. The granting of State, city, or county aid to railroads has existed almost from their invention, probably on the analogy of highways; at all events, it is too late to be constitutionally questioned now. The exemption from taxation of private profitable enterprises, such as mills or factories, is less defensible. Frequently, however, they go without question, it being to no one's particular interest to do so. The usual subjects of State bounties were, in 1890, beet-root sugar, binding twine, iron and iron-pipe, potato starch, and rope, with tax exemptions to portland-cement works. Ramie fiber continued a favorite subject of bounty for some years, with seed distributions to farmers, which were in some States held unconstitutional. In 1896 Utah gave a bounty on canaigre leather and silk culture. There was an exemption on salt plants in Michigan, but beet sugar continued the favorite beneficiary. There has been a reaction against bounty legislation of recent years. In 1908, for instance, New York repealed its bounty on beet sugar, and it may be hoped, with greater intelligence of constitutional principles, that all such legislation will be abandoned.

Coming to matters of ordinary taxation, of course the first thing to note is its extraordinary extent. In direct taxation it is not an unfair estimate to say that the States and their municipal organizations undertake to impose an annual assessment on real and personal property which would average at least two per cent throughout the country; amounting to from one third to one half of the income derived therefrom. In indirect taxation, duties, and revenue taxes, a sum far greater is taken from the average household. One might very much wish that the individual householder might at least know how large a sum is thus taken from his earnings annually, for it is safe

to say that in no civilized country, not even in the France before the Revolution, was individual taxation any thing like so heavy. Therefore, we are beginning to find legislation, even constitutional provisions, carefully limiting the tax rate. The amount of the State tax is thus limited in probably half the States, mostly Southern or Western, and nearly all of them limit also the amount of taxation to be imposed by the counties, cities, towns, school districts, or for other special purposes. In the Northeastern States such limitation is not usual, though in Massachusetts and New York it exists as to certain cities. It may properly be said of such legislation that it does not appear to be so futile as one might have expected. There is, of course, a tendency to raise the limit, involving frequent constitutional amendment, or, in Massachusetts, for instance, where the limitation is put on only by statutes, by later statutes authorizing the borrowing outside of the debt limit; for it should be said that such limitations do usually apply both to the appropriations and to the funded indebtedness incurred. Still I have not observed in the last twenty years any repeal of such laws or constitutional provisions, but rather an increasing number of States adopting them, from which it may be inferred that they work satisfactorily. Nearly all the States purport to tax the capital value of both real and personal property, not, as in England, rents or incomes; and they tax "tangibles" and also "intangibles." That is to say, they undertake to tax stocks or bonds or mortgage debts; the evidence of property, as well as the property itself; and the debt as well as the property securing it. Some States, such as Pennsylvania, impose a smaller, more nominal, tax upon stocks and bonds in the hands of the owner, for the sake of getting a larger return, but in many States, such as Massachusetts, this legislation would be unconstitutional, as not proportional taxation.

There is a mass of legislation every year directed to the assessing and collecting of taxes, tending more and more to become inquisitorial, requiring the taxpayer under oath to furnish full schedules of his property, with provision for an arbitrary assessment if he fails to do so. One effect of this has been to drive very wealthy men from Ohio or other Western States to a legal residence in the East, where the laws are more lenient, or their enforcement more lax. The problem is a most important one and I see no signs yet of any solution in the increasing mass of legislation one finds upon this subject every year. It is to be noted — what our socialist friends have never seemed to observe — that just in so far as a man's earnings or income are taken from him in the form of taxation, you are already in a state of socialism. That is to say, to that extent is his income taken from him and administered by the state. This is an observation most unwelcome to the opponents of capitalism, so-called, who resent the conclusion that if the State and Federal governments are already taking forty

per cent of his income from him, a state of perfect socialism could do no more than take the other sixty per cent. This whole problem of taxation, indeed, is evaded at present only by the miserable solution of fraud; hardly any one, except the non-propertied classes, paying what the law purports to take from them; and the non-propertied classes only pay it because their taxation, being indirect, is paid for them by others.

Coming to other forms of taxation, we may distinguish three: Income, succession, and license. Income taxation in England dates, it is said, from 1435; but (in the shape of tithes) it is far older. The power of income taxation (except upon earnings and profits) belongs here only to the States; just as the sole power of imposing duties on imports is given to the Federal government. Many of the States impose an income tax, but I observe no particular increase in that kind of taxation in the last twenty years. A man's income is commonly taxed with his other property. It is a form of tax far more evaded here than in England, probably because the English law provides a machinery for collecting a large part of income taxation from the persons from whom the income is derived, as, for instance, from the tenant who pays rent to a landlord; just as with us a corporation is made to pay the tax on its capital stock nominally due from the individual owner. The only notable extension of income tax legislation is in the establishment of the principle of the *graded* income tax, which is beginning to be adopted in a few States, as in North and South Carolina in 1897.

This principle of graduated taxation has, however, been nearly universal in our next and more modern variety — the succession tax. The old English precedents are the "aids" and fines for alienation. But beginning here about 1893, this form of taxation has now been adopted by nearly all the States, the amount of the tax being graded both according to the relation of the inheritors to the person from whom the succession is derived, and according to the amount of the inheritance itself; the rate of the tax thus varying all the way from an absolute exemption, as to the wife or children, to a tax as high as twenty-five per cent (in New York) in the case of large estates going to remote relatives. The Federal inheritance tax imposed at the time of the Spanish War was soon repealed, and this domain of taxation, with the income tax, is now almost universally employed by the States. The principle itself can hardly be carried much farther, but it will be necessary to have some understanding or arrangements between the States, whereby double or treble succession taxes are not imposed on the same estate, as notably in the case of the stock or bonds of railroads chartered in several States, all of which may undertake to impose full succession taxes upon such stock. It has been held that succession taxes may be graded even in cases where a State constitution provides

for proportionate taxation, the tax being an excise tax and not a direct property tax; but this is not so in respect to income taxes. We may assume therefore that income taxes must be equal in States which have this constitutional provision, although in one or two of them recent statutes have exempted a portion of the income of veterans of the Civil War. This might be sustained as a pension, pensions being for actual military service constitutional, and are in the Southern States expressly permitted to Confederate soldiers and their families — despite the implied prohibition of the Fourteenth Amendment.

The last form of taxation, that of an excise upon licenses or trades, is most usual in the South. An increasing number of trades are thus being taxed or regulated. Sometimes the taxation is put under the guise of a fee for examination and licensing, sometimes plainly as an excise tax. Undoubtedly such taxation is against all the history of our legislation demanding complete freedom of labor and trade. Nevertheless, it has not been held unconstitutional by the States except, of course, when touching a trade which is interstate commerce, though the *examination* occasionally has been. Such taxation has not yet become popular in the North, except definitely for the purpose of examination and license; but it is almost universal in the South, many States indeed providing by their constitution or laws that all trades and callings may be thus taxed. These taxes may be arbitrary in amount, but are sometimes graded according to the amount of business done. Such legislation has been sustained in so far as it is a tax or a license imposed for protecting the public health in a reasonable manner; thus, doctors, plumbers, nurses, dentists, etc., have been submitted to such regulation, but in the case of blacksmiths its constitutionality was in one State denied, and the law as to barbers in several States annulled. Nevertheless, it will always be a popular method of raising money in the poorer States, where land already bears its full burden and little personal property can be found.

Commissions of inquiry on this whole subject of taxation are continually being appointed — we have had two in Massachusetts in the past ten years — and their recommendations nearly always prove unacceptable. The probable scientific answer, that you must only tax property, and not money or the evidence of property, and that if direct taxation thereby becomes too burdensome we must reduce our rate of expenditure, is a conclusion our legislators are yet unwilling to accept. The taxation of corporations presents a different problem and we shall therefore leave it for special consideration with that subject. The matter of betterment taxes may be dismissed with a word, as it is hardly, in theory, taxation at all, but rather using municipal agencies to collect the cost, or part of the cost, or a local work or benefit. It is, of course, closely connected with the subject of eminent domain. That is to say, only a public use, or at least a general local

benefit, can justify a betterment tax. There is still considerable legislation on this matter, confined generally to the objects of securing a jury trial, or at least a public hearing, on the amount of the assessment, defining the purposes for which it may be imposed, as, for instance, paving, sewers, waterworks, where public, and — perhaps the most contested case of all — that of parks or pleasure-grounds; and providing that the amount of betterment taxes imposed shall not exceed one half the value of the improvement of the property, and shall never exceed the amount paid as damages when part of the owner's land is taken.

By far the greatest mass of legislation relating to property is concerned with the police power and modern extensions thereof. It is also by far the most dangerous to property rights, and this for several reasons: firstly, it involves the destruction of property without any compensation whatever, not upon payment of damages, as in the case of eminent domain; secondly, on account of the extraordinary extension by our modern legislation of this power to matters not hitherto deemed necessary for the safety, health, or even the well-being of the public, vague as the legal application of the last word is; thirdly, and perhaps most important, because the police power is usually exercised without any common-law guarantees, without process of law, or jury trial, but by the arbitrary ruling of some board, or even single commissioner, and often, so far as the statute is concerned, without a jury or even an appeal from the commissioner's ruling to any court of law.

I believe this to be the most dangerous tendency that now confronts the American people — government by commission, tenfold more dangerous than "government by injunction." Not only is there no liberty, no appeal to common right and the courts, but all permanent "boards" tend to become narrow and pedantic or, worse, to be controlled by the works they are created to control.[1] The constitutionality of such boards is, of course, always questionable, but the tendency to create them is perhaps the most striking thing in modern American legislation. Not only do we find them in enormously increased numbers in all the States, but even a late President of the United States seriously recommended that the contracts and affairs of all corporations at least (and the bulk of modern business is done in corporate form) should be so submitted to the control or dictation, or even the nullification, of such an administrative board or commission, and this again with no appeal to the courts. So audacious an upsetting of all Anglo-Saxon ideas of the right to law, it may be said without exaggeration,

[1] Two singular instances happened only the past year: at common law any one may build railroads, and they are certainly for the general advantage whether profitable to the owners or not. Yet the railroad commissions of New York and Massachusetts have recently in each State prevented the building of most important lines, by responsible applicants — under the opposition of other railroads.

has never been attempted in the history of the English people, not even by the Stuart kings, who were most of all disposed to interfere in such particulars. Wiser counsels deterred the administration from insisting on this measure, but the fact that it could be brought up, and that with the approval of a large portion of the public, indicates how radical our legislation is getting to be in this particular.

It is a common place in the law that no court has defined, or ever will consent to define, the exact limits of this police power; suffice it to say that in the classic words of Chief Justice Shaw of Massachusetts, "it is all that makes for the health, safety, or comfort of the people." As to the health and safety, there can be little question; but when it comes to indefinite words like "comfort" or "well-being," too wide a field is left for the imagination. It has recently been decided that the æsthetic part of life does not necessarily concern the comfort or well-being of the people. That is to say, laws forbidding the use of land for the erection of hideous signs, or forbidding the height of buildings at an inartistic excess have been declared not to fall within the police power, but under eminent domain. So of statutes forbidding the taking of a man's picture, or a woman's portrait for advertising purposes, when not properly obtained; yet it may be questioned if any law is more certainly for the comfort of the persons concerned than such a statute. On the other hand, noisy or noxious trades, mosquito ponds, trees infected with moths, etc., sawdust in water, offensive smoke, and, in Vermont, signs, were all made nuisances by statute of one State or other in 1905 alone. The first historical instance, perhaps, of destruction of property under the police power was the blowing up of buildings to check a conflagration, a practice still common, although its utility was much questioned after the Boston fire, and which, at common law at least, gave the owner no right to compensation; but the more usual use of the police power until very recent years has been limited to the prohibition of offensive trades in certain localities, and the suppression of public nuisances. Later, the prohibition of the manufacture of intoxicating or malt liquors, and the regulation of tenement houses at the orders of the Board of Health. This led to the regulation or prohibition of certain trades conducted in tenement houses or in sweat shops, and to other matters which we shall find it more convenient to consider under the head of labor legislation.

Whether there are any limits to this power is much discussed. There is no question that the power must not be arbitrary or utterly without reason, and of that reason the courts must and do in fact judge. Taking property for a purpose unjustified by the police power is, of course, taking property without due process of law. An arbitrary statute taking the property of *A* and giving it to *B*, or even to the public, without compensation has, from the time of Lord Coke

himself, been the classic definition of an unjustifiable law and one which with us at least is unconstitutional; but our courts wisely refuse to judge if, when a proper police motive is disclosed in the statute, it is the *best* method of effecting the result. This, I think, is a clear statement of the principle of our court decisions. If, upon the face of the statute, the court can see no possible relation to the public health or safety, or, possibly, general welfare, it will hold the law null in so far as it invades either property or liberty rights because not under the police power. If, on the other hand, they can see *some* relation to the public health, safety, or general welfare, even though they do not think it the best method of bringing about the desired result, they will not presume to run counter to legislative opinion. Of the expediency of the statute, the legislature must be and is the final judge.

With us the police power is exercised largely for moral reasons. That is to say, the great instances of its extension have been connected with moral or sanitary reform. No doubt the police power may broaden with advancing civilization and more complex appliances and possibly greater medical knowledge and social solidarity. No doubt purposes which were once lawful may be unlawful, and property devoted to them thus be destroyed by a change in the law. Mr. Justice Brewer, of our Supreme Court, holding the contrary view, was overruled by the majority, and that decision is final.[1] Not only we, but a State, may not even make a contract which shall be immune from future extension of the police power, the Dartmouth College case notwithstanding. For instance, the State of Massachusetts in 1827 granted a perpetual franchise to a corporation to make beer. It was allowed, forty years later, to pass a law that no corporation should make beer, and the brewery became valueless. The State of Minnesota granted a perpetual franchise to a railroad to fix its own fares. Twenty years later it took away that right, thereby, as claimed, making the railroad property valueless; the railroad has no remedy. A man in Connecticut had barrels of whisky in a cellar for many years, but the State was allowed to pass a law prohibiting its sale; which of course, had he been a teetotaler, would have deprived that property of all value, and in any case, of all exchange value. A man in Iowa owns one glass of whisky for several years, and then a law is passed forbidding him to sell it; the law is valid. A youth in Nebraska buys tobacco and paper and rolls a cigarette. The State afterward passes a law forbidding smoking by minors. It is a crime if he light it. Sufficient has, perhaps, been said to show the extraordinary scope and elasticity of this, the widest, vaguest, and most dangerous domain of our modern legislation, though perhaps we should add one or two striking cases affecting personal liberty, as, for instance,

[1] Mugler *vs.* Kansas, 123 U.S. 623.

a citizen of Pennsylvania marries his first cousin in Delaware and returns to Pennsylvania, where the marriage is void and he becomes guilty of a criminal offense; a white man in Massachusetts who marries a negress or mulatto may be guilty of the crime of miscegenation in other States; a woman might work fifty-eight hours a week in Rhode Island, but if she work over fifty-six in Massachusetts may involve her employer, as well as herself, in a penal offense.

The most valuable of all police legislation is, of course, that to protect public health and safety; and prominent in the legislation of the last twenty years are the laws to secure pure and wholesome food and drugs. Possibly, "wholesome" is saying too much, for our legislative intelligence has not yet arrived at an understanding of the danger from cold storage or imperfectly canned food, though Canada and other English colonies have already legislated on the subject, to say nothing of our tariff war with Germany on the point. One may guess that ninety-nine per cent of the present food of the American people, leaving out the farmers themselves, is of meat of animals which have been dead many months, if not years, and from vegetables which date at least many months back. It is nonsense to suppose that such food is equally wholesome with fresh food, or that there is not considerable risk of acute poisoning or a permanent impairment of the digestive system. Senator Stewart, of Nevada, has shown that nearly fifty per cent of the soldiers of the Spanish War had permanent digestive trouble, as against less than three per cent in the Civil War, which took place before cold-storage food was known, or canned food largely in use. It was hopeless for the States to act until there was Federal legislation on the subject, as the health authorities had no constitutional power over goods imported from other States; but the passage, under Roosevelt, of a national food and drugs act has given a great impetus to the reform, and by this writing more than half the States have passed pure-food laws, being usually, as they obviously should be, an exact copy of the Federal Act. Among the articles specially mentioned in such legislation we find candy, vinegar, meat, fertilizers, milk, butter, spices, sugar, cotton seed, formaldehyde, insecticide, and general provisions against adulteration, false coloring, the use of colors and preservatives, etc.

Going from matters merely unwholesome to actual poisons, the course of legislation on intoxicating liquors is too familiar to the reader to make it necessary to more than refer to it, with the general observation that in the North and East the tendency has been toward high licensing or careful regulation, always with local option; while in the West originally, and now in the South, the tendency is to absolute "Statewide" prohibition and even to express this principle in the constitution. How much this extreme measure is based on the racial question, in the South at least, is a matter of some debate; and the

working of such laws everywhere from Maine to Georgia, of considerably more. One may hazard the guess that the wealthier classes have no difficulty in getting their liquor through interstate commerce, while the more disreputable classes succeed in getting it surreptitiously. Prohibition, therefore, if effective at all, is probably only effective among the respectable middle class where, perhaps, of all it is least needed. In the older States, at least in Massachusetts, there has been a decided tendency away from prohibition in the last twenty years, and even from local prohibition in the larger cities. Worcester, for instance, after being the largest prohibition city in the world, ceased to be so this year by the largest vote ever cast upon the question.

Whatever may be said of the strict prohibition of liquor dealing, no one can have an objection to such laws as applied to cocaine, opium, or other poisonous drugs, and we find statutes of this sort in increasing number; while the manufacture and sale of cigarettes to minors or even, in some States, their consumption, is strictly prohibited, under criminal penalty. Laws of a similar sort were aimed at oleomargarine when invented, but this probably not so much to protect the health of the people as the prosperity of the dairymen. The mass of such legislation has emerged from the scrutiny of the courts, State and Federal, with the general result that only such laws will be sustained as are aimed to prevent fraud; but the manufacture and sale of oleomargarine under that name cannot be prohibited. Artificial coloring matter may be forbidden, but a New Hampshire law was not sustained which required all oleomargarine to be colored pink; so it may be guessed that the laws of those States which make criminal the sale or use of cigarettes to or by children "*apparently*" less than sixteen or eighteen, will hardly be sustained as a constitutional police measure; yet such laws existed in 1890, while the State of Washington in 1893 made the sale even of cigarette paper criminal.

Another important line of modern legislation consists in the subjecting of trades to a license for the purpose of *examination* (the tax feature has been discussed above). Such laws are constitutional when applied to a trade really relating to the public health, but as we have found above, blacksmithing is not such an one; when imposed merely for the purpose of raising revenue, such legislation is undoubtedly constitutional under our written constitutions, but opposed to historic English principles, which insisted for seven centuries of statute-making on the utmost liberty of trade. In a South American republic you have to get a concession before going into almost any business, even maintaining a shoe shop, or a milk farm, which concession is, of course, often obtained by bribery or withheld for corrupt reasons. It is to be hoped that the citizens of our States will never find themselves in that predicament. Still, certain State constitutions, as that of South Carolina, provide absolutely that all trades may be subject

to a tax, and the tendency — particularly in the South — to raise revenue in this way is increasing by leaps and bounds. Among the trades already subjected to such licensing or taxing, we find doctors, of course, and properly, pharmacists, plumbers, peddlers, horseshoers, osteopaths, dentists, veterinary surgeons, accountants, bakers, junk dealers, coal dealers, optometrists, architects, barbers, commission merchants, embalmers, and nurses. Of course it is a motive to novel or irregular trades to secure a licensing law from the State, for the slight tax insures them protection. This is the reason that we find common statutes allowing osteopaths, etc., to be licensed. So far as I have observed, there is no such statute as yet in any State applying to Christian Scientists.

Police regulation for the *safety* of the public is found nearly entirely in the laws regulating labor, factories, mines, or machinery, and will be accordingly treated in that connection. Laws protecting the public against fraud, which from earliest times has been a branch of police legislation, have been of late years numerous, principally in connection with the prohibition of dealing in futures or sales on margin, of sales of goods in bulk without due precautions and notice to creditors, of the issue of trading stamps or other device tending to mislead the public. Some States have prohibited department stores, but this legislation has been held unconstitutional, though the early English labor statutes forbidding to any person more than one trade or mystery will by the historical student be borne in mind. Usury laws, of course, are still frequent, but decreasing in number with the increasing modern tendency to allow freedom of contract in this as in other matters, except only to such persons as, for instance, pawn-brokers, who peculiarly require police regulation.

Coming to statutes which merely facilitate business as it now exists, by far the most important movement has been the successful work of the State Commissioners on Uniformity of Law in getting their negotiable instrument act passed in nearly all the States, and in several already their uniform law statute on sales, only recommended in 1907. Some progress has been made in getting a uniform standard of weights and measures, and there is an increasing tendency to prescribe specific weights and markings for packages — possibly unconstitutional legislation. Still more important as a change in previously existing law has been the increasing tendency to make documents other than bills and notes negotiable. Perhaps this is a matter which requires explanation to the lay reader.

The early Anglo-Saxon law could not conceive of ownership of property as distinct from possession, and to their simple minds, when ownership was once acquired it was impossible to divest the owner of his property by any symbolical delivery. Hence the very early statutes making fraudulent sales or conveyances of property without

actual and visible change of possession. The notion of a symbol, a paper or writing, which should represent that property would probably have impressed them like a spell or charm in a child's fairy tale. Even theft with asportation could not alter property rights, even in favor of innocent purchasers, when the owner did not intend to part therewith. A moment's recollection of what is now perhaps the most familiar of Teutonic saga to the ordinary reader, the text of Wagner's "Ring of the Nibelung," will give ample evidence of that mental attitude. But the Oriental mind was far more subtile. To the Jews or Lombards we owe the discovery of that *bill of exchange* — the first of negotiable instruments, and the first historically to bring into our law the legal concept of a symbol of ownership which might be instantly transferred with an absolute change of title in the property thereby represented, and this either to a present transferee or to one far away. Thus, a simple bill of exchange might transfer the ownership in a pile of gold in a moment from a man in Venice to a man in London, thereby (if the law-merchant was respected) freeing the treasure from attack at the hands of the Venetian authorities. And not only was this change of ownership instantaneously effected by the transfer of some symbol or document representing it, but there also, and as a necessary part of the invention, grew up the doctrine that the transferee was relieved of any claims against the property at the hands of the previous owner. This is what we mean by negotiable; and it is essential that the precise meaning of the word should be understood if we are to understand the importance of this legislation. Even most business men have a very vague understanding of the difference between *negotiable* and *assignable*. Substantially all property and choses in action are assignable, except personal contracts; and in ordinary business many of them are assumed to be negotiable, such as bills of lading, warehouse receipts, trust receipts, or certificates of stock. Most brokers, or even bankers, assume that when they have a stock certificate duly endorsed to them by the owner mentioned on its face they have an absolute and unimpeachable title to the stock therein represented. Such, of course, is not the case except for recent statutes in a few States. To take a familiar example, and I think of none better to show exactly the difference between a personal contract non-assignable, a document which is assignable, and one which is negotiable — a Harvard-Yale football ticket. If the ticket is issued by the management to a person under his name, with a condition that it shall be used by no one else, it is a contract non-assignable. If it is issued to him in the same manner, but with no provision against assignment or the use by another person, it would entitle such other person to whom the ticket was given to use the seat, but only under the title of the original holder; and if the assignment was later forbidden, or for other reasons the right recalled by the management,

the holder would have no greater title to the seat; the contract is assignable, but not negotiable. The assignee takes it merely as standing in the place of the original holder and subject to all the equities between him and the management. If, for instance, the ticket were given him by fraud, the right to use it might be revoked and the transferee would have no greater right than the original holder. But if the ticket were *negotiable*, like a bank-note payable to bearer, the holder, not actually himself the thief, would have an absolute title to the seat without regard to anything that happened prior to his getting possession of the ticket.

Now it is obvious that it is for the enormous convenience of business to have business documents made negotiable. If a banker can loan on a bill of lading or a warehouse receipt, or a trader can buy the same, or if a man can give a trust receipt to his banker agreeing that all his general shipments or stock in trade shall be the property of that banker until his debt is paid, it makes enormously for the rapid turning over of capital, and the extension of credit. Of course, an enormous proportion of business in the United States is conducted upon credit, and without the invention of the negotiable instrument those credits could not be secured without an actual delivery of the commodities intended to secure them. And the custom of business is to consider most such documents negotiable even when in fact they are not so. It is more than usual to loan money upon warehouse receipts, bills of lading, stock certificates or trust receipts of all descriptions, regardless of the question whether the law of the State makes them negotiable. Hence the very great tendency to make such instruments negotiable by statute; and I find many such laws, beginning in 1893 in North Carolina, as to warehouse receipts, while the Massachusetts statute concerning stock dates from 1884.

A reaction to the English common law is the statute, common in recent years, prohibiting sales in bulk. It appears to have been a growing custom for merchants, particularly retail merchants, when in financial difficulties to sell their entire stock in trade to some professional purchaser by a simple bill of sale without physical delivery. Nearly all States have adopted statutes against this practice, although in several they have been held unconstitutional. The feeling that they are dishonest is doubtless justified by the facts; but it may also be truly described as a reaction to the simpler English law as against Oriental innovations.

The descent of property throughout the United States is regulated by English common-law ideas. That is to say, there is no primogeniture, although in early colonial times the older son took a double portion; and there is, except in Louisiana, complete liberty of testamentary disposition, although in one or two other States there have been statutes forbidding a man to dispose of all his estate to a charity

within a short time previous to his death, to the prejudice at least of his direct heirs. The Code Napoleon, of course, limits testamentary disposition in favor of these latter, so in Louisiana, only half of a man's estate can be given away from his children or widow, and not more than three-fourths of his estate can be bequeathed to strangers or to charity, to the prejudice even of collateral heirs.

In matters of general business the usual lines of legislation have been the ordinary ones found in English history. That is to say, statutes of frauds, usury or interest laws, and other familiar matters. The only tendency one can note is a broad range of legislation devised in the interest of the debtor — not only liberal insolvency laws now superseded by the national bankruptcy act, which is still more liberal than the laws of the States preceding it, but statutes restricting or delaying foreclosure of mortgages, statutes exempting a substantial amount of property, implements of trade, agricultural articles, goods, land, or even money, from the claims of his creditors. The exemption of tools or implements of trade goes back to Magna Charta, it will be remembered, but the exemption of other articles is modern and American. There is probably, however, no subject which is so apt to be let alone by our legislatures as that of business law. Upon that subject, at least, they are fairly modest and inclined to think that the laws of business are known better by business men. Imprisonment for debt is, of course, absolutely abolished everywhere, and in most States a woman is not subject to personal arrest in civil process. The statutes prevailing throughout the country, which give special preference to claims for wages or even for material furnished by "material men," have already been noted. It may be broadly stated that the presumption is that such claims are everywhere a preferred debt to be paid out of the estate of the insolvent, living or dead, in preference to all claims except taxes.

The security of mortgages is very generally impaired by legislation confining the creditor to only one remedy and delaying his possession under foreclosure. That is to say, in far Western States, generally, he cannot take the land or other security, and at the same time sue the debtor in an action for debt for the amount due, or the deficiency. This, of course, makes of a mortgage a simple pledge. Moreover, with the practice of delaying possession under foreclosure, appointing receivers in the interest of the debtor, etc., he is in many States so delayed in getting possession of his security that by the time he acquires it he will find it burdened with overdue taxes and in a state of general dilapidation. We have already alluded to the practice in California of compelling the executor of a mortgage to submit himself to the jurisdiction of the local public administrator, which practically results in a sequestration of a considerable portion of the property. For all these reasons, many conservative lawyers in the East, at least, would not

permit their clients to invest their money in mortgages in California, Minnesota, Washington, or the other States indulging in such legislation, and partly for this reason the rate of interest prevailing in mortgages is very much higher in the far West than it is in States east of the Missouri River.

The greatest mass of legislation is, of course, that upon mechanic's liens, which are burdensome to a degree that is vexatious, besides being subject to amendment almost every year. In a general way, no land-owner is free from liability for the debt of any person who has performed labor or furnished materials on the buildings placed upon the land, even without the knowledge or consent of the land-owner in some States, though in one or two instances, notably in California, such legislation has been carried to such an extreme as to make it unconstitutional.

The matter of nuisances has been already somewhat covered. Legislation extending the police power and declaring new forms or uses of property to be a nuisance is, of course, rapidly increasing in all States. The common-law nuisance was usually a nuisance to the sense of smell or a danger to life, as, for instance, an unsanitary building or drain. Noise, that is to say, extreme noise, might also be a nuisance, and in England the interference with a man's right to light and air. Legislation is now eagerly desired in many States of this country to make in certain cases that which is a nuisance to the sense of sight also a legal nuisance, as, for instance, the posting of offensive bills on the fences, or the erection of huge advertising signs in parks or public highways. Such a law was, however, held unconstitutional in Massachusetts. There is some legislation against the blowing of steam whistles by locomotives, although I believe none against the morning whistle of factories, and some against the emission of black smoke in specified durations or quantities.

But perhaps the most important legislation affecting simple matters of business other than the line of statutes already mentioned, making new negotiable instruments and controlling the title of property by the possession of a bill of exchange, bill of lading, warehouse or trust receipt, are those statutes prohibiting the buying of "futures," or the enforcement of gambling contracts to buy or sell stocks or shares or other commodities without actual or intended change of possession, which we have necessarily referred to in our discussion of restraint of trade. There is a very decided tendency throughout the country, particularly in the South, to prohibit all buying or selling of futures, that is to say, of a crop not actually sold, or of any article where physical delivery is never intended, and it will be remembered we found plenty of precedent for such legislation in early English statutes. Gambling contracts may be forbidden only in specified places, such as stock exchanges; and the buying of futures may be

specially permitted to favored persons, such as actual manufacturers intending to use the goods; and both such statutes will be held constitutional and not an undue interference with the liberty of contract. These matters were largely covered by the statutes of forestalling in early times. Legislation more distinctly modern is that against sales in bulk, and against department stores; more striking still is the statute, already passed in Wisconsin and Virginia, forbidding all tips, commissions, or private advantages secured by any servant or agent in carrying on the business of his principal, his master, or the person with whom he deals; the statute even forbids a gratuity intentionally given directly from the one to the other. It is hard to see how the last clause of the law can be held constitutional, any more than the laws forbidding department stores, although such commissions may be forbidden to be given "unbeknownst."

Weights and measures are standardized by the Federal government, and to these standards the States in practice all conform, but the legal weight of a bushel or other measure of articles varies widely in the different States, and the State Commissioners on Uniformity of Law have tried in vain to get the matter generally regulated. At one time the weight of a barrel of potatoes in New York City was fourteen pounds more than it was in Hoboken, across the river. In Massachusetts the weight of a barrel of onions was increased two pounds to conform with the uniform law recommended to all the States by the commissioners; but a representative in the State Legislature coming from a locality of onion farms lost his seat in consequence, which inspired such terror in other members of the State Legislature that the uniform law was promptly repealed, the weight of the barrel of onions put back at the former figure, and this over the veto of the governor. It is needless to say that the whole value and object of the whole movement for uniformity is to have actual uniformity. That is to say, unless the lawyer or citizen reading the statute can be sure that it is uniform with the laws of all other States without taking the trouble to consult them, the reform has no value. But it has proved almost hopeless to get this through the brain of the average legislator. The uniform law upon bills and notes, indeed, already mentioned, is treated with more respect; because, as has been said above, they regard that as a matter of business, and they have some respect for the expert knowledge of business affairs possessed by business men.

The licensing of trades might be made a very valuable line of legislation to prevent the fleecing of the ultimate consumer by the middleman. Our ancestors were of the opinion that the middleman, the regrator, was the source of all evils, and they were also of the opinion that any combination whatever to control the price of an article of food, or other human necessity, or to resell it elsewhere than at its

actual market and at the proper time, was a conspiracy highly criminal and prejudicial to the English people; in both of which matters they were, in the writer's opinion, perfectly right, and far more wise than our modern delusion that "business" — that is to say, the making of a little more profit from the larger number of people — justifies everything. Now, at the time of the coal famine of 1903, Massachusetts passed a statute licensing dealers in coal; the law for the municipal coal-yard having been declared unconstitutional. The object of this statute was not to derive revenue or to restrict trade, but to regulate profits; and in particular to prevent the retail coal-dealers from combining to fix the price of coal themselves. Yet in spite of this legislation, the ice-dealers of Massachusetts only this year (1910) assembled in convention in Boston upon a call, widely advertised in the newspapers, that they were holding the assembly for that precise purpose, that is to say, to fix and control the price and the output of ice. They were, indeed, "malefactors of great wealth"; at least we may guess the latter, and the animus of a more intelligent precedent may some day hopefully be directed to such definite evils, of which our ancestors were well aware, rather than blindly running amuck at all. The coal-dealers in Boston, by the way, made the same argument that is always made, and was made at Athens in the grain combination of the third century B.C. — to wit, that they put up the prices in order to prevent other people buying all the coal and speculating in it; but notwithstanding that showing of their altruistic motives, the secretary of state revoked the license of the coal company in question. The statute also forbade the charging extortionate prices, which, again, was a perfectly proper subject of legislation under the common law; but, unfortunately, was carelessly drawn, so that it resulted in a somewhat cloudy court opinion.

For the matter of uniform legislation the reader must be referred in general to reports of the National Commission. Their greatest achievement has been the code of the law of bills and notes just mentioned. Besides this they have just adopted a code on the law of sales, and they have recommended brief and uniform formalities as well as forms for the execution and acknowledgment of deeds and wills, and have very considerably improved the procedure in matters of divorce.

The best modern legislation concerning trade and business is, of course, that of the pure-food laws. The Federal law has certainly proved effective, although it is in danger of being repealed or emasculated in the interest of the "special interests"; most of the State laws simply copy it. Undoubtedly the laws should be identical in interstate commerce and in all the States; and this can only be done by voluntary uniform action.

THE COURTS AND PROPERTY

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The constitutional safeguards which surround private property in the United States are exceptionally strong. Between confiscation and the multitude stand the state and the federal courts. In Cutting *vs.* Goddard, decided in 1901, the Supreme Court held that a return of 10.9 per cent on the investment is not unreasonably high and that a return of 5.3 per cent is unreasonably low.[1] In decreeing the dissolution of the Standard Oil and the American Tobacco Companies, the same tribunal left the defendant companies in possession of everything which they had succeeded in amassing by unlawful methods. Nowhere in either of these decisions is there any hint that restitution ought to be made. On the contrary, every precaution necessary to conserve the property which monopoly control had garnered together was scrupulously observed. In the course of the Standard Oil decision, the Chief-Justice remarked "that one of the fundamental purposes of the statute (the Anti-trust Act) is to protect, not to destroy, rights of property."[2] No penalty was inflicted other than dissolution and the prohibition of acts violative of the statute. So far as constitutional guaranties are concerned, the most strenuous advocate of property rights could scarcely ask for anything more.

I

Nevertheless, the extent to which the Supreme Court conserves the rights of property is easily exaggerated. The Dred Scott decision did not prevent the overthrow of slavery, and moreover without compensation. On the contrary, it hastened its downfall and proved to be the one thing from which the slave power might well have prayed to be delivered. Much comfort was extracted by an influential portion of the property-owning class from the income tax decision in 1895, but the cost of what was gained from that decision has seldom figured properly in the account. Probably no decision of the Supreme Court since the Civil War has excited so much dissatisfaction or fallen so flat. In the opinion of many the court as now constituted would find a way of upholding a similar measure even though the constitution had not been amended. To save the face of the court was the strongest argument for proposing the income-tax amendment. But the decision of 1895

[1] Ripley, William Z., Railway Problems, p. 578.
[2] *United States Supreme Court Reports*, Vol. LV, Law. Ed., October, 1910, p. 652.

fanned the fires of social discontent. It unmasked the motives of those opposed to an income tax. On the one hand, are those well able to bear the burden of taxation upon whom a properly administered income tax would to a considerable extent rest. On the other hand, are the beneficiaries of protection who fear that an income tax will deprive them of one pretext for the maintenance of the tariff. The glaring injustice of any income tax apportioned among the several states according to population, in conformity with the court's decision, made such a tax impracticable. One effect was to discredit the court itself. Another fact had a similar effect. In its first decision, the court divided evenly on certain of the points at issue. After reargument it stood five to four against the act on these points. Far from conserving the social order, the income-tax decision did quite the reverse.

Professor Daniels says:

> The decision or, more strictly, the decisions of the Supreme Court which killed the Income Tax of 1894 made a great deal of history, and unmade, or at all events remade, a good deal of law. It certainly traversed legal expectation, it jostled the doctrine of *stare decisis*, it contravened previous decisions, and it discredited a good many dicta which had already become "blessed words" among authoritative text writers and accredited authorities on constitutional law. . . . The deliverance of the court can be explained only by reference to what has been happily termed "psychological climate." . . . The Supreme Court had reversed its own decision before, but except in the legal tender cases no modern decision had been reversed which bore very directly upon the stirring political issues of the day. But the court evidently had not been appealed to in vain upon the issue that the tax was a stride towards socialism, and the "weightier matters of the law" seemed to have been forgotten under the shadowy sense of dread which the dim specter of socialism invoked. The most venerable member of the court gave emphatic utterance to the feeling which moved him. "The present assault upon capital," said Mr. Justice Field, "is but the beginning. It will be but a stepping-stone to other, larger and more sweeping, till our political contests will become a war of the poor against the rich, a war constantly growing in intensity and bitterness." [1]

Probably the Dartmouth College case has been more often quoted than any other as indicative of the jealous care with which the Supreme Court safeguards property rights. But few decisions illustrate better the relativity of judicial decisions to the circumstances existing at the time and place. When the decision was handed down, business was still conducted on a very modest scale, and the era of the corporate form of business organization was yet to come. In view of the important respects in which the doctrine of charter rights has been modified in subsequent cases, it is probable that the decision handed

[1] Daniels, Winthrop More, The Elements of Public Finance, pp. 199, 200, 206.

down in 1819 would have been different if the industrial changes of the next fifty years had been foreseen. Some one has aptly said that the Supreme Court follows the election returns. As it was, it appears that Chief Justice Marshall succeeded in bringing a majority of the court to his point of view only by means of methods which in the light of to-day are so high handed and questionable that they would hardly be tolerated for a moment.[1]

The potency of the courts to protect property rights depends upon public opinion. Respect for the law is not always at a maximum in the country having the most laws. "It is not the existence of statutes," writes President Hadley, "which makes murder a crime; it is the growth of a public opinion which makes the individual condemn himself and his friends, as well as his enemies, for indulgence in that propensity." The chance of convicting prominent business men under the criminal section of the anti-trust act until recently has been so slim that it was not worth while to bring suit. During the disorders attending the strike of employees on railways centering at Chicago in 1894, public feeling ran so high that the injunctions issued by the federal courts were not vindicated until much of the irreparable injury forbidden by the courts had been inflicted upon the railways and those dependent upon their services. The damages which the railways have since recovered by suits at law for the destruction of property are but a tithe of the losses which they sustained, to say nothing about the losses inflicted upon the public at large. When toll pikes in Kentucky were in public favor, the right of property in them was secure. When they came to be regarded as a "relic of barbarism," the courts were powerless to protect them.

Prior to the Civil War, many counties in Missouri issued bonds to subsidize the building of railways. The bond issues were loosely safeguarded, and some counties in which no railroad was built were addled with a heavy debt. The people in these counties naturally opposed paying the interest and the principal of the debt, and went so far in some instances as to elect judges of the county court pledged not to make the necessary tax levy. The bond-holders accordingly sought a remedy at the hands of the federal court in Kansas City, Missouri. But in a number of counties public opinion was so set that the orders of the federal court directing the county judges to levy the necessary tax have repeatedly failed to command obedience. One of the accepted and well-understood duties of the judges in some counties has been a jail sentence for contempt of court. In some cases the judges have taken to the woods as soon as elected. The Supreme Court has held that a federal judge can not himself or through any official appointed by him make a tax levy. The utmost that can be done is to order a

[1] Orton, Jesse F., Confusion of Property with Privilege; Dartmouth College Case, *The Independent*, Vol. LXVII, 1909, pp. 392–397.

county official to levy the tax needed to pay a judgment, and to punish failure to comply as contempt of court.[1] The upshot is that the decrees of the federal court have for years been in abeyance and the legal rights of the bond-holders have not been enforced. This incident renders it more than doubtful whether the federal courts could have prevented a number of states from repudiating their debts even if the eleventh amendment had never been added to the constitution. In the words of Lincoln:

> In this and like communities, public sentiment is everything. With public sentiment, nothing can fail; without it nothing can succeed. Consequently he who molds public sentiment goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed.[2]

If the status of public opinion sometimes paralyzes the activity of prosecuting attorneys and nullifies the decrees of courts, it also occasionally enforces a higher standard of business conduct than the law requires. Numberless oral agreements are every day faithfully observed which can not be enforced at law. Many a man's word is as good as his bond. Every social group has a code of honor which in some respects exceeds the letter of the law. Probably "Wall Street" suggests a low order of cunning to most minds, and yet there is no place where certain kinds of contracts are more scrupulously observed. The whole fabric of credit so essential to modern business rests upon men keeping faith, and is in the main quite independent of the compulsory processes of the courts. Justice secured by means of litigation is frequently so expensive that it comes too high. Throughout the silver controversy the members of the New York Clearing House steadfastly refrained from paying their daily balances in silver, though Congress required the Clearing House rule forbidding such payments to be rescinded.[3] During the Civil War, Massachusetts paid the interest on her bonds in gold, "though it cost her sometimes nearly three for one to keep her faith."[4] More noteworthy was the maintenance of the gold standard on the Pacific Slope. Legally debtors in California had as much right to tender greenbacks in full discharge of their debts as in any other part of the country, but the fact that a man could not tender greenbacks without injuring his credit and losing standing among business men effectually prevented such conduct. Self-interest resulted in a higher standard of business honor than the law demanded. In like manner competition at the present time frequently compels a higher standard of efficiency and honor among men than the law requires.

[1] I am indebted to the Dean of the University of Missouri for this information.
[2] Debates of Lincoln and Douglas, Edition of Follet, Foster & Co., Columbus, Ohio, p. 82.
[3] White, Horace, Money and Banking, fourth edition, p. 171.
[4] Lowell, James Russell, Prose Works, Essay on Democracy, Vol. VI, p. 11.

It is difficult to see why any one with any practical experience of business should take the law of the matter as a guide. The law is a very cumbrous, slow and inefficient machine for preventing robbery and other crimes on the part of rogues and burglars in the various forms in which they infest society. It makes no attempt to show how things should be done well. That is not its business. Any one who relies on the merely legal interpretation of his duties is only doing enough to keep him out of Wormwood Scrubs.[1]

Once more, when boast is made of the protection afforded private property by the courts, an important exception should be noted, namely, promissory notes. Congress has the right at any time to emit bills of credit and to declare them a legal tender in payment of pre-existing debts. The man who lends another one thousand dollars to-day is without any remedy at law if his debtor at the maturity of the loan tenders him depreciated paper money which Congress has clothed with legal tender power. In other words, a large class of property is in an important respect well outside the protection of the courts. The only remedy open to those opposed to debasing our monetary standard is political action. It was this remedy and this remedy alone that brought about the resumption of specie payments and subsequently prevented the free coinage of silver. Even if the final decision of the Supreme Court in the legal-tender cases had been adverse to the power of Congress to issue the greenback, a large portion of the community, including the great army of wage earners, would have suffered an irreparable loss before the decision was reached.

The property-owning interests dependent upon a protective tariff for their prosperity are in a position similar to the holders of promissory notes. The tariff schedules fixed by any Congress may be changed at any time without the slightest obligation to compensate those whose business interests are thereby disturbed. The courts can not be successfully invoked to stay the hands of Congress. Here as in the case of promissory notes the parties interested are limited to political action, and if the history of tariff legislation indicates anything it is that the remedy is more than adequate.

The case of the liquor traffic, a business in respect to which the police power of the state is subject to a minimum of restraint by the courts, illustrates the same point. The state may, if it deems wise, prohibit the manufacture and sale of intoxicating beverages without indemnifying any one for losses sustained. The liquor business is commonly regarded as disreputable. When run for profit, it is inconsistent with the public good and it is accordingly subjected to all sorts of restrictions. It is notorious that the business in many communities is conducted in flagrant disregard of law. Comparatively few states, however, go so far as to try to prohibit the traffic. In most communities

[1] Withers, Stocks and Shares, p. 145.

the business flourishes and there is no lack of capital willing to assume the risks incidental to embarking in it. As in the case of protection, the political remedy is usually more than ample to safeguard the liquor interests.

II

The framers of the constitution were fearful of democracy and entertained serious misgivings concerning the essential goodness of man. In theology, many of them accepted the doctrine of original sin, total depravity, infant damnation and the final perseverance of the saints. In politics, they distrusted the masses, favored a restricted suffrage, provided an electoral college for the choice of president, left the election of United States senators to the legislatures of the several states, contrived the system of checks and balances and established an appointive judiciary with power to set aside an act of Congress. The constitution was the work of the "solid, conservative, commercial and financial interests of the country" who feared legislative tyranny and whose solicitude never lost sight of the safety of property. For a long time, however, the guaranties of property in the constitution were never seriously put to the test. The one noteworthy exception was property in slaves which the constitution failed to protect. Until recently the ownership of property was widely diffused, and because of the abundance of fertile land the man without property to-day stood an excellent chance of becoming an owner to-morrow. There was no wage-earning class destined to remain such to the end of its life. For a time the scarcity of men willing to work for hire handicapped the development of manufactures. It has not been the distinctive features of our form of government so much as our environment that has given us peace with plenty.

It does not follow consequently that our governmental and economic systems, under the conditions which obtain to-day, are proof against socialism. The institution of private property depends upon the general consensus of opinion which varies from age to age. It is a common error to suppose that whatever is always will be. Take the right of a man to interfere with the business of another by normal competition, by way of illustration. This is regarded as a matter of course to-day, but there was a time when the right to engage in a given trade was restricted to the members of a certain guild, and a man was not at liberty to enter any pursuit he might elect. The individual's position in the social order was determined by the status into which he happened to be born and not by competition. Accordingly, the courts in place of upholding the right of competition as at present were once inclined to look upon it with disfavor.[1] Likewise, property rights are no more

[1] Wyman, Control of the Market, pp. 11–12.

absolute than is the right of competition. Slave property, once nation-wide, became sectional and then disappeared altogether. Property in general depends as much upon considerations of social utility as property in slaves. For a long time it was restricted to movables. At first it included only weapons and ornaments. Gradually it came to include domestic animals. The ownership of land was vested in the community and not in private hands until comparatively recent times. The powers and franchises granted corporations are wholly optional with the several states, and depend upon considerations of social expediency. But for the social will embodied in positive law, there would be no such thing as theft.

At the present time property rights are being modified in various directions. There is a strong tendency to municipalize or nationalize certain industries. In Ireland, the property rights of the large land-owners have been abridged by Parliament. Railways and other labor organizations that occupy a strategic position are altering the distribution of the social income and are establishing a sort of joint proprietorship. This is the effect of "full crew bills." According to the committee of railway managers, the demands of the railway employees on the eastern roads at the present time for an advance of wages are equivalent to putting the income of three hundred and forty millions at five per cent. ahead of the first mortgage bonds of the roads.[1] The modification of the liability of employers at common law, the enactment of workingmen's compensation acts and more ample provision for playgrounds, art, music and education by taxation and private benevolence point to the growth of collective property. The social obligations resting upon private property are increasing. The abridgment of property rights is reflected in the lighter punishments provided for offenses against property. Imprisonment for debt has been abolished. The branding of thieves and vagabonds has been discarded. Capital punishment for crimes against property no longer exists. Many punishments which appear cruel and unusual in the light of to-day did not appear so at all to our forefathers. As humanitarian considerations have gained ground, private property has lost something of the sanctity in which it was once held.

It is remarkable how quickly even the staunchest defenders of property sometimes face about and demand an abridgment of property rights. All that is needed is some event that brings out clearly the opposition between private and public interests. A strike that ties up the steam roads of the country, or the street railway service of a city, may turn out to be such an event. The anthracite coal strike undoubtedly was. No one would probably accuse so "safe and sane" an organ as *The New York Tribune* of socialistic leanings, and yet this paper remarked:

[1] *The Commercial and Financial Chronicle*, July 12, 1913, p. 76.

The old doctrine that a man may do what he will with his own worked well enough when the life of the community was not dependent on what he did own, but some way or other it does not fit the case when a whole community is under one control. It did not seriously matter if one mine was shut down and its product cut off. The community could allow the owner to say it was his, and his use of it did not concern them. But when all the coal mines are subject to one will, the way that will works is of profound interest to those dependent on it. The mines are at law unquestionably private property. Nobody can go into court and get relief because the mines do not produce the coal he needs. But there is a moral trust — even kings now admit that, even though they rule by divine right, they hold a trust for their people. Prerogative and title are with the operators, but the people must have coal, and if the operators forget the moral obligations attached to their property-holding they will force the substitution of legal for moral obligation in some form or other.[1]

If the public mind veers strongly toward socialism, there are at least three ways by which it may attain its goal. First, private property can be more heavily taxed and more heavily subjected to the police power of the state. All of the machinery required for these purposes already exists. No constitutional change is necessary. Private property is held subject to the right of the state to tax. In addition, in such cities as New York, the building department supervises all structural changes or defects in buildings; the tenement-house department regulates the number of windows required for light and air and all alterations in houses occupied by more than three families, and if its orders are not complied with this department has power to vacate property and lock it up; the fire-department prevention bureau has charge of such matters as fire escapes; the board of health sees that certain sanitary requirements are complied with; the highway department requires abutting owners to keep their sidewalks in repair; the state factory inspectors have supervision of establishments where one or more men are employed, and the street-cleaning department looks after such things as garbage receptacles. An increase in the scrutiny of the public eye in each of these directions is easily conceivable. There is no hard and fast line between "taxation, reasonable regulation and fair payment," on the one hand and confiscation, on the other. The difference is a matter of degree and of opinion.

Secondly, a much more important gateway to socialism stands wide open, namely, the regulation of bequest and inheritance, neither of which is a property right under the federal and state constitutions. So long as public opinion favors private property, laws governing bequest and inheritance similar to those which exist at present will be continued in force. But if public opinion ever turns in disgust from the existing economic system, convinced of the practicability as well as of the

[1] Quoted by *The Outlook*, August 30, 1902, p. 1035.

desirability of socialism, a change in the laws governing the descent of property will be one of the easiest methods of approach.

In the third place, the position of the federal courts is not impregnable. Save only the Supreme Court, Congress has power to abolish them. This was actually done in 1801 in the case of the "midnight judges." More recently the existence of the Commerce Court has been threatened. There is no way, moreover, of compelling a recalcitrant Congress to make appropriations for the federal courts, and if so disposed the President by failing to appoint or the Senate to confirm could permit even the Supreme Court to die a peaceful death. Jefferson, Jackson and Lincoln showed that a Supreme Court decision is not binding on a coördinate department of the government. The constitution expressly makes the appellate jurisdiction of the Supreme Court subject to such exceptions and regulations as Congress shall make. On one occasion Congress limited the appellate jurisdiction of the court with a view to preventing it from declaring an act of Congress unconstitutional. This action was upheld by the court itself.[1] It is well known also that Congress can pack the court by increasing its membership. Professor Goodnow aptly remarks "that almost all of the great powers which the federal courts possess are theirs only because of the fact that their exercise of these powers has as a whole been satisfactory to the people of the United States." [2]

III

The main reliance of property owners does not lie in constitutions and courts, but in not violating the sense of fair play. The desire for property is well-nigh universal, and, so long as a fair and open field is maintained, the sense of injustice will have little chance to take root, and the army of property owners, both actual and potential, together with their natural allies among those without property, will be too numerous to be dispossessed. The danger to property does not lie so much in the minds of wily agitators, in the ignorance or depravity of the common man, or in the envy which the poor bear toward the rich as in closing the door of opportunity to the struggling and aspiring masses. So long as a man could homestead a piece of land, there was no social problem such as exists to-day. No self-respecting class whose necessities condemn it to a life of barely requited toil can be expected to rest content without at least the hope of something better. There is no better way to safeguard property than to give every man a fair start and an even chance in life. No class can so ill afford to disregard the forms of law as the owners of property. To throw labor agitators into jail or to railroad them to the penitentiary on trumped up charges,

[1] Goodnow, Social Reform and the Constitution, p. 345.
[2] Ibid. pp. 343-344.

to seize their persons and deport them from the community by an unlawful exercise of force, or to interfere unwarrantably in any way with their freedom of speech, is undisguised anarchy. Those property owners who make undue exactions, who entrench themselves in positions of privilege, who use the state for their own aggrandizement and for the exploitation of the weak, or who stand out against much needed reforms, are among the worst enemies of their class. . . .

* * * * * * *

Changes in our fundamental law can not be indefinitely postponed by a difficult mode of amendment. In the long run the effect is to irritate the public mind and to accentuate such changes. Until the constitution of Ohio was overhauled in 1912, no amendment could be added unless it received a majority of all the votes cast at an election. Every vote that was not cast for an amendment counted against it. Hence, it was next to impossible to amend the constitution. It is true that several amendments were added during the early part of the last decade. The veto power was given the governor, and the double liability of stockholders in certain domestic corporations was withdrawn. But this was done by the Republican and Democratic parties indorsing the amendments and placing the word "Yes" opposite them on the state tickets. As a result of this strategy, large numbers of uninformed and indifferent voters voted for the amendments. It was only on very rare occasions, however, that the coöperation of the machines of both parties could be secured in this way. The pressure for constitutional tinkering, therefore, increased until sweeping changes were made when the opportunity offered.

On 240 out of the 472 constitutional questions submitted to the voters of the several states in the decade ending with 1908, the vote was less than fifty per cent. of the vote for candidates. In 1910 the vote in Oregon rose to seventy or more per cent. in but 14 out of 23 cases.[1] The heavy handicap of requiring a majority of the total vote cast at an election to adopt an amendment is, therefore, apparent. As a result of this requirement, not a single amendment was added to the constitution of Oregon in the forty-three years ending with 1900.[2] It is possible that both California and Oregon have more recently gone to the other extreme and have made it too easy to amend their constitutions, but a mode of amendment that is practically prohibitory is beyond doubt unsound. Political machinery that compels deliberation and prevents hasty and precipitate action is of the utmost importance to the success of democracy. The formation of public opinion on any question requires time for discussion. The disposition to weigh evidence needs encouragement. Every precaution necessary

[1] Oberholtzer, Ellis Paxson, The Referendum, Initiative and Recall in America, p. 506.
[2] Haynes, George H., *Political Science Quarterly*, March, 1913.

to both sides of a question having a hearing should be taken. "Tried expedients," "verified conclusions," "traditional beliefs" should not be abandoned without mature deliberation. But when the checks upon the popular will exceed what is necessary to these ends, they not only cease to serve a useful purpose, but become obstructive. Discussion which is stopped at the outset from changing social conditions is useless. When the door to orderly change is closed, the only remaining alternative is revolution.

If the federal constitution were less rigid, both life and property would probably be more secure. A more flexible instrument would not hold things in a vise-like grip, but would permit changes in governmental policy with less social tension. The constitution as it stands leads the courts to make forced interpretations, makes for obstructive delay in the righting of grievances, and pens up the ferment of society until it sometimes threatens the social order. It has discouraged the existence of a party committed to any cause that requires a constitutional amendment. It has helped to make our political contests largely scrambles for offices. So far as principles are concerned, the difference between our leading parties has usually been so slight that it has been very difficult to distinguish between them. In such a humanitarian and democratic age as the present, a constitution that is "based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities," [1] and that is at the same time so difficult to amend is out of keeping with the times. So scholarly a man and conservative a thinker as Professor Monroe Smith maintains that

> In Kentucky, not more than two amendments can be submitted at a time; in Arkansas, Kansas and Montana, not more than three at a time. In New Jersey and Pennsylvania, no amendment or amendments can be submitted oftener than once in five years; in Tennessee, not oftener than once in six years, and in Vermont, not oftener than once in ten years. A number of states require a majority of those voting at an election for the adoption of an amendment. In these states, a majority of those voting for and against an amendment does not necessarily suffice.[2] No less than forty amendments that have been added to the constitution of Michigan would have failed to carry if this requirement had been in force.[3] In Wyoming, a majority of the qualified electors, whether voting or not is required. In Pennsylvania, an "amendment must be passed by two successive legislatures before it can be voted on by the people, and the legislature meets only on alternate years."[4] The amendment of the constitution of Illinois is especially difficult. A two-thirds vote of each house is necessary to propose

[1] Beard, Charles A., An Economic Interpretation of the Constitution of the United States, p. 324.
[2] Thorpe, Francis Newton, The Federal and State Constitutions of the United States.
[3] Fairlie, John A., The Referendum and Initiative in Michigan, p. 149.
[4] Lewis, William Draper, "A New Method of Constitutional Amendment by Popular Vote," *Annals of the American Academy of Political and Social Science*, p. 322.

an amendment. Not more than one article at a time can be amended, and the same article not oftener than once in four years. Finally, a majority of those voting at an election is required to adopt an amendment.[1] As a result, many reforms that depend upon amending the constitution are practically at a standstill. The advocates of different amendments block each other. The friends of the initiative and the referendum prevent the reform of the general property tax and *vice versa*. Each demands the right of way. In the meantime, the reorganization of the judiciary, the short ballot, the abolition of minority representation in the legislature and home rule for cities are obliged to wait.[2] One is reminded of the celebrated Lecompton constitution whch was nearly foisted upon the people of Kansas. In providing for its own amendment, it declared: "But no alteration shall be made to affect the right of property in the ownership of slaves."[3]

One might suppose that the constitution of New York is particularly difficult to amend, judging from the amount of criticism which the highest court of the state has excited in recent years. This, however, is not the case. The constitution has been amended on numerous occasions since its adoption in 1894. New York is suffering from the archaic condition of its judicial mind rather than from the rigidity of its constitution. Professor Walter F. Willcox has noted that the court of appeals, in holding the Workmen's Compensation Act unconstitutional, substituted its own assumptions for the facts. In the face of statistical evidence to the contrary, the court held that the statute "does nothing to conserve the health, safety or morals of the employees."[4] Such an attitude of mind is unscientific and until it is corrected no mode of amending the constitution, however facile, can prevent salutary measures from being held up for a time by the courts. "A master of legal history tells us that taught law is tough law. Certainly it is true that our legal thinking and legal teaching are to be blamed more than the courts for the want of sympathy with social legislation which has been so much in evidence in the immediate past. One might almost say that instead of recall of judges, recall of law teachers would be a useful institution. At any rate, what we must insist upon is recall of much of the juristic and judicial thinking of the last century."[5]

LAW IN BOOKS AND LAW IN ACTION

By Roscoe Pound, of the Harvard Law School

(From the *American Law Review*, January–February, 1910, Vol. XLIV, pp. 12–36)

When Tom Sawyer and Huck Finn had determined to rescue Jim by digging under the cabin where he was confined, it seemed to the uninformed lay mind of Huck Finn that some old picks the boys had

[1] Thorpe, Francis Newton, op. cit.

[2] See an interesting series of newspaper articles by Arthur M. Evans, in *The Chicago Record-Herald* during November and December, 1913.

[3] Debates of Lincoln and Douglas, op. cit. p. 109.

[4] *The American Journal of Sociology*, Vol. XVIII, 1913, pp. 606–612.

[5] Professor Roscoe Pound, *The American Journal of Sociology*, Vol. XVIII, 1912, p. 339.

found were the proper implements to use. But Tom knew better. From reading he knew what was the right course in such cases, and he called for case-knives. "It don't make no difference," said Tom, "how foolish it is, it's the *right way* — and it's the regular way. And there ain't no other way that ever I heard of, and I've read all the books that gives any information about these things. They always dig out with a case-knife." So, in deference to the books and the proprieties, the boys set to work with case-knives. But after they had dug till nearly midnight and they were tired and their hands were blistered, and they had made little progress, a light came to Tom's legal mind. He dropped his knife and, turning to Huck, said firmly, "Gimme a case-knife." Let Huck tell the rest:

> He had his own by him, but I handed him mine. He flung it down and says, "Gimme a *case-knife.*"
>
> I didn't know just what to do — but then I thought. I scratched around amongst the old tools and got a pickax and give it to him, and he took it and went to work and never said a word.
>
> He was always just that particular. *Full of principle.*

Tom had made over again one of the earliest discoveries of the law. When tradition prescribed case-knives for tasks for which pick-axes were better adapted, it seemed better to our forefathers, after a little vain struggle with case-knives, to adhere to principle — but use the pickax. They granted that law ought not to change. Changes in law were full of danger. But, on the other hand, it was highly inconvenient to use case-knives. And so the law has always managed to get a pickax in its hands, though it steadfastly demanded a case-knife, and to wield it in the virtuous belief that it was using the approved instrument.

It is worth while to recall some of the commonplaces of legal history by way of illustration. One of the first difficulties encountered by archaic legal systems founded upon the family and postulating for every sort of legal, social and religious institution, the continuity of the household, was the failure of issue, the want of the son to perpetuate the household worship, whom religious and legal dogmas required. No one thought of superseding these dogmas, but their manifest inconvenience and injustice were avoided by the device of adoption. Presently a better way of disposing of property after death, without infringing upon ancient doctrines, occurred to some Roman. Why not sell his whole household and estate to the person upon whom he desired it to devolve? But if he so sold it, and the purchaser was an honorable man, the latter would carry out oral instructions at the time of the transfer as to the purpose for which it was made and the disposition to be made of the property. After this had gone on till every one had begun to employ the proceeding, a law of the Twelve

Tables gave legal efficacy to the oral instructions, when the form of sale was had, and wills had come into being. A better example is to be seen in the Roman law of marriage. The religious marriage, which was the only one recognized by religion and hence by law, was not open to the plebeian. In consequence he did not have his wife in *manus* or his children in *potestas*, and his household had no standing before the law. The law was not altered. It was not enacted that there might be marriage without a wife in *manus* and a family without children in *potestas*, but purchase or adverse possession and the statute of limitations were resorted to in order to bring the plebeian's wife into *manus* in another way. Our own law furnishes many such instances. When the Anglo-Saxon king desired to extend the protection of his peace to some one, he took him by the hand publicly and made of him, for legal purposes, a minister or servant entitled to the king's peace which attached to members of his household. When wager of law had made the action of debt a worthless remedy upon simple contracts, wager of law was not abolished, but the courts found a trespass and a breach of the king's peace in failure to perform a promise, if only something had been given presently in exchange for it, and thus imposed upon our law of contracts the formality of a consideration. When the delay and formalism of real actions and the incident of trial by battle made them inadequate remedies, a fictitious lease and fictitious ejectment were resorted to in order to make another remedy meet the situation. When the hard and fast form of writ and declaration failed to provide for new cases of conversion of a plaintiff's property, the form was not altered, but the loss and finding were assumed from the conversion; so that we are able to read in an American report of the nineteenth century that the plaintiff casually lost one hundred freight cars and the defendant casually found them and converted them to its own use, as if it were a watch or a pocket book that had been lost.

We are by no means so much wiser than our fathers as we sometimes assume. While we have few of the old fictions of procedure left, we can make new ones of our own upon occasion in the like spirit. The mode of reading bills to some of our state legislatures pursuant to constitutional requirements is in every way worthy to go down in history with *ac etiam* and *quo minus*. The doctrine of the presumed citizenship of stockholders of corporations, and hence of the corporations, for purposes of suit in the Federal courts, is worthy of the courts that found a breach of the king's peace in fraud and deceit. But it is not of fictions of themselves that I would speak. They soon get into the books and become part of the law as it is written. They mark where there was once a distinction between law in the books and law in action, and show one way in which the two have been brought into accord. They show where and how legal theory has yielded to

the pressure of lay ideas and lay conduct. The current divergencies are not yet so marked. They escape notice. The fictions that are to mark them for future generations of jurists are in the making. But if we look closely, distinctions between law in the books and law in action; between the rules that purport to govern the relations of man and those that in fact govern them, will appear, and it will be found that to-day also the distinction between legal theory and judicial administration is often a very real and very deep one.

Let us take a few examples. It is a settled dogma of the books that all doubts are to be resolved in favor of the constitutionality of a statute — that the courts will not declare it in conflict with the constitution unless clearly and indubitably driven to that conclusion. But it can not be maintained that such is the actual practice, especially with respect to social legislation claimed to be in conflict with constitutional guaranties of liberty and property. The mere fact that the Court of Appeals of New York and the Supreme Court of the United States differed on such questions as the power to regulate hours of labor on municipal and public contracts, and the power to regulate the hours of labor of bakers, the former holding adversely to the one[1] and upholding the other,[2] while the latter court had already ruled the opposite on the first question[3] and then reversed the ruling of the New York court on the second,[4] speaks for itself. Many more instances might be noted. But it is enough to say that any one who studies critically the course of decisions upon constitutional questions in a majority of our state courts in recent years must agree with Professor Freund that the courts in practice tend to overturn all legislation which they deem unwise,[5] and must admit the truth of Professor Dodd's statement:

> The courts have now definitely invaded the field of public policy and are quick to declare unconstitutional almost any laws of which they disapprove, particularly in the fields of social and industrial legislation. The statement still repeated by the courts that laws will not be declared unconstitutional unless their repugnance to the constitution is clear beyond a reasonable doubt, seems now to have become "a mere courteous and smoothly transmitted platitude." [6]

Departure from the legal theory at this point is leading to another change. The doctrine of the books is that an unconstitutional statute is simply a nullity. There never was such a statute. No legal effect whatever has been produced. But when in five years the courts of

[1] People *vs.* Coler, 116 N.Y. 1.
[2] People *vs.* Lochner, 177 N.Y. 145.
[3] U.S. *vs.* Martin, 94 U.S. 400.
[4] Lochner *vs.* N.Y., 198 U.S. 45.
[5] *Green Bag*, XVII, 416.
[6] "The Growth of Judicial Power," *Political Science Quarterly*, XXIV, pp. 193, 194.

this country hold three hundred and seventy-seven statutes, or an average of over seventy-one a year, unconstitutional, it is obvious that such a theory becomes highly inconvenient. It is a natural consequence that a practice of recognizing what might be called "*de facto* statutes" is beginning to appear in one guise or another.[1]

Another example is to be found in those jurisdictions where the common-law doctrines as to employer's liability still obtain and in those corners of employer's liability in other jurisdictions where recent legislation has left the common law in force. It is notorious that a feeling that employers and great industrial enterprises should bear the cost of the human wear and tear incident to their operations dictates more verdicts in cases of employer's liability than the rules of law laid down in the charges of the courts. Most of the new trials directed by our highest courts of review because the verdicts returned are not sustained by the evidence are in cases of this sort. Here the law in the books is settled and defined. The law administered is very different, and only the charge of the court, rigidly examined on appeal, serves to preserve an appearance of life in the legal theory.

More striking still is the divergence between legal theory and current practice in the handling of persons suspected of crime. The "third degree" has become an everyday feature of police investigation of crime. What is our law according to the books? "The prisoner," says Sir James Stephen, "is absolutely protected against all judicial questioning before or at the trial." "This," he adds, "contributes greatly to the dignity and apparent humanity of a criminal trial. It effectually avoids the appearance of harshness, not to say cruelty, which often shocks an English spectator in a French court of justice."[2] Such is the legal rule. But prosecuting attorneys and police officers and police detectives do not hesitate to conduct the most searching, rigid and often brutal examinations of accused or suspected persons, with all the appearance of legality and of having the power of the state behind them. It is true, no rich man is ever subjected to this process to obtain proof of violation of anti-trust or rebate legislation and no powerful politician is thus dealt with in order to obtain proof of bribery and graft. The malefactor of means, the rogue who has an organization of rogues behind him to provide a lawyer and a writ of *habeas corpus* has the benefit of the law in the books. But the ordinary malefactor is bullied and even sometimes starved and tortured into confession by officers of the law. It is no doubt a sound instinct that makes us hesitate to give any such examinations the sanction of legality. We may agree with Sir James Stephen's informant that there is a deal of laziness behind it, that, to use his words, "it is far pleasanter to sit comfortably in the shade

[1] "The Growth of Judicial Power," *Political Science Quarterly*, XXIV, 193, 194.
[2] History of the Criminal Law, I, 441.

rubbing red pepper into a poor devil's eyes than go about in the sun hunting up evidence." [1] The fact remains, however, that the attempt of the books to compel prosecutors to use only a case-knife is failing. They will use the pickax in practice, and until the law has evolved some device by which they may use it in all cases the weak and friendless and lowly will be at a practical disadvantage, despite the legal theory.

Not only does the law in the books seek to surround accused persons with safeguards which the practical exigencies of prosecution will not put up with, but at other times it demands conviction of persons whom local or even general opinion does not desire to punish. Jury lawlessness is the great corrective of law in its actual administration. The will of the state at large imposed on a reluctant community, the will of a majority imposed on a vigorous and determined minority, find the same obstacle in the local jury that formerly confronted kings and ministers. More than this, where in a particular cause there are peculiar considerations of mitigation or circumstances requiring exercise of a dispensing power, the power of juries to render general verdicts needs only a little help from alienist theories of insanity to enable a verdict to be rendered which will accord with the moral sense of the community. Here again, as in the case of the "third degree," the law is often too mechanical at a point requiring great nicety of adjustment. And the tendency to extend the scope of jury lawlessness, manifest in almost all jurisdictions, indicates that there are many points where a readjustment or a better adjustment must be had. For instance, legislation making questions of negligence in all cases matters wholly for the jury is becoming common. Many states make juries judges of the law in criminal cases, and a larger number commit to juries the power of sentencing in many classes of prosecutions, or even in all cases. Persistent attempts are making to leave all cases of contempt to juries. More than all these, legislation against comment upon the facts in the charge of the Court, requiring a written charge, or in some states limiting the Court to granting or refusing written instructions tendered by counsel, has reduced the charge of the Court to an imposing, but ineffective, ritual and turned the actual decision of causes over to a jury unfettered by rules of law.

What is the purpose and what the occasion of the extensions of the powers of juries to which I have referred? Practically the purpose is, in largest part, to keep the letter of the law the same in the books, while allowing the jury free rein to apply different rules or extra-legal considerations in the actual decision of causes — to create new breaches and widen existing breaches between law in the books and law in action. The occasion is that popular thought and popular action are at variance with many of the doctrines and rules in the books, and that the law is trying to save the latter and accommodate

[1] Ibid.

itself to the former by the good old device of calling a pickax a case-knife. If the ritual of charging the jury on the law with academic exactness is preserved, the record will show that the case was decided according to law, and the fact that the jury dealt with it according to extra-legal notions of conformity to the views of the community for the time being is covered up. It is worthy of consideration whether the exaggerated tendency of American procedure in the past fifty years to try the record rather than the cause is not in part a result of extravagant powers of juries. To adjust the rules of law to the exigencies of action, we have set up a wide dispensing power in juries. To preserve the appearance of legality and rule and system, we have developed a complicated machinery of procedure and have refined and re-refined its smallest details. In England, where an unfettered Parliament makes the written law sensitive to public opinion, there is very little jury lawlessness. The judges charge effectively on the law and vigorously on the facts. They hold the jury to the law. It is not entirely a coincidence that English courts waste but little time on procedure.

Another attempt at adjusting the letter of the law to the demands of administration in concrete cases, while apparently preserving the law unaltered, is to be seen in our American ritual, for in many jurisdictions it is little else, of written opinions, discussing and deducing from the precedents with great elaboration. As one reads the reports critically the conclusion is forced upon him that this ritual covers a deal of personal government by judges, a deal of "raw equity," or, as the Germans call it, of equitable application of law, and leaves many a soft spot in what is superficially a hard and fast rule, by means of which concrete causes are decided in practice as the good sense or feelings of fair play of the tribunal may dictate. One instance of this, in constitutional law, has been spoken of. Many others might be adduced from almost any department of private law. Let one suffice. In the law as to easements it is laid down that a right may be acquired by adverse user, although the known use was not objected to, if it was in fact, adverse. But the same courts say properly that a permissive user will give no right. When, however, one turns to the cases themselves and endeavors to fit each case in the scheme, not according to what the court said was the rule, but according to the facts of that case, he soon finds that the apparent rules to a great extent are no rules, and that where to allow the right would work a hardship the courts have discussed the decisions as to permissive user, and where, in the concrete cause, it seemed fair to grant the right they have insisted on the adverse character of the claimant's conduct. And the reason is not far to seek. We have developed so minute a jurisprudence of rules, we have interposed such a cloud of minute deductions between principles and concrete cases, that our case-law has become

ultra-mechanical, and is no longer an effective instrument of justice if applied with technical accuracy. In theory our judges are tied down rigidly by hard and fast rules. Discretion is reduced to a strictly defined and narrowly limited minimum. Judicial law-making has produced a wealth of rules that has exhausted the field formerly afforded for the personal sense of justice of the tribunal. Legally, the judge's heart and conscience are eliminated. He is expected to force the case into the four corners of the pigeon-hole the books have provided. In practice, flesh and blood will not bow to such a theory. The face of the law may be saved by an elaborate ritual, but men, and not rules, will administer justice.

The lawyer commonly flatters himself that the vagaries of legislators are responsible for most of the divergence between law in the books and law in action; that statutes impossible of enforcement, enacted off-hand without knowledge of the situation to be dealt with, are chiefly to be blamed. No doubt crude legislation has been a factor of no mean importance. Legislation imposing a heavier punishment upon one who gives an adult a cigarette than upon blackmail, or upon many forms of graft most detrimental to the proper conduct of public business, does not impress jurors or prosecutors, or even judges, with a sense of duty of upholding the written law. No doubt, too, we have had laws made merely to please particular constituents and not intended to be enforced. But to my mind these are the least of the matter; for our revered common law, our judge-made traditions, our settled habits of legal thought often fare little better in action. I have already spoken of our common law of master and servant. Our ultra-individualist doctrines of contributory negligence fare no better at the hands of juries, and legislation is either modifying them or leaving the whole question to juries in an increasing number of states. Again, it is a settled judicial doctrine that opposes collusive divorce. Yet every morning paper bears witness how little force it has in practice. What would the average community do to a supposed gentleman convicted judicially of extreme cruelty to a lady? Yet there are coming to be respected persons of high standing in all communities against whom there are such records. We know that in many parts of the country, at least, extreme cruelty has become a convenient fiction to cover up that incompatibility of temper that may not unreasonably exist between a lady and a gentleman. The legal theory, the judicial decisions defining cruelty, the judge-made rule against collusion remain in the books. But husband and wife agree upon a settlement of property out of court, they agree that she shall aver and prove cruelty unopposed, the newspapers publish the fact, the ritual is gone through with and a decree is entered. In other words, public thought and feeling have changed, and, whatever the law in the books, the law in action has changed with them.

Some of the causes of divergence between the law in the books and the law in action have been suggested already. In the first place, it is nothing new. Law has always been and no doubt will always continue to be, "in a process of becoming." It must be "as variable as man himself."[1] "Social life," says Wundt, "like all life, is change and development. Law would be neglecting one of its most important functions if it ceased to meet the demands of this ceaseless evolution."[2] However much the lawyer, enamored of his ideal of an absolute certainty in legal rules, may seek to evade these demands, the people will not permit it. Men will do what they are bent on doing, laws and traditions to the contrary notwithstanding. The forms may be kept, but the substance will find some fiction or some interpretation, or some court of equity or some practice of equitable application, to sanction change. Nevertheless, the divergence between law in books and law in action is more acute in some periods of legal history than in others. In all legal systems, periods of growth, periods in which the law is developing through juristic activity, alternate with periods of stability, periods in which the results of the juristic activity of the past are summed up or worked out in detail or merely corrected here and there by legislation. Our common law in America has passed through its period of growth. In some parts of the country this period ended about the time of the Civil War. Elsewhere it lingered for some time, but in general it may be said to have come to an end about 1875. To-day we are manifestly in a period of stability. Our case law is incapable of solving new problems or of meeting new situations of vital importance to a present-day life. Judicial decision has failed conspicuously to provide a sound doctrine as to employer's liability. With the theory of "general jurisprudence" of the Supreme Court of the United States at hand to build on, it has failed to meet the general demand for uniform commercial law. With centuries of discussion before them, our courts have failed to work out a reasonable or certain law of future interests in land. The common law has broken down wholly in the attempt to prevent discrimination by public service companies, because of inability to make procedure enforce its doctrine and rules. In our western states, where there was abundant opportunity for free judicial development, judicial law-making proved inadequate to adjust water rights. Case law has been found unable to hold promoters to their duty and to protect those who invest in corporate enterprises against mismanagement and breach of trust. It has failed to work out a scheme of responsibility that will hold legal entities, or those who hide behind the skirts of such entities, to their duty to the public. Finally judicial decision is doing little or nothing for improvement of procedure in the face of insistent popular demand.

[1] Wundt, Ethik, 2 ed. p. 556.
[2] Ibid. p. 581.

On all these points we have had to turn to legislation. Juristically, then, we are in a period of stability and the growing point of law is in legislation. But legislation has always brought with it an imperative theory of law, a theory that law was the command of the sovereign and a resulting tendency to overlook the necessity of squaring the rules upon the statute book with the demands of human reason and the exigencies of human conduct. More than this, in periods of stability the desire for formal perfection seizes upon jurists. Justice in concrete causes ceases to be their aim. Instead they aim at thorough development of the logical content of established principles through rigid deduction and at a certainty which shall wholly eliminate the personal equation in the administration of justice and permit judicial decision to be predicted with absolute assurance. Such periods have produced in the past spurious interpretation and courts of equity. In the present such a period is giving rise to a practice of equitable application as a means of asserting the element of discretion, of reason, of equity in its wider sense, inherent in all law. The controversy between the analytical and historical schools on the one hand and the equitable school on the other over the application of the new code in modern Germany is an instance of the same thing; for in such periods of juristic stability popular thought and popular practice may be anything but stable, and in consequence may diverge widely from the doctrines and rules to be found in the lawyer's books. This is a general reason, applicable to all cases of divergence between the nominal and the actual law in periods of legal maturity.

Closer analysis will reveal three special causes behind the conditions in American law to which I have called attention — namely, (1) that our settled habits of juristic thought are to no small extent out of accord with current social, economic and philosophical thinking, (2) the backwardness of the art of legislation, particularly in that our legislative law-making, like our judicial law-making, is too rigid, attempts too much detail and fails to leave enough margin for judicial action in individual cases, and (3) the defects of our administrative machinery.

To the ancient, law was sacred. It was not made by man, and could not be changed by man. Man simply discovered it. Any attempt to alter it was of necessity futile. We are told that when contact with the Romans taught Teutonic peoples that through the written page they could make and alter the law as well as record it, a great ferment resulted. In somewhat the same way, when lawyers find they can deduce law from settled premises and the people find they can enact it without premises, a ferment ensues. When legislation is merely a record of law, when juristic speculation is merely a record of law, when juristic speculation is merely a discovery of the dictates of reason, the resulting rules and doctrines in the books can

not be far removed from current popular thought and popular practice. But once admit an imperative theory, and let the rule be *quod principi legis habet vigorem*, and it makes little difference whether the *princeps* is a Roman emperor, represented by jurisconsults who legislate in his name, or the people of an American commonwealth speaking through the judiciary committees of its Legislature. In either case it will be found that a mass of detail will in practice lack the force of law. But it is equally true that if we admit the doctrines of the historical jurist and take the juristic principles of the Roman law or of Anglo-American common law as the basis from which to make logical deductions, the law in the books will more and more become an impossible attempt to govern the living by the dead.

Settled habits of juristic thought are characteristic of American legal science. Our legal scholarship is historical and analytical. In either event it begins and ends substantially in Anglo-American case law. But the fundamental conceptions of that case law are by no means those of popular thought to-day. Nor is this condition in any wise unique. "All sciences," wrote Ulrich Zäsius in 1520, "have put off their dirty clothes, only jurisprudence remains in her rags." [1] When Zäsius wrote this, every other department of learning was revivifying under the influence of renewed study of the classical texts by the humanists. Jurisprudence was conspicuous in its isolated existence to the new light. Greek learning made itself felt in Roman letters and Roman thought in the first century B.C.; in Roman legal science in the second and third centuries A.D. Philosophy had been delivered from Aristotle and theology from the fathers of the church for over a century before law was set free from Justinian and jurisprudence was divorced from the older theology. To-day, while all other sciences, in the wake of the natural sciences, have abandoned deduction from predetermined conceptions, such is still the accepted method of jurisprudence. After philosophical, political, economic and sociological thought have given up the eighteenth century law of nature, it is still the premise of the American lawyer. In other words, law has always been dominated by ideas of the past long after they have ceased to be vital in other departments of learning. This is an inherent difficulty in legal science, and it is closely connected with an inherent difficulty in the administration of justice according to law — namely, the inevitable difference in rate of progress between law and public opinion.

Of the defects in our American administration of justice with which fault is found to-day, the more serious are reducible ultimately to two general propositions: (1) over-individualism in our doctrines and rules, an over-individualist conception of justice, and (2) over-reliance upon the machinery of justice and too much of the mechanical in

[1] Stintzing, Ulrich Zäsius, p. 107.

the administration and application of rules and doctrines. At first sight the coexistence of over-individualism in the rules of law and in the doctrines from which they proceed, with lack of individualization or too little adjustment to individual cases in the application of the rules and doctrines, is a paradox. But in truth the latter is due to exactly the same causes, and is a result of the same attitude toward law and government and of the same frame of mind as the former. The former is an assertion of the individual against his fellows individually. The latter is an assertion of the individual against his fellows collectively. The former expresses the feeling of the self-reliant man that, as a free moral agent, he is to make his own bargains and determine upon his own acts and control his own property, accepting the responsibility that goes with such power, subjecting himself to liability for the consequences of his free choice, but exempt from interference in making his choice. The latter expresses the feeling of the same self-reliant man that neither the state, nor its representative, the magistrate, is competent to judge him better than his own conscience; that he is not to be judged by the discretion of men, but by the inflexible rule of the law. Each proceeds from jealousy of oppression of the individual. The former is due to fear he may be oppressed in the interest or for the protection of others; the latter is due to fear that a magistrate, who has power to adjust rules to concrete cases and discretion in the application of legal doctrines, may misuse that power and abuse that discretion to the injury of some individual. It assumes that oppression by mechanical laws, mechanically executed, is preferable to government by other men exercising their own will and judgment, and that elimination of every personal element and procedure according to hard and fast rules necessarily constitutes justice. Each is a phase, therefore, of the extreme individualism which is one of the chief characteristics of the common law. Indeed, Berolzheimer asserts that the one distinguishing mark of common-law juristic thought is this "unlimited valuation of individual liberty and respect for individual property." [1]

The individualism of our common law is something of far more than academic interest. So far as American legal scholars trouble themselves with juristic theory at all, their point of view is usually historical. English juristic thought is chiefly analytical. The English hold to the imperative theory because it expresses the actual situation in the English polity. What Parliament commands is enforced in the courts, and hence visibly and obviously law is the command of King, Lords and Commons. But in the United States Austin's critics have been read much more than Austin himself. Although our writers upon politics adopt the imperative theory,[2] the American doctrine of judicial

[1] System der Rechts und Wirthschaftsphilosophie, Vol. II, p. 160.
[2] Willoughby, The Nature of the State, chaps. vii, viii.

power with respect to legislation makes against adherence to the imperative theory by lawyers. It is not what the Legislature desires, but what the courts regard as juridically permissible that in the end becomes law. Statutes give way before the settled habits of legal thinking which we call the common law. Judges and jurists do not hesitate to assert that there are extra-constitutional limits to legislative power which put fundamental common-law dogmas beyond the reach of statutes. Under such circumstances an imperative theory is too much at variance with the actual situation to find acceptance. This manifest inapplicability of the chief tenet of the analytical jurists, together with the commanding position of Harvard Law School in American legal education, has led to an almost uncontested supremacy of the historical school. But when we look closely into the method of the historical school we find it in practice strangely like that of the eighteenth century law-of-nature school against which it arose to protest.

Eighteenth century jurists conceived that certain principles were inherent in nature, were necessary results of human nature, and that these principles were discoverable *a priori*. They held that it was the business of the jurist to discover these principles, and, when discovered, to deduce a system therefrom and test all actual rules thereby. Such is even now the orthodox method in our constitutional law. Our bills of rights are regarded as merely declaratory of fundamental natural rights. Eminent judges assert that legislation is to be judged by those rights and not by the constitutional texts in which they are declared. And the greatest American lawyer of recent times, in the true method of the eighteenth century, lays down a criterion of law and legislation *a priori*, deduces from it an absolute test of right and wrong and proceeds to define the limits of legislative law-making accordingly. A portion of the eloquent passage from Mr. Carter's posthumous work to which I refer is worth quoting. He says:

> There is a guide which, when kept clearly and constantly in view, sufficiently informs us what we should aim to do by legislation and what should be left to other agencies. This is what I have so often insisted upon as the sole function both of law and legislation — namely, to secure to each individual the utmost liberty which he can enjoy consistently with the preservation of the like liberty to all others. Liberty, the first of blessings, the aspiration of every human soul, is the supreme object. Every abridgment of it demands an excuse and the only good excuse is the necessity of preserving it. Whatever tends to preserve this is right. All else is wrong. To leave each man to work out in freedom his own happiness or misery, to stand or fall by the consequences of his own conduct, is the true method of human discipline.[1]

[1] Carter, Law, its Origin, Growth and Function, p. 337.

My excuse for this long quotation is that it is an authoritative exposition of current juristic thought in America. To lawyers all that I have said may seem to go without saying, but to economists, to sociologists, to students of comparative legislation, of politics, or of the juristic thought of the rest of the world, the eighteenth century interpretation of law as existing solely to secure liberty, the acceptance of Herbert Spencer's Kantian formula of justice, the theory that government is to be held down to the inevitable minimum and the uncompromising insistence that men should be required to act unaided by legal restraints in their own interest and made to stand or fall by the consequences of their choice, belie the twentieth century date upon the title page. Yet the author believed that he wrote from the historical standpoint, and he represents undoubtedly the views of the historical school in America. For the historical school too works *a priori*. It has deduced from and tested existing doctrines by a fixed, arbitrary, external standard. Having no philosophical method of their own, as Berolzheimer has pointed out, when the German historical jurists overthrew the premises of the eighteenth century law-of-nature school, they preserved the method of their predecessors, merely substituting new premises. They had, he says, neither the capacity nor the desire to put a new philosophy of law in the place of the buried law of nature. They sought the nature of right and of law in historical deduction from the Roman sources, from Germanic legal institutions, and from the juristic development based thereon.[1] In the United States this natural law upon historical premises has gone even further. With us the basis of all deductions is the classical common law — the English decisions and authorities of the seventeenth, eighteenth and first half of the nineteenth centuries. We make of this a very *Naturrecht*. We test all new situations and new doctrines by it. We construe statutes by it, and Mr. Carter tells us that it is a wise doctrine to presume that legislatures intend no innovations upon this common law, and to assume, so far as possible, that statutes were meant to declare and reassert its principles.[2] More than this, through the power of courts over unconstitutional legislation and the doctrine that our bills of rights are declaratory, we force it upon modern social legislation. Hence the character, the attitude — if I may fall back upon a German word, the *Weltanschauung* — of this body of doctrine becomes of the utmost practical importance. Not merely the jurist, but the legislator, the sociologist, the criminologist, the labor leader, and even, as in the case of our corporation law, the business man, must reckon with it. For the fundamental conceptions of our traditional case law have come to be regarded as fundamental conceptions of legal science. When in a period of collectivist thinking and social legislation courts

[1] System der Rechts und Wirthschaftsphilosophie, Vol. II, p. 4.
[2] Carter, Law, its Origin, Growth and Function, pp. 308–309.

and lawyers assume that the only permissible way of thinking or of law-making is limited and defined by individualism of the old type, when while men are seeking to promote the ends of society through social control, jurists lay it down that the only method of human discipline is "to leave each man to work out in freedom his own happiness or misery," conflict is inevitable. With jurisprudence once more in the rags of a past century, while kindred sciences have been reclothed, we may be sure that law in the books will often tend to be very different from the law in action.

Probably one may summarize this first point by saying that a gulf has grown up between social justice, which is the end men are seeking to-day, and legal justice; that the movement away from the Puritan standpoint in our social and economic and political thought has not been followed by legal thought, and that we still adhere to the idealistic, or at least to the political interpretation of, legal science, although in kindred branches of learning the economic and social interpretation is more and more accepted.

That the legal idea of justice is not the idea entertained in the related sciences is becoming a commonplace of the sociologists. They do not hesitate to contrast social justice and legal justice.[1] As Professor Commons put it recently, "Justice is not merely fair play between individuals, as our legal philosophy would have it — it is fair play between social classes."[2] And one has only to read the judicial decisions upon liberty of contract to see that his conception of legal justice is that entertained by the courts. As Judge Baldwin has well put it, "The circle of individual rights narrows."[3] But courts and lawyers seem to conceive it their duty to oppose and resist this narrowing at every point.

Sometime in the future when a philosophical jurist writes upon the spirit of the common law, we may have a worthy account of the relation between Puritan theology and the common law. Such an account will be as much a part of the philosophical history of our system as the relation of Stoic philosophy to Roman law is a part of the history of that system, and hence an important consideration in legal science. I have ventured some discussion of this on another occasion. Here I need only say that it is not an accident that the great periods of common law history, the periods of growth, the periods when doctrines were worked out and took shape, were periods in which religious thought was a prime form of mental activity and were periods in which the Puritan was a potent force in religious thought. The work of the English courts prior to Coke was summed up for us and handed down

[1] Ward, Applied Sociology, 22–24; Willoughby, Social Justice, 20–25.
[2] 13 *American Journal of Sociology*, 764.
[3] The Narrowing Circle of Individual Rights (Reprint from *Proc. Va. Bar Assn.* 1908), p. 4.

to us by that indefatigable scholar in what we have chosen to consider an authoritative form, and we have looked at it through his spectacles ever since. Hence we may neglect the periods of growth prior to the age of Elizabeth and James I., since their results in our law to-day depend upon the way in which they appealed to the end of the sixteenth and beginning of the seventeenth centuries. Again we may pass over the constructive work of the eighteenth century, for that was done in equity and the law merchant. Neither of these strictly is part of the common law, and, so far from their affecting the spirit of the common law, the spirit of the common law has affected them powerfully. But there are two great growing periods of our common-law system; two periods in which principles and doctrines were formative, in which our authorities have summed up the past for us and have given us principles for the future. These periods are: (1) the classical common-law period, the end of the sixteenth and beginning of the seventeenth century, and (2) the period that some day may be held no less classical than the first — the period of legal development in America that came to an end with the Civil War. In the one the task was to go over the decisions and legislation of the past and make a system for the future. In the other the task was to examine the whole body of English case law with reference to what was applicable to the facts of life in America and what was not. Obviously the spirit of these times and of the men of these times, whose juristic labors gave us what we call our common law, could not fail to give color to the whole system. But the age of Coke was the age of the Puritans in England and the period that ends with our Civil War was the age of the Puritans in America. We must not forget that the Puritan had his own way in America, that he was in the majority, had no powerful establishment to contend with, and made institutions to his own liking. For again it is not an accident that common-law principles have attained their highest and most complete logical development in America, and that we are and long have been more thoroughly a common-law country than England herself. It is significant that the classical expositions of characteristic common-law views upon employer's liability, for example, upon rights of adjoining owners with respect to surface water, and upon abusive exercise of rights have come from New England.

The fundamental proposition from which the Puritan proceeded was the doctrine that man was a free moral agent, with power to choose what he would do and a responsibility coincident with that power. He put individual conscience and individual judgment in the first place. No authority must be permitted to coerce them, but every one must assume and abide the consequences of the choice he was free to make. In its application this led to a régime of "consociation, but not subordination."[1] "We are not over one another," said Robinson,

[1] Lord Acton, Lectures on Modern History, p. 200.

"but with one another."[1] Hence law was a device to secure liberty, its only justification was that it preserved individual liberty, and its sole basis was the free agreement of the individual to be bound by it. The early history of New England abounds in examples of attempts to make this a practical political doctrine.[2] The good side of all this we know well. On the side of politics, the conception of the people—not as a mass, but as an aggregate of individuals — the precise ascription of rights to each of these individuals, the evolution of the legal rights of Englishmen into the natural rights of man, have their immediate origin in the religious phase of the Puritan revolution.[3] But on the side of law it has given us the conception of liberty of contract, which is the bane of all labor legislation, the rooted objection to all power of application of rules to individual cases which has produced a decadence of equity in so many of our state courts, the insistence upon and faith in the mere machinery of justice which makes American legal procedure almost impossible of toleration in the business world of to-day, the notion of punishing the vicious will and of the necessary connection between wrongdoing and retribution which make it so difficult for our criminal law to deal with anti-social actions and to adjust itself in its application to the exigencies of concrete criminality.

Finally, our interpretation of jurisprudence and of legal history is either idealistic or political. Brooks Adams is the only American writer to insist upon the economic and social interpretation. But until we come to look at our legal history in this way, history on which our jurists rely chiefly is not unlikely to prove a blind guide. The history of juristic thought tells us nothing unless we know the social forces that lay behind it.

I have discussed at length the effect of stability of juristic thought and the nature of American juristic thought because those are the subjects which the lawyer must ponder. It is there that the divergence between law in books and law in action has a lesson for him. The other two causes may be looked at only in the briefest way.

Rigidity of legislation is best illustrated in the codes of procedure and practice acts, so common in the United States, which in large measure have defeated their own ends by going too much into detail. Legislation must learn the same lesson as case law. It must deal chiefly with principles; it must not be over-ambitious to lay down universal rules. We need for a season to have principles from which to deduce, not rules, but decisions. Legislation which attempts to require cases to be fitted to rules instead of rules to cases will fare no better than judicial decisions which attempt the same feat. So long as an imperative theory leads the law-maker to think that he has

[1] Lord Acton, Lectures on Modern History, p. 200.
[2] Merriam, Am. Political Theories, p. 19.
[3] Dunning, Political Theories, from Luther to Montesquieu, pp. 220–221.

only to put his views of all the details of legal and judicial administration into sections and chapters, and, as the will of the sovereign, they will become effective law, the law upon the statute books will be far from representing what takes place actually in the courts.

The third cause mentioned, defective administration, perhaps more than any other cause, is immediately responsible for making law in action different from law in the books. If any legislation has an active public interest behind it, and is sought to be enforced by zealous partisans whose wishes command the attention of executive officers, it is labor legislation. But the proceedings of the American Association for Labor Legislation bear abundant and eloquent testimony that our copious labor legislation for the most part fails of effect because of defective administration.[1] Both judicial and executive administration are at fault. A great deal of the law in the books is not enforced in practice because our machinery of justice is too slow, too cumbersome and too expensive to make it effective. One need only instance petty cases, triable by justices of the peace, appealable for a complete new trial to superior courts of record and then reviewable by supreme courts or courts of appeals. It is not to be expected that such a machinery of justice will afford any real check upon extortion by public service companies. But, beyond this, we have preserved an etiquette of justice, devised in large part in a past age of formal over-refinement, no small part of which is as out of place in a twentieth century American court of justice as gold lace and red coats upon a modern skirmish line. It is chiefly, however, in executive administration that laws fail of effect. The clash of departments or even of officials, so characteristic of our polity, the extreme decentralization that allows a local jury or even a local prosecutor to hold up instead of uphold the law of the state, the elaborate machinery of check, balance and subdivision which the Puritan jealousy of the magistrate has fixed in our institutions, too often result in a legal paralysis of legal administration. Effective administration is perhaps the great problem of the future. But that is a problem chiefly for the statesman and the student of politics.

For the lawyer, the moral of the difference between law in books and law in action is not to be obsessed with the notion that the common law is the beginning of wisdom and the eternal jural order. Let us not be afraid of legislation, and let us welcome new principles, introduced by legislation, which express the spirit of the time. Let us look the facts of human conduct in the face. Let us look to economics and sociology and philosophy, and cease to assume that jurisprudence is self-sufficient. It is the work of lawyers to make the law in action conform to the law in the books, not by futile thunderings against popular lawlessness, nor eloquent exhortations to obedience to the

[1] Proc. Second Annual Meeting of Am. Assn. for Labor Legislation, pp. 9, 32, 92.

written law, but by making the law in the books such that the law in action can conform to it, and providing a speedy, cheap and efficient legal mode of applying it. On no other terms can the two be reconciled. In a conflict between the law in books and the national will there can be but one result. Let us not become legal monks. Let us not allow our legal texts to acquire sanctity and go the way of all sacred writings. For the written word remains, but man changes. Whether laws of Manu or Zarathustra or Moses, or the fourteenth amendment, or the doctrine of the Dartmouth College case, or Munn *vs.* Illinois, or the latest legislative discovery in Oklahoma, all laws tell us the same tale.

III

THE POLICE POWER

WHAT IS THE POLICE POWER?

By Walter Wheeler Cook, of the University of Wisconsin

(From the *Columbia Law Review*, May, 1907)

Nearly all of the legislation regulating industry finds its sanction in that elastic, indefinable power called the "police power." Hence, any study of the relation of government to industry must pivot on an understanding of the police power and how federal and state courts interpret it. — Editor's Note.

No phrase is more frequently used and at the same time less understood than the one which forms the subject of the present discussion. It is a common thing for our courts to say that the police power does not admit of an exact definition, yet only a few of those who make the remark appear to understand clearly why this should be so. As the eminent holder of the Roosevelt Professorship in Berlin has so well said:

> The police power is the dark continent of our jurisprudence. It is the convenient repository of everything for which our juristic classification can find no other place.[1]

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As a convenient method of approaching our subject, let us examine briefly the definitions or descriptions given by two or three writers who have studied the problem with a considerable degree of thoroughness. The author whose words have already been quoted, after showing the apparent confusion of the Supreme Court of the United States upon the question, begins with the derivation of the words from the Greek and traces their introduction into the political science of modern Europe and their history since, and concludes by stating what he conceives to be the most recent view of political science upon the scope of the police power, closing as follows:

[1] Burgess, Political Science and Comparative Constitutional Law, Vol. II, p. 136.

written law, but by making the law in the books such that the law in action can conform to it, and providing a speedy, cheap and efficient legal mode of applying it. On no other terms can the two be reconciled. In a conflict between the law in books and the national will there can be but one result. Let us not become legal monks. Let us not allow our legal texts to acquire sanctity and go the way of all sacred writings. For the written word remains, but man changes. Whether laws of Manu or Zarathustra or Moses, or the fourteenth amendment, or the doctrine of the Dartmouth College case, or Munn *vs.* Illinois, or the latest legislative discovery in Oklahoma, all laws tell us the same tale.

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> The police power is the dark continent of our jurisprudence. It is the convenient repository of everything for which our juristic classification can find no other place.[1]

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As a convenient method of approaching our subject, let us examine briefly the definitions or descriptions given by two or three writers who have studied the problem with a considerable degree of thoroughness. The author whose words have already been quoted, after showing the apparent confusion of the Supreme Court of the United States upon the question, begins with the derivation of the words from the Greek and traces their introduction into the political science of modern Europe and their history since, and concludes by stating what he conceives to be the most recent view of political science upon the scope of the police power, closing as follows:

[1] Burgess, Political Science and Comparative Constitutional Law, Vol. II, p. 136.

The political science of the present century has resurveyed the field of the police power, and has brought out four very fundamental distinctions in regard to it. The first is, that the police power is, in its nature, administrative, not legislative or judicial; the second is, that it is not coextensive with the whole scope of internal administration, as distinguished from external, but is only a branch of internal administration; the third is, that, in the exercise of the police functions, the executive discretion should move within the lines of general principles prescribed either by the constitution or the legislature; and the fourth is, that the community in its most local organization should participate, so far as possible, in the exercise of the police power. . . . Every right acknowledged to the individual by the state may be abused by him to the detriment of the state. The state must therefore confer upon the government the power to *watch for and prevent* such abuse. This is the police power.[1]

The most noteworthy thing about this treatment of the subject is that the problem is treated as being purely one in political science as distinguished from constitutional law. The author is describing the meaning which ought, in his opinion as a political scientist, to be given to the phrase "the police power"; or perhaps a more accurate statement would be, that he is describing the limitations which he thinks ought to be imposed by the constitution upon the government in behalf of individual liberty. . . .

* * * * * * *

The author of the most recent and without doubt the most valuable treatise upon the police power[2] pursues an analytical rather than an historical method in dealing with the subject. He begins[3] by making an analysis and classification of the objects of government in the abstract, finding them to fall into three classes: (1) the maintenance of national existence; (2) the maintenance of right, or justice; (3) the promotion of the public welfare. Under the first he includes international relations, governmental organization and support, war, and the putting down of internal revolt and insurrection; under the second, the administration of civil and criminal justice; under the third, not merely the prevention of wrongful acts but the imposition of positive regulations designed to promote the general welfare. The general welfare, he finds, "embraces a variety of interests, calling in different degrees for public care and control. They may be classified as follows: the primary social interests of safety, order and morals; economic interests; and non-material and political interests."[4] The police power, he concludes, is occupied with the accomplishment of the objects which fall under the third class. The essence of the police power, then, is the exercise of control for the purpose of promoting the general welfare.

[1] Burgess, op. cit. Vol. I, p. 216.
[2] Freund, The Police Power.
[3] Ibid. p. 3.
[4] Ibid. p. 7.

Here again we have a solution of our problem which pursues the methods of the political scientist rather than those of the constitutional lawyer, the difference being that this time the analytical is substituted for the historical method. Mr. Freund's conclusion, however, as to the scope of the police power is obviously far different from that of Mr. Burgess.

Let us now turn our attention to the discussions of a third writer whose valuable contribution to the literature of the subject is too little known to the legal profession generally, owing, doubtless, to the place of its publication.[1] Like Mr. Burgess, Mr. Hastings pursues the historical method, but with this difference, that he writes as a student of constitutional law rather than as a political scientist; that is to say, he traces the history of the phrase in the discussions of American constitutional lawyers, particularly in the opinions of the judges of the Supreme Court of the United States, seeking thus to ascertain the meaning which the phrase has come to have when used by the courts. It is difficult to state his conclusion without giving to one who has not had the pleasure of reading his discussion an erroneous conception of his meaning. He says:

> The police power is a fiction. Every judge whom we have seen attempt to analyze it finds in it Madison's "indefinite supremacy" of the state. . . . The term is certainly a mere abstract and collective one for the state, where regarded as employed in certain functions, and the constant forgetting of this fact has made endless trouble.[2]

Mr. Hastings, then, from a study of the use of the phrase by the courts, considers it as standing for the "indefinite supremacy" of the State; as another name for the State when employed in certain functions. This may all be true enough — and, as I shall show later, I think it is — but it is a bit too vague to be entirely satisfactory.

. . . Let us then first glance, very briefly indeed, at the history of the phrase. For our purposes I think we need not go farther back than the constitutional convention of 1787 which framed our present constitution. At that time a phrase somewhat similar to the one we are discussing seems to have been in more or less general use. On July 17th, in discussing the sixth resolution of the Committee of the Whole, which empowered the national congress "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation," Mr. Sherman of Connecticut proposed in its place to insert: "to make laws binding on the people of the United States in all cases which

[1] Hastings, W. G., The Development of Law as Illustrated by the Decisions relating to the Police Power of the State. Proceedings of the American Philosophical Society, Sept. 1900. Also printed for private distribution.

[2] Ibid. 191.

may concern the common interests of the Union; but not to interfere with the government of the individual States in any matters of *internal police* which respect the government of such States only, and wherein the general welfare of the United States is not concerned." This proposition had the support of Mr. James Wilson, but was opposed by Mr. Gouverneur Morris on the ground that "the internal police, as it would be called and understood by the States, ought to be infringed in many cases, as in the case of paper-money, and other tricks by which citizens of other States may be affected." This discussion is interesting in that it seems to show that the phrase "internal police" was used to signify the whole power of internal government which would remain in the hands of the States when the powers enumerated had been vested by the constitution in the national government, this being, in general, a power to promote the general welfare of the inhabitants of the State. Another instance of the use of the phrase is found in a report of a special committee made to the convention on August 22d. The question at once arises: Is there any connection between the two phrases? I believe that there is, and that a study of the subsequent history will show that the one was substituted for the other, and that the more modern phrase, "the police power," is to-day used by our courts in much the same sense that the earlier phrase was used in the convention by the framers of the constitution. As Mr. Hastings has shown, Chief Justice Marshall seems to be entitled to any credit that may be due for the introduction of the modern phrase.[1] Space fails me to trace the evolution in detail, but it is sufficient to point out that we find the chief justice using in 1824[2] the phrase "internal police," while in 1827 he substitutes for it "the police power."[3] This is taken up by Judge Barbour in 1837[4] and we find him saying:

> We choose to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty, of a State to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.

[1] Hastings, op. cit. 10.
[2] Gibbons *vs.* Ogden, 9 Wheat. 1, 210.
[3] Brown *vs.* Maryland, 12 Wheat. 419.
[4] New York *vs.* Miln. 11 Pet. 102.

He then goes on to describe the scope of this police power (as he calls it in another passage), and includes within it, apparently, the sum total of the powers of government left in the States by the constitution of the United States, thus making it coextensive with what the authors of *The Federalist* call "the residuary sovereignty" of the States. Thus far, then, the phrase seems to mean very much what we may guess was meant by Sherman and Morris when they were discussing the powers of "internal police" which the States would have under the new constitution. In later opinions of the Supreme Court, however, we find a somewhat narrower statement of the scope of the police power to which I shall call attention later.

Leaving for the time being the field of history, let us turn our attention now to the making of a brief survey of the distribution of governmental power in the American constitutional system. This distribution may be described as follows: First, the constitution denies to any government in our system, including, therefore, both the national government and the States, the exercise of certain powers, the right to do certain things — for example, in the Thirteenth Amendment forbidding slavery. The power to do any of these things, then, is under the constitution vested exclusively in the bodies charged with the amendment of the constitution itself. Second, of the remaining powers which may conceivably be exercised by a government, the constitution vests a portion in the government of the United States, so that, to use the technical phrase, the government of the United States is a government of enumerated powers. The word "enumerated" here, of course, includes not only those powers expressly mentioned but also all powers incidental to one or more or all of the powers expressly delegated.[1] Examining these powers in the light of the decisions of the Supreme Court of the United States, we find that for our purposes we must classify them into two groups: (*a*) powers vested exclusively in the national government; (*b*) powers not exclusively vested in the national government. With respect to those falling under (*a*), it is obvious that there is implied a denial of power to the States to exercise them; with repect to those under (*b*), it is of course the recognized principle that the States may exercise these powers, subject always to the proviso that, whenever the State statute is inconsistent with an act of Congress, passed in pursuance of its power to regulate the same matter, the State law must yield so long as the act of Congress remains in force.[2]

[1] Compare Sections 51–xxxix of the Australian constitution, which reads as follows: The Parliament (of the national government) shall, subject to this constitution, have power to make laws for the peace, order, and good government of the Commonwealth, with respect to: Matters incidental to the execution of any power vested by this constitution in the Parliament or either house thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

[2] Compare the Australian Constitution, which expressly provides in Section 109: When a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall to the extent of the inconsistency, be invalid.

All other conceivable powers of government not included in the foregoing are delegated to, or, as some perhaps would prefer to say, left with the States. The States, therefore, in our system possess an indefinite, though clearly not an unlimited, residuum of governmental power. This necessarily must be so unless, as in Canada, we reverse the process and make the central government the residuary legatee of governmental power and the States simply governments of enumerated powers. It will not and can not, I think, be disputed that it is necessary in any system to vest residuary governmental power, *i.e.*, authority to do anything which has not been forbidden expressly or by implication, in some department of the government. To maintain the contrary would be to assert the feasibility of enumerating in the constitution all the powers which a government should exercise. With us then, this indefinite residuary power to govern is vested or left by the constitution of the United States in the States.[1]

If now we examine this residuum of governmental power more closely, we shall find that it includes the power to accomplish in part all three of the objects for which, according to Mr. Freund, all governments exist. In the first place, we find a power in each State to maintain its existence by putting down insurrection and rebellion within its limits, by laying and collecting taxes, by taking private property for public purposes, etc. At the same time, we find that this power is not a complete one, the State being compelled by the constitutional provisions to rely in part for the maintenance of its existence upon the national government.[2] Again, we find that the maintenance of right, or justice, *i.e.*, the administration of civil and criminal justice, is very largely but not wholly vested in the States. The same is true with reference to the accomplishment of the third class of objects, viz., the promotion of the public welfare. In fact, the power of the States in our system to promote the public welfare is the residuum of governmental power left after subtracting from the sum total of the States' residuary powers of government as described above, the powers devoted to the maintenance of existence and the administration of justice. This, otherwise unclassified, residuary power of government, necessarily of indefinite though not unlimited extent, has come to be called the police power. In other words, we have taken the residuary powers of government possessed by the States in our system — the "residuary sovereignty" of *The Federalist* — have classified and given specific names to certain parts, *e.g.*, power of taxation, of eminent domain, etc., and then, perhaps for want of a better term, have called what is left "the police power."

[1] Of course, I am referring here only to the parts of the United States which are organized into states. In the remaining portions the residuary powers of government are of course vested by the constitution in the Congress of the United States. Article IV, Section 3.

[2] Constitution of the United States, Article I, Sections 8 and 10; Article II, Section 2, etc.

It thus appears that all three of the writers whose definitions have been discussed are in part right. Mr. Burgess is entirely correct in his description of the police power as the "convenient repository of which our juristic classifications can find no other place;" in fact, if I am right about it, this must always be so until we overturn our whole constitutional system. Again, Mr. Hastings is in part, at least, right when he says that the police power is "indefinite supremacy," only we must add that while the power must always remain "indefinite" it by no means follows that it is unlimited; we must interpret "indefinite" to mean simply "undefined" and "undefinable," in the sense that what can be done under it can not be enumerated; that its limits can be ascertained only by a process of finding out what can not be done rather than by describing what can be done. On the other hand, regarded in this way, the police power is not "a fiction," though it certainly is "the State, regarded as employed in certain functions."

If, then, I were to attempt a definition of the police power, I should say that it is the unclassified, residuary power of government vested by the constitution of the United States in the respective States.[1] . . . .

* * * * * * *

From the nature of the police power, as above defined, it is evident that a work which undertakes to deal with the whole of the police power must approach very closely to being a work upon the whole subject of constitutional law, or at least the major portion thereof. We must ascertain what the State may do to promote the general welfare; we can do this, if I am right about it, only by finding out what powers are denied to the States in one of the two ways I have described, and subtracting from the result those powers which have for their object the maintenance of State existence and the administration of justice. To do this is to determine, first, what powers are vested by the constitution exclusively in the national government, and second, what powers are otherwise denied to the States. We shall therefore have to furnish a treatise: first, on the powers of the United States government: which are exclusive of the States and which are concurrent; including therefore a discussion of the commerce clause, a subject large enough to have a volume to itself; second, another treatise (or several of them) covering all the limitations

[1] Compare Mr. Justice Field's statement of the scope of the police power in Barbier *vs.* Connolly (1885), 113 U.S. 27: "The power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity." Mr. Justice Field, however, seems to be in error when he says that the fourteenth amendment was not designed to interfere with the police power of the states. If by "interfere" we understand to limit or cut down the scope of the police power, it would seem that that was the very object of the amendment; in fact, any additional limitation on the power of a state to act must necessarily reduce its police power, *i.e.*, its residuary governmental power.

imposed by the constitution in behalf of civil liberty: the prohibition of slavery and involuntary servitude in the thirteenth amendment, the question what amounts to a deprivation of life, liberty or property without due process of law, or the denial of the equal protection of the laws, under the fourteenth amendment, etc., etc., through the whole list. Moreover, we shall have a discussion of these constitutional questions running throughout the book; we shall not find the discussion of what amounts to due process of law in one chapter or section, the equal protection of the laws in another, etc.; but rather, a discussion, for example, of the power of the State to regulate railway rates in a given manner, all the constitutional questions involved being treated together. That this arrangement of the subject has some advantages is obvious, especially from the point of view of the student of government. At the same time the defects of the method are equally obvious: in the course of each discussion many constitutional provisions are involved and nowhere does one find a complete, connected statement of just what, for example, due process of law is, not with reference to one law but as a whole. Moreover, if we adopt Mr. Freund's wider definition, there is added to the already vast field a discussion of the commerce clause, not from the point of view of finding out what regulations of commerce are denied to the States, but from that of ascertaining what Congress can do for the promotion of the general welfare by virtue of its power under this clause. Logically, also, we should omit to discuss the question of whether there could be regulations of inter-state commerce by Congress which had for their objects not the promotion of the public welfare but, say, the maintenance of national existence. The same thing is true of any other power vested in the Congress of the United States; under Mr. Freund's definition it must be discussed in so far and only in so far as it may be exerted for the promotion of the public welfare. While not denying, therefore, the value of treatises on the police power as a whole, I am inclined to think that a series of treatises on the commerce clause, the thirteenth amendment, the fourteenth amendment, etc., will be of still greater utility for the student of constitutional law. Take a concrete case: a State enacts a law regulating the charges, say of grain elevators (as in the case of Munn *vs.* Illinois[1]). Is the law constitutional? It is unless the power to act is denied to the State. The constitutional lawyer therefore runs over in his mind one by one, each one being a complete problem by itself, the various possibilities: is the exercise of this power vested exclusively in the United States government? If not, does it deprive any one of liberty or property without due process of law, or deny the equal protection of the laws, or do any other forbidden thing? If it does none of these things, then it is a valid police law.

[1] (1876) 94 U.S. 113.

Thus far the problem has been treated as one arising purely under the constitution of the United States. The constitutional lawyer's task is, however, not yet completed; he must reckon with the State constitution. The people of the State have not seen fit to delegate all the residuary powers of government left in their hands by the national constitution to their representatives in the State government, but have, wisely or unwisely, deemed it necessary to impose additional constitutional limitations. To ascertain, then, the extent of the power which the State government may exert for the promotion of the welfare of the inhabitants of the State, we must still farther reduce our residuum of governmental power, which we have above called the police power, by subtracting this farther denial of power; what we have left is — still unclassified, residuary power to govern — the police power as it actually exists in any particular State. Here again the desired result is attained by determining the scope of what is to be subtracted: whatever is not denied, is granted.

It remains now, in closing, to point out that this method of treating the problem does not necessarily, and should not, lead to any narrower view of the powers of the States to promote the general welfare or — what amounts to the same thing — any undue widening of the scope of the constitutional limitations. Our courts should not forget — as apparently some of our State courts too often do — that as a result of the distribution of governmental power in our system, our states are the residuary legatees of governmental authority; that they are the bodies vested with power and authority to meet the changing needs of society, as industry and commerce develop and new forms of business and industrial organization grow up, by appropriate changes in the law: perhaps by regulating in new ways activities of the individual which in the past have been subjected to some regulation, or even, as in Munn *vs.* Illinois, subjecting to regulation, in the interests of society, as activities which at an earlier period did not need such regulation. Nor, as the late Mr. Thayer so often and so strenuously insisted,[1] should they forget that they are not the primary but only the secondary guardians of constitutional liberty. Only when an individual who thinks that his rights are being infringed chooses to call upon them for aid do they get an opportunity to pass upon the constitutionality of the statutes passed by the legislature, and it may be that this will not be done until many years after the passage of the law.[2] From this results that fundamental principle of our constitutional law that a statute duly passed by the legislative branch of the government is not to be treated as null and void because unconstitutional unless the

[1] Thayer, Origin and Scope of the American Doctrine of Constitutional Law, pp. 4–12.

[2] As in the case of the United States Bank, the validity of the charter to which did not come before the Supreme Court for decision until after the first charter had expired and the second had been granted. McCulloch *vs.* Maryland (1819) 4 Wheat. 316.

court feel a clear and strong conviction that it violates one of the provisions of the constitution in behalf of the liberty of the individual.[1] When, therefore, a statute is challenged as unconstitutional, the burden of proof is upon the shoulders of the one who makes the challenge; the State need not prove its power to act; the individual must satisfy the court of the denial of power to the State. It is especially desirable that in dealing with that vague phrase, "due process of law," the courts should bear in mind these fundamental principles. Originating in England, as the phrase did, it was used there to place limitations not upon the legislative but upon the executive branch of the government, and therefore had a very definite meaning, viz., that in dealing with the individual the executive department should proceed only in accordance with the principles of the common law or of statutes duly enacted by the parliament. Due process of law there was, and is today, whatever parliament enacts. Carried over into our system as a limitation upon the legislative branch of the government, the phrase at once becomes vague and uncertain. As we all know, as interpreted by the Supreme Court it amounts in substance to saying that the government must not act unreasonably; that its laws shall not be arbitrary or in violation of the fundamental principles of liberty and justice.[2] In applying this test the Supreme Court of the United States has, I think, on the whole come very near to following the principle suggested by Mr. Justice Holmes, now of the Supreme Court itself, but at that time writing as a dissenting member of the Supreme Court of Massachusetts. In discussing the validity of a law regulating relations between employer and employee, which the majority of the court were holding to be unconstitutional, he said:

> If I assume . . . that, speaking as a political economist, I should agree in condemning the law, still I should not be willing to think myself authorized to overturn legislation on that ground, unless I thought that an honest difference of opinion was impossible, or pretty nearly so.

It is in such cases as Munn *vs.* Illinois,[3] Davidson *vs.* New Orleans,[4] Hurtado *vs.* California,[5] Holden *vs.* Hardy,[6] and many others which might be cited, that this attitude of the court clearly appears. Occasional lapses, such as, for example, that in Norwood *vs.* Baker,[7] are sooner or later, if not expressly, at least in effect, overruled.[8] As Mr.

[1] As Mr. Thayer points out, when the question is one of the allotment of power by the national constitution between the national government and the states, and the enactment in question is one by a state legislature, a different principle may well govern and perhaps has governed the court in settling the constitutional question. Thayer, op. cit., 12–30; Thayer, Cases on Constitutional Law, pp. 156–157.

[2] Hurtado *vs.* California (1884) 110 U.S. 516; Holden *vs.* Hardy (1898) 169 U.S. 366.

[3] (1876) 94 U.S. 113.

[4] (1877) 96 U.S. 97.

[5] (1884) 110 U.S. 516.

[6] (1898) 169 U.S 366.

[7] (1898) 172 U.S. 269.

[8] (1898) French *vs.* Barber Asphalt Paving Co. (1901) 181 U.S. 324.

Justice Brown said in Holden *vs.* Hardy: "The constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power so to amend their laws as to make them conform to the wishes of their citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land. . . . We concur in the following observations of the Supreme Court of Utah in this connection: '. . . Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety or comfort of the people, or to secure good order, or promote the general welfare, we must resolve them in favor of the right of that department of the government.'"

THE POLICE POWER, A PRODUCT OF THE RULE OF REASON

By the Hon. George W. Wickersham, Former United States Attorney-General

(From the *Harvard Law Review*, February, 1914)

A well-known writer on the police power calls it "The law of overruling necessity," [1] and he adds:

> The law of necessity has been stated to be an exception to all human ordinances and constitutions, yet has been frequently decided to be subject to the law of reason, and subject to the control of the courts.

It would be more accurate to say that the entire doctrine of the police power of the states is the creation of the courts, evolved from the necessity of harmonizing provisions of written constitutions of states and nation with the imperative needs of civilized society. It is the result of the application of the "rule of reason" in the construction of written constitutions. For the absence of exact definitions of such words as "to deprive," "liberty," "property," "due process of law," "equal protection of the laws," "privileges and immunities," and the like, in constitutions,[2] left room for but one conclusion, to paraphrase the language of the Chief Justice in the Standard Oil Case,[3] which is, that it was expressly designed not to unduly limit or extend the application of the constitution by precise definition, but, while fixing a standard, that is, by declaring the ulterior boundaries

[1] Prentice, W. P., The Police Power, p. 6
[2] See Francis J. Swayze on the Fourteenth Amendment, 26 *Harv. L. Rev.* 1.
[3] Standard Oil Co. *vs.* United States, 221 U.S. 1, 63.

which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law, and the duty to apply and enforce the public policy embodied in the constitution in every given case, whether any particular act of a legislative body was, within the contemplation of the constitution, permitted or forbidden. That is to say, the rule of construction, to be applied to constitutions as well as to statutes, must be the spirit and intent of the people or their representatives, and therefore the prohibition of a constitution must be held to extend to acts "even if not within the literal terms" of the constitution, "if they are within its spirit, because done with an intent to bring about the harmful results which it was the purpose of the" constitution to prohibit.[1] And on the other hand, that such prohibition must not be held to extend to acts which, while within the literal terms of a constitutional prohibition, could not have been intended by the people to be prohibited to legislative competence, because of the obvious injury to public interests which would result from such prohibition.

The inhabitants of the thirteen original states of our federal union, with common accord, embodied their conceptions of proper governmental organization in written constitutions, carefully devised to insure the expression and limitations of the powers of government, and the distribution of those powers among three distinct, although coördinated, branches. "The theory of our government, state and nation, is opposed to the deposit of unlimited power anywhere."[2]

In almost every one of these constitutions there was embodied a bill of rights — an enumeration of the rights which the people intended to secure to every individual of the community, for his protection in his life, his liberty, his right to labor in his own way, and the protection of the property which should be the fruit of his labor. These provisions, more or less detailed in the constitutions of the different states, were designed to restrict and control the activities of the legislative and executive branches of the government, and thus to secure the blessings of civil liberty to the people of those states and their posterity.

"Civil liberty," said Judge Sharswood, "the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained except by equal, just and impartial laws."[3]

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The fact that the Constitution of the United States, as originally framed, contained no bill of rights, was the subject of serious com-

[1] United States *vs.* American Tobacco Co., 221 U.S. 106, 177.
[2] Loan Association *vs.* Topeka, 20 Wall. (U.S.) 655.
[3] 1 Sharswood's Blackstone, 127, note 8.

plaint, and the first Congress, on September 25, 1789, adopted and proposed to the legislatures of the several states ten amendments, which were ratified between that date and December 15, 1791. These amendments embodied, as restrictions upon the action of the federal government, many of the provisions familiar to all the state constitutions, imposing restraints upon action of the state governments.

It seems incredible that any intelligent student of government should have questioned the power and duty devolved upon the judiciary by these constitutions to inquire, when a question arose in a case coming before the courts, whether or not an act of the legislature, or of the Congress, violated some express provision of fundamental law. Not only was such a duty the necessary result of the establishment of constitutions purporting to regulate or circumscribe legislative action, and granting to the courts exclusive judicial power, but the constitutions of four of the New England states contained express provisions authorizing the legislature, or the governor, for their guidance in keeping within the constitutional bounds applicable to their respective functions, to require the opinions of the justices of the highest court of the state upon important questions of law, and upon solemn occasions.[1]

No such provision, however, being found in the Constitution of the United States, the justices of the Supreme Court from the very beginning declined to answer questions at the request of the executive, holding that the exercise of judicial power required them merely to decide questions or controversies coming before them in the course of the ordinary administration of justice.[2] But the court also held that when such questions arose in such cases or controversies, they would not hesitate to measure a law invoked in support of any given act with the constitution of the state or nation from which the power to legislate was derived, or by which it was qualified or restrained, and to declare it to be invalid if it exceeded the limits expressed in such grant or regulation.[3]

The opinion of Chief Justice Marshall in Marbury *v.* Madison, the case referred to, for a century has been followed by the Supreme Court. Its reasoning has never been answered. The courts of the states and of the nation have uniformly recognized and discharged the

[1] See Const. of Mass. 1780, Chapter 3, Article 2; Const. of Maine, 1819, Article 6; Const. of New Hampshire, 1902, Article 73; Const. of Rhode Island, 1842, Article 10.

Similar provisions were embodied in the Const. of South Dakota, 1889, Article 5, Section 13, and that of Missouri prior to 1875 contained a like provision. See note to 1 Thayer's Cases on Const. Law, p. 175.

By the Supreme Court Act (1875) of Canada, as amended by 54 and 55 Vict., Chapter 25, the Governor-General in Council, and in some cases the Senate or the House of Representatives of the Dominion Parliament, are empowered to call upon the justices of the Supreme Court for opinions on questions of law.

[2] Marshall, Life of Washington, Vol. V, p. 441; Sparks, Life of Washington, Vol. X, p. 359.

[3] Marbury *vs.* Madison, 1 Cranch (U.S.) 137, 177.

duty of passing upon the constitutionality of acts of state or national legislatures respectively, when they arose in cases coming before them. In no other way could the mandates of constitutions have been made effective; in no other way, certainly, could the supremacy of the federal Constitution have been maintained — a supremacy which was declared in the language of the Sixth Article:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The existence of this power and duty was universally accepted [1] despite the partisan outbreak of Mr. Jefferson after the decision in Chisholm *vs.* Georgia in 1793, and by Andrew Jackson a quarter of a century later, until very recent times, when, for similar reasons, — namely, because the construction put upon constitutional provisions by the courts offended a radical faction of the community, — a renewed and even more violent assault was made upon the exercise of this judicial power.

With great subtlety, but with singular inaccuracy, the most conspicuous leader of this attack has characterized the action of the judiciary in holding state statutes unconstitutional, to be the performance, not of the ordinary judicial function, but of "the function which no other judge in the world performs of declaring whether or not the people have the right to make laws for themselves on matters which they deem of vital concern." [2]

The statement is wide of the fact. In nearly every one, if not all, of the English colonies whose governments are embodied in written constitutions by which a separation is effected between the executive, legislative, and judicial functions, the courts of the colonies exercise power to pass upon the constitutionality of acts of the legislature, and their decisions are, under certain conditions, subject to review by the Judicial Committee of the Privy Council in England.

Thus, in Buckley *vs.* Edwards, L. R. [1892] A. C. 387, the Privy Council held an act of the legislature of New Zealand to be invalid because unauthorized by the constitution of that colony.

In Webb *v.* Outrim [1907] App. Cases, 81, on appeal to the Privy Council from a decision of the Supreme Court of Victoria, the powers

[1] Mr. C. A. Beard, in an article entitled "The Supreme Court, Usurper or Grantee," in the *Political Science Quarterly*, March, 1912, p. 1, has amply demonstrated the fact that the framers of the federal Constitution whose views on the subject are recorded recognized that the necessary effect of its provisions would be to empower the judiciary to declare void any acts of Congress or of state legislatures which would violate the limitations imposed by the Constitution.

[2] Roosevelt, Theodore, Judges and Progress, *The Outlook*, Jan. 6, 1912.

of that colony under the constitution of the Commonwealth of Australia were considered, and it was held that the Parliament of the Commonwealth had no power to take away from the colony the right to appeal to the King in Council existing in that case; and the power of the colony, under the constitution to impose an income tax, even on the salary of an officer of the Commonwealth, was considered and determined.

Very recently the Privy Council in England, on appeal from the Supreme Court of Canada from opinions given by it in answer to questions submitted by the Governor-General in Council concerning the power of the Dominion to enact a law relating to solemnization of matrimony, gave authoritative construction to certain sections of the constitution of the Dominion of Canada (The British North America Act, 1867, Sects. 91 and 92), and defined the limits of Dominion control over provincial legislation on the subject of marriage.[1]

The same power is constantly exercised by the Supreme Court of Canada[2] and by the High Court of Australia.[3]

Mr. Herbert Pope, in a recent article,[4] explains, in an able review of its Parliamentary history, why in England no court exercises the power to declare an act of Parliament unconstitutional, by showing that not merely is there no written constitution of Great Britain, but that Parliament itself has always exercised judicial powers, and has been and continues to be the highest court of the realm. But under the American state and federal constitutions the legislature possesses no judicial powers, and as Mr. Pope says, "The meaning of the constitution *as law* could be determined only by the judgment of some court, and Congress, under the Constitution, is not a court."

In the construction of constitutional provisions made for the protection of individuals the courts early recognized what Mr. Justice Holmes so well expressed in a comparatively recent case, that:

> In modern societies every part is related so organically to every other that what affects any portion must be felt more or less by all the rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that in the working of a statute there is some tendency logically discernible to interfere with commerce or existing contracts. Practical lines have to be drawn and distinctions of degree must be made.[5]

In the year 1835, Chancellor Walworth, in deciding a case in the New York Court of Chancery, said:

[1] See L. R. App. Cases [1912] p. 880.
[2] Todd, Parliamentary Government in the Colonies, pp. 220, 363–366.
[3] See Huddart Parker & Co. *vs.* Moorehead, 8 Comw. L. R. 330; The King *vs.* Commissioners, ibid. p. 419.
See also Moore, Constitution of the Commonwealth, 2 ed., Part 6, chap. 1.
[4] 27 *Harvard Law Review*, 45.
[5] Diamond Glue Co. *vs.* U.S. Glue Co., 178 U.S. 611, 616.

But in a state which is governed by a written constitution like ours, if the legislature should so far forget its duty, and the natural rights of an individual, as to take his private property and transfer it to another, where there was no foundation for a pretense that the public was to be benefited thereby, I should not hesitate to declare that such an abuse of the right of eminent domain was an infringement of the spirit of the constitution; and therefore not within the general powers delegated by the people to the legislature.

But while I deny to the legislative power the right thus to take private property for the mere purpose of transmitting it to another, I admit that the two branches of the legislature, subject only to the qualified veto of the executive, are the sole judges as to the expediency of making police regulations interfering with the natural rights of our citizens, which regulations are not prohibited by the constitution.[1]

In the great case of Commonwealth *v.* Alger, 7 Cush. (Mass.) 53, Chief Justice Shaw, with that masterful grasp on principles of law and government that always characterized him, analyzed and expounded the relation between constitutional provisions, adopted for the preservation of individual rights, and the powers of government by which those rights must be qualified, in order that, without impairment of the substantial and essential rights of the individual in a free state, government may nevertheless go forward and discharge its necessary functions for the benefit of society at large — the commonwealth. He said:

We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.

He added:

[1] Varick *vs.* Smith, 5 Paige's Chancery, 136, 159.

It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well-ordered governments, and where its fitness is so obvious, that all well-regulated minds will regard it as reasonable. . . . (pp. 84–86)

The limits of the case under consideration did not lead the Chief Justice to a discussion of the many other cases where the fitness of the exercise of such power is not so obvious that its reasonableness would be agreed to by "all well-regulated minds."

In the year 1837 the same principle was recognized by the Supreme Court of the United States, in a case involving the constitutionality of a state statute requiring the master of every vessel bringing immigrants from any other country, to report to the authorities of the state in which the port of arrival was situated certain facts concerning such immigrants. It was claimed that this statute amounted to a regulation of foreign commerce, and therefore was invalid, because in conflict with the power over that subject conferred upon Congress by the federal Constitution. In holding that it did not so conflict, the court, by Justice Barbour, affirmed

That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty, of a state to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.[1]

In Prigg *vs.* Commonwealth, 16 Peters (U. S.) 539, in holding unconstitutional and void an act of the legislature of Pennsylvania, purporting to punish as a public offense against the state the act of seizing and removing a slave by his master, which the court held the Constitution of the United States was designed to justify and uphold, Mr. Justice Story said:

To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the states, and has

[1] City of New York *vs.* Miln, 11 Peters (U.S.) 102, 139.

never been conceded to the United States. It is wholly distinguishable from the right and duty secured by the provision now under consideration, which is exclusively derived from and secured by the Constitution of the United States, and owes its whole efficacy thereto. We entertain no doubt whatsoever that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers. The rights of the owners of fugitive slaves are in no just sense interfered with or regulated by such a course; and in many cases the operations of this police power, although designed generally for other purposes, for the protection, safety, and peace of the state, may essentially promote and aid the interests of the owners. But such regulations can never be permitted to interfere with or to obstruct the just rights of the owner to reclaim his slave, derived from the Constitution of the United States, or with the remedies prescribed by Congress to aid and enforce the same. (p. 625)

In giving scope to the exercise of this so-called police power the Supreme Judicial Court of Massachusetts has been, perhaps, more scrupulously regardful of the limitations upon its exercise imposed by constitutional restrictions than the courts of any other state. Chief Justice Knowlton, in the case of Commonwealth *vs.* Strauss, 191 Mass. 545, 550, defined this power as including "the right to legislate in the interest of the public health, the public safety, and the public morals. If the power is to be held within the limits of the field thus defined," he said, "the words should be interpreted broadly and liberally. If we are to include in the definition, as many judges have done, the right to legislate for the public welfare, this term should be defined with some strictness so as not to include everything that might be enacted on grounds of mere expediency."

The legislature of Massachusetts has also exhibited a commendable desire to restrain its action within the boundaries of constitutional power, by frequently requesting the opinions of the justices of the Supreme Court as to the constitutionality of measures proposed to be justified under the exercise of the police power, and in every instance, so far as the writer has been able to ascertain, the legislature has acquiesced in the expression of opinion thus invoked.[1]

The adoption of the Thirteenth and Fourteenth Amendments to the United States Constitution, particularly the provision forbidding states to make laws which shall abridge the privileges or immunities of citizens of the United States, deprive any person of life, liberty, or property without due process of law, or deny to any person within the jurisdiction the equal protection of the laws, forced upon the Supreme Court of the United States a more careful and comprehensive con-

[1] See 200 Mass. 619, 622; 211 Mass. 605; 207 Mass. 601; *ibid.* 606; 211 Mass. 618.

sideration of the limits of the police power than previously had been incumbent upon that tribunal. In a line of cases, too well known to require or justify enumeration here, the Supreme Court has analyzed and discussed the extent to which constitutional prohibitions or fundamental principles are and must be modified by that uncertain reserve power in the states known as the police power. It should be remembered that the whole doctrine of the police power is of judicial origin; that no provision in the Constitution of the United States, nor, so far as the researches of the present writer have shown, in that of any state, expressly limits or qualifies the declaration of the rights which they purport to secure to individuals, by the further declaration that any law which the legislature may choose to enact for the avowed purpose of protecting public health, public safety, or public morals, or of providing for the general public welfare, shall be valid, notwithstanding any effect which such law may have upon the rights guaranteed by the Constitution.

There are in many of the modern State constitutions provisions expressly subordinating all corporation to the police power. Such provisions are generally expressed in such language as the following:

> The police power of the State shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State.[1]

Such provisions, obviously, are intended, not to weaken, but to strengthen provisions in the Bills of Rights in behalf of individuals.

The wisdom and the necessity of the creation of some such doctrine as that of the police power may well be recognized; but in that recognition credit also should be given to the sagacity of the judges who first perceived the impossibility of carrying on government without some such lubricant, and who therefore formulated and applied the theory of the police power.

Criticism of the failure of the judiciary to extend this principle in some instances to particular cases of novel and experimental legislation for social betterment should be silenced by a recognition of the far-seeing statesmanship which first led courts by the application of "the rule of reason" to enunciate the doctrine of the police power and the necessity of so applying it as not to override express constitutional provisions.

In the Slaughter-House Cases, 16 Wall. (U. S.) 36, in which the doctrine first received extensive consideration by the Supreme Court

[1] See constitutions of Pennsylvania (1873), North Dakota (1889), Montana (1889), Mississippi (1890), Kentucky (1890), Virginia (1902), South Dakota (1898), Louisiana (1898), Idaho (1889). The constitutions of Wyoming (1889) and New Mexico (1911) contain a clause, "The police power of the state is supreme over all corporations as well as individuals." (Thorpe's constitutions.)

after the adoption of the Fourteenth Amendment, Mr. Justice Field, in his dissenting opinion, said:

> With this power of the state and its legitimate exercise I shall not differ from the majority of the court. But under the pretense of prescribing the police regulation the state cannot be permitted to encroach upon any of the just rights of the citizens, which the Constitution intended to secure against abridgment. (p. 87)

No student of the history of the legislation enacted, and that sought to be justified under this power, can fail to recognize that the apprehension suggested in this statement has been realized, and that the rights intended to be secured to citizens under state and federal constitutions have been and are being continually encroached upon in the interests of what is vaguely known as "the public welfare."

If the views suggested by Mr. Justice Holmes, in dissenting from the majority opinion in Lochner *vs.* New York,[1] should prevail, and courts be held to have "nothing to do with the right of a majority to embody their opinions in law," written constitutions had better be avowedly and formally abolished, as bills of rights would then become mere mockeries.

But such views have not always prevailed, although they certainly have affected the modern tendency of decision in the Supreme Court.

Professor Freund[2] defines the term "police power" "as meaning the power of promoting the public welfare by restraining and regulating the use of liberty and property."

Professor Tiedeman, in the preface to his treatise on "State and Federal Control of Persons and Property in the United States," says that the police power is properly confined to the detailed enforcement of the legal maxim *sic utere tuo ut alienum non lædas*, and he quotes, with approval, a passage from an opinion of Judge Henshaw in the Supreme Court of California, in which that judge says that while the police power is one whose proper use makes most potently for good,

> In its undefined scope and inordinate exercise lurks no small danger to the republic; for the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws none the less dangerous because well meant.[3]

In Bartemeyer *vs.* Iowa,[4] Mr. Justice Field, who had dissented from the decision of the court in the Slaughter-House Cases, in an opinion concurring with the majority, stated the position of the judges who had dissented in those cases to be, not that they contended that the Fourteenth Amendment *interfered* in any respect with the police power

[1] 198 U.S. 45, 75.
[2] Freund, The Police Power, Preface.
[3] 112 Cal. 468, 473.
[4] 18 Wall. (U.S.) 129.

of the state or was adopted for any such purpose; but that under the pretense of prescribing a police regulation the state could not be permitted to encroach upon any of the just rights of the citizens which the Constitution intended to guard against abridgment; and because in their opinion the act of Louisiana under consideration in the Slaughter-House Cases went far beyond the province of a police regulation and created an oppressive and odious monopoly they regarded it as unconstitutional.

In almost every case in which the constitutionality of legislation sought to be held under the police power has been considered by the Supreme Court, the court has taken pains to declare that a state cannot, under the pretense of the exercise of the police power, encroach upon the powers of the general government or rights granted or secured by the supreme law of the land.[1]

But, as Mr. Justice Holmes said in Otis *vs.* Parker,[2]

> General propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree.

In the case of Holden *vs.* Hardy[3] the court, in discussing the question whether or not a state law violated the due process clause of the Fourteenth Amendment, referred to many local reforms which had been enacted in the states, saying that they were mentioned only for the purpose of calling attention to a probability that other changes of no less importance might be made in the future, "and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land." (p. 387)

This case perhaps was the first one to suggest that the doctrine of expediency should control the judgment of the court in measuring state enactments with constitutional requirements. The premise upon which it was based has been proved untenable by a recent demonstration, in the adoption of two constitutional amendments within a short time of their proposal, that the Constitution of the United States may be easily amended *when a substantial majority of the people desire it to be done.*

[1] See Beer Co. *vs.* Mass., 97 U.S. 25, 28; Butchers' Union *vs.* Cresent City Co., 111 U.S. 746, 754; Lochner *vs.* New York, 198 U.S. 45.
[2] 187 U.S. 606, 608.
[3] 169 U.S. 366.

In an earlier case, the Supreme Court repudiated the proposition that a state, in the face of the Fourteenth Amendment, could make due process of law of anything which it chooses to declare as such, saying:

> To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.[1]

But the *opinion*, if not the actual *decision*, in Holden *vs.* Hardy is scarcely consistent with this reservation, and in Railroad Co. *vs.* Drainage Commissioners[2] the court, speaking by Mr. Justice Harlan, said: (p. 592)

> We hold that the police power of the state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. . . . And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose.

* * * * * * *

The recognition by the courts of an undefined and undefinable power in the legislature, qualifying the declaration of fundamental individual rights, does indeed impose an arduous duty upon the judiciary in determining when even this wide area of legislation is departed from in the effort to secure utopian conditions through legislation. On the other hand, it opens such a wide and undefined pathway around constitutional restrictions, that nothing but constant vigilance, careful analysis, and inflexible obedience to the spirit and intent of constitutional mandates on the part of the judiciary can prevent the gradual but effective impairment of their force. If the scope attributed to the police power by Mr. Justice Holmes in the Oklahoma Bank Guaranty Cases[3] is to prevail, it is hard to see what restrictions upon legislative effort to promote the social welfare still remain, short of the crude appropriation of individual property for private, as distinguished from public, purposes. "It may be said in a general way," runs his opinion in that case, "that the police power extends to all the great public needs. Camfield *vs.* United States, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion, to be greatly and immediately necessary to the public welfare." Yet that the

[1] Davidson *vs.* New Orleans, 96 U.S. 97.
[2] 200 U.S. 561.
[3] Noble State Bank *vs.* Haskell, 219 U.S. 104, 112.

learned justice recognized that this broad statement requires some qualification is evidenced by his further observation:

> With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. . . . It will serve as a datum on this side, that in our opinion the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line.

In an earlier case[1] the Supreme Court declared that while "the right to exercise the police power is a continuing one . . . yet the exercise of this power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment."

In every case, the courts at all events must inquire[2] "whether the legislature has adopted the statute in the exercise of a reasonable discretion, or whether its action be a mere excuse for unjust discrimination, or the oppression or spoliation of a particular class."[3]

So far from the Supreme Court being open to fair criticism for giving unduly narrow construction to constitutional provisions in favor of public welfare, a more candid criticism might suggest that that great tribunal in common with other courts had yielded somewhat unduly to public criticism in giving effect to legislation, which, however desirable from the standpoint of social reform, yet involves a measurable encroachment upon some of those individual rights to secure which the Fourteenth Amendment was adopted.

Modern criticism of courts apparently proceeds upon the theory that constitutional provisions shall be enforced only until a certain number of people who are able to give expression to their views in newspapers, magazines, and on the lecture platform shall contend that some other principles should control legislative action. The theory of the framers of constitutions in the past has been that their provisions were to be more than temporary in duration, and that they should be respected and enforced, until a sufficiently large number of people should disagree with them to bring about a modification of the constitution in the method provided in such instrument; and that the question whether or not legislative or executive action exceeded constitutional limitations should not be left to the final determination of those acting, but, when arising in the course of litigation, should become a judicial question, to be determined by the courts of justice. This has been the American theory of constitutional government; and it is interesting to note that the same theory was deliberately adopted in one of the newest and, in some respects, the most radical of English federations, — Australia.

[1] Dobbins *vs.* Los Angeles, 195 U.S. 223–239.
[2] Holden *vs.* Hardy, 169 U.S. 366, 398.
[3] See also Dobbins *vs.* Los Angeles, *supra*, and cases cited on pp. 236–238.

In the convention which framed the constitution of the Commonwealth of Australia it was proposed that when any law passed by the Commonwealth Parliament was declared unconstitutional by a decision of the High Court, the executive might, upon the adoption of a resolution by absolution majorities in both houses, or in one house alone, refer the law to the electors for their approval, and, if so approved, that the same should become a law notwithstanding the constitution — in effect Colonel Roosevelt's proposition for the recall of judicial decisions.

But Mr. Moore, in his work on the "Constitution of the Commonwealth," says:

> The proposal received no support, and the maintenance of the individual right to impugn laws is the more significant because in other respects the constitution differs markedly from the Constitution of the United States in not establishing rights of individuals against governmental interference.[1]

The constitution, as adopted, expressly empowered the Parliament, "subject to this constitution," "to make laws for the peace, order, and good government of the Commonwealth, with respect to" certain enumerated subjects, and authorized Parliament to confer original jurisdiction upon the High Court in any matter "arising under this constitution, or involving its interpretation." Not only was the finality of judicial interpretation of constitutional power recognized as incident to the ordinary administration of justice, but it was also provided that under certain conditions the executive or the legislature might require the opinions of the justices of the High Court upon constitutional questions, and it was further declared,

> No appeal shall be permitted to the Queen in Council from the decision of the High Court upon any question howsoever arising as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any state or states, or as to the limits *inter se* of the constitutional powers of any two or more states, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.[2]

It would be well if the exercise of the police power could be limited by the test often enunciated, but not always followed, of reasonableness, as distinguished from arbitrary or capricious action.[3]

But the pressure is very great on the part of social reformers to compel legislation which transcends constitutional restrictions, and seeks justification under the elastic boundaries of the police power,

[1] See Moore, Constitution of the Commonwealth, 2 ed., Melbourne, 1910, p. 360.

[2] See Edgerton, Federations and Unions within the British Empire, Oxford, 1911, pp. 58, 66, 212, 214.

[3] State *ex rel.* Davis *vs.* Clausen, 117 Pac. 1101.

See also "Judicial Construction of Fourteenth Amendment," by Francis J. Swayze, 26 *Harvard Law Review*, 1.

and any interference with their programs by decisions of courts based upon constitutional limitations is received by them with impatience, and provokes them to intemperate attacks on judges and the exercise of the judicial function just described. The leader of the radical movement against the judicial enforcement of constitutional limitations has declared his belief that courts should continue to have the power to declare void unconstitutional legislation, but, he adds, "only provided the power is exercised with the greatest wisdom and self-restraint." [1] If the continued existence of governmental functions were to be dependent upon officials always exercising powers vested in them "with the greatest wisdom and self-restraint," it may be questioned how long government could continue. Certainly there have been times when the executive office under such a test would have had to go into commission. There are infirmities in all human institutions, but government is an exceedingly practical business. The framers of our institutions believed that the welfare of society would suffer if the legislature had unlimited power. When the states became members of a federal union the short experience under the original Articles of Confederation demonstrated the need of a stronger central government, and of some power to prevent either state or national government from encroaching upon the domain assigned to the other. This power was provided in an impartial judicial establishment. Our forefathers had suffered from various kinds of tyranny. They proposed to protect the individual citizen in his life, his liberty, his reputation, and his property, against any form of oppression, and to that end they formulated and embodied in the fundamental law declarations of rights which were to be forever recognized and preserved. The judiciary was made the guardian of those rights. In the discharge of that sacred trust it has sometimes erred; but on the whole it has not allowed the letter to stifle, but has been quickened by the spirit of liberty under law. Mr. Justice Holmes recently said he did not believe the Union would be imperiled if the Supreme Court lost its power to declare an act of Congress void; but he added, "I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the commerce clause was meant to end." [2]

Whether the power be taken away directly, or be deadened and atrophied in its action by adverse criticism and demagogic clamor, when the judiciary no longer shall feel at liberty to construe the provisions of the fundamental law "in the light of reason," constitutional

[1] *The Outlook*, *supra*, Jan. 6, 1912.

[2] Speech by Mr. Justice Holmes before the Harvard Law Association, New York, Senate Doc. No. 1106, 62d Cong., 3d session.

government, in the sense in which it has been understood for a century and a half, will be at an end, and the doctrine of the police power will have been swallowed up in the capacious maw of unrestrained democracy.

STATE POLICE POWERS AND FEDERAL PROPERTY GUARANTEES

By Charles C. Marshall of the New York Bar

(From the *Columbia Law Review*, March, 1904)

The Federal Constitution as originally adopted contained only two clauses that could be said to be guarantees of property rights[1] as against the exercise by the States of their Police Powers. They were contained in the Commerce Clause, providing that Congress shall have power to regulate commerce with foreign Nations and among the several States, and in the Fugitive Slave Clause. The Commerce Clause, in that it signified freedom of commerce from State control was a guarantee of property rights involved therein, and the Fugitive Slave Clause, in that it secured the return of the fugitive slave was a guarantee to the Slave States of slave property. Both operated to restrain the States in the exercise of their Police Powers touching the property in question.

We do not overlook the provisions forbidding the States to pass laws impairing the obligation of contracts, that full faith and credit should be given by each State to the public acts, records and judicial proceedings in every other State, that the citizens of each State should be entitled to all the provisions and immunities of citizens in the several States, nor such provisions as those delegating to the National Government the power to tax, to establish uniform bankruptcy laws, and to coin money and regulate the value thereof, and to fix the standard of weights and measures. All these may at times affect property rights and possibly override some manifestations of State Police Powers, but their effect is indirect and incidental and they are in no sense limitations on State sovereignty in respect to property rights and are not to be considered here.

The jealousy by the States of the Federal Power which thus showed itself in the Federal Constitution as originally adopted was none the less active in 1789 when the first ten amendments were added, for, as is well known, these were directed against the National Government in their restrictive effect and were not intended to apply to the

[1] It is, of course, Common Law property rights which are referred to. Special property rights, such as patents, copyrights, etc., are excepted from consideration here.

States. They in effect provided, touching property, that no person should be deprived by the Federal Government of life, liberty or property without due process of law, and that private property should not be taken by the same for public use without compensation. The States in these respects were still left free of Federal limitations.

* * * * * * *

Each State in the exercise of its Police Power may determine the status of property, may impair and in effect destroy it, whether such property exist originally within the State or come therein from other States in which it enjoys the full property status. No interstate rights or obligations can be pleaded by the other States and there is no Federal power or guarantee which they can invoke. Violent as was the revolution in interstate property rights marked by the Fourteenth Amendment, it was confined, with the qualification stated above, to one species of property which it swept out of existence. All other property in the States of the Union remained with attributes and incidents the same as from the beginning wholly subject to the State Police Powers to whose dread exercise property always has yielded as readily as wax in the blaze of the furnace.

It is desirable at this point to refer to cases which reveal, as no definition can, the present limits of the Police Power under our law. We may select the Slaughter House cases;[1] Mugler *vs.* Kansas;[2] Munn *vs.* Illinois.[3]

In the Slaughter House cases the Court sustained the exercise of the Police Power by the State of Louisiana in a statute which in effect destroyed the value of a large amount of property in lands and buildings and fell with crushing force upon the citizens of the State engaged in slaughtering. The statute provided that that business should be entirely given over to a single corporation, or, if pursued by others, should be conducted on the premises of such privileged corporation upon payment thereto for the privilege. We quote from the language of Mr. Justice Field in his dissenting opinion:

> The act of Louisiana presents the naked case, unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively for twenty-five years, for an extensive district and a large population, in a single corporation, or its exercise is for that period restricted to the establishments of the corporation, and then allowed only upon onerous conditions.

In the case of Mugler *vs.* Kansas, the State statute prohibited the manufacture and sale of intoxicating liquors for use as a beverage,

[1] (1872) 16 Wall. 36. [2] (1887) 123 U.S. 623. [3] (1876) 94 U.S. 113.

declared all places for their manufacture, sale or gift, common nuisances, and provided that upon the judgment of a Court to that effect, the sheriff should close them and *destroy all property* including not only liquors, but screens, bars, tables, glasses and other property used therein, irrespective of the fitness and value of such property for other and innocent purposes. The owner was upon conviction to be punished by fine and imprisonment. No jury trial was provided for.

In the Grain Elevator Case, Munn *vs.* Illinois, it was held that a State Legislature could fix by law the maximum charges for the storage of grain in warehouses in the State held in *private ownership*, and it was asserted that private property, when it is devoted by the owner to a public use or the prosecution of a business affected with a public interest, is subject to legislative regulation in respect to prices and charges. This decision profoundly affected all property interests in the United States, and may be considered as one of the most momentous ever rendered by the Court. By subsequent decisions,[1] the Court held that such prices and charges must be reasonable, and that the power to review the Statute fixing them and to hold the same unconstitutional and void for unreasonableness was a judicial power — a qualification which mitigates to some extent the sweeping character of the first decision. But as this rule of reasonableness must change with public sentiment, and yield to economic and political exigencies, to the influence of which courts as well as legislatures are subject, its efficacy may well be doubted.

Such being our Constitutional Law of property rights, it is difficult to discover any basis for that rigid conception of property which prevails in American life, for that widespread notion of Federal property guarantees ready to be invoked by the citizens of the States, for that conviction so deeply imbedded even in intelligent minds that the legal conception of property is definite and permanent, that "property" existed prior to the Constitution and is superior to it, and that the principal object of that instrument is to preserve it forever in its original lines regardless of economic, social and moral changes, the exigencies of society and the very life of the State itself.

So distinguished an authority on the practical side of the property question as Mr. Morgan in his testimony in the Northern Securities Case, defined the principle of community of interests as "that principle that a certain number of men who own property, can do what they like with it." It is clear that under our law the most powerful individual cannot do as he likes with his property. The artificial ownership that arises from combination or incorporation as hereafter more fully pointed out, so far from extending the rights of property, limits

[1] C. M. & St. P. R. R. Co. *vs.* Minnesota (1889) 134 U.S. 418; Covington & Lex. Road Co. *vs.* Sanford (1896) 164 U.S. 578.

them and subordinates them further to the public interest. The Common Law maxim, "A man may do as he will with his own," is frequently quoted. The qualification which the Common Law always attached is overlooked or disregarded — "so that he does not injure another." In the first clause of the maxim is the sum and substance of the Common Law of private property; in the second clause is its condensed doctrine of the Police Power. To state either without the other is a manifest perversion.

It was the grave contention of the coal owners that the late controversy between them and their employees was a purely private affair, in which the public had no interest. Through artificial combination they had stifled competition, and possessed themselves practically of the national anthracite coal supply. They had as donations from the Public their right of combination, perpetuity of existence in their corporations, their railway franchises across the public domain. With all this they asserted that their rights and duties were only those of private owners. The claim was even made that inasmuch as the Public could use bituminous coal, anthracite coal was not a necessary of life, and that therefore the Public had no interest in the situation — a suggestion which savored much of the innocent inquiry of the Queen of France, at a somewhat critical period of the world's history, "If the people cannot get bread, why don't they eat cake?" Not less remarkable were the claims of labor combinations on the opposite side of the controversy in respect to their commodity of labor. The true answer to the claims of both parties is that as the one side by combination had assumed the duty of supplying the Public with coal, and as the other side had assumed the duty of supplying the Public with labor, both had entered upon a service or duty affected, yes, dominated, by a public interest, and the interposition of the Public by way of legislative action, and even by the much criticised action of the Chief Federal Executive, may have had, under the doctrine of the Grain Elevator Case, and the force of the Commerce Clause, a firmer legal and constitutional basis than was apprehended at the time.

Not the least important fact in that Case was that the property affected was vested in individual as distinguished from corporate ownership. It was quite generally conceded that if the grain elevators had been owned by corporations in the enjoyment of public franchises, the decision of the Court would have rested on a firmer basis, but the basis of the decision, as we have said, was not the nature of the ownership, but the fact that the property affected was "devoted to the public use" or "affected with a public interest."

Space does not permit of commenting further on that momentous decision. We may however refer here briefly to its importance to the interstate corporation question. It may be said that a "trust," (and by that is meant nothing more than the corporation of sufficient

size to absorb all or a substantial part of a particular class of property, manufacture or trade), in that it assumes to supply the Public with a particular service or commodity,[1] becomes thereby "affected with a public interest" and therefore, within the doctrine of the Grain Elevator Case, peculiarly subject to legislative control. In view of this fact, the recourse of the most important property and industrial interests of the country to incorporation as a method of ownership and development would seem to be fraught with some peril, and if some late writers on political economy are correct, to verify the maxim, "Whom the Gods would destroy they first make mad."

The enormous industrial expansion and material development of the last twenty years has necessarily engendered interstate property problems of great magnitude. Railway extensions and consolidations,[2] irrigation schemes,[3] sanitary systems,[4] and municipal water supplies[5] have brought before the Supreme Court interstate questions of novel aspect and great importance. To these conditions the vast increase in the corporate form of ownership and enterprise have largely added. "The trust" as defined above, in its largeness of resources, which is the essential result of combination, easily groups in one artificial ownership, created and localized in one State, property and rights existing in and ramifying through many different States. Every such artificial ownership may raise interstate questions, may present a conflict between property rights and Police Powers, for under our Federal system every such artificial ownership rests upon quite a different legal basis from that which underlies individual or natural ownerships.

The Constitution provides by Article IV that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, but it nowhere provides that the corporations of each State shall be so entitled.[6] Therefore, while citizens of each State may in common with the citizens of any other State acquire and hold property within that State, a corporation created in one State cannot acquire and hold in corporate ownership property in another State whose laws forbid such corporate ownership.

[1] The corporation embracing the trolley lines, gas and electric interests of several counties in New Jersey calls itself "The Public Service Corporation."

[2] The Northern Securities Merger.

[3] Kansas *vs.* Colorado (1902) 185 U.S. 125.

[4] Missouri *vs.* Illinois (1900) 180 U.S. 208.

[5] New York City *vs.* Pine (1902) 185 U.S. 93.

[6] Corporations as is well known have been held by the U. S. Supreme Court not to be citizens, and hence not to be entitled to the privileges of citizens within the provisions of Article IV of the Federal Constitution. Santa Clara Co. *vs.* Southern Pac. R.R. (1885) 118 U.S. 394. They are, however, held to be persons and therefore entitled to the protection of the Fourteenth Amendment. Covington Turnpike Co. *vs.* Sanford (1896) 164 U.S. 578. No contention is of course intended to be made in the text that *if a State permits* the acquisition of property within it by a corporation of another State, it can *subsequently arbitrarily* deprive that corporation of its property. The Fourteenth Amendment would, of course, prevent.

It is therefore clear that it is quite within the power of a State to discriminate against the corporations of other States, in the pursuit of its policy and in the exercise of its Police Power. As a State tends to industrial coöperation and an intensified social development, so it will extend its encouragement to the corporate form of ownership and enterprise, but as its policy may be directed against such development, as it may tend toward individualism, it will assuredly legislate against the corporation. No more reasonable issue for a difference in State politics can be found. Individuals as members of the body social and politic, in the nature of things submit themselves to the powers and energies of other *individuals*, as conditions which belong to the natural order of things, but there must be a marked change in fundamental rights and in the status of citizenship as established by the Federal Constitution before the individual citizens of any State can be left wholly exposed to the power of *artificial combinations created by other States.*

Theory and experience alike demonstrate the magnitude of such powers. Our corporations have shown their ability to wield with most oppressive results the despotism of a wealth transcending individual limitations, and to largely impair, if not wholly to reverse the common law condition of competition. It is true that an individual may build up a great fortune, and with it exercise large powers, but in inherent physical limitations and in the shortness of human life, are found sure and certain restrictions upon the exercise of his powers in derogation of the natural rights of his fellows. To withhold property from dead hands, to restrain ownership in perpetuity was one of the prime objects of the Common Law. To these ends the people at large were always engaged in a struggle with vested interests, and perhaps one of the most important questions to-day is to what extent shall corporations be permitted to absorb in perpetual ownership the vast natural properties of the State, such as the coal deposits, the petroleum supply, the iron mines and all those resources which make up the natural wealth of a People.

The testimony and the argument in the Northern Securities case revealed that the paramount purpose of the capitalists promoting the Merger was to vest a large part of the railway interests of the continent, and ultimately of the Oriental trade of the Nation in one corporate ownership with a view to securing the advantage of perpetuity. The journey of the individuals interested, to the State of New Jersey, some two thousand miles away, for incorporation, was picturesquely described by the senior counsel for the Northern Securities Company at the bar of the Supreme Court, as a race with Death.

Taking together the difference in our law, Federal as well as State, between the status of the corporation and the individual as outlined above, the great development of the corporate form of enterprise and

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Taking together the difference in our law, Federal as well as State, between the status of the corporation and the individual as outlined above, the great development of the corporate form of enterprise and

ownership, its economic advantages, its perpetuity of existence, it is evident that the situation must necessarily develop many attempts to affect or control through the corporations of one State the property rights and industrial interests localized in other States, and that such efforts must involve sharp conflicts with the Police Powers of those States.

The issue to which I refer, in one aspect at least, has already been presented to the Supreme Court, for it is a real issue in the Northern Securities Case. Underneath the question whether the Northern Securities Merger is a violation of the Federal Anti-Trust Law, which is the question presented in the case of the United States against that Company, is the more fundamental and perhaps the controlling question,[1] presented in the case of the State of Minnesota against that company, whether the Northern Securities Company, under the sovereignty of New Jersey which created it, can assert rights in property localized in Minnesota, contrary to the statutes of that State enacted in the exercise of its Police Power. It is the same question which inhered in the License Cases and in the Slavery Cases — the paramount right of a State in the exercise of its Police Power to determine the status of property localized or situate within its territorial limits as against the legislation of another State, touching such property. The Fugitive Slave Cause alone prevented the assertion of this right in regard to the escaped slave. The Commerce Clause alone prevented its assertion in regard to the barrel of gin, and then only as to the first sale in the original package. What shall prevent its assertion by the State of Minnesota in respect to the railways of that State? By what Federal Power or Guarantee, by what inherent Sovereign Power of her own, can New Jersey assume to determine the status of the ownership of the railways of Minnesota, and by the alchemy of modern corporation law convert real estate in Minnesota into personalty through the medium of stock certificates, and consolidate in the ownership of a New Jersey corporation the railways of Minnesota, whose consolidation the fundamental law and express policy of that State forbid?

The plea may be made, as it has been made by the Northern Securi-

[1] In making this suggestion the absence of purely technical questions is assumed. There is a question of jurisdiction in the case. It is also well known that a question may exist as to the construction of the statutes of Minnesota. There is no doubt but that the spirit and intent of these statutes forbid such a merger of competing railroads in the State of Minnesota as the Northern Securities Company is intended to secure. A question exists whether the language of the statutes is sufficient on this point. They provide that a railroad corporation, a manager or purchaser of a railroad corporation, shall not consolidate with or in any way become the owner of or control any other railroad corporation, or stock thereof, which owns a parallel or competing line. Whether the Northern Securities Company is such a railroad corporation or a manager or a purchaser within the meaning of the act is a question in the case. It should also be borne in mind that the Minnesota case may be disposed of on some ground touching the injunctive relief asked for. The alleged ownership of the stock was acquired by the Northern Securities Company prior to the commencement of the suit, and under its decisions the Court has the power, if it sees fit, to deny the equitable remedy on the familiar ground of laches or delay.

ties Company in the Minnesota case, that freedom of commerce forbids that the State of Minnesota should have the power to prevent the consolidation of her State railways, in that such consolidation, necessarily affecting interstate commerce, would be interference therewith, and therefore illegal. The object of this plea is obviously to secure the consummation of the purposes of the Northern Securities Company through the nullification of the Railway Law of Minnesota. But the plea contains within itself its own refutation, for surely if the law of the State of Minnesota consolidating her railways is void because inimical to the Commerce Clause of the Federal Constitution, the law of the State of New Jersey creating a corporation which by original purpose or subsequent accident consolidated those railways in a single ownership would be equally inimical to the Commerce Clause. The plea obviously overlooks the fact that the Railway Laws of Minnesota are laws enacted by that State in respect to property within her territorial limits, and rights and interests of her own creation, while the rights asserted by the New Jersey corporation are asserted under a statute of New Jersey in respect to property localized within a sovereignty remote therefrom. But argument in respect to the validity of the plea is superfluous, for the Supreme Court has already spoken. In Louisville & Nashville Railway *vs.* Kentucky,[1] the Court said:

> But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. . . .
>
> It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to instruments of such commerce, so far as the legislation was within its ordinary Police Powers. Nearly all the railways in the country have been constructed under State authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.
>
> If it be assumed that the States have no right to forbid the consolidation of competing lines because the whole subject is within the control of Congress, it would necessarily follow that Congress would have the power to authorize such consolidation in defiance of state legislation —*a proposition which only needs to be stated to demonstrate its unsoundness.*

[1] (1896) 161 U.S. 677.

A State has the right at the inception of its railway development to create one or more railroads within its territory as it pleases, and it is equally undisputed that at all future times it may consolidate or multiply such railroads without in any respect invading the Commerce Power. It would be only in the event of some extreme exigency that Congress could forbid such consolidation or multiplication of State railway facilities with even a pretence of constitutionality. Such Federal action is hardly within the range of possibilities, for another method exists by which Congress could effectuate its purpose in the event of such emergency, and that is by the construction of a Federal railway.

There can be no doubt but that if the Northern Securities Company had been organized in the State of Minnesota for the purpose, under legislative assent, of owning and so consolidating railways within that State, that Company could proceed to the consummation of its purpose. In his argument before the Supreme Court in the case of the United States, the Attorney-General was asked by one of the Justices whether if a company like the Northern Securities Company in its avowed purpose had the legislative sanction of the State whose railways it sought to acquire, such acquisition could be held to violate the Federal Anti-Trust Law. The Attorney-General answered that under those circumstances it *could* be held to violate that law *if* the declared purpose of Congress in respect to interstate commerce would thereby be interfered with. The answer obviously resolved itself into a negative, for the declared purpose of Congress in respect to interstate commerce could not in a *legal sense* be interfered with by the consolidation under State Law of State railways. And so perhaps the Attorney-General intended to imply.

These considerations, if correct, must go far to ameliorate those conditions of hardship which it has been said must surely follow on the decision against the mergers in the Northern Securities Case. For if the Merger is held not to be void as a violation of the Anti-Trust Law, but void only on fundamental considerations of State autonomy, then that large class of consolidations and combinations, to whose creation the State, whose territory embraces the property rights affected has assented, will be safe from attack.

It will be a radical step for the Supreme Court to assent to the proposition that because the mere fact of ownership, whether by an individual or by that association of individuals which is called a corporation, carries with it the power to use property contrary to law, therefore such ownership is invalid.

It will be a still more radical step for that tribunal to sustain the right of one State within the Union, in the development of its property and corporation interests, to invade the fundamental rights of another State over property within its territorial limits, to wreck its policy

in respect to such property, and to render of no effect those Police Powers which the Court for a hundred years has exalted above the Constitution itself.

THE PROGRESSIVENESS OF THE UNITED STATES SUPREME COURT

By Charles Warren, Assistant United States Attorney-General

(From the *Columbia Law Review*, April, 1913)

During the past two years, there has been much agitation directed against the Supreme Court of the United States, frequent reference to "judicial oligarchy," "usurpation" and the like, and demands for fundamental changes in the judicial system under the constitutions, not only of the States but of the United States. An evil is alleged to have grown up requiring radical measures for its correction — an evil consisting in the supposed tendency of the National Supreme Court to invalidate by its decisions the liberal and progressive State legislation of the day.

There is grave danger that through constant iteration the truth of this charge will be assumed, and that the discussion will be confined to the form of remedy needed.

The Bar of this country has too long neglected its duty in allowing this charge to take root in the minds of laymen, swayed by unanswered articles in popular magazines and by uninstructed orators on the stump. Unless the Bar and the law reviews set the real facts constantly before the people, a complete misconception of our greatest Court may prevail to the detriment of its influence and of its powers. The falsity of the charge is easily to be proved.

The reformers who claim that the Court stands as an obstacle to "social justice" legislation, if asked to specify where they find the evil of which they complain and for which they propose radical remedies, always take refuge in the single case of Lochner *vs.* New York decided by the United States Supreme Court in 1905, in which the Court held unconstitutional the bakers' 10-hour day law of New York.[1]

Yet a single case does not necessarily prove the existence of an evil. If the evil is as serious as is claimed, it ought to be easy to point out numerous other cases.

The years 1887 to 1911 inclusive have constituted the period most productive of progressive and liberal — even radical — social and economic legislation in the United States. The evil, if it exists, must have grown up during these years and should appear in the decisions

[1] Lochner *vs.* New York (1905) 198 U.S. 45.

of the Supreme Court of the United States in cases arising under the "due process" and "equal protection of the law" clauses of the Fourteenth Amendment; for under those clauses practically all State legislation of this kind can, sooner or later, be brought before that Court.

The records show that between these years — 1887 to 1911 inclusive[1] — the United States Supreme Court rendered over 560 decisions based on these clauses of the Federal Constitution and involving the validity of State statutes or other form of State action.[2] Examination of these 560 cases conclusively proves that the alleged evil in the trend of the Court is a purely fancied one; for out of these 560 there are only two cases (other than the Lochner Case) in which any State law, involving a social or economic question of the kind included under the phrase "social justice" legislation, has been held unconstitutional by the Supreme Court. One of these two possible exceptions is the *Connolly Case*[3] in which the Court, in 1902, held invalid an Illinois anti-trust law because it illegally discriminated in favor of certain classes; the other exception is a case of minor importance — the *Allgeyer Case*[4] — in which, in 1897, a Louisiana law depriving citizens of the right to order insurance by mail from foreign insurance companies was held invalid as an interference with liberty of contract. Even if it be assumed that all three of these exceptional cases were wrongly decided — three cases out of 560 — yet any court, or any official body — executive or legislative — which on any particular subject makes only three mistakes in twenty-five years, certainly has a remarkable record. Even the People themselves, in their referendums or recalls, might easily err once every eight years.

The National Supreme Court, so far from being reactionary, has been steady and consistent in upholding all State legislation of a progressive type. When this fact is once firmly grasped, it becomes clear that there is no necessity for the introduction of the new remedy — recall of judicial decisions — or for its application to decisions of State courts on questions involving the "police power" or "social justice." For if any State court be found reactionary or inclined to deny the constitutionality of State laws on social or economic matters, a very simple remedy is at hand — the enactment of a single change in the Federal Judiciary Act, a change urged by many lawyers and Bar Associations. The Supreme Court is now confined to passing on only those State statutes whose validity under the Federal Constitution a State court has upheld. If that Act shall be amended so as to provide that an appeal may be taken to the United States Supreme Court

[1] United States Supreme Court Reports, Volumes 123 to 222 inclusive.

[2] In the nineteen years previous — 1868 to 1886 — there were only 46 cases decided under the same clauses.

[3] Connolly *vs.* Union Sewer Pipe Co. (1902) 184 U.S. 540.

[4] Allgeyer *vs.* Louisiana (1897) 165 U.S. 578.

on a decision of a State highest court denying the constitutionality of a State statute, the people of this country can, by that very slight change enacted by Congress, be fully protected against any reactionary State courts (if such exist); and practically every State statute involving great social or economic questions can then be quickly and finally passed upon by the Supreme Court of the Nation, whose progressiveness cannot be denied.

The following synopsis of State legislation upheld by the Supreme Court during the past twenty-five years is the best proof of its success in dealing with the new and advancing conditions of modern sociological, economical and business life. Lawyers and laymen alike may well refresh their memory with the actual record.[1]

Labor Legislation

The Supreme Court has upheld every State labor statute brought before it under these clauses of the Constitution (with the single exception of the New York 10-hour labor law) as follows:

Wages, Etc.

8-hour day law of Utah, for miners (1898); Arkansas law requiring payment of all unpaid wages to railroad employees when discharged (1899); Tennessee law requiring redemption in money of store orders, etc., given to employees for wages (1902); Illinois coal mining classification, coal miner's liability, and coal mine inspection law (1901) (1907); Kansas 8-hour law for labor on public works (1903); Ohio mechanics' lien law (1904); 8-hour law for women of Oregon (1908); Arkansas law preventing contracting for wages on basis of screened coal mined (1909); full train-crew law of Arkansas (1901); Iowa law forbidding railroads to deduct insurance benefits from the wages due employees for injury (1911).[2]

Employees' Injuries

The Supreme Court has upheld every State statute brought before it abrogating or modifying the fellow-servant doctrine — *i.e.*, the

[1] This synopsis includes only cases appealed under the clauses of the Fourteenth Amendment. There are of course many State statutes of a similar nature which have been considered by the Court in cases involving only the question whether the statute was or was not repugnant to the Federal jurisdiction over interstate commerce. Such cases will show an equal progressiveness on the part of the Court — the only statutes of this nature which have not been sustained being those which were a direct interference with the powers of the Federal Government over such commerce. The dates given in the text are dates of actual rendering of decisions, not dates of enactment of the legislation.

[2] Holden *vs.* Hardy (1898) 169 U.S. 366; St. Louis etc. R.R. *vs.* Paul (1899) 173 U.S. 404; Knoxville Iron Co. *vs.* Harbison (1901) 183 U.S. 13; Consolidated Coal Co. *vs.* Illinois (1902) 185 U.S. 203; Wilmington Star Min. Co. *vs.* Fulton (1907) 205 U.S. 60; Atkin *vs.* Kansas (1903) 191 U.S. 207; Great Southern etc. Co. *vs.* Jones (1904) 193 U.S. 532; Muller *vs.* Oregon (1908) 208 U.S. 412; McLean *vs.* Arkansas (1909) 211 U.S. 539; Chicago etc. R.R. *vs.* Arkansas (1911) 219 U.S. 453; C. B. & Q. R.R. *vs.* McGuire (1911) 219 U.S. 549.

outworn doctrine that an employee could not recover damages for injuries due to the negligence of a fellow-employee, as follows:

Laws abrogating or modifying the fellow-servant doctrine on railroads in Iowa (1888); in Minnesota (1888); in Kansas (1895); in Indiana (1899) (1910); in Mississippi (1911); in Iowa (1911); in Arkansas (1911); general abrogation of fellow-servant rule of Minnesota (1905).[1]

Anti-trust Legislation

The Supreme Court has upheld every State anti-trust law brought before it under these clauses of the Constitution with one exception (Illinois 1902), and that exception was due simply to the fact that the Illinois act unconstitutionally discriminated in its application between different classes of persons. The following laws have been sustained:

Anti-railroad consolidation law of Kentucky (1896); anti-trust laws of Texas (1905) (1909), of Kansas (1905), of Arkansas (1909), of Mississippi (1910), of Tennessee (1910); combination law of Wisconsin (1904); law of Iowa against combinations fixing rates (1905); anti-railroad consolidation act of Minnesota (1896).[2]

Laws regulating Sales of Pure Food and other Merchandise and Conduct of Mercantile Business

The Supreme Court has upheld every law regulating sales of pure food and other merchandise and restricting conduct of mercantile business, as follows:

Oleomargarine laws of Pennsylvania (1888), of Massachusetts (1894), of Ohio (1902); pure food laws of Ohio (1903), of New York (1904); sanitary milk law of New York (1905) (1906); law of New Jersey restricting oyster dredging (1907); law requiring paint labels to show ingredients, of North Dakota (1907); inspection fertilizers law of North Carolina (1898); laws of Connecticut (1909) and Michigan (1910) forbidding sales of merchandise in bulk without notice to creditors; law of Oklahoma forbidding sale of certain illuminating fluids (1909); cold storage law of Illinois (1909); Arkansas law forbidding drumming or soliciting business on railway trains (1910);

[1] Mo. Pac. Ry. *vs.* Mackey (1888) 127 U.S. 205; Minn. etc. R.R. *vs.* Herrick (1888) 127 U.S. 210; Chicago etc. R.R. *vs.* Pontius (1895) 157 U.S. 209; Tullis *vs.* Lake Erie etc. R.R. (1899) 175 U.S. 348; Louisville & N. R.R. *vs.* Melton (1910) 218 U.S. 36; Mobile etc. R.R. *vs.* Turnipseed (1910) 219 U.S. 35; C. B. & Q. R.R. *vs.* McGuire (1911) 219 U.S. 549; Aluminum Co. *vs.* Ramsey (1911) 222 U.S. 251; Minn. Iron Co. *vs.* Kline (1905) 199 U.S. 593.

[2] Louisville & N. R.R. *vs.* Kentucky (1896) 161 U.S. 677; National Cotton Oil Co. *vs.* Texas (1905) 197 U.S. 115; Waters-Pierce Oil Co. *vs.* Texas (1909) 212 U.S. 86; Smiley *vs.* Kansas (1905) 196 U.S. 447; Hammond Packing Co. *vs.* Arkansas (1909) 212 U.S. 322; Grenada Lumber Co. *vs.* Mississippi (1910) 217 U.S. 433; Standard Oil Co. of Ky. *vs.* Tennessee (1910) 217 U.S. 413; Aiken *vs.* Wisconsin (1904) 195 U.S. 194; Carroll *vs.* Greenwich Ins. Co. (1905) 199 U.S. 401; Pearsall *vs.* Great No. R.R. (1896) 161 U.S. 646.

Louisiana law restricting private markets (1891); Louisiana law requiring gaugers on coal and coke boats (1895); law of New York forbidding pumping out natural mineral springs (1911); District of Columbia law forbidding gift and trading-stamp enterprises (1911); Missouri law regulating weight of grain, seed and hay and forbidding deductions (1911); fish and game restriction laws of New York (1894) (1909), of Connecticut (1896).[1]

Gambling Legislation

The Supreme Court has upheld every State gambling, bucket shop, and anti-grain-option law brought before it, as follows:

Illinois law against dealing in options in grain, etc. (1902); California sales on margin law (1903); gaming instrument and policy law of New York (1904); California gambling law (1905); Ohio law imposing liability on owner of building used for gambling (1905); bucket-shop law of North Carolina (1906); Missouri law taxing sale of grain, stock, etc. for future delivery (1911).[2]

Liquor and Cigarette Legislation

The Supreme Court has upheld State liquor, prohibition, license and local option laws and anti-cigarette laws as follows:

The prohibition law of Kansas (1887); the liquor laws abating distilleries as a nuisance, of Iowa (1888) (1889); the liquor license laws of California (1890), of Alabama (1908); liquor laws of Texas (1893), of Nebraska (1892), of Ohio (1900); local option laws of Texas (1904) (1906), of Ohio (1904); sales of liquor to women, of Colorado (1904); transfer of liquor license in Massachusetts (1907); Illinois ordinance against sale of cigarettes (1900); laws against sale of cigarettes, of Tennessee (1900), of Iowa (1905); law of Virginia revoking charter of a club for illegal liquor sales (1908).[3]

[1] Powell *vs.* Pennsylvania (1888) 127 U.S. 678; Plumley *vs.* Massachusetts (1894) 155 U.S. 461; Capital City Dairy Co. *vs.* Ohio (1902) 183 U.S. 238; Arbuckle *vs.* Blackburn (1903) 191 U.S. 406; Crossman *vs.* Lurman (1904) 192 U.S. 189; New York *vs.* Van DeCarr (1905) 199 U.S. 552; St. John *vs.* New York (1906) 201 U.S. 633; Lee *vs.* New Jersey (1907) 207 U.S. 67; Heath Co. *vs.* Voist (1907) 207 U.S. 338; Patapsco Guano Co. *vs.* North Carolina (1898) 171 U.S. 345; Lemieux *vs.* Young (1909) 211 U.S. 489; North American Cold Storage Co. *vs.* Chicago (1909) 211 U.S. 306; Waters-Pierce Co. *vs.* DeSelms (1909) 212 U.S. 159; Williams *vs.* Arkansas (1910) 217 U.S. 79; Natal *vs.* Louisiana (1891) 139 U.S. 621; Pittsburgh etc. Coal Co. *vs.* Louisiana (1895) 156 U.S. 590; Lindsley *vs.* Natural Carbonic Gas Co. (1911) 220 U.S. 61; Sperry etc. Co. *vs.* Rhodes (1911) 220 U.S. 502; House *vs.* Mayes (1911) 219 U.S. 270; Lawton *vs.* Steele (1899) 152 U.S. 133; New York *vs.* Hesterberg (1909) 211 U.S. 31; Geer *vs.* Connecticut (1896) 161 U.S. 519.

[2] Booth *vs.* Illinois (1902) 184 U.S. 425; Otis *vs.* Parker (1903) 187 U.S. 606; Adams *vs.* New York (1904) 192 U.S. 585; Ah Sin *vs.* Wittman (1905) 198 U.S. 500; Marvin *vs.* Tront (1905) 199 U.S. 212; Gatewood *vs.* North Carolina (1906) 203 U.S. 531; Brodnax *vs.* Missouri (1911) 219 U.S. 285.

[3] Mugler *vs.* Kansas (1887) 123 U.S. 623; Kidd *vs.* Pearson (1888) 128 U.S. 1; Eilenbecker *vs.* Plymouth County District (1890) 134 U.S. 31; Crawley *vs.* Christiansen (1890) 137 U.S. 86; Phillips *vs.* Mobile (1908) 208 U.S. 472; Giozza *vs.* Tiernan (1893) 148 U.S.

Cattle Legislation

The Supreme Court has upheld State statutes regulating the cattle industry and cattle diseases as follows:

Iowa law fixing absolute liability on all persons having Texas cattle and spreading Texas fever (1889); Utah Act for damages to highway by driving animals (1897); live stock sanitary commission and cattle quarantine law of Texas (1901); Colorado cattle disease law (1902); Idaho law of liability for damages by sheep grazing within two miles of a house (1907).[1]

Laws restricting Freedom of Contract and Action in Individuals

In addition to the foregoing, the Supreme Court has sustained State statutes brought before it regulating the exercise of personal, social or economic rights — *i.e.*, limiting or regulating an individual's liberty of contract or of action, or of conduct of business in behalf of the general welfare of the community. A single exception to its uniform upholding of such laws was the statute of Louisiana restricting rights of owners of cotton to use the mail to obtain insurance in foreign insurance corporations.[2]

The following regulative legislation has been upheld:

West Virginia act licensing physicians (1889); Connecticut druggist license act (1895); registration of physicians acts of Michigan (1903), of Maryland (1910); carrying concealed weapons law of Texas (1894); Massachusetts law requiring license for speaking in public places (1897); Utah ordinance as to moving buildings on public streets (1899): Indiana law prohibiting waste in flow of gas and oil (1900); Louisiana ordinance fixing geographical limits for houses of ill fame (1900); Minnesota barber shop law (1900); alimony law of New York (1901); lunacy law of Alabama (1901); Louisiana quarantine law (1902); Missouri law fixing limits for cow stables (1904); compulsory vaccination law of Massachusetts (1905); laws granting exclusive right to dispose of garbage, of California (1905), of Michigan (1905); California law requiring keepers of places of amusement to admit all

657; Mette *vs.* McGuckin (1885) 18 Neb. 323, aff. (1892) 149 U.S. 781; Reyman Brewing Co. *vs.* Brister (1900) 179 U.S. 445; Rippey *vs.* Texas (1904) 193 U.S. 504; Ohio *vs.* Dollison (1904) 194 U.S. 445; Cronin *vs.* Adams (1904) 192 U.S. 108; Cox *vs.* Texas (1906) 202 U. S. 446; Tracy *vs.* Ginzberg (1907) 205 U.S. 170; Gundling *vs.* Chicago (1900) 177 U.S. 183; Austin *vs.* Tennessee (1900) 179 U.S. 343; Hodge *vs.* Muscatine County (1905) 196 U.S. 276; Cook *vs.* Marshall County (1905) 196 U.S. 261; Cosmopolitan Club *vs.* Virginia (1908) 208 U.S. 378.

[1] Kimmish *vs.* Ball (1889) 129 U.S. 217; Jones *vs.* Brim (1897) 165 U.S. 180; Smith *vs.* St. Louis etc. R.R. (1901) 181 U.S. 248; Reid *vs.* Colorado (1902) 187 U.S. 137; Bacon *vs.* Walker (1907) 204 U.S. 311; Bown *vs.* Walling (1907) 204 U.S. 320.

[2] Allgeyer *vs.* Louisiana (1897) 165 U.S. 578.

ticket holders (1907); law against use of flag for advertising purposes, of Nebraska (1907); law of Arkansas requiring negotiable instrument taken in payment for sale of patented article to state on face for what it was given (1907); Massachusetts laws restricting height of buildings (1903) (1909); Connecticut law forbidding loans for more than 15% (1910); California law restricting burials in city (1909); Minnesota law imposing double damages on trespassers on State lumber lands (1910); New York law forbidding advertising on street vehicles (1911); New York law forbidding unauthorized use of portraits for advertising (1911); Massachusetts law regulating assignments of wages (1911); Illinois law imposing liability for damages from riots on municipalities (1911); Texas law restricting pilots (1909).[1]

Regulation of Railroads and Railroad Rates

The Supreme Court has upheld State statutes regulating railroads rates and the management of railroads, as follows:

Rates

The railroad rate acts of Arkansas (1888) (1895), of Georgia (1888), of Michigan (1892), of South Dakota (1900); long and short haul railroad commission law of Kentucky (1902); rates of Minnesota (1902); freight rates, of Florida (1906); grain rates of Mississippi (1906); school children half-fare law of Massachusetts (1907).[2]

General Management

Law of Alabama forbidding employment of color-blind persons and requiring railroads to pay examination fees (1888); law of Iowa

[1] Dent *vs.* West Virginia (1889) 129 U.S. 114; Gray *vs.* Connecticut (1895) 159 U.S. 74; Reetz *vs.* Michigan (1903) 188 U.S. 505; Watson *vs.* Maryland (1910) 218 U.S. 173; Miller *vs.* Texas (1894) 153 U.S. 535; Davis *vs.* Massachusetts (1897) 167 U.S. 43; Wilson *vs.* Eureka City (1899) 173 U.S. 32; Ohio Oil Co. *vs.* Indiana (1900) 177 U.S. 190; L'Hote *vs.* New Orleans (1900) 177 U.S. 587; Petit *vs.* Minnesota (1900) 177 U.S. 164; Lynde *vs.* Lynde (1901) 181 U.S. 183; Simon *vs.* Craft (1901) 182 U.S. 427; Compagnie Francaise *vs.* State Board of Health (1902) 186 U.S. 380; Fischer *vs.* St. Louis (1904) 194 U.S. 361; Jacobson *vs.* Massachusetts (1905) 197 U.S. 11; California Reduction Co. *vs.* Sanitary Reduction Works (1905) 199 U.S. 306; Gardner *vs.* Michigan (1905) 199 U.S. 325; Western Turf Ass'n *vs.* Greenberger (1907) 204 U.S. 359; Halter *vs.* Nebraska (1907) 205 U.S. 34; Osan Lumber Co. *vs.* Union County (1907) 207 U.S. 201; Welch *vs.* Swasey (1909) 214 U.S. 91; Griffith *vs.* Connecticut (1910) 218 U.S. 563; Kidd *vs.* Musselman Grocer Co. (1910) 217 U.S. 461; Laurel Hill Cemetery *vs.* San Francisco (1910) 216 U.S. 358; Sherwin Carpenter Co. *vs.* Minnesota (1910) 218 U.S. 57; *Re* Gregory (1911) 219 U.S. 210; Fifth Ave. Coach Co. *vs.* New York (1911) 221 U.S. 467; Mutual Loan Co. *vs.* Martell (1911) 222 U.S. 225; Chicago *vs.* Sturgis (1911) 222 U.S. 313; Olsen *vs.* Smith (1904) 195 U.S. 332.

[2] Dow *vs.* Beidelman (1888) 125 U.S. 680; Georgia R.R. *vs.* Smith (1888) 128 U.S. 174; Chicago etc. R.R. *vs.* Wellman (1892) 143 U.S. 339; Chicago etc. R.R. *vs.* Tompkins (1900) 176 U.S. 167; St. Louis R.R. *vs.* Gill (1895) 156 U.S. 649; Louisville & N. R.R. *vs.* Kentucky (1902) 183 U.S. 503; Minneapolis etc. R.R. *vs.* Minnesota (1902) 186 U.S. 257; Seaboard Air Line R.R. *vs.* Florida (1906) 203 U.S. 261; Alabama & Vicksburg R.R. *vs.* Mississippi (1906) 203 U.S. 496; Interstate Consol. St. Ry. *vs.* Massachusetts (1907) 207 U.S. 79.

fixing double damages for cattle killed on railroads neglecting to fence (1889); law of Minnesota fixing treble damages for failure to fence tracks (1893); Georgia law stopping freight trains on Sunday (1896); Missouri and Kansas laws imposing liability for fire from locomotives (1897) (1899); Minnesota law requiring trains to stop at county seats (1897); New York law forbidding heating of cars by stoves (1897); Illinois law requiring flags, gates, etc. at crossings (1897); Arkansas law requiring railroads to pay all unpaid wages to employees when discharged (1899); Ohio law requiring trains to stop at stations of over 3,000 inhabitants (1899); Kansas city ordinance as to speed of trains (1900); Minnesota law requiring track connections of intersecting roads (1900); Nebraska law fixing absolute liability on railroads for injuries to passengers (1902); Michigan law as to safety appliances on railroad crossings (1903); Minnesota law requiring establishment of stations (1904); Texas law penalizing railroads for allowing Johnson grass or Russian thistle to go to seed (1904); order requiring connecting trains, of North Carolina (1907); requiring railroads to adjust claims for damage to shipments within 40 days, of South Carolina (1907); Kansas law requiring certain trains to run (1909); Mississippi order to operate spur tracks (1908); Minnesota law requiring railroad to construct bridge over street (1909).[1]

Corporation Rates

The Supreme Court has upheld statutes fixing or regulating rates for public service corporations, other than railroads, as follows:

New York law regulating charges of grain elevators (1892); North Dakota grain warehouse act (1894); reasonableness of water rates of California (1899) (1900) (1903) (1904); water rates of Illinois (1901); forfeiture of charter of waterworks company for illegal rates by Louisiana court (1902); telephone rate law of California (1909); gas rates of New York (1909); water rates of Tennessee (1903) (1909).[2]

[1] Nashville etc. R.R. *vs.* Alabama (1888) 128 U.S. 96; Minneapolis etc. R.R. *vs.* Beckwith (1889) 129 U.S. 26; Minneapolis etc. R.R. *vs.* Emmons (1893) 149 U.S. 364; Hennington *vs.* Georgia (1896) 163 U.S. 299; St. Louis etc. R.R. *vs.* Mathews (1897) 165 U.S. 1; A. T. & S. F. R.R. *vs.* Matthews (1899) 174 U.S. 96; Gladson *vs.* Minnesota (1897) 166 U.S. 427; N. Y., N. H. & H. R.R. *vs.* New York (1897) 165 U.S. 628; C. B. & Q. R.R. *vs.* Chicago (1897) 166 U.S. 226; St. Louis etc. R.R. *vs.* Paul (1899) 173 U.S. 404; Lake Shore etc. R.R. *vs.* Ohio (1899) 173 U.S. 285; Erb *vs.* Morasch (1900) 177 U.S. 584; Wisconsin etc. R.R. *vs.* Jacobson (1900) 179 U.S. 287; Chicago etc. R.R. *vs.* Zernecke (1902) 183 U.S. 582; Detroit etc. R.R. *vs.* Osborn (1903) 189 U.S. 383; Minneapolis etc. R.R. *vs.* Minnesota (1904) 193 U.S. 53; Missouri etc. R.R. *vs.* May (1904) 194 U.S. 267; Atlantic Coast Line R.R. *vs.* North Carolina (1907) 206 U.S. 1; Seaboard Air Line R.R. *vs.* Seeger (1907) 207 U.S. 73; Missouri Pacific R.R. *vs.* Kansas (1910) 216 U.S. 262; Mobile etc. R.R. *vs.* Mississippi (1908) 210 U.S. 187; St. Paul etc. R.R. *vs.* Minnesota (1909) 214 U.S. 497.

[2] Budd *vs.* New York (1892) 143 U.S. 517; Brass *vs.* North Dakota (1894) 153 U.S. 391; San Diego Land Co. *vs.* National City (1899) 174 U.S. 739; Osborn *vs.* San Diego etc. Co. (1900) 178 U.S. 22; San Diego Land Co. *vs.* Jasper (1903) 189 U.S. 439; Stanislaus County

Regulation of Banks

The Supreme Court has upheld every State banking regulation statute brought before it, as follows:

Bank guaranty fund laws of Oklahoma, Kansas and Nebraska (1911); Massachusetts law forfeiting to the State unclaimed bank deposits (1911); New York law licensing private bankers (1911).[1]

Regulation of Insurance and Telegraph Corporations

The Supreme Court has upheld State statutes regulating the business and methods of insurance and telegraph companies, as follows:

Missouri act compelling insurance companies to pay the full amount for which property was insured, in case of total loss (1899); Missouri non-forfeitable policy law (1900); acts abolishing defense of false representations by insurers unless willful and connected with the loss, of Ohio (1901), of Missouri (1906); acts forbidding insurance agents from effecting insurance in unauthorized foreign companies, of California (1895), of Massachusetts (1902); Texas act imposing 12% additional damage and attorneys' fees on life and health companies failing to pay loss within specified time (1902); Nebraska valued policy law, and act allowing attorneys' fees (1903); Missouri act excluding suicide as a defense on life insurance policies (1907); Alabama act compelling insurance companies entering into any rate-fixing association to pay to insured additional 25% of loss (1911); Georgia law as to diligence in delivery of telegrams (1896); Michigan law forbidding telegraph companies to limit liability for negligent failure to deliver (1910); New York law for reorganization of an insurance association (1907); Kentucky law withdrawing license of any foreign insurance company removing case to Federal courts (1906).[2]

vs. Irrigation Co. (1904) 192 U.S. 210; Freeport Water Co. *vs.* Freeport (1901) 180 U.S. 587; New Orleans Water Works Co. *vs.* Louisiana (1902) 185 U.S. 336; Home Tel. & Tel. Co. *vs.* Los Angeles (1909) 211 U.S. 265; Wilcox *vs.* Consol. Gas Co. (1909) 212 U.S. 19; Knoxville Water Co. *vs.* Knoxville (1903) 189 U.S. 434; Knoxville *vs.* Knoxville Water Co. (1909) 212 U.S. 1.

[1] Noble State Bank *vs.* Haskell (1911) 219 U.S. 104; Shallenberger *vs.* First State Bank (1911) 219 U.S. 114; Assaria State Bank *vs.* Dolley (1911) 219 U.S. 121; Providence Inst. for Savings *vs.* Malone (1911) 221 U.S. 660; Engel *vs.* O'Malley (1911) 219 U.S. 128.

[2] New York Life Ins. Co. *vs.* Cravens (1900) 178 U.S. 389; Orient Ins. Co. *vs.* Daggs (1899) 172 U.S. 557; John Hancock Life Ins. Co. *vs.* Warren (1901) 181 U.S. 73; N. W. Life Ins. Co. *vs.* Riggs (1906) 203 U.S. 243; Hooper *vs.* California (1895) 155 U.S. 648; Nutting *vs.* Massachusetts (1902) 183 U.S. 553; Fidelity Mut. Life Ins. Co. *vs.* Mettler (1902) 185 U.S. 308; Iowa Life Ins. Co. *vs.* Lewis (1902) 187 U.S. 335; Farmers Ins. Co *vs.* Dobney (1903) 189 U.S. 301; Whitfield *vs.* Aetna Life Ins. Co. (1907) 205 U.S. 489; German Alliance Ins. Co. *vs.* Hale (1911) 219 U.S. 307; W. U. Tel. Co. *vs.* James (1896) 162 U.S. 650; W. U. Tel. Co. *vs.* Com. Milling Co. (1910) 218 U.S. 406; Security Mut. Life Ins. Co. *vs.* Prewitt (1906) 202 U.S. 246; Polk *vs.* Mut. etc. Ass'n (1907) 207 U.S. 310; see also W. U. Tel. Co. *vs.* New Hope (1903) 187 U.S. 419; Postal Tel. Co. *vs.* New Hope (1904) 192 U.S. 55.

Public Improvements

The Supreme Court has upheld State statutes authorizing undertakings of a public nature such as drainage, levees, grade crossings and irrigation; and it has uniformly held that such improvements, even if interfering with private property, were within the police power of the State:

Public dam acts of Wisconsin (1891) and Minnesota (1897); improved waterway tolls act of Michigan (1887); Pennsylvania railroad construction act (1894); Connecticut grade-crossing act (1894); District of Columbia land drainage law (1897); Louisiana levee act (1895); Massachusetts swamp drainage act (1895); California irrigation ditch act (1897); Ohio act changing street grades (1897); street obstruction ordinance of Virginia (1898); Connecticut act assessing certain towns for cost of bridge (1898); Minnesota log lien act (1900); forest preserve act of New York (1900); New York grade-crossing act (1900); construction of waterworks act of New York (1902); drainage act of Louisiana (1905); purchase of waterworks act of Massachusetts (1909); mill flowage acts of Massachusetts (1906); South Carolina dam act (1905); wharf act of Oregon (1906); Utah eminent domain law, allowing condemnation of right of way across placer claims for aërial bucket (1906); Utah law allowing condemnation of land for irrigation (1905); New York law for erection of viaduct in city street without compensation to abutters (1907); Connecticut law allowing railroads owning three-quarters of stock of other railroads to condemn remaining shares (1906); New Jersey law against diverting water into another State (1908); Virginia law allowing railroads to condemn land for spur track to a private industry (1908); Pittsburgh and Alleghany consolidation law of Pennsylvania (1907); nominal damages for land on bed of navigable stream, of New York (1911).[1]

Taxation Laws

Besides the above statutes, there have been over one hundred State laws relating to taxation brought before the United States Supreme Court in cases appealed under the "due process" and "equal protec-

[1] Kaukama etc. Co. *vs.* Greenberg etc. Co. (1891) 142 U.S. 254: St. Anthony etc. Co. *vs.* Board (1897) 168 U.S. 349; Sands *vs.* Manistee River Imp. Co. (1887) 123 U.S. 288; Marchant *vs.* Penn. R.R. Co. (1894) 153 U.S. 380; Bauman *vs.* Ross (1897) 167 U.S. 548; Eldredge *vs.* Trezevant (1895) 160 U.S. 452; N. Y. & N. E. R.R. Co. *vs.* Bristol (1894) 151 U.S. 556; Sweet *vs.* Rechel (1895) 159 U.S. 380; Fall Brook Irrigation District *vs.* Bradley (1897) 164 U.S. 112; Wabash R.R. *vs.* Defiance (1897) 167 U.S. 88; Meyer *vs.* Richmond (1898) 172 U.S. 82; Williams *vs.* Eggleston (1898) 170 U.S. 304; Lindsey etc. Co. *vs.* Mullen (1900) 176 U.S. 126; Adirondacks Ry. Co. *vs.* New York (1900) 176 U.S. 335; Newburyport Water Co. *vs.* Newburyport (1904) 193 U.S. 561; Wheeler *vs.* N. Y. N. H. & H. R.R. (1900) 178 U.S. 321; Skaneateles Water Co. *vs.* Skaneateles (1902) 184 U. S. 354; New Orleans Gas Light Co. *vs.* N. O. Drainage Com. (1905) 197 U.S. 453; Otis Co. *vs.* Ludlow Mfg. Co. (1906) 201 U.S. 140; Manigault *vs.* Springs (1905) 199 U.S. 473; Mead *vs.* Port-

tion of the laws" clauses of the Constitution. With the exceptions hereinafter noted, the Court has upheld every variety of tax law, as follows:

Corporation and franchise taxes,[1] inheritance and legacy taxes,[2] license taxes,[3] railroad taxation,[4] street and sewer betterment assess-

land (1906) 200 U. S. 148; Strickley *vs.* Highland Boy Gold Min. Co. (1906) 200 U.S. 527; Clark *vs.* Nash (1905) 198 U.S. 361; Sauer *vs.* New York (1907) 206 U. S. 536; Offield *vs.* N. Y., N. H. & H. R.R. (1906) 203 U.S. 372; Hudson County Water Co. *vs.* McCarter (1908) 209 U.S. 349; Hairston *vs.* Danville etc. R.R. Co. (1908) 208 U.S. 598; Hunter *vs.* Pittsburg (1907) 207 U.S. 161; Appleby *vs.* Buffalo (1911) 221 U.S. 524.

[1] New York bank tax and corporation tax, Palmer *vs.* McMahon (1890) 133 U.S. 660, Home Ins. Co. *vs.* New York (1890) 134 U.S. 594; Missouri, Ohio, Kentucky and Indiana express company tax acts, Pacific Express Co. *vs.* Seibert (1892) 142 U.S. 339, Adams Express Co. *vs.* Ohio (1897) 165 U.S. 194, Adams Express Co. *vs.* Kentucky (1897) 166 U.S. 171, American Express Co. *vs.* Indiana (1897) 165 U.S. 255; Indiana telegraph company tax, W. U. Tel. Co. *vs.* Indiana (1897) 165 U.S. 304; State Bank tax of Pennsylvania, Merchants etc. Bank *vs.* Pennsylvania (1897) 167 U.S. 461; foreign corporation tax acts of Pennsylvania and New York, Pembina Silver Min. Co. *vs.* Pennsylvania (1888) 125 U.S. 181, New York *vs.* Roberts (1898) 171 U.S. 658; Kentucky bridge corporation tax, Henderson Bridge Co. *vs.* Henderson (1899) 173 U.S. 592; Connecticut corporation tax, Travelers Ins. Co. *vs.* Connecticut (1902) 185 U.S. 364; Kentucky franchise tax, Coulter *vs.* Louisville & N. R.R. (1905) 196 U.S. 599; insurance company credit tax of Louisiana, Met. Life Ins. Co. *vs.* New Orleans (1907) 205 U.S. 395, Board *vs.* N. Y. Life Ins. Co. (1910) 216 U.S. 517; Louisiana tax on premiums and notes due foreign insurance companies, Liverpool etc. Ins. Co. *vs.* Board (1911) 221 U.S. 346; New York franchise tax, N. Y. C. R.R. *vs.* Miller (1906) 202 U.S. 584; Ohio consolidation of railroads tax, Ashley *vs.* Ryan (1894) 153 U.S. 436; Indiana telegraph company tax, W. U. Tel. Co. *vs.* Taggart (1896) 163 U.S. 1; Kentucky bank tax, Citizens National Bank *vs.* Kentucky (1910) 217 U.S. 443, Citizens Sav. Bank *vs.* Owensboro (1899) 173 U.S. 636; Colorado refrigerator car tax, Amer. etc. Co. *vs.* Hall (1899) 174 U.S. 70. See also note 4 *infra*.

[2] Magoun *vs.* Illinois Trust & Savings Bank (1898) 170 U.S. 283; Billings *vs.* Illinois (1903) 188 U.S. 97; Blackstone *vs.* Miller (1903) 188 U.S. 189; Campbell *vs.* California (1906) 200 U.S. 87; Chanler *vs.* Kelsey (1907) 205 U.S. 466; Beers *vs.* Glynn (1909) 211 U.S. 477; Cahen *vs.* Brewster (1906) 203 U.S. 543.

See also Scudder *vs.* Coler (1899) 175 U.S. 32; Orr *vs.* Gilman (1902) 183 U.S. 278; Board of Education *vs.* Illinois (1906) 203 U.S. 553; Moffitt *vs.* Kelley (1910) 218 U.S. 400.

[3] Dog valuation law of Louisiana, Sentell *vs.* N. O. etc. R.R. Co. (1897) 166 U.S. 698; license tax of Georgia on emigrant agents, Ficklen *vs.* Shelby County (1892) 145 U.S. 1, Williams *vs.* Fears (1900) 179 U.S. 270; Louisiana tax on sugar refiners, Amer. Sugar Ref. Co. *vs.* Louisiana (1900) 179 U.S. 89; Minnesota tax on elevators and warehouses, Cargill Co. *vs.* Minnesota (1901) 180 U. S. 452; classified merchants license tax of Pennsylvania, Clark *vs.* Titusville (1902) 184 U.S. 329; merchants' tax of Tennessee, Amer. Steel & Wire Co. *vs.* Speed (1904) 192 U.S. 500; non-resident meat packer tax of Georgia and North Carolina, Kehrer *vs.* Stewart (1905) 197 U.S. 60, Armour Packing Co. *vs.* Lacy (1906) 200 U.S. 226; Texas license tax on wholesale dealers in oils, S. W. Oil Co. *vs.* Texas (1910) 217 U.S. 114; Kentucky license tax on distillers, Brown Forman Co. *vs.* Kentucky (1910) 217 U.S. 563, Thompson *vs.* Kentucky (1908) 209 U.S. 340.

[4] Taxing railroads for salary of State railroad commissioners in South Carolina and New York, Charlotte etc. R.R. *vs.* Gibbes (1892) 142 U.S. 386, New York Electric Lines *vs.* Squire (1892) 145 U.S. 175; Georgia Railroad tax law, Columbus Ry. Co. *vs.* Wright (1894) 151 U.S. 470; imposing cost of repairs and maintenance of safe viaduct on railroads in Nebraska, C. B. & Q. R.R. *vs.* Nebraska (1898) 170 U.S. 57; railroad grade-crossing law of New York, Wheeler *vs.* N. Y., N. H. & H. R.R. (1900) 178 U.S. 321; Florida act assessing back taxes on railroads, Florida etc. R.R. *vs.* Reynolds (1902) 183 U.S. 471; Alabama tax on foreign railroad stock, Kidd *vs.* Alabama (1903) 188 U.S. 730; street railway tax of Georgia, Savannah Ry. *v.* Savannah (1905) 198 U.S. 392; Illinois laws imposing on railroads cost of removing and rebuilding bridges and removing tunnel, C. B. & Q. R.R. *vs.* Illinois (1906) 200 U.S. 561, West Chicago Street R.R. *vs.* Illinois (1906) 201 U.S. 506; street railway franchise tax of New York, New York *vs.* State Board (1905) 199 U.S. 1; Indiana law imposing cost of bridge on railroad, Cincinnati etc. Ry. *vs.* Connersville (1910) 218 U.S. 336; Indiana railroad tax, Pittsburg etc. R.R. *vs.* Backus (1894) 154 U.S. 421;

ments,[1] and general property taxes.[2]

The Court has also upheld, under these same clauses of the Constitution, a large number of cases involving State statutory civil and criminal court procedure, and general political rights.[3]

Now, as pointed out above, notwithstanding this mass of cases appealed and decided under the Fourteenth Amendment, in which cases parties have sought to overthrow State laws — over 560 in number between 1887 and 1911 — it is remarkable that the Court has held unconstitutional only three State statutes dealing with general social or economic conditions, *i.e.*, "social justice" laws. In addition, it is true, it has held unconstitutional several instances of State legislation or of State action which involved simply private rights of property, *i.e.*, questions of illegal taxation and of other forms of actual taking of

Michigan railroad tax, Michigan Central R.R. Co. *vs.* Powers (1906) 201 U.S. 245; Nebraska railroad tax, C. B. & Q. R.R. *vs.* Babcock (1907) 204 U.S. 585; Kentucky railway franchise, Illinois etc. R. R. *vs.* Kentucky (1910) 218 U.S. 551.

[1] Walston *vs.* Nevin (1888) 128 U.S. 578; Essex Public Road Board *vs.* Skinkle (1891) 140 U.S. 334; Paulsen *vs.* Portland (1893) 149 U.S. 30; Parsons *vs.* Dist. of Col. (1898) 170 U.S. 45; Weyerhauser *vs.* Minnesota (1900) 176 U.S. 550; Lombard *vs.* West Chicago Park Com. (1901) 181 U.S. 33; French *vs.* Barber Asphalt Paving Co. (1901) 181 U.S. 324, and 7 following cases: Cass Farm Co. *vs.* Detroit (1901) 181 U.S. 396; Voight *vs.* Detroit (1902) 184 U.S. 115; Goodrich *vs.* Detroit (1902) 184 U.S. 432; King *vs.* Portland (1902) 184 U.S. 61; Chadwick *vs.* Kelly (1903) 187 U.S. 540; Schaefer *vs.* Werling (1903) 188 U.S. 516; Seattle *vs.* Kelleher (1904) 195 U.S. 351; Louisville & N. R.R. *vs.* Barber Asphalt Co. (1905) 197 U.S. 430; Briscoe *vs.* Rudolph (1911) 221 U.S. 547; Carson *vs.* Brockton (1901) 182 U.S. 398; Hibben *vs.* Smith (1903) 191 U.S. 310; Cleveland etc. R.R. *vs.* Porter (1908) 210 U.S. 177.

[2] Pennsylvania tax law, Bell's Gap R.R. *vs.* Pennsylvania (1890) 134 U.S. 232; mortgage tax laws of Oregon and New York, Savings etc. Society *vs.* Multnomah County (1898) 169 U.S. 421, Paddell *vs.* New York (1908) 211 U.S. 446; laws forfeiting land for unpaid taxes, of West Virginia and Kentucky, King *vs.* Mullins (1898) 171 U.S. 404, Kentucky Union Co. *vs.* Kentucky (1911) 219 U.S. 140; Minnesota and Louisiana taxes on investments by a non-resident, Bristol *vs.* Washington County (1900) 177 U.S. 133, New Orleans *vs.* Stempel (1899) 175 U.S. 309; Pennsylvania tax on estates of absentees, Cunnius *vs.* Reading School District (1905) 198 U.S. 458; Maryland tax on non-resident stockholders, Corry *vs.* Baltimore (1905) 196 U.S. 466; Maryland tax on liquors in warehouses, Carstairs *vs.* Cochran (1904) 193 U.S. 10; Ohio tax on bonds deposited by insurance companies, Scottish Ins. Co. *vs.* Boland (1905) 196 U.S. 611; New York stock transfer act, New York *vs.* Reardon (1907) 204 U.S. 152; Kentucky tax on ocean-going steamships, Southern Pacific Co. *vs.* Kentucky (1911) 222 U.S. 63; Louisiana tax on credits on collateral security loans, State Board *vs.* Comptoir National D'Escompte (1903) 191 U.S. 388; levee tax law of Arkansas, Ballard *vs.* Hunter (1907) 204 U.S. 241.

[3] For a few of the statutes of more general interest see, claims of foreign corporations as creditors law of Tennessee, Blake *vs.* McClung (1898) 172 U.S. 239; Massachusetts attachment law, Rothschild *vs.* Knight (1902) 184 U.S. 334; Maryland insolvent law, Brown *vs.* Smart (1892) 145 U.S. 454; trustee process law of Rhode Island, King *vs.* Cross (1899) 175 U.S. 396; non-resident mortgagee claims law of Tennessee, Sully *vs.* Amer. Nat. Bank (1900) 178 U.S. 289; Maine disseizin law, Soper *vs.* Lawrence Bros. Co. (1906) 201 U.S. 359; corporation act of West Virginia, St. Mary's etc. Co. *vs.* West Virginia (1906) 203 U.S. 183; California law for quieting title, Amer. Land Company *vs.* Zeiss (1911) 219 U.S. 47; Massachusetts absentee estate act, Blinn *vs.* Nelson (1911) 222 U.S. 1; registration of voters in classified cities of Missouri, Mason *vs.* Missouri (1900) 179 U.S. 328; city annexation act of Kansas, Clark *vs.* Kansas City (1900) 176 U.S. 114; incorporation of a city, of Texas, Lampasas *vs.* Bell (1901) 180 U.S. 276; new school district of Michigan, Kils *vs.* Lowrey (1905) 199 U.S. 233; negro segregation laws of Louisiana, Georgia, Kentucky, Plessy *vs.* Ferguson (1896) 163 U.S. 537, Cumming *vs.* Board of Education (1899) 175 U.S. 528, Berea College *vs.* Kentucky (1908) 211 U.S. 45, Williams *vs.* Mississippi (1898) 170 U.S. 213, Chiles *vs.* C. & O. R.R. (1910) 218 U.S. 71.

private property without compensation. No one claims, however, that the recall of judicial decisions or other radical remedies should be applied to court decisions which simply adjudicate private property rights.

Even in cases of this nature, the Court has held State laws or State action unconstitutional and void in only 34 instances during the past 25 years, as follows:

One street assessment tax act;[1] six acts authorizing taxes, court judgments or disposition of property without hearing or reasonable notice to property owners;[2] one act regarding enforcement of mortgages;[3] eight acts taxing property outside the jurisdiction of the State;[4] four tax acts imposing unlawful discriminations or denying equal protection of the law;[5] five requirements of unreasonably low and confiscatory rates or tolls in Minnesota, Texas, Kentucky, Nebraska and Pennsylvania;[6] one Minnesota railroad rate law, held invalid for excessive penalties and for failure to provide for a hearing;[7] and seven laws depriving corporations of their property without compensation, as follows: a Nebraska order of a Board requiring a railroad to allow persons to erect an elevator on its property (1896); a Texas constitution depriving a railroad of a vested right (1898); a Michigan law requiring a railroad to issue and accept interchangeable mileage tickets with other roads (1899); a California ordinance forbidding the erection of gas works previously authorized (1904); an Ohio ordinance granting property of one street railway to another (1907); a Kentucky law requiring a railroad to deliver its cars to other roads (1909); a Nebraska law compelling construction of side tracks, etc., to private grain elevators, without a hearing (1910);[8] and one law of Texas

[1] Norwood *vs.* Baker (1898) 172 U.S. 269.

[2] Scott *vs.* McNeal (1894) 154 U.S. 34; Roller *vs.* Holly (1900) 176 U.S. 398; Central of Georgia R.R. *vs.* Wright (1907) 207 U.S. 127; Londoner *vs.* Denver (1908) 210 U.S. 373; National Exchange Bank *vs.* Wiley (1904) 195 U.S. 257; Old Wayne Mutual Life Ass'n *vs.* McDonough (1907) 204 U.S. 8.

[3] Bradley *vs.* Lightcap (1904) 195 U.S. 1.

[4] Dewey *vs.* Des Moines (1898) 173 U.S. 193; Louisville etc. Ferry Co. *vs.* Kentucky (1903) 188 U.S. 385; Union Refrigerator Transit Co. *vs.* Kentucky (1905) 199 U. S. 194; Fargo *vs.* Hart (1904) 193 U.S. 490; Delaware etc. R.R. *vs.* Pennsylvania (1905) 198 U.S. 341; Selliger *vs.* Kentucky (1909) 213 U.S. 200; Buck *vs.* Beach (1907) 206 U.S. 392; New Orleans *vs.* New York Life Ins. Co. (1910) 216 U.S. 517.

[5] Cotting *vs.* Kansas City Stockyards Co. (1901) 183 U.S. 79; Raymond *vs.* Chicago etc. Co. (1907) 207 U.S. 20; Southern Ry. Co. *vs.* Greene (1910) 216 U.S. 400; Stearns *vs.* Minnesota (1900) 179 U.S. 223; see also Duluth etc. R.R. *vs.* St. Louis County (1900) 179 U.S. 302.

[6] Chicago etc. Ry. Co. *vs.* Minnesota (1890) 134 U.S. 418; Reagan *vs.* Farmers Loan & Trust Co. (1892) 154 U.S. 362; Reagan *vs.* Mercantile Trust Co. (1894) 154 U.S. 413; Covington Turnpike Co. *vs.* Sandford (1896) 164 U.S. 578; Smyth *vs.* Ames (1898) 169 U.S. 466; see also Prout *vs.* Starr (1903) 188 U.S. 537; Postal Tel. Cable Co. *vs.* New Hope (1904) 192 U.S. 55.

[7] *Ex parte* Young (1908) 209 U.S. 123.

[8] Missouri Pacific Ry. Co. *vs.* Nebraska (1896) 164 U.S. 403; Houston *vs.* T. C. R.R. (1898) 170 U.S. 243; Lake Shore etc. Ry. *vs.* Smith (1899) 173 U.S. 684; Dobbins *vs.* Los Angeles (1904) 195 U.S. 223; Cleveland etc. Ry. *vs.* Cleveland (1907) 204 U.S. 116; Louisville & N. R.R. *vs.* Central Stockyards Co. (1909) 212 U.S. 132; Missouri Pacific Ry. Co. *vs.* Nebraska (1910) 217 U.S. 196.

requiring railroads losing suit to pay attorney's fees was held to deny equal protection of the law (1897).[1]

It thus appears that, out of over 560 State statutes or other form of State action adjudicated upon under the "due process" and "equal protection" clauses during the last twenty-five years, the Court has upheld over 530; it has held nvalid only three relating to "social justice," and only thirty-four relating to private rights of property.[2]

The actual record of the Court thus shows how little chance a litigant has of inducing the Court to restrict the police power of a State, or to overthrow State laws under the "due process" clause; in other words, it shows the Court to be a bulwark to the State police power, not a destroyer. And while its actual record proves the responsiveness of the Court to the changing needs of the times, the words of its justices are quite as illuminating and encouraging. The modern attitude of the Court was well expressed by Judge Harlan in one of its late decisions, in 1911, in which he said:[3]

> Among the powers of the State not surrendered is the power to so regulate the relative rights and duties of all within its jurisdiction as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good; and that it is with the State to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own Constitution or the Constitution of the United States.

It has frequently been asserted by State courts and by law writers that the scope of the "police power" is confined to matters of public morals, public health and public safety. Such a restriction, however,

[1] Gulf etc. Ry. *vs.* Ellis (1897) 165 U.S. 150.

[2] It may be fair to add that the following acts were also attacked as repugnant to the Fourteenth Amendment and were held unconstitutional; but the Court's decisions were based chiefly upon the ground that the acts were repugnant to the Federal powers over interstate commerce, *viz.*, tax laws of Kansas and Arkansas in W. U. Tel. Co. *vs.* Kansas (1910) 216 U.S. 1, Pullman Car Co. *vs.* Kansas (1910) 216 U.S. 56, Ludwig *vs.* W. U. Tel. Co. (1910) 216 U.S. 146; natural gas law of Oklahoma, Oklahoma *vs.* Kansas Natural Gas Co. (1911) 221 U.S. 229; or as being repugnant to the impairment of obligation of contract clause of the Constitution, *viz.*, New York elevated railroad act, Muhlker *vs.* N. Y. & H. R.R. Co. (1905) 197 U.S. 544; railroad profit law of Indiana, Terre Haute etc. R.R. *vs.* Indiana (1903) 194 U.S. 579.

In one case the Court held invalid an order of the Kentucky railroad commission, fixing a general tariff of railroad rates, but only because it exceded its statutory authority, and not because the statute was deemed unconstitutional: see Silver *vs.* Louisville & N. R.R. (1909) 213 U.S. 175.

In an Illinois gas rate case, Peoria Gas Co. *vs.* Peoria (1906) 200 U.S. 98, the Court granted a temporary injunction, but did not decide whether the rates were confiscatory under the Fourteenth Amendment, referring the case to a master to find the facts; so also in a Virginia railroad rate case, Prentiss *vs.* Atlantic Coast Line Co. (1908) 211 U.S. 210, the Court merely held that it had jurisdiction, but did not invalidate the rates. In Amer. Sugar Ref. Co. *vs.* New Orleans (1900) 181 U.S. 277, the Court upheld its jurisdiction, but did not decide on the validity of the tax involved.

[3] House *vs.* Mayes (1911) 219 U.S. 270.

finds no warrant in the late decisions of the Supreme Court, for, as Judge Harlan said in 1906:[1]

We hold that the police power of a State embraces regulations designed *to promote the public convenience or the general property as well as regulations designed to promote the public health, the public morals or the public safety.*

The criterion of the State's power is the *public welfare* as viewed by the Legislature, for as said by Judge Hughes in 1911:[2]

The right to make contracts . . . is subject also in the field of State action to the essential authority of government to maintain peace and security and to enact laws for the promotion of the health, safety, morals *and welfare* of those subject to its jurisdiction.

And Judge Holmes in 1911 expresses the same view:[3]

It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality of strong and preponderant opinion to be greatly and immediately necessary to the public welfare.

In an able article in a recent law review, Judge Swayze of New Jersey says:[4]

The interpolation of the word "welfare" in addition to the words health, safety and morals, seems likely to have important results.

It is apparent, however, from the whole trend of its recent opinions that the Court itself does not regard the addition of this word "welfare" as an "interpolation" or as the introduction of any change in the law which it had previously laid down. Thus Judge Holmes, in his opinion on the petition for rehearing of the Oklahoma bank guaranty case,[5] says, with reference to his prior decision:

The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, *not* to give a new or wider scope to the power.

and Judge McKenna had already said in 1907,[6] referring to a previous case:

In that case, we rejected the view that the police power cannot be exercised for the *general well being* of the community. That power, we said, embraces regulations designed *to promote the public convenience or the general prosperity.*

[1] C. B. & Q. R.R. *vs.* Illinois (1906) 200 U.S. 561, 592.
[2] C. B. & Q. R.R. *vs.* McGuire (1911) 219 U.S. 549.
[3] Noble State Bank *vs.* Haskell (1911) 219 U.S. 104, 110, 111.
[4] 26 *Harvard Law Review* 1, 13.
[5] Noble State Bank *vs.* Haskell (1911) 219 U.S. 575, 580.
[6] Bacon *vs.* Walker (1907) 204 U.S. 311, 317.

and in the latest decision of the Court on this subject, January 13, 1913, Judge Day has said, upholding a city ordinance of Chicago fixing the weight of bread loaves: [1]

> This court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of the police power fixing weights and measures and standards must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right of contract freely, because of restrictions upon that right deemed necessary *in the interest of the general welfare.*

In this connection may be noticed the charge — often refuted but as often reasserted — that the Court bases its decisions on its own views of the policy of a State law, rather than on strict legal doctrines. The Court, however, has time and again announced the exact contrary; and in almost every decision of note in the last quarter of a century, it has emphasized the point that it has no concern whatever with the "wisdom" or "policy" of the legislation construed. Thus Judge Peckham in the *Lochner Case* said:

> This is not a question of substituting the judgment of the Court for that of the Legislature. If the act be within the power of the State, it is valid, although the judgment of the Court might be totally opposed to the enactment of such a law.

Judge Harlan said, in 1911: [2]

> Much may be done by a State under its police power which many may regard as an unwise exertion of governmental authority. But the Federal courts have no power to overturn such local legislation simply because they do not approve it or because they deem it unwise or inexpedient.

And Judge Holmes said in the Oklahoma bank case in 1911: [3]

> We fully understand the practical importance of the question and the very powerful argument that can be made against the wisdom of the legislation; but on that point we have nothing to say, *as it is not our concern.*

When the people of this country know and realize the importance of these facts about its Supreme Court, the present agitation, based so largely on misconception, will die away; and all will agree with the patriotic sentiment expressed in 1828 by a paper strongly opposed in politics to the Court, during the heated States' Rights and Nullification period — a period of far more violent agitation against the Court than the present: [4]

[1] Schmidinger *vs.* Chicago (1913) 226 U.S. 578.
[2] Brodnax *vs.* Missouri (1911) 219 U.S. 285.
[3] Noble State Bank *vs.* Haskell (1911) 219 U.S. 575.
[4] Niles Register, Jan. 19th, 1828.

Though the Constitutional construction of this lofty tribunal is not wholly conformable to our humble opinion of right, we have often thought that no person could behold this venerable body without profound respect for the virtue and talent concentrated on its bench; and with a great degree of confidence that, as there must be some power in every government having final effect, it could hardly be vested anywhere more safely than in the Supreme Court as at present filled.

A BULWARK TO THE STATE POLICE POWER — THE UNITED STATES SUPREME COURT

By Charles Warren, Assistant United States Attorney-General

(From the *Columbia Law Review*, December, 1913)

Court decisions "based on the individualist theories of a century ago," says a recent political scientist,[1] are no longer in harmony with modern conditions. The tendency of the present-day mind is unquestionably to tolerate increased restriction of the individual by the State, in the interest of the general public welfare. It is highly important, therefore, that the layman should comprehend how far the courts are embodying in their decisions this tendency.

The history of English law is one of struggle between two motives, a desire to protect the rights of the individual, and a desire to extend the rights of the public. Whether at common law or under a written constitution, a man's rights of property or of action are limited by the correlative rights of others, on which he may not legally infringe. It is by extending the rights of others, as individuals, that the courts have developed the common law of torts; and the legislatures, the statutory law of torts. It is by extending the rights of others, bonded together as the State, that the courts have developed the law of the State police power; and the legislatures, the criminal law. The foundation of the doctrine of the State police power is that every man must hold his property and conduct his life to a certain reasonable extent in trust for the benefit of the public; and that such a trust, if reasonable, may be enforced by the legislature by appropriate legislation passed under its general police power.[2] What is reasonable may vary at different eras and under different conditions. The rights of an individual will vary, therefore, and will be expanded or compressed according to the extent to which the courts shall hold State legislation

[1] Moore, Blaine Free, The Supreme Court and Unconstitutional Legislation, (1913).

[2] Thus Allen, J., in Com. vs. Gilbert (1893) 160 Mass. 157, says: All property is acquired and held under the tacit condition that it shall not be so used as to destroy or greatly impair the public rights and interests of the community.

to lie within or outside the scope of the police power. To fix the line, beyond which the legislature cannot go without infringing on the constitutional rights of the individual is, to-day, one of the most difficult tasks of a court. For as a judge of the Supreme Court, closely in sympathy with modern views, has frequently pointed out, "all legal lines are more or less arbitrary as to the precise place of their incidence, although the distinctions of which they are the inevitable outcome are plain and undeniable." [1] "Difference of degree is one of the distinctions by which the right of the Legislature to exercise the police power is determined." [2] "Any distinction, no matter how sensible and how plain, leads at last to a line which is worked out by the contact of decisions clustering around the opposite poles, and which may seem arbitrary if we attend to it alone and not to the nature of the groups which it divides." [3] "The question is one of degree, and sooner or later we reach a point at which the Constitution applies, and forbids physical appropriation and legal restrictions alike unless they are paid for." [4]

Where questions as to rights depend on matters of "degree," and of "distinction," it is of vital importance to the individual and to the public to know in what direction lies the general trend of the judicial mind.

Under the present prevailing anti-individualism, there can be no doubt that the test of the progressiveness of a court is the degree of remoteness of the line fixed, within which the legislature shall have scope to legislate without being held to infringe on the Constitution. Consequently, any court which recognizes wide and liberal bounds to this State police power is to be deemed in touch with the temper of the times.

Before accepting the remedies of those who wish to reform the courts, in order, as they claim, to make them more consonant with modern sentiments and conditions, sociological and economic, it is highly important to know the exact facts as to the existence of the evil or defect, for which the cure is proposed.

In an article in the April number of the *Columbia Law Review*,[5] I pointed out that so far as the United States Supreme Court was concerned, the evil condition of dissonance did not exist; and that the Court instead of being an obstacle in the path of progressive State legislation, had been found its consistent supporter, — at least in cases appealed under the "due process" and "equal protection" clauses of the Constitution.

[1] Holmes, J., in Lincoln *vs.* Street Com. (1900) 176 Mass. 210, 213.
[2] Holmes, J., in Rideout *vs.* Knox (1889) 148 Mass. 368, 372.
[3] Holmes, J., in Smith *vs.* American Linen Co. (1898) 172 Mass. 227, 229.
[4] Holmes, J., in Bent *vs.* Emery (1899) 173 Mass. 495, 496.
[5] 13 *Columbia Law Review*, 294; reprinted as Senate Document No. 30, 63d Congress First Session.

An analysis of the cases showed that out of over 560 decisions rendered under those clauses in the past twenty-five years (1887–1911), the Supreme Court had held invalid only three State laws involving a social or economic question of the kind included under the phrase "Social Justice" legislation; and that moreover it had so held invalid only thirty-four other State laws involving questions of taxation or of private property rights.[1] A closer analysis will show that out of these thirty-four invalid statutes only fourteen were passed in the exercise of the State police power, — the remaining twenty being enacted in the exercise of the State taxing power, etc.

In other words, in this great and vitally important class of cases, the Court has settled the boundary line which separates the end of the police power and the beginning of the Constitutional guaranties, overwhelmingly in favor of the State as against the individual (the individual, it may be noted, being, in the vast majority of the cases, a corporation).[2]

"Due process" and the "police power" both being indefinite terms, the Court has exercised a wide discretion in enlarging the scope of both in favor of the State.

There are, however, two other clauses of the Constitution under which the extent of the State police power has been tested by parties attacking the validity of State laws, viz.: the "impairment of obligation of contract" and the "regulation of commerce among the several States" clauses.

What has been the tendency of the Court in these classes of cases?

It is to be noted that these constitutional terms are not as indefinite or as incapable of exact delimitation as the term "due process." It is to be expected, therefore, that in attacks on legislation based on these clauses, there would be less room for exercise of discretion by the Court, in holding a statute to fall on this or the other side of the dividing line. It will be found, nevertheless, that even in cases brought under these latter clauses, the Court has a record substantially as liberal in support of the State police power, as in the other class of cases. Therefore, even if the accusation be well founded that there are certain State courts narrow and unprogressive in their tendencies,

[1] To the latter should perhaps be added one further case (making thirty-five instead of thirty-four), Willcox *vs.* Consol. Gas Co. (1909) 212 U.S. 19, in which a comparatively unimportant part of a New York statute was held invalid, the main statute being upheld.

[2] If the prior years (1868–1886) had been taken (and the whole period of the decisions on the Fourteenth Amendment thus included) it would have been found that the Court in those years did not hold inavlid a single State law enacted under the police power and dealing with "social justice" legislation, unless the Chinese laundry act of California in 1885 and the negro jury exclusion acts of West Virginia and Virginia in 1879, of Delaware in 1881, and of Kentucky in 1883 can be so termed, these laws being held invalid as denying the "equal protection of the laws" guaranteed by the Constitution.

See Yick Wo *vs.* Hopkins (1885) 118 U.S. 356; Strauder *vs.* West Virginia (1879) 100 U.S. 303; *Ex parte* Virginia (1897) 100 U.S. 339; Neal *vs.* Delaware (1881) 103 U.S. 370; Bush *vs.* Kentucky (1883) 107 U.S. 110.

and prone to restriction of the State police power, the United States Supreme Court will be found to constitute a bulwark to that power, whenever that Court can be invoked.

If any added remedy is needed to relieve a State from a too timid or too conservative State court, an ample remedy can be provided simply by broadening the present Federal Judiciary Act, so as to permit appeals to the United States Supreme Court in cases where the State court has held the State law unconstitutional (such appeals being now confined to cases where the State court has upheld the State law). Such a remedy will be simpler, less revolutionary, and, in view of the past record of the United States Supreme Court, fully as effective, as radical recall of judicial decisions.[1]

The need of such an amendment to the Judiciary Act has become the more imperative, since the enactment by Congress of the recent Act of March 4, 1913.[2] Heretofore, it has frequently been possible to bring the question of the constitutionality of a State law before the United States Supreme Court in a suit begun in the Federal Circuit Court, as an appeal lay from the decision of the inferior Federal Court whether such decision upheld or set aside the State law. Under the recent act of Congress, if any suit is brought in an inferior Federal court involving an injunction against proceedings under any State law or under any order made by an administrative board or commission created by and acting under a State law, all proceedings to restrain the execution of such statute or order in the Federal court shall be stayed, if there shall have been brought and be pending in the court of the State a suit involving such State laws. In view of this, fewer cases involving State statutes will be likely to reach the United States Supreme Court from the inferior Federal courts; and it will in the future be increasingly difficult to obtain the opinion of that Court on the validity of any State statute except in cases brought on writ of error to the State courts. It will become the more important therefore, that the facility of appeal from the State courts be increased; and that the scope of such appeal be extended, so as to allow the United States Supreme Court to apply its progressive and broadening views to the construction made of the Constitution by any narrow-minded State courts, if such there be.

In the following summary of the attitude of the United States Supreme Court towards the State police power in cases arising under the obligation of contract and interstate commerce clauses of the Constitution, a period of forty years (1873–1912) has been taken so as

[1] It is to be noted that it is only in cases of the exercise of the "police power" by the State, that recall of judicial decisions is advocated. See Ransom, Majority Rule and the Judiciary (1912), p. 114, citing the originator of the proposed reform.

[2] See Act of March 4, 1913, entitled "An Act restraining the issuance of interlocutory injunctions to suspend the enforcement of the Statute of a State, etc.," amending the Judiciary Act of March 3, 1911.

to correspond practically with the whole period covered by the Court's decisions as to "due process" under the Fourteenth Amendment.[1] It is important to note that a large proportion of the State laws[2] attacked under these clauses was enacted in the exercise of the taxing power by the State, and not of the police power. There is a marked difference between the attitude of the Supreme Court towards mere tax laws, and its tendencies when passing upon State regulative legislation enacted for the public welfare under the police power.

OBLIGATION OF CONTRACT CASES

In the past forty years — 1873 to 1912 — the Supreme Court has decided about 320 cases in which State legislation was attacked on the ground of impairment of obligation of contract.[3] Of these, about 160 were concerned with legislation which might, in general, be said to have been enacted for the public welfare under the State police power; while about 110 were concerned merely with questions of taxation or private or municipal indebtedness. The remaining cases (about fifty) simply decided that (*a*) the action of the State was merely a breach of contract and not a law impairing obligation; (*b*) that a judgment of a court does not constitute an impairment; (*c*) that the proceedings involved did not constitute a contract; (*d*) that the jurisdiction of the court did not appear: these cases therefore have no bearing on the attitude of the Court towards State statutes, and need not be considered in this connection.

POLICE POWER LEGISLATION

The broad-minded and thoroughly progressive attitude of the Court towards legislation of the first class mentioned above, is readily seen upon examination of the following record of its decisions, classified and in detail.

Laws Affecting General Property Rights and Business

The Supreme Court has upheld under the State police power anti-lottery laws, anti-trust laws, and legislation affecting the business and property rights of members of the community in general, in fifteen cases as follows:

[1] The Fourteenth Amendment was declared in force July 28, 1868; the first United States Supreme Court decision under it was the Slaughter-house Cases (April 14, 1873) 16 Wall. 36.

[2] Throughout this article the term "State law" or "State statute" is intended to include a State constitution, municipal ordinance or an order issued by a State board, officer, or commission by virtue of some State statute; in other words, all legislative forms of State activity.

[3] Cases included in the following volumes of reports of the United States Supreme Court, 15 Wall. to 225 U.S. inclusive. In the previous eighty-three years (1789–1872) the Court decided only about eighty-five cases on the question of obligation of contract.

Minnesota law validating deeds (1875); Massachusetts prohibition act forbidding sale and manufacture of liquor (1878); Mississippi anti-lottery act (1880); Minnesota dam act (1897); Kentucky anti-lottery act (1897); Texas land forfeiture act (1902); South Carolina creek obstruction dam act (1905); Georgia non-resident meat-packers' agent act (1905); Oregon change of street grade act (1906); Connecticut act as to condemnation of minority railroad shares (1906); Arkansas anti-trust law (1909); Kentucky negro segregation law (1908); Connecticut law restricting interest on small loans (1910); Massachusetts unclaimed bank deposit act (1911); New York ordinance as to advertising on street vehicles (1911).[1]

Laws Regulating the Business and Property of Public Service Corporations

The Supreme Court has upheld, under the State police power, legislation affecting the property rights and regulating the business, obligations and existence of railroads, gas, water and other public service corporations, and imposing new obligations on them, in thirty-one cases (other than tax cases), as follows:

New York act as to State railroad directors (1873); Virginia ordinance against engines in streets (1878); Georgia act establishing new bridge and ferry (1880); Connecticut act requiring railroad station stops (1881); Louisiana law as to sale of waterworks (1882); Massachusetts repeal of a railroad charter (1882); Pennsylvania canal company reorganization act (1883); Mississippi railroad regulation law (1886); Pennsylvania railroad damage act (1889); Illinois riparian lands act (1892); New York electrical subway act (1892); New York railroad reorganization law (1893); Connecticut grade-crossing removal act (1894); Kentucky anti-railroad consolidation law (1896); Minnesota anti-railroad consolidation law (1896); Missouri railroad fire liability act (1897); Nebraska law requiring railroad to repair viaduct (1898); Texas constitution as to railroad grants (1898); New York railroad land condemnation act (1900); Minnesota gaslight-post ordinance (1901); Illinois water company ordinance (1901); Kentucky railroad long and short haul law (1902); Wisconsin act as to claims of water company against a city (1903); Louisiana act imposing cost of change in pipe location on gas company (1905);

[1] Randall *vs.* Kreiger (1875) 23 Wall. 137; Boston Beer Co. *vs.* Massachusetts (1878) 97 U.S. 25; Stone *vs.* Mississippi (1880) 101 U.S. 814; St. Anthony Falls etc. Co. *vs.* Board (1897) 168 U.S. 349; Douglas *vs.* Kentucky (1897) 168 U.S. 488; Wilson *vs.* Standefer (1902) 184 U.S. 399; Kehrer *vs.* Stewart (1905) 197 U.S. 60; Manigault *vs.* Springs (1905) 199 U.S. 473; Mead *vs.* Portland (1906) 200 U.S. 148; Offield *vs.* N. Y. & N. H. R.R. (1906) 203 U.S. 372; Hammond Packing Co. *vs.* Arkansas (1909) 212 U.S. 322; Berea College *vs.* Kentucky (1908) 211 U.S. 45; Griffith *vs.* Connecticut (1910) 218 U.S. 563; Provident Institution for Savings *vs.* Malone (1911) 221 U.S. 660; Fifth Ave. Coach Co. *vs.* New York (1911) 221 U.S. 467.

Massachusetts act abrogating contract between city and railway (1905); Illinois act compelling railroad to pay for lowering tunnel (1906); Connecticut act imposing cost of paving on street railway (1906); New Jersey act forbidding water company to divert water into another State (1908); Minnesota act requiring railroad to repair viaduct (1908); Kansas order as to increased train service (1910); Indiana act requiring interlocking crossings on railroads (1911).[1]

The Court has held invalid, as impairing the obligation of contract, only one statute of this nature: Indiana act requiring railroad to pay part tolls to the State (1904).[2]

Laws as to Rates of Public Service Corporations and as to Construction of Municipal Plants

The Supreme Court has upheld legislation regulating the rates of railroad, gas, electric light and water companies, and legislation authorizing the construction of municipal public service plants, and repealing charters of public service corporations, in twenty-two cases, as follows:

Illinois act removing tollgates and making streets public (1878); California water rates act (1884); Pennsylvania water works act (1887); Georgia railroad rate law (1888); Minnesota railroad rate law (1890) (1890) (but held unconstitutional under Fourteenth Amendment); Alabama act regulating water works monopoly (1891); Ohio municipal gas plant act (1892); Illinois regulation of water rates (1901); Florida municipal electric light plants act (1902); New York municipal water works act (1902); Alabama constitution revoking exclusive franchise to water company (1902); Tennessee water rates ordinance (1903); Missouri municipal electric light plan act (1903); Kentucky water rates ordinance (1903); California water

[1] Miller *vs.* New York (1873) 15 Wall. 478; Railroad Co. *vs.* Richmond (1878) 96 U.S. 521; Wright *vs.* Nagle (1880) 101 U.S. 791; N. Y. & N. H. R.R. *vs.* Hamersley (1881) 104 U.S. 1; New Orleans *vs.* Morris (1882) 105 U.S. 600; Greenwood *vs.* Union Freight R.R. (1882) 105 U.S. 13; Gilfillan *vs.* Union Canal Co. (1883) 109 U.S. 401; Stone *vs.* Farmers etc. Co. (1886) 116 U.S. 307; Penn. R.R. *vs.* Miller (1889) 132 U.S. 75; Illinois etc. R.R. *vs.* Illinois (1892) 146 U.S. 387; N. Y. Electric Lines Co. *vs.* Squires (1892) 145 U.S. 175; New York *vs.* Cook (1893) 148 U.S. 397; N. Y. & N. E. R.R. *vs.* Bristol (1894) 151 U.S. 556; L. & N. R.R. *vs.* Kentucky (1896) 161 U.S. 677; Pearsall *vs.* Gt. No. R.R. (1896) 161 U.S. 646; St. Louis etc. R.R. *vs.* Mathews (1897) 165 U.S. 1; C. B. & Q. R.R. *vs.* Nebraska (1898) 170 U.S. 57; Galveston etc. R.R. *vs.* Texas (1898) 170 U.S. 226; Adirondack R.R. *vs.* New York (1900) 176 U.S. 335; St. Paul Gaslight Co. *vs.* St. Paul (1901) 181 U.S. 142; Rogers Park Water Co. *vs.* Fergus (1901) 180 U.S. 624; L. & N. R.R. *vs.* Kentucky (1902) 183 U.S. 503; Oshkosh Water Co. *vs.* Oshkosh (1903) 187 U.S. 437; N. O. Gas Co. *vs.* N. O. Drainage Com. (1905) 197 U.S. 453; Worcester *vs.* Worcester etc. Ry. (1905) 196 U.S. 539; West Chicago St. Ry. Co. *vs.* Illinois (1906) 201 U.S. 506; Fairhaven etc. R.R. *vs.* New Haven (1906) 203 U.S. 379; Hudson County Water Co. *vs.* McCarter (1908) 209 U.S. 349; No. Pac. R.R. *vs.* Minnesota (1908) 208 U.S. 583; No. Pac. R.R. *vs.* Kansas (1910) 216 U.S. 262; Grand Trunk etc. R.R. *vs* Indiana (1911) 221 U.S. 400.

[2] Terre Haute etc. R.R. *vs.* Indiana (1904) 194 U.S. 579.

rates reduction act (1904); Illinois gas rates reduction act (1904); Michigan railroad rates act (1904); Idaho municipal water plant act (1904); Tennessee municipal water plant act (1905); Texas half-fare school children act (1905); Michigan repeal of charter of water company (1910).[1]

The Court has held eight laws as to rates of municipal plants invalid on the ground that the legislation infringed on exclusive franchises or on contracts with the municipalities and thus impaired the obligation of contracts, in nine cases:

Louisiana constitution relating to water company (1885) (1885) (1887); Kentucky act chartering gas company (1885); Oregon municipal waterworks act (1898); California city water rates ordinance (1900); Michigan street railway fare ordinance (1902); Mississippi city waterworks (1902) (1906) (1907) (one case); Ohio street railway rate reduction act (1904); Minnesota street railway rate reduction (1910).[2]

Stockholders' Liability Laws

The Supreme Court has sustained every statute imposing new or additional liability on stockholders in corporations, as follows: Missouri (1875); Missouri (1890); California (1901); Minnesota (1907); Kansas (1910).[3]

[1] St. Clair Turnpike Co. *vs.* Illinois (1878) 96 U.S. 63; Spring Valley Water Co. *vs.* Shottler (1884) 110 U.S. 347; Lehigh Water Co. *vs.* Easton (1887) 121 U.S. 388; Georgia etc. R.R. *vs.* Smith (1888) 128 U.S. 174; Minn. etc. R.R. *vs.* Minnesota (1890) 134 U.S. 467; and Chic. etc. R.R. *vs.* Minnesota (1890) 134 U.S. 418; (the law in these cases being held unconstitutional, however, on another ground — lack of due process). Stein *vs.* Bienville Water Supply Co. (1891) 141 U.S. 67; Hamilton Gaslight Co. *vs.* Hamilton (1892) 146 U.S. 258; Freeport Water Co. *vs.* Freeport (1901) 180 U.S. 587; Capital City Light Co. *vs.* Tallahassee (1902) 186 U.S. 401; Skaneateles Water Co. *vs.* Skaneateles (1902) 184 U.S. 354; Bienville Water Supply Co. *vs.* Mobile (1902) 186 U S. 212; Knoxville Water Co. *vs.* Knoxville (1903) 189 U.S. 434; Joplin *vs.* S. W. Mo. Light Co. (1903) 191 U.S. 150; Owensboro *vs.* Owensboro Waterworks Co. (1903) 191 U.S. 358; Stanislaus County *vs.* San Joaquin etc. Co. (1904) 192 U.S. 201; People's Gaslight Co. *vs.* Chicago (1904) 194 U.S. 1; Grand Rapids etc. R.R. *vs.* Osborn (1904) 193 U.S. 17; Helena Waterworks Co. *vs.* Helena (1904) 195 U.S. 383; Knoxville Water Co. *vs.* Knoxville (1906) 200 U.S. 22; San Antonio Traction Co. *vs.* Altgelt (1906) 200 U.S. 304; Calder *vs.* Michigan (1910) 218 U.S. 591.

[2] New Orleans etc. Co. *vs.* Louisiana etc. Co. (1885) 115 U.S. 650 (see New Orleans Water Works Co. *vs.* Rivers (1885) 115 U.S. 674); *cf.* St. Tammany Water Works Co. *vs.* N. O. Water Works Co. (1887) 120 U.S. 64; Louisville Gas Co. *vs.* Citizens etc. Gas Co. (1885) 115 U.S. 683; Walla Walla *vs.* Walla Walla Water Co. (1898) 172 U.S. 1; Los Angeles *vs.* Los Angeles City Water Co. (1900) 177 U.S. 558; Detroit *vs.* Detroit Citizens St. Ry. Co. (1902) 184 U.S. 368; Vicksburg Water Works Co. *vs.* Vicksburg (1902) 185 U.S. 65; Vicksburg *vs.* Vicksburg Water Co. (1906) 202 U.S. 453; Vicksburg *vs.* Vicksburg Water Co. (1907) 206 U.S. 496; Cleveland *vs.* Cleveland City R.R. (1904) 194 U.S. 517; Minnesota *vs.* Minn. Street Ry. Co. (1910) 215 U.S. 417.

[3] Ochiltree *vs.* R. R. Contracting Co. (1875) 21 Wall. 249; Hill *vs.* Mutual Ins. Co. (1890) 134 U.S. 515; Pinney *vs.* Nelson (1901) 183 U.S. 144; Bernheimer *vs.* Converse (1907) 206 U.S. 516; Henley *vs.* Myers (1910) 215 U.S. 373.

Laws Regulating the Business and Property of Private Corporations

The Supreme Court has upheld, under the State police power, legislation affecting the property rights and regulating the business and obligations of corporations other than public service corporations, or of corporations in general, in sixteen cases, as follows:

Pennsylvania college charter amendment (1872); Illinois abatement of fertilizer company as a nuisance (1878); Illinois insurance law (1885); Kentucky removal of a college site law (1894); Ohio insurance company annual statement act (1894); New York condemnation act (1897); Texas act forfeiting corporation's right to do business (1900); Michigan insurance company stockholders' vote act (1900); foreign corporation act of Wisconsin (1903); Missouri act as to assessment insurance company (1902); Minnesota act changing place of business of corporations (1904); Virginia act incorporating a company with same name as foreign society (1906); Virginia act revoking charter for illegal liquor sale (1908); New York insurance company reorganization act (1907); Oklahoma and Nebraska bank guaranty laws (1910) (1911).[1]

The Court has held invalid one statute of this kind: Tennessee act restricting a corporation in its right to do business (1911).[2]

Laws Affecting Legal Processes and Remedies

The Supreme Court has upheld, as being within the State police power, statutes changing or providing new forms of remedy or legal process, or providing new statutes of limitation, in the following thirty-two cases:

Kansas and Georgia limitation acts (1873) (1877); Arkansas service of process act (1877); South Carolina set-off act (1877); Tennessee acts abolishing or modifying rights to sue State (1877) (1880); Alabama acts repealing right to sue State (1880); Louisiana registry of judgments act (1880); Pennsylvania abolition of imprisonment for debt (1881); Wisconsin statute of limitations (1882); Texas repeal of usury act (1883); Louisiana mortgage recording law (1883); Louisiana tax limit act (1883); Illinois mortgage redemption act

[1] Jefferson College *vs.* Wash. & Jeff. College (1872) 13 Wall. 190; N. W. Fertilizing Co. *vs.* Hyde Park (1878) 97 U.S. 659; Chicago Life Ins. Co. *vs.* Needles (1885) 113 U.S. 574; Bryan *vs.* Board (1894) 151 U.S. 639; Eagle Ins. Co. *vs.* Ohio (1894) 153 U.S. 446; Long Island Water Supply Co. *vs.* Brooklyn (1897) 166 U.S. 685; Waters-Pierce Co. *vs.* Texas (1900) 177 U.S. 28; Looker *vs.* Maynard (1900) 179 U.S. 46; Wilson *vs.* Standefer (1902) 184 U.S. 399; Diamond Glue Co. *vs.* U.S. Glue Co. (1903) 187 U.S. 611; Knights Templars Co. *vs.* Jarman (1902) 187 U.S. 197; Wright *vs.* Minn. etc. Ins. Co. (1904) 193 U.S. 657; Nat'l Council *vs.* State Council (1906) 203 U.S. 151; Cosmopolitan Club *vs.* Virginia (1908) 208 U.S. 378; Polk *vs.* Mut. Res. Life Ins. Co. (1907) 207 U.S. 310; Noble State Bank *vs.* Haskell (1911) 219 U.S. 104; Shallenberger *vs.* First State Bank (1911) 219 U.S. 114.

[2] Bedford *vs.* Eastern Bldg. Assn. (1901) 181 U.S. 227.

(1883); Missouri statute of limitations (1884); Tennessee set-off and bond-refunding law (1885); Minnesota insolvent law (1888); New York statute of limitations (1890) (1890) (1897); Virginia statute of limitations (1890); Tennessee lien law (1891); New York law regulating rate of interest on judgments (1892); Maryland insolvent law (1892); Louisiana mandamus law as added remedy to force corporation to comply with city contracts (1895); Texas escheat law (1896); North Carolina repeal of discretionary power of court to hear claims against State (1896); North Dakota mechanics' lien law (1901); Pennsylvania prescriptive rights as to ground rents act (1902); Texas act providing additional legal remedies (1903); Wisconsin act as to claims against city (1903); California mortgage redemption act (1904).[1]

The Court has also upheld the following 10 statutes affecting the status of municipal corporations or of individuals:

Ohio act to change county seats (1880); Louisiana law forbidding listing of doubtful State obligations (1882); Illinois act validating a loan (1883); Missouri bond registration act (1883); Texas public land sales law (1889); Louisiana constitution declaring bonds still in State's possession (1893); Louisiana bond issue (1901); Michigan act creating new school district (1905); South Carolina law forbidding State treasurer to carry bonds on his books as a debt (1907); Pennsylvania law enlarging municipality (1907).[2]

The Court has held invalid, as impairing the obligation of contract, seven statutes which were held to deprive creditors of substantial remedies for enforcement of the debts due to them; (of these seven, only three occurred within the last twenty-five years):

Georgia act increasing the amount of property exempt from execution (1873); Georgia act restricting plaintiff's right to recover a debt

[1] Sohn *vs.* Waterson (1873) 17 Wall. 596; Terry *vs.* Anderson (1877) 95 U.S. 628; Cairo etc. R.R. *vs.* Hecht (1877) 95 U.S. 168; Blount *vs.* Windley (1877) 95 U.S. 173; Tennessee *vs.* Sneed (1877) 96 U.S. 69; Memphis etc. R.R. *vs.* Tennessee (1880) 101 U.S. 337; S. & N. R.R. Co. *vs.* Alabama (1880) 101 U.S. 832; Louisiana *vs.* New Orleans (1880) 102 U.S. 203; Penniman's Case (1881) 103 U.S. 714; Koshkonong *vs.* Burton (1882) 104 U.S. 668; Ewell *vs.* Daggs (1883) 108 U.S. 143; Vance *vs.* Vance (1883) 108 U.S. 514; Louisiana *vs.* New Orleans (1883) 109 U.S. 285; Conn. Mut. Life Ins. Co. *vs.* Cushman (1883) 108 U.S. 51; Mitchell *vs.* Clark (1884) 110 U.S. 633; Amy *vs.* Tax District (1885) 114 U.S. 387; Denny *vs.* Bennett (1888) 128 U.S. 489; Wheeler *vs.* Jackson (1890) 137 U.S. 245; and McFarland *vs.* Jackson (1890) 137 U.S. 258; Turner *vs.* New York (1897) 168 U.S. 90; *Re* Brown (1890) 135 U.S. 701; East Tenn. etc. R.R. *vs.* Frazier (1891) 139 U.S. 288; Morley *vs.* Lake Shore etc. R.R. (1892) 146 U.S. 162; Brown *vs.* Smart (1892) 145 U.S. 454; N. O. etc. R.R. *vs.* Louisiana (1895) 157 U.S. 219; Hamilton *vs.* Brown (1896) 161 U.S. 256; Baltzer *vs.* North Carolina (1896) 161 U.S. 240; Red River etc. Bank *vs.* Craig (1901) 181 U.S 548; Wilson *vs.* Iseminger (1902) 185 U.S. 55; Waggoner *vs.* Flack (1903) 188 U.S. 595; Oshkosh Water Works Co. *vs.* Oshkosh (1903) 187 U.S. 437; Hooker *vs.* Burr (1904) 194 U.S. 415.

[2] Newton *vs.* Commissioners (1880) 100 U.S. 548; N. Y. Guar. Co. *vs.* Board of Liquidation (1882) 105 U.S. 622; Gross *vs.* U.S. Mortgage Co. (1883) 108 U.S. 477; Hoff *vs.* Jasper County (1883) 110 U.S. 53; Campbell *vs* Wad (1889) 132 U.S. 34; Bier *vs.* McGeehee (1893) 148 U.S. 137; Board *vs.* Louisiana (1901) 179 U.S. 622; Michigan *vs.* Lowry (1905) 199 U.S. 233; Smith *vs.* Jennings (1907) 206 U.S. 276; Hunter *vs.* Pittsburg (1907) 207 U.S. 161.

until he pays a certain tax (1873); North Carolina act exempting property from execution (1878); Virginia act affecting remedy (1885); Ohio mechanics' lien law (1890); Kansas and Illinois mortgage foreclosure acts (1896) (1904).[1]

In addition to the above, the Court has held invalid legislation changing the obligation of individuals or municipalities in nine cases, (of which only four occurred within the last twenty-five years), as follows:

South Carolina act creating a preference for the State as creditor of a State bank (1874); North Carolina act as to contracts payable in Confederate currency (1875); Virginia Confederate sequestration act (1878); Tennessee act voiding bank issues during the Civil War (1878); Wisconsin act abolishing an office held under a contract (1880); Oregon land act (1891); Texas constitution as to land grants (1898); Texas act repudiating land warrants (1900); New York elevated railway act (1905).[2]

The foregoing cases may be said to cover in general all the statutes enacted by State legislatures in the exercise of the State police power for the general welfare of the people, and which have been attacked on the ground of impairment of obligation of contract. From the records, it would appear that, in this class of cases, statutes were found constitutional in 131 cases; twenty-seven were found unconstitutional, the Court thus holding unconstitutional an average of about one statute of this nature every two years.

It is clear, therefore, that here also, as in the case of legislation attacked under the due process clause of the Fourteenth Amendment, the United States Supreme Court has been consistently liberal in its support of modern State legislation, enacted under the State police power.

Taxing Power Legislation

In addition to the above 158 cases, there have been about 110 cases in which statutes were attacked as impairing obligation of contract; but these were concerned, however, merely with the subjects of taxation and of municipal or State obligations. Such decisions affecting merely the taxing power and individual property rights do not come within the class of statutes which the advocates of the recall of judicial decisions claim should be subject to their new remedy.

[1] Gunn *vs.* Barry (1873) 15 Wall. 610; Walker *vs.* Whitehead (1873) 16 Wall. 314; Edwards *vs.* Kearzey (1878) 96 U.S. 595; Effinger *vs.* Kenney (1885) 115 U.S. 566; Toledo etc. Ry. *vs.* Hamilton (1890) 134 U.S. 296; Barnitz *vs.* Beverly (1896) 163 U.S. 118; Bradley *vs.* Lightcap (1904) 195 U.S. 1.

[2] Barings *vs.* Dabney (1874) 19 Wall. 1; Wilmington etc. R.R. *vs.* King (1875) 91 U.S. 3; Williams *vs.* Bruffy (1878) 96 U.S. 176; Keith *vs.* Clark (1878) 97 U.S. 454; Hall *vs.* Wisconsin (1880) 103 U.S. 5; Pennoyer *vs.* McConnaughy (1891) 140 U.S. 1; Houston etc. R.R. *vs.* Texas (1898) 170 U.S. 343; Houston etc. R.R. *vs.* Texas (1900) 177 U.S. 66; Muhlker *vs.* N. Y. & H. R.R. (1905) 197 U.S. 544.

Taxes on Corporations

The Supreme Court has upheld legislation taxing corporations, and has denied that the charters of such corporations taxed, or that the previous legislation regarding them, constituted a contract entitling them to exemption from taxation, in the following fifty cases:

South Carolina railroad tax (1873); Delaware railroad tax (1874); Missouri railroad tax (1874); Pennsylvania railroad tax (1875); Michigan tax (1875); Illinois bank tax (1875); Georgia license tax on insurance companies (1876); Wisconsin railroad tax (1876); Georgia railway tax (1876) (1876); Virginia railroad tax (1877); Tennessee railroad tax (1878); Maine railroad tax (1878); Pennsylvania car license act (1880); South Carolina railroad tax (1879); Arkansas railroad tax (1879); Maryland tax on exempt bonds of other States (1882); Tennessee bank tax (1882); Tennessee tax (1883); Florida railroad tax (1883); Missouri ferry license fee (1883); Arkansas railroad tax (1884) (1885); West Virginia railroad tax (1885); New Jersey tax (1886); Louisiana railroad tax (1886); Tennessee railroad tax (1889); Louisiana tax (1891); Louisiana railroad tax (1892); Kentucky tax (1892); North Carolina railroad tax (1892); Missouri railroad tax (1894); Tennessee tax (1896); Tennessee constitution (1896); Mississippi levee tax (1897); Louisiana constitution tax (1897); Kentucky bank tax (1899); Kentucky bridge tax (1899); Mississippi railroad tax (1901) (1901) (1901); Georgia tax (1901); New York succession tax (1902); Michigan railroad tax (1903); New York special franchise tax (1905); Tennessee tax (1908); Kentucky bank tax (1907); Missouri license tax (1908); Kentucky bank tax (1910); Virginia tax (1911).[1]

[1] After the year 1818 when the Court decided, in the Dartmouth College Case, a legislative charter to be a contract, many fears were expressed that such doctrine would doom all State legislation relating to corporations. In 1826, in the United States Senate, Martin Van Buren severely criticized the Court for its broad construction of the phrase "impairment of obligation of contract," and deplored the "tremendous sweep" which that construction had given to the jurisdiction of the Court. A decision of the Court in 1853 in Piqua Branch of The State Bank of Ohio *vs.* Knoop, 16 How. 369 caused even greater fear in the United States lest the Supreme Court should become the engine of destruction of State legislation. In that case it was announced definitely that a State legislature had power to exempt corporations from taxation, so that a tax imposed by a later legislature was to be held an "impairment of obligation" of the contract of exemption, and therefore unconstitutional. Judge Campbell, in his dissenting opinion, violently attacked the decision as utterly subversive to the State powers. On how little ground these fears were based, may be seen from the actual record of the Court relative to statutes of this nature, as follows: — Tomlinson *vs.* Jessup (1873) 15 Wall. 454; Minot *vs.* R.R. (1874) 18 Wall. 206; Trask *vs.* Maguire (1874) 18 Wall. 391; Erie Ry. Co. *vs.* Pennsylvania (1875) 21 Wall. 492; Tucker *vs.* Ferguson (1875) 22 Wall. 527; Concord *vs.* Portsmouth Sav. Bank (1875) 92 U.S. 625; Home Ins. Co. *vs.* Augusta (1876) 93 U.S. 116; West Wisconsin Ry. *vs.* Trempeleau County (1876) 93 U.S. 595; Ches. & Ohio R.R. *vs.* Virginia (1877) 94 U.S. 718; Central R.R. etc. Co. *vs.* Georgia (1876) 92 U.S. 665; S. W. R.R. *vs.* Georgia (1876) 92 U.S. 676; Railroad Companies *vs.* Gaines (1878) 97 U.S. 697; Maine Centr. R.R. *vs.* Maine (1878) 96 U.S. 499; Union Ry. Co. *vs.* Philadelphia (1880) 101 U.S. 528; Hoge *vs.* Railroad Co. (1879) 99 U.S. 348; Railway Co. *vs.* Loftin (1879) 98 U.S. 559; Bonaparte

The Court has held statutes invalid in eighteen cases as imposing taxes on corporations which were held specifically exempt from taxation under their charters or under previous legislation; (of these eighteen cases, however, only nine occurred within the last twenty-five years):

North Carolina railroad tax (1872); South Carolina railroad tax (1873) (1873); Missouri (1874); New Jersey (1877); Tennessee bank tax (1878); Illinois tax act (1879); Louisiana tax (1882); Tennessee (1886); Tennessee (1894); Tennessee bank tax (1896); Louisiana bank tax (1879); Minnesota railroad tax (1900); Louisiana license tax (1904); Michigan railroad tax (1906); Colorado foreign corporation license tax (1907); Georgia franchise tax (1910); Louisiana lottery tax (1886).[1]

State and Municipal Taxes

The principal class of statutes which have been held invalid by the Supreme Court as in violation of this clause of the Constitution, has been that which includes the numerous laws by which States have endeavored to authorize the evasion of payment of bonds issued by the State, city, or county under some prior administration.

Statutes reducing or annulling power of taxation previously existing have been declared invalid in thirteen cases (of which only four

vs. Tax Court (1882) 104 U.S. 592; Bank of Commerce vs. Tennessee (1882) 104 U.S. 493; Memphis Gas Light Co. vs. Shelby County (1883) 109 U.S. 398; L. & N. R.R. vs. Palmes (1883) 109 U. S. 244; Wiggin Ferry Co. vs. St. Louis (1883) 107 U. S. 365; Memphis R.R. vs. Commissioners (1884) 112 U S. 609; St. Louis etc. Ry. Co. vs. Berry (1885) 113 U.S. 465; Ches. & Ohio R.R. vs. Miller (1885) 114 U. S. 176; Given vs. Wright (1886) 117 U.S. 648; Vicksburg R.R. vs. Dennis (1886) 116 U. S. 665; Pickard vs. East Tenn. etc. R.R. (1889) 130 U. S. 637; New Orleans vs. N. O. Water Works Co. (1891) 142 U.S. 79; New Orleans etc. R.R. vs. New Orleans (1892) 143 U. S. 192; Louisville Water Co. vs. Clark (1892) 143 U.S. 1; Wilmington etc. R.R. vs. Aldsbrook (1892) 146 U.S. 279; Keokuk etc. R.R. vs. Missouri (1894) 152 U.S. 301; Phoenix etc. Ins. Co. vs. Tennessee (1896) 161 U.S. 174; Bank of Commerce vs. Tennessee (1896) 163 U.S. 416; Ford vs. Delta etc. Co. (1897) 164 U.S. 662; Grand Lodge vs. New Orleans (1897) 166 U.S. 143; Louisville vs. Bank of Louisville (1899) 174 U.S. 439; Henderson Bridge Co. vs. Henderson (1899) 173 U.S. 592; Yazoo etc. R.R. vs. Adams (1901) 180 U.S. 1; Ill. etc. R.R. vs. Adams (1901) 180 U.S. 28; Gulf etc. R.R. vs. Hewes (1901) 183 U. S. 66; Wells vs. Savannah (1901) 181 U.S. 531; Orr vs. Gilman (1902) 183 U.S. 278; Wisconsin etc. R.R. vs. Powers (1903) 191 U.S. 379; New York vs. State Board (1905) 199 U.S. 1; (see also 199 U.S. 48; 199 U.S. 53); Jetton vs. University (1908) 208 U.S. 489; Bank of Kentucky vs. Kentucky (1907) 207 U.S. 258; St. Louis vs. United Rys. Co. (1908) 210 U.S. 266; Citizens Nat. Bank vs. Kentucky (1910) 217 U.S. 443; J. W. Perry Co. vs. Norfolk (1911) 220 U.S. 472.

[1] Wilmington R.R. Co. vs. Reid (1872) 13 Wall. 264; Tomlinson vs. Branch (1873) 15 Wall. 460; Humphrey vs. Pegues (1873) 16 Wall. 244; Pacific R.R. Co. vs. McGuire (1874) 20 Wall. 36; New Jersey vs. Yard (1877) 95 U.S. 104; Farrington vs. Tennessee (1878) 95 U. S. 679; University vs. People (1879) 99 U.S. 309; Asylum vs. New Orleans (1882) 105 U.S. 362; Tennessee vs. Whitworth (1886) 117 U.S. 129; Mobile etc. R.R. vs. Tennessee (1894) 153 U.S. 486; Bank of Commerce vs. Tennessee (1896) 161 U.S. 134; New Orleans vs. Citizens Bank (1897) 167 U.S. 371; Stearns vs. Minnesota (1900) 179 U.S. 223; (see Duluth etc. R.R. vs. St. Louis County (1900) 179 U.S. 302); Citizens Bank vs. Parker (1904) 192 U.S. 73; Powers vs. Detroit etc. R.R. (1906) 201 U.S. 543; Amer. Sm. & Ref. Co. vs. Colorado (1907) 204 U.S. 103; Wright vs. Ga. etc. R.R. (1910) 216 U.S. 420; New Orleans vs. Houston (1886) 119 U.S. 265.

occurred within the last twenty-five years) in the following States: — Tennessee (1878); Wisconsin (1880); Louisiana (1881) (1882); Missouri (1882); Louisiana (1884); Alabama (1886); Louisiana (1886); Missouri (1887); Missouri (1891); Missouri (1897); South Carolina (1906); Louisiana (1909).[1] And State laws otherwise interfering with the payment of State and municipal bonds have been held invalid, as follows: Seven laws in Pennsylvania, South Carolina, Minnesota, Illinois, Louisiana, South Carolina, and Pennsylvania, and a series of cases as to Virginia bond laws (of these cases, only three occurred within the last twenty-five years):

Pennsylvania tax on foreign held bonds (1873); South Carolina ordinance deducting tax from city debt interest when payable (1878); Minnesota act withdrawing authority from town to subscribe to bonds (1883); Virginia act deducting tax from interest coupons (1881); Virginia act forbidding receipt of coupons on State bonds in payment of taxes (1883) (1885); Virginia bond law (1886) (1886) (1887) (1898); Virginia license tax for sale of coupons (1890); Illinois constitution forbidding municipal subscription to corporate securities when applied to previous subscriptions (1882); Louisiana lottery bond act (1882); South Carolina bond invalidation law (1886); Pennsylvania act requiring railroads to deduct tax from coupons (1894).[2]

On the other hand, the Supreme Court has upheld legislation altering or imposing new taxes or assessments or tax remedies in thirteen cases, as follows:

New York tax act (1875); Louisiana tax act (1875); Indiana law refunding taxes (1876); Tennessee city street tax (1878); Tennessee act repealing city charter (1880); California swamp reclamation act (1884); New Jersey highway assessment act (1891); Maryland repeal of tax (1902); New York succession tax (1902) (1903); New York

[1] Memphis *vs.* United States (1878) 97 U.S. 293; (see Memphis *vs.* Brown (1878) 97 U.S. 297); Mt. Pleasant *vs.* Beckwith (1880) 100 U.S. 514; Wolff *vs.* New Orleans (1881) 103 U.S. 358; Ralls County Court *vs.* United States (1882) 105 U.S. 733; Louisiana *vs.* Pillsbury (1882) 105 U.S. 278; Louisiana *vs.* Parish (1884) 111 U.S. 716; Mobile *vs.* Watson (1886) 116 U.S. 289; Louisiana *vs.* Police Jury (1886) 116 U.S. 131; Seibert *vs.* United States (1887) 122 U.S. 284; Scotland County Court *vs.* United States (1891) 140 U.S. 41; Shapleigh *vs.* San Angelo (1897) 167 U.S. 646; Graham *vs.* Folsom (1906) 200 U.S. 248; Louisiana *vs.* New Orleans (1909) 215 U.S. 170. See also Shreveport *vs.* Cole (1889) 129 U.S. 36.

[2] Cleveland etc. R.R. *vs.* Pennsylvania (1873) 15 Wall. 300; Murray *vs.* Charleston (1878) 96 U.S. 432; Red Rock *vs.* Henry (1883) 106 U.S. 596; Hartman *vs.* Greenhow (1881) 102 U.S. 672; Antoni *vs.* Greenhow (1883) 107 U.S. 769; Poindexter *vs.* Greenhow (1885) 114 U.S. 270; Chaffin *vs.* Taylor (1885) 114 U.S. 309; Allen *vs.* Balt. & O. R.R. (1885) 114 U.S. 311; White *vs.* Greenhow (1885) 114 U.S. 307; Pleasants *vs.* Greenhow (1885) 114 U.S. 323; Sands *vs.* Edmunds (1886) 116 U.S. 585; Royall *vs.* Virginia (1886) 116 U.S. 572; Royall *vs.* Virginia (1887) 121 U.S. 102; McGahey *vs.* Virginia (1890) 135 U.S. 662 (and seven other cases); McCullogh *vs.* Virginia (1898) 172 U.S. 102; Clay County *vs.* Soc. for Savings (1882) 104 U.S. 579; Louisiana *vs.* Pillsbury (1882) 105 U.S. 278; Hagood *vs.* Southern (1886) 117 U.S. 52; N. Y. etc. Ry. *vs.* Pennsylvania (1894) 153 U.S. 628.

stock transfer tax (1906); Louisiana constitution exempting property from taxation (1910); California inheritance tax (1910).[1]

INTERSTATE COMMERCE CASES

In the forty years between 1873 and 1912, the constitutionality of State statutes or State action was attacked either in the State highest courts or in the inferior Federal courts on the ground of interference with the Federal jurisdiction over interstate commerce in about 260 cases.[2] Of these, about 145 were concerned with legislation enacted in general for the public welfare under the State police power; while about 115 were concerned merely with questions of taxation.

POLICE POWER LEGISLATION

A review of the decisions on interstate commerce of the first class above noted shows that the Supreme Court has, where possible, tried to sustain the constitutionality of State laws by imputing to the State the intent to legislate under the police power reserved to the State rather than an intent to interfere with the interstate commerce powers of the National Government.

Inspection Laws

The Court has upheld seven inspection acts as follows:

Kentucky oil inspection act (1879); Maryland tobacco inspection act (1883); North Carolina fertilizer inspection act (1898); Missouri beer inspection fee law (1905); New Mexico hide inspection law (1906); Tennessee oil inspection act (1908); North Carolina kerosene and oil inspection acts (1912).[3]

It has invalidated three as follows:

Minnesota law requiring inspection of meats in State before slaughter (1890); Virginia law forbidding sale of meats slaughtered more than 100 miles from place of sale (1891); Virginia flour inspection act (1891).[4]

[1] Garrison *vs.* New York (1875) 21 Wall. 196; Morgan *vs.* Louisiana (1876) 93 U.S. 217; Tippecanoe County *vs.* Lucas (1876) 93 U.S. 108; United States *vs.* Memphis (1878) 97 U.S. 284; Merriweather *vs.* Garrett (1880) 102 U.S. 472; Hager *vs.* Reclamation District (1884) 111 U.S. 701; Essex Public Road Ward *vs.* Skinkle (1891) 140 U.S. 334; No. etc. R.R. *vs.* Maryland (1902) 187 U.S. 258; Orr *vs.* Gilman (1902) 183 U.S. 278; Blackstone *vs.* Miller (1903) 188 U.S. 189; Chanler *vs.* Kelsey (1907) 205 U.S. 466; Ark. & So. R.R. *vs.* La. etc. R.R. (1910) 218 U.S. 431; Moffitt *vs.* Kelly (1910) 218 U.S. 400.

[2] See the volumes of U.S. Reports from 15 Wall. to 223 U.S. inclusive. In the previous eighty-three years (1789–1872) the court decided only about thirty-seven cases involving State statutes and interstate commerce.

[3] Patterson *vs.* Kentucky (1879) 97 U.S. 501; Turner *vs.* Maryland (1883) 107 U.S. 38; Patapsco Guano Co. *vs.* No. Car. Board (1898) 171 U.S. 345; Pabst Brewing Co. *vs.* Crenshaw (1905) 198 U.S. 17; McLean *vs.* Denver etc. R.R. (1906) 203 U.S. 38; General Oil Co. *vs.* Crain (1908) 209 U.S. 211; The Red Oil Mfg. Co. *vs.* North Carolina (1912) 222 U.S. 380.

[4] Minnesota *vs.* Barber (1890) 136 U.S. 313; Brimmer *vs.* Rebman (1891) 138 U.S. 78; Voight *vs.* Wright (1891) 141 U.S. 62.

Game Laws

The Court has sustained the game bird law of Connecticut (1896) and the game law of New York (1908).[1]

Modern Economic Legislation

The Court has upheld the following modern legislation of an economic and financial nature:

Alabama license for buying and selling futures (1908); Missouri act as to sales for future delivery (1911); Iowa railroad car attachment act (1910); Tennessee anti-trust act (1910); New York license act for private bankers (1911); Kansas act for regulating powder for coal mines (1912); Nebraska modified contributory negligence law (1912).[2]

Cattle, Health, and Quarantine Laws

The Court has sustained nine laws relating to cattle disease and cattle quarantine, as follows:

Louisiana quarantine laws (1886) (1900) (1902); Iowa damage from Texas fever cattle act (1888); Kansas cattle contagious disease act (1898); Texas anthrax quarantine law (1901); Idaho sheep quarantine act (1901); Colorado cattle inspection law (1902); Kansas live stock quarantine law (1908).[3]

It has invalidated one: Missouri act against driving Texas cattle (1878).[4]

Liquor and Cigarette Laws

The Court has sustained prohibitory and other laws as to liquor and cigarettes in 13 cases as follows:

Iowa liquor laws (1874) (1888) (1898) (1905); Kansas liquor prohibition laws (1884) (1891); Tennessee cigarette prohibition law (1900); Iowa cigarette law (1905); Tennessee license for selling liquors on ferry boats (1908); Georgia liquor law (1906); Kentucky liquor

[1] Geer *vs.* Connecticut (1896) 161 U.S. 519; New York *vs.* Hesterberg (1908) 211 U.S. 31.

[2] Ware *vs.* Mobile Co. (1908) 209 U.S. 405; Brodnax *vs.* Missouri (1911) 219 U.S. 285; Davis *vs.* Cleveland etc. R.R. (1910) 217 U.S. 157; Standard Oil Co. *vs.* Tennessee (1910) 217 U.S. 413; Engel *vs.* O'Malley (1911) 219 U.S. 128; Williams *vs.* Walsh (1912) 222 U.S. 415; Mo. Pac. R.R. *vs.* Castle (1912) 224 U.S. 541.

[3] Morgan's etc. S. S. Co. *vs.* Louisiana (1886) 118 U.S. 455; Louisiana *vs.* Texas (1900) 176 U.S. 1; Compagnie Française etc. *vs.* La. State Board (1902) 186 U.S. 380; Kimmish *vs.* Ball (1889) 129 U.S. 217; Mo. etc. R.R. *vs.* Huber (1898) 169 U.S. 613; Smith *vs.* St. Louis etc. R.R. (1901) 181 U.S. 248; Rasmussen *vs.* Idaho (1901) 181 U.S. 198; Reid *vs.* Colorado (1902) 187 U.S. 137; Asbell *vs.* Kansas (1908) 209 U.S. 251.

[4] Railroad Co. *vs.* Husen (1878) 95 U.S. 465.

law (1907); South Dakota license tax on liquor drummers (1907); Alabama liquor license tax (1908).[1]

It has held that the operation of such laws interfered with interstate commerce in nine cases as follows:

Texas tax on imported liquors (1880); Iowa liquor law (1888); Michigan brewer license act and tax on receipts (1890); Iowa liquor act (1890); South Carolina State dispensary law (1897); South Carolina liquor inspection law (1898); Kentucky liquor laws (1907) (1909) (1912).[2]

Oleomargarine Laws

The Court has sustained two oleomargarine laws: Massachusetts (1894) and Ohio (1902);[3] and has invalidated two: New Hampshire (1898) and Pennsylvania (1898).[4]

Negro Segregation Laws

The Court has sustained two laws relating to segregation of negroes in trains: the "Jim Crow" law of Mississippi (1890); the Kentucky negro car law (1910);[5] and has invalidated one, the steamboat separate cabin law of Louisiana.[6]

Railroad Legislation

No subject has more engrossed the attention of State legislation during the past twenty-five years than that of the regulation of railroads. It is not surprising, therefore, that the largest number of cases tested under the interstate commerce clause involved railroad statutes.

The Court has sustained the powers of the States to control and regulate the general administration of railroads in twenty-five cases, as follows:

[1] Bartemeyer *vs.* Iowa (1874) 18 Wall. 129; Kidd *vs.* Pearson (1888) 128 U.S. 1; Rhodes *vs.* Iowa (1898) 170 U.S. 412; Amer. Ex. Co. *vs.* Iowa (1905) 196 U.S. 133; Foster *vs.* Kansas (1884) 112 U.S. 201; Wilkerson *vs.* Rahrer (1891) 140 U.S. 545; Austin *vs.* Tennessee (1900) 179 U.S. 343; Cook *vs.* Marshall Co. (1905) 196 U.S. 261; Foppiano *vs.* Speed (1905) 199 U.S. 501; Heyman *vs.* So. R.R. (1906) 203 U.S. 270; Adams Ex. Co. *vs.* Kentucky (1907) 206 U.S. 129, and two other cases; Delamater *vs.* South Dakota (1907) 205 U.S. 93; Ware & Leland *vs.* Mobile (1908) 209 U.S. 405.

[2] Tiernan *vs.* Rinker (1880) 102 U.S. 123: Bowman *vs.* Chic. & N. W. R.R. (1888) 125 U.S. 465; Lyng *vs.* Michigan (1890) 135 U.S. 161; Leisy *vs.* Hardin (1890) 135 U.S. 100; Scott *vs.* Donald (1897) 165 U.S. 58; Scott *vs.* Donald (1897) 165 U.S. 107; Vance *vs.* W. A. Vandercook Co. (1898) 170 U.S. 438; Adams Ex. Co. *vs.* Kentucky (1907) 206 U.S. 129; Adams Ex. Co. *vs.* Kentucky (1909) 214 U.S. 218; L. & N. R.R. *vs.* Cook Brewing Co. (1912) 223 U.S. 70.

[3] Plumley *vs.* Massachusetts (1894) 155 U.S. 461, Capital City Dairy Co. *vs.* Ohio (1902) 183 U.S. 238.

[4] Schollenberger *vs.* Pennsylvania (1898) 171 U.S. 1; Collins *vs.* New Hampshire (1898) 171 U.S. 30.

[5] Louisville etc. R.R. *vs.* Mississippi (1890) 133 U.S. 587; Chiles *vs.* Ches. & Ohio R.R. (1910) 218 U.S. 71.

[6] Hall *vs.* DeCuir (1878) 95 U.S. 485.

Iowa railroad contract (1874); Alabama license law for engineers (1888); Alabama law regulating qualifications, duties, liability and color blindness of employees on interstate trains (1888); Kentucky act prohibiting consolidation of parallel lines (1896); New York railroad car stove law (1897); Minnesota interstate mail train county stop act (1897); Georgia Sunday freight train stop act (1896); Ohio train stop act (1899); Virginia, West Virginia and Missouri laws as to liability for negligence on connecting lines (1898) (1898) (1899); Iowa law as to contracts for exemption from liability (1898); California State court jurisdiction of prosecution for murder of engineer on U.S. mail train (1898); Kansas railroad speed act (1900); Minnesota track connection act (1900); New York mileage book act (1902); Pennsylvania law limiting carriers' liability for negligence (1903) (1906); Texas interstate railroad shipments (1907); Mississippi orders to standardize narrow gauge road and operate a spur track (1908); Kansas order as to railroad service to particular shipper (1909); Kansas order as to passenger service (1910); Georgia law as to speed at crossings (1910); South Carolina act penalizing failure to pay damages promptly (1910); Arkansas full crew law (1911).[1]

The Court has on the other hand held invalid State laws or action on this subject in 13 cases, as follows:

Texas act as to failure to deliver goods on tender of rate named in bill of lading (1895); Illinois county-seat mail train stop acts (1896) (1900); Georgia act as to initial carriers' duties (1905); North Carolina order as to car delivery on private sidings (1906); Texas act as to furnishing cars to shippers (1906); Mississippi order stopping mail trains at county seats (1906); South Carolina order as to train stops (1907); Missouri act as to train stops at junction (1910); Arkansas act requiring supply of cars to shippers (1910); Indiana act as to free passes for printing (1911); North Carolina act penalizing refusal to receive freight (1912); Washington act as to hours of labor on railroads (1912).[2]

[1] Dubuque R.R. Co. *vs.* Richmond (1874) 19 Wall. 584; Smith *vs.* Alabama (1888) 124 U.S. 465; Nashville etc. R.R. *vs.* Alabama (1888) 128 U.S. 96; Louisville etc. R.R. *vs.* Kentucky (1896) 161 U.S. 677; N. Y. N. H. & H. R.R. *vs.* New York (1897) 165 U.S. 628; Gladson *vs.* Minnesota (1897) 166 U.S. 427; Hennington *vs.* Georgia (1896) 163 U.S. 299; Lake Shore etc. R.R. *vs.* Ohio (1899) 173 U.S. 285; Richmond etc. R.R. *vs.* R. G. Patterson Tobacco Co. (1898) 169 U.S. 311; Pittsburg etc. R.R. *vs.* West Virginia (1898) 172 U.S. 32; Mo. etc. R.R. *vs.* McCann (1899) 174 U.S. 580; Chic. etc. R.R. *vs.* Solan (1898) 169 U.S. 133; Crossley *vs.* California (1898) 168 U.S. 640; Erb *vs.* Morasch (1900) 177 U.S. 584; Wis. etc. R.R. *vs.* Jacobson (1900) 179 U.S. 287; Erie R.R. *vs.* Purdy (1902) 185 U.S. 148; Penn. R.R. *vs.* Hughes (1903) 191 U.S. 477; Martin *vs.* Pittsburg etc. R.R. (1906) 203 U.S. 284; Gulf etc. R.R. *vs.* Texas (1907) 204 U.S. 403; Mobile etc. R.R. *vs.* Mississippi (1908) 210 U.S. 187; Mo. Pac. R.R. *vs.* Larabee etc. Co. (1909) 211 U.S. 612; Mo. Pac. R. R. *vs.* Kansas (1910) 216 U.S. 262; So. R. R. *vs.* King (1910) 217 U.S. 524; Atl. etc. R.R. *vs.* Mazursky (1910) 216 U.S. 122; Chic. etc. R.R. *vs.* Arkansas (1911) 219 U.S. 453.

[2] Gulf etc. R.R. *vs.* Hefley (1895) 158 U.S. 198; Ill. etc. R.R. *vs.* Illinois (1896) 163 U.S. 142; Cleveland etc. R.R. *vs.* Illinois (1900) 177 U.S. 514; Central etc. R.R. *vs.*

The Court has sustained State regulation of railroad rates in eight cases, as follows:

Iowa freight rate act (1873); Maryland railroad earnings act (1875); Iowa rates (1877); Wisconsin rates (1877); Minnesota rates (1877); Illinois rates (1877); Mississippi rates (1886); Arkansas rates (1888).[1]

It has held invalid three cases of State action: Illinois long and short haul law (1886); Kentucky long and short haul clause of State constitution (1902); Arkansas rates (1903).[2]

Grain Rate Laws

The Court has upheld every grain rate law brought before it, as follows: Illinois grain warehouse rates (1877); New York grain elevator rate law (1892); North Dakota grain elevator rate law (1894); Minnesota grain elevator license law (1901).[3]

Laws as to Navigation

The Court has sustained the State laws (other than tax acts) controlling rivers, ferries, bridges and canals in eleven cases as follows:

Wisconsin dam act (1878); Illinois ferry license fee (1883); Illinois bridge act (1883); California bridge act (1885); Illinois lock toll act (1886); Michigan river improvement and toll act (1887); Oregon bridge act (1888); Ohio bridge act (1897); Illinois dock act (1903); South Carolina creek obstruction by dam act (1905); New Jersey oyster bed act (1907).[4]

It has held invalid the three following State laws: Georgia State

Murphey (1905) 196 U.S. 194; McNeill *vs.* So. R.R. (1906) 202 U.S. 543; Houston etc. R.R. *vs.* Mayer (1906) 201 U.S. 321; Miss. R.R. Com. *vs.* Ill. etc. R.R. (1906) 203 U.S. 335; Atl. etc. R.R. *vs.* Wharton (1907) 207 U.S. 328; Herndon *vs.* Chic. etc. R.R. (1910) 218 U.S. 135; Roach *vs.* A. R. & S. F. R.R. (1910) 218 U.S. 159; St. L. etc. R.R. *vs.* Arkansas (1910) 217 U.S. 136; Chic. etc. R.R. *vs.* United States (1911) 219 U.S. 486; So. R.R. *vs.* Reid (1912) 222 U.S. 424 (and two other cases); No. Pac. R.R. *vs.* Washington (1912) 222 U.S. 370.

[1] Railroad Co. *vs.* Fuller (1873) 17 Wall. 560; Railroad Co. *vs.* Maryland (1875) 21 Wall 456; C. B. & Q. R.R. *vs.* Iowa (1877) 94 U.S. 155; Chic. etc. R.R. *vs.* Ackley (1877) 94 U.S. 179; Winona etc. R.R. *vs.* Blake (1877) 94 U.S. 180; Peik *vs.* Chic. etc. R.R. (1877) 94 U.S. 164; Stone *vs.* Farmers etc. Co. (1886) 116 U.S. 307; Dow *vs.* Beidelman (1898) 125 U.S. 680.

[2] Wabash etc. R.R. *vs.* Illinois (1886) 118 U.S. 557; Louisville etc. R.R. *vs.* Eubank (1902) 184 U.S. 27; Hanley *vs.* Kansas City etc. R.R. (1903) 187 U.S. 617.

[3] Munn *vs.* Illinois (1877) 94 U.S. 113; Budd *vs.* New York (1892) 143 U.S. 517; Brass *vs.* North Dakota (1894) 153 U.S. 391; W. W. Cargill Co. *vs.* Minnesota (1901) 180 U.S. 452.

[4] Pound *vs.* Turck (1878) 95 U.S. 459; Wiggins Ferry Co. *vs.* East St. Louis (1883) 107 U.S. 365; Escanaba Co. *vs.* Chicago (1883) 107 U.S. 678; Cardwell *vs.* Amer. Bridge Co. (1885) 113 U.S. 205; Huse *vs.* Glover (1886) 119 U.S. 543; Sands *vs.* Manistee Imp. Co. (1887) 123 U.S 288; Willamette etc. Co. *vs.* Hatch (1888) 125 U.S. 1; Lake Shore etc. R.R. *vs.* Ohio (1897) 165 U.S. 365; Manigault *vs.* Springs (1905) 199 U.S. 473; Cummings *vs.* Chicago (1903) 188 U.S. 410; Lee *vs.* New Jersey (1907) 207 U.S. 67.

compact as to river (1876); Kentucky bridge tolls law (1894); Illinois ferry for transporting cars act (1904).[1]

Pilot, Harbor and Immigration Acts

The Court has sustained the State laws dealing with pilots and harbor control (other than tax laws) in six cases as follows:

New York pilot law (1881); Alabama harbor improvement law (1881); Louisiana coal boat gaugers act (1895); Texas pilot law (1909); Louisiana pilot law (1909); California pilot law (1912).[2]

It has held invalid such laws in three cases: California immigrant bond law (1876); Louisiana vessel inspection law (1877); Georgia pilot law (1886).[3]

Marine Liens, Liabilities, etc.

The Court has upheld six State laws as follows:

New Jersey ship lien act (1875): Indiana act as to death from marine torts (1876); Illinois vessel lien and attachment act (1886); Minnesota log lien act (1900); Michigan vessel lien act (1907); Washington act as to lien on foreign vessels for non-maritime torts (1911).[4]

Telegraph Corporation Regulation Laws

The Court has sustained the following four State laws regulating telegraph companies (other than tax laws):

Georgia law as to diligence in delivery of telegrams (1896); Nebraska law for recovery of excessive charges (1901); Michigan law as to failure to deliver telegrams (1910); Virginia law as to failure to transmit promptly (1911).[5]

From the foregoing cases, covering in general all the State laws made in the exercise of the State police power which have been attacked on the ground of interference with interstate commerce, it appears that 106 laws were held constitutional and thirty-eight unconstitutional (of which twenty-nine were within the last twenty-five

[1] South Carolina *vs.* Georgia (1876) 93 U.S. 4; Covington & Cinn. Bridge Co. *vs.* Kentucky (1894) 154 U.S. 204; St. Clair Co. *vs.* Interstate etc. Co. (1904) 192 U.S. 454.

[2] Wilson *vs.* McNamee (1881) 102 U.S. 572; Mobile Co. *vs.* Kimball (1881) 102 U.S. 691; Pittsburg etc. Co. *vs.* Louisiana (1895) 156 U.S. 590; Olsen *vs.* Smith (1904) 195 U.S. 332; Leech *vs.* Louisiana (1909) 214 U.S. 175; Anderson *vs.* Pac. etc. Co. (1912) 225 U.S. 187.

[3] Chy Lung *vs.* Freeman (1876) 92 U.S. 275; Foster *vs.* New Orleans (1877) 94 U.S. 246; Spraigue *vs.* Thompson (1886) 118 U.S. 90.

[4] Edwards *vs.* Elliott (1875) 21 Wall. 532; Sherlock *vs.* Alling (1876) 93 U.S. 99; Johnson *vs.* Chic. etc. Co. (1886) 119 U.S. 388; Lindsay & Phelps Co. *vs.* Mullen (1900) 176 U.S. 126; Iroquois etc. Co. *vs.* DeLancy etc. Co. (1907) 205 U.S. 354; Old Dominion S. S. Co. *vs.* Gilmore (1907) 207 U.S. 398; Martin *vs.* West (1911) 222 U.S. 191.

[5] W. U. Tel. Co. *vs.* James (1896) 162 U.S. 650; W. U. Tel. Co. *vs.* Call Pub. Co. (1901) 181 U.S. 92; W. U. Tel. Co. *vs.* Commercial Milling Co. (1910) 218 U.S. 406; W. U. Tel. Co. *vs.* Crovo (1911) 220 U.S. 364.

years, the Court thus holding constitutional an average of about one law each year). Of these thirty-eight laws so found to be beyond the limits of the State police power, thirteen were so held as regulating interstate railroad trains, and nine as regulating interstate commerce in liquor; so that with these exceptions the Court has only held invalid sixteen instances of exercise of the State police power.

Taxing Power Legislation

In addition to the above 144 cases there have been about 115 cases in which State laws enacted under the taxing power were attacked as interfering with interstate commerce; and it is in this class of cases that the Court has been obliged to hold unconstitutional the largest number of State laws. Its decisions adverse to the power of the State legislatures cannot, however, be regarded in any way as expressing divergency between the opinion of the Court and of the legislatures as to the policy of the statutes, nor as expressing any ultra-conservative or unprogressive attitude of the Court towards modern social or economic questions. Rather is it an evidence of the increasing trend of Congress to take advantage of its interstate commerce jurisdiction, and to legislate on many matters formerly left to the States alone.

The following tax legislation has been acted upon by the Court:

Railroad and Steamship Tax Laws

The Court has upheld the following ten laws:

Alabama license fee (1873); Pennsylvania gross receipts tax (1873); Delaware tax (1874); Maine franchise excise tax (1891); Pennsylvania railroad receipts within the State tax (1892); Indiana railroad tax (1894); Pennsylvania railroad tolls tax (1895); Michigan railroad property tax (1903); New York franchise tax (1906); Texas railroad tax (1894).[1]

It has held invalid the following eight:

Pennsylvania freight tax (1873); Pennsylvania ferry company stock tax (1885); Pennsylvania steamship gross receipts tax (1887); Michigan railroad gross receipts (1887); California railroad franchise tax (1888); Texas railroad gross receipts tax (1908); Colorado railroad tax (1912); Pennsylvania license tax (1890).[2]

[1] Osborne *vs.* Mobile (1873) 16 Wall. 479; Phila. & Reading R.R. *vs.* Pennsylvania (1873) 15 Wall. 284; Minot *vs.* Phila. etc. R.R. (1874) 18 Wall. 206; Maine *vs.* Grand Trunk R.R. (1891) 142 U.S. 217; Lehigh Valley R.R. *vs.* Pennsylvania (1892) 145 U.S. 192; Pittsburg etc. R.R. *vs.* Backus (1894) 154 U.S. 421; Cleveland etc. R.R. *vs.* Backus (1894) 154 U.S. 439; N. Y. etc. R.R. *vs.* Pennsylvania (1895) 158 U.S. 431; Wisconsin etc. R.R. *vs.* Powers (1903) 191 U.S. 379; N. Y. C. etc. R.R. *vs.* Miller (1906) 202 U.S. 584; Reagan *vs.* Mercantile Trust Co. (1894) 154 U.S. 413.

[2] Phila. etc. R.R. *vs.* Pennsylvania (1873) 15 Wall. 232; Gloucester Ferry Co. *vs.* Pennsylvania (1885) 114 U.S. 196; Phila. etc. S. S. Co. *vs.* Pennsylvania (1887) 122 U.S. 326; Fargo *vs.* Michigan (1887) 121 U.S. 230; California *vs.* Central Pac. R.R. (1888) 127 U.S. 1; Galveston etc. R.R. *vs.* Texas (1908) 210 U.S. 217; A. T. & S. F. R.R. *vs.* O'Connor (1912) 223 U.S. 280; Norfolk etc. R.R. *vs.* Pennsylvania (1890) 136 U.S. 114.

Pullman and Refrigerator Car Tax Laws

The Court has upheld five State laws as follows:

Kansas palace car tax (1891); Pennsylvania palace car tax (1891); Colorado refrigerator car tax (1899); Utah refrigerator car tax (1900); Mississippi privilege tax on Pullman cars (1903).[1]

It has held invalid the following three: Tennessee sleeping car tax (1886) (1903); Kansas charter fee act (1910).[2]

Express Company and Cab Service Tax Laws

The Court has upheld the following seven laws:

Missouri express company business tax (1892); Florida express company license tax (1897); Ohio, Indiana and Kentucky express company tax acts (1897) (1897) (1897); New York franchise tax on cab service (1904); Minnesota express company tax (1912).[3]

It has held invalid the following three: Kentucky express company agent license act (1891); Indiana foreign express company property tax (1904); Oklahoma express company gross receipts tax (1912).[4]

Telegraph and Telephone Company Tax Laws

The Court has upheld the following nine State laws:

Massachusetts telegraph tax laws (1888) (1891); South Carolina license fee (1894); Mississippi franchise tax (1894); Indiana tax law (1896); Pennsylvania license for supervision of poles and wires (1903); Pennsylvania license act (1903); Missouri telegraph tax laws (1893) (1903); Pennsylvania pole license act (1904).[5]

It has held invalid the following eight:

Florida exclusion act (1878); Texas tax on messages (1882); Indiana regulation law (1887); Ohio tax on receipts (1888); Alabama

[1] Pullman's etc. Co. *vs.* Hayward (1891) 141 U.S. 36; Pullman's etc. Co. *vs.* Pennsylvania (1891) 141 U.S. 18; Amer. Refrig. Transit Co. *vs.* Hall (1899) 174 U.S. 70; Union Refrig. Co. *vs.* Lynch (1900) 177 U.S. 149; Pullman Co. *vs.* Adams (1903) 189 U.S. 420.

[2] Pickard *vs.* Pullman etc. Co. (1886) 117 U.S. 34; Tennessee *vs.* Pullman etc. Co. (1886) 117 U.S. 51; Allen *vs.* Pullman's etc. Co. (1903) 191 U.S. 171; Pullman Co. *vs.* Coleman (1910) 216 U.S. 56.

[3] Pac. Ex. Co. *vs.* Seibert (1892) 142 U.S. 339; Osborne *vs.* Florida (1897) 164 U.S. 650; Adams Ex. Co. *vs.* Ohio (1897) 165 U.S. 194; Adams Ex. Co. *vs.* Indiana (1897) 165 U.S. 225; Adams Ex. Co. *vs.* Kentucky (1897) 166 U.S. 171; Penn. R.R. *vs.* Knight (1904) 192 U.S. 21; U.S. Ex. Co. *vs.* Minnesota (1912) 223 U.S. 335.

[4] Crutcher *vs.* Kentucky (1891) 141 U.S. 47; Fargo *vs.* Hart (1904) 193 U.S. 490; Meyer *vs.* Wells Fargo Co. (1912) 223 U.S. 298.

[5] W. U. Tel. Co. *vs.* Massachusetts (1888) 125 U.S. 530 (the State law as to issue of injunction, being, however, held invalid); Massachusetts *vs.* W. U. Tel. Co. (1891) 141 U.S. 40; Postal Tel. Co. *vs.* Charleston (1894) 153 U.S. 692; Postal Tel. Co. *vs.* Adams (1895) 155 U.S. 688; W. U. Tel. Co. *vs.* Taggart (1896) 163 U.S. 1; Atlantic etc. Tel. Co. *vs.* Phila. (1903) 190 U.S. 160; W. U. Tel. Co. *vs.* New Hope (1903) 187 U.S. 419; St. Louis *vs.* W. U. Tel. Co. (1893) 148 U.S. 92; W. U. Tel. Co. *vs.* Missouri (1903) 190 U.S. 412; Postal Tel. Co. *vs.* New Hope (1904) 192 U.S. 55.

license and property tax (1888); Pennsylvania tax on messages outside of State (1888); Alabama tax on gross receipts (1889); Pennsylvania license ordinance (1904).[1]

Foreign Corporation Tax Laws

The Court has sustained the following five State tax laws:

Pennsylvania foreign corporation tax law (1888); New York tax on franchise or business (1892); Ohio filing fee (1894); New York tax on property (1898); Wisconsin tax (1903).[2]

It has held invalid the following five:

Pennsylvania license fee for office in State (1890); Kansas foreign corporation law (1910); Kansas tax on capital stock of foreign corporation (1910); Arkansas tax on capital stock (1910); Kansas charter fee (1910).[3]

Salesmen Tax Laws

The Court has upheld the following seven State laws taxing or licensing traveling salesmen, drummers, etc.:

Tennessee tax on sewing machine peddlers (1880); Tennessee license fee on merchandise brokers (1892); Georgia emigrant agent license tax (1900); Tennessee merchants' tax (1904); Georgia tax on resident agents of foreign meat packers (1905); South Dakota liquor drummers' license tax (1907); Pennsylvania retail vendor tax (1911).[4]

It has held invalid the following fourteen:

Missouri and Wisconsin license taxes for drummers (1876) (1877); Virginia sewing-machine vendors' license law (1881); Michigan non-resident liquor salesmen tax (1886); Maryland drummer tax (1887); Tennessee drummer tax (1887); Texas drummer license law (1888); District of Columbia commercial agents' license tax (1889); California tax on agent to solicit business outside State (1890); Pennsylvania drummer act (1894); Tennessee drummer act (1902); North

[1] Pensacola Tel. Co. *vs.* W. U. Tel. Co. (1878) 96 U.S. 1; W. U. Tel. Co. *vs.* Texas (1882) 105 U.S. 460; W. U. Tel. Co. *vs.* Pendleton (1887) 122 U.S. 347; Ratterman *vs.* W. U. Tel. Co. (1888) 127 U.S. 411; Leloup *vs.* Mobile (1888) 127 U.S. 640; W. U. Tel. Co. *vs.* Pennsylvania (1888) 128 U.S. 39; W. U. Tel. Co. *vs.* Alabama (1889) 132 U.S. 472; Postal Tel. Co. *vs.* Taylor (1904) 192 U.S. 64.

[2] Pembina Con. Silver Min. Co. *vs.* Pennsylvania (1888) 125 U.S. 181; Horn Silver Min. Co. *vs.* New York (1892) 143 U.S. 305; Ashley *vs.* Ryan (1894) 153 U.S. 436; New York *vs.* Roberts (1898) 171 U.S. 658; Diamond Glue Co. *vs.* U.S. Glue Co. (1903) 187 U.S. 611. And see as to other foreign corporation laws: 113 U.S. 727; 119 U.S. 110; 132 U.S. 282.

[3] Norfolk etc. R.R. *vs.* Pennsylvania (1890) 136 U.S. 114; International Text Book Co. *vs.* Pigg (1910) 217 U.S. 91; W. U. Tel. Co. *vs.* Kansas (1910) 216 U.S. 1; Ludwig *vs.* W. U. Tel. Co. (1910) 216 U.S. 146; Pullman Co. *vs.* Kansas (1910) 216 U.S. 56.

[4] Machine Co. *vs.* Gage (1880) 100 U.S. 676; Ficklen *vs.* Shelby Co. etc. (1892) 145 U.S. 1; Williams *vs.* Fears (1900) 179 U.S. 270; Amer. Steel & Wire Co. *vs.* Speed (1904) 192 U.S. 500; Kehrer *vs.* Stewart (1905) 197 U.S. 60; Delamater *vs.* South Dakota (1907) 205 U.S. 93; Banker Bros. Co. *vs.* Pennsylvania (1911) 222 U.S. 210.

Carolina picture drummer license act (1903); Pennsylvania drummer act (1906); Alabama license for sales agents act (1910).[1]

Imports and Miscellaneous Tax Laws

The Court has upheld the following ten State laws dealing with property from other States or in transit:

Louisiana tax on coal (1885); New Hampshire tax on logs (1886); Michigan tax on floating logs (1903); Missouri ordinance specifying use of Trinidad asphalt (1904); North Carolina license tax on sewing-machines shipped C. O. D. (1903); North Carolina meat packing house tax (1906); New York stock transfer tax (1907); Alabama license tax on buying and selling futures (1908); Iowa and Indiana laws as to commercial feeding stuffs (1912) (1912).[2]

It has held invalid the following four:

Pennsylvania tax on original packages (1878); Wyoming tax on sheep driven through the State (1903); Tennessee tax on property product of soil of other State (1908); Kansas act prohibiting gaspipe lines (1911).[3]

Wharfage, Vessels, and Immigrant Tax Laws

The Court has upheld the following five State laws:

Iowa wharfage tonnage toll ordinance (1877); Mississippi wharfage rates ordinance (1880); Kentucky wharfage fee ordinance (1882); West Virginia wharfage fees (1883); Louisiana wharfage rates act (1887).[4]

It has held invalid the following six:

Alabama vessels tax law (1873); New York and Louisiana immigrant tax law (1876); Maryland discriminatory wharfage fees act (1880); New York immigrant tax law (1883); Louisiana towboat license tax law (1884); Illinois tugboat license tax law (1893).[5]

[1] Welton *vs.* Missouri (1876) 91 U.S. 275; Morrill *vs.* Wisconsin (1877) 154 U.S. 626; Webber *vs.* Virginia (1881) 103 U.S. 344; Walling *vs.* Michigan (1886) 116 U.S. 446; Corson *vs.* Maryland (1887) 120 U.S. 502; Robbins *vs.* Shelby Co. (1887) 120 U.S. 489; Asher *vs.* Texas (1888) 128 U.S. 129; Stoutenburgh *vs.* Hennick (1889) 129 U.S 141; McCall *vs.* California (1890) 136 U.S. 104; Brennan *vs.* Titusville (1894) 153 U.S. 289; Stockard *vs.* Morgan (1902) 185 U.S. 27; Caldwell *vs.* North Carolina (1903) 187 U.S. 622; Rearick *vs.* Pennsylvania (1906) 203 U. S. 507; Dozier *vs.* Alabama (1910) 218 U.S. 124.

[2] Brown *vs.* Houston (1885) 114 U.S. 622; Coe *vs.* Errol (1886) 116 U.S. 517; Diamond Match Co. *vs.* Ontonagon (1903) 188 U.S. 82; Field *vs.* Barber Asphalt Co. (1904) 194 U.S. 618; Norfolk etc. R.R. *vs.* Sims (1903) 191 U.S. 441; Armour Packing Co. *vs.* Lacy (1906) 200 U.S. 226; Hatch *vs.* Reardon (1907) 204 U.S. 152; Ware *vs.* Mobile Co. (1908) 209 U.S. 405; Standard etc. Co. *vs.* Wright (1912) 225 U.S. 540; Savage *vs.* Jones (1912) 225 U.S. 501.

[3] Cook *vs.* Pennsylvania (1878) 97 U.S. 566; Kelley *vs.* Rhoads (1903) 188 U.S. 1; I. M. Darnell & Son Co. *vs.* Memphis (1908) 208 U.S. 113; West *vs.* Kan. Nat. Gas Co. (1911) 221 U.S. 229.

[4] Keokuk etc. Co. *vs.* Keokuk (1877) 95 U.S. 80; Vicksburg *vs.* Tobin (1880) 100 U.S. 430; Cincinnati etc. Co. *vs.* Catlettsburg (1882) 105 U.S. 559; Parkersburg etc. Co. *vs.* Parkersburg (1883) 107 U.S. 691; Ouachita etc. Co. *vs.* Aiken (1887) 121 U.S. 444.

[5] Morgan *vs.* Parham (1873) 16 Wall. 471; Henderson *vs.* Wickham (1876) 92 U.S. 259; Guy *vs.* Baltimore (1880) 100 U.S. 434; New York *vs.* Comp. Gen. Trans. (1883) 107 U.S. 59; Moran *vs.* New Orleans (1884) 112 U.S. 69; Harman *vs.* Chicago (1893) 147 U. S. 396.

Bridge and Ferry Tax Laws

The Court has upheld the following State laws: Kentucky bridge tax (1891) (1897) (1899); Illinois bridge stock tax (1900).[1]

GENERAL SUMMARY

The result of the above analysis of the decisions of the Court on the statutes passed under the police power and involving obligation of contract and interstate commerce (excluding all tax legislation and confining the inquiry to that legislation enacted for the general public welfare as distinguished from legislation for revenue purposes) may be summed up as follows.

Of the 158 cases on obligation of contracts, 131 statutes were held constitutional and twenty-seven unconstitutional; but of these twenty-seven, sixteen related simply to legal remedies of creditors and debtors, and only eleven to general social and economic questions.

Of the 144 cases on interstate commerce, 106 statutes were held constitutional, and thirty-eight unconstitutional; but of these thirty-eight, thirteen related to interference by the State with the running of interstate trains, and only twenty-five to other general social and economic questions.

Of a total of 302 cases, therefore,[2] only thirty-six State statutes were held unconstitutional in forty years, relating to the following broad classes of questions: anti-lottery laws; anti-trust and corporate monopoly laws; liquor laws; food, game, oleomargarine and other inspection laws; regulation of banks, telegraph and insurance companies; cattle, health and quarantine laws; regulation of business and property of water, gas, electric light, railroad (other than interstate trains) and other public service corporations; regulation of rates of public service corporations, grain elevators; stockholders' liability laws; regulation of business of private corporations; negro-segregation laws; labor laws; laws as to navigation, marine liens, ferries, bridges, etc., pilots, harbors and immigration.

In other words, the record proves that the United States Supreme Court has followed and still follows the wise policy expressed by Justice Woodbury, as long ago as 1848, in the following pregnant terms:

It is to be recollected that our legislatures stand in a position demanding often the most favorable construction for their motives in passing laws,

[1] Henderson Bridge Co. *vs.* Henderson (1891) 141 U.S. 679, (1897) 166 U.S. 150, (1899) 173 U.S. 592; Keokuk Bridge Co. *vs.* Illinois (1900) 175 U.S. 626.

[2] In this summary, there is, of course, a slight duplication of cases, as a few statutes involved were attacked on more than one constitutional ground; and, therefore, several of the cases cited contained decisions on more than one point. This fact does not affect the argument, for if the Court upholds or sets aside a statute on two grounds, the effect is the same as if it had made decisions in two cases.

and they require a fair rather than hypercritical view of well-intended provisions in them. Those public bodies must be presumed to act from public considerations, being in a high public trust; and when their measures relate to matters of general interest, and can be vindicated under express or justly implied powers, and more especially when they appear intended for improvements, made in the true spirit of the age, or for salutary reform in abuses, the disposition in the judiciary should be strong to uphold them.[1]

Or, as stated more recently by Justice Brown in 1896:

Where the police power is invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests, it will be sustained, wherever it can be done without the impairment of vested rights. . . . The general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and within legislative control, and in the exertion of such power the legislature is vested with a large discretion, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry.[2]

[1] Planters' Bank *vs.* Sharp (1848) 6 How. 301, 319.
[2] L. & N. R.R. *vs.* Kentucky (1896) 161 U.S. 677, 700–701.

IV

CORPORATIONS

THE ABUSE OF THE CORPORATION CHARTER

By Don E. Mowry of the Milwaukee Bar

(From *Central Law Journal*, January 18, 1907)

The corporation is the almost universal form of organization used in conducting business to-day; and in one sense the corporation problem is the business problem of our country. The question is a very wide one, and only a few phases of corporate control can be presented here. — Editor's Note.

The wave of legislative reform, which has taken on such gigantic proportions within the last few years, has finally culminated in an active, aggressive, and altogether too zealous campaign against the industrial corporation. We appear to have gone "reform mad," and in our efforts to curb the power of capital and allied corporate interests, we have failed, utterly, to realize that the trend of modern business makes the corporation an imperative necessity. This outcry is largely due to the fact that public policy has not taken the proper steps towards bringing about a regulation of corporate interests. The transformation from the partnership to the business corporation has been so rapid that we, who are vitally interested in legislative reform, have failed to see that the real danger lies not so much in the corporation itself as in the granting of the corporation's charter. To-day five men can sit around a table, put one dollar in the center, organize a corporation calling for a million dollars worth of capital, repocket the dollar, and go home after sending a certificate of incorporation to the secretary of state, with a million dollar enterprise ready to launch. Such are the laws of every state of the union with the exception of Massachusetts. Some states have gone even a step farther. They have made their laws so general in character that companies have been organized for the express purpose of incorporating enterprises which do not intend to do business within the particular state. These states do not hesitate to put the great seal of the state upon a concern which

lies, deliberately lies, the moment it leaves the office of the secretary of state. Such states are, in particular, New Jersey, Delaware, West Virginia, South Dakota and Nevada. There are many other states which favor corporations, more or less, but these states are the most bold, the most open in their methods, and the most eager to obtain corporation fees.

In Delaware, the secretary of state referred the writer's letter of inquiry concerning the laws of incorporation in that state to the Delaware Corporation Company, of Wilmington. Are not the laws of Delaware self-explanatory? Why is it necessary for the secretary of state to refer such a general letter to a company making it a practice to "guarantee incorporation," unless, perhaps, he was interested in some way with the company? In South Dakota, the secretary of state has drawn up a letter of recommendation for the South Dakota Corporation Charter Company. He says, in part:

> The company has organized a large number of corporations under the laws of this state, and I have had and now have frequent opportunity to examine incorporation papers prepared and filed in this office by said company and find that it is very particular in all cases to comply with the requirements of the statutes of this state.

These are some of the open and above-board methods which are being used by officers of the states in order to further their own personal welfare. The incorporation companies in these several states have been over-anxious to secure the incorporation of companies within their respective states. The legal press is filled with advertisements, encouraging suspicious enterprises to avail themselves of the cheap cost, liberal laws, and freedom from liability, which the particular state in question offers. Such conspicuous phrases as: "Incorporate in South Dakota," "The Corporation Laws of the State of Nevada offer the greatest inducements," and "We beat New Jersey," are not uncommon advertisements of our enterprising western states.

The New Jersey laws relating to business corporations began to show the influence of special interests in 1896 when the general corporation act was passed. This act makes it possible for any company, wherever located, to secure a charter through agents within the state. A residence office must be maintained, and one director must be a legal resident of the state. The trust companies, organized for that specific purpose, act as the local agent, the home office, and furnish the required resident director. While it is necessary for the state director to hold three shares of stock, the organizing company generally gives such agent of the trust company the necessary stock, with the understanding, however, that it is to be transferred back to the owners who are residents of other states in many instances. A complete set of forms, necessary for incorporation, including proxies, transfers of

subscription, waiver of notice of meeting of incorporators and subscribers, etc., are furnished by the guarantee and trust companies. The New Jersey law requires that the corporation must place in a conspicuous place before its home office, which must be in the state, the name of the company. At the entrance of the New Jersey Corporation Agency, in Jersey City, there are over 700 such names. The stockholders' meeting must be held at the registered office in New Jersey, but inasmuch as the law allows absent stockholders to vote by proxy, this provision has little or no effect. The most striking provision in the New Jersey law is that foreign corporations must pay the same taxes, fines, penalties, licenses, fees and other obligations, as are required of New Jersey corporations in other states. In this provision, New Jersey has greatly favored her own corporations, and has practically silenced other states in their efforts to impose stringent requirements upon her corporations.

The corporation laws of Delaware were revised some years after those of New Jersey went into effect, with the avowed purpose of outwitting the various corporation companies in New Jersey. It is clearly evident that the promoters of the present vicious law have succeeded in so doing. Any company incorporated under the laws of the State of Delaware may hold all of the meetings of its stockholders and directors outside of the state, wherever it is provided in its by-laws, and furthermore, all of the original records of the company may be kept at its principal office outside of the state. The company may issue all the bonds it desires without any further authority from the state than that granted in its charter, and without being subject to tax thereon. All or any part of the capital stock may be made full paid for real or personal property, or for services as well as for cash, and stock that is once made full in this or any other manner is not subject to any further assessment, not even for wages and taxes. The private property of the stockholders is not liable for corporate debts to any extent whatever. Nothing is required to be paid in when the company is organized. Merely $1000 has to be subscribed, and this may be made full paid for property as above suggested, paid in one lump sum or paid in such amounts and installments as called for by the board of directors after the company is organized. Charters once granted under the laws of the State of Delaware are absolutely perpetual and unalterable, except at the instance of the parties owning the franchise, and Delaware is the only state in the union that grants such charters. A Delaware charter does not limit one to a single object, but one may have authority in the same charter to transact as many different branches of business as one may desire, in fact, one may carry on any and every branch of business except banking. The company may even have trust company powers.

The annual tax upon companies incorporated under the laws of

Delaware is as follows: In the case of telephone, telegraph, oil, pipe line, railroad, electric light, heat, light and power, water power, canal, cable and express companies, there is no tax upon the capital stock or bond issues of the company, or on business done outside of the state. In the case of other companies, such as mercantile, mining and manufacturing companies, there is no tax upon the amount of capital authorized in the charter, nor upon the stock issued, but simply a tax of fifty cents on each $1000 of capital actually paid in. The annual state tax is, therefore, just one-half that of New Jersey. The local trust companies maintain the Delaware office, the Delaware director, keep the company advised on all the requirements of the law, look after its annual report, and, in fact, perform all the duties incumbent upon a local representative.

J. G. Guy, of the Delaware Trust Company, writes me as follows:

> If you will send us on the enclosed form, entitled, "Memoranda for Preparing the Certificate of Incorporation and By-Laws," the name of your proposed company; the names and addresses of at least three parties who will act as incorporators (none of whom need be residents of this state), the amount of authorized capital you desire, par value of the shares, and a brief statement of the object and purpose of the company, we will prepare you a charter and all the papers connected with the organization of your company, and forward to you for execution by your parties. After they are executed and returned to us, we will have the charter granted, organize your company by proxy here, electing the board of directors whom you will designate and then forward the records of organization to you, with a draft of directors' minutes outlining the action necessary to be taken by your directors at their first meeting, which may be held wherever you desire. This will complete the organization of your company.

The prime movers in such procedure believe that a corporation organized in Delaware commences business with a charter entitled to respect; that the laws are based upon the experience of all states affording opportunity to form corporations, and are framed so as to invite confidence and investment. Broad and liberal powers are conferred upon corporations, at a "minimum cost," making it possible for them to do business in any part of the world. This is essential from the incorporation company's point of view.

The general corporation laws of West Virginia are more elaborate than either those of New Jersey or Delaware, but their character and purport is about the same. The present secretary of state, if he is in league with corporation-promoting companies, has succeeded in "covering his tracks to good advantage." Inasmuch as the tone of the West Virginia laws runs parallel to those of the two states just mentioned, it will not be necessary to go into details concerning the law and its workings.

In Nevada, where the state bank and trust company of Carson City

is the chief exponent of liberal laws, there is no franchise tax. In this respect the Nevada law differs from the laws of New Jersey, Delaware and West Virginia. The annual franchise tax on a capitalization of $1,000,000 in West Virginia is $410; Delaware, $500; New Jersey, $1000; Nevada, nothing. Corporate purposes are unlimited; annual meetings may be held outside of the state, if an office and resident agent is maintained within the state; the right to consolidate incorporations or merge their interests is permitted, the fee being simply on the amount of gross capital above that of the combined incorporations; the duration of corporations is unlimited; the capital stock may be made absolutely non-assessable.

"The important consideration," says the *Mercantile and Financial Times* of November 2, 1901, "after the value of incorporation is, what states offer the best inducements, in the questions of protection and expense, for obtaining charters? When these two important matters are thoroughly considered, we would say South Dakota." This statement seems to be borne out when, during the very year 1901, 1013 companies were incorporated in South Dakota. "In nineteen cases out of twenty," writes the president of the South Dakota Corporation Charter Company, "we are able to get the charter into the mails within ten hours after the application is received here." South Dakota has an eye for business. The main points of advantage, from the incorporator's point of view, are:

1. There is absolutely no tax of any kind, unless the company owns property in the state. This is of no inconsiderable importance when, for example, the annual franchise tax on a company organized with an authorized capitalization of one million dollars, varies from $410 in West Virginia to $1250 in New York.

2. The cost of incorporation varies from $150 in Delaware to $3333.33 in Pennsylvania. In South Dakota, the entire expense, including the maintenance of such office as may be required, rarely exceeds $75.

3. Branch offices may be maintained outside of the state, where all business may be transacted.

4. Stock need not be subscribed before securing a charter.

5. Charters may be renewed indefinitely.

Is it any wonder then that the people who are suffering from the present lawlessness of the corporations should begin to ask for legislative reform? It is their savings that are being taken to promote enterprises which are not organized upon a sound business basis, and it is justice that the state should protect these unfortunates who are unable to see the weakness in such organizations. But in our zeal for reform we must not lose sight of the fact that the corporation as such is not an evil. The law must be reorganized. The law must compel every corporation to limit its advertised capital to the actual value of its

assets. The facts must not be juggled in such a manner as to cause confusion. The company must be forced to tell the truth from beginning to end. We cannot longer tolerate annual reports to the secretary of state which consist of four or five general statements. Such action upon the part of the state will not inspire confidence in corporate enterprises. Many of the malpractices, so general and widespread at the present moment, must be done away with. It is never good policy to deprive the states of power, but in the matter of incorporating business enterprises the state cannot act freely and independently. This power, therefore, must be delegated to the national government, for, if several states enact good, fair and just laws, other states may place barriers of such a nature that it will be impossible for the corporation, organized under these fair laws, to do business in the obstinate state or states. For the benefit of the people as a whole the states must be deprived of the right to grant charters. Such an act will rid the country of bandits and freebooters and insure stability in financial circles. "No fact of industry is more obvious than that modern business has outgrown and wholly disregards state lines, and that the jurisdiction of a single state as applied to the operations of a great interstate business, are futile and even harmful." Corporations are destined, in many instances, to go beyond the proper supervision and control of the state which gave them existence. The best of state laws will never do away with the present abuses. Congress alone can, with safety, provide a method by which reasonable combination may be permitted. The relative merits of a federal license or a national incorporation law are beyond question.

UNIFORM FOREIGN CORPORATION LAWS[1]

By Franklin A. Wagner of the New York Bar

(A Paper Read at the Fifteenth Annual Convention of the Commercial Law League, at Narragansett Pier, on July 20, 1909)

The growth of new and diverse legislation in the various States has become a positive burden to all who are called upon to acquire a comparative knowledge of the statutes.

The introduction of bills, often for "home consumption" only, has surfeited our Legislatures, and unless protected by a self-reliant governor who has the courage to wield his veto powers, the result of each legislative session is the addition of one or two volumes of session laws to the lawyer's library.

Multiply this output by forty-six times the number of legislative

[1] Reprinted from the *New York Law Journal*, July 27, 1909.

sessions that have been held since the last official compilation of statutes in each State and add over 2000 decisions of the higher courts in the last dozen years, and you have a fair idea of the work involved in attempting to interpret and comply with the laws of all the States on the single subject of "foreign corporations."

The growing importance of corporation law to the commercial lawyer challenges his attention to the subject, and the foreign corporations law is the phase of it with which he is most often called upon to deal. Its practice is most profitable, as you all know, owing to the immense amount of litigation and capital involved. The corporate form is the modern way of doing business; indeed, without it, coöperation on a large scale would be impossible.

A competent authority has computed that over ninety per cent of the industries of the United States are controlled by corporations. In 1800 there was one corporation to every 2500 people. In 1909 there is one to each 180 people. To-day there are probably 500,000 corporations doing business in the United States.

In the first six months of 1909, 4611 new companies were incorporated under the laws of the State of New York alone. This was a gain of nearly 1000 corporations over the first six months of 1908. Many of these companies will do business in two or more States, a fact which serves to accentuate the importance of the foreign corporation laws.

The Federal Congress has exercised the power to create corporations for certain purposes, but such power is limited by the constitution. Whether Congress may lawfully create merely industrial corporations by virtue of its constitutional authority to regulate interstate and foreign commerce, is a mooted question. Certainly the framers of the constitution never contemplated such an interpretation of the so-called "commerce clause." Down to the present time the State has been regarded as the proper body to charter and regulate business corporations.

We cannot disregard the tendency of the times, however, toward centralization. The new Federal corporation tax, which is frankly a regulating measure masquerading under the guise of a revenue producing act, is the entering wedge. "A national law authorizing the formation of corporations to carry on interstate business," said Attorney-General Wickersham in a recent address, "seems to be the inevitable result of economic conditions. . . . Such a law will logically follow the tariff tax on corporations."

With the corporation taxing power safely lodged in the Federal government, and a national incorporating act in force for corporations doing an interstate business, it is only a step to the complete national control of all corporations. Thus the problem of the foreign corporation would be merged in the greater one.

Such a step will logically and inevitably follow unless the States adopt fairer and more uniform regulations. The attitude of the Federal government has been largely brought about by the errors of omission and commission of the States themselves. Their foreign corporation laws are of a heterogeneous type — no two are alike; in some of the States they are so loose that their own citizens are not protected, in others they are so drastic that in the interests of commerce they are intelligently unenforced. These statutes give rise to a multiplicity of technical litigation, and the decisions in one State are of little value as precedents in the others. The corporations themselves would be the first to welcome such a change.

The only escape from Federal regulation, in this decade or the next, will be the getting together of the State Legislatures on a broad uniform law regulating the status and conduct of all corporations doing business within their borders.

It is settled by abundant authority that the domicile of a corporation is the legal jurisdiction of its origin. It cannot migrate, and the only status it acquires in another State is by the law of comity, or express statutory provisions.

Common law remedies are inadequate. A curious fallacy has marked the attitude of the common law courts toward foreign corporations. In England, as early as 1729, it was held that a foreign corporation could bring suit in its courts, but could not be sued. As late as 1819 the New York Court of Chancery held that a foreign corporation could not be sued in the New York courts. Massachusetts followed this decision in 1834, and England upheld it as late as 1872. These decisions were based on the common law rule that process against a foreign corporation must be served on the head office. A State court could not by any method acquire jurisdiction to render a personal judgment against a foreign corporation. Such a conclusion was reached by a too close adherence to the fiction of artificiality and the middle age idea of the non-migratory character of a corporation.

This strange perversion of justice, which prevented a creditor from bringing suit in his home State against a foreign corporation, was the earliest condition to be remedied by statute. This was accomplished by a provision requiring a foreign corporation to appoint an agent within the State authorized to accept service of process. Such a provision has now been adopted in every State.

Statutory regulations of the business of foreign corporations are directed, generally speaking, to securing the rights of domestic creditors, stockholders or others dealing with such corporations. There is no reason why foreign corporations should enjoy any greater privileges or immunities than those accorded to domestic corporations organized for similar purposes. It would seem, therefore, perfectly proper for the State to regulate foreign corporations in the matters of:

(1) Admission,
(2) Taxation,
(3) Service of process,
(4) State supervision to secure solvency or publicity as to condition, and
(5) State regulation for the protection of local creditors.

But such regulation should be fair and impartial, and the penalties for non-compliance should not be out of all proportion to the offense committed.

It is a common statutory provision in many of the States that foreign corporations shall be subject to all the liabilities, restrictions and duties imposed upon domestic corporations of like character, and shall have no other or greater powers. Once admitted a foreign corporation is entitled to "the equal protection of the laws," and to as favorable treatment as a domestic corporation.

One of the most difficult points to be decided is what is meant by "doing business" from the wording of the statutes. This question has been the subject of much judicial interpretation of no very enlightening nature. Speaking generally, a corporation is within the statute when it continuously conducts and concludes a series of transactions constituting a substantial portion of its regular business within the State. In most States a single transaction or occasional business transactions are not sufficient to require a certificate of authority. The mere employment of traveling agents to take orders, which are approved and filled at the home office, by weight of authority does not come within the purview of the statute, since the contracts are made outside the State.

On the other hand, the Supreme Court of Michigan has recently held that the installation of a new elevator and the repair of an old one was doing business within the State. If the Michigan decision is followed every corporation engaged in the sale and erection of machinery over the country would have to go to the trouble and expense of taking out a license in every State where it has made or may make a sale. This would inflict a most serious hardship on manufacturers of machinery — a hardship which is not required for the protection of the citizens of the State where the machinery is erected.

Anti-trust acts within the last few years have been passed in many of the western and southwestern States. These acts are often loosely drawn, and the courts have not always upheld them as applied to foreign corporations. In Illinois, Texas, Missouri and some other States foreign corporations violating these acts may be heavily fined and prohibited from doing business in the States.

The statutory requirements for obtaining permission for a foreign corporation to do business vary greatly in the different States, and

might well be one of the features upon which uniformity should and could easily be secured. In some States, as in New York, a verified statement is required, accompanied by a sworn copy of the certificate of incorporation. In other States, as in Illinois, the sworn statement must be accompanied by a certified copy of the certificate of incorporation. In Idaho a foreign corporation must file a certified copy of its certificate both with the Secretary of State and the recorder of the county where the corporation is doing business before it can maintain an action to enforce any contract entered into by it while thus in default. Some States do not require a statement of the amount of property owned by the corporation or the amount of capital proposed to be invested in the State, while others, as Illinois and Ohio, require a statement of the amount and nature of the property owned by the corporation, wherever situated, and the proportion to be employed within the State.

There is no uniformity in the matter of license or admission fees. This tax theoretically corresponds to the organization tax required of domestic corporations, but owing to its higher rate in some States, foreign corporations are placed at a decided disadvantage. This is true in New York where the rate is two and one-half times the organization tax on domestic corporations.

On the basis of $500,000 capital employed by a foreign corporation within the State, this tax varies from nothing in New Jersey, to $10 in Maine, $50 in Delaware, $100 in Virginia, $200 in Massachusetts, $500 in Missouri, $545 in Illinois and Texas, $625 in New York, and $1666.66 in Pennsylvania.

The annual tax, that is, the franchise tax or tax for the privilege of doing business as a corporation, also varies greatly in the different States. In some States it is imposed upon the entire authorized capital stock, wherever situated, as in Arkansas, California and Colorado, while in others it is on the amount of capital employed within the State, as in Alabama, Ohio and New York. In Virginia there is no annual tax on foreign corporations, while domestic corporations are taxed. In many States there is no annual franchise tax on either domestic or foreign corporations. In New Jersey the tax is retaliatory, that is, by the statutes the same tax is imposed on a foreign corporation doing business in New Jersey as a New Jersey corporation would be required to pay in the State where the foreign corporation is domiciled, but this feature of the Tax Law has never been enforced, and foreign corporations escape.

Foreign corporations are frequently required to stipulate, as a condition precedent to obtaining a license, not to sue in or remove any suit to a Federal court, on the ground of diversity of citizenship, local prejudice or other basis of Federal jurisdiction. A State can exclude a foreign corporation for removing a case to the Federal courts, and

such a statute is constitutional. It cannot, of course, prevent removal.

In a recent case in Kentucky it was held that the insurance commissioner under a statute which made it his duty to revoke the authority of an insurance company to do business in the State if it removed a cause to the Federal court could not be enjoined from revoking the license.

This statute has also been upheld in the Supreme Court of the United States in the case of Security Mutual Life Ins. Co. *vs.* Prewitt, recently quoted by Attorney-General Wickersham, to show the unlimited extent of the power of the States recognized by the Supreme Court.

Such a provision should find no place in the statutes of any State and a uniform foreign corporation law, permitting the removal of certain causes to the Federal courts, would do much to settle this controversy.

The penalties imposed upon foreign corporations for failure to qualify should be the subject of uniform legislation. Many State statutes are explicit as to the results of non-compliance, and a strict construction of these statutes leaves little for judicial decision. Thus in Oregon it was recently held that a foreign corporation neglecting to comply could not recover on a contract made within the State. In Pennsylvania, Illinois, Texas and Wisconsin contracts made in the State by a foreign corporation that has failed to qualify are absolutely void. In New York contracts made in the State are unenforcible in the State courts, whether sued upon by the corporation, by its assignee or by those claiming under either. In Massachusetts such contracts are not invalid, but no recovery can be had; in New Jersey no action can be maintained; in Virginia a fine is imposed.

Many statutes, however, are silent as to the result of non-compliance, and as to what rights a guilty foreign corporation may assert the authorities appear to be irreconcilable. Such a case resolves itself into the assertion of corporate privileges by a group of individuals without legal sanction; in other words, the question is one of unauthorized corporate action, analogous to the unauthorized action of domestic *de facto* corporations. Under such conditions, in Kansas a foreign corporation is not refused relief for an invasion of its property rights; in North Dakota a party who had received the benefits of a contract with a foreign corporation was denied the right to collaterally attack its non-compliance; but as a drastic check upon total disregard of the law, in New Jersey full liability was imposed on the associates to the extent of holding them liable as partners, and the corporation was not recognized.

In some States, in addition to the usual penalties, fines are imposed ranging from $100 to $10,000, and the agent may be guilty of a misdemeanor.

When a corporation has strictly complied with the statutes of another State it should be permitted to enjoy all the privileges and immunities of a domestic corporation. This is not true in several of the States.

In New York an attachment may issue against the property of a foreign corporation within the State (as was held in Robertson *vs.* Ongley Elec. Co., 82 Hun, 585, 588), "however solvent it may be, and however great its ability to pay all claims against it on demand. It is not within its power to prevent a creditor or a fictitious claimant even from obtaining an attachment." Neither can a foreign corporation in New York obtain a liquor license.

In Pennsylvania a foreign corporation may be made a garnishee in an execution attachment, and it is also liable to foreign attachment. With certain exceptions it cannot own land in fee simple.

In Alabama, New York and many other States, when an attachment is sued out in favor of a foreign corporation, security for costs of the suit must be given. Process of attachment may issue in Alabama against any foreign corporation having property in the State.

In New Jersey foreign corporations which have obtained authority are not subject to attachment merely because they are foreign corporations, but if they are not qualified they are subject to attachment at all times. The New Jersey rule would seem to be the fair one.

The problem of the foreign corporation has given no little trouble to the Legislatures and the courts of the various States. The growth of commerce and the increasing number of corporations that are carrying on business in two or more States has compelled the States, one by one, to pass statutes regulating such corporations. Maine and Oklahoma are the latest States to adopt foreign corporation laws.

Unquestionably much hardship has been inflicted on foreign corporations when, through ignorance of the local laws, or through failure to understand their drastic scope, they have entered into contracts which, because of these statutes, they were unable to enforce. In some States the statutes are too lenient; in others too severe. In few States have they been comprehensively worked out to adequately meet present day needs. A uniform law would confer a lasting benefit both upon the States and the corporations. Such a law should embody the following features:

1. Define what is "doing business."
2. Provide a simple procedure for qualification.
3. Name the Secretary of State the agent upon whom process may be served.
4. Abolish the license fee, excise or bonus tax.
5. Tax foreign corporations on the amount invested in the State on the same basis and at the same rate as domestic corporations.
6. Require an annual report of condition, including a statement of

assets and liabilities, naming the officers and directors of the company, and its officers and agents located in the State.

7. Affirmatively grant the privilege to use the Federal courts in proper causes.

8. Remove drastic penalties and substitute reasonable fines.

9. Abolish attachment on the mere ground that it is a foreign corporation.

10. In all other respects place foreign corporations on a par with domestic corporations.

Such a uniform foreign corporation law might, I judge, properly be sponsored by this great organization. In any attempt to secure such uniformity the Commercial Law League of America should be first in the field. Its plan could be worked out in committee and presented for adoption in each State through its own legislative organization. It should also seek the aid and coöperation of such powerful bodies as the State Boards of Commissioners on Uniform State Laws, the "House of Governors" now being organized, and the National Civic Federation. The times are auspicious, as the subject of "Uniform Legislation" is in the air all over the country, foreshadowing an era of permanent legislative reform. I am sanguine that the benefits resulting from the adoption of a uniform law affecting foreign corporations throughout the United States would be of far reaching importance not only to the commercial lawyer, but to the cause of good government and commercial prosperity.

GOVERNMENTAL REGULATION OF SECURITIES ISSUES

By Arthur U. Ayres

(From the *Political Science Quarterly*, December, 1913)

Until very recently it has been tacitly agreed that a man runs his own risk in choosing securities in which to invest, goes into such a project with his eyes open, and deserves no governmental protection from swindlers and companies of unsound organization. The last two or three years, however, have indicated a decided change in opinion. There has been a realization that the individual investor, the banks, and the sound corporations all need the protection that a supervisory board or official can afford in detecting the impostor and excluding him from the market. Following the lead of Kansas, eighteen states have passed "blue-sky" laws, and other states have such legislation now under consideration. The general purpose of these laws is to force those who intend to offer stocks and bonds to the public to make known to some proper state authority their

organization, plan of business and the purpose for which the income from the securities will be used. If this official does not believe that the project offers a fair opportunity to the investor he may forbid the proposed sale. This power has been variously given to the bank commissioner, the secretary of state, or to a specially created securities commissioner.[1]

The first steps in this direction, however, antedated the Kansas blue-sky law. The first corporations to which this principle was applied were public utility companies, which have received the lion's share of attention in restrictive legislation. As early as 1908 clauses began to appear in the new public-service laws providing for commission regulation of securities issues. The evolution of this legislation can be traced with profit. Beginning with the establishment of commissions with an undefined power of advising changes in the service and rates of common carriers, the states have year by year increased the powers of these commissions, extended their jurisdiction to all public utilities, and broadened the scope of their duties. Naturally enough the consumers' interests were the first to receive protection; the most recent laws have extended this protection to the interests of investors as well. This is achieved by giving to public officers power to pass upon stock and bond issues of companies under their jurisdiction.

In this, as in other progressive legislation, the provisions in different states vary widely, some allowing the corporations great freedom of issue, others putting a large share of the responsibility upon the regulative boards. Since 1908 some of the most backward states have stepped to the very forefront in this matter, modeling their laws after the notable examples of New York and Wisconsin. Other states that have long possessed commissions with complete power to fix rates and command improvement of service have not yet seen the necessity of regulating the issue of securities.

In 1912 this supervisory power existed in thirteen states: Georgia, Massachusetts, Michigan, Kansas, Nebraska, New York, Wisconsin, California, Maryland, New Jersey, New Hampshire, Ohio and Vermont. In these jurisdictions it is required that the corporation file a statement showing (1) the amount and character of the securities to be issued, (2) the purpose for which they are issued, (3) the terms and (4) the total assets and liabilities of the corporation. The commission will then grant a certificate authorizing the issue, stating the amount allowed, the character, purpose and terms. Often the corporation has not been allowed to issue the full amount petitioned for. For example, in New York (first district) in 1908 — the first year in which this law had effect — stock and bond issues amounting to

[1] Corporation Commissioner: Arizona, Oregon, Montana. Bank Commissioner: Arkansas, Idaho, Kansas, Maine, Missouri, Vermont. Secretary of State: Iowa. Bank Examiner: North Dakota, West Virginia. Securities Commission: Michigan, South Dakota.

$155,000,000 were asked for, while permission was granted to issue only $70,000,000. Yet the companies are ultimately more than repaid through the increased value of their securities in the eyes of the investing public. Mr. R. V. Johnson writes:

> Regulation of the stock and bond issues . . . has worked to the benefit of the corporations themselves, in that it is made easier to obtain money for extensions and improvements. Commissioner Halford Erickson [Wisconsin] said recently, "We know from experience that investors often attach a great deal of importance to governmental regulation of securities. . . . In fact, investors often buy securities on the strength of the existence of such regulation alone, without inquiring into its character and scope.[1]

It is evident, however, that grave danger lies in such a blind confidence on the part of the investors. The enacting laws usually state that such regulation may not be construed as a guarantee that the stocks and bonds issued are a good investment. The commission is under a duty to protect the investor from blue-sky sales and excessive flotations, but it cannot be held responsible for errors in judgment or for unforeseen circumstances which might make the securities worthless. This also applies to the recent blue-sky laws. In fact the power of these commissions is much less than the average investor supposes; for, as a rule — except in New York — the commission cannot refuse to grant a certificate for new issues if the provisions of the law have been complied with. In other words, it cannot pass upon the social necessity of the purpose for which the income from the stocks and bonds will be used; it can only determine how great an issue will be needed for the purpose proposed by the corporation, based on the estimated earnings of the new enterprise. The fact was well brought out in a decision of the Wisconsin Commission in regard to a petition of the Southern Wisconsin Railroad Company.[2] The petitioner wished to issue $300,000 of bonds for (1) renewal of equipment, (2) extension of lines, (3) erection of a power plant and (4) payment of its floating debt. The commission did not wish to issue the certificate, but held that under the law it was required to do so; for the company had "complied with all the requirements . . . by furnishing such statements and evidence as the commission deemed pertinent to the inquiry." In Minnesota the court declared unconstitutional a statute giving power to grant or refuse a bond issue at will as an attempt to delegate legislative powers.[3]

In New York alone is this condition remedied; not, it is true, by allowing a free decision on the part of the public service commission, but by an inclusion in the law of a detailed statement of purposes for

[1] "Workings of the Wisconsin Commission," *Public Service*, April, 1912, p. 130.
[2] Report of 1907–8, Vol. II.
[3] State *vs.* Great Northern Railroad, 111 N.W. 289.

which issues can be made. The commission may refuse all petitions that are not within the scope of these provisions. For example, in 1909 in the second district, applications were refused for issue of scrip dividends, capital stock and bonds for the reimbursement of the treasury, on the ground that these purposes were not provided for in the original law.

A new departure such as this, creating new conditions, often by its logical development makes necessary a new governmental policy. When a commission determines that the investment will "provide for a fair return on the stocks, bonds and other securities . . . offered for sale," [1] it is in some measure, although not legally, bound to protect the company against competing enterprises whose presence in the field may diminish the returns on the original investment. This view of the question is new. Its significance has been realized in full only in New York; but in Wisconsin it has been recognized in part. In the former state all railroads and public utility companies must obtain from the commission a certificate of "public convenience and necessity" before entering upon any new construction, whether it be an extension of an existing plant or the erection of a new plant. In Wisconsin a similar certificate must be obtained by all common carriers. In this case it is entirely at the option of the commission to grant or refuse application, and this certificate is in no way connected with the certificate authorizing any new security issue that may be needed to build the extension or new plant. In both states, if the field is already occupied by a company of adequate capacity, the commissions have refused to allow a competitor to enter. Some of the Wisconsin decisions are most interesting, showing as they do the frank recognition of monopoly as the best condition for public utility service.

Railroads are generally natural monopolies and the unnecessary paralleling of lines only results in the end in consolidation or arrangements whereby the public benefits of competition . . . yield to the inevitable increase in the cost of transportation made necessary by the cost of operating and maintaining two railways where one is adequate. . .[2]

It is well understood that the theory of the law is that utility enterprises are generally monopolistic in their character. . . .[3] It was one of the purposes of the statute to insure the public against the undertaking of unusually hazardous enterprises. It was doubtless contemplated to prevent the projection of lines for speculative purposes and through which the innocent purchaser would be made to suffer losses. . . .[4]

The legislature doubtless intended that through the administration of this law, destructive competition and rate wars . . . should be prevented.[5]

[1] Kansas House Bill No. 906 (Session 1911). In Kansas, securities are passed upon by the bank commissioner of the state.

[2] Report of the Wisconsin Railroad Commission, Vol. III (1908–9), p. 289.

[3] Ibid. Vol. IV (1909–10), p. 60.

[4] Ibid. Vol. V (1910), p. 473.

[5] Ibid. p. 475.

The Milwaukee and Fox River Valley Railway Company petitioned for a certificate of public convenience and necessity for an interurban railway. The commission granted the certificate with the decision: "While the project involves many uncertainties, these uncertainties do not create a risk of such magnitude as to justify the commission in denying promoters and investors the privilege of assuming it. . . ."[1] The territory to be covered by this company was already practically entirely served by the Milwaukee Northern Railway, and the decision is therefore interesting as showing that the commission will allow competition where it believes there is business enough for two. The opinion went on to say, however, that there would be no rate-cutting or destructive competition in this instance, *because the commission has the power to fix rates.*[2]

One noteworthy fact in connection with this problem is that in Wisconsin the "public convenience and necessity" idea does not extend to telephone companies. "These alone are left in a class by themselves, supposed to be governed by the ordinary laws of competition."[3] No explanation for this exception is offered either by the commission or by the original law. It is also to be noted that there is a possible appeal from the commission's decision to the circuit court of Dane county, and from there to the state supreme court.

In New York the principle above outlined is definitely extended to all public-utilities companies. One example will suffice to illustrate the principle upheld. The Hudson River Electric Company petitioned for permission to exercise rights granted them by a franchise issued by South Glens Falls to light the streets of that village. The public service commission decided:

> The village of South Glens Falls is now being served and has for years last passed been served with the electric light of the United Gas, Electric Light & Fuel Company of Sandy Hill and Fort Edward, N.Y. . . . The said company has a plant sufficiently adequate to supply proper service to the said village . . . and no reason exists why the applicant should be allowed to light therein.[4]

The commission then ordered the existing company to furnish light at the rate proposed by the applicant.

[1] Ibid. Decision, Milwaukee and Fox River Valley Railway Co.

[2] Some states, far from recognizing the monopolistic character of public utilities, have attempted to maintain competition among them. For example, Missouri has a statute preventing any railroad from owning, controlling, or operating a parallel or competing line. Section 41 of the Oklahoma state constitution prohibits public service corporations from holding or controlling in any manner whatever the stock of any competitive corporation engaged in the same kind of business. In the light of the Wisconsin and New York attitude on this question, it would seem best to allow rate-regulated competition if the field can afford business enough for two, but to prohibit in the first place the construction of the competitor if the field is clearly inadequate to provide fair profits for a duplicate equipment.

[3] Report of the Wisconsin Railroad Commission, Vol. IV (1909–1910), p. 60.

[4] Report of the New York Public Service Commission (2d dist.), 1909, Vol. I, p. 660.

In another decision of the New York commission a further development is seen. When the North Shore Electric Light and Power Company asked for permission to furnish power in a territory already served by the Port Jefferson Electric Light Company, it was shown that the latter's service was inadequate, that the plant needed improvements and additions, that rates were discriminatory, and that the business methods were lax. The commission denied the application, *provided* the Port Jefferson Company present within ten days a resolution of the board of directors promising without complaint to obey any order of the commission within six months from date, requiring additions, improvements, etc. The company furnished the resolution requested and the application of the competitor was refused.[1] In a similar case decided some time previous, the recommendations of the commission following the refusal of the competitor's application amounted to a practical renewal of the entire plant and equipment as well as a reorganization of the company's whole business system.

Thus in states existing side by side we may outline the evolution of commission regulation: (1) states without a railroad or public utilities commission of any sort (six); (2) states having power to enforce changes in service, rates and equipment (twenty-eight); (3) states that may regulate security issues for new enterprises but may not pass upon the social necessity of the undertaking for which they are issued (eleven); (4) one state that may in addition determine whether public convenience or necessity demands the new project, if the applicant is a common carrier (Wisconsin); (5) one state that may apply this test to all public utilities, and use the power to grant or refuse such a certificate as a whip to compel adequate service from the resident company (New York).

Blue-sky legislation applies to all companies the principle evolved as a middle step in public utility regulation. It will be interesting to see whether other steps of this series are ever given a universal application, whether a commission be given power to fix prices and regulate the output of industries (as was indeed suggested in the last presidential campaign), and whether the monopoly principle be recognized here too as in the case of public utilities.

[1] Report of the New York Public Service Commission (2d dist.), 1910, Vol. I, pp. 782, 783.

INTERLOCKING CORPORATIONS

By Harold M. Bowman of the New York Bar

(From the *Michigan Law Review*, February, 1913)

Once more a striking phrase has suddenly become a part of our everyday speech and with it a cause, though it is as yet a more or less indefinite cause, has found a measure of prosperity. It is an effective phrase, one in which an advertising agent or a seeker of political catch words must take a pure delight. "Interlocking directorates." You do not have to hear it often to find yourself thinking of the boards of directors of many of the big corporations in the land as mortised and fitted to work in perfect unison — an interlocking, interchangeable, intercorporate marvel of the joiner's art. Nor does the imagination far outstrip the facts. In every city of any size how many interlocking corporations are there? How many are there in the big cities; some of state-wide importance, some of national or even international influence?

The Steel Corporation, for example, is a morsel to roll under any man's tongue. Here is the way it impresses one militant journalist:

> The Steel Trust's advantage over competitors of three dollars a ton in cost of production, due not to superior efficiency but to the ownership of certain strategic railroads and steamship lines, is greatly enhanced by its relations to many other carriers. The few men who control the Steel Corporation are directors also in twenty-nine other railroad systems, with 126,000 miles of line — more than half the railroad mileage of the United States — and in steamship companies. These men are also directors in twelve steel-using street railroad systems, including some of the largest in the world; they are directors in forty machinery and similar steel-using companies; in many gas, oil, and water companies, extensive users of iron products; and in the great wire-using telephone and telegraph companies. The aggregate assets of these different corporations exceed sixteen billion dollars. Sixteen billion dollars is more than twice the assessed value of all the property of New England. It is more than one and one-half times the assessed value of all the property in the thirteen Southern States. It is larger than the assessed value of all the property in the twenty-two States, North and South, lying west of the Mississippi River, except only Texas.[1]

Interesting, even startling, but in a measure misleading, if these great properties are considered as being under a common control. The common control extends to a considerable part of them; with the others this relation means little more than ease of intercommunication

[1] *Collier's Weekly*. Oct. 5, 1912. Compare the testimony taken by the Pujo investigating committee of the House of Representatives, especially that taken on Dec. 18, 1912.

or ability to respond quickly to a common impulse, for a common benefit or defense. On the other hand, the Steel Corporation is not the only sun with satellites in the American sky. There are several others.

However, the new-found phrase has proved in a measure tyrannical. As is so often the case with such phrases, being a catch-word it has bred impulsive judgment — it has turned attention to one side of a big problem and has effectively excluded most others. First, it has begged the question — it has created an assumption that interlocking directorates are in and of themselves undesirable. But this might be indulged, if it had not so totally obscured the big questions that lie just behind. Directors, after all, are merely the agents, or trustees of corporations. A corporation's owners are the principals. Its big stockholders — and yes, begging leave, its little ones — are the men behind the guns. If interlocking agents are anathema why not interlocking principals? Yet the question of common ownership is as effectively obscured as though it were almost non-existent.

The problem is more than this. Indeed it is not one but several problems. The question of intercorporate directorates, it must be granted, is a question of importance. But it is indissolubly connected with several others. The questions of intercorporate contracts, of intercorporate combinations, consolidations, leases and sales, invite thought in which the intercorporate directorate may be but incidental, a background shadow. And brooding over all is always the question of the interlocking ownership of these corporations, the interfinancial hegemony, which can no longer be obscured. Moreover each and all of these problems has two sides. Public and private interest differ and are not the same. Intercorporate directorates, intercorporate ownership, contracts between corporations having common directors or ownership, may signify one thing from the standpoint of a minority stockholder, another from that of the majority stockholder, and still another from that of the public. And all of these questions may in turn be qualified or entirely metamorphosed by the nature of the business in which, as it happens, the particular set of interlocked corporations under examination is engaged. If the corporations are smaller middle-sized merchandising corporations, the consuming public may be specially exercised at their real or imagined practices. If they are industrial corporations, labor will be particularly alert to all their doings. If they are public service corporations, they will always entertain a medley of interested inquisitors — a little bit of this, that and the other thing. If they are corporations of the secret process brand, or if they are close corporations, or if they are in any sort of business in which reticence is something more than good manners, they may experience one sort of thing — which may sometimes prove very painful — whereas if they are corporations of the banal, open-to-

everybody kind, or the kind that has an assured monopoly, a perpetual franchise, and stock and bonds all listed on the stock exchange, the experience may, as a rule, be quite different. A little more discrimination than we have had thus far in the interlocking directorate controversy — which doesn't quite cover everything in the trust and corporation question — may prove helpful.

Most of all, differentiation would be welcome in dealing with the concern of the stockholder on one hand, that of the public on the other. Obvious as the need of this may seem to be, it has been somewhat lacking.

The stockholder's interest in the corporation is that of a property holder, his relation to the director is that of one of several joint owners of property to their representatives and managers — representatives and managers who have very full powers indeed, who can help the stockholder or hurt him beyond repair. The stockholder's prime concern is that the director shall work always and all the time for the corporation, for that means he will work for the stockholder. The director may be, and if he is a big man in the business world, he is likely to be, a director in other corporations, perhaps in several of them. That of itself may mean nothing of importance to the stockholder. The corporations in which the director is interested as director may never come into commercial contact with his own, or their contact may be in its effect neutral or even beneficial. But once the director is interested as director in a competing corporation, or in a corporation which performs a service or produces a commodity or possesses property which the other corporation desires to buy, then the situation changes immediately. The director is at once in the position of one who seeks to serve two masters whose interests are or may easily become more or less conflicting and antagonistic. Can he maintain a perfectly even balance? Will he dot every *i*, cross every *t*, do equity like a Solomon? When contracts are made between the two corporations is there not danger that he will give one of them the better of it? The danger is a very real one, and the opportunity presented has tempted many men in just such situations to do gross fraud.

Perhaps it will be said that the stockholder has himself to blame if he permits conditions which make such discrimination or dishonest dealing easy. That would be true if the stockholder's position were that of the ordinary employer or owner. But this is not the case. While in certain respects his rights and powers are like those of such an employer or owner, in others they are entirely unlike them. Unless he owns a working majority of the stock himself he cannot say who shall be the directors; he cannot say that a part or even all of the directors chosen shall not hold like positions in one or a dozen other corporations, any or all of which may be competitors of his own

corporation; there is as yet practically no positive law against intercorporate directorates, intercorporate principals or intercorporate contracts between such directorates or principals. What means the stockholder has to protect himself are curative rather than preventive.

And there are impediments — sometimes exceedingly difficult to overcome — even in the way of administering the cures. Nowhere perhaps is this better illustrated than in the existing state of the law concerning the stockholder's right to inspect the books and papers of the corporation. It is laid down as a broad general proposition that one of the privileges incident to stock ownership is that of inspection of the books and papers of the corporation, and that this privilege in general becomes a right "when the inspection is sought at proper times and for proper purposes." In many of the states this right has been expressly guaranteed by statute, in some by the constitution — but the right, such as it is, exists at common law, independent of legislative act or constitutional guarantee. Such as it is. For as a general thing it is a right which can be availed of only with difficulty even when the exercise of it seems almost imperative. In ordinary relations it often seems practically impossible to assert it effectively. Some courts have been more liberal than others in permitting examination of the corporation's books and papers by the stockholder. In certain cases the privilege has been granted when the only purpose of the stockholder appeared to be to acquire information to enable him to vote intelligently. But no one who looks into the matter can fail to be impressed with the character or apparent number of the instances in which the privilege has been refused. The corporation may cease to pay dividends; the market value of its shares may greatly decrease; the officers may discontinue their reports to the stockholders; the directors may decide to lease or dispose of a part of the property; they may decide to bring suit against one or more of the stockholders. In such cases the stockholder's anxiety will be very real and the only ways in which it can be allayed will be through the assurances of officers and directors whom he trusts or by an examination of the condition of the corporation itself. Yet in cases of precisely this character stockholders seeking information have gone away empty handed, and the courts have refused relief.

Overmuch stress of course is not to be placed upon this condition of affairs. A fair balance must always be maintained. A corporation is a business enterprise and like most business enterprises it has a business privacy which cannot be invaded and business secrets which cannot be divulged without injury to the stockholders themselves. The director as a trustee of the corporation — and he is a trustee of the corporation first, of the stockholder only secondarily — is often under obligation to preserve these secrets even against the stockholder himself. These secrets may be secrets of process in manufacture; special-

ized and therefore more or less secret knowledge of markets, of when to buy or to sell to the best advantage; but they may also to some extent — to a reasonable extent — be secrets of business conditions. It may for a time be as important to a corporation to keep its competitor in the dark concerning its profit and loss account or its borrowing power as it is to keep from that competitor all knowledge of the ingredients entering into the thing it sells. But admitting all this, the privilege of non-communication can easily transcend the bounds of fairness to the stockholders. It can easily be made to cloak a scheme to deceive the stockholder as to his holdings, to help directors working for their own private pockets or for their underground financial prestige. It is a sinister privilege at the best.

When with a stoutly claimed privilege of silence, of non-communication, there coexists a situation facilitating and inviting intercorporate relations or contracts or alliances which may easily prove to be to the detriment of stockholders in one or more of the corporations concerned, who can doubt that the privilege should be subject to the closest scrutiny, that the presumptions of the law should favor the stockholder and lodge the burden of showing fairness upon the shoulders of the directors? Who can doubt that all contracts made between such corporations where the common directors of all constitute an acting majority, or a powerful influence in each, should be strictly voidable, and that it should be possible for a very minor stockholding interest to set in motion the machinery which would determine whether the contract was fair or prejudicial?

What the law has accomplished in this respect and what it may yet incline to accomplish deserve consideration and careful study. It will be found that the courts have made much more than a beginning, that they have recognized and often protected the infirmities of the stockholders even if they have not often taken those final steps which would make the stockholder quite independent in his dealing with the corporation.[1]

A very few courts have held that contracts between corporations which have common directors — under certain conditions at least — are void. Usually, however, in such cases the true reason why they have been held void is that the transaction was fraudulent. A considerable number of courts are to be found at the other extreme. They hold that the contracts are valid, but usually they say that they are subject to strict scrutiny and must be fair. But the rule upheld by most courts is that they are voidable. Some say that such contracts may be avoided "without regard to the question of advantage or detriment," but the great majority permit avoidance only when in

[1] Some of the most important phases of this matter are discussed by the writer in an article entitled "The Validity of Contracts between Corporations Having Common Directors," published in the *Michigan Law Review*, June, 1906.

addition to the common directorship some element of adverse interest, agency, or fraud is present.

The rule that declares all such contracts void seems oppressive. The rule that declares them valid, on the other hand, is much too liberal. It makes common directors feel that they have free rein, that the presumptions are in their favor. The true policy seems to lie between — where most of the courts have located themselves. The contracts should be regarded as voidable whenever any advantage has been taken of the stockholders on either side. The utmost good faith should be required of those who make such contracts. And therefore to protect fully the interests of the minority and the individual stockholder does it not seem that the individual stockholder — provided he is not shown to be a gratuitous trouble-maker — should have power to begin proceedings in the courts which would lead to avoidance of the contract if any advantage had been taken of him or other stockholders? Then the mere showing that the two corporations between which the contract is made have common directors should constrain the court to look into the matter. The courts have not yet given the individual stockholder or the small group of stockholders adequate powers of interference in such cases. And they have not yet allowed them that freedom in the examination of the books and papers of the corporation without which this right would often be empty and meaningless. It is in these two directions that improvement can be made — but improvement can be made in them without great difficulty, for the advance lies along a beaten track. There are no trails to blaze.

It follows as a natural conclusion that so far as the private interest — the interest of the stockholder — is concerned, legislation at this time prohibiting interlocking directorates — except in exceptional cases — or interlocking principals, would be premature. It is doubtful whether, from the private point of view alone, such legislation will ever be necessary, providing the courts take good case of the intercorporate contracts, extending their good offices in the further strengthening of the stockholder's position.

The dividing line between the public and private or stockholder's interest and point of view in this group of problems is sharp. The public question is economic, to some extent political and social; the stockholder's problem is almost entirely one of profit and loss. In a word, the public problem is the anti-trust problem, the problem of competition and combination. It is not intended to discuss the trust question. It may be said at once that what is said here rests upon a belief in the economic expediency and the social advantage of a general competitive régime in which limited competitive combination or co-operation, in other words a reasonable as distinguished from a monopolistic modus operandi, is allowed to play a significant but an inci-

dental and therefore subordinate role. The kind of combination or coöperation that is not allowed to block the movement and free development of equal economic opportunity, is but the logical evolution and expression of one form of highly developed competitive efficiency. What bearing then have intercorporate directorates, intercorporate ownership, and contracts between corporations having common directors or owners, upon the question of competition and combination?

It is at once obvious that if two or more corporations have boards of directors so constituted that an acting majority or even a highly influential minority of those on one board are members of the other board or boards these two or more corporations may with great facility be made to work together — almost as though they were one. This assumes of course that they are corporations which in their nature can work together. The presence on a local New England real estate corporation's board of a majority of the directors who constitute the board, let us say, of a corporation engaged in lighterage in New York harbor would be utterly without significance. These two corporations would never play into each other's hands, nor could they well take advantage of each other. But where the corporations are of such a kind that between them there could be combination, horizontal or vertical, the presence of common directors becomes of the utmost significance. A railroad needs freight, the freight producer needs the railroad— with interlocking directorates they are often as good as combined. A steel producing company needs ore, an ore producing company wants a good market for its product — give them common directors and often they are more than united, they are almost coalesced. The United States Steel Corporation, the International Harvester Company, the American Sugar Refining Company are all illustrations of vertical combination; and as for illustrations of horizontal combination, they are also found in these companies as they are in a legion of others.

In some cases such combination by the interlocking of directorates will offend public policy. In other cases it may be said to be directly in line with it — as when non-competing railroads are thus combined. The public policy of nearly all our states in the past has favored the consolidation of non-competing railroads, and common directorates is a promising step toward such consolidation.

But if combinations in unreasonable restraint of trade are to be condemned, then wherever two or more corporations are engaged in practices that are destructive of competition, and it can be shown further that they have interlocking directorates, the presumption becomes exceedingly strong that they have in effect combined to restrain trade. The interlocking directorate in such cases is the visible symbol of an inward and secret transgression of the law. Should not the fact of common directorates be laid hold of by the law in such

circumstances and be used to fasten the presumption of illegal practices upon the corporations concerned? Some would go further, prohibiting absolutely all interlocking directorates in the case of competing corporations. But the rebuttable presumption may prove adequate.

When, in addition to the common directorates, there are contracts in common, or contracts between the interlocked corporations, the government's case may usually be considered made. Between such corporations there must usually be such contracts, written or word-of-mouth, or if not contracts then "gentlemen's" or other equally intelligible agreements — so that once the fact of interlocking directorates is established a *subpœna duces tecum* or a rigid cross examination of the gentlemen agreeing is likely to mean death in the pot.

However, this is not all of the matter. We may pin down the intercorporate contract, we may ventilate the interlocking director, and find ourselves still outside the gates. By example we should tread softly here. We now approach a subject around which some law officers and many other persons have been tiptoeing, much as though they were attendants in a sick room or a sanctuary.

There are of course corporations normally competitive which have interlocking directorates without interlocking ownership. On the other hand there is interlocking ownership without interlocking directorates. A and B may own a majority of the stock in corporation No. 1 and a majority of the stock in corporation No. 2, and an influential part of the board of directors of the first corporation may or may not constitute a part of the board of directors of the second corporation. It does not make very much difference. In any case, the problem is about the same. When the corporations have a sufficient number of common directors they will tend to be managed in a common interest. When they lack the common directors but have common owners every director will tend to be either dummy or Good Man Friday. He will know his master's voice and when to heed it.

Interlocking ownership so far has seemed to bear a charmed life. Now there may be good reasons for this. There must be some reason for it. There must be some reason why bills are framed against the agents, the common directors — while the common owners, the principals, are entirely passed by. Perhaps it is because of that commendable spirit of thorough experimentation which bids the wise to make haste slowly; to go ahead, but first to have some idea of the directions. Perhaps it is due to a conviction, conscious or subconscious, that common ownership is not necessarily an evil thing, that the evil lies only in practices that are in unreasonable restraint of trade, and that it is possible to have common ownership and legal practice. In some cases no doubt this is true. But in others it seems to require a faith in human nature little short of the sublime, and therefore of course

sometimes not far removed from the ridiculous. Unless, which seems entirely possible, a combination reconstituted as a combination of common owners may be said to have suffered a sea-change "into something rich and strange" and in its new condition be given a charter of indulgences permitting it to do what before was in violation of the law. Or it may be that interlocking ownership has enjoyed this immunity from attack because of much doubt as to just how far the government can go, constitutionally and practically, in compelling the owners of illegally combining properties to liquidate their properties in part to others. The practical difficulty of a thorough-going measure of this kind would assuredly be extreme, while its constitutional implications might prove most embarrassing.

As a matter of fact all of these things and more must be taken into consideration in any attempt to do justice to the existing state of mind — to its blind side as well as to the side on which an optic nerve is beginning to develop. It was only yesterday, so to speak, that the significance of common ownership was thrown into sharp relief, when the Standard Oil agglomeration emerged from its ordeal of disintegration seemingly more closely integrated, more thoroughly concentrated, more narrowly held than ever before, so far at least as common ownership is concerned. The Standard Oil system stands dissolved and the little shareholders in it own perhaps less than they did before, the big shareholders more. Genius itself could not have contrived a scheme better adapted to the automatic and perfectly noiseless elimination of the little fellows.

It is perhaps not to be wondered at that the political physician still remains transfixed, that the lips of the prophets are dumb — though of course there is no big surprise without its sequel. It may be that we have some preliminaries of the sequel already, in the Union Pacific-Southern Pacific decree. How far-reaching the principles enunciated in that decision may prove to be remains to be seen.

Moreover the anti-trust evolution is just now at a point — and, must it not be said, a healthy one? — where most attention is directed to practices, to acts, to deeds; to the nature and the incidence of those things which tend to throttle healthful competition, and make desert the conditions under which opportunity for men of little means and power flourishes. We have reached the point where we may hope to see Congress and the government come to grips with realities. Something already has been done. We are on the threshold of this achievement. One or two pushes — how great the misfortune of the pulls backward! — and the government will be straight over the bars, laying about it right and left, at the cut-throat price discriminations, at the stifling of competitors by refusing to sell anything to those who will not buy everything, at monopoly espionage, at fake independence, at any and every similar device. We shall have regulation of

competition, regulation of reasonable coöperation, of combination that is not destructive of opportunity, more liberty, and more enterprise.

It is not surprising that with a prospect of being thus engrossed we should not yet have begun to examine very critically the more or less abstract questions of interlocking directorates, or the perhaps even more abstract questions of interlocking ownership.

There is in this an excellent chance of escape for director or owner who in the past has directed or owned to the end that trade might be unreasonably restrained. If he is intelligent enough to take warning from the growing demands for the suppression of practices inimical to a régime of economic freedom and justice — and as director or owner of one corporation can achieve the feat of truly competing with himself as director or owner of the other — he may be allowed to lead his dual and difficult life in all the peace that is economically possible. But if he does not do this — if he lacks the requisite intelligence to do it — he may well beware the bale that is in store for him. For suppose that in the effort to put an end to practices that stifle competition and throttle opportunity, the struggle should seem vain — and largely perhaps because of interlocking contracts, the interlocking directorate or the common owners. Suppose that the men earnestly working for the improved conditions become convinced of that. Does any one doubt what they will do? Will they hesitate to suppress such contracts? The courts have already shown the way to do that and in many instances they have done it. Will they stop at the interlocking directorates? The legislatures, state and national, have already entertained some measures of this kind, and at least one of them enacted into law has been most successful. Will they stop even at common ownership? Perhaps there they may pause and look about them questioningly, but that they will stop there if the common welfare urges them onward, who will prophesy?

We know that there is a very general feeling among laymen and a certain conviction among lawyers that under our system of jurisprudence there is no way of preventing a man from owning almost anything he pleases and as much of it as he pleases, provided he has the means of acquiring it. But once the demand arises and becomes distinct, a demand of the deliberate majority, we may be surprised at the comparative ease with which the change is brought about — and brought about according to the forms of existing law. To-day many might ridicule any suggestion that through the power of taxation, the power of eminent domain, the "police power," the power to grant and so to limit corporate franchises, or the power to control interstate or intrastate commerce, really practical and effective limitations could be put upon the amount of stocks of a given kind that any man could own. But each of these branches of the law — taxation perhaps the least, the power to restrict corporate franchises and the

power to control commerce perhaps the most — contains the seed from which in the fertile soil of judicial construction or extension some hardy plants may grow.

Perhaps the least difficult device for control of interlocking ownership — but one not without many difficulties under our dual government — would be to grant corporate franchises only to those who own no stock or only a limited amount of stock in competing corporations, making this restriction a condition on breach of which the corporation's franchise would be forfeited. No one who realizes the tremendous extent of power which Congress has over interstate commerce — how it reaches into details, into incidents but remotely related — no one who has observed the almost furious pace at which this power has developed and is still developing, could be very greatly surprised if out of it there should be evolved far-reaching limitations upon the amount and character of stockholdings in all corporations engaged in interstate commerce, corporations which now include the big manufacturing or industrial corporations with the others.[1]

The time may not yet have come for broad, general laws forbidding intercorporate directorates. For the next few years we seem destined to give most attention to deeds, to the acts that are hostile to our economic and social welfare. It is well that the emphasis is placed there. The energy that seems now behind it might be dissipated, even destroyed, if it were sunk in the abstractions of mere organization. But we shall be fatuous beyond belief if in hammering at deeds we lose sight of these abstractions, for they embrace the real. There are even now certain corporation aggregations which menace the movement against destructive trade practices and agreements, chiefly because of the fact that they are dominated by common directors or common owners. If in any cases the situation is worse than this, if there is beyond a preponderance of doubt a class of corporations in which interlocking management means an inevitable breach of that public policy which has declared for reasonable competition and fair opportunity, there can hardly be a choice. Interlocking management for that specific class of corporations will have to give way or the public policy itself will have to give way.

Large-scale production may be desirable, in some branches of trade it is undoubtedly essential to prosperity. We should do everything possible to mediate between those economic forces which make toward the most efficient units of production and the struggle of individuals for freedom of opportunity, which is even more important. Mediation of course is far removed from dogmatic politics. It puts the emphasis

[1] It may be that the existing Anti-Trust legislation, with some not fundamental changes, will prove adequate to accomplish such an end, should there prove to be a public need for it. Since this paper was written Attorney-General Wickersham's proposition for the regulation of the Union Pacific and Southern Pacific stockholdings — a direct blow to interlocking ownership — has been made.

on the facts; condemns the contract between interlocking corporations only when it is contrary to the interests of the private stockholder or offends public policy; condemns interlocking directorates where the facts show that they should be condemned, and therefore in the absence of sufficient information waits awhile before it makes up its mind; condemns the common ownership of competing corporations only when it is demonstrated that neither the surveillance of such corporations, the supervision of their contracts, nor the prescription of their organization has been enough. Mediation, however, is not mere meditation. Its time is now and its method is one of ceaseless activity.

THE POWER OF CONGRESS TO ENACT INCORPORATION LAWS AND TO REGULATE CORPORATIONS

By Victor Morawetz of the New York Bar

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This article might properly have been placed in a subsequent division on "Tendencies toward Federal Centralization," on p. 498. It is inserted here because the problem of federal control has become the latest and most vital phase of the corporation question. — Editor's Note.

I. The Power of Congress to Enact Incorporation Laws

The formation of corporations is not a primary purpose or power of the national government. Corporations are not mentioned in the Constitution. But, subject to the limitations expressly imposed by the Constitution, Congress has power to enact laws to execute any of the purposes or powers entrusted by the Constitution to the national government; and, therefore, Congress can pass an act of incorporation, or an act regulating corporations, if such an act is merely a means of executing some constitutional purpose or power.

In 1791 the first Congress passed a bill incorporating the Bank of the United States, a private stock corporation with power to establish branches and to engage in a general banking business. President Washington called upon Thomas Jefferson, the Secretary of State, and Edmund Randolph, the Attorney-General, for opinions as to the constitutionality of the bill. Their opinions being adverse, the President called upon Alexander Hamilton, who was Secretary of the Treasury and had been the principal author of the bill, to state the reasons which induced him to consider the bill constitutional. Hamilton submitted a persuasive opinion in favor of the constitutionality

of the bill,[1] which thereupon was signed by the President. The charter of the bank expired in 1811 and for political reasons Congress refused to renew it; but in 1816 Congress passed an act chartering the second Bank of the United States, which also was a private stock corporation with power to establish branches and to engage in a general banking business throughout the United States. The United States was a shareholder in the bank, and the latter was constituted a depositary of the United States government. In the case of M'Culloch *vs.* Maryland[2] the Supreme Court decided that the act incorporating the bank was constitutional because the creation of such a banking corporation was an appropriate instrument for conducting the fiscal operations of the government. The court held that the creation of a corporation was not a substantive and independent governmental purpose, but was merely a means employed to effect some ulterior purpose; that, except so far as expressly limited by the Constitution, Congress was impliedly empowered to resort to any appropriate means of effecting any of the constitutional purposes of the national government; that it was not a subject of controversy that the creation of a banking corporation was a convenient, useful, and essential means for carrying on the fiscal operations of the government, and that there was no reason why Congress should not resort to the creation of a corporation for that purpose.[3]

In 1863 and 1864 Congress passed general acts for the incorporation of national banks. In Farmers' and Merchants' National Bank *vs.* Dearing[4] the Supreme Court said:

> The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United States. The reasoning of Secretary Hamilton and of this court in M'Culloch *vs.* Maryland (4 Wheat. 316) and in Osborn *v.* Bank of the United States (9 id. 708) therefore applies. The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge.

Although undoubtedly the court was right in sustaining the constitutionality of the National Bank Act, the grounds upon which the court based its conclusion seem questionable. The act incorporating the Bank of the United States was sustained because it was created to serve as an instrument of the government in carrying on its fiscal

[1] Hamilton's opinion is printed in the edition of *The Federalist* edited by Paul Leicester Ford, published by Henry Holt & Co. in 1898.

[2] 4 Wheat. (U.S.) 316 (1819). See also Osborn *vs.* Bank of United States, 9 Wheat. (U.S.) 738, 859-(1824).

[3] See the opinion of Chief Justice Marshall, 4 Wheat. (U.S.) 411, 422, 423 (1819).

[4] 91 U.S. 29 (1875).

operations; but the constitutionality of a general act for the incorporation of an unlimited number of banks to engage in a general banking business for the profit of their stockholders cannot fairly be based on that ground.[1] Under the National Bank Act more than seven thousand banks have been formed, many of them having a capital of only $25,000 and supplying only local needs of banking facilities. An assertion that all these banks were incorporated to serve as instruments of the government in the administration of its fiscal operations would seem little more than a pretense. A sounder and better ground for sustaining the constitutionality of the National Bank Acts appears to be the power conferred by the Constitution upon Congress "to regulate commerce with foreign nations, and among the several states." Even in 1791, when the commerce of the United States was in its infancy, Alexander Hamilton assigned the commerce clause of the Constitution as a ground for sustaining the constitutionality of the act incorporating the first Bank of the United States. In modern times a sound banking system and adequate banking facilities are as essential to interstate and international commerce as are railways and steamship lines.

In the case of California *vs.* Pacific Railroad Companies[2] the Supreme Court sustained the constitutionality of the acts of Congress incorporating the Pacific Railroad Companies. Mr. Justice Bradley, delivering the opinion of the court, said:

> It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce.[3]

In Luxton *vs.* North River Bridge Co.[4] the Supreme Court sustained the constitutionality of the act of Congress incorporating the North

[1] In Osborn *vs.* Bank of United States, 9 Wheat. (U.S.) 738, 860 (1824), Chief Justice Marshall said: "The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government is admitted; but the Bank is not such an individual or company. It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court, in the case of M'Culloch *vs.* The State of Maryland, is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.'"

[2] 127 U.S. 1 (1887).

[3] 127 U.S. 39 (1887). Congress also has granted a charter to the Nicaragua Canal Company.

[4] 153 U.S. 525 (1894).

River Bridge Company for the construction of a bridge across the Hudson River between the states of New York and New Jersey. The court held that "although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by authority of two States across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water." [1]

Congress possesses all sovereign powers of government in the territories of the United States, and may establish territorial governments with general legislative powers. Therefore Congress has power to pass special or general laws authorizing the formation of corporations for any purposes within the territories, and this power may be delegated to the respective territorial legislatures.[2] Congress also may charter corporations in the District of Columbia.[3] However, the franchises of a territorial corporation do not extend beyond the territory in which it was incorporated, and the franchises of a corporation chartered by Congress under its legislative powers over the District of Columbia do not extend beyond the District. Such corporations may carry on their authorized business and operations in the several states only so far as permitted by the states.

II. National Incorporation of Trading Companies

The grant by the Constitution of power "to regulate" interstate and international commerce has been construed by the Supreme Court as constituting, in effect, a grant of power to legislate generally in respect of such commerce. It has been held that Congress not only has power to regulate interstate and international commercial transactions and to prescribe police regulations for the government of interstate and international commerce,[4] but also has power to pass laws prohibiting restraints of such commerce,[5] and laws to provide the public with suitable instrumentalities or facilities for the transaction of such commerce, such as railways, bridges, and telegraph lines,[6] as well as laws regulating the business and operations of public

[1] 153 U.S. 525, 530 (1894).

[2] Mormon Church *vs.* United States, 136 U.S. 1, 42 (1889), and cases cited; Vincennes University *vs.* Indiana, 14 How. (U.S.) 270 (1852); Williams *vs.* Bank of Michigan, 7 Wend. (N.Y.) 539 (1831) and cases cited.

[3] Hadley *vs.* Freedman's Savings Bank, 2 Tenn. Ch. 122, 126 (1874); Williams *vs.* Creswell, 51 Miss. 817, 822 (1876).

[4] Lottery Case, or Champion *vs.* Ames, 188 U.S. 321 (1902); Reid *vs.* Colorado, 187 U.S. 137 (1902); *In re* Rahrer, 140 U.S. 545 (1890).

[5] For example, the Anti-Trust Act of 1890.

[6] Cases *supra*.

carriers and of others engaged in a business of a public character and serving the public as instrumentalities for the transaction of such commerce.[1]

Soon after the adoption of the Constitution, when the interstate and international commerce of the United States was comparatively small, Hamilton pointed out that "the fact that all the principal commercial nations have made use of trading corporations is a satisfactory proof that the establishment of them is an incident to the regulation of commerce."[2] In modern times a very large part of interstate and international trade is carried on by means of corporate organizations and the right to form corporations to carry on such trade has become a practical necessity. An act of Congress authorizing the formation of such corporations could, therefore, justly be sustained on the ground that the right to form corporations is necessary to the convenient and effective transaction of interstate and international trade.

If the several states should refuse or fail to provide adequate facilities for the formation of corporations to engage in interstate and international trade, the need of national legislation would become obvious; but the fact that the several states have enacted laws authorizing the formation of corporations to engage in interstate and international trade would not impair or limit the power of Congress to enact such laws, if Congress could exercise this power in the absence of all state legislation. On the contrary, the diversity of the corporation laws of the several states; the practice which has grown up of forming corporations under the laws of certain states for the purpose of carrying on business principally, or wholly, in other states; the attempts of some of the states to increase their income from corporation fees and taxes, by inviting the formation of corporations under laws conferring wide powers and containing few restrictive regulations for the protection of the public; and the policy adopted by other states of imposing burdensome restrictions upon foreign corporations; — all would furnish additional grounds for national legislation authorizing the formation of interstate trading corporations governed by uniform regulations with respect to their organization, their powers, and their management, and vested by Congress with the right to carry on their business throughout the United States.

In his opinion on the constitutionality of the charter of the first Bank of the United States, Hamilton said:

[1] Compare the Interstate Commerce Act, approved February 4, 1887, and its various amendments; the "Elkins Act," approved February 19, 1903; the Act to promote the safety of employees and travelers upon railroads, approved March 2, 1903, and the Employers' Liability Act, approved April 5, 1910.

[2] Hamilton's opinion as to the constitutionality of the Bank of the United States, Ford's edition of *The Federalist*, p. 677.

It is conceded that implied powers are to be considered as delegated equally with express ones. Then it follows, that as a power of erecting a corporation may as well be implied as any other thing, it may as well be employed as an instrument or mean of carrying into execution any of the specified powers, as any other instrument or mean whatever. The only question must be, in this, as in every other case, whether the mean to be employed, or in this instance, the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government. Thus a corporation may not be erected by Congress for superintending the police of the city of Philadelphia, because they are not authorized to regulate the police of that city. But one may be erected in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian tribes; because it is the province of the federal government to regulate those objects, and because it is incident to a general sovereign or legislative power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage.

A strange fallacy seems to have crept into the manner of thinking and reasoning upon the subject. Imagination appears to have been unusually busy concerning it. An incorporation seems to have been regarded as some great independent substantive thing; as a political end of peculiar magnitude and moment; whereas it is truly to be considered as a quality, capacity, or mean to an end. Thus a mercantile company is formed, with a certain capital, for the purpose of carrying on a particular branch of business. Here the business to be prosecuted is the end. The association, in order to form the requisite capital, is the primary mean. Suppose that an incorporation were added to this, it would only be to add a new quality to that association, to give it an artificial capacity, by which it would be enabled to prosecute the business with more safety and convenience.[1]

III. Franchises of National Corporations

Power in Congress to pass a national incorporation law implies power, (*a*) to confer upon a corporation formed under the law the legal right or franchise to act in a corporate capacity in carrying on its business and operations throughout the United States, without regard to state lines, and (*b*) to prescribe the method of organizing the corporation, to define the terms and effect of the charter contract among the shareholders, and to regulate the internal affairs of the corporation, including the rights and obligations of its shareholders and the method of winding up its affairs in case of dissolution or insolvency.

Whether Congress can confer upon a corporation special rights or franchises, in addition to the right to act in a corporate capacity, depends upon the purposes of the corporation and the nature of the special rights. The constitutionality of such a grant of special rights could not be based on the ground that the corporation was formed

[1] Ford's edition of *The Federalist*, p. 657. See also the opinion of Chief Justice Marshall in M'Culloch *vs.* Maryland, 4 Wheat. (U.S.) 316, 411, 421 (1819).

under an act of Congress. Congress could grant special rights to a national corporation only if it could constitutionally grant such special rights to an unincorporated association or to a state corporation for similar purposes. Thus, if the purpose of a national corporation or of a state corporation is to build a railroad or bridge to serve the public as an instrument of interstate commerce, Congress may confer upon it the right to condemn property for that purpose and may confer all powers necessary to enable the corporation to establish and operate its railroad or bridge. If the purpose is to serve the national government as an instrument for carrying on some governmental function or activity, Congress may confer upon the corporation all powers necessary for the performance of this function or activity throughout the United States.[1]

The act of Congress incorporating the second Bank of the United States conferred upon the bank the right to engage in a general private banking business throughout the United States, and the constitutionality of the grant of this right was sustained on the ground that the bank could not serve the national purpose for which it was established unless authorized to engage in a general banking business.[2] The same rule was applied to the provisions of the National Bank Act under which numerous banks have been organized to carry on a general banking business for the profit of their shareholders. Similarly, the constitutionality of the acts incorporating the Pacific Railroad Companies was sustained although these companies were authorized to engage in intrastate as well as interstate transportation and to carry on their business and operations like other railroad companies in the several states. These powers were necessary to enable these corporations to accomplish the national purposes for which they were established.

Assuming that Congress has constitutional power to enact a law for the incorporation of companies to engage in interstate or international trade, a question may arise whether Congress could authorize such companies to engage incidentally in intrastate commerce, or to carry on a general trading business, including not only interstate or international trade, but also intrastate trade. The argument in favor of the constitutionality of such a law would not be as strong as the argument in favor of the constitutionality of a law for the incorporation of a bank to serve as fiscal agent of the government, with power to engage in a general banking business, or of a law for the incorporation of a railway company to furnish a highway of interstate commerce, with power to engage in a general railroad business. It may, however, be urged with much force that authority to engage in trade generally, including intrastate trade, is a practical necessity to enable

[1] See the opinion of Chief Justice Marshall in Osborn *vs.* Bank of United States, 9 Wheat. (U.S.) 861, 862 (1824). See Thomson *vs.* Union Pacific R. Co., 9 Wall. (U.S.) 579 (1869).

[2] Osborn *vs.* Bank of United States, 9 Wheat. (U.S.) 739 (1824).

a corporation to serve as a means or facility for the transaction of interstate and international commerce. Commerce is not governed by state lines, and the business of a partnership or of a corporation rarely consists wholly of interstate or international commerce, or wholly of intrastate commerce. To authorize the formation of a trading corporation or copartnership with no power to engage in any commerce except interstate and international commerce would be useless. If Congress cannot authorize the formation of corporations to engage in interstate and international commerce with incidental power to engage in trade generally, the right to use a corporate organization as a means of carrying on interstate and international commerce would depend wholly upon the laws of the several states, though the national government alone has constitutional power to control and to regulate such commerce.

IV. National Legislation relating to National Corporations

Power in Congress to pass an act of incorporation does not include power to legislate generally concerning the legality of the transactions of a corporation formed under the act, or concerning its property rights, contracts, and liabilities in the several states. Such general legislation, though embodied in the act of incorporation, could not be sustained as a regulation for the government of the corporation, or as a limitation of its corporate powers.

Of course Congress can regulate the transactions of national corporations to the same extent as the transactions of state corporations or of individuals. Thus Congress can regulate their interstate and international commerce; and the business of a corporation operating a highway of interstate commerce or acting as a public interstate carrier is subject to regulation by Congress whether the corporation was formed under an act of Congress or under a state law. Furthermore, if a corporation should be used by the national government as a means of executing any of its constitutional purposes or powers, Congress could enact laws governing the transactions, property rights, contracts, and liabilities of the corporation so far as necessary to secure the execution of the governmental purpose or power. Thus if Congress should use a corporation as a means of providing a highway, or a railway line, or other transportation facilities for the interstate commerce of the people, or for the postal and military operations of the government, Congress could enact laws governing the transactions, property rights, contracts, and liabilities of the corporation so far as necessary to attain these governmental purposes in a safe and effective manner.[1] Similarly, Congress can legislate concerning

[1] Compare the Acts relating to the Pacific Railroad Companies, the Interstate Commerce Acts, the Safety Appliance Acts and the Employers' Liability Acts; and see the

the acts and dealings of national banks so far as may be needed to effect the national purposes served by them.[1] However, the constitutionality of such legislation would not be based on the ground that the corporations to which it applies were formed under an act of Congress. It would be based wholly upon the character of the business or transactions to which the legislation relates, or upon the fact that the corporations were employed by the government as instrumentalities to execute some constitutional purpose or power of the government. Congress could enact such legislation applicable to individuals or to state corporations under like conditions.[2]

If Congress should pass a law for the incorporation of private trading companies to engage in interstate or international trade, Congress would have the sole power to regulate their interstate or international commerce, to limit their corporate purposes and powers, and to regulate their management and internal affairs, but their intrastate commerce, and their property rights, contracts, and liabilities in the several states could not be regulated by Congress and would be governed by the laws of the states.

V. State Laws affecting National Corporations

The rule that the operation of a constitutional law enacted by Congress cannot be controlled or limited by state legislation applies to national acts of incorporation. Thus a state cannot by law interfere with the operation of the provisions of the National Bank Act relating to usurious transactions of national banks,[3] or to the winding up of national banks and distribution of their assets in case of insolvency.[4] Similarly a state cannot by law prohibit a national bank from receiving deposits when insolvent and impose a penalty upon the officers of a bank violating the prohibition.[5] It is clear also that the states cannot constitutionally defeat the purpose or impair the efficiency of a corporation established under authority of a national law as an instrumentality or agency of the national government, even though no express provision of the national law be infringed.[6] However, subject to the limitations above stated, national corporations

Second Employers' Liability Cases, 223 U.S. 1 (1912) and cases cited. It should be observed that the power of Congress to pass such legislation applicable to railway lines used in the postal and military operations of the Government would not depend upon the fact that the lines were interstate lines or were used in the transaction of interstate commerce.

[1] See Farmers', etc. Bank *vs.* Dearing, 91 U.S. 29 (1875); Davis *vs.* Elmira Savings Bank, 161 U.S. 275 (1896).

[2] See the opinion of Chief Justice Marshall in Osborn *vs.* Bank of United States, 9 Wheat. (U.S.) 862–864 (1824).

[3] Farmers', etc. Bank *vs.* Dearing, 91 U.S. 29 (1875).

[4] Davis *vs.* Elmira Savings Bank, 161 U.S. 275 (1896). See also Rankin *vs.* Barton, 199 U.S. 228 (1905).

[5] Easton *vs.* Iowa, 188 U.S. 220 (1903).

[6] See M'Culloch *vs.* Maryland and Osborn *vs.* Bank of United States, *supra*.

are subject to the operation of the general laws of the several states. In First National Bank *vs.* Kentucky[1] Mr. Justice Miller used the following language:

> They [national banks] are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.

VI. State Taxation of National Corporations

Congress may exempt from state taxation the business and operations of a national corporation serving the government as an instrument in the execution of some governmental purpose or power, or serving the public as an instrument of interstate or international commerce, and it seems that Congress also may exempt from state taxation any property held and used by such a corporation in the service of the government or of the public. The power of Congress to exempt the business or property of such a corporation from state taxation would not be based upon the corporate character of the organization or upon the fact that the corporation was chartered by Congress, but it would be based upon the purposes of the corporation and the governmental or public uses to which its property was devoted. Congress could grant such an exemption to a national corporation only if it could constitutionally grant a similar exemption to state corporations or to individuals under similar circumstances.[2]

In the absence of an express exemption from state taxation, the rule appears to be as follows: The right or franchise to carry on the business or operations of a corporation formed by authority of the national government to serve as a governmental agency or to serve the public as an instrument of interstate or international commerce cannot be taxed by the states, but the property of the corporation may be taxed by the states in the same manner as the property of individuals and state corporations, provided that the governmental or public purposes of the corporation be not impaired. If, however, a corporation was not formed to serve as an agency of the government or to serve a public use, but was formed merely to serve its shareholders as a means of carrying on interstate or international trade for private profit, the corporation and its transactions would be subject to taxation and to other state legislation to the same extent as

[1] 9 Wall. (U.S.) 353 (1869). See also Railroad Co. *vs.* Peniston, 18 Wall. (U.S.) 5.

[2] *Cf.* Thomson *vs.* Railroad Co., 9 Wall. (U.S.) 579 (1869); Railroad Co. *vs.* Peniston, 18 Wall. (U.S.) 5 (1873).

individuals and unincorporated companies engaged in a similar business. Only the interstate and international commerce of such a corporation and its right or franchise to be a corporation and to act in a corporate capacity would be exempt from state taxation.

In M'Culloch *vs.* Maryland[1] the Supreme Court decided that a statute of the state of Maryland prohibiting the Bank of the United States from issuing notes within the state except upon payment of a tax to the state and imposing a penalty upon officers of the bank violating this prohibition was unconstitutional, because it was a tax on the operations of the bank and consequently on the operations of an instrument employed by the government of the Union to carry its powers into execution. But the court pointed out that a state could impose a tax on the real property of the bank in common with other real property within the state, or a tax upon the interest of citizens of the state in the bank in common with other property of the same description throughout the state.[2]

Similarly, in cases involving the constitutionality of state taxes imposed upon railroad companies authorized by Congress to build and maintain interstate lines of railway the Supreme Court held that a state could not constitutionally tax the franchise or right to carry on their operations conferred upon these companies by the United States, whether the companies were incorporated under the laws of the United States or under state laws,[3] but that a state could tax the property of these companies equally with other property within its jurisdiction.[4]

VII. National Control and Regulation of State Corporations

Congress has power to regulate the interstate and international commerce of state corporations to the same extent as that of partnerships and of individuals, and there appears to be no constitutional reason why Congress should not enact regulations applicable only to the commerce of corporations.

[1] 4 Wheat. (U.S.) 316 (1819).

[2] 4 Wheat. (U.S.) 436 (1819). In Osborn *vs.* Bank of the United States, the court held that a tax imposed by the state of Ohio upon the bank for each office of discount and deposit maintained by it within the state was unconstitutional because a tax upon the business or franchise of the bank.

The power of the states to tax the property of national banks and the shares of their stockholders is regulated by the National Bank Act. (U.S. Rev. Stat., Sect. 5219.) See Covington *vs.* First Nat. Bank, 198 U.S. 100 (1904); Owensboro Nat. Bank *vs.* Owensboro, 173 U.S. 664 (1899); Van Slyke *vs.* Wisconsin, 154 U.S. 581 (1871); Aberdeen Nat. Bank. *vs.* Chehalis County, 166 U.S. 440 (1897); National Bank *vs.* Commonwealth, 9 Wall. (U.S.) 353 (1869).

[3] California *vs.* Pacific Railroad Co., 127 U.S., 1, 40 *et seq.* (1887).

[4] Thomson *vs.* Union Pacific R. Co., Eastern Division, 9 Wall. (U.S.) 579 (1869); Union Pacific R. Co. *vs.* Peniston, 18 Wall. (U.S.) 5 (1873). See also Western Union Tel. Co. *vs.* Massachusetts, 125 U.S. 530, 531 (1888).

A plan has been suggested of regulating state corporations engaged in interstate or international commerce by an act of Congress prohibiting them from engaging in such commerce, except upon obtaining from some government official a license to be issued only upon compliance with prescribed regulations with respect to the issue of their stocks and bonds, the conduct of their business and the management of their internal affairs. Against the constitutionality of such legislation it may be urged that the right of corporations, as well as of partnerships and individuals, to engage in interstate and international commerce is not derived from the national government and does not exist merely by grace or license of that government; that the Constitution does not confer upon Congress power to prohibit interstate or international commerce, but only confers power to regulate it; that the power of regulation extends only to acts done in carrying on commerce and to matters connected directly with the transaction of commerce;[1] and that the organization, powers, and internal affairs of trading corporations are not directly connected with the transaction of commerce, but bear only a remote relation thereto.

Strong arguments, however, can be advanced in support of the constitutionality of such legislation. No state can confer a legal right or franchise to act in a corporate capacity in other states, and Congress alone is vested by the Constitution with the power to legislate for the regulation of interstate and international commerce. The organization, powers, and financial condition of a trading corporation may have a direct and important relation to the transaction of interstate and international commerce, and may be of such a character as to render the commercial operations of the corporation a menace to the security and welfare of the people of all the states. A statute prohibiting the transaction of interstate commerce by means of a corporate organization which is a menace to the security of the public would seem justifiable as an exercise of the police power over interstate commerce and as a regulation of such commerce within the meaning of the Constitution. Furthermore, if interstate and international commerce cannot be carried on in an orderly manner and with safety to the public by a multitude of corporations organized under the diverse and varying legislation of forty-eight different states and subject in each state to special regulations and restrictions, it would seem justifiable, under the power to regulate interstate and international commerce, to require all corporations engaging in such commerce to comply with any appropriate regulations for the protection of the public and also to confer upon all corporations

[1] Thus although the products of agriculture and of manufacturing may become important objects of trade and commerce, Congress cannot on that account regulate agriculture or the business of manufacturing. Agriculture and manufacturing are not in themselves commerce or any part of commerce, and they have no direct connection with the transaction of commerce.

complying with the prescribed regulations a legal right or franchise to carry on their interstate and international commerce throughout the United States, free from restrictions imposed by the several states.

Congress has power to require corporations and other associations engaged in interstate or international commerce to file reports as to their organization, powers, and financial condition.[1] Congress also may provide for the appointment of officers and commissions to act as police of interstate commerce and to administer and enforce all constitutional regulations prescribed by law.[2] Congress, therefore, may vest in a national commission or in some public officer all necessary powers for the enforcement of any constitutional regulations enacted by Congress with respect to trading corporations engaged in interstate or international commerce. Such a commission or public officer may be required by law to issue to every corporation that shall have complied with the prescribed regulations a certificate of such compliance in the form of a license; and there seems to be no good reason why such certificates should not be made prima facie evidence of compliance with the prescribed regulations, or why corporations should not be prohibited from engaging in interstate or international commerce until they shall have obtained such certificates.

The power of Congress to enact such legislation would not be based upon the theory that the right to transact interstate and international commerce through a corporate organization was derived from Congress or was conferred by national license, or upon the theory that Congress has power to regulate the organization, powers, or management of state corporations. It would be based upon the theory that a corporate organization is but a means of transacting commerce, and that under its power to regulate interstate and international commerce Congress can prohibit the transaction of such commerce by means of any corporate organization which in its opinion is unsafe or otherwise prejudicial to the interstate commerce of the public.

An attempt on the part of Congress to control or regulate state corporations by means of the imposition of prohibitory excise taxes should not be countenanced. It has been asserted that a legislature may use its taxing power not only as a means of raising revenue, but also as a means of securing by indirection results which the legislature could not constitutionally attain by direct legislation; and in support of this assertion reference has been made to the dictum of Chief Justice Marshall that "the power to tax involves the power to destroy."[3] This dictum, like other striking phrases of that great jurist, has sometimes been quoted without reference to its context and in

[1] See the Interstate Commerce Act of February 4, 1887, with its amendments, and the Act of February 14, 1903, establishing the Department of Commerce and Labor and providing for the appointment of a Commissioner of Corporations.

[2] See the Interstate Commerce Act of February 4, 1887, and its amendments.

[3] M'Culloch *vs.* Maryland, 4 Wheat. (U.S.) 316, 431 (1819).

support of doctrines which it does not justify. The statement that "the power to tax involves the power to destroy" was made in support of the conclusion that a state could *not* tax the operations of an instrument of the national government and thus control its constitutional measures; but Chief Justice Marshall certainly did not mean to imply that the taxing power could constitutionally be used as a pretext for the accomplishment of an unconstitutional object. That this was not his meaning is apparent from his statement in the same case that "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." Undoubtedly, the courts would not be justified in scrutinizing the reasonableness of a tax, or the wisdom or motive of Congress in imposing it; but if it should appear plainly that a law nominally imposing a tax was not really a revenue measure, but in fact was an act of confiscation, or a mere pretext for the accomplishment of some purpose not warranted by the Constitution, the Supreme Court could not sustain such a law without abdicating its highest function and permitting the practical nullification of the Constitution itself.[1]

THE CASE OF THE MONOPOLIES — SOME OF ITS RESULTS AND SUGGESTIONS

By Sidney T. Miller of the Detroit Bar

(From the *Michigan Law Review*, November, 1907)

The most prodigious form the corporation has assumed is the trust or monopoly. The trust problem is not the whole of the corporation problem, by any means, although, in the popular conception, it seems to be so. It is only the most immediate phase, the most imminent phase, of the whole question of how to organize business, allowing it necessary freedom, without endangering the community. The literature on the trust problem is vast. Only three articles are presented here: Professor Frederic Jesup Stimson's setting forth the law of combined action and possession; Mr Miller's article dealing with the historic case of the monopolies, which

[1] See, however, the opinion of Mr. Justice White in McCray *vs.* United States, 195 U.S. 27 (1903). In this case the Supreme Court refused to declare unconstitutional a tax on the manufacture of artificially colored oleomargarine, though the tax obviously was not a revenue measure, and held that the right to manufacture artificially colored oleomargarine was not protected by the Constitution. The decision of the Supreme Court in Veazie *vs.* Fenno, 8 Wall. (U.S.) 533 (1869) that the imposition by Congress of a prohibitory tax upon state bank notes was constitutional may be sustained on the ground that Congress could absolutely prohibit the issue of such bank notes as a necessary incident to the creation of the national banking and currency system.

ushered in such platoons of legal adversaries; and Professor Wilgus's well-known analysis of the Standard Oil decision, which was the culmination of our attempt to apply the Sherman Law to the greatest of modern monopolies. — EDITOR'S NOTE.

Apparently the monopolistic idea is as old as the history of man. That great and good man, Job, may be counted as the earliest recorded "trust-buster," [1] if we read between the lines of his story, and Solomon said,[2] "He that withholdeth corn, the people shall curse him; but blessing shall be upon the head of him that selleth it."

Doubtless, by exhaustive search, we could find some record of attempts to monopolize during each century from Biblical days to the time of printing, and as surely there must have been a counter-movement.

But not until the last five hundred years of English history have the *pros* and *cons* crystallized in such a way as to be of intelligent use to us. In legal records, the "Case of the Monopolies" is the first meeting, head-on and with a clear field, of the monopolists and anti-monopolists, and it therefore seems worthy of close scrutiny. If we uncover the reasons for this particular quarrel we shall find something like this:

I

In the early days of England, kings, like common folk, often were in straits for money. In olden times, when the "divine right" was part of the religion of the nation, a short cut to relief for the empty purse was found by a war of conquest. If the ruler were not powerful enough for this he resorted to petty measures, confiscating the property of his wealthier subjects on trumped-up charges of treason, or by levying taxes.

But by the latter part of the reign of Elizabeth the people had become a power. Whether the crown wished or not, they had to be consulted in matters of taxation. Parliament, too, had some say about attainders for treason, and confiscation. The old short cuts were shut off; new expedients must be found, therefore, for helping the treasury.

Whatever else may be said of the ancestors of our nation we must admire the way the lawyers met any emergency which arose. Some poor bailiff ran off with the funds of his lord, — instead of sighing for the sweet old days when he might have chased him with blood-hounds and have strung him up when caught, the good baron who was robbed took himself to the law — a new remedy must be devised, and lo, the writ of *capias* was born. Again, a cleric declined to give

[1] Job, 29.
[2] Proverbs, 11: 26. See also Genesis, chap. xlvii, for an account of Pharaoh's monopoly.

up a fat living. He was not clapped in a town jail, or taken to the tower and branded. Those methods had gone out of fashion. The law must rule — if it did not reach the case, stretch it a little and devise a new writ. So the clerics became responsible for the writ of *quo warranto*. The remedies sprang full-armed from the courts, fathered by the inventive genius of the old English bar.

So to some shrewd counselor of the earlier days must be attributed the idea of formally granting special privileges to favored mortals as a means of revenue to the crown or as a reward for services rendered. These grants grew until they became in most cases monopolies, and were in fact styled "monopolies" or "purveyances." The scheme was a ready and easy makeshift, to enable the sovereign to obtain coin when needed.

The practice reached its climax while Elizabeth was in power. A list of her grants includes patents giving the sole rights to sell or manufacture currants, salt, iron, powder, cards, calf-skins, fells, pouldavies, ox-shin bones, train-oil, lists of cloth, potashes, aniseseed, vinegar, sea-coals, steel, aqua-vitæ, brushes, pots, saltpeter, bottles, lead, accidences, oil, calamine-stone, oil-of-blubber, glasses, paper, starch, tin, sulphur, new drapery, dried pilchards, beer, horn, leather, Irish yarn, importation of Spanish wool, and transportation of iron ordinance.[1]

These monopolists were less merciful than their successors of to-day, as it is noted that they raised the price of salt from sixteen pence a bushel to fourteen or fifteen shillings.[2]

The Virgin Queen also distinguished herself by chartering the East India Company, then called the "Governor and Company of London trading to the East Indies," which was a fine pattern of monopoly.[3] This was in the last year of the sixteenth century and

[1] To golf enthusiasts this may be of interest.

On June 26th, 1626, William and Thomas Dickson, makers of "gowffe" balls in Leith, complained to the Privy Council that James Melville, quartermaster of Lord Morton's regiment, pretends that he had a gift from James VI for excluding a certain import on golf balls and for exacting "an import off every gowffe ball made within this kingdom," which their lordships had never ratified — on Feb. 20th, Melville sent "lawless soldiours" who took from Dickson's house a great number of "gowffe balls," which they had made for his majesty's use.

Dicksons were fined five pounds, and one hundred pounds, — "caution," —

See "Sphere," February 22, 1902. "Privy Council of Scotland."

[2] Hume's History of England, Vol. IV, p. 209; some of the things named are strange to us: pouldavies, a coarse canvas; calamine-stone, a kind of zinc-silicate; pilchards, a small herring-like fish.

[3] For a graphic introduction to the possibilities of this company see Macaulay's History of England, Vol. IV, p. 104, *et seq.* Sir Josiah Child's career is a curious parallel of many a self-made man's rise in our contemporary "Trusts." The charter for the company was granted in 1599, and its rights were practically unchallenged for nearly a century. It is noteworthy, too, that under Elizabeth were ratified letters patent granted by Henry VIII in 1534 to the University of Cambridge licensing it to appoint three printers to print and sell all books approved by the Chancellor and three Doctors. This was a monopoly limited geographically, but is interesting as a forerunner of the famous "Stationers' Company," which so long held all writers in its strong grasp. See Birrell's Law and History of Copyright, p. 56.

before the nation had expressed any formally pronounced disapproval of the grants.

But the fruit which was sweet to the favored few was bitter to the taste of the many. In 1597 unsuccessful protests had been made in Parliament, and in 1601 a list of monopolies was made out and it was proposed to abolish them by law. Sharp discussion followed: Francis Bacon took the side of the royal prerogative, and Sergeant Heyle asserted that the queen could take what she pleased from the subject of her regal right.[1] The discontent of the people nerved the Parliamentary opponents of the grants, however, and they stood firm.

As Macaulay says (Vol. I, p. 49, of his History of England):

> It was in 1601 that the opposition which had, during forty years, been silently gathering and husbanding strength, fought its first great battle and won its first victory. The ground was well chosen. The English sovereigns had always been intrusted with the supreme direction of commercial police. It was their undoubted prerogative to regulate coin, weights and measures, and to appoint fairs, markets and ports. The line which bounded their authority over trade had, as usual, been but loosely drawn. They therefore, as usual, encroached on the province which rightfully belonged to the legislature. The encroachment was, as usual, patiently borne, till it became serious. But at length the queen took upon herself to grant patents of monopoly by scores. Iron, oil, vinegar, coal, etc., etc., could be bought only at exorbitant prices. The House of Commons met in an angry and determined mood. There seemed for a moment some danger that the long and glorious reign of Elizabeth would have a shameful and disastrous end. She, however, with admirable judgment and temper, declined the contest, put herself at the head of the reforms, redressed the grievance, thanked the Commons, etc., etc.

This was a popular triumph but was comparatively barren of results. A great number of the hated gifts of the crown still remained in force. It seemed to many that they had been tricked and the spirit of discontent was not downed.[2] Encouraged by the strength shown in Parliament a case was pressed to test the legality of the grants. That was the famous Case of the Monopolies, reported in XI Coke, page 85, under the title of Darcy *vs.* Allein, and decided in 1602, 44th Elizabeth. The plaintiff was a groom of the queen's privy chamber; the defendant a haberdasher in London. The action was

[1] See Skottowe's Short History of the English Parliament, p. 54.

[2] Campbell, Puritan in Holland, England and America, Vol. II, p. 175. Green says that all obnoxious grants were canceled, — "she (the queen) acted with her usual ability, declared her previous ignorance of the existence of the evil, thanked the House for its interference, and quashed at a single blow every monopoly that she had granted." Short History of the English People, Vol. II, p. 813. Either this statement is wrong or else some of the grants were speedily renewed. Green (Vol. III, p. 1072) says they were revived under Charles I, but it would seem that some of them not only had been spared by Elizabeth but had actually struggled through the Act of Parliament passed under James I to officially extinguish them.

on the case for damages and was based on a patent given the plaintiff by Queen Elizabeth. From the brief synopsis given by Coke, it seems that this patent had been preceded by another to one Bowes, giving the same powers, in practically the same terms and privileges: in the recital of Bowes' patent, no mention is made of any money returned to the crown, but in Darcy's an annual payment of one hundred marks is required, and Darcy's is for twenty-one years while Bowes' was for twelve, but in the main they are identical.

Under this patent the patentee was exclusively empowered to import or manufacture playing cards and to sell them in the realm. No one else should assume these rights "upon pain of the Queen's highest displeasure, and of such fine and punishment as offenders in the case of voluntary contempt deserve." A good reason for the "displeasure" is set forth in the artful preamble of the declaration. Coke, who had been made Attorney-General over so strong a candidate as Bacon some years before, appeared for the plaintiff, and it seems as though his skillful hand had probably framed the pleading. It recites that the Queen "intending that her subjects being able men to exercise husbandry, should apply themselves thereunto, and that they should not employ themselves in making playing cards, which had not been an ancient manual occupation within this realm, and that by making such a multitude of cards, card-playing was becoming more frequent, and especially among servants and apprentices, and poor artificers; and to the end her subjects might employ themselves to more lawful and necessary trades, by her letters patent" granted, etc.

It was thus introduced to the court not as a monopoly meant to make money from those of moderate means seeking some pleasure in an age of few pastimes, but as a healthful police-measure, protecting the general morals. Under the patent the price of the cards was so high [1] that they would be beyond the reach of any except the very wealthy whose morals were either beyond reproach or past repair, so that cards could do no hurt in either case.

The defendant pleaded "not guilty" except as to one-half gross — as to that half gross he claimed that he belonged to the society or guild of Haberdashers of the "ancient city" of London, and as a citizen and member of that society, ancient and time-honored usage guaranteed him the right to buy and sell freely any merchandise.

We may assume that the proof sustained the pleadings. The points against the grant, Coke sets out in such detail that it arouses some suspicion that he liked that side the better. Among the counsel in the case we find Coke, Attorney-General, upholding the grant, and

[1] 400 gross (or 57,600 cards) cost 5000 pounds, or more than a shilling each. This grant covered all kinds of cards. Some were very elaborate. Prince Eugene had a pack made of ivory which he is said to have carried through his campaigns, — and an interesting set is now in the Bodleian Library at Oxford, giving scenes from the life of Dr. Sacheverel, whose sensational career is described in McCarthy's Queen Anne.

against it Altham, afterward Baron of the Exchequer, and Tanfield, afterward Lord Chief Baron of the Exchequer. The arguments are in part set forth in the reports as follows:

It was claimed the grant "of sole making of playing cards" was good for three reasons.

1. Because the said playing cards were not any Merchandise or Thing concerning Trade of any necessary Use, but Things of Vanity and the Occasion of loss of Time, and Decrease of the Substance of many, the Loss of the Service and Work of Servants, Causes of Want, which is the Mother of Wo and Destruction, and therefore it belongs to the Queen to take away the great Abuse, and to take Order for the moderate and convenient Use of them.

2. In Matters of Recreation and Pleasure the Queen has a Prerogative given her by the Law to take such Order for such Moderate Use of them as seems good to her.

3. The Queen, in regard of the great abuse of them, and of the Cheat put upon her Subjects by Reason of them, might utterly suppress them and by Consequence without Injury done to any one, might moderate and tolerate them at her Pleasure. And the reason of the Law which gives the King these Prerogatives in Matters of Recreation and Pleasure was, because the greatest Part of Mankind are inclinable to exceed in them.

As to the first it was argued to the contrary by the Defendant's Counsel that this grant was void for two reasons. 1. That it is a monopoly and against the Common Law. 2. That it is against divers acts of Parliament.

It is against Common Law for four reasons.

1. "All Trades, as well Mechanical as others, which prevent Idleness (the Bane of the Commonwealth) and exercise Men and Youth in Labour, for the Maintenance of themselves and their Families and for the Increase of their Substance to serve the Queen when Occasion shall require as profitable for the Commonwealth," therefore the grant to the plaintiff to have the sole making is against the common law and the benefit and liberty of the subject.

Counsel cites "a case adjudged in this court" *inter* Davenant & Hurdis (41 Eliz.), — which case was "That the Company of Merchant Taylors in London, having power by charter to make Ordinances for the better Rule and Government of the Company, — made an Ordinance that every Brother of the same Society, who should put any Cloth to be dressed by any clothesworker, not being a Brother of the same Society, should put one-half his cloths to some Brother of the same Society, who exercised the Art of clothesworker, upon Pain of forfeiting ten shillings," and it was adjudged that that ordinance, though made under the charter, was against the Common Law because against the liberty of the subject, as every man has the right to put his cloth to be dressed by whatever clothesmaker he pleases, and can't be restrained to certain persons, as that in effect would be a monopoly.

2. "The sole Trade of any Mechanical Artifice or any other Monopoly, is not only a Damage and Prejudice to those who exercise the same Trade,

but also to all other Subjects," — because it is natural that three bad things will happen, to-wit, (*a*) the price will be raised, (*b*) the commodity will not be so good, (*c*) it will tend to the impoverishment of others formerly in the same trade, but now prevented from exercising it.

3. The Queen was deceived in her grant for, as appears from the preamble, it was intended for the Weal Publick, and will be employed only for Private Gain.

4. It is a dangerous innovation, "as well without any President or Example as without authority of Law or Reason." It is for twelve years to plaintiff so that his executors, wife or children, or others inexpert in the art will have this monopoly, and it can't be intended that Edward Darcy, "a groom of the Queen's Privy Chamber, has any skill in this Mechanical Trade of making of Cards."

While playing cards is a vanity, if it is abused, still the making of them is neither a vanity nor a pleasure, but labor and pains.

It was resolved that the Queen could not suppress the making of cards within the realm any more than the making of Dice, Bowls, Balls, etc., which are works of labor and art, although they serve for pleasure, recreation and pastime and can't be suppressed except by Parliament, nor a man restrain from any trade except by Parliament.

This opinion was handed down in 1602, when Shakespeare was superintending the first production of the Merry Wives of Windsor and incidentally buying a farm near Stratford to serve as a country place and a pastime. It would be interesting to know whether or not he regarded the result of the case as a threatening victory for the guilds,[1] the trades unions of his time.

A short time afterward Elizabeth died, and in 1604 James came into power, possessed of the belief in the absolute divinity of Kings.[2] At first he was not bothered in this belief, but in 1608 friction between him and the Commons resulted in the suppression by Parliament of a book (by Cowell) which declared "the King is above the law by his absolute power," and in 1610 he made a proclamation about "Monopolies." His lavishness drove him to extremes, however, and he again granted monopolies. The judges, with the single exception of Coke (characterized by Green, III, 997, as "a narrow-minded and bitter man, but of the highest eminence as a lawyer") were terrorized

[1] Guilds.

For an interesting enumeration and description of these forerunners of trades unions see the life of Sir Richard Whittington by Besant and Rice (Putnam's Ed. 1881, p. 70), which shows that they existed even before the Norman Conquest, and were very powerful as early as the fourteenth century. In the reign of Edward III we find the first threat of "department stores" in the plan of the Company of Grossers, a fraternity of wholesale merchants who proposed to sell everything themselves instead of through retail dealers. This was stopped by a command of the King, that each should confine himself to one craft, or "mystery." In the year 1355 the following companies are listed:

Brasiers, Sporiers, Tanners, Butchers, Grossers, Poulterers, Curriers, Bowyers, Ironmongers, Chandlers, Pewterers, Tailors, Wax-Chandlers, Pouchmakers, Skinners, Leather-Dressers, Salters, Cutlers, Fishmongers, Mercers, Girdlers, Cappers, Brewers, Vintners, Prossers in the Ropery, Glovers, Armourers, Goldsmiths, Drapers.

[2] Green, Short History of the English People, Vol. III, p. 976.

by the crown, and no attempt was made to invoke the law to abridge the crown. Coke, who is here found on the side of the question next his heart, was dismissed from office because he failed to yield to the King's pleasure, and became a leader of the opposition. Green says "The most crying constitutional grievance arose from the revival of monopolies, in spite of the pledge of Elizabeth to suppress them." [1]

In 1610 the business which chiefly occupied the commons during their session was the abolition of wardships and purveyance — prerogatives which had been, more or less, touched on every session during the whole reign of James.[2] This time the Commons offered the King a settled revenue for the powers he was to forego. He wanted 200,000 pounds a year, which they agreed to confer upon him. They didn't raise the funds, however — why is unknown, as the journals of this session are lost.

To quote again from Macaulay: [3]

> The discontents which Elizabethan wisdom had appeased were revived by the dishonest and pusillanimous policy which her successor called Kingcraft. He readily granted oppressive patents of monopoly. When he needed the help of his Parliament he as readily annulled them. At length the excellent House of Commons which met in 1623 determined to apply a strong remedy to the evil. The King was forced to give assent to a law which declared monopolies established by royal authority to be null and void. Some exceptions were made and unfortunately were not clearly defined. It was especially provided that every Society of Merchants which had been instituted for the purpose of carrying on trade should retain all its legal privileges. The question whether a monopoly granted to such a company were or were not a legal privilege was left unsettled and continued to exercise the ingenuity of lawyers.[4]

While the Parliaments were enacting statutes the courts do not seem to have questioned the doctrine of Dâcy *vs.* Allein for some time after. The abuse attacked in that case raised its head again,[5]

[1] III Short History, 1008.

[2] III Hume, p. 269.

[3] History of England, Vol. IV, p. 103.

[4] Of these companies the most important was that incorporated on the last day of the sixteenth century under title of "Company of Merchants of London trading to the East Indies."

In 1681 five persons had a sixth and fourteen persons a third of the votes in that company. Stock was up to 500 pounds. One man, Sir Josiah Child, had 20,000 pounds per annum, an amount with a huge purchasing power as compared with like figures to-day. Child became a great favorite at court, was "governor" of the company and gave presents of 10,000 pounds each to Charles II and James. He was a judicious administrator, and had his connections with the court well established, but the revolution spoiled his plans. The Commons censured some of his acts in 1690 (2 W. & M.) and referred future relations to a committee.

[5] On July 20th, 1620, the King gave a patent to Sir Thomas Roe and partners for the sole sealing, importing, engrossing and sale of tobacco. This was complained against by the Virginia Company. Also the King attempted to give a monopoly of Virginia coast fishing to Sir F. Joyes, but was prevented by the Privy Council, after a hearing. See Brown, The First Republic in America, p. 386, *et seq.*

as Macaulay notes, and grew so bold that in 1723 a law was passed (found in Cap. III, 21 Jac.). This law was probably framed by Coke, who was then out of favor with the crown and had become one of the leaders of the Commons. One can't help wondering whether he would then have repeated the inscription on the fly-leaf of his reports published in the thirteenth year of James, whom he styles "the Fountain of all Piety and Justice and the Life of the Law." Of this act the preamble is so firm in tone, although moderate in expression, that it deserves a moment. It reads thus: "Forasmuch as your most excellent Majesty, in your royal judgment, and of your blessed disposition to the weal and quiet of your subjects, did in the year of our Lord God 1610 publish in print to the whole realm, and to all posterity, That all grants and monopolies . . . are contrary to your Majesty's laws, which your Majesty's declaration is truly consonant and agreeable to the ancient and fundamental laws of this your realm: And whereas your Majesty was graciously pleased expressly to command that no suitor should presume to move your Majesty for matters of that nature; yet nevertheless upon misinformations, and untrue pretences of publick good many such grants have been unduly obtained, and unlawfully put in execution, to the great grievance and inconvenience of your Majesty's subjects contrary to the laws of this your realm, and contrary to your Majesty's most royal and blessed intention so published as aforesaid." For avoiding whereof "be it enacted that all monopolies are altogether contrary to the laws of this realm and are and shall be void and of no effect."

This act further provides that all such monopolies shall be tried and determined according to the common laws of the realm, and not otherwise, and gives treble damages to any party aggrieved. Of course patents for new inventions are saved from the operation of the act.

For some time after the enactment of this statute of James in 1623 the times were so troublous that little attention was paid to the validity or frailty of monopolistic grants by the courts. Charles I, Cromwell and the Commonwealth, and Charles II kept the public mind agitated on the questions of succession and with civil war. There were at least two cases brought involving the validity of charters to merchant companies, but neither seems to have been decided in definite form.

One of these was an action of trespass and was brought in King's Bench (in the case of Horne *vs.* Ivy, 21 Car. II, 1669) [1] for taking away a ship. The defendant justified under the "Canary Company" patent, providing that none but such and such trade thither and claiming he acted under authority from the patentees, and seized the

[1] 1 Modern, p. 18.

ship as it was unlawfully trading.[1] Serjeant Pollexfen, for the plaintiff in trespass, argued that the patent was void because it undertook to give forfeiture of goods and imprisonment, which cannot be by patent. The court said it desired to be satisfied whether this was a monopoly or not, and ordered it to be argued — no note of the decision or the argument is made in the report.

In the case of the Company of Merchants Adventurers *vs.* Rebow,[2] the question is raised as to the validity of the patent given by Elizabeth to the plaintiff organization. The defendant is accused, in an action on the case, of trading in prohibited places, — that is, prohibited to all except the select company. Mr. Pollexfen contended that the patent was clearly void, — "all engrossing and monopolizing are void for the common law, the one is a species of the other." He makes the rather humorous statement that the East India case (which apparently had been argued in the lower courts) is not like this because that grant prohibited trading with infidels while this (at bar) restrains trading with Christians in Holland, Zealand, etc., etc. The reporter does not chronicle the decision.

With William and Mary came national quiet, and again we find a disposition to deal firmly with the monopoly question.

This time it comes up in new guise. Under a statute, an action on the case was brought in admiralty,[3] one Sands *vs.* Sir Josiah Child, Franklin and Leach, to recover damages because the plaintiff was not permitted to go from the Port of London on December 13, with the ship called "The Commerce of London," being in his possession, "loaden with merchandizes partly his own, partly of divers other merchants" to trade for them, he to have a fifth part of the profits. On that 13th day of December, 1683, the defendants prosecuted a suit in the Admiralty for the stay of the ship, until security should be given that it should not go to "trade with infidels" within the limits of the charter of the East India Company; by this suit the ship was detained sixteen months, so that plaintiff lost the profits of his voyage. For this loss plaintiff sues here. The plea was not guilty (it was a *qui tam* action); on the trial one of the defendants (Franklin) was found not guilty, but as to Sir Josiah Child and Leach a special verdict was returned to the effect that they acted under the charter of the East India Company which gave this company the sole right to trade with infidels in the East Indies, under penalty of the forfeiture of ship and goods, — that the plaintiff and others had fitted out the ship for the purpose of so trading, — that Child, governor of the company, and Leach, its solicitors, petitioned the King in council for a

[1] The Dutch found the monopolies granted the West India Company were stifling their colonies, so in 1638 all the most important ones in New Netherlands were abolished. See Fiske, Dutch and Quaker Colonies, Vol. I, p. 170.

[2] 3 Jac. II, 1687; 3 Modern, 131.

[3] 3 Levinz, 352.

stay of the ship and an order in admiralty issued for such a stay, and admiralty process followed in course, staying the vessel and losing the voyage. The verdict further found "if guilty, damages for the plaintiff *in duplo* 1500 pounds and costs." Judgment was rendered for the plaintiff — defendants bring error. It was argued among other things, that this was no monopoly but only a "prohibition to traffick with Infidels, which the King may well do, they being perpetual enemies." To this it was replied that the King has power to grant embargoes in time of danger, but this was not such a case, but only an attempt to prevent trade within the limits of the East India Company grant. Further, "royalty should not interfere because there was a remedy in the courts — further as to prohibiting traffic with infidels if no commerce should be held with them they will never be converted, and it is a disparagement to the Christian Religion to think they should rather be converted by infidels than that infidels should be converted by them, which argument is only a pretence anyway, for the restraint is only as to infidels within the limits of the East India Company." The reporter adds that there was not much doubt upon any of the matters moved except whether this was properly brought in admiralty. Lord Holt first queried as to the jurisdiction, but afterwards concluded the action was properly brought. We may note that the change of administration militated against Childs and his company and undoubtedly affected the decision. This ship was stopped under Charles II — the action or damages for the stopping was decided in the fifth year of William and Mary.

The next case of any particular import on the question of monopolies was heard in 1712,[1] where a point of law was submitted to the King's Bench by the court of chancery, — "Whether the grant of the crown, to the company of Stationers to have the sole printing of 'almanacks,' provided they were licensed by the Archbishop of Canterbury and the Bishop of London, were a good grant; or void, because against the liberty of the subjects."[2] Against the patent it was argued that printing was a handicraft trade and no more to be restrained than other trades.

For the patent it was argued that the crown had a peculiar interest in a book of common prayer and consequently in the calendar, which is part of it. Further that printing was an art introduced by the crown, and therefore subject to a special property. Also printing is always an exception and subject to kingly regulation because of the inconvenience to the public through any mismanagement of the printing press. The Court reserved its decision.

[1] 10 Modern, 105.

[2] See Birrell, Law and History of Copyright, p. 55: The "King's Books," the printing of which he controlled, included (*a*) Acts of Parliament and their abridgments; (*b*) All books of rites and services of the resettled Church of England; (*c*) Bibles and Testaments; (*d*) Law Books and Year Books; (*e*) Almanacks; (*f*) Ed. works, Latin grammars. The first appointment of King's printer was in 1547, by Edward VI.

II

From the foregoing we have noted some of the general causes leading up to the case of the monopolies, and the ebb and flow thereafter of public and judicial opinion relating to men's attempts in England to get the sole control of one or another product or trade. This case stands as the first strong and fearless statement by the courts of the law as men had long felt it ought to be. Parliament had enacted statutes before the controversy of Allein and Darcy, but the enactments had been dead letters. Not until the court gave its opinion in this case did the people feel that laws of restriction might be effective.

To this decision, then, we may rightly look as the cause of James' unwilling law against monopolies, a great step forward in popular rights, — to it must be attributed, too, the abrogation of the charters of the East India Company and the Canary Company, and the modification of the law as to engrossing, forestalling, and 'corners' generally.[1]

We come to the beginning of the nineteenth century, therefore, with the rule pretty well fixed that monopolies are unlawful, and that *corners* are reprehensible but not necessarily illegal.

The statutes against the latter have been repealed by the law passed in 1772 (12 George III, Cap. 7), but the set of the courts is against extremes.[2]

The first year of the new century (A.D. 1800) brings an interesting development of the underlying idea in the case of King *vs.* Waddington.[3] This was a criminal action on an information charging the defendant with two offenses, — 1st, buying up large quantities of hops with the intention of reselling them at unreasonable profit, — 2d, spreading rumors of the scarcity of hops with the purpose of causing others owning hops to withhold them from the market and of enhancing the price by such tactics.

One of the defenses urged was that no offense had been committed because hops are not 'a victual,' hence not subject to engrossing — the reply was that this had been settled by 9 Anne, c. 12, s. 24, which made hops a necessary ingredient of beer, and therefore a victual.

[1] Engrossing: Purchasing large quantities of a commodity in order to command the market and sell at high prices.

Forestalling: Buying victuals on their way to market (before they reach it) so as to sell again at higher prices.

Regrating: Enhancing, or seeking to enhance, price of victuals by any means.

[2] So far as one may judge from reading the statutes, it seems that the fear of monopoly of one kind or another was often present. In 1552 we have the act against engrossers (5th and 6th, Edward VI): in 1623 the law against monopolies as finally forced upon James I; in 1778 (28 George III, Cap. 53, Sec. 2), a statute providing that a combination of five or more for the purpose of purchasing and selling coals shall be unlawful and punishable by indictment. But in 1772 (12 George III, Cap. 70) it was found that some of the dreaded monsters were not formidable, and the statute law was modified by an attempted repeal of the 5th and 6th Edward VI.

[3] 1 East, 143.

Lord Kenyon in a long and interesting opinion holds that the defendant had committed an offense at common law, — the repeal of the statutes not having affected the common law as bearing on this subject, — and the defendant was sentenced to pay a fine of 500 pounds and be imprisoned one month. On an indictment he was also adjudged guilty and mulcted another 500 pounds, and sentenced to three months additional. This is not a bad precedent for us to follow in dealing with the authors of some roorbacks to-day.

With the improved method of communication, however (due to steam and to the growth of population), it soon became apparent that larger combinations of effort would be necessary. Larger undertakings came — among them the first gas company, organized in London 1810 — and no one man could provide financial means; it was also plain that some of the narrowing results of the older laws and decisions were obsolete. Hence we soon find a modification, by the courts, of the harsher rules.

In 1825, Chief Justice Best held, in Homer *vs.* Ashford,[1] that an agreement was good that prevented an employer from embarking for himself and soliciting patronage in certain districts, although it would have been bad if applied to the whole kingdom.

In 1844, came the act of Victoria doing away with all offenses of forestalling, engrossing and regrating.

In 1889, the climax was capped by the decision in the case of Mogul Steamship Company *vs.* McGregor *et al.*[2] This was an action for damages because of a conspiracy to prevent plaintiffs from carrying on trade between London and China. Plaintiffs were shipowners and defendants were a body of other shipowners who had associated themselves for the purpose of keeping up freight rates in the tea trade between China and Europe, and securing that trade to themselves by allowing a rebate of five per cent on all freights paid by shippers who shipped tea in the association vessels. To get this rebate shippers were required to sign a declaration that they have not made nor been interested in shipments by others than lines associated. Defendants sent a circular to merchants in the China trade saying that shipments by certain specified steamers owned by the plaintiffs, and other non-associated boats would bar the shippers from association rebates for six months.

It further seems that the defendants agreed to send steamers to underbid any independents who made stray trips to get cargoes, with the immediate object of driving these independent and non-associated competitors out of business. Plaintiffs did send to Hankow to contract for business, and defendants ran the freights down to twenty-five pounds whereas the normal rate was fifty pounds or more. Plaintiffs sued for the consequent damage. In the lower court Lord Coleridge found

[1] 3 Bingham 327. [2] 23 Q. B. D. 598.

for the defendants.[1] The citation here is the appealed case. Lord Esher (M. R.) thought the plaintiffs entitled to recover, but was overruled by Justices Bowen and Fry, who held for the defendants. The opinion of Justice Bowen is often quoted; he holds broadly that one man has a full right to compete with another in trade, — that what is right for one man to do cannot be wrong for an association of men, and that there is therefore no conspiracy here. This decision is against the whole spirit of the English law, as it encourages the concentration of power and sole control. In this country we can hardly follow it in its reasoning. It suggests a radical departure from the underlying doctrine of the case of the Monopolies, — but it seems that the court was misled and that the decision will hardly take a permanent place as an authority. The case of Nordenfelt *vs.* Maxim Nordenfelt Guns & Ammunition Co.,[2] is often cited as upholding the same rule, but it is not based on the same principle nor do others since go the full length of the Mogul Co. case.

III

The early days of the United States were too full of struggle to invite much litigation bearing on monopolies, or much discovered attempt to establish any.

It is true we find that some of the States in the earlier half of the last century adopted constitutions with clauses forbidding all monopolistic combinations, but it is only within the last twenty-five years that popular feeling on this continent has been gradually arousing. This is shown by the laws which have been enacted by the legislatures during that period and the constitutions more recently adopted. These statutory and constitutional provisions have been enacted independently and with reference to local conditions, and it may be interesting for a few moments to run over some of them.

The constitution of Arkansas (adopted in 1874) provides that, Article II, Section 2, "perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed."

In the case of Ex-parte Levy,[3] which arose under this provision, Judge Eakin in his opinion goes back to the time of Elizabeth for the root of the evil and says, "The monopolies which in England became so odious as to excite general opposition and infuse a detestation which has been transmitted to the free states of America, were in the nature of exclusive privileges of trade granted to favorites or purchasers from the crown, for the enrichment of individuals, at the cost

[1] Lord Coleridge found that the combination came within the limit of "reasonable and legitimate selfishness." His opinion is commended for its English. See Life of Lord Coleridge, Vol. II, p. 358.

[2] Decided 1894, App. Cases 535.

[3] 43 Ark. 42.

of the public. The memory and historical traditions of abuses resulting from this practice, have left the impression that they are dangerous to liberty, and it is this kind of monopoly against which the constitutional provision is directed."

In California the constitution (Article I, Section 21) provides: No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislature, nor shall any citizen, or class of citizens, be granted privileges, or immunities which, upon the same terms, shall not be granted to all citizens.

In Connecticut, which was one of the most progressive and hard-headed of our early states, there is no constitutional limitation but it was held (in the case of Norwich Gas Light Co. *vs.* Norwich City Gas Co.[1]) that "The statute of 21 James I, c. 3, which declares monopolies void, is merely declaratory of the common law." And further "A legislative grant of a monopoly would be void as being contrary to the theory of free government, therefore the legislature cannot grant to any private corporation the exclusive right to lay down gas pipes in the city." [2]

In Georgia there is this constitutional provision, Article IV, Section 2, Par. 4,

The general assembly of this state shall have no power to authorize any corporation to buy shares of stock in any other corporation in this state or elsewhere, or to make any contract or agreement whatever, with any such corporation which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts and agreements shall be illegal and void.

The Organic Act of Hawaii (adopted April 30, 1900, 2 Supp. R. S. 1141) says at Sect. 55:

The legislature shall not grant to any corporation, association or individual any special or exclusive privilege, immunity or franchise without the approval of Congress.

In Indiana a statute of 1901 (Sect. 3312 G. *et. seq.*) forbids any arrangement between persons or corporations to lessen, or tend to lessen competition in trade, or to tend to control the price of any article, making such arrangement void and forfeiting the charter of any corporation found guilty of being a party.

In Kansas the General Statutes of 1901, Sect. 2443, provide:

[1] 25 Conn. 38.

[2] It is instructive that Connecticut has found it expedient to temper this rule. Judge Pardee, in the case of the Citizens Co. *vs.* Bridgeport Co., 55 Conn. 16, states, "it is the duty of courts to preserve contracts inviolate rather than to destroy monopolies."
See also the opinion of Baldwin, J., in State *vs.* Orr, 68 Conn. 101.

Every person, servant, agent or employee, or any firm or corporation doing business within the State of Kansas that shall conspire or combine for the purpose of monopolizing any line of business, or for the purpose of preventing the produce of grain, seeds, live stock or hay from shipping or marketing the same without the agency of any third person, firm or corporation, shall be deemed guilty of a misdemeanor, and fined not less than $1000, and not to exceed $5000, for each offense.

Michigan boasts of a complete law passed in 1899 (Act 1255) and amended in 1905 by a supplementary act (Act 329, p. 507). The first act is entitled "An Act to prevent trusts, monopolies and combination of capital."

The later is "An Act relative to agreements, contracts and combinations in restraint of trade or commerce."

The earlier law while complete, is on conventional lines. The later act attempts to reach further, stating that promising not to engage in business is unlawful, and that all combinations made with the purpose of establishing a monopoly of any kind are declared to be against public policy and illegal and void.

Minnesota passed a law in 1893 to this effect: (Sect. 6955, of Second Minn. Stat.) "Any party to a pool, trust, agreement, combination or confederation to regulate price or output of any article, is guilty of a conspiracy, and subject to a fine of from $100 to $1000, and imprisonment from one to ten years.

In Montana, Sect. 321, Title VII, Cap. 8, Annotated Code, reads:

Any one combining or making a contract with the purpose of creating a monopoly in the manufacture, sale or transportation of any article, is punishable by imprisonment not exceeding five years, or fine not exceeding $1000.

Any corporation which is found guilty of this offense forfeits all of its property within the state, as well as its franchise.

New York in its Stock Corporation Law of 1892 (Revised Stat. p. 1008), provides:

Sect. 7. No stock corporation shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade, or for the prevention of competition in any necessary of life.

Again, by a statute entitled — "An Act to prevent monopolies in articles of general necessity," there is this restriction (Laws of 1893, Chapter 716), that "Every contract or combination in the form of a trust or otherwise . . . whereby competition in the State of New York in the supply or price of an article or commodity of common use for the support of life and health, may be restrained or prevented for the purpose of advancing prices, is hereby declared illegal."

In North Carolina, according to the revised code of 1905, there

seems to be simply this provision (Sect. 3739), "If any person in any way violates any of the provisions of the law against trusts and monopolies, he shall be guilty of a misdemeanor," and fined or imprisoned.

North Dakota (Chapter 53, Revised Code of 1905), possesses the most complete act that has come to the writer's notice covering this subject. The skeleton act was passed in 1890 but changed much in 1905. By it the Attorney-General is required of his own motion, to take proceedings whenever his attention is called to the violation of a law, and another provision makes it incumbent upon every corporation to file an affidavit each year showing it is not a member of a trust, pool or combination.

Ohio defines a trust (Chapter 19 *a*, Revised Stat. Act of 1898) as a "combination of capital, skill or acts by two or more . . . to carry out restraints in trade, or to limit or increase the production, or to prevent competition in manufacture and sale."

In Oklahoma (Sect. 6739, Annotated Statutes of 1903), by a law passed in 1890, trusts and combinations were put under the ban. We find an unusual element in the act, which includes a combination to fix the rate of interest as a monopolistic offense.

South Carolina (by Sect. 212 of the Criminal Code of 1902) makes a combination of this character a conspiracy against trade, and fixes the punishment at a fine of from $100 to $5000, with imprisonment for not less than six months nor more than ten years.

Texas by its constitution (Article I, Section 6), decrees, "Perpetuities and monopolies are contrary to the genius of a free government and shall not be allowed."

The Virginia constitution of 1902 says (Section 165), "The General Assembly shall enact laws preventing all trusts, combinations and monopolies, inimical to the public welfare."

Wyoming by the constitution of 1889 followed the old track, saying (Article I, Section 30),—"Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."

Congress by its enactment of the anti-trust law on July 2, 1890, fell in line with the general sentiment. This law is entitled, "An Act to Protect Trade Against All Unlawful Restraints and Monopolies." [1]

This provides that every contract in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal, and that every person who shall monopolize, or attempt to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be guilty of a misdemeanor, punishable by a fine not exceeding $5000, or imprisonment not exceeding one year.

While examining this law we may note that it seems the irony of fate that the next chapter in the statute book legalizes the incorporation

[1] See 3 U.S. Compiled Stat. 1901, p. 3200.

of national trades unions, which some believe to be the extremest form of trusts.

From the foregoing laws, whether in the shape of constitutions or statutes, we may conclude that a wave of popular feeling in this country is rapidly reaching the height which in England in 1602 resulted in the decision of the Case of the Monopolies. Sometimes our court decisions have followed the popular will as shown in the laws; sometimes they have helped to form public opinion, which resulted in the later enactment of statutes. It would be far beyond the scope of this paper to mention all the cases incidental to the subject. It is amusing, however, and instructive to examine some of the attacks which have been made under these anti-trust laws, and to note that the chain of authorities almost invariably leads back to the notable case of Darcy *vs.* Allein. Among them we may mention these:

People of the State of New York *vs.* North River Sugar Refining Co.,[1] where it was sought to forfeit the charter of this sugar company because it had deeded its property to the trust. The court said the transfer was void because a manufacturing concern cannot enter into any arrangement which will avoid and disregard statutory permissions and restraints. By attempting so to do, the corporation violated its charter and failed in the performance of its corporate duty and must be dissolved. It is noticeable that this opinion was rendered before the enactment of the anti-trust law in New York, and on the general ground that an attempt of this character was ultra vires.

In State of Indiana *vs.* Haworth,[2] an attempt was made to invalidate an act which provided that certain officers should procure and furnish such school books as were determined upon for the public schools. It was claimed that this resulted in a monopoly throughout the state for certain school book concerns. The court decided that the statute cannot be construed as creating a monopoly requiring that a certain class of books should be used to the exclusion of others, as there was a provision throwing open to all the competition for supplying books to the state.

Probably the most famous of all the recent monopoly cases is that of The State of Ohio *vs.* Standard Oil Co.,[3] decided in 1892. This was in the nature of an application for quo warranto to oust the defendant from its franchises as a corporation because of wrongful combination. Judgment was given ousting defendant from the right to make a certain agreement and the power to perform it. The agreement in question was the far-famed trust agreement which is set out at length in a statement by Judge Minchall, who decided (p. 159),

[1] 121 N.Y. 582; 9 L. R. A. 33.
[2] 122 Ind. 462; 7 L. R. A. 240.
[3] 49 Ohio St. 137; 15 L. R. A. 145.

"By this agreement — indirectly it is true but none the less effectually — the defendant is controlled and managed by the Standard Oil Trust, an association with its principal place of business in New York City, and organized for a purpose contrary to the policy of our laws. Its object was to establish a virtual monopoly of the business of producing petroleum, by which it might not merely control the production, but the price at its pleasure."

The Kansas Supreme Court has had the question up in different shape in the case of Kansas *vs.* Phipps,[1] where the court held that foreign insurance companies doing business in that state that combine to control and increase the rates of insurance violate the anti-trust law of Kansas.

In Missouri the case of State *ex rel.* Wyatt *vs.* Ashbrook,[2] was an attack upon a department store under what was known as the anti-department store law of that state. The court said there was no such evil as would warrant an exercise of a police power by the state in the passage of the act in question; that it was not a monopoly but should be encouraged.

In Illinois in 1900 in the case of the Inter-Ocean Publishing Co. *vs.* Associated Press,[3] the Supreme Court of Illinois held that a by-law of the Associated Press which sought to exclude from publication by any of its members, news procured from any other source than itself, was void as tending to create a monopoly in its own favor and to prevent its members from procuring news from others engaged in the same character of work.

In the case of Whitwell *vs.* Continental Tobacco Co.,[4] an attempt was made by the plaintiff to recover treble damages under the federal anti-trust act, on the ground that the defendants refused to sell the manufactured products of the Tobacco Company to him at prices which would enable him to resell them to others at a profit, unless he refrained from handling chewing tobacco made by independent manufacturers. Judge Sanborn wrote the prevailing opinion of the United States Circuit Court, and held that the restriction of trade by the defendants to those purchasers who declined to deal in goods of their competitors, was not a violation of the anti-trust law, and further that the owner of goods may at all times dictate the prices at which he will sell them. The refusal to sell at a price which would enable the purchaser to resell at a profit, constitutes no legal injury and is not actionable. One ground upon which he bases his reasoning is that the tobacco company was not dealing in articles of prime necessity like corn or coal, nor was it rendering a public service.[5]

[1] 50 Kan. 609; 18 L. R. A. 657.
[2] Decided in 1900, 154 Mo. 375; 48 L. R. A. 265. [3] 184 Ill. 438.
[4] 125 Fed. Rep. 454, which is reported with very full notes in 64 L. R. A. 689.
[5] Compare this with the case of King *vs.* Waddington, 1 East 143. There beer was held to be a "victual" or necessity: here tobacco is a luxury.

The case of Strauss *vs.* American Publishers' Ass'n,[1] decided in February, 1904, was an attempt to set aside an agreement between publishers of and dealers in books, whereby they contracted not to sell books of any kind to dealers who shall be suspected of selling copyrighted books at less than the net price fixed by the publishers. The court held that this contract was a violation of the New York statute against monopolies.

One of the most instructive cases is that of the City of Atlanta *vs.* Chattanooga Foundry & Pipe Works,[2] decided in 1903 by the United State Circuit Court of Appeals, — Judges Lurton, Severens, and Richards.[3] This was brought under the federal anti-trust law against two companies of the State of Tennessee which made cast-iron pipe and fittings. The declaration averred that the two defendants entered into an unlawful combination with certain other corporations in the same line for the purpose of restricting bidding, so that an Anniston company, which received the contract for furnishing the pipe, got $15,000 more than would have been paid but for the agreement, and this unjust profit was divided among the parties to the pool, including the two defendants. Judge Lurton wrote the opinion, holding that the action would lie under the anti-trust law.

Of Michigan cases probably the most widely known is that of Richardson *vs.* Buhl.[4] This was a chancery suit to enjoin defendants from selling stock in a manufacturing corporation which was held by them as security. The stock was that of the Diamond Match Company, and the question of its legal integrity was the crucial question in the case. The members of the court wrote individual opinions holding the Diamond Match Company an illegal combination. Judge Champlin said (p. 660), "Such a vast combination as has been entered into is a menace to the public. Its object and direct tendency is to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that this monopoly has in fact reduced the price of matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree."

Another Michigan case is that of Lovejoy *vs.* Michels.[5] The defendant ordered two sets of knives from a concern which was a member of the knife makers' association, one of the principal objects of which was to keep up prices. No price was agreed upon at the time of the order, and the bills were received after the knives were used. The court held that the price fixed by the combination of manufac-

[1] 177 N.Y. 473. [2] 127 Fed. Rep. 23.
[3] This has been affirmed recently in the Supreme Court, Mr. Justice Holmes writing the opinion. (December 3d, 1906.)
[4] 77 Mich. 632. [5] 88 Mich. 15.

turers was not the one which should control, Such combinations have been vicious and against public policy, and in them "the odious features of illegal monopolies are plainly apparent."

Another Michigan case on the same line is that of the Detroit Salt Co. *vs.* National Salt Co.,[1] decided in 1903. The opinion of Hooker, C. J., holds that no combinations in restraint of trade are lawful in Michigan to-day.

Hunt *vs.* Riverside Co-Operative Co. *et al.*[2] was decided in 1905; this was an attempt of plumbers to fix local prices, and in the opinion of Judge Carpenter it is announced that "the mere fact that the monopoly created is not a complete and perfect monopoly, is no defense." We find also the case of the White Star line *vs.* Star Line of Steamers,[3] decided in November, 1905, in which the complainant and the defendants, with three other steamboat lines, enter into a pool for the purpose of controlling water traffic between Detroit and near-by points. Judge McAlvay says that the purpose of the agreement "was to monopolize and control traffic" and is unlawful and invalid as against the provisions of the Sherman Act, known as the federal anti-trust law.

Taking these statutes and decisions together we may conclude that to-day the American test of the lawfulness or unlawfulness of the combinations of persons or forces (as being of a monopolistic character) is whether or not they tend to control prices. That a concern lowers prices is no defense or shield. As Mr. Pingry says in his work on "Extraordinary Industrial and Interstate Contracts" (Sect. 321), "It is enough to know that the natural tendency of such contracts is injurious."

It is somewhat difficult to reconcile some "trade-union" decisions with the rule of law governing combinations, but it seems fair to assume that the law will soon be shaped by American intelligence so that it will provide for the proper control of these bodies. Agreements or combinations which undertake the absolute control of the labor market should be as unlawful as any trust or monopolies: agreements which provide for a living wage should be legalized, both for labor and capital. The line of demarcation is hard to find, but we are nearing it with each swing of the pendulum.

IV

The last problem suggested in this connection is with relation to "holding companies." This new kind of questionable corporate character is prominent now because of the recent move of some of our monopolistic combinations in transferring the stock of their

[1] 134 Mich. 103.
[2] 140 Mich. 538, 12 D. L. N. 265.
[3] 141 Mich. 604, 12 D. L. N. 586.

subsidiary companies to English corporations. The question of the hour is how to meet this method.

Mr. Beale in his work on "Foreign Corporations" (Sect. 785), lists seven states which permit their corporations to acquire stock in corporations of other states. In most instances this power is limited so as to prevent the encouragement of monopoly, but the plan of transatlantic holding companies must be taken from the other end. We cannot control the power of the holding corporations. Can we attain our purpose by restricting the amount of stock in a domestic corporation which may be held by foreign capital? The District of Columbia has a statute (Compiled Stat. of 1894, p. 43, Sect. 2) providing that corporations having more than twenty per cent of stock owned by aliens are prohibited from holding real estate in the district. Shall it be our policy to adopt a similar method?

Judge Noyes in his book on "Intercorporate Relations" (Sect. 286, p. 416) says "the holding by foreign corporations of the stock of domestic companies for the purpose of destroying competition, is inimical to public policy and consequently void, but in such a case the unlawful purpose is the essential objection rather than the foreign domicile of the corporation." If a transatlantic company undertakes to do something not permitted by law for an American company, is not its purpose avowedly against the public policy of this country and are not its acts here void? Surely our courts have power to interfere, on a proper showing.

This last development seems likely to become a feature of international law. A leading French authority, Mons. A. Pillet, in his book on the "Principles of Private International Law,"[1] lays down the general rule that a stranger domiciled in France, or other foreign country, should have no greater rights than he has in his own country. If we may accept this as true, the stranger corporation formed under the laws of England for the purpose of controlling stock in American corporations, which could not be so controlled by an American corporation, is undertaking a business which is contrary to our laws and which can be restrained by our courts.

It has been the boast of the English press that trusts were unknown in Great Britain; therefore we should look for little sympathy in our anti-trust agitation if it were not for a new development in British business circles. This is a trust or combination of the soap manufacturers against which the London *Spectator* has been wielding the cudgels in its most approved fashion. If this trust becomes popularly obnoxious, or if others are formed, we may find it possible to make an arrangement with England, by treaty or otherwise, providing that no corporation organized in one country shall stand as a holding company for the shares of corporations organized in the other country.

[1] Pillet, A., Principes de Droit International Privé, Sect. 220, etc.

Is it not possible that this idea may soon spread? Why should it not be taken up at the next Hague conference, as it is a menace threatening the internal peace of any progressive industrial nation?

To summarize may we not say that some of the results of "The Case of the Monopolies" have been (*a*) the clear establishment of the idea that sole control of a product is against public policy and consequently against fundamental law, — (*b*) the giving a firm base and good outline for our States to start from in their law-making and their courts. One of its suggestions, too, that we need to-day is that the monopolistic idea is against the grain of English thought, and that therefore we should have little real trouble in framing an understanding with all English speaking lands as to an interchange of corporate restriction.

THE STANDARD OIL DECISION: THE RULE OF REASON

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(From the *Michigan Law Review*, June, 1911)

After twenty-one years the Sherman Anti-Trust Act has been applied to the typical combination restraining interstate commerce, which that act was designed to prevent.

In the debate in the United States Senate, on the original bill introduced by Senator Sherman, he said:[1]

> Associated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination, commonly called trusts, that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman or a president. The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties comprising it. The law of selfishness, uncontrolled by competition, compels it to disregard the interests of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it

[1] See Congressional Record, Vol. 21, Mar. 21, 1890; Bills and Debates in Congress relating to trusts, 1888–1902, pp. 95–96. There are many other references to the Standard Oil Co. in the debates: Allison, p. 126; Teller, p. 170; Wilson, p. 337.

allows no competitors. Such a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry in all of the states of the Union, it tends to advance the price to the consumer of any article produced, it is a substantial monopoly injurious to the public, and, by the rule of both the common and the civil law, is null and void and the just subject of restraint by the courts, of forfeiture of corporate rights and privileges, and in some cases should be denounced as a crime, and the individuals engaged in it should be punished as criminals. It is this kind of a combination we have to deal with now.

Do I exaggerate the evil we have to deal with? I do not think so. I do not wish to single out any particular trust or combination. It is not a particular trust, but the system I aim at. I will only cite a very few instances of combinations that have been the subject of judicial or legislative inquiry, to show what has been and what can be done by them, as follows:

In Handy *vs.* C. & M. R. R. Co., 31 Fed. 689, 693. "The Standard Oil Co. and George Rice were competitors in the business of refining oil; the Standard desired to crush Rice and his business, and under threat of building a pipe line, compelled the receiver of the railroad to carry its oil at 10 cents per barrel and charge Rice 35 cents per barrel for a like service, and pay the Standard 25 cents out of the 35 cents thus exacted from Rice."

It also appears in an equity suit in Pennsylvania *vs.* Penn. R.R. (1897), by testimony of A. J. Cassatt, that the Standard Oil Company were receiving rebates of 49c. per bbl. on crude oil from Bradford Oil region to tide water, 51½c. from the lower oil region to tide water, and 64½c. from Cleveland to tide water, — or the annual illegal receipts by the Standard Oil Co. would have been $5,480,000. I do not wish to single out the Standard Oil Company. . . . I only refer to them because they are the oldest of these combinations founded upon contracts which have been copied by the other corporations.[1] Sir, now the people of the United States as well as of other countries are feeling the power and grasp of these conbinations, and are demanding of every legislature and of Congress a remedy for this evil, only grown into huge proportions in recent times. They had monopolies and mortmains of old, but never before such giants as in our day. You must heed their appeal or be ready for the Socialist, the Communist, and the Nihilist. Society is now disturbed by forces never felt before.[2]

The Supreme Court of the United States has now — after these 21 years — decided [3] that the Standard Oil Company of New Jersey, is an unlawful combination in restraint of interstate and foreign commerce, in violation of the Federal Sherman Anti-trust act of 1890. The court's decision to this effect is unanimous, affirming the unanimous decision of the Circuit Court.[4]

The court ruled: (1) That the Anti-trust act makes only con-

[1] See Congressional Record, Vol. 21, March 24, 1980; Bills & Debates, p. 167.
[2] Ibid. Bills & Debates, p. 101.
[3] United States *vs.* Standard Oil Co., U.S., (May 15, 1911).
[4] 173 Fed. 177; 152 Fed. 290.

tracts and combinations in unreasonable restraint of interstate and foreign trade and commerce illegal, and (2) that the Standard Oil Co. of New Jersey is such a combination. Chief Justice White writes the opinion, Mr. Justice Harlan vigorously dissenting on the first proposition. Whether all the other justices concur in the result only, or also upon the first proposition, is not definitely stated in the reports received; but that a majority of the court concurs on the first proposition is indicated by the words of the Chief Justice that if there are statements in former decisions inconsistent with this, "they are necessarily now limited and qualified."

The court had no difficulty in unanimously finding from the facts, that the Standard Oil Company of New Jersey was a combination in *unreasonable* restraint of interstate commerce. The Circuit Court also had no difficulty in so unanimously finding. Hence, there was no question before the court requiring it to decide that the Anti-trust act applied *only* to combinations in *unreasonable* restraint of interstate commerce, and it seems unusual for the court in a case where such a question is not involved to overrule two prior decisions where such a question was directly and necessarily involved and passed upon.

The facts are generally known and voluminous (23 volumes, 12,000 pages), yet a summary is proper to show how unnecessary it was for the court in this case to announce the first proposition. The following, gleaned from various sources, but more than confirmed by the record in the case, will make this clear:

Oil was "struck" by boring in 1858, in Northwestern Pennsylvania, near Titusville, about 25 miles from Corry, Union City, and Meadville, 125 miles from Cleveland, and 170 from Pittsburg by rail. The Pennsylvania road reached Corry and Union City, and from the latter connected with the Lake Shore, 25 miles away, at Erie; the Erie road ran through Corry, Union City and Meadville. In 1863 the Oil Creek railroad reached Titusville and Oil City from Corry, and the Erie road built to Franklin; in 1868 the Lake Shore completed a line to Oil City. By 1868 successful pipe lines, storage reservoirs, and transferable oil certificates were in use. The first refinery had been built in 1862, in which the processes yet in use were employed. In 1865 Mr. J. D. Rockefeller went into the refining business at Cleveland. In 1876 he took in his brother William and H. M. Flagler. In 1868 Mr. Rockefeller represented to General Devereux, Vice-President of the Lake Shore road, that building refineries at the oil regions would ruin the Cleveland refineries, and destroy the oil traffic of the road; a rebate of 15 cents per barrel from the 40 cent rate on the crude oil from the fields was made to Mr. Rockefeller, and he agreed to fight it out with the oil region refineries.[1] In 1870, the Standard Oil Co. of Ohio was formed by Mr. Rockefeller and his associates with

[1] Tarbell, Ida, *McClure's Magazine*, Nov. 1902, and following.

[illegible] The result was that of the [illegible] refineries [illegible] four or five sold out at from 45 to 50 per cent of their value.[7] The premature putting into effect of this contract, February 26, almost led to riots[8] in the oil regions, and the railroads were [illegible] to abrogate it, and there followed legislative investigations and the repeal of the charter, March 25, 1872. A new contract was made with "perfect equality to all shippers," which didn't last two weeks, and it soon became apparent that the railroads "were doing for the Standard secretly just what they had publicly contracted to do for the South Improvement Co."[9] The details are obscure in some places. The result, however, was perfectly apparent. The Standard first acquired control of the local pipe lines, by means of drawbacks of 22 cents per barrel allowed to the Standard lines — and the other local lines "died off like sheep."[10] In 1875, lower rates were

[1] [illegible] Com. R., [illegible]. [2] Ibid. 547, 626, 647.
[3] Ibid. [illegible], 703. [4] Ibid. 691. [5] Ibid. 690.
[6] [illegible] Ind. Com. R., [illegible].
[7] Ibid. [illegible]; 43 O. S., 581; Tarbell, Ida, *McClure's Magazine*, Nov. 1902, and following.
[8] [illegible] Indus. Com. R., 641. [9] 1 Indus. Com. R., 385–386.
[10] Ibid. [illegible], 641, 696, 697.

given the Standard on western shipments, by allowing them to ship tank cars averaging 100 barrels and billing them at 80 barrels, and, although the tariff rates were charged, "according to some prearranged method," a portion was refunded under the names of "drawbacks" or "rebates." [1] This contract lasted till 1883.[2] To enable the Standard to acquire a competing pipe line the New York Central made a rate netting 11 cents to the Standard, when the open rate was $1.90 from Cleveland to New York.[3] In 1878, the Standard, stating they had regularly received 35 cents commission per barrel from the New York Central, and 20 cents from the Erie, demanded 20 cents per barrel from the Pennsylvania on all oil shipped by these roads, and Mr. Cassatt granted it "after seeing the receipted bills" from the other roads. This amounted on the Pennsylvania alone, in two months, to $68,753. It had been in existence since October 17, 1877, on the other roads.[4] Another contract gave a Standard Oil Terminal Company 22½ cents "*on all oil transported*" by the Pennsylvania Co.[5] In these ways, by 1879, the Standard had obtained not only control of the local pipe lines, but also the terminal facilities of the four trunk lines at Philadelphia, Baltimore and New York,[6] and had obtained control of 90 or 95 per cent of the refining business of the country,[7] and, according to the Hepburn Committee, "the parties who have been driven to the wall have had ample capital and equal ability in the prosecution of their business in all things save their ability to acquire facilities for transportation." [8]

Similar discriminations by railroad companies in favor of the Standard Oil Co., or of some of its numerous affiliated companies had practically continued to the time of bringing the suit in this case.

In 1879, a secret trust agreement was entered into by the thirty-seven stockholders of the Standard Oil Company of Ohio, whereby the stocks of thirty separate competing companies, were turned over to trustees to hold, control and manage for the benefit of the stockholders of the Standard. This was superseded in 1882 by the Standard Oil Trust composed of trustees. Forty corporations (including those of 1879) were taken in, their $56,000,000 of capital stock being exchanged by their stockholders with the trustees for $70,000,000 trust certificates. In the ten years after 1882, the stocks of seventy-eight more companies were acquired, but fifty refineries had been dismantled in the meantime; $12,000,000 more trust certificates had been issued for these properties and $15,000,000 more issued as a stock dividend, making $97,250,000 trust certificates outstanding against property valued at $67,936,000. In March, 1892, the Supreme Court of Ohio declared the Trust illegal

[1] 43 O. S., 571, 583–584, from finding of facts by trial court.
[2] Ibid.
[3] 1 Indus. Com. R., 263, 513, 696, 713.
[4] Ibid. 387.
[5] Ibid. 387, 696.
[6] 13 Indus. Com. R., 643.
[7] 1 Indus. Com. R., 646, 647.
[8] 19 Indus. Com R., 654.

a capital stock of $1,000,000, and their refining capacity was 600 barrels of crude oil daily [1] — the production of all the 150 refineries of the country being 15,000 barrels daily.[2] Some of the railroad officials became stockholders in the Standard Oil Co.[3] In 1871 (May 6) the South Improvement Co. was chartered in Pennsylvania, with very broad powers; this was brought to Mr. Rockefeller's attention as early as October, 1871,[4] and he, and four other Standard Oil Co. members, took 1,375 shares of the 2,000 of its stock, and Peter Watson, freight agent of the Lake Shore, took 100 more.[5] The company was organized, Watson made president, and January 18, 1872, a contract was entered into with the railroads, signed by the presidents or managers, whereby oil rates were to be doubled, and the South Improvement Co. was to have *rebates* (40 cents out of 80 cents on crude oil to Cleveland, $1.06 out of $2.56 to New York) on crude oil shipped by it, and 50 cents out of $2.00 on refined, from Cleveland to New York; and in addition to these rebates, the South Improvement Co. was to have *drawbacks to the same amount on all oil shipped by all other shippers;* the rate from the oil fields to New York, 125 miles nearer than Cleveland, was made $2.92 — or 92 cents higher; the railroads agreed to furnish all way bills of all oil shipped by any one and open their books to them (the Improvement Co.) and do everything they could to insure them "*against loss or injury by competition.*" February 12 the Standard increased its stock to $2,500,000, and Mr. Rockefeller proceeded to Cleveland, and told the thirty refineries there that if they didn't sell their property to him it would be valueless — that there was a combination of railroad and oil men.[6] The result was that of the thirty refineries all but four or five sold out at from 45 to 56 per cent of their value.[7] The premature putting into effect of this contract, February 26, almost led to riots [8] in the oil regions, and the railroads were obliged to abrogate it, and there followed legislative investigations and the repeal of the charter, March 25, 1872. A new contract was made with "perfect equality to all shippers," which didn't last two weeks, and it soon became apparent that the railroads "were doing for the Standard secretly just what they had publicly contracted to do for the South Improvement Co." [9] The details are obscure in some places. The result, however, was perfectly apparent. The Standard first acquired control of the local pipe lines, by means of *drawbacks* of 22 cents per barrel allowed to the Standard lines — and the other local lines "died off like sheep." [10] In 1875, lower rates were

[1] Indus. Com. R., 606, 689.
[2] Ibid. 547, 626, 647.
[3] Ibid. 606, 645, 690, 694, 703.
[4] Ibid. 691.
[5] Ibid. 690.
[6] 1 Indus. Com. R., 692, 644.
[7] Ibid. 616, 644, 648, 692; 43 O. S., 581; Tarbell, Ida, *McClure's Magazine*, Nov. 1902, and following.
[8] 13 Indus. Com. R., 641.
[9] 1 Indus. Com. R., 385–386.
[10] Ibid. 386, 388, 641, 696, 697.

given the Standard on western shipments, by allowing them to ship tank cars averaging 100 barrels and billing them at 80 barrels, and, although the tariff rates were charged, "according to some prearranged method," a portion was refunded under the names of "drawbacks" or "rebates." [1] This contract lasted till 1883.[2] To enable the Standard to acquire a competing pipe line the New York Central made a rate netting 11 cents to the Standard, when the open rate was $1.90 from Cleveland to New York.[3] In 1878, the Standard, stating they had regularly received 35 cents commission per barrel from the New York Central, and 20 cents from the Erie, demanded 20 cents per barrel from the Pennsylvania on all oil shipped by these roads, and Mr. Cassatt granted it "after seeing the receipted bills" from the other roads. This amounted on the Pennsylvania alone, in two months, to $68,753. It had been in existence since October 17, 1877, on the other roads.[4] Another contract gave a Standard Oil Terminal Company 22½ cents "*on all oil transported*" by the Pennsylvania Co.[5] In these ways, by 1879, the Standard had obtained not only control of the local pipe lines, but also the terminal facilities of the four trunk lines at Philadelphia, Baltimore and New York,[6] and had obtained control of 90 or 95 per cent of the refining business of the country,[7] and, according to the Hepburn Committee, "the parties who have been driven to the wall have had ample capital and equal ability in the prosecution of their business in all things save their ability to acquire facilities for transportation." [8]

Similar discriminations by railroad companies in favor of the Standard Oil Co., or of some of its numerous affiliated companies had practically continued to the time of bringing the suit in this case.

In 1879, a secret trust agreement was entered into by the thirty-seven stockholders of the Standard Oil Company of Ohio, whereby the stocks of thirty separate competing companies, were turned over to trustees to hold, control and manage for the benefit of the stockholders of the Standard. This was superseded in 1882 by the Standard Oil Trust composed of trustees. Forty corporations (including those of 1879) were taken in, their $56,000,000 of capital stock being exchanged by their stockholders with the trustees for $70,000,000 trust certificates. In the ten years after 1882, the stocks of seventy-eight more companies were acquired, but fifty refineries had been dismantled in the meantime; $12,000,000 more trust certificates had been issued for these properties and $15,000,000 more issued as a stock dividend, making $97,250,000 trust certificates outstanding against property valued at $67,936,000. In March, 1892, the Supreme Court of Ohio declared the Trust illegal

[1] 43 O. S., 571, 583–584, from finding of facts by trial court.
[2] Ibid.
[3] 1 Indus. Com. R., 263, 513, 696, 713.
[4] Ibid. 387.
[5] Ibid. 387, 696.
[6] 13 Indus. Com. R., 643.
[7] 1 Indus. Com. R., 646, 647.
[8] 19 Indus. Com R., 654.

and ordered its dissolution.[1] At this time the stocks of eighty-four companies were held by the trustees. The trustees of the trust appointed themselves liquidating trustees and proceeded to liquidate in the following way: The stock of twenty-three of these companies was transferred to the Standard Oil Co. of New Jersey; that of eleven other companies to the Standard Oil Co. of New York; that of eleven other companies to the Anglo-American Oil Co. of England; and that of nineteen other companies to seven other corporations, leaving the stock of twenty other companies in the hands of the trustees for distribution; and these twenty companies by stock ownership controlled all of the others which had been in the hands of the trustees; since there were 972,500 trust certificates of $100 each the trustees offered to each holder of one trust certificate 1/972500 of the stock of all the twenty companies that owned the stocks of the other sixty-four companies; by the end of the year 494,619 trust certificates (a bare majority of all) had been exchanged by the trustees with themselves and their immediate associates, for their proportional amounts of the stocks in the twenty companies thereby giving them the control of these companies, and besides leaving the balance of the trust certificates in their hands. During the next six years only two more shares of trust certificates were exchanged; in the meantime dividends were regularly declared upon the outstanding trust certificates, and exactly enough to pay these was collected by the trustees from the income of the sub-companies. In 1897, the Attorney-General of Ohio filed contempt proceedings against the Standard Oil Co., for not in good faith dissolving the trust, but on the testimony of Mr. Rockefeller and other high officials of the company, that this had been done in good faith and that the twenty companies were competing, this case was dismissed. However, within a month after filing the suit a large amount of trust certificates was turned in and stock of the sub-companies issued; and in 1899 the Standard Oil Company of New Jersey was reorganized, with a capital stock of $100,000,000, with the power to do all the kinds of business done by all the sub-companies, with the same by-laws as those of the trust, and with the liquidating trustees as directors; the balance of the trust certificates were liquidated at once; all of the shares of the twenty sub-companies were then turned over by the shareholders (several thousand in number), to the Standard Oil Company of New Jersey, and exactly 972,500 shares of its stock were issued to such shareholders, and thereby when the Government brought its suit the Standard Oil Company of New Jersey owned directly the stock of sixty-five sub-companies, which in turn owned the stock of forty-nine others; and of the 972,500 shares of the Standard Oil Co. of New Jersey, the liquidating trustees and their immediate business associates, own over 500,000 shares; the par value

[1] State *vs.* Standard Oil Co., 49 Ohio St. 137.

of the shares is $100; the market value at the time of the decision was $672, and has been as high as $843; and for many years dividends from thirty to forty-eight per cent have been paid.

Upon the first proposition — that the anti-trust act applies only to contracts and combinations in unreasonable restraint of trade — the Chief Justice insists that "*contracts in restraint of trade*," in the statute means only such as were by the common law in *unreasonable* restraint of trade, as known and understood at the time the law was passed. In so holding he reiterates substantially what he said in his dissenting opinion in United States *vs.* Freight Association.[1]

This was the suit brought by the Government to dissolve the Trans-Missouri Freight Association, organized for the purpose of "maintaining just and reasonable rates, preventing unjust discriminations, by furnishing adequate and equal facilities for the interchange of traffic between the several lines, without preventing or illegally limiting competition." The case was heard on the pleadings, and the answer stating the above facts was admitted to be true. The district court, Riner, J., held that such an agreement did not violate the Anti-trust act.[2] This was affirmed by the Circuit Court of Appeals, Sanborn and Thayer, JJ., Shiras, J., dissenting.[3]

In the Supreme Court, Mr. Justice Peckham (White, Field, Gray, Shiras, JJ., dissenting), delivered the opinion, and said:

> What is the meaning of the language as used in the Statute, that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal"? Is it confined to a contract or combination which is only in *unreasonable* restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature? . . . It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act; that the common law meaning of the term "contract in restraint of trade," includes only such contracts as are in unreasonable restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.

This is exactly the holding of Sanborn and Thayer, JJ., in the Court of Appeals. Justice Peckham continues:

> The term is not of such limited signification, contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts

[1] 166 U.S. 335. [2] U.S. *vs.* Trans-Mo. Freight Ass'n (1892), 53 Fed. 440.
[3] Ibid., (1893), 58 Fed. 58.

which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term "contract in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of the act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

In United States *vs.* Joint Traffic Ass'n,[1] the facts were similar and a reconsideration of the holding in the Trans-Missouri case was asked, on the ground that the Anti-trust act, if it made "every contract in restraint of interstate commerce" illegal, the act was then unconstitutional as depriving persons of their liberty without due process of law. The court, however, overruled this, and reaffirmed the view taken in the Trans-Missouri case. Mr. Justice Peckham again delivered the opinion of the court, and Gray, Shiras, and White, JJ., dissented.

The same constitutional point was affirmed in Addyston Pipe and Steel Co. *vs.* U.S.,[2] and also in Montague & Co. *vs.* Lowrie,[3] Mr. Justice Peckham delivering the opinions in both cases.

In Northern Securities Co. *vs.* U.S.,[4] the question was again raised, Justices Harlan, Brown, McKenna and Day holding that the Anti-trust act "embraces all direct restraints, reasonable or unreasonable." In his concurring opinion, Mr. Justice Brewer, however, said of the preceding Traffic Association and other cases, "Instead of holding that the Anti-Trust Act included all contracts reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. . . . Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld." In this case Fuller, C. J., White, Peckham, Holmes, JJ., dissented on the ground that "the acquisition and ownership of stock in competing railroads, organized under state law, by several persons or by corporations, is not interstate commerce, and, therefore, not subject to the

[1] 171 U.S. 556.
[2] 175 U.S. 228.
[3] 193 U.S. 38.
[4] 193 U.S. 197.

control of Congress." But in Loewe *vs.* Lawlor,[1] Chief Justice Fuller speaking for the whole court without dissent, citing the foregoing cases says (p. 297), they "hold in effect that the Anti-trust law has a broader application than the prohibition of restraints of trade unlawful at common law."

The road Chief Justice White travels in reaching the conclusion that only unreasonable restraint is forbidden is:

> The text of the first and second sections of the act is:
>
> "Section 1. Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared to be illegal. . . ."
>
> "Section 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."
>
> The debates show that doubt as to whether there was a common law of the United States which governed the subject in the absence of legislation was among the influences leading to the passage of the act. They conclusively show, however, that the main cause which led to the legislation was the thought . . . that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.
>
> The sole subject with which the first section deals is restraint of trade, as therein contemplated, and the attempt to monopolize is the subject with which the second section is concerned. It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law and were familiar in the law of this country prior to and at the time of the adoption of the act in question.
>
> It is certain that at a remote period the words contract in restraint of trade in England came to refer to some voluntary restraint put by contract by an individual on his right to carry on his trade or calling. Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made them. In the interest of freedom of individuals to contract this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void. That is to say, if the restraint was partial in its operation and was otherwise reasonable the contract was held to be valid.
>
> Monopolies were defined by Lord Coke as follows: "A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporation, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politic or corporate are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade."
>
> As monopoly, as thus conceived, embraced only a consequent arising from an exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such.

[1] 208 U.S. 274.

But as it was considered, at least so far as the necessaries of life were concerned, that individuals by the abuse of their right of contract might be able to usurp the power arbitrarily to enhance prices, one of the wrongs arising from monopoly, it came to be that laws were passed relating to offenses such as forestalling and engrossing, by which prohibitions were placed upon the power of individuals to deal under such circumstances and conditions as . . . to give rise to the presumption of an intent to injure others through the means of a monopolistic increase of prices.

[Hence,] the prohibited act of engrossing, because of its inevitable accomplishment of one of the evils deemed to be engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize.

From the development of more accurate economic conceptions and the changes in conditions of society it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and so such acts were repealed in England in 1844.

By an early statute of the Province of Massachusetts, 1778–1779, monopoly and forestalling were expressly treated as one and the same. It is also true that the principles concerning contracts in restraint of trade, that is voluntary restraint put by a person on his right to pursue his calling, came generally to be recognized in accordance with the English rule. It came, moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices — in other words, to monopolize — came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade.

Without going into detail and but briefly surveying the whole field, it may be with accuracy, said that the dread of enhancement of prices and of other wrongs which, it was thought, would flow from the undue limitation of competitive conditions caused by contracts or other acts of individuals or corporations, led as a matter of public policy, to the prohibition or treating as illegal of contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.

In view of the common law and the law in this country as to restraint of trade, which we have reviewed, we think it results, [as to the first section]:

(*a*) That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade.

(*b*) That in view of the many new forms of contracts and combinations

which were being evolved from existing economic conditions it was deemed essential by an all embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation.

(*c*) And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself to classes broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied to the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

And a consideration of the text of the second section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section; that is, restraints of trade, by any attempt to monopolize or monopolization thereof, even though the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section.

And, of course, when the second section is thus harmonized with and made, as it was intended to be, the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason, guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve.

In dissenting from this view Mr. Justice Harlan says:

There are some things in this opinion, and some that are to result from this opinion, which I think may very well alarm thoughtful men, or many thoughtful men; and I am unwilling to let them pass with any idea that I approve them.

The anti-trust act of 1890 was passed at a time when this country was in a state of great unrest, arising out of enormous aggregation of capital in a few hands, and arising out of combinations which had their hands upon the throat of this country in respect even to the necessities of life; and Congress had before it the great question as to how these evils were to be remedied, so far as Congress had the power to remedy them. The

question was: What shall we do? They finally, after great debate by able statesmen, passed the anti-trust act of 1890. It provides in section 1, "That every contract, combination in form of trust or otherwise, or conspiracy not in restraint of trade, as the learned chief justice said in one part of his remarks, but . . . in restraint of trade among the several states and with foreign nations is hereby declared to be illegal."

Congress has nothing to do with domestic trade in the states, but as to interstate trade it has a great deal to do, and therefore it fell upon this policy.

The men who were in the Congress of the United States at that time knew what the common law was about the restraint of trade. They knew what restraints of trade at common law were lawful and what were unlawful. But Congress said:

The surest way to protect interstate commerce is not to start upon any distinctions at all as to the kinds of trade; "every" contract in restraint of trade among the states is hereby declared to be illegal.

Then, in the second section:

"Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize" — Monopolize what? "Any part of interstate trade or commerce shall be liable to the penalties prescribed by this act." What becomes, then, of the statement that this act did not condemn monopoly in itself? Did not these men know what a monopoly was? And when Congress said that we will punish any man who monopolizes or attempts to monopolize any part of interstate commerce, did it not know what it intended? That is not all: "Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the states, is hereby declared illegal."

Therefore Congress said to all the people of this country: "We are not going to bother the courts or ourselves with any inquiries as to what contracts are in restraint of trade, reasonably or unreasonably. We are not going to leave that to any jury. We are not going to leave that to any circuit judge. We will determine it as a part of the policy of the United States, that, so far as interstate trade is concerned, no body or corporation shall make or attempt to enforce a contract, any contract, that in any degree restrains interstate trade." Can anybody doubt the meaning of those words? . . . What occurred next? Look at this, step by step, and I shall get directly, to the part of this opinion that I say may well alarm the country, notwithstanding the many good things that are in it, magnificently said.

In 1896, fifteen years ago, a case was in this court known as the Trans-Missouri case. The question involved the construction as to the scope and meaning of that anti-trust law. Who was here to instruct the court on that occasion? We hear a good deal about the "lamp of reason." We hear that the time has come when we should hold up the light of reason and look at this act; as if the men of that day, freshly after the passage of the act, were moving about in darkness and did not know what they were doing or saying.

Let us see who were the men in the case. They were, Attorney General Harmon, W. F. Guthrie, John F. Dillon, James C. Carter, Edward J. Phelps, Lloyd W. Bowers, and John G. Johnson.

Justice Harlan then quotes extensively from this case, including the quotations given above. He also quotes from the Joint Traffic case, showing that that case reaffirmed the Trans-Missouri case after the fullest argument by the same distinguished attorneys with the help of Senator Edmunds, and after the fullest consideration of the same views of Mr. Justice White in his dissenting opinion, and still further, after a rehearing, for a third time the majority of the court held the same. He adds:

If you will take the trouble to look through the Federal Reporter you will find that possibly nearly every Federal court in this country has accepted those original decisions as the final decision of this court as to the meaning of the act of Congress.

Now it is laid down in some of the cases, and it is common sense, that this court is bound to know what everybody else in the community knows, and therefore I say, without hesitation, that everybody knows that there has not been a session of Congress since 1896, when that original opinion was delivered but that somebody, taking the opposite view from what the court has said, has applied to Congress to get that law amended; but it never has been amended, and there is not a man in the country to-day who does not know that it never will be amended by the Congress of the United States to mean what they wanted Congress to have it mean, and which Congress refused to have it mean; to get the courts so to construe it.

In the not very short life that I have passed in this capital and the public service of the country the most alarming tendency of this day, in my judgment, so far as the safety and integrity of our institutions are concerned, is the tendency to judicial legislation, so that, when men having vast interests are concerned and they cannot get the law-making power of the country which controls it to pass the legislation they desire, the next thing they do is to raise the question in some case, to get the court so to construe the Constitution or the statutes as to mean what they want it to mean. That has not been our practice.

Although it is usually said that debates in a legislative body may not be resorted to to determine the meaning of a statute,[1] yet the reports of committees may be.[2] It is, however, proper for the purposes of review to look into the proceedings of Congress.

Section 1, of the original bill[3] introduced by Senator Sherman read:

That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations *made with a view, or which tend, to prevent full and free competition* in the importation, transportation, or sale," etc., and "all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful and void.

[1] U.S. *vs.* Trans-Missouri Freight Ass'n, 166 U.S. 318.
[2] Church of Holy Trinity *vs.* U.S., 143 U.S. 457.
[3] 51st Cong. 1st Sess. Dec. 4, 1889, Senate Bill No. 1, Bills & Debates, p. 69.

The Senator said:

It does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government. Similar contracts in any State in the Union are now by the common or statute law, null and void. . . . The purpose of his bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States to protect local interests.

This Section (1) will enable the Courts of the U. S. to restrain, limit, and control such combinations as *interfere injuriously* with our foreign and interstate commerce to the same extent that the state courts habitually control such combinations as interfere with the commerce of a State.

This bill, as I would have it, has for its single object to invoke the aid of the courts of the United States to deal with the combinations described in the first section when they affect injuriously our foreign and interstate commerce and our revenue laws, and in this way to supplement the enforcement of the established rules of the common and statute law by the courts of the several States in dealing with combinations that affect injuriously the industrial liberty of the citizens of these states.

This bill does not seek to cripple combinations of capital and labor, the formation of partnerships or of corporations, but only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer. It is the unlawful combination, tested by the rules of the common law and human experience, that is aimed at by this bill, and not the lawful and useful combinations.

The bill "does not interfere with any lawful business in the United States, whether conducted by a corporation or a partnership or an individual. It deals only with unlawful combinations, unlawful by the code of any law of any civilized nation of ancient or modern times."

The Senator further refers to and quotes from the cases referred to below. After the bill was debated for several weeks in the Senate it was, with numerous proposed amendments, referred to the Judiciary Committee composed of many of the distinguished lawyers of the country.[1] They reported the bill back in its present form by Senator Edmunds.[2] Senator Hoar of the committee said:

We have affirmed the old doctrine of the common law in regard to all interstate and international commercial transactions, and have clothed the United States courts with authority to enforce that doctrine by injunction. We have put in also a grave penalty.[3] And Senator Edmunds said:

We would frame a bill that should be clearly within our Constitutional power, that we should make its definition out of terms that were well

[1] Bills & Debates, p. 303. [2] Ibid. 306. [3] Ibid. 311.

known to the law already, and would leave it to the courts in the first instance to say how far they could carry it or its definitions as applicable to each particular case as it might arise.[1]

And Senator Edmunds said in reference to monopoly "that we studied it with whatever little ability we had, and the best answer I can make is to read from Webster's Dictionary the definition of the verb 'to monopolize': '1. *To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as to monopolize sugar or tea.*' Like the Sugar Trust. One man, if he had capital enough, could do it just as well as two. '2. *To engross or obtain by any means the exclusive right of, especially the right of trading to any place, or within any country or district; as to monopolize the India or Levant trade.*' The old definition. . . . We thought we had done the right thing in providing, in the very phrase we did, that if one person instead of two, by a combination, if one person alone, as we have heard about the wheat market in Chicago, for instance, did it, it was just as offensive and injurious to the public interests as if two had combined to do it." [2]

Senator Edmunds' definition of monopoly should be noted, especially the first, — purchase of the whole commodity to control its sale. He, as does the Chief Justice, assumes that the second definition given, is the *old* one; this is a mistake, it only goes back to Lord Coke; the other, the first one, back to Aristotle, — and literally means a "sole seller." Aristotle says:

> Thales, the Milesian philosopher, was reproached for his poverty, but he knew by his skill in the stars while it was yet winter that there would be a great harvest of olives in the coming year; so having a little money, he gave deposits for the use of all the olive-presses in Chios and Miletus, which he hired at a low price because no one bid against him. When the harvest-time came, and many wanted them all at once and of a sudden, he let them out at any rate he pleased, and made a quantity of money. He is supposed to have given striking proof of his wisdom, but, as I was saying, his device for getting money is nothing but the creation of a *monopoly*.

So too, "there was a man of Sicily, who having money deposited with him, bought up all the iron from the iron mines; afterwards, when the merchants from their various markets came to buy, he was the only seller, and without much increasing the price he gained 200 per cent. Which when Dionysius heard, he told him he might take away his money, but that he must not remain in Syracuse. He had the same idea as Thales; they both contrived to *create a monopoly* for themselves. And statesmen ought to know these things." [3]

The foregoing statements seem to confirm the view of the Chief

[1] Ibid. 315. [2] Ibid. p. 324. [3] Politics, Bk. I.

Justice; this, however, is only apparent, and a careful study of the debates leads to a different view. (1) Senator Sherman's original bill was aimed at "all arrangements, contracts, etc., made with a *view, or which tend to prevent full and free competition*" *in interstate* and foreign commerce; it made these illegal, null and void. (2) He pointed out that the purchase of property by one person of another, the formation of partnerships or corporations, to aid production, are not combinations which prevent competition in the legal sense, — they are not contracts in restraint of trade within the meaning of the common law. (3) He cited cases: "that all combinations for the purpose of raising or controlling prices of merchandise or any of the necessaries of life are monopolies," — matches here, — and "it is no answer to say that it has reduced the price," for it can "at any time raise the price to an exorbitant degree;" [1] a secret partnership among the grain dealers in a town, — each firm apparently conducting its own business as if no such partnership existed, — "to control the price of grain, costs of storage and expense of shipment at such town is in restraint of trade, and void;" [2] the division of the city of Chicago by agreement between two gas companies, "allowing each the exclusive right of supplying gas therein for 100 years, and stipulating that neither would interfere with the business of the other in its own territory," although "it involved a partial restraint of trade," was void as between "corporations engaged in a public business in which the public have an interest," [3] and the purchase of a majority of the capital stock of the four competing gas companies in Chicago, by a new corporation incorporated for "the manufacture, sale and distribution of gas, and to purchase and hold the capital stock of any gas company in Chicago or elsewhere," builds up "a virtual monopoly in the manufacture and sale of gas," which is unlawful and the corporation can be dissolved; [4] and "any combination the *tendency* of which is to prevent competition in its broad and general sense, and *thus at will* enhance prices to the detriment of the public is a legal monopoly." [5] (4) These views were not controverted, denied or questioned, but seemed to be taken for granted by all. And further the debates were to assume, that for practical purposes, any contract "made with the view and directly tending to prevent full and free competition" in *interstate* commerce, since it would affect the people of at least two states, and might all of them, — would be inherently in *unreasonable* restraint of trade by the rules of the common law. (5) But the Senator also proposed that the *policy* of the States not only as indicated by the decisions but by their *statutes* as well, making these things

[1] Richardson *vs.* Buhl (1889) 77 Mich. 632.
[2] Craft *vs.* McConoughy (1875) 79 Ill. 346.
[3] Chicago Gas L. Co. *vs.* People's Gas L. Co., 121 Ill. 531.
[4] People *vs.* Chicago Gas Trust Co. (1889) 130 Ill. 268.
[5] Mr. Justice Barrett, in People *vs.* North River Sugar Ref. Co., 2 Abb. N. C. 164.

criminal and tortious, should be supplemented by adopting a like policy by the Federal government in reference to interstate and foreign commerce. (6) The debate was mostly upon the remedies for these wrongs, — should they be made criminal, should they be enjoined at the suit of the United States, should a person not a party to the restraining contract have a civil remedy for the damage done him or should these things be held null, void and unenforcible, by the parties to them, as at common law? No one proposed the latter alone, but all desired to provide one or more of the other remedies; and this is why the original bill was referred to the Judiciary Committee, and why it reported the bill in its present form — to *extend the policy of the states* to interstate and foreign commerce, — to make violations thereof criminal, clothe the Federal courts with power to enforce this policy by injunction, and give a civil remedy to a person injured by its violation. (7) So too, because the bill said nothing about monopoly, and would not prevent *cornering* the market, was another objection to it; hence the judiciary committee added the monopoly section. If this is correct, then it seems probable that "*every* contract," was deliberately used to mean what it says; and this seems to be more than confirmed by the subsequent history set forth in Justice Harlan's opinion.

It is not quite clear therefore why the court should in a case not requiring it, and when the question was touched upon only incidentally in the briefs, — because it had been considered practically settled for fifteen years, suddenly reverse itself, and mount that "unruly horse" — public policy — which no court has ever yet successfully ridden and which will vary as it has heretofore, in matters of this kind, on the equity side "with the length of the chancellor's foot," and on the legal side from Hull's "per Dieu, if the plaintiff were here, he should go to prison till he paid a fine to the King," because he took a bond from a dyer not to use his dyer's craft in town for half a year,[1] to the House of Lords' conclusion that a combination to engross all the tea trade between Shanghai and Europe, to the exclusion of the plaintiff, was not *unlawful*, — so as to give the plaintiff an action for damages;[2] the court here, however, was careful to point out that while this was a *contract in restraint of trade*, it was not *unlawful*, so as to give a *third* party an action for damages; they did not hold that it was a contract in "reasonable restraint of trade," so that one party to it would have had an action against another for damages for refusing to abide by it; they probably would have refused to enforce it so, because it was in *unreasonable* restraint of trade.[3] And it is safe to say that had the case arisen before 1844, the *court* would hardly have held under the

[1] Dier's Case (1415) Y. B. 2 H. V. f. 5, pl. 26.
[2] Mogul Steamship Co. *vs.* McGregor (1892) A. C. 25.
[3] Nordenfelt *vs.* Maxim &c. Co. (1894) A. C. 535.

laissez faire rule of reason so fashionable at the time that the English statutes did not apply as they before had been interpreted. It would have been left to Parliament, as it was, to abrogate the statutes and establish a new policy.

However, if hereafter, the common law rule of reason is to apply, and though this will lead to a sea of uncertainty, if one can judge by the conflict in the views of the members of the court, perhaps the ultimate result will not be greatly different, except to throw a greater burden on the government in getting at and establishing the facts in each case. There is not much in the common law rule of reason, except its uncertainty, to give comfort to any of the large trusts to classify themselves among the sheep instead of among the goats. The best statement of the common law, so far as it can be stated at all, is that made by President Taft, when as judge he rendered the decision in the Addyston Pipe Case.[1] He said, citing cases in the note:

Covenants in partial restraint of trade are generally upheld as valid when they are agreements; (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner, pending the partnership, not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2 and 3) to the enjoyment by the buyer of the property, good-will or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employee of the confidential knowledge acquired in such business.[2]

[1] United States *vs.* Addyston & Co. (1898) 85 Fed. 271.

[2] **First class**: Mitchel *vs.* Reynolds, 1 P. Wms. 181; Fowle *vs.* Parke, 131 U.S. 88, 9 Sup. Ct. 658; Nordenfelt *vs.* Maxim-Nordenfelt Co. [1894], App. Cas. 534; Rousillon *vs.* Rousillon, 14 Ch. Div. 351; Cloth Co. *vs.* Lorsont, L. R. 9 Eq. 345; Whittaker *vs.* Howe, 3 Beav. 383; Match Co. *vs.* Roeber, 106 N.Y. 473, 13 N.E. 419; Tode *vs.* Gross, 127 N.Y. 480, 28 N.E. 469; Beal *vs.* Chase, 31 Mich. 490; Hubbard *vs.* Miller, 27 Mich. 15; National Ben. Co. *vs.* Union Hospital Co., 45 Minn. 272, 47 N.W. Rep. 806; Whitney *vs.* Slayton, 40 Maine 224; Pierce *vs.* Fuller, 8 Mass. 223; Richards *vs.* Seating Co., 87 Wis. 503, 58 N.W. Rep. 787.

Second class: Tallis *vs.* Tallis, 1 El. & Bl. 391, and Lange *vs.* Werk, 2 Ohio St. 520.

Third class: Machinery Co. *vs.* Dolph, 138 U.S. 617, 11 Sup. Ct. 412; Machinery Co. *vs.* Dolph, 28 Fed. Rep. 553; and Matthews *vs.* Associated Press, 136 N.Y. 333, 32 N.E. Rep. 981.

Fourth class: American Strawboard Co. *vs.* Haldeman Paper Co., 83 Fed. Rep. 619; and Hitchcock *vs.* Anthony, 83 Fed. Rep. 779, both decisions of this court; Navigation Co. *vs.* Winsor, 20 Wall. 64; Dunlop *vs.* Gregory, 10 N.Y. 241; Hodge *vs.* Sloan, 107 N.Y. 414, 17 N.E. Rep. 335.

Fifth class: Homer *vs.* Ashford, 3 Bing. 322; Horner *vs.* Graves, 7 Bing. 735; Hitchcock *vs.* Coker, 6 Adol. & E. 438; Ward *vs.* Byrne, 5 Mees. & W. 547; Dubowski *vs.* Gold-

But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.[1]

And in the very recent case of Dr. Miles Med. Co. *vs.* John D. Park Sons Co.,[2] Mr. Justice Hughes says:

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer.

The decisions of the Supreme Court under the Anti-trust act may be summarized and classified as follows: (1) Purchase or acquisition of stock of competing corporations by one of the competitors for the purpose of preventing competition or creating a monopoly.

Of this class are the Sugar Trust cases. In the Knight case,[3] the American Sugar Refinery Company, being in control of a large part of the manufactories of refined sugar in the United States, purchased all the stock of four competing Philadelphia sugar refineries, giving the American Co. a practical monopoly of the refining and sale of sugar in the United States; it was *held*, by Fuller, C. J., that "conceding the existence of a monopoly in the *manufacture* is established," it cannot be suppressed in the mode attempted in this bill, because manufacturing is not commerce. Harlan, J., dissents.

In the Kissel case,[4] the same American Sugar Refining Co., by

stein (1896) 1 Q. B. 478; Peels *vs.* Saalfeld (1892) 2 Ch. 149; Taylor *vs.* Blanchard, 13 Allen 370; Keeler *vs.* Taylor, 53 Pa. St. 467; Herreshoff *vs.* Boutineau, 17 R. I. 3, 19 Atl. Rep. 712.

[1] Citing: People *vs.* Sheldon, 139 N.Y. 251; Morris Run Coal Co. *vs.* Barclay Coal Co., 68 Pa. St. 173; Nester *vs.* Brewing Co., 161 Pa. St. 473; Salt Co. *vs.* Guthrie, 35 O.S. 666; Anderson *vs.* Jett, 89 Ky. 375; Chapin *vs.* Brown, 79 Ill. 346; Craft *vs.* McConoughy, 79 Ill. 346; More *vs.* Bennett, 140 Ill. 69; Association *vs.* Niezerowski, 95 Wis. 129; Vulcan Powder Co. *vs.* Hercules Powder Co., 96 Cal. 510; Oil Co. *vs.* Adone, 83 Tex. 650; Association *vs.* Kock, 14 La. Ann. 168; Hilton *vs.* Eckersley, 6 El. & Bl. 47; Urmston *vs.* Whitelegg, 63 L. T. (N. S.) 455.

See also Hartman *vs.* Park & Sons, 145 Fed. 358; Page, Contracts, Sect. 373; Ripley, Trusts, Pools & Corporations, chaps. ix, x. 8 *Mich. L. Rev.* 298 (J. C. Knowlton); 6 *Mich. L. Rev.* 1 (S. T. Miller); 3 *Mich. L. Rev.* 119 (D. M. Fredericksen).

[2] (1911), 31 S.C. 376 on 385.

[3] U.S. *vs.* E. C. Knight Co. (1895) 156 U.S. 1; 60 Fed. 934.

[4] U S. *vs.* Kissel (1910) — U.S. — 31 S.C. 124; 173 Fed. 382.

Kissel, its agent, without disclosing his principal, loaned a large sum of money to S. (who owned more than half the stock of a competing Pennsylvania Co.), and took this stock, with a power of attorney to vote upon it, as collateral security for the loan, which was to last for one year. S. did not know the American Co. was back of K., and was dependent upon the income of this stock to repay the loan. K., at the instigation of the American Co., voted to close the Pennsylvania Co., and thereby destroy its business, and ruin S. *Held*, this was an illegal *conspiracy*, violating the Anti-trust act, — "a partnership for a criminal purpose," — per Holmes, J., no dissent.

Perhaps in this class should also be placed the Northern Securities case, and the case under review. See No. (3) below.

(2) Purchase or lease of competing properties with covenant from the seller or lessor that he will not compete with the purchaser.

In the Packet case,[1] a seller of two river steamboats plying between two places and the intermediate points in the State of Ohio on the Ohio river, agreed not to engage in the packet business for five years between the same points, — *held*, Holmes, J., even if there is some interference with interstate commerce, it "is insignificant, and incidental and not the dominant purpose of the agreement" which relates to *intrastate* traffic only, and does not violate the Anti-trust act. No dissent.

In the Cotton Compress case,[2] the lessee already owned and controlled a large number of the cotton compresses in the southern states; the lessor compress company leased all its property and good will to the foreign lessee company, with a covenant to discourage all competition with the latter, and itself refrain from engaging in compressing cotton within 50 miles of any plant operated by the lessee, — this lease being made in pursuance of a plan to draw into one control the compression business of the cotton producing states. *Held*, McKenna, J., violates Anti-trust act. No dissent.

The Banana trust, noted below (7), was of this character also.

(3) Organization of a trust or corporation by former competing concerns, or by their shareholders, to take over the property or stock of such concerns in order to prevent competition.

Of this class is the Northern Securities case,[3] where the Securities Company was organized with $400,000,000 of capital stock, — $211,000,000 of which it exchanged with the stockholders of the Great Northern Railroad Co., for practically all of its $118,000,000 capital stock, and likewise exchanged $177,000,000 more of its stock with the shareholders of the Northern Pacific Railroad Co., for practically all of its $154,000,000 capital stock, — giving the former share-

[1] Cincinnati, P. B. &c. Packet Co. *vs.* Bay (1906) 200 U.S. 179.
[2] Shawnee Compress Co. *vs.* Anderson (1908) 209 U.S. 423; 28 S.C. 572.
[3] U.S. *vs.* Northern Securities Co. (1904) 193 U.S. 197; 120 Fed. 721.

holders about $388,000,000 of the Securities' stock, while the latter company became the sole shareholder in the two railroad companies, with power to control them and prevent the continuance of competition between their 5500 miles of lines. *Held*, Harlan, Brown, McKenna, Day, and Brewer, that this violated the Anti-trust act, Fuller, C. J., Peckham, Holmes, and White, JJ., dissenting on the ground that exchange of shares was purchase of property, and not a combination or contract in restraint of interstate commerce. Compare the Sugar trust cases, *supra*, under (1).

In the subsequent case,[1] arising out of the distribution of the assets of the Securities Co., under the decree in the original case, it was held that there was a real purchase of the stock of the railroad companies by the Securities Co., and the $118,000,000 stock of Great Northern, and $154,000,000 stock of Northern Pacific should not be returned to the original owners respectively from whom they were received, but that the two stocks should be divided pro-rata, among all the shareholders in the Securities company who should surrender 99 per cent of the Securities stock. Opinion by Fuller, C. J. No dissent.

The case under review belongs to this class.

(4) Agreements to fix or maintain transportation rates on interstate traffic.

The cases here are the freight association cases,[2] sufficiently reviewed above. The Securities case belongs here too, because the majority of the court held that even if there was a sale and purchase of property, that would not purge the plain intent to restrain competition between competing railroads.

In the Packet case, *supra*, where the purchaser of the steamboats agreed to maintain the present rates primarily at least on *intrastate* traffic, there was no violation of the Anti-trust act.

(5) Associations or agreements between former competitors not to compete, — yet otherwise retaining control over their own business.

The Live Stock exchanges at Kansas City, where the State line runs through the stock yards were held not to violate the Anti-trust act. In the Hopkins case,[3] an association was formed among those whose business it was to receive consignments of live stock from various states, make advances to their owners, feed and care for the stock, prepare them for sale, and sell them on commission, remitting to the owners the balance after deducting costs, expenses, and commissions; they fixed uniform commissions, and agreed to deal with no one who violated rules relating to employment of agents and sending prepaid

[1] Harriman *vs.* Northern Securities Co. (1905) 197 U.S. 244; 134 Fed. 331; 132 Fed. 464.

[2] U.S. *vs.* Trans-Mo. Freight Ass'n (1897) 166 U.S. 290; 58 Fed. 58; 53 Fed. 440; U.S. *vs.* Joint Traffic Ass'n (1898) 171 U.S. 505; 89 Fed. 1020; 76 Fed. 895.

[3] Hopkins *vs.* U.S. (1998) 171 U.S. 578; 84 Fed. 1018, 82 Fed. 529.

telegrams. *Held*, their business was not *interstate commerce*, — Peckham, J., (Harlan, J., dissenting).

In the Anderson case,[1] the yard live stock traders, who themselves bought and sold live stock at the Kansas City stock yards, associated together, and agreed not to recognize any one not a member as a yard trader, or employ any one to buy or sell for him unless he had a certificate from the exchange, or pay any buyer or seller any fee for buying or selling for him. *Held*, such agreement was not in restraint of, nor an attempt to monopolize, interstate commerce, even if its members are engaged in such commerce.

In the Pipe Trust cases,[2] it was held that an agreement among a large number of the companies manufacturing iron pipe in the United States, fixing prices to the public by a committee, dividing territory, and pooling profits, violates the Anti-trust act, — per Peckham, J. No dissent. The same combination was likewise held to be illegal in the Chattanooga Foundry Works case,[3] by Holmes, J., two of the court dissenting on other matters.

In the Meat Trust case,[4] it was held that a combination of the dominating members of dealers in fresh meats throughout the United States to bid in conjunction with and not against one another for live stock, in order to regulate prices, to restrict shipments, and to get less than lawful rates from railroads, violates the Anti-trust act, — Holmes, J. No dissent.

The Packet case is given above under (2).

The Wall Paper trust,[5] by organizing a selling corporation to fix and maintain prices for its members and limit production, was assumed to be illegal. See below under (6). So too, the Banana trust. See below under (7).

(6) Agreements between seller and buyer that the latter will resell to public only on terms named by the original seller.

Thus where the patentée of harrows sold the right to manufacture and sell the same, to a licensee, and agreed to license no one else, and the licensee agreed to make and sell the harrows at a price fixed by patentee, and to sell no others; the agreement does not violate the Anti-trust act, —[6] Peckham, J. No dissent.

But where the wholesale dealers in tiles, etc., in one state, associate with the makers of such tiles in other states, whereby the makers agree not to sell to non-members and the wholesale dealers agree not to purchase from non-members, and not to sell at all at less than the list prices agreed upon, to non-members, — more than 50% higher

[1] Anderson *vs.* U.S. (1898) 171 U.S. 604; 82 Fed. 998.
[2] Addyston Pipe & Steel Co. *vs.* U.S. (1899) 175 U.S. 211; 85 Fed. 271; 78 Fed. 712.
[3] Chattanooga F. & P. Works *vs.* Atlanta (1906) 203 U.S. 390; 27 S.C. 65.
[4] Swift *vs.* U.S. (1905), 196 U.S. 375; 122 Fed. 429.
[5] Continental Wall Paper Co. *vs.* Voight (1909), 212 U.S. 227; 29 S.C. 280; 148 Fed. 939.
[6] Bement *vs.* National Harrow Co. (1902) 186 U.S. 70.

than to members, is an association which violates the act, —[1] per Peckham, J. No dissent.

However, a contract between a board of trade and a telegraph company, whereby the board agrees to furnish quotations of the prices of grain, on condition that the telegraph company will communicate such prices only to persons having contractual relations with and approved by the board of trade, and not to bucket shops, does not violate the Anti-trust act,[2] as a contract in restraint of trade, — per Holmes, J. (Harlan, Brewer, and Day, JJ., dissenting).

In the Wall Paper trust, in addition to what is stated above (5) the selling agency fixed prices to wholesalers, to retailers, and to the public, and required the wholesalers to agree to sell to retailers only on the terms fixed, and the retailers to sell only to the public at the prices fixed by the seller. *Held*, per Harlan, J., to violate Anti-trust act (Holmes, Brewer and White, JJ., dissent on the ground that a wholesale dealer who had purchased a bill of goods from the trust was not in a position to contest the validity of its existence).

The same sort of an agreement whereby the maker and seller of a proprietary medicine made under a secret process undertook to fix the prices to wholesalers, and by them to the retailers, and by the latter to the public, and that such wholesalers should sell only to such retailers as were approved by the proprietor violates the Anti-trust act;[3] opinion by Hughes, J. (Holmes, J., dissenting).

So too, in Bobbs-Merrill Co. *vs.* Straus,[4] the district court held that Bobbs-Merrill Co. could not prevent the sale below a specified price, of a copyrighted book by the purchaser, — the Book trust, composed of the American Publishers' Ass'n, and the Am. Booksellers' Ass'n, a combination controlling the sale and fixing the price of 90 per cent of the copyrighted books, and blacklisting dealers who would not come into the association, — even though it was an unlawful trust, as held by the court. This was affirmed, as a *restraint on alienation*, the copyright of a book not giving the same right as a patent of an article, but the Supreme Court did not deem it necessary to pass on the validity of the Book trust.

(7) Combinations to prevent others from carrying on their trade in the usual way.

By force, threats, violence, and actual physical obstruction, preventing the movement of sleeping cars engaged in interstate commerce, as in the Debs case.[5] *Held*, by lower court, to violate the Anti-trust act, but affirmed by the Supreme Court, on broader grounds as

[1] Montague & Co. *vs.* Lowry (1904) 193 U.S. 38; 115 Fed. 27, 106 Fed. 38, 98, Fed. 817.
[2] Board of Trade *vs.* Christie &c. Co. (1905) 198 U.S. 236; 139 Fed. 496, 120 Fed. 608.
[3] Dr. Miles Med. Co. *vs.* Park & Sons Co. (1911) — U.S. — 31 S.C. 376; 164 Fed. 803. See Hartman *vs.* John D. Park, 145 Fed. 358.
[4] 210 U.S. 339; 28 S.C. 722; 147 Fed. 15; 139 Fed. 155; 131 Fed. 530.
[5] *In re* Debs (1895) 158 U.S. 564; 64 Fed. 724.

interfering with the movement of the mails, etc., — per Brewer, J. No dissent.

So too, a boycott by the hatters' union of 9000 members, in combination with the American Federation of Labor of 1,400,000 members, of the manufacturer of hats to be transported and sold across state lines whose shop the Union seeks to unionize, by preventing purchasers from reselling for fear of strikes, and loss of customers, because of the wide publication in the Union papers of the names of unfair dealers, is a combination in restraint of interstate commerce, in violation of the Anti-trust act, —[1] per Fuller, C. J. No dissent.

In the Banana trust case,[2] the trust organized in the United States, with an intent to control competition and monopolize the banana trade, bought out many competitors, who promised not to compete, acquired the stock of others, contracted with still others limiting the quantity to be purchased, and organized a selling corporation to fix and maintain prices. Plaintiff, a United States citizen, acquired a banana plantation in U. S. of Colombia, and proceeded to construct a railroad to it. The trust induced the Costa Rica government to prevent by its soldiers, the plaintiff from completing his road, procured a fraudulent judgment as to the title to the land, and forcibly ejected plaintiff, and destroyed his business. *Held*, although the parties were engaged in the foreign banana trade of the United States, the wrongful acts occurred outside the territory of the United States, and the Federal courts had no jurisdiction to give relief,—per Holmes, J., all concur.

(8) Miscellaneous.

A municipal ordinance specifying that Trinidad Lake asphalt, a foreign product, shall be used in the pavement of a city street, and thereby preventing competitive bidding does not violate the Anti-trust act,[3] — per Day, J. No dissent. Corporations are not protected under the provisions of the 5th amendment of the Constitution from having their agents testify or their books produced, in a criminal prosecution against them under the Anti-trust act, on the ground that a criminal cannot be required to testify against himself; this privilege is personal to the witness called on to testify. Such corporations, however, are protected against unreasonable searches and seizures.[4]

The facts show that the defendant in the case under review, has been a party to contracts or combinations held illegal under most of the foregoing classes, but particularly of forming a trust or combina-

[1] Loewe *vs.* Lawlor (1907) 208 U.S. 274, 28 S.C. 301; 142 Fed. 216, 130 Fed. 633.

[2] American Banana Co. *vs.* United Fruit Co. (1909) 213 U.S. 347; 29 S.C. 511; 166 Fed. 261.

[3] Field *vs.* Barber Asphalt Co. (1904) 194 U.S. 618; 117 Fed. 925.

[4] Hale *vs.* Henkel (1906), 201 U.S. 43; McAlister *vs.* Henkel, 201 U.S. 99; Nelson *vs.* U.S. (1906) 201 U.S. 92; Alexander *vs.* U.S. (1906) 201 U.S. 117.

tion, under (3) above, and thereby, and by unlawful agreements with transportation companies, secured illegal preferences, practically as efficient as a special grant from the government would be; they have been, and have intended to be parties to combinations in restraint of interstate commerce, and have attempted to monopolize, and have monopolized, such trade and commerce. And in this way they have

> . . . Engrossed and piled up
> The cankered heaps of strange achieved gold.

There is not much in the common law rule of reason, nor in the cases reviewed, to furnish much of aid or comfort to such existing institutions as are similar to those that have been challenged in the courts heretofore.

THE LAW OF COMBINED ACTION OR POSSESSION

By Frederic J. Stimson of the Harvard Law School

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I shall consider here the law of combination, whether of persons or of properties or privileges or franchises, and whether such law differs from the law of the acts and possessions of the individual, and if so in what particulars. This subject is the most important law topic to-day; it is one of the very earliest doctrines of the English law, one which distinguishes the early common law from the law of other countries, and yet was recently, or it may be said still is, one of the most forgotten and the most misunderstood. What remained of it in the minds of lawyers, our fathers' contemporaries, was merely the law of conspiracy; usually understood to mean criminal conspiracy, and even in that narrow field regarded as a law mysterious and technical. The common law on the subject became almost forgotten; the early statutes were unknown; and that is why most of our anti-trust legislation, the Sherman Act included, and much of our legislation in the matter of labor combinations, is confused and clumsy and apt to be either unnecessary or unconstitutional. And now we are told by recent discoverers or agitators that the very basis of this law should be changed. It is asserted — not only by Mr. Gompers, but by learned judges, and even by the British Parliament — that modern conditions demand the removal of this entire body of law from our jurisprudence, that is to say, they advance the specious theory that the law of the acts of one should be identical with the law of the acts of many; correspondingly, that the law of the possessions of one should be identical with the law of possessions of many,

even though that many be not natural persons, but corporations or aggregations of corporations, labor unions, or finally, one huge corporation, national in extent, which we call the trust. The recent English Act of Parliament says that no act done or intended, and no combination by a number of persons, shall be criminal or even subject them to damages, when no act actually done by them in the combination is criminal in itself. No one has yet proposed that the corresponding principles should be extended to the field of capitalism — that is to say, that no ownership or combination of capital or corporations should in any way be reprehensible, when its component parts were lawfully constituted. The English statute indeed applies only to a certain class, favored above all other classes in modern legislation; that is to say, the class of those who perform skilled labor with their hands. Such a limitation would, of course, be impossible in this country, but the principle of the supposed reform is specious, and to the unlearned in history and in the essentials of liberty, almost unanswerable. Why should a few men be punished or be liable when no one does anything that is criminal, and even the combination intends no crime?

The answer is, in logic, the tremendous power of combination; in history the whole course and origin of English law; in morals the fact that of all our English law this law recognizes most profoundly the necessary conditions of individual liberty and well being, as well as the principles of the moral law.

Now from the very earliest statutes I shall quote, when the danger of powerful oppressors, combinations of great men against small was recognized and prohibited, to the most modern decision on the boycott or blacklist based on the unwritten common law, we have had the intelligence to recognize and restrain this huge power of combination. Through most of Balzac's novels runs the plot of a combination of only thirteen men and women, who, by the mere fact that there are thirteen combined became all powerful in the political, the social and the criminal world. And it is not sufficient that we forbid such combinations to effect crime. Such concerted action to the injury of an individual in his trade, or even of his good repute may amount to the destruction of his fortune or his happiness. You cannot combine to injure another, even without violence or crime. That is our great principle. I can, of course, dislike a man, I may even wish him ill;[1] I may refuse to buy bread of a baker; I may perhaps advise my friends not to buy bread of him; but when I call a meeting of many or all the inhabitants in my town and we all agree not to trade with him, our united action amounts to the absolute ruin of the baker in question.

[1] A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards. Holmes, The Common Law, p. 110.

I hope I have shown that the law of aggregation, of the action of a multitude and of the possession of many, perhaps to the point of monopoly, is and ought to be different from the law governing the single individual. If I have not done so it is of little use to cite authority; but I will mention that the very latest and certainly not the least profound of our English writers on this subject recognizes fully the position I take. I refer to Professor Dicey of Oxford. He, in his most recent book, Law and Opinion in England, at the very outset of his appendix (which, as Mr. James Bryce once remarked, like a German footnote, is often the best part of a book), puts first and foremost this subject, which he calls "the right of association." It is fully discussed in his text from which I shall only quote two sentences:

> Whenever men act in concert for a common purpose, they tend to create a body which, from no fiction of law, but from the very nature of things, differs from the individuals of whom it is constituted. . . . A body, moreover, created by combination, — a natural corporation, if the expression may be allowed, — whether a political league, a church, or a trade union, by its mere existence limits the freedom of its members, and constantly tends to limit the freedom of outsiders. Its combined power is created by some surrender of individual liberty on the part of each of its members, and a society may from this surrender acquire a strength far greater than could be exercised by the whole of its members acting separately; a disciplined regiment of a thousand men, acting under command, is a far more formidable assailant than a thousand men who even though armed act without discipline and combination.[1]

And in the appendix he says, still more clearly[2] that the right of this exercise of the power of association "raises difficulties in every civilized country. In England, as elsewhere, trade unions and strikes, or federations of employers and lock-outs; in Ireland, the boycotting by league and societies of any landlord, tenant, trader, or workman, bold enough to disobey their behests or break their laws; in the United States, the efforts of mercantile trusts to create for themselves huge monopolies; in France, the real or alleged necessity of stringent legislation in order to keep religious communities (*congregations religieuses*) under the control of the State — in almost every country, in short, some forms of association force upon public attention the practical difficulty of so regulating the right of association that its exercise may neither trench upon each citizen's individual freedom nor shake the supreme authority of the State. The problem to be solved, either as a matter of theory or as a matter of practical necessity, is at bottom always and everywhere the same. How can the right of combined action be curtailed without depriving individual

[1] Dicey, Law and Opinion in England, p. 153.
[2] Ibid. p. 465.

liberty of half its value? How can it be left unrestricted without destroying either the liberty of individual citizens, or the power of the Government? To see that this problem at the present day presents itself everywhere, and has nowhere received a quite satisfactory solution, is of importance."

The importance of this English law of combination is well shown by the fact that the great mind of Napoleon I, or the men he chose to draw the French code, adopted it in full; so far back as 1820 Dane's Abridgment, printed in Massachusetts, tells us that the English law of conspiracy was made French law by the code of Napoleon. Now, what is this law of conspiracy? It is that a *combination of many, not only to commit a crime, or to attain a lawful object by unlawful means, but even a purpose ordinarily lawful for one acting alone, if to the injury of a third party or the State* — to the hurt of the public, or to the coercion of another in his lawful right — is unlawful, void, a criminal offense, and (where such third party or the public is in danger of irreparable injury) may be enjoined in a court of equity; and where it differs from all other common law of private right is in this — that the obnoxious purpose need be, not a criminal offense, but merely a moral wrong.

The Old Law of Conspiracy

The great volumes of Statutes of the Realm begin with Magna Charta as promulgated by Henry III, A.D. 1217; although they also print the Charter of Liberties of Henry I, A.D. 1101; the charter of Stephen, A.D. 1107, and of course the original charter of John, A.D. 1216. Magna Charta contains no special reference to the law of combination; which is natural, as it was but a treaty between the King and his individual subjects. The law of conspiracy is commonly said to be first formally recorded in the Statute concerning Conspirators, of uncertain date; sometimes associated, however, with the statute against Champerty which dates from 33 Edward I; that is to say, 1305. This is early enough to show the respect to which this ancient law is entitled; for no statute of importance preceded 1305 except the great code of Westminster I and the statute of Mortmain. Cobbett in his history of the English Parliament makes no reference to this statute, not realizing its importance. It is indeed only aimed at conspiracies with the object of maintaining lawsuits, but nevertheless it is a criminal statute, and the word "engine," that is to say, fraud, is used in the preamble, thus establishing from the very start that a combination with a perfectly lawful purpose (for a lawsuit is, of course a lawful purpose), but with the intent to injure some one, as by a lawsuit based on a false claim, is a criminal offense; and furthermore that the intent is material. A special writ is given, entitling it a plea of conspiracy and trespass; and "if any man be convicted under such

writ he is to be imprisoned until he hath satisfied the party aggrieved and paid a fine to the King." Note that it refers to conspiracy as an offense or action already well known in the law. Like all early statutes it probably merely imposes a new and severer penalty on a common law offense and is irrefutable evidence of what the law already was. But five years before this, 1300, the Articles upon the Charter, of the 28th Edward I, state that the King hath provided a remedy against "conspirators" by special writ. There is no definition of the phrase, so it is quite clear that it was familiar and well understood in the year 1300. Then in 1330, the 4th of Edward III, the preamble of Chapter 11 says: "divers People of the realm, as well great men as other, have made Alliances, Confederacies, and *Conspiracies* to maintain Parties, Pleas and Quarrels, whereby . . . some have been destroyed, and some *for fear to be mained and beaten durst not sue for their Right* . . . to the great hurt of the People and Common Right." A substantially fair definition of the modern wrongful boycott. Fourteen years later another statute speaks of conspirators and confederators, and gives the writ of exigent against them. Then the first great statute of the Staple, 1353, states the law to be: "ordained and established that no Merchant or other shall make Confederacy, Conspiracy, Covin . . . or evil Device . . . to the . . . Disturbance, Defeating or Decay of the said Staples"; that is to say, there must be no combination in restraint of trade at a staple town or in the staple market. The word "Covin" implies *intent*. Finally, that the history be made quite complete, having already got our conspiracy in restraint of trade, we now have a statute recognizing conspiracy in labor matters; by the 34th of Edward III, Chapter 9, A.D. 1360, certain wages are fixed, and "all alliances and Covins of Masons and Carpenters, and Congregations, Chapters (that is to say, trade unions), Ordinances and Oaths betwixt them made or to be made, shall be from henceforth void and wholly annulled; so that every Mason and Carpenter of what condition he be, shall be compelled by his Master to whom he serveth to do every work that to him pertaineth to do, or of free stone or of rough stone; and also every Carpenter in his degree; but it shall be lawful . . . to make bargain or covenant of their work in gross," — that is to say what we should call piece work, or contract work, is allowed.

We thus see the whole law of combination as I have stated it completely set forth in statutes of the Fourteenth Century, between the years 1305 and 1360, and we have a perfect example of a statute aimed against, first a conspiracy to maintain a lawsuit; then against a conspiracy in restraint of trade, the origin of the criminality of the modern trust; and finally, against a conspiracy of laboring men, with a quite satisfactory definition of the boycott and its evils. Only, with true modern leniency, the laborers "shall not be punished by fine and

ransom"; although indeed they may be imprisoned if they refuse to work, according to the Statute of Laborers; that is to say, conspiracy of laborers is not made a criminal offense, but only null and void in the law, and — injunctions not then existing — a remedy for enforcement somewhat similar to the injunction is provided.

Blackstone wrote on this matter with substantial correctness, although it is apparent that he did not take the pains to study these early statutes. His ultimate definition is found in his book on criminal law, Vol. IV, p. 136. He speaks only of conspiracy to indict an innocent man of felony, and mentions that there must be at least two to form a conspiracy. But Judge Cooley's footnote states the whole common law as shown in Hawkins' Pleas of the Crown — "all confederacies wrongfully to prejudice another are misdemeanors at common law and indictable accordingly, whether the intention is to injure his property, his person or his character," and "the offense of conspiracy is not confined to the prejudicing a particular individual; it may be to injure public trade, to affect public health, to violate public policy, to insult public justice, or to do any act in itself illegal. There are many cases in which the act itself would not be unlawful if done by a single person which become the subject of indictment when committed by several with a joint design"; and he quotes from the Term Reports and Campbell the instances of two or more persons agreeing to hiss an actor at a theater, by preconcerted plan, or when several unite in a scheme to blast the character of another, though the oral slander of a private individual is not indictable, and the offense depends on the unlawful agreement, and not on the act which follows it. On the other hand it is no offense to conspire to prosecute a guilty person; and this is shown in a better instance than that cited by Judge Cooley, for the earliest instance of conspiracy in the State Trials is that of 1588 where certain adherents of Queen Elizabeth conspired to bring to judgment certain persons adherents of Mary Queen of Scots for combining to dethrone Queen Elizabeth and put Mary in her place. Throughout this entire report, which is extremely interesting, it is perfectly evident that never for one moment do they consider the combination of Queen Elizabeth's friends a conspiracy, while the combination of Queen Mary's friends was so declared, and led to the conviction, and death not only of the persons involved but of Mary herself. In Viner's Abridgement my exact instance is cited, of a conspiracy not to buy bread of a certain baker. The other justices of King's Bench seem to hold that there must be an overt act to make such a combination indictable; but even this is vigorously denied by the Chief Justice.

But if there were any doubt about the ancientness of the law of conspiracy it would be solved at once by the Abbot of Lilleshall case, which was actually decided in 1221, eighty-four years before the first

Statute of Conspiracy was enacted; first printed by the Selden Society in 1870, it is a perfect instance of the medieval boycott, well worth being quoted in full:

> The Abbott of Lilleshall complains that the bailiffs of Shrewsbury do him many injuries against his liberty, and that they have caused proclamation to be made in the town that none be so bold as to sell any merchandise to the Abbot or his men upon pain of forfeiting ten shillings, and that Richard Peche, the bedell of the said town, made this proclamation by their orders. And the bailiffs defend all of it, and Richard likewise defends all of it, and that he never heard any such proclamation made by anyone. It is considered that he do defend himself twelve-handed (*i.e.* with eleven compurgators), and do come on Saturday with his law.

This is a remarkable report; for in twelve lines (ten lines of the law Latin) we have here set forth all of the important principles of the law of boycott. The Abbot complains that the Shrewsbury people do him many injuries "against his liberty" *i.e.*, the Abbot claims a constitutional right to freely conduct his own business; then we have the recognition of the threat of a boycott as a particularly illegal act: "They have caused proclamation to be made that none sell merchandise to the Abbott." The defendants admit the illegality of their conspiracy, because they deny it as a fact; and the bedell likewise denies that he ever made such a proclamation or threat, whereupon (the plaintiff being a man of the Church) they are set to trial by wager of law instead of by actual battle, neither party nor the court making any question of the illegality both of the conspiracy and of the act complained of.

What is particularly to be noted is that in every one of these statutes and the earliest cases cited, it is the intent that is elemental. And the defendants in the Lilleshall case themselves admit, that were it true they had combined with the intention of injuring the Abbot, it would have been a criminal offense.

Monopoly

The law of monopoly, resting also on combined action with a common purpose, is based largely on the same principles. A great mine of information on this point is to be found in the Great Case of Monopolies, argued in 1684 during many months and reported in full in the seventh volume of State Trials.[1] All the lawyers who were or became Chief Justices of England at that time were concerned in this great cause. It was brought by the great East India Company against a merchant, one Sandys, who had freighted a ship for East India ports in contravention, as it was claimed, of the charter of the

[1] P. 513.

company granted originally under Elizabeth, which gave them a monopoly of the trade in the Indies. Had the case been decided against the company it would have put an end to the English Indian Empire in India. Sandys defended on the plain ground that the grant was a monopoly in contravention of the common law. The company only sued on the case for one thousand pounds damages, although no specific remedy or penalty was provided in the grant to the company; just as a man might sue to-day a trust which had injured him, even though no specific damages were allowed by the statute. They won. The court admitted that the common law made grants of monopoly in English trade void, but they said this did not extend to foreign nations, particularly heathen nations; that, as the Crown might prohibit all such trade, to prevent possible corruption of the manners and morals of England by intercourse with heathens, so the King might grant a limited permission or grant the monopoly of said trade to one company, or to certain specified persons. On the other hand, Sandys relied on the old Statute of Edward, 18 Edward III, chap. 3 "that the Sea be open to all manner of merchants to pass with their merchandise where it shall please them" — upon this the plaintiff's demur. Holt, afterwards Chief Justice, made a wonderful argument against the monopoly, curiously modern in thought; much of it indeed might have been quoted in the brief against our Standard Oil company. Here are a few of the interesting matters he cited. First the case of the King against Crispe: "Here was lately an agreement between copperas makers and copperas merchants for the buying of all copperas; and that these copperas makers shall for three years make at so much a ton, and restraining them from selling to others." This was held to be criminal engrossing. But long before this he cites the case of one Peachy, in the 50th of Edward III, A.D. 1375. Peachy, he tells us, by Royal grant was given a monopoly of selling sweet wines in London; he did so and was punished for extortion, just as if it were claimed and proved that a modern trust sold its goods at an exorbitant profit by reason of its monopoly, — and the Royal grant did not protect him. The case also cites [1] the famous case of the Tailors of Ipswich,[2] — "A company of tailors made a by-law to exclude tailors from exercising and using their trade within the town unless they present themselves to the masters and wardens of the company and are admitted as members." This by-law was held void, the court saying — "ordinances for the good government of men, of trades and mysteries are good; but not to restrain any in their lawful mystery"; and they refer even to the monopoly held by physicians, and say — "The patent to the College of Physicians that no person shall practice physic without their license would have been void had it not been confirmed by act of Parliament, yet this con-

[1] P. 520. [2] 6 Coke.

cerned not all the subjects of England and is a mystery, and the professors thereof fit to be approved by persons of skill in it." [1]

Here we have a complete review of the common law of monopoly and of monopolistic combinations both by an individual (Peachey's case), by a company of manufacturers (King against Crispe), by a company of industrial workers, what we should call a trade union (the Tailors' case), and finally by the members of a skilled profession. It is so complete that nothing need be added; and we see that the question of the intention runs throughout them all.

The Modern Law

So much for the antiquity of the law, but in these days we must be prepared to admit that no law however ancient can be justified by that alone unless it appeals to modern reason. The next thing therefore to consider is what other tests of the unlawful combination, either of labor or trade may be imagined; and whether such other tests would on the whole work better than the test of intention.

So far as I am able to find but two others have been suggested: One is the familiar one of the effect or the result, that is to say, if the result be unlawful or against public interest, it may render unlawful the combination bringing it about. Now this precise question was recently asked by one of the Justices of the Supreme Court of the United States to one of the Counsel arguing for the government the case against the Standard Oil Company. Mr. Justice White asked Mr. Kellogg whether, if the Standard Oil Company had in fact acquired every oil refinery in the State of Pennsylvania, that fact would have made it an unlawful combination there. Mr. Kellogg for the moment did not give a definite answer, but the Attorney General in his close took up the question, taking the ground for which I contend that it was one of intention and not of result. The old New York anti-trust statute was based upon the latter notion, and consequently was never effectual; it provided in substance (for, being a criminal statute, it had to be construed strictly) that when any combination brought about a monopoly, that is to say, an actual or complete monopoly of a trade in the State of New York, it should be an unlawful trust under the New York statute. As it was obvious that no trade, in fact, ever did succeed, not even the Standard Oil, nor the sugar, nor any other trust, in actually getting a hundred per cent monopoly, that test proved a failure, and no one was ever convicted.

I believe that the question of complete monopoly or the ultimate effect has nothing whatever to do with it except in so far as it may be evidence of the probable intention of the conspirators at the inception of the combination. It is to me perfectly clear that I may

[1] Williams, *arguendo*, p. 548.

obtain, with one or more associates, an actual, complete, impregnable one hundred per cent monopoly, and yet be perfectly within my law; on the other hand I may combine with two or three or more with the intention of restraining trade, of getting a monopoly, of destroying competitors, and ours will be a criminal combination though we fail in our purpose as rapidly and completely as did some of the earlier trusts, for instance the cordage trust, which only lasted a year or two before it went down in utter smash. If I happen to own, let us say, the only cordage works, at Plymouth, in the State of Massachusetts, except a small concern, let us say, at Newburyport, in the same State, I have a perfect right to buy out my competitor, there being no unfair act committed. I am inclined to think even that I and my competitor may form a consolidated cordage company and, failing evidence to show that we intend then or ever to get a monopoly by fair means or foul, we are within our right; that is to say if our motive is merely that of making a bigger concern or securing a profitable bargain. That motive being perfectly lawful will make our combination lawful. In other words it grows out of the natural relation that I have to my neighbor, whose property I purchased. And this brings me to the third and most modern test, which I mention merely because it is advanced in the most recent textbook, the work of Mr. Cooke of New York — Combinations, Monopolies and Labor Unions. In his preface he rejects the old test, for which I am still contending, of intention; but it appears from the context that he objects to it principally because it has been repealed by the modern English statute, the Trade Disputes Act of 1906. Now what we may do by statute is one thing. Mr. Gompers has been trying for thirty years to get that English statute and its predecessor, the Conspiracy and Protection of Property Act, 38 and 39 Vict. c. 86, adopted in the United States, but has only succeeded in the States of Maryland, California and Oklahoma. His bill to adopt the English statute has been pigeon-holed in Congress for a generation. However, he is entirely within his rights in leading the agitation, and we may, of course, enact such statute yet if we deem it wise, and if the statute would be constitutional. Fortunately or unfortunately it would not be, for it is the clearest kind of class legislation; and that I take to be forbidden, expressly or impliedly, in every State Constitution in this country, except perhaps that of Oklahoma, as well as by the clear implication of the Fourteenth Amendment.

The point we are discussing is not whether we should alter the ancient common law of combination, or whether such alteration would be constitutional, but what the law in fact is, and whether it is a reasonable law to-day. Now Mr. Cooke advances the test exploited by the famous case of the Mogul Steamship Company *vs.* McGregor — "the natural incident or outgrowth of some lawful relation," and

he says the three relations he specially considers are those of trade competitor, of employer, and of employee. In his lack of interest in our "mass of anti-trust legislation" as clumsy and unnecessary, I have every sympathy, for I hold it to be unnecessary, and we both hold it to be clumsy; but when he calls the common law also clumsy and a worse than useless medieval survival, I cannot follow him. Yet I do not feel that we are so far apart, in fact only that we do not give the same reasons for our opinion. I think the common law theory, or what I believe to be the common law theory, arrives at the right result, by saying that a combination, to quote Mr. Cooke's words, which arises naturally out of a relation of trade, such as the purchase of an adjoining business, is lawful, for the very reason I have alleged; that its first motive is the necessary development of business, arising naturally and normally, and that the indirect result, of restraining trade, or even getting a monopoly of it, is not the *first* thing contemplated, and consequently not, under my test, the intention of the combination. This I take it to be the law of the Mogul case. It was English law in the twelfth century, and it is American common law to-day.

The Present Question

Having thus stated the thesis which I wish to defend, I will ask now, consider first, the past history of our laws; then the reported cases, and finally pass to apply our test to the great questions of to-day. I have already said that I stand by the old common law test of intention, intent; a test neither unusual nor difficult for a jury to apply, for it is universal in the criminal law, substantially recognized in Mr. Justice Holmes' book on the Common Law, and universally, I think, recognized in the oldest evidence of the law we really have — namely, the very old statutes of England. For the Reports of cases begin one or two centuries later, and we must always be on our guard against the tendency of judges to be over learned, to base the English common law upon the logic of the mind rather than the logic of events, and most of all to impart into England the Roman law. I could show statute after statute in Anglo-Norman reigns which is aimed against the Roman law, and even against the Courts of Chancery and the Church Law, its offshoots, and even a statute which forbids the Roman law to be cited in the courts; another which complains of the number of Italian clerks (clerics) brought into England and of their teaching; and finally at the beginning of every reign, each king solemnly promised that the English law, that is, the law of Edward the Confessor, should be restored, and should be recognized independently of any Roman innovation. For the Roman law was only rediscovered to the world by Pisan pirates at Amalfi in 1135, and of

course, this wonderful system spread among the learned and dazzled them with its logic. So that judges in rendering their opinions from the bench delighted in finding a reason, logic, and a Roman law basis or precedent for the very oldest institutions of the Anglo-Saxon common law. And this has lasted down to modern times. There are plenty of learned writers, the successors of Austin and others, who still so maintain. Spence, even, admits that modern English law is almost as much Roman as English. But the only point I wish to make is that we must beware of the subtleties of judges in their opinions; and perhaps of that school which seeks to find in all cases a deep law logic reason for an ancient customary law. Even the book of Mr. Justice Holmes, perhaps our leading writer on this subject, and the more recent book by Professor Gray, give many pages to profound speculation and analysis of the logic of decisions; but the early common law did not grow that way. It was the ancient and customary law of the people; the evolution of the totality of their lives and customs, only in comparatively recent times it became subject to the accretion of more judicial opinion and of "judge-made law."

The common law, therefore, was that a conspiracy, an unlawful combination, is a combination of two or more persons (and they must be two); it has been decided that a husband and wife cannot form a conspiracy, (1) with a criminal or unlawful purpose, aim or intention; (2) or a lawful purpose, which by intention, or necessarily, has to be attained by unlawful means; or (3) for a purpose morally wrongful as is the injury of a third person or the State. And no overt act alone makes a conspiracy nor is one necessary to a conspiracy, except merely as evidence under the last two varieties, that is of a combination intending unlawful means or merely wrongful ends. It is, of course, this question of the moral purpose, the doing unto others as you would not be done by, that is the very distinction, it seems to me, of this English law; a distinction so high that it has been admired and copied into the codes of most modern civilized countries as completely as the institution of trial by jury; and this principle is not based upon recent cases alone. I have no intention of going into the thousands of decisions upon the modern strike, the boycott or the blacklist, or the acts of intimidation and picketing, or the combinations in restraint of trade. But I will mention what appear to be the boundary cases, for we know it is the nice decisions, the border cases, that draw the line of the law.

I assert that in this law of combined action, the law goes into the domain of morals and of high constitutional right, and that it ought to do so. The opponents of the theory base their opposition on the fact that the law does not do so in similar cases of individual action or possession — which I admit. The friendly critic might ask, why not? To this I can only answer that it is practically impossible for

the law to refine upon private motives to this extent. Where an individual commits an act that is criminal the law can find him guilty; when he commits a tort upon his neighbor, it may give that neighbor damages and the very fact that this already is going a step farther is shown by the far greater difficulty that law of tort gives to Holmes,[1] Gray and other students of the logic of the law than the question of crime; but when you go beyond even tort, which after all is a definite tangible injury to a definite person under old common law theories of personal trespass or negligence, and come to that injury which is mere malevolence accompanied by an action otherwise perfectly lawful, it is a matter for the priest, for the confessor, for a man's conscience, not for the law. A simple example again is, of course, my engaging in a trade or in refusing to trade with some individual; in both cases really for the purpose of injuring that individual, but otherwise entirely within my lawful rights. My act, in other words, on its surface lawful and regular, deep in my conscience is dictated by hatred. The law cannot go into one man's conscience; we have been claiming only that it might, or that a jury might, judge of the consciences of two or more persons working together; for the *object* of their getting together is a matter of which a jury well may judge.

Yet there are cases which come very near to this — extreme cases of individual action; and I will mention four or five; one very old and the others very modern. No better case illustrating my doctrine of combination can be imagined than that one in the State of Ohio, decided only last year, when a number of persons combined to draw their deposits from a bank on the same day for the purpose of breaking that bank, and that purpose having been duly found by the court or a jury, it was declared a conspiracy. Of course the law is a creature of common sense besides custom, and while all conspiracies are in my opinion technically criminal, it is conceivable that they will range all the way from those highly so, down to those where a criminal punishment would hardly be imposed. The law will rest content with a civil suit for damages or even, as in the anti-trust common law of England,

[1] "Our system of private liability for the consequences of a man's own acts, that is, for his trespasses, started from the notion of actual interest and actual personal culpability." Holmes, The Common Law, p. 4.

It is important to note that this law of conspiracy has no connection whatever with the common law of tort; that is to say, it springs from another and a different route; it is indeed more ancient doctrine than that of torts, which did not assume its present shape before the fourteenth century. The earliest case of tort I find in Professor Ames' collection dates only from 1348. The notion of responsibility of a person for a tort not amounting to a crime in a court of law is, therefore, considerably later than the doctrine of conspiracy, as shown at least in the Statute of 1305 if not before.

Certain modern cases quoted in the text (and a few more might be added) lean strongly to the doctrine that an individual may recover damages from another individual for an act otherwise lawful, but prompted solely by malice. There seems to be a sudden development of the law that way; but such was not until to-day (if it be to-day) the law. The writer makes no plea for such a change; all the doctrine contended for in the text is confined strictly to the law of *combination*.

with merely declaring the combination void at law, such as all contracts which were simply in restraint of trade. But there are cases which almost seem to apply this law of unmoral purpose to individual action. First of all is the very old case of Tarlton *vs.* McGawley.[1] That was a case where a slave trader having his ship off the coast of Africa had collected a tribe of negroes upon the beach for the purpose of enslaving them; but a competing slave trader came up with another vessel, and in order to destroy his competitor's trade fired a cannon with the intention of scaring the negroes on the beach so that they ran away into the woods and escaped. One or two were killed or injured but there was no trespass committed upon the defendant. The point that slave trading was an immoral occupation in itself was of course not raised in those days; yet this perfectly lawful act was held to give the owner of the vessel the right to damages when he got back to London.

Wyeman *vs.* Deady[2] was a Connecticut case where the plaintiff got damages against defendants for procuring his discharge by intimidation of the employer. The element of conspiracy was said by the court not to be in the case. So in Brennen *vs.* United Hatters,[3] the plaintiff recovered damages from the Hatters' Union because he refused to pay the fine and they took away his membership card which resulted in his discharge by the employer, and the court go to the length of saying that malice is the intentional doing of a wrongful act without justification and a wrongful act is an act, which in the ordinary course will infringe upon the rights of another. But perhaps the most extreme modern case, almost going back to the old case against McGawley, that of the slave trader, is the Minnesota case of Tuttle *vs.* Buck,[4] where the defendant, not a barber, but a banker, established another barber in the town for the purpose of competing with the plaintiff, who had been for some years established as a barber in the same village. It was alleged that this was done with the sole purpose of destroying the plaintiff's business, and not for any legitimate interest of the defendant, and the plaintiff, although the court was evidently in some doubt, got damages under a divided opinion. Finally there was also a Louisiana case where the proprietor of a barroom recovered damages against the superintendent of a street car line for advising the car conductors and drivers not to patronize his saloon.

These are examples of cases brought against individuals not in conspiracy which seem to me to go to the extreme limit of the law.

Let us now close by applying our principle to modern cases of combination; one of labor and one of capital. If our test is of any value it should stand application to the very most recent and most important controversies now before the public, and we will take as examples —

[1] Peak, N. P. C., 170.
[2] 65 Atl. 129.
[3] 65 Atl. 165.
[4] 119 N. W. 946.

but merely as examples, for the cases are still *sub judice* — the great Government suit against the Standard Oil Company on the one hand and the contempt process against Messrs. Gompers, Mitchell and others in the Buck Stove and Range case at Washington, D.C., on the other.

In the first place we must recognize that serious difficulty arises from the fact that we are acting under a statute, at least in matters of interstate commerce, the Sherman Act of July 2, 1890. At common law a combination in restraint of trade or a monopoly by royal grant were both void; no contract under them could be enforced; and by the Statute of Monopolies any person injured might bring a common law suit and recover treble damages; indeed it appears from the East India case that this was common law without the statute. No machinery of government interference was provided; the tremendous power of the government was not employed like a club to destroy the business and all that it represented; it was always, under common law principles, a lawsuit between individuals.

The contract or combination might indeed be held void as against the suit of any third person aggrieved, or against the defense of a party refusing to be bound by it, but there the matter ended. Now our Sherman Act goes beyond the common law in two particulars: First, the familiar one that on its face it forbids *all* contracts in *any* restraint of interstate commerce, even a reasonable one; and secondly, and quite as important, that instead of leaving the matter to individuals it is made the duty of the Government, through any District Attorney, to institute proceedings in equity to prevent and restrain such violations.[1] All property owned under any such contract or combination, being transported from one State to another or from a foreign country, may be seized and forfeited; and then follows the common law provision of treble damages to the individual injured.[2] It is furthermore[3] made a misdemeanor for any person to engage in such combination or make such contract. The Act, of course, applies to corporations and is called "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies." Section one names particularly contracts in restraint of trade, and punishes persons engaged in such; and section two is addressed to persons who monopolize or attempt to monopolize or combine to monopolize any part of such interstate trade. It was apparent in the argument before the Supreme Court that both bench and bar had some difficulty in seeing what new thing section two added to section one, and yet they were bound to find such additional meaning if possible. Where the statute transcends or contradicts common law is well shown in section one where "every contract, combination or conspiracy in restraint of trade" is denounced. But a combination in restraint of trade is by the definition of the

[1] Sherman Act, Sect. 4. [2] Ibid. Sect. 7. [3] Ibid. Sect. 3.

common law a conspiracy, so this is tautologous, while the words "every contract" in section one, with the words "any part" in section two, have forced our courts to denounce contracts in restraint of trade, or combinations, which at the common law would have been reasonable growth and not monopoly.

But to my mind the innovation of the remedy is more important still. Mr. Johnson, in arguing for the Standard Oil Company, urged at least that they be punished only for what they had done wrong, and not totally destroyed. But the sledge hammer of government prosecution cannot stop short of destruction. No other penalty is provided. And a still more important consequence of using this direct prosecution by government in a court of chancery is that there is no jury trial of the facts in the locality where they happened. It practically comes to an attempt by the Supreme Court to decide what is peculiarly a question of fact, on a written record, which did indeed, I believe in this case, amount to twenty-seven printed volumes. But the question of intention and of the reasonableness of ordinary business matters is peculiarly adapted to be tried by a jury of the people in the locality affected. Under the Sherman Act our highest tribunal is deprived of this assistance. Furthermore the difficulty of discriminating between "good trusts and bad trusts" is enormously more difficult for a high court of appeal in a hearing on a bill in equity than it is for a jury in a common law suit for damages. However, leaving the essential difficulties of interpreting this Act of Congress with this brief mention, let us now try to apply our test, — which is after all I think, the test intended by the Sherman Act as I believe it to be, — the test of the common law.

In the Standard Oil case the question would be — was the combination actually complained of in this suit (which might, of course, be the original Trust agreement, or a later combination of corporations, or, finally, the articles of association of the Standard Oil Company of New Jersey itself) created with the intention and the aim of restraining trade in any of the many forms of such restraint, as by fixing prices, limiting output, parceling territory, or even unfair competition, the destruction of competitors by artificial underselling, or finally, with the intention and aim of establishing a Federal monopoly. No amount of reasonable acquisition without such malign purpose and with no evidence of any malign act, no amount of acquisition of more refineries, pipe-lines, fleets of ships, would in this test of itself amount to evidence of a criminal combination; even though the result, either by larger ownership or greater ability, might in fact be to get a very large percentage of the business of refining and shipping oil. On the other hand, if the jury found, — and now the court must act as a jury, — that the intention of the contract or combination or charter complained of was to bring about a national monopoly (and any one of

the above enumerated acts of restraining trade would be evidence of such intention), then a jury might find the contract or combination void; and so a State court, of intrastate combination, under the common law.

It is of course possible, if not probable, that our high court has no doubt of the law, but it is more than likely that they have a doubt of the facts, sitting merely as an appellate court of chancery with no jury to aid them.

Coming now to the Buck Stove case, the same principles apply. I leave out that part of the argument of counsel for Mr. Mitchell and Mr. Gompers, which is based on the claim that their right of the freedom of the press is infringed, for that brings up merely the constitutional question of whether the freedom of the press in our written constitutions means more than, as in England, the right to publish without preliminary censorship, being responsible for such acts of publication in the common law courts, in any ordinary way. It is lawful, for instance, to walk upon the highway, to exercise the right of free locomotion, yet there have been many injunctions where a congregating upon highways, or even the right of free locomotion in certain places, has been restrained. But the test of intention, it seems to me, works as well here as in the other case. The plaintiff claims that there is a combination to boycott his business, with one overt act. The evidence of such combination is the printing of his name weekly on the "Unfair List" of the official journal of the Federation of Labor, coupled with the expressed intention of going on so to print it in every journal until the plaintiff yields. The first question is simply whether there was a combination with the intention of controlling the plaintiff's lawful liberty, and of injuring, boycotting or destroying his business. That fact seems to be admitted; then the same question will arise as to the intention of the publication which is the cause of the sentence for contempt. Mr. Gompers himself asked me whether he had not the right to print the fact that there was a trade dispute with the Buck Stove Company in his own newspaper as part of his right to freedom of the press; I said "certainly you have. You can print it once at least as matter of news; you can doubtless comment upon it in your editorial column; but when you print it in every issue for a year or five years, and moreover, state that you intend to go on printing this Unfair List until the Buck Stove Company yields, it will be a question of fact whether you are printing that as matter of news, or as a threat, a boycott; the act of a combination with an unlawful aim." It may be difficult for us, for you and me or for lawyers to decide, but such cases are very often much more simple to a jury of common-sense men. Go before that jury if you can. If they hold that it is a matter of recurrent interest, of news, that you should print every week a story about this trade

dispute, they will so find. If, on the other hand, they see that it is part of an organized attempt to destroy the plaintiff's business, especially when coupled with a threat of continuing this printing forever in the editorial column, and not mere matter of news, they will probably find the other way.

I conclude, therefore, that we should think long and carefully before we abandon this great principle of our English law preventing the oppression of the individual by the multitude, and, in the law of combination, going directly to the ethical motive of the combine. It has been a commonplace of laymen critics that the law is not moral, — that it does not go into the higher issues, — that it is easy to keep within the letter of the law while morally guilty to one's neighbor or to the State. This is *not* true of our law of combination. Let us, therefore, not carelessly give up this one great domain of the law of private right, which, based both on our English history and the profoundest laws of economy at the same time, rises to the highest standard of duty to one's neighbor and to the State; the one great body of the common law based squarely on the Golden Rule.

STATE CONTROL OF PUBLIC UTILITIES [1]

By Bruce Wyman of the Boston Bar

(From the *Harvard Law Review*, June, 1911)

The Public Service Corporation has been placed quite completely under the regulating powers of the State, principally under the theory that it is a "business affected with a public interest." — Editor's Note.

I

The difference between public callings and private business is a distinction in the law governing business relations which has always had, and will always have, most important consequences. Those in a public calling have always been under the extraordinary duty to serve all comers, while those in a private business might always refuse to sell if they pleased. So great a distinction as this constitutes a difference in kind of legal control rather than merely one of degree. The causes of this division are, of course, rather economic than strictly legal. And the relative importance of these two classes at any given time, therefore, depends ultimately upon the industrial conditions which prevail at that period. Thus in the England which we see through the medium of our earliest law reports the medieval system with its

[1] — being in large part the Preface to Wyman on Public Service Corporations, reprinted by permission of Baker, Voorhis & Co.

established monopolies called for the legal requirement of indiscriminate service from those engaged in almost all employments. There followed in succeeding centuries an expansion of trade which gradually did away with the necessity for coercive law. Indeed in the early part of the nineteenth century, free competition became the very basis of the social organization, with the consequence that the recognition of the public callings as a class almost ceased. It is only in very recent years that it has again come to be recognized that the process of free competition fails in some cases to secure the public good. And it is now reluctantly admitted that state control is again necessary over such lines of industry as are affected with a public interest. Thus with varying importance the distinction between the public callings and the private callings has been present in our law from the earliest times to the present day.

II

Some restraint has always been exercised over such lines of industry as are of vital interest to the public. The establishment of the peace, the protection of the weak against the physical violence of the strong, is a fundamental function of government; but of equal importance and of almost equal antiquity is the protection of the common people against the greed and oppression of the powerful. In matters not vital to the life and well-being of mankind the laws of society may be left free to operate without limitation by the sovereign power; but in all that has to do with the necessaries of life the protection of the sovereign is extended. The modern state protects equally against physical violence and against oppression that affects the means of living.

As a result of an economic evolution there have come into being in the last generation a considerable number of employments which have gained, if not a legal monopoly, at any rate, as a result of circumstances, a virtual monopoly in matters of public necessity. The positive law of the public calling is the only protection that the public have in a situation such as this, where there is no competition among the sellers to operate in their favor. So much has our law been permeated with the theory of *laissez faire*, which was but lately so prominent in the policy of our state, that the admission has been made with much hesitation that state control is ever necessary. But the modern conclusion, after some bitter experience, is that freedom can be allowed only where conditions of virtual competition prevail, for in conditions of virtual monopoly, without stern restrictions, there is always great mischief.

It has been remarked many times that the common law may be relied upon to meet, by the continual development of its fundamental principles, the complex conditions created by the constant evolution in the industrial organization. One of the most striking of modern

instances of this capacity of growth in the common law is the astonishing progress in the working out of the detail of the exceptional law governing the conduct of public callings. In recent times there undoubtedly is an increasing need of this stricter regulation of all employments which appear to be affected with a public interest. Great power brings as its consequence the need of control of that power for the good of the whole people.

III

Whether a business is public or not depends in last analysis upon the situation of the public with respect to it. Are there enough of such purveyors to serve the public? or are there, for permanent reasons, never enough? If so, there will be virtual competition; if not, there will be virtual monopoly. It will be found that, in all such businesses, competition, although from a legal point of view possible, is from the economic point of view improbable. So far as one can see, virtual competition is at an end in these industries, and virtual monopoly will henceforth prevail. Therefore it must be said that the public has now an interest in the conduct of these businesses by their owners. They are affected with a public interest, since these agencies are carried on in a manner to make them of public consequence. Therefore, having devoted their property to a use in which the public has an interest, they in effect have granted to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest they have created. Plainly we have in the accepted use of these phrases the manifestation of a deep-seated change in habits of thought. Only twenty-five years ago the general feeling as to every sort of industrial relation was that it was better to leave all alone, that it was better to leave people to work out their own salvation. But of late years we have been calling upon the state to save us from monopoly in all its forms; and we are impatient if it delays.

The present situation is plain enough to all of us. Whatever way we turn we depend upon a service that is public in character. Not only in long travels but in short journeys we employ common carriers — railroads and steamships, coaches and cabs, street cars and omnibuses, the subway car and the elevated train. If we ship goods there are various transportation services at our disposal beside railroads and ships, such as express companies and dispatch lines, refrigerator lines and tank lines. If we are journeying ourselves we eat at hotel restaurants, and put up at public inns, or travel in palace cars and lodge ourselves in sleeping cars. Our freight in its transit has its needs attended to — for our goods, warehouses, for our grain, elevators, for our cattle, stockyards, and for our exports, docks. In

almost every community, even relatively small, we have for our household needs gas, electricity, water supply and sewerage service provided for us, usually, except the last two, by private companies in public service, but even where the service is provided by the municipality it is subject to the same law governing public service. For speedy communication in our business and pleasure, we have the telephone and telegraph in common use, and ticker-service and messenger call for special needs. One may judge by this incomplete list how common to every part of our modern life are the various public services, and how necessary it is that they should be required by law to serve us all with adequate facilities for reasonable compensation and without discrimination.

IV

The spirit of our present age demands that these great business enterprises shall be conducted in accordance with the requirements of society. The present program of organized society is to see to it that those who have gained a substantial control of their market shall not be left free to exploit those who look to them to supply their needs. Men now see clearly that freedom of action may, even in the industrial world, work injuriously for the public; and it must then be restrained in the public interest. We have seen the results of unrestrained power; and we no longer wish those who have control over our destinies left free to do with us as they please.

While state regulation is the prevailing philosophy of the people at the beginning of the twentieth century, it must be borne in mind that this has been the result of a gradual progress of thought, and that this progress has not affected all men equally. Now, as at all times, there are conservatives and radicals, the former as far behind the prevailing spirit of the time as the latter go beyond it. In every change of popular thought there have been those who have been unable to appreciate the change; and in every such change there have been those who are unable justly to estimate the true meaning of the change.

Many persons still hold conservative views as to the application of the law of public callings to modern conditions. They believe that the conductors of every business, however necessary to public welfare, should do whatever seems good in their own eyes. But the most of men appreciate that the law has already taken control of the situation for all time. It is hardly too much to say that the efficient regulation of the public employments by sufficient law is the most pressing problem confronting this nation; and it must be met without further hesitation.

V

In this crisis of affairs the people must be assured that the law is adequate to deal with the situation, that it has not only elaborated

detail to meet obvious wrongs seldom defended, but also enlightened comprehension to deal with the large policies openly justified, which are truly inconsistent with public duty. That those who profess a public employment owe the utmost public service should be generally accepted as the fundamental principle upon which the law governing public employment is to be based. It is not agreed, however, how far this principle should be pressed; there is a clash of interests here, and there is an inclination on the part of those who conduct the public services to contest every issue. This is not even an enlightened selfishness.

The time has come when extension of the law and enforcement of it should be the avowed attitude of all conservative persons who wish the perpetuation of present conditions. It would be well, therefore, if the restless and the doubting who see many abuses and many wrongs in the conduct of our public services without prompt remedy or adequate redress, might be relieved and heartened by being shown that the common law is adequate to deal with all real industrial wrongs, and that with the aid of remedial statutes the administration of the law can be relied upon. The proprietors of the public services should be told sharply that they may not adopt, to the prejudice of their public, various profitable policies, and then justify them as inherent rights which other men in ordinary business may use in the advancement of their interests.

There is now fortunately almost general assent to state control of the public service companies. Two ways only can be found to exercise such control. One way, that advocated by the most radical statesmen, is the government ownership and operation of these services. The other way, which is in fact the conservative method of dealing with the problem, is the control of the rates and practices of the utilities for the public good. One or the other of these methods must be finally adopted. The conservative method is now on trial. It behooves the lawyers to see to it that it be so intelligently tried, and that the law applicable to the case be so accurately enforced, that we may not be driven perforce to the radical alternative of public ownership.

VI

All businesses both public and private are subject, to be sure, to that general police power of the state whereby in any civilized society the effort is made so to order things that one may not use his own so as to injure another. But the comparison of the large amount of regulation which it is considered proper for the state to impose in regard to public services with the small amount of regulation which it is considered proper for the state to enforce in regard to private business is in itself significant enough. The difference which is shown is more than one of degree, it becomes one in kind. It is only in public

business that the law imposes affirmative duties; generally speaking, the duties imposed upon those in private business are negative. The law says to those in public business you must do this for this applicant, and you must do it thus. To those in private business it says you must not do this, or if you do this you must do it thus. This is the chief distinction between public calling and private calling.

General principles may now be developed and corollaries to them established by the use and with the coördination of cases from a variety of public employments. Not only are the fundamental principles true as to all public employments — that all must be served, adequate facilities must be provided, reasonable rates must be charged, and no discriminations must be made. But also in dealing with the minor detail of these principles, cases from one service will be found in point in another — as to what conditions there are precedent to service, what will excuse failure in provision of facilities, what is a proper basis for calculating rates and what differences constitute discrimination. This is the way our law grows, by breaking down the partitions between departments of the law which have been built up separately. The public service law has at length reached a stage of development in which it may be possible to state its principles with some degree of confidence. It is only within the last few years that it would have been within the range of possibility to do this.

Twenty-five years ago the public services that were recognized were still few, and the law as to them imperfectly realized. It was known from olden times that those who professed a public employment must serve all at a reasonable rate. As to the duty to serve, it was recognized that there were certain excuses. As to the restriction to reasonable rates, there was no standard unless, indeed, the customary charge. But the important duty to provide adequate facilities had hardly advanced beyond the general law as to negligence. And the duty not to discriminate, which according to present ideas is the most important of all, was denied altogether by the weight of authority. Even ten years ago when these four obligations had become generally recognized, the details as to them in regard to any particular employment had been worked out only in very fragmentary manner; but at the present day it is just being appreciated that rapid progress may be made by the general recognition of the unity of the public service law, whereby cases as to one calling may be used to show the law in all. It is only in our present day that the attempt to treat the public service law as a consistent body of law could be made with any hope of success.

VII

As time goes on, one finds himself almost among the conservatives in standing by the original program for state control. And yet

IX

We are just entering upon a great and important development of the common law. Enormous business combinations, virtual monopolization of the necessaries of life, the strife of labor and capital, now the concern of the economist and the statesman, may prove susceptible of legal control through the doctrines of the law of public callings. These doctrines are not yet clearly defined. General rules, to be sure, have been established, but details have not been worked out by the courts; and upon the successful working out of these details depends to a large extent the future economic organization of the country. Only if the courts can adequately control the public services in all contingencies may these businesses be left in private hands.

This principle of state control does not lead one to socialism; indeed, it saves one from socialism if truly understood. It is only in those few businesses where the conditions are monopolistic that dangerous power over their public has been attained by those who have the control. In most businesses the virtual competition which prevails puts the distributors at the mercy of their public. In current opinion the recognition of this distinction is manifest. Men are as eager for an open market as ever; but they wish the control of monopoly to insure it. The demand is for freer trade where competition prevails and stricter regulation where monopoly is found. So long as virtual competition prevails there is no necessity for coercive law, since there is then no power over the purchasing public. But where in any business virtual monopoly is permanently established the people will not be denied in their deliberate policy of effectual regulation of such public services for the common good.

Only to this extent the individualistic ideal of society gives place to the collectivist policy. It is with true appreciation of the real issue that we are contending for state control to gain individual liberty. It may once have been the ideal of industrial freedom that a man might do as he pleased with his own; in any event that is no longer our notion of social justice. It is believed now that with increase in power over the particular market comes increase in responsibility to the dependent public. Socialism would destroy all private interests in the name of the public; regulation would preserve private interests by reconciling them with public right. Socialism attacks all capital to whatever business it is devoted; regulation grapples with monopoly only when it is convinced that there is no other way to safeguard the interests of the public.

X

So far as one can judge, the future holds no possibility of the coercive regulation of the conduct of all businesses, which it is apparent would

be one form of socialism. Regulation of this extreme sort will be confined to those businesses which are affected with a public interest. It is, however, certain that the other businesses than those now within this classification will be brought within it. Indeed, the generalization must have occurred to the reader that all businesses which have a virtual monopoly firmly established in the nature of things, are so affected with a public interest as to be within the class of callings which are considered public employments. What branches of industry will eventually be considered of such public importance as to be included within the category of public callings it would be rash to predict. But no one can study the authorities on this subject without feeling their great potentialities. In private businesses, one may sell or not as one pleases, manufacture what qualities one chooses, demand any price that can be gotten, and give any rebates that are advantageous. It is because the modern trusts are carrying on a predatory competition under the cover of this law that we have the trust problem. All this time in public businesses one must serve all that apply without exclusive conditions, provide adequate facilities to meet all the demands of the consumer, exact only reasonable charges for the services that are rendered, and between customers under similar circumstances make no discriminations. If this law might be enforced against the trusts, perhaps a solution of the problem would be found.

THE ANTHRACITE COAL INDUSTRY AND THE BUSINESS AFFECTED WITH A PUBLIC INTEREST

By Alexander A. Bruce of the Supreme Court of North Dakota

(From the *Michigan Law Review*, June, 1909)

From the discussion of public utilities, such as railroads, the question naturally arises, Can the doctrine of a "business affected with a public interest" be expanded to cover other kinds of industry, especially those usually called natural monopolies? The following article raises the question in an interesting manner. — Editor's Note.

The constitutions, state and federal, do not anywhere guarantee any absolute property rights nor right to liberty. The guarantee is merely that no person shall be deprived of life, liberty and property without due process of law. The right to liberty and property was never absolute under the English law, and the American constitutions have never been construed as going further than guaranteeing

the continuance of the rights which existed at the time of their adoption.[1]

The doctrine expressed by the maxim *salus populi suprema est lex* indeed, expresses an underlying principle both of the common law of England and of the constitutional law of the United States. Subject to it all property is owned and controlled and all property rights exist, and subject to it the American constitutions themselves may be said to have been ratified and adopted. The principle just expressed does not stop at merely justifying the destruction of tangible property in certain instances where the further existence of the same threatens injury to the public, as in the case of the razing of buildings and other property to prevent the spread of a conflagration, or the summary destruction of property which has come within the definition of a nuisance per se, but extends to the control of property rights and the limitation of their enjoyment, in obedience to the broad idea that the ultimate good of the community as a whole is the underlying principle of all government and of the governmental sanction and recognition of any property rights in the individual at all. We may almost say that the right to the private ownership of property has only been recognized by the law because the existence of such a right has been deemed most beneficial to the community as a whole. It is now and has been for a long time conceded among the English speaking peoples that in the majority of instances as near an approach to absolute private ownership and control as is possible is the best public policy, and that by it self-respect is stimulated and enterprise, thrift and love of country engendered. But there always have been and always will be cases where different considerations apply, and where a governmental limitation on this right has been and always will be deemed to contribute more to the welfare of the state than unlimited freedom. This for a long time has been held to be the case where private property or the right to use or control the same has been or is affected with a public interest. It then ceases to be *juris privati* only. Property becomes clothed with a public interest when it is used in a manner to make it of public consequence and to affect the community at large.[2] It is true that originally the class idea largely prevailed in the law of England, and that this feudal theory, coupled with the natural selfishness of the dominant military aristocracy, occasioned the earlier restrictions and limitations to be imposed almost entirely upon the lower and laboring classes. But this was and only could be for a limited time. As the democratic idea grew and the state became more and more commercial and less and less

[1] This can hardly be said to have been the case with the guarantees of religious liberty contained in the so-called American Bill of Rights and in the various state constitutions. Religious liberty was hardly known before the adoption of the American Constitution.

[2] Munn *vs.* Illinois, 94 U. S. 113.

military, the classes affected were extended and the principles and theories by which the rich and powerful sought to justify their control over the *serving* poor afforded the justification for the control of the rich when they in turn came to be, as in the case of our great railroad magnates of to-day, the carrying and serving agencies of the community. There can be but little doubt that the carter and the pack mule owner and the ferryman, who were the original common carriers, were at first regulated because they were "poor devils." This was no doubt also true of the innkeeper, the baker and the laborer generally. But these persons were none the less engaged in necessary and often almost monopolistic public callings and their regulation redounded to the good of the majority of all classes. They, too, held their landed possessions from their lords and relied upon their lords for protection from highway robbers and their other enemies. This protection was especially necessary to the common carrier, whose route often lay over wild and robber infested highways and bypaths. It is also quite probable that there was a medieval and a feudal philosophy beneath it all, and that the aristocracy who imposed the regulations argued that they themselves had their duties to perform in the social organism, the duties of free military service to their sovereign and of protection to their tenants and retainers, and that their liberties were also restricted only in another way. They no doubt argued that there was, or should be, a social duty on the part of those who could only labor and carry to serve them and the public for a reasonable rate and in a reasonable manner, the same as there was upon themselves, the fighters, to don their armor when called upon and to follow their sovereign to battle, and to protect the poor from pillage and from robbery. The whole feudal idea, indeed, was one of public service. Service perhaps at first culminating in a landed aristocracy and in a monarch, but in a social system in which the monarch was in a large sense the state. It was but a step to substitute the popular for the personal sovereign. It was from an early time indeed insisted, that "the splendor and powers of the crown were attached to it for the benefit of the people and not for the private gratification of the sovereign," and "that the prerogatives of the crown were not given for the personal advantage of the king, but they were allowed to exist because they were beneficial to the public." [1] The right of governmental regulation has always been conceded where the unrestricted use of property or of liberty has injuriously affected the health or the morals of the community. Every such business or exercise of individual or property rights is deemed to be affected with a public interest, and in such cases governmental interference and control, if at all reasonable, is and always has been justified. These are the cases in which the

[1] Chitty, Prerogatives 4; Rorke *vs.* Daysell, Term. R. 410. See Munn *vs.* Illinois, 94 U.S. 113.

so-called police power of the state is usually exercised.[1] There are other cases, however. Property becomes affected with a public interest when it is devoted to a use in which the public has an interest, a use by which the owner, in effect, grants to the public an interest. In such cases the owner must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may, in most instances, withdraw his grant by discontinuing the use; but so long as he maintains the use he must submit to the control.[2]

"A man," says Lord Hale in his treatise *De Portibus Maris*,[3] "for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage, for he doth no more than is lawful for any man to do, viz: makes the most of his own. If the King or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the Queen, or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the King's license or charter. For now the wharf, and crane and other conveniences are affected with a public interest, and they cease to be juris privati only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest." So, too, it was said by Lord Ellenbrough that "there is no doubt that the general principle is never both in law and justice, that every man may fix whatever price he pleases upon his own property or the use of it. But if for a particular purpose, the public have a right to resort to his premises and make use of them and he have a monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms."[4]

It is true that Mr. Justice Field, in his dissenting opinion in the case of Munn *vs.* Illinois,[5] takes the position that no such right of governmental control ever existed at the common law, except where the public health and morals were directly affected, or where special privileges had been granted to the person sought to be controlled.

[1] Lake View *vs.* Rose Hill Cemetery, 70 Ill. 192; Potter's Dwarris 444. In 1229, places were fixed for the holding of markets in London; in 1306 the use of sea coal in the city was made a capital offense; in 1345 the sale of poultry in lanes and hostels was forbidden; in 1429 slaughter houses were licensed.

[2] See Munn *vs.* Illinois, 94 U.S. 113.

[3] See opinion in Munn *vs.* Illinois, 94 U.S. 113; De Portibus Maris, 1 Harg. L. Tr. 78.

[4] Allnut *vs.* Inglis, 12 East 527.

[5] 94 U.S. 113.

But this contention is hardly borne out by the facts. Perhaps it may more truthfully be said that in the early times special privileges were deemed to have been practically granted to all. The miller was given by his lord the right to contruct his mill and to harness the waterways. And the innkeeper no doubt was given the privilege to erect his inn. Both were entitled to call upon their lords for protection, and it was the failure of this protection from the landlords which gave to Edward I and his successors, especially the Tudors, the opportunity to intrench themselves in power. This was mainly accomplished by the invention of the standing army and, in return for the loyalty and support of the lower and middle classes and the payment by them of direct dues and taxes to the crown, the furnishing of a military protection which was better than the lords could ever have given or were in the habit of giving. When we remember how wild the country was, how difficult to traverse, how infested with brigands and highway robbers, we will realize how necessary this protection was to all trade and to all intercourse, and especially to the common carrier. Before the rise of the royal army, indeed, the free-trading cities and the trade guilds had been compelled to maintain military organizations of their own and were to a large extent the employers of the free lances and mercenaries who swarmed over Europe. It is also true that at first the supervision and control of the lower and serving classes was to a very large extent in the hands of the great landlords and it was they who came in direct contact with the masses of the people. But the statute of quia emptores which was designed as much to center control in the landlord as it was to make conveyances of real property easy and possible, carried the idea much further, and under the construction of Edward I centered all control in the King, who was the source of all privileges.[1] The theory of the origin of these rights in the state itself, and of a responsibility to the state therefor, was, as the democratic ideal grew, henceforth easy and natural. Prior to the passage of the statute in question the purchasers "of lands and tenements of the fees of great men and other lords" were able to enter "into their fees to the prejudice of the lords" and to buy "the lands and tenements" from the freeholders of such great men, to hold of their feoffers and not of the chief lords of the fees; so that the chief lords "lost their escheats, marriages, and wardships of such lands and tenements, which was a grievance to the great land holders of the kingdom," who thought themselves "in a manner disherited by such defalcations in their seigniories."[2] For these reasons the statute of *quia emptores* was enacted at the instance of the great land holders. It provided that in the future it should be lawful for every freeman to sell at his pleasure his land or tenements or part thereof, so that the feoffee should hold the land or tenement of the chief lord by the same

[1] See Reeve, History of English Law, chap. xi.

[2] See preamble to act.

services and customs by which the feoffer before held it. By this means every freeholder instead of the partial permission he before had under Magna Charta, was at liberty to alien all his lands, provided he made a reservation of the services, not to himself but to the chief lord. This was intended to intrench the old aristocracy by putting a stop to the practice of creating new seigniories, and it was intended no doubt that every tenancy in the kingdom should thereafter continue a part of the same fee or manor to which it then belonged; for if no new reservation of services could be made, no new manor could be created.[1] But Edward I forced the statute much further and to its logical conclusion. He maintained that the statute could only lead to the vesting of all absolute control in himself; that he was the superior lord, and that under the feudal system all holdings were held from him. And it was in return for an acquiescence in this position by the great land holders that the privilege of primogeniture was first granted, and the landed nobility protected from their creditors of the merchant and middle classes of whom they were so jealous and so much in dread.[2] These merchant classes, however, were all the recipients of royal charters and royal favors; they were the inhabitants of the free burghs and the members of the trade guilds.[3]

There is, therefore, nothing illogical or inconsistent in our modern theories concerning the right of governmental regulation. We have merely applied a little more reason in the matter, and based the right of regulation not on a foundation of power and selfish interest, but

[1] See Reeve, History of English Law, chap. xi.

[2] It was the Statute of Merchants enacted by Edward I himself which had given to this class its powers. Prior to this time its members had no means by which to enforce their claims and the lord and large landed proprietors could repudiate their debts at will. Now the courts of the country were opened to the merchant and the royal power placed behind the mandates of these courts so that judgments could be collected. It is indeed from the time of the passage of the Statute of Merchants that we begin to trace the real rise in power of the English middle class and the growth of English middle class parliamentary government. It was not long before the King and the middle classes (who had the money and could pay the taxes) dominated everything. Henry VII, Henry VIII, and Elizabeth ruled for and through these classes. Charles I was beheaded, and James II was deposed for not catering to them, and ever since they have been the dominant classes in the Kingdom. The aristocracy have, it is true, officered the army and the navy, but the army and the navy were in their origin and present day use royal agencies which were organized for the protection of trade and of the middle classes as much as for the purpose of intrenching in power the monarch himself. These were the agencies which as we have before seen took from the hands of the old landlord the duty and the power of police protection and vested it in the state itself.

[3] The right to trade was in England from an early time everywhere hedged around with restrictions and was frequently the subject of royal charters. Even the public fairs, where most of the trading was originally done, were generally held under these charters or grants, the grantees of the privileges in turn being empowered to license and to control. As early as the reign of William II we read of a royal charter being given to the Bishop of Winchester to hold a fair on his domains, the grant being coupled with the duty of police regulation and control and the right to charge a toll on all goods sold. The sale of goods anywhere else in Winchester was for the time at least forbidden. In the reign of Edward VI it was made a criminal offense to buy goods which were on their way to a market or to buy corn or other dead victual in any market and to sell it again in any other market.

on one of general necessity. We have retained in America enough of the individualism of the frontier and of our Norse and Anglo-Saxon forefathers to base all right of regulation on this ground of necessity and of basic reasonableness, and though conceding the full power, where the necessity exists, to deny it when that necessity is not apparent. We have, however, retained enough of the collectivism of feudalism to recognize the needs and the rights of the community as a whole and of the state, which is nothing more nor less than the community.

As our population increases and the struggle for existence grows keener and keener, the necessity for governmental regulation will become more and more apparent and its field will become more and more expanded. It is now generally conceded that not merely the health, safety, comfort and morality of the public are matters of governmental solicitude, but its convenience and welfare generally, and that, though the right to liberty and property cannot be interfered with unreasonably and competition is the desideratum of the law, where competition is suppressed, either naturally or artificially, interference and regulation may be resorted to. Where, indeed, a practical monopoly is created or exists in a business, that business, if at all necessary to the public, is to that extent deemed to be affected with a public interest. It is not sufficient, however, to justify such regulation to show merely that a monopoly exists. It must actually and necessarily exist. An adequate opportunity to contend against the monopoly must be wanting. If a sewage or water company has the exclusive use of the streets of a city the business is affected with a public interest, for, in the nature of things, one must gain a connection with such sewer or water supply, or go without. One grocery store in a town is not, however, such a business, as others may easily be started.[1] Neither is the mere fact that the public has an interest in the business sufficient in itself; for in what business has the public not an interest? The doctor, for instance, need not minister to all who require his services, and yet he solicits the patronage of all and is a necessary social factor.[2] His business is affected with a public interest in so far as the public is interested in his competency and can insist upon his proper training and education,[3] and hold him liable in an action of trespass for his negligence as for a breach of a public duty. Doctors, however, are at present so numerous, competition so strong, and the tendency to unionize, if existing, comparatively so harmless, that the right to regulate prices could hardly be insisted upon. Where unions exist, however, whether of doctors, of lawyers, of merchants or of laboring men, and are generally adhered to, and the prices exacted are

[1] Brewster *vs.* Miller, 101 Ky. 275.
[2] Hurley *vs.* Huddingfield, 156 Ind. 416.
[3] Y. B. 19 H. VI, 49, 5; Y. B. 43 Ed. III, 6 pl. 11; Slater *vs.* Baker, 2 Wils. 359.

extortionate, or the union is of such a strength that the prices may become extortionate, the right to regulate is established. The statutes of laborers of England were passed under such conditions. The labor market at the time was monopolized and regulation was the result. At the time of the revolution selfish and unpatriotic attempts on the part of many to make an exorbitant profit out of the necessities of the troops in the field and of the life struggle of the colonies, led to the passage of statutes in New York and Massachusetts which fixed the scale of wages for farm laborers, mechanics and teamsters and the scale of prices for various commodities. These statutes, even if passed after the adoption of the American constitution, would no doubt have been upheld, as the businesses were essentially affected with a public interest, and by creating a monopoly and controlling prices, public regulation had been invited.

We are to-day extending the field of governmental interference, and businesses and occupations which were formerly unknown or of little importance are now being regulated and their charges controlled. The police powers of a state must necessarily be elastic in their nature, and be as extensive as the wants and ideals of the community; and businesses and occupations which were formerly of little importance may, as time goes on, become necessary to the community. When they become necessary and liable to become monopolies, the right of regulation exists. To this class now undoubtedly belong electric light companies operating upon the public streets,[1] railroad bridge companies,[2] telephone and telegraph companies,[3] water companies,[4] sewerage companies,[5] irrigation and canal companies.[6] So, too, the rapid development and importance of the grain elevator or warehouse business, and the building up therewith and in conformity with its requirements and conveniences of the American grain raising industries, have induced the courts of recent years not only to sustain statutes which regulate the charges of such institutions, but which place them in the category of common carriers, compel them to accept the goods of all who may apply as long as they have room, and even to insure the grain stored with them at their own expense.[7] Not merely

[1] Gould *vs.* Electric Light Company, 60 N.Y. Supp. 559.
[2] Canada Railway *vs.* International Bridge Company, 8 App. Cas. 723.
[3] State *vs.* Telephone Company, 17 Neb. 126.
[4] Haugen *vs.* Albina Water Company, 21 Ore. 111; City of Tampa *vs.* Waterworks Company, 34 South. 631.
[5] Mobile *vs.* Water Supply Company, 130 Ala. 379.
[6] Wheeler *vs.* Irrigation Company, 10 Col. 582.
[7] Munn *vs.* Illinois, 94 U.S. 113; People *vs.* Budd, 117 N.Y. 1; State *vs.* Brass, 2 N.D. 482; Brass *vs.* North Dakota, 153 U.S. 391, 14 Sup. Ct. 857.
A vigorous protest has been made against the later case of Brass *vs.* North Dakota which sustains a statute when directed not merely against terminal elevators, as was the case in Munn *vs.* Illinois, but against the ordinary country elevator. It is urged that in the later case there is no necessary monopoly, and that every farmer, or combination of farmers, can at a little cost, erect its own elevator. It was on this ground that Mr. Justice Miller

have the courts of recent years justified the regulation of prices and interference with private industry for the protection of the public against extortionate rates, but the regulation in a large measure by law of the rates of wages, or, at any rate, of the method by which wages shall be paid in order to preserve tranquillity in particular industries.[1] It has even been held that where the conduct of any business tends to disturb the public peace, and its owners are constantly calling upon the public for protection, the business to that extent becomes affected with a public interest. This was the case in the mines of Tennessee and Virginia.[2] This could well be the case in the anthracite mines of Pennsylvania.

These latter cases are of great importance and significance and full of suggestion for the future, for there never has been a time in the history of the country when the business world has been so closely articulated. The breaking of one link in the chain, indeed, often completely paralyzes the whole system. The business stagnation which resulted from the so-called Debs strike and that which resulted from the strike in the anthracite coal fields of Pennsylvania are fresh in our memories even to-day. The strike which is again threatened in those fields, and the sympathetic or secondary strikes which are not only threatened in the bituminous fields but on the railroads and in the other branches of labor, and which are quite certain to follow, bring before us once more the question of the right of the public as a whole in the control of the industries which flourish under its protection. Are our laws and is our constitution such, and is the history of our legal and national growth of such a nature, that we as a people must sit idly by and be content merely to keep the peace or to see that the battle is fought under Marquis of Queensberry rules? To what extent does American individualism extend? Is there any legal foundation for the statement so often made by the business man, that his

and Mr. Justice Bradley, who concurred in the majority opinion in the leading terminal elevator case of Munn *vs.* Illinois, dissented from the opinion in Brass *vs.* North Dakota, and which held it competent to regulate the charges of elevators generally. He maintained that in the terminal elevator system in Chciago, there was a practical monopoly, as such elevators were not merely terminal elevators, but the high price of land and the difficulty of access to the railroad tracks made competition almost impossible. These considerations he held did not apply to the country elevators. "If this be a monopoly, justifying public control of prices for service," said Mr. Justice Brewer, "I am at a loss to perceive at what point the fact of monopoly will cease and freedom for business commence, for obviously elevators along that line of road were as plentiful as other institutions of industry and as easily and cheaply conducted, and therefore, savoring no more of monopoly." And there seems to be much of reason in this dissent. Modern events have, however, shown the ease with which such businesses can be monopolized, the real lack of an aggressive competition, and the dependence of the public upon the elevator industry. Since the decision in the merger cases indeed it seems to have been settled that the power and ability to monopolize is the criterion and not the actual fact of monopolization.

[1] See Peel Splint Coal Co. *vs.* State, 36 W.Va. 802; Harbison *vs.* Knoxville Iron Co., 103 Tenn. 421; Knoxville Iron Co. *vs.* Harbison, 183 U.S. 13, 22 Sup. Ct. 1; Dayton Coal Co. *vs.* Barton, 183 U.S. 23, 22 Sup. Ct. 5.

[2] See Knoxville Iron Co. *vs.* Harbison, 183 U.S. 13, 22 Sup. Ct. 1.

business is his own and he has the right to run it as he pleases? Is the right of the laboring man to strike a right which is inalienable?

Prior to the year 1892 there was in America but one answer to these questions. It was to be found in the case of Godcharles *vs.* Wigeman[1] and in a long line of decisions which followed its reasoning.[2] In it and in the other opinions mentioned the right of legislative bodies to regulate the terms of employment between master and servant, except in cases when one of the parties was a minor or a sailor or a woman who had not been granted the privileges of the married woman's acts, and except perhaps in the cases where health and life were directly affected, was vigorously denied, and statute after statute which sought to so regulate was set aside either on the ground of class legislation or because it appeared to the courts to be unreasonable and a denial to the persons affected (both employers and employees) of liberty and property and of due process of law. "There can be no doubt," said the supreme court of Missouri in the case of State *vs.* Loomis,[3] "but the legislature may regulate the business of mining and manufacturing so as to protect the health and safety of the employees, but that is not the scope of the two sections of the statute now in question. They single out those persons who are engaged in carrying on the pursuits of mining and manufacturing, and say to such persons, 'You cannot contract for labor payable alone in goods, wares and merchandise. The farmer, the merchant, the builder, and the numerous contractors, employing thousands of men, may make such contracts, but you cannot.' They say to mining and manufacturing employees: 'Though of full age, and competent to contract, still you shall not have the power to sell your labor for meat and clothing alone, as others may.' It will not do to say that these sections simply regulate payment of wages, for that is not their purpose. They undertake to deny to the persons engaged in the two designated pursuits the right to make and enforce the most ordinary, every-day contracts — a right based upon a classification which is purely arbitrary, because the ground of the classification has no relation whatever to the natural capacity of persons to contract. Now, it may be that instances of oppression have occurred and will occur, on the part of some mine owners and manufacturers, but they occur quite as frequently in other fields of labor. Conceding that such instances may and do occur, still that furnishes no reasonable basis for depriving all persons engaged in the two lawful and necessary pursuits of the right to make and enforce

[1] 113 Pa. St. 431, 6 Atl. 354, decided in 1886.

[2] State *vs.* Goodwill (1889) 33 W.Va. 179, 10 S.E. 285; State *vs.* Fire Creek Coal & Coke Co., 33 W. Va. 188, 10 S.E. 288; State *vs.* Loomis (1893) 115 Mo. 307, 22 S.W. 350; Millett *vs.* People, 117 Ill. 294; Frorer *vs.* People, 141 Ill. 171, 31 N.E. 395; Ramsey *vs.* People, 142 Ill. 380; Low *vs.* Rees Printing Co., 41 Neb. 127, 59 N.W. 362; Ritchie *vs.* People, 155 Ill. 99, 40 N.E. 454; *In re* House Bill No. 203, 21 Col. 27, 39 Pac. 431; *In re* Eight Hour Bill, 21 Col. 29, 39 Pac. 328; *In re* Morgan, 26 Col. 415, 58 Pac. 1071.

[3] 115 Mo. 307.

every-day contracts. Liberty, as we have seen, includes the right to contract as others may, and to take that right away from a class of persons following lawful pursuits is simply depriving such persons of a time-honored right which the constitution undertakes to secure to every citizen." While in the case of Godcharles *vs.* Wigeman[1] the supreme court of Pennsylvania went still further and said that an act of the kind in question "is an infringement, both of the rights of the employer and the employee. It is an insulting attempt to put the laborer under a legislative tutelage which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or his coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges and consequently void."[2] These cases were for a time everywhere followed. It was not until 1892

[1] 113 Pa. St. 431, 6 Atl. 354.

[2] In the same strain the Supreme Court of West Virginia, in the earlier case of State *vs.* Goodwill, 33 W.Va. 179, which, however, is now practically overruled by the case of Peel Splint Coal Co. *vs.* State, 36 W.Va. 802, said: "It is a species of sumptuary legislation which has been universally condemned as an attempt to degrade the intelligence, virtue and manhood of the American laborer and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a tyrant and the employee is an imbecile." While the Supreme Court of Colorado, in the case of *In re* Morgan, 26 Col. 415, 58 Pac. 1071, went even further and denied the right of legislative interference altogether in the matter of contract between employer and employee even though the health of the latter was directly concerned. "The only object that can rationally be claimed for the act," the court said, "is the preservation of the health of those working in the smelters. Were the object of the act to protect the public health and its provisions reasonably appropriate to that end, it might be sustained; for in such a case even the constitutional right of contract may be reasonably limited. But the act before us is not of that character. In selecting a subject for the exercise of the police power, the legislature must keep within its true scope. The reason for the existence of the power rests upon the theory that one must so use his own as not to injure others, and so as not to interfere with or injure others, and so as not to interfere with or injure the public health, safety, morals, or general welfare. How can one be said injuriously to affect others, or interfere with these great objects, by doing an act which confessedly visits its consequences on himself alone? And how can an alleged law, that purports to be the result of an exercise of the police power, be such in reality, when it has for its only object, not the protection of the others, or the public health, safety, morals, or general welfare, but the welfare of him whose act is prohibited, when, if committed, it will injure him who commits it, and him only? The maxim does not read, 'So use your own right or property as not to injure yourself or your own property.' . . . Our bill of rights expressly says that government is instituted solely for the good of the whole."

But of these opinions and this conception of public morality, the Supreme Court of the United States in the case of Holden *vs.* Hardy, 169 U.S. 366, in its turn said: "It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently under the statute is the only one liable, his defense is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employees, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer."

and 1899 respectively, that the supreme courts of West Virginia [1] and Tennessee [2] made a complete change of front and took a radically different position, and not until 1901 [3] that the supreme court of the United States sustained them in so doing. "The whole is not greater than the sum of all its parts, and when the individual health, safety and welfare are sacrificed or neglected the state must suffer" the latter court had already said in sustaining a statute of Utah which regulated the hours of labor in underground mines.[4] In the case of Knoxville Iron Co. *vs.* Harbison [5] it went still further and, in sustaining the judgment of the supreme court of Tennessee to which we have referred, quoted with approval the following language of its opinion: "Confessedly, the enactment now called in question is in all respects a valid statute and free from objection as such, except that it is challenged as an arbitrary interference with the right of contract, on account of which it is said that it is unconstitutional and not the law of the land or due process of law. The act does, undoubtedly, abridge or qualify the right of contract, in that it requires that certain obligations payable in the first instance in merchandise shall in certain contingencies be paid in money; yet it is as certainly general in its terms, embracing equally every employer and employee who is or may be in like situation and circumstances, and it is enforceable in the usual modes established in the administration of government with respect to kindred matters. The exact and precise requirement is *that all employers, whether natural or artificial persons, paying their employees in 'coupons, script, punchouts, store orders, or other evidences of indebtedness,' shall redeem the same at face value in money, if demanded by the employee or a bona fide holder on a regular pay day or at any time not less than thirty days from issuance and that, if payment be not so made upon such demand, the owner may maintain a suit on such evidence of indebtedness, and have a money recovery for the face value thereof, in any court of competent jurisdiction.*' There is no prohibition against the issuance of any of the obligations referred to, nor against payment in merchandise or otherwise according to their terms, but only a provision that they shall be paid in money at the election and upon a prescribed demand of the owner. In other words, the effect of the act is to convert into cash obligations such unpaid merchandise orders, etc., as may be presented for money payment on a regular pay day or as much as thirty days after issuance. Under the act the present defendant may issue weekly orders for coal, as formerly, and may pay them in

[1] Peel Splint Coal Co. *vs.* State, 36 W.Va. 802, 15 S.E. 1000.

[2] Harbison *vs.* Knoxville Iron Co., 103 Tenn. 421, 53 S.W. 955; Dayton Coal & Iron Co. *vs.* Barton, 103 Tenn. 604, 53 S.W. 970.

[3] Knoxville Iron Co. *vs.* Harbison, 183 U.S. 13, 22 Sup. Ct. 1; Dayton Coal Co. *vs.* Barton, 183 U.S. 23, 22 Sup. Ct. 5.

[4] Holden *vs.* Hardy, 169 U.S. 366, 18 Sup. Ct. 383; see also St. Louis I. M. & S. R. Co. *vs.* Paul, 173 U.S. 404, 19 Sup. Ct. 419.

[5] 22 Sup. Ct. 1.

that commodity when desired by the holder, but instead of being able, as formerly, to compel the holder to accept payment of such orders in coal, the holder may, under the act, compel defendant to pay them in money. In this way and to this extent the defendant's right of contract is affected. Under the act, as formerly, every employee of the defendant may receive the whole or a part of his wages in coal orders, and may collect the orders in coal, or transfer them to some one else for other merchandise or for money. His condition is bettered by the act, in that it naturally enables him to get a better price for his coal orders than formerly, and thereby gives him more for his labor; and yet, although the defendant may not in that transaction realize the expected profit on the amount of coal called for in the orders, it in no event pays more in dollars and cents for the labor than the contract price. The scope and purpose of the act are thus indicated. The legislature evidently deemed the laborer at some disadvantage under existing laws and customs, and by this act undertook to ameliorate his condition in some measure by enabling him or his bona fide transferee, at his election and at a proper time, to demand and receive his unpaid wages in money rather than in something less valuable. Its tendency, though slight it may be, is to place the employer and employee upon equal ground in the matter of wages, and, so far as calculated to accomplish that end, it deserves commendation. Being general in its operation and enforceable by ordinary suit, and being unimpeached and unimpeachable upon other constitutional grounds, the act is entitled to full recognition as the 'law of the land' and 'due process of law' as to the matters embraced, without reference to the state's police power, as was held of an act imposing far greater restrictions upon the right of contract, in the case of Dugger *vs.* Mechanics' & T. Ins. Co., 95 Tenn. 245, 28 L. R. A. 796, 32 S. W. 5, and as had been previously decided in respect of other limiting statutes therein mentioned. 95 Tenn. 253, 254, 28 L. R. A. 799, 32 S. W. 6, 7. Furthermore, the passage of this act was a legitimate exercise of police power, and upon that ground also the legislation is well sustained. The first right of a state, as of a man, is self-protection, and with the state that right involves the universally acknowledged power and duty to enact and enforce all such laws, not in plain conflict with some provision of the state or federal constitution, as may rightly be deemed necessary or expedient for the safety, health, morals, comfort, and welfare of its people. The act before us is, perhaps less stringent than any one considered in any of the cases mentioned. It is neither prohibitory nor penal; not special, but general; tending towards equality between employer and employee in the matter of wages; intended and well calculated to promote peace and good order, and to *prevent strife, violence, and bloodshed.* Such being the character, purpose, and tendency of the act, we have no hesitation in holding that

it is valid, both as general legislation, without reference to the state's reserved police power, and also as a wholesome regulation adopted in the proper exercise of that power."

Perhaps, however, the real reasons for these decisions and the reasons which will appeal with the greatest force to the public as a whole are those which are contained in the opinion of the court in the case of Peel Splint Co. *vs.* State,[1] which was decided about the same time and in which the supreme court of West Virginia said:

We base the decision in this case. First, upon the ground that the defendant is a corporation in the enjoyment of unusual and extraordinary privileges which enables it and other similar associations to surround themselves with a vast retinue of laborers, who need to be protected against the fraudulent or suspicious devices in the weighing of coal or payment of wages for labor; Secondly, the defendant is a licensee, pursuing a vocation which the state has taken under its general supervision for the purpose of securing the safety of employees, by ventilation, inspection and government report, and the defendant, therefore, must submit to such regulations as the sovereign thinks conducive to public health, public morals and public security. We do not base this decision so much upon the ground that the business is affected by the public use, but upon still higher ground, that the public tranquillity, the good and safety of society, demand, where *the number of employees* is such that specific contracts with such laborers would be *improbable*, if not *impossible*, that in general contracts justice shall prevail as between operator and miner; and, in a company's dealings with a multitude of miners with which the state has by special legislation enabled the owners and operators to surround themselves, that all opportunities for fraud shall be removed. *The state is frequently called upon to suppress strikes; to discountenance labor conspiracies;* to denounce boycotting as injurious to trade and commerce; and it cannot be possible that the same police power may not be invoked to protect the laborer from *being made the victim of the compulsory power of that artificial combination of capital which special state legislation has originated and rendered possible.* It is a fact worthy of consideration and one of such historical notoriety that the court may recognize it judicially, that every disturbance of the peace of any magnitude in this state since the civil war has been evolved from the disturbed relations between powerful corporations and their servants and employees. *It cannot be possible that the state has no police power adequate to the protection of society against the re-occurrence of these disturbances*, which threaten to shake civil order to its very foundations. Collisions between the capitalist and the working man endanger the safety of the state, stay the wheels of commerce, discourage manufacturing enterprise, destroy public confidence and at times throw an idle population upon the bosom of the community.[2]

[1] 36 W.Va. 802.

[2] The reasoning of this case was affirmed and its language quoted with approval by the Supreme Court of the United States in the case of Knoxville Iron Co. *vs.* Harbison, 183 U.S. 13, 22 Sup. Ct. 1.

The significance of these cases, and of the judicial change of front and public policy in them expressed is very great. In them is an assertion of the rights of the independent public which in labor disputes have heretofore been too often ignored. They, it will be seen, would justify the state of Pennsylvania and the sister states in which sympathetic strikes are being inaugurated, in settling the controversies by legislative action. In other words, when the contestants are not able to settle their controversies between themselves, and the public peace and welfare are being jeopardized, in stepping in and prescribing the rules and regulations under which the industries shall be conducted. They sanction not, it is true, a compulsory arbitration, but the prescribing by the state legislatures the rules which shall control in the conduct of the businesses. The matters which were in dispute in the coal fields of West Virginia and Tennessee were, to all intents and purposes, the same matters as those which were in dispute in the recent coal strike in Pennsylvania, and in the strike which is now threatened. They were disputes over the method of weighing coal, the method of paying wages and the paying of such wages in orders on the company's stores or truck-shops. In the opinions the courts take the broad position that every business man and every man who seeks the protection of society in order that he may live and do business, and who calls upon that society for protection from physical harm and upon its courts for the enforcement of his contracts, must be willing to yield to that society some measure of regulation and control when that control is necessary for the preservation of the public peace and the public welfare. This is socialism no doubt — or looks like it, but "it is the way they have in West Virginia and Tennessee" and in the supreme court of the United States itself. It was Professor Dicey, was it not, who recently said: "We all of us in England still fancy at least that we believe in the blessing of freedom, yet, to quote an expression which has become proverbial, 'To-day we are all of us socialists.'" [1]

[1] "The Combination Laws as Illustrating the Relations Between Law and Opinion in England during the Nineteenth Century," 17 *Harv. L. Rev.* 552.

V

COMMISSIONS AND BOARDS

COMMISSION REGULATION OF PUBLIC UTILITIES: A SURVEY OF LEGISLATION

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The machinery devised for governmental regulation is most frequently a commission or board. The more important commissions are appointed, usually, after investigations which are conducted either by members of the legislature or Congress, or by special investigating commissions, or by officers of the government under special instructions. — Editor's Note.

I. The Scope of Utility Legislation

In the early days of the development of public utility properties there was little or no regulation for the safeguarding of public welfare. In order to afford effective stimulus for inventive genius and business initiative it was necessary to provide a free field for private enterprise, unhampered by legislative restriction. The technique of utility operation, in which so high a degree of efficiency has now been attained, had yet to be worked out; and the permanent necessity and financial practicability of the utility services, which have now been recognized beyond recall, had yet to be established. In these monopolistic industries, as in private business, public welfare counseled a policy of *laissez-faire*. In spite of their monopolistic character, it was felt that the public service industries, in order to be ready for public control no less than for public ownership, must first have reached a stage of maturity consistent with the lessened opportunities for private gain necessarily involved in a system of effective public regulation. During the first half of the nineteenth century, therefore, franchise privileges were freely granted by the state legislatures. These franchises extended for long periods and often in perpetuity. As a result, the privileges essential for supplying the future, as well as the then-

existing, needs of the city were given to private coporations with little thought of immediate restriction or of reservation of power for future regulation. The public service franchise was looked upon as a private contract between the state and the grantee corporation, instead of as a permit by the sovereign for the performance by private individuals or corporations of functions largely public in their nature.

The regulation of public utilities may be said to have passed through three stages, not always entirely distinct, from which emerge three different methods of public control. First, there was regulation through the provisions of the franchise. During the second part of the nineteenth century greater care began to be exercised in the drawing up and the granting of franchises. Exclusive grants were often prohibited by constitutional provision and statutory enactment. The unconditional long-term grant began to give way to the short-term franchise with restrictive provisions. Instead of grants in perpetuity or for ninety-nine, or even fifty, years, the life of the franchise came more generally to be twenty-five to forty years. Moreover, the grantee was subjected to restrictions incorporated in the franchise. Maximum rates were often prescribed, particularly in the case of street railway service, above which the grantee corporations could not go in fixing their rates and fares. There was often some provision, too, as to the character of the service to which the public would be entitled under the terms of the franchise. This form of regulation had two fundamental drawbacks: in view of the rapid growth of American cities, the restrictions contained in the grant did not provide adequate regulation even for the short period of twenty to thirty years; and there was no administrative machinery for the execution, on behalf of the public, of the limited restrictions of the franchise contract.

The second form in which the movement for adequate regulation manifested itself was the reservation to the state of the general power of control. This reserved power of regulation, which was gradually extended by the courts as a power inherent in the state even in the absence of express reservation, was exercised by state legislatures through the enactment of statutes and by city councils through the promulgation of municipal ordinances. While this method gave a fuller recognition to the permanence of the problems raised by the unregulated operation of the public service industries and afforded a means for regular instead of periodic adjustment of the relations between the public and the public service corporations, the lack of expert knowledge on the part of legislators and councilmen together with the great diversity of their interests, and the absence of administrative machinery for carrying into effect the public policy embodied in the legislation aiming to regulate public utilities, resulted in a control

which was inevitably spasmodic and at best inadequate. This was the general situation at the end of the nineteenth century.[1]

Regulation by the states through administrative commissions of the type that prevails to-day is very recent. The Railroad Commission of Wisconsin was not established until 1905 and it was not given jurisdiction over utilities other than railroads, express companies and telegraph companies till 1907. The public service commissions of New York were not established till 1907. The Wisconsin and New York commissions have served, to a large degree, as models for the numerous administrative bodies for the regulation of public utilities that have sprung into being since 1907; and the Wisconsin and New York laws have been the basis of a large mass of the public utility legislation recently enacted. These laws substitute administrative regulation for direct legislative control. Large powers are intrusted to special boards or commissions whereby they are enabled to keep themselves constantly and thoroughly informed of the practical operation as well as of the general policy of public service corporations, on the basis of which knowledge and information they exercise such supervision over these utilities as may tend to harmonize the private interests of the owners and the general welfare of the public. With but few exceptions, present-day utility regulation is legislative in character only in the sense that the extent of commission jurisdiction and power is determined by statutory enactment.

Now a complete résumé of utility legislation would include, in addition to the so-called commission laws, all special franchises and charters, with such restrictions as they contain, and all direct legislation imposing duties upon utilities for the enforcement of which no provision is made. A comprehensive survey of commission legislation even would include many laws whereby duties are imposed upon utilities by direct legislative enactment with power of enforcement vested in commissions. This paper deals almost exclusively with commission laws. Emphasis is here placed upon the organization and powers of commissions rather than upon the duties of utilities. Moreover, the discussion is limited to state commissions. Since the authority of the Interstate Commerce Commission extends primarily, if not entirely, to interstate business, it is given no consideration here, in spite of its large influence upon state commission legislation. Municipal commissions are likewise beyond the scope of this paper. Although there has been considerable American experience with municipal commissions, usually deriving their direct authority from municipalities and exercising jurisdiction over utilities whose business is

[1] There were, of course, notable exceptions to this situation. In Massachusetts, for example, the board of gas and electric light commissioners, established in 1885, was supervising gas and electric companies with marked success.

confined within these municipalities, the general trend of commission regulation is towards the establishment of central commissions whose authority is state-wide.[1]

II. The Organization of Commissions

The success of commission regulation will depend largely upon the personnel of the commissions. Ultimately, the personnel of public service commissions will be determined by the attitude of the public towards its officials in general, and by the confidence or distrust which the public manifests towards the employment in the public service of trained experts and men of large business experience. This is one of the fundamental problems of American democracy, and it cannot be solved by mere legislation. But the effectiveness of commission regulation depends in large measure also upon political machinery; and this leads to a consideration of the important legislative requirements dealing with commission organization and procedure.

There are at the present time forty-eight state commissions, with independent personnel, representing forty-five separate jurisdictions.[2]

[1] The New York Public Service Commission for the first district is a state commission with limited territorial jurisdiction because of the special problems created by the dominating position of New York City.

[2] The following is a complete list of state railroad and public service commissions. Because of limited space no attempt is made to present a complete list of constitutional and statutory sources. All of the more important commission laws are given, and reference is made to such other provisions as deal with the creation and organization of commissions.

Alabama: Railroad Commission of Alabama (*Code 1907*, Sects. 5632, 5633, 5636, 5637, 5640, 5642). Arizona: Corporation Commission (*Session Laws 1912*, chap. xc). Arkansas: Railroad Commission of Arkansas (*Kirby's Digest 1904*, Sects. 6788, 6789, 6793). California: Railroad Commission of the State of California (*Statutes 1911*, 1st extra session, chaps. xiv, xl). Colorado: State Railroad Commission of Colorado (*Laws 1910*, special session, chap. v). Connecticut: Public Utilities Commission (*Public Acts 1911*, chap. cxxviii). Florida: Railroad Commissioners of the State of Florida (*Gen. Stats. 1906*, Sects. 2882, 2883, 2887 [as amended 1907]). Georgia: Railroad Commission of Georgia (*Code 1911*, Sects. 2616, 2620, 2621, 2622, 2625. *Acts 1878–79*, no. 269, Sect. 1). Idaho: Public Utilities Commission of the State of Idaho (*Session Laws 1913*, house bill no. 21). Illinois: State Public Utilities Commission (*Acts 1913*, house bill no. 907). Indiana: Public Service Commission of Indiana (*Acts 1913*, house bill no. 361). Iowa: Board of Railroad Commissioners (*Code 1897*, Sects. 2111, 2121). Kansas: Public Utilities Commission (*Gen. Stats. 1909*, Sect. 7185. *Laws 1911*, chap. ccxxxviii). Kentucky: Railroad Commission (Constitution, Section 209. *Carroll's Statutes 1909*, Sects. 821–823). Louisiana: Railroad Commission of Louisiana (Constitution, Articles 283, 287, 289). Maine: Board of Railroad Commissioners (*Rev. Stats. 1903*, chap. li, Sect. 48 [as amended by public laws 1909, chap. cxli]; chap. cxvi, Sect. 1). Maryland: Public Service Commission (*Laws 1910*, chap. clxxx; *Laws 1912*, chap. dlxiii). Massachusetts: Board of Gas and Electric Light Commissioners (*Rev. Laws 1902*, chap. cxxi, Sect. 1 [as amended by acts 1907, chap. cccxvi]. *Acts 1910*, chap. dxxxix, Sect. 1); Public Service Commission (*Acts 1913*, chap. dcclxxxiv). Michigan: Michigan Railroad Commission (*Public Acts 1909*, no. 300). Minnesota: Railroad and Warehouse Commission (*Rev. Laws 1905*, Sects. 1953 and 1956 [as amended by laws 1911, chap. cxl, 1961]). Mississippi: Mississippi Railroad Commission (*Code 1906*, Sects. 4826, 4828, 4830). Missouri: Public Service Commission (Public service commission law of March 17, 1913). Montana: Public Service Commission (Public service commission law of 1913). Nebraska: Nebraska State Railway Commission (*Cobbey's Annotated Statutes 1909*, Sects. 10649, 10650). Nevada: Railroad Commission of Nevada (*Statutes 1907*, chap. xliv [as amended by statutes 1911, chap. cxciii]); Public Service Commission of Nevada

Delaware, Utah and Wyoming are the only states which have no central commissions. New York, Massachusetts and South Carolina each has two distinct commissions.

Twenty-seven of the forty-eight commissions are appointed by the governor by and with the consent or advice of the senate or council; one is appointed by a railroad board, or a majority of its members, consisting of the governor, the lieutenant governor, and the attorney-general; twenty are elected by the people. It is generally recognized that the appointive commission, all else being equal, is likely to call into the public service better and abler men than the elective commission. And there is a strong tendency towards the appointive commission. Not only is a clear majority of the commissions appointive, but all the states which legislated during the past year created appointive commissions.[1]

The number of commissioners varies from three to seven. Thirty-eight commissions have three members; one has four; eight have five; one has seven. The term of office varies from two years in Arkansas and North Dakota to ten years in Pennsylvania. In five jurisdictions the tenure is three years; in six, four; in three, five; in thirty, six; in one, eight years. It is evident that the commissioners are generally being given a long enough tenure to make them expert in their work even if they are not so when they take office.

(*Statutes 1911*, chap. clxii). The personnel of the two commissions is the same, the railroad commission being *ex officio* the public service commission. New Hampshire: Public Service Commission (*Laws 1911*, chap. clxiv). New Jersey: Board of Public Utility Commissioners (*Laws 1911*, chap. cxcv). New Mexico: State Corporation Commission (Constitution, Article XI, Section 1. *Laws 1912*, chap. lxxviii). New York: Public Service Commission, First District (*Laws 1910*, chap. ccccixxx as amended through 1913]); Public Service Commission, Second District (same citation as for first district commission). North Carolina: Corporation Commission (*Pell's Revisal 1908*, Sects. 1054–1056, 1060, 2754). North Dakota: Board of Railroad Commissioners of the State of North Dakota (Constitution, Section 82. *Rev. Codes 1905*, Sect. 364, 366, 367. *Laws 1909*, chap. ccxvi, Sect. 4). Ohio: Public Utilities Commission of Ohio (*Laws 1911*, no. 325. *Laws 1913*, house bill no. 582). Oklahoma: Corporation Commission (Constitution, Article IX, Sections 15, 16, 18 (a). Constitution, schedule Section 15). Oregon: Railroad Commission of Oregon (*Gen. Laws 1907*, chap. liii. *Gen. Laws 1911*, chap. cclxxix). Pennsylvania: Public Service Commission of the Commonwealth of Pennsylvania (*Laws 1913*, no. 854). Rhode Island: Public Utilities Commission (*Acts 1912*, chap. dccxcv). South Carolina: Railroad Commission (Constitution, Article IX, Section 14. *Gen. Stats. 1902*, Sects. 2063, 2064. *Laws 1893*, no. 304, Sect. 1. *Laws 1910*, no. 286). South Dakota: Board of Railroad Commissioners of the State of South Dakota (*Rev. Pol. Code 1903*, Sects. 186, 187, 189–191, 194, 195 [as amended by session laws 1907, chap. ccviii]). Tennessee: Railroad Commission of the State of Tennessee (*Acts 1897*, chap. x. *Acts 1907*, chap. cccxc). Texas: Railroad Commission of Texas (Constitution, Article XVI, Section 30. *Sayles' Civil Statutes 1897*, Art. 4561). Vermont: Public Service Commission (*Public Statutes 1906*, Sects. 4591, 4592, 6172. *Laws 1908*, no. 116). Virginia: State Corporation Commission (Constitution, Section 155). Washington: Public Service Commission of Washington (*Laws 1911*, chap. cxvii). West Virginia: Public Service Commission (public service commission law of February 20, 1913). Wisconsin: Railroad Commission of Wisconsin (*Laws 1905*, chap. ccclxii as amended. *Laws 1907*, chaps. ccccxcix as amended, cccciiv, dlxxviii. *Laws 1911*, chap. dxciii. *Laws 1913*, chap. dcclvi).

[1] Idaho, Illinois, Indiana, Massachusetts, Missouri, Montana, Ohio, Pennsylvania, West Virginia.

The compensation of commissioners varies from $1500 in South Dakota to $15,000 in New York. In one commission the salary is $1500 per annum; in one, $1700; in one, $1900;[1] in four, $2000; in one, $2200; in three, $2500; in nine, $3000; in one, $3500; in nine, $4000; in two, $4500; in four, $5000; in one, $5500; in four, $6000; in one, $7500; in one, $8000; in two, $10,000; and in two, $15,000. It will be noted that in fifteen commissions the salaries are $5000 or over and in thirty-three they are less than $5000. In nine commissions they are less than $2500. In the recent legislation the tendency is to provide a reasonably adequate salary for the commissioners. Illinois and Pennsylvania, for example, in their new laws, provide a salary of $10,000 for each of the commissioners; Massachusetts, $8000; Ohio, Indiana and West Virginia, $6000; Missouri, $5500; and Idaho, $4000.

In addition to the commissioners, provision is often made in the statutes for a secretary or clerk and for a special attorney to the commission. Such provision for a secretary or clerk is found in thirty-five jurisdictions, and for a special attorney in twenty-two jurisdictions. In some states the attorney-general is directed to act on behalf of the commission and to appoint such other counsel as may be necessary. In thirty jurisdictions the salary of the secretary or clerk is fixed by statute, varying from $1200 to $6000. In nine jurisdictions the salary of the attorney to the commission is fixed by statute, varying from $2500 to $10,000. In most of the jurisdictions it is further provided that the commission may employ such subordinates as it deems essential for the adequate performance of its duties. The following provision from the recent Massachusetts public service commission law indicated the general tendency of commission legislation in the matter of subordinate employees: "The commission may appoint or employ such engineers, accountants, statisticians, bureau chiefs, division heads, assistants, inspectors, clerks and other subordinates as it may deem advisable on such terms of office or employment and at such salaries as it may deem proper."[2]

In eight jurisdictions commissioners must have special qualifications prescribed by statute. In Georgia one of the commissioners must be experienced in law, and one in the railroad business; in Kansas one must be "a practical, experienced business man," and one experienced in the management or operation of a common carrier or public utility; in Maine the chairman must be learned in law, one of the commissioners must be a civil engineer experienced in the construction of railroads, and one experienced in the management and

[1] In South Carolina the salary of the members of the railroad commission is $1900 per annum; the members of the public service commission receive $10 a day when actually employed.

[2] *Acts 1913*, chap. dcclxxxiv, Sect. 9.

operation of railroads; in Michigan one must be an attorney having a knowledge of and experience in the law relating to common carriers, and the other two must have a knowledge of traffic and transportation matters; in Nevada the chief commissioner must be an attorney at law well versed in the law of railroad regulation, the first associate commissioner must be a practical railroad man familiar with the operation of railroads, and the second associate must have a general knowledge of railroad fares, freights, tolls and charges; in Virginia at least one commissioner must have the same qualifications as are required for judges of the supreme court of appeals; in West Virginia one of the commissioners must be a lawyer of not less than ten years' actual experience at the bar; and in Wisconsin one must have a general knowledge of railroad law, and each of the others must have a general understanding of matters relating to railroad transportation. In two jurisdictions the qualifications are very general in character. The new Massachusetts public service law provides that each of the commissioners shall be "a competent person"; and in South Carolina it is provided that the members of the public service commission shall be "reputable and competent citizens of South Carolina."

Most jurisdictions provide certain disqualifications for membership in a railroad or public utility commission. The disqualification provisions of forty jurisdictions, stated in composite form, provide that no person employed by or connected with or holding any official relation to or owning stocks or bonds of or having any direct or indirect or pecuniary interest in any public utility over which the commission has jurisdiction or of the kind over which the commission has jurisdiction is eligible to membership in the commission. In Wisconsin it is provided that no person who has a pecuniary interest in any railroad or telegraph or express company in Wisconsin or elsewhere may become a member of the commission. In twenty-six jurisdictions it is further provided that no commissioner, officer or employee of the commission may engage in any other business, employment or vocation, or hold any other political office. In Idaho and West Virginia the prohibition extends only to any other political office.

The determination of rules of procedure and practice is largely in the hands of the commissions. In two-thirds of the jurisdictions authority is specifically conferred upon the commissions to adopt rules and regulations for their government and proceedings. It is usually provided, however, that all hearings must be open to the public and that any party in interest may be heard in person or by attorney. On the other hand, authority is almost universally given to the commissions to administer oaths, subpœna witnesses and order the production of books, records and memoranda in proceedings held before them. Investigations and hearings are commonly started on com-

plaint, but it is often provided that the commission may make summary investigations and hold hearings on its own motion or initiative and issue orders on the basis of its findings.

III. The General Extent of Commission Authority

The general extent of commission authority may be examined from three points of view. First, the scope and trend of regulation may be gathered from the number of commissions in existence and the rapidity of their growth. There are to-day, as already indicated, forty-eight state commissions, representing every state but Delaware, Utah and Wyoming. No less than thirty of these either came into existence since 1907 or, though in existence prior to that year, they have been so completely changed in character since 1907 that they are practically new commissions. Early in 1913 the National Civic Federation completed a comprehensive compilation and analysis of laws for the regulation of public utilities by central commissions.[1] In the single year that has elapsed since the results of that investigation were published, public service commissions have been created in two states, Idaho and West Virginia, where no utility commissions had before existed, and seven other states have passed complete public service laws now in operation.[2] In addition there has been a mass of amendatory legislation whereby already existing commissions have been very largely transformed.

The extent of commission authority may also appear from a consideration of the kind and number of utilities which may be reached in any way by the utility commissions. These commissions collectively have some degree of authority over corporations, companies, associations, joint stock companies, partnerships or individuals owning, operating, managing or controlling steam railroads, electric and street railways, interurban or suburban railways, elevated railroads or subways, automobile railroads, steamboats and other water craft, express lines and messenger lines, signaling facilities, bridges and ferries connected with railroads, pipe lines for the transportation of oil or water, sleeping, parlor and drawing-room cars, terminals, union depots, docks, wharves, storage elevators, fast freight lines, stage lines, messenger companies, telegraph and telephone companies, facilities for the manufacture and sale of gas or electricity, heat, light, water, power, hot or cold air or steam, and irrigation and sewage facilities. Whether a given business constitutes a public service undertaking depends largely upon the social and industrial conditions that

[1] *Commission Regulation of Public Utilities: A Compilation and Analysis of Laws of Forty-three States and of the Federal Government for the Regulation by Central Commissions of Railroads and Other Public Utilities.* The National Civic Federation, Department on Regulation of Interstate and Municipal Utilities, New York, 1913.

[2] See footnote 3.

prevail in the community. Whether, upon recognition of a given undertaking as a public service industry, express authority to regulate shall be granted to commissions, depends usually upon the public policy of the given community and more particularly upon the political conditions prevailing in that community. Therefore the utilities to which commission jurisdiction extends vary greatly in the different states; but the principles of adequate regulation, as embodied in the various powers conferred upon commissions, are found to depend but very slightly upon the number and nature of utilities regulated. This is but a recognition that public service industries may, in most respects, be treated as a homogeneous class. A distinction is often made between interstate and municipal utilities, or between railroads and other public utilities. Commission legislation but seldom distinguishes to any striking degree between these classes of utilities, although there is considerable variety in the names of the commissions. Twenty-two of them are railroad commissions; twelve are public service commissions; seven are public utility commissions; five are corporation commissions; one is a railroad and warehouse commission; and one is a board of gas and electric light commissioners. The names of the commissions do not always indicate the scope of their jurisdiction. Many of the railroad commissions have jurisdiction over the so-called municipal utilities: as, for example, the railroad commissions of Oregon and Wisconsin. And most of the public utility or public service commissions have jurisdiction over railroads: as, for example, the Massachusetts and New York commissions.

Finally, the extent of commission jurisdiction may be gathered from the powers vested in the commissions. Two types of regulating boards have appeared in American experience: the advisory board, with powers of investigation and recommendation, of which the old Massachusetts railroad commission is the most notable example, and the mandatory board, with power to order as well as to recommend, of which the New York and Wisconsin commissions are perhaps the best examples. The advisory commission relies upon publicity and the strength of public opinion for the enforcement of its recommendations; the mandatory commission is vested with sufficient power to compel the utilities to submit to its orders.

The advisory commission has been abandoned even in Massachusetts. Large powers are now granted to the commissions; the duty of utilities to comply with the orders of the commissions is clearly stated; the commissions are given authority to invoke judicial process for the enforcement of their orders; and usually penalties, varying in stringency, are imposed upon utilities for failure to comply with these orders. Since the enactment of the Wisconsin railroad commission law in 1905 and of the Hepburn amendments to the act

to regulate commerce in 1906, practically all utility legislation has proceeded on the basis of clothing commissions with ample power to exercise continuous supervision over public utilities and to afford effective relief to any party in interest whenever necessary. The authority to prescribe just and reasonable rates, therefore, is almost universally enjoyed by the modern type of public service commission. But in addition to such specific powers as are necessary for adequate public control, commissions now possess large general powers of investigation and supervision over the property and business of public utilities.

This general power of regulation is stated in most comprehensive fashion in the Illinois public utilities commission law. It is there provided that

> The commission shall have general supervision of all public utilities, shall inquire into the management of the business and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipments and other property owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with the provisions of this act and any other law, with the orders of the commission and with the charter and franchise requirements.[1]

The following provision of the Wisconsin public utilities act is found in most jurisdictions, and indicates the nature of the powers vested in commissions in so far as they are essential to a proper performance of their duties:

> The commission or any commissioner or any person or persons employed by the commission for that purpose shall, upon demand, have the right to inspect the books, accounts, papers, records and memoranda of any public utility and to examine, under oath, any officer, agent or employee of such public utility on relation to its business and affairs.[2]

IV. The Powers of Utility Commissions

We may now present a brief résumé of the more important specific powers vested in public utility commissions.

1. *Franchises*

The important provisions in commission laws looking to franchise regulation aim to prevent unnecessary duplication of utility properties through the introduction of competition where the public welfare

[1] *Acts 1913*, house bill no. 907, Sect. 8.
[2] *Laws 1907*, chap. cccxcix, Sect. 1799m–38.

demands the recognition of monopoly, and to provide for the uninterrupted operation of utilities, under adequate control of rates and service, subject to municipal purchase whenever such private operation ceases to promote the public good.

The first of these purposes has been accomplished by requiring the issue of a certificate of convenience and necessity by the commission before a public utility may enter upon a new undertaking or extend an existing undertaking or exercise franchise privileges previously granted but not theretofore exercised. The essential elements of the certificate of convenience and necessity are stated as follows in the New Hampshire public service commission law:

> No public utility shall commence within this state the business of transmission of telephone or telegraph messages or of supplying the public with gas, electricity or water, or shall engage in such business or begin the construction of a plant, line, main or other apparatus or appliance intended to be used therein in any city or town in which at the time it shall not already be engaged in such business, or shall exercise any right or privilege under any franchise hereafter granted (or any franchise heretofore granted but not heretofore actually exercised) in such town, without first having obtained the permission and approval of the commission. The commission shall grant such permission whenever it shall, after due hearing, determine and find that such engaging in business, such construction or such exercises of the right, privilege or franchise would be for the public good and not otherwise; and may prescribe such terms and conditions upon the exercise of the privilege granted under such permission as it shall consider for the public interest. Authority granted under provisions of this section may only be exercised within two years after the same shall be granted and shall not be exercised thereafter.[1]

Provisions substantially identical with the New Hampshire section are found in nineteen jurisdictions.[2] It is to be noted that pratically all the states which passed complete laws during 1913 provide for certificates of convenience and necessity.

The other purpose of the franchise provisions of commission laws is to recognize the essentially monopolistic character of public utilities by providing for their continuous operation, during good behavior, under a permit unlimited as to time, with power in the municipality to exercise an option of purchase. The indeterminate franchise was first established in Massachusetts, where street railway locations may be revoked by local authorities (the revocation being subject to approval by the commission in certain cases) at any time after the expiration of one year from the date of the franchise. The most thoroughgoing indeterminate franchise law is to be found in Wis-

[1] *Laws 1911*, chap. clxiv, Sect. 13 (a).

[2] Arizona, California, Connecticut, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New York, Pennsylvania, South Dakota, Vermont, West Virginia, Wisconsin.

consin. It was enacted in 1907 and materially amended in 1911.[1] It provides for indeterminate permits for street railways and for heat, light, water and power companies in municipalities. The indeterminate permit was first to apply to all future grants, with authority for companies operating under limited-term franchises to exchange them for indeterminate permits. The amendment of 1911 provided that all franchises theretofore granted were to become indeterminate. The essential characteristics of the principle of indeterminate franchises are: first, that the public service corporation is recognized as a legal monopoly and no permit is granted to a competing company unless public convenience and necessity require such grant; and second, that the public service company, in accepting an indeterminate permit, consents to the purchase of its plant by the municipality in which it operates. The purchase price is to be fixed by the commission, subject to review by the courts. The new public service commission law of Indiana provides for indeterminate permits similar to those established in Wisconsin.[2]

2. *Security Issues*

In fifteen jurisdictions the commission has authority to supervise the issue of stocks and bonds.[3] In some of these jurisdictions the commission's power is stated in general terms and does not provide for a strict control of capitalization. The New Jersey law, for example, merely provides that no public utility shall

> issue any stocks, stock certificates, bonds or other evidences of indebtedness payable in more than one year from the date thereof until it shall have first obtained authority from the board for such proposed issues. It shall be the duty of the board, after hearing, to approve of any such proposed issue maturing in more than one year from the date thereof, when satisfied that the same is to be made in accordance with law and the purpose of such issue be approved by said board.[4]

In many of the states, however, the commission has complete control, definite financial standards being prescribed and provision being made for thorough investigation and valuation by the commission before approval of security issues, and for detailed supervision of the disposition of the proceeds after the commission's certificate has been granted. The Wisconsin stock and bond law,[5] applying to railroads, street

[1] *Laws 1907*, chap. ccccxcix, Sects. 1797m–74 to 1797m–86. *Laws 1907*, chap. dlxxviii, Sects. 1797t–1 to 1797t–12. *Laws 1909*, chaps. clxxx, ccxiii. *Laws 1911*, chaps. xlvi, dxcvi, dclxii.

[2] *Acts 1913*, house bill no. 361, Sects. 100–109.

[3] Arizona, California, Kansas, Illinois, Indiana, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New York, Pennsylvania, Texas, Vermont, Wisconsin.

[4] *Laws 1911*, chap. cxcv, Sect. 18 (e).

[5] Ibid. chap. dxciii.

railway, telegraph, telephone, express, freight line, sleeping car, light, heat, water and power corporations, establishes the most comprehensive system of regulation of security issues by commission. It affords a practical guaranty by the state that there is an equivalence between the amount of outstanding securities and the investment upon which the utilities are entitled to a fair return. Legislation of similar scope may be found in five other states, three of which legislated during the past year.

3. *Rates and Services*

Commission laws lay down the basis of rate-making, or the requisites of lawful rates, declare unjust discrimination unlawful, prescribe publicity in the making of rates and schedules, and vest in commissions the power to fix rates in accordance with the principles thus prescribed.

It is almost invariably provided that rates and charges must be just and reasonable, and the commissions are given authority to enforce the standard thus established. In many jurisdictions the various elements that must be considered and the various devices that may be adopted in the establishment of reasonable rates by utilities and commissions are further prescribed. The chief elements emphasized by the statutes for lawful rates are that a due regard be had "to a reasonable average return upon the value of the property actually used in the public service and of the necessity of making reservation out of income for surplus and contingencies."[1] Twenty-four jurisdictions make express provision for valuation of the property of public utilities by commissions.[2] These valuations are sometimes used for capitalization and purchase as well as for rate-making purposes. The tendency in these valuation provisions is to vest in commissions ample power for the successful ascertainment of utility valuations. Such elaborate valuation provisions may be found in Ohio,[3] Pennsylvania,[4] Washington[5] and Wisconsin.[6] The main device provided by statute by which reasonable rates may be secured is the sliding scale, chiefly applicable to the gas industry, but also, in some cases, to electric companies. In addition to the Boston sliding scale act in Massachusetts,[7] nine jurisdictions authorize utilities to establish

[1] New York: *Laws 1910*, chap. cccclxxx, Sect. 97.

[2] Arizona, Arkansas, California, Florida, Georgia, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Washington, West Virginia, Wisconsin.

[3] *Laws 1913*, house bill no. 582, Sects. 21–31.

[4] Ibid. no. 854, art. II, Sect. 1 (k); Art. III, Sects. 4 (a), 6; Art. V, Sects. 19–23.

[5] *Laws 1911*, chap. cxvii, Sect. 92.

[6] *Laws 1907*, chap. ccccxcix, Sects. 1797m–5, 1797m–6, 1797m–19, 1797m–82 to 1797m–86. *Laws 1907*, chap. dlxxviii, Sect. 1797t–8. *Laws 1911*, chap. dclxii.

[7] *Acts 1906*, chap. ccccxxii.

the sliding scale for the automatic adjustment of charges and dividends under commission supervision.[1]

It is almost invariably provided also that unjust discrimination is prohibited, and the commissions are given authority to enforce the prohibitions. Unjust discrimination is variously defined. As defined in the commission laws collectively it consists in charging a greater or less compensation to one person than to another for like and contemporaneous service; in charging rates other than those prescribed by law or specified in published schedules, refunding, remitting or rebating any portions of such rates, or extending privileges or facilities not uniformly open to all; in charging a less compensation in consideration of the furnishing by utilities of any part of the facilities incident to the service; in charging a less compensation in consideration of the size of the shipment or the extent of the service; in charging a greater compensation for a shorter than for a longer distance or for a smaller than for a larger service; in granting to any person, corporation, locality or any particular description of service any undue or unreasonable preference or advantage, or in subjecting the same to any undue or unreasonable prejudice or disadvantage; in assisting or permitting patrons to secure special favors or advantages, or rates other than those lawfully established; in soliciting, accepting or receiving special favors or advantages, or rates other than those lawfully established. There are also general prohibitions against offering, granting, soliciting or accepting free or reduced rate or special service, with elaborate lists of exceptions; special prohibitions, applicable to public officials and members of political organizations; and requirements that lists of persons to whom free or reduced rate or special service has been granted shall be published and filed with the commission. The provisions also indicate the kinds of special treatment which constitute justifiable discrimination and authorize the commissions to determine under what conditions such circumstances exist as make discrimination justifiable.

Again, it is almost invariably provided that utilities submit to full publicity in the establishment and change of their rates and schedules, and authority is vested in the commissions to render publicity in rate-making effective. Utilities are thus ordered to file their schedules of rates with the commissions, after due notice of their adoption; the matters to be contained in these schedules are prescribed in detail; the forms of schedules are made subject to the approval of commissions; it is provided that the schedules be published and posted; the filing, publishing and posting of rate schedules are often made a condition precedent to the exercise by utilities of the right to do business; and utilities, in many instances, are required to file with the

[1] Arizona, California, Idaho, Maryland, Missouri, New York, Ohio, Pennsylvania, Wisconsin.

commissions copies of leases, contracts and arrangements made with other utilities.

The most important powers as to rates are found in the provisions which authorize commissions to regulate or prescribe the rates and charges of utilities, establish the procedure to be followed in the exercise of these powers, and indicate the legal effect to be given to the rates and charges so established. All the states now give the commissions mandatory powers over rates. In many of the jurisdictions there is language so broad that it may, by liberal interpretation, be construed to vest in the commissions power to fix rates in the first instance. When the legislation in each jurisdiction is taken as a whole, however, the authority of the commissions in practically all of the commission states is limited to the power on its own motion or on complaint, after investigation, to declare unreasonable rates and charges previously in force, and to prescribe others in lieu thereof to be followed in the future. In other words, in spite of the large power over rates vested in commissions, the right to initiate rates is practically everywhere reserved to the utilities; but in about one-third of the jurisdictions the commissions are given the additional authority to suspend the operation of rates fixed by utilities pending an investigation as to their reasonableness undertaken by the commissions. In some jurisdictions the rates fixed by commissions are considered *prima facie* lawful and in force until found unreasonable upon review by a proper court; in some states their operation is suspended until declared reasonable upon judicial review.

Many of the rate provisions, in so far as they empower commissions to supervise the business of utilities, apply to regulations, practices and service. But while more than one-half of the states provide that the service furnished by utilities must be reasonable or that the facilities must be adequate and safe, only about one-third of the commission jurisdictions vest sufficient authority in the commissions to render these requirements effective. The practice in the past has been to establish by direct legislative enactment absolute standards of service and safety, and specific facilities and safety appliances. The present tendency, however, as evidenced by much of the recent legislation,[1] is to clothe commissions with power over service and facilities, both as to adequacy and safety, commensurate with their power over rates. The more recent commissions, therefore, are authorized to prescribe reasonable service standards and to provide for such inspection and testing of service and facilities as will insure their adequacy and safety.

[1] Idaho, Illinois, Indiana, Missouri, Pennsylvania, West Virginia.

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4. *Accounts and Reports*

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The regul- ation of accounts and reports serves to provide for com-
missions the respo data essential to an adequate control of capitalization,
rates and s other service.

There a e been e provisions for the regulation of accounts in twenty-
eight juris acity, dictions. The most general requirement is that by which
authority e in th is granted to commissions to establish a system of uniform
accounts oloni for public utilities, with power to prescribe the forms of
accounts ordin , records and memoranda and to indicate the manner in
which t resp hey shall be kept or to classify public utilities and establish
a syste ivate m of accounts and prescribe forms for each class. In most
jurisdi- pert ictions this power may be exercised in the discretion of the com-
missi- ider sion. Sometimes, as in the new Indiana law, the authority to
pr prescribe accounting practices is made mandatory upon the commission.[1] In a number of the jurisdictions it is further made unlawful for utilities to keep any other accounts, records or memoranda than those prescribed or approved by the commission. In the case of common carriers, the commissions are often specifically required to conform, as far as possible, to the system and form of accounts established and prescribed from time to time by the Interstate Commerce Commission. In about one-fourth of the states — Arizona,[2] California,[3] Idaho,[4] Illinois,[5] Indiana,[6] Missouri,[7] New Jersey,[8] Ohio,[9] Oregon,[10] Pennsylvania,[11] Wisconsin[12] — special depreciation accounts are provided for: the commission is empowered to require proper and adequate depreciation or deferred maintenance accounts to be kept in accordance with prescribed forms and regulations whenever it shall determine that depreciation accounts can reasonably be required. And the commissions are given authority to examine as well as to prescribe accounts; that is, the commission or the commissioners or their duly authorized agents or examiners may have access to the accounts of the utilities and may at all reasonable times examine and inspect them. Heavy penalties are usually imposed for violations of accounting provisions.

The duty is almost invariably imposed upon utilities to transmit to

[1] *Acts 1913*, house bill no. 361, Sect. 15.
[2] *Session Laws 1912*, chap. xc, Sect. 49.
[3] *Statutes 1911*, 1st extra session, chap. xiv, Sect. 49.
[4] *Session Laws 1913*, house bill no. 21, Sect. 47.
[5] *Acts 1913*, house bill no. 907, Sect. 14.
[6] Ibid. house bill no. 361, Sects. 22–25.
[7] Public service commission law of March 17, 1913, Sect. 61.
[8] *Laws 1911*, chap. cxcv, Sect. 17 (f).
[9] Ibid. no. 325, Sects. 51, 52.
[10] *General Laws 1911*, chap. cclxxix, Sect. 17.
[11] *Laws 1913*, no. 854, Art. II, Sect. 1 (i); art. V, Sect. 15
[12] *Laws 1907*, chap. ccccxcix, Sect. 1797m–15.

the commission at specified intervals or at such time as it may designate, regular reports of their doings setting forth such facts, statistics and particulars relative to their business, receipts and expenditures as may be required by the commission. In many states special reports may also be called for by the commission at different intervals. It is often provided that the commission shall furnish blank forms for regular or special reports; and the reports must be duly sworn to or verified by such officers or persons as the commission may designate. Full and specific answers must be given to all questions propounded by the commission, or sufficient reasons must be stated for failure to make such answers. In case the reports or returns appear to be defective or erroneous, the commission is usually given the power to order their amendment within a specified time. It was very common in the older utility laws, particularly for the regulation of railroads and common carriers, to prescribe by statute the detailed contents of annual reports; but in pursuance of the general trend of giving commissions ample discretion in the regulation of utilities, the more advanced legislation, including most of the recent laws, vests complete power in the commissions as to the scope of the reports of utilities. Heavy penalties are usually imposed for the violation of provisions relating to reports.

A GOVERNMENT OF LAW AS DISTINGUISHED FROM A GOVERNMENT OF FUNCTIONARIES

By Hon. Hannis Taylor

(From the *Green Bag*, September, 1906)

Francis Lieber has told us, in his "Civil Liberty and Self-Government," p. 108, that the "guarantee of the supremacy of the law leads to a principle which, so far as I know, it has never been attempted to transplant from the soil inhabited by Anglican people, and which, nevertheless, has been, in our system of liberty, the natural production of a thorough government of law as distinguished from a government of functionaries. It is so natural in the Anglican race that few think of it as essentially important to civil liberty, and it is of such vital importance that none who have studied the acts of government elsewhere can help recognizing it as an indispensable element of civil liberty."[1] In giving expansion to the same thought at a later time Mr. Dicey, who fills the chair of Blackstone at Oxford, has said: "In England the idea of legal equality, or of the universal subjection of all

[1] Law of the Constitution, p. 183.

classes, to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts and made, in their personal capacity, liable to punishment or to the payment of damages for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person." Under the Anglican system of civil liberty any man may at his peril resist any act which he considers unlawful, and then have the question of legality passed upon in the ordinary courts under the law of the land. Anglican law knows no special or official tribunals in which or special rules under which acts performed by officials claiming to have legal authority can be tested. In countries not governed by Anglican law obedience to the officer is, as a general rule, demanded, and redress can only take place after previous obedience. In France, for instance, no matter whether the government be Royal, Imperial, or Republican, the doctrine has always prevailed that the government, as representing the state, possesses rights and powers as against individuals superior to and independent of the ordinary laws of the land. That theory, so hard for us to understand, is the real basis of a *droit administratif* under which officials, that is all persons employed in the service of the state, are, in their official capacity, protected from the ordinary law of the land, exempted from the jurisdiction of the ordinary tribunals and subject in many respects to official law administered by official bodies. For this *droit administratif*, which under one name or another prevails in most of the continental states, there is in English phraseology no proper equivalent for the good and sufficient reason that the thing itself does not exist. The absence of any such branch of law in the jurisprudence of the United States at once attracted de Tocqueville's attention; and in 1831 he wrote to a judge in his own country asking not only for an explanation of this contrast between French and American institutions, but for an exposition of the general ideas (*notions générales*) governing the *droit administratif* of his own country.[1] If, under the French system, any official, no matter whether a minister, a prefect, or a policeman, commits any official act n excess of his legal authority, the rights of the individual aggrieved and the mode in which these rights are to be determined are questions of *droit administratif* which is administered by administrative courts (*tribunaux administratifs*) at the head of which stands the Council of State. To illustrate

[1] *Œuvres Complètes*, Vol. VII, p. 66.

from recent events in France growing out of the conflicts between church and state: Suppose a policeman acting under the orders of his superiors, breaks into a monastery and, after seizing the property of its inmates, expels them from the house. When he is charged with acts which in English law would be called trespass and assault, he pleads that he is acting under government orders in execution of a decree dissolving certain religious societies. When the policeman in question is brought before an ordinary civil court and threatened with the ordinary law of the land, as he would be in any country subject to Anglican law, an objection is raised at once that the civil courts have no jurisdiction of such a case. The "conflict" which thus arises is not determinable however by the ordinary judges because in that event they would be allowed to pronounce a final judgment on the limits of their own authority in defiance of that principle of French law which declares that "administrative bodies must never be troubled in the exercise of their functions by any act whatever of the judicial power." To meet such contingencies there exists in France a *Tribunal des Conflits*, a court for the settlement of conflicts of jurisdiction, whose special function is to determine finally whether a given case, say an action against a policeman for such a trespass and assault as has been described, comes within the jurisdiction of the civil courts, or of the administrative courts. If within the jurisdiction of the latter then the administrative law, unknown to Anglican countries, at once supersedes what we call the law of the land.

In the light of the foregoing contrast it will be easier to comprehend, I trust, Lieber's declaration that the "guarantee of the supremacy of the law leads to a principle which, so far as I know, it has never been attempted to transplant from the soil inhabited by Anglican people, and which nevertheless has been in our system of liberty the natural production of a thorough government of law, as distinguished from a government of functionaries." Let us glance for a moment at the historical origin of this supremacy of the law as embodied in what we call the law of the land to which the high and low are subject in the ordinary tribunals. Upon that rock has been built the constitutional church in England and the United States. The group of Low Dutch tribes from the neck of the Danish peninsula, out of whose union arose the English people, transferred to Britain that rough yet vigorous system of political, judicial, and military organization which everywhere prevailed among the Teutonic tribes of the fatherland.

Whenever a district of country was won from the native race, the conquerors encamped upon the soil; and then, after dividing the land upon the basis of that peculiar system that rested at once on military and tribal divisions, they organized self-governing communities which became nurseries of English customary law. Just as the English

language is the outcome of the fusion of the dialects spoken in those local communities, so English customary law, as a distinct and entire code, is the outcome of the fusion of the customary or popular law developed therein. The primitive system of law which thus matured in the provincial courts of the English people, like all archaic law, took on an iron rigorism of form which rendered it unelastic. Its entire inadequacy to the wants of a progressive society never became apparent, however, until the Norman Conquest drew England into the march of continental nations. The most important single outcome of that event was the centralization of justice through the establishment of a great court at Westminster by whose agency a new system of royal law, which found its source in the person of the king, was brought in to remedy the defects of the old, unelastic system of customary law prevailing in the provincial courts of the people. This new system of royal law was sent down to the popular courts existing in the shires by the hands of the itinerant justices who there represented the crown first for fiscal then for judicial purposes. During the reigns of the four Norman kings the English and Norman races became fused together into one nation scarcely conscious yet of its own unity. As soon as that condition of things was reached in which it was difficult to distinguish an Englishman from a Norman, all legal distinctions in favor of one race as against the other necessarily passed out of view. The substructure of the new political and legal fabric which thus arose out of the amalgamation of races was English, the superstructure was Norman. The welding together of the two systems received a temporary check during the period of disorganization known as the reign of Stephen, a period during which the royal authority which Henry I had done so much to consolidate came to an end, while England, for the first and last time in her history, sank into that state of feudal anarchy which the Conqueror by his far-sighted policy had striven to prevent. For a time the land lay helpless in the hands of the barons, who intrenched themselves in their unlicensed castles and arrogated to themselves all the rights of petty despots. The great mission of Henry II, Henry of Anjou, was to reëstablish order and with it the reign of equal law. The full scope of Henry's policy was not only to establish the reign of law, but to reduce all orders of men to a state of equality under the same system of law; in other words, to establish the supremacy of the law as afterwards understood. The most formidable obstacles which stood in the way of the complete execution of that design were the baronage on the one hand, with their private jurisdictions, and the clergy on the other, with their far-reaching claims of exemption from the ordinary process of the temporal tribunals. When Henry II passed away, the prodigal knight-errant who succeeded him, Richard I, impressed upon the nation, then marshaled in the ranks of the three estates, the necessity

for concert of action against a central despotism capable of oppressing every class by the imposition of inordinate taxation. The hope that the accession of John would relieve that condition was quickly disappointed. His needs proved as great as Richard's, and the money he obtained was used for purposes that appealed to no one but himself. The excessive exactions demanded both in money and service, coupled to the unpopular uses to which these were put, form the keynote of the whole reign; they form the background of Magna Charta. When viewed in the light of the circumstances attending its execution, the fact clearly appears that while that great instrument was issued in the form of a royal grant, it was really a consitutional compact entered into by the royal authority on the one hand and the nation marshaled in the ranks of the three estates on the other. There is nothing in the provisions of the charter to recall obsolete distinctions of English and Norman blood; there is nothing to suggest differences of English and Norman law. The very absence of such provisions clearly shows that such distinctions had passed forever away. The winning of the Great Charter was the final consummation of the work of union, and this first great act of the united nation was not in the path of political experiment. The provisions of the charter embody no abstract theory of government; they consist simply of a summing up of the traditional liberties of the English nation, with such modifications as those liberties had suffered through the results of the Norman Conquest. The royal pretentions born of that event reached the limit of their growth when both Richard and John, accepting the imperialist theories of Glanvill, held that the will of the prince was the law of the land. The reckless attempts made by John to enforce that theory finally brought about the armed conflict between the nation and the king. Upon the part of the nation it was claimed that the law of the land was not the will of the prince, but the immemorial laws of the English Kingdom, with such modifications and amendments as those laws had suffered in the process of Norman centralization. After the coming of the Conqueror, the Old-English system of customary law was generally appealed to as "the laws of good King Edward," while the changes which it suffered through the result of the Conquest were generally described as the amendments made by King William. There is no attempt in the Charter to wipe out the irrevocable effects of the Conquest; the new system of central administration and the system of feudal tenures are both recognized as abiding elements in the constitution. The effort is to fix the limits of innovation, to define the extent to which the centralizing and feudalizing process to which the Conquest gave birth shall be permitted to abridge the immemorial freedom in the time to come.

Only in the light of such an historical preface is it possible to expound the judicial clauses of the Great Charter in which its framers,

after making provisions touching the character and appointment of judicial officers, announced a series of practical rules, both general and special, for the government of all courts in the administration of justice. First among those general rules stands the famous declaration that "no freeman shall be arrested or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land." The technical student of English law who expounds the phrase *per judicium parium*, in the light of recent research, does not find in it a guarantee of trial by jury, which had not then come into existence. He finds that the phrase "the lawful judgment of his peers" was only intended to guarantee to the accused a trial by his "equals." That right was not originally a class privilege of the aristocracy but a right shared by all grades of freeholders; whatever their rank they could not be tried by their inferiors. In that respect English custom did not differ from the procedure prescribed by the feudal usage on the continent. In England the "peers" of a crown tenant were his fellow crown tenants, who would normally deliver judgment in the *Curia Regis;* while the "peers" of a tenant of a mesne lord were the other freeholding tenants assembled in the court baron of the manor. A further illustration of the meanings conveyed by the word "peers" to a medieval mind together with the nature of *judicium parium* may be drawn from that provision in John's charter of April 10, 1201, which provides that "if a Christian bring a complaint against a Jew, let it be adjudged by his peers of the Jews." When the twin phrase *per legem terræ* is interpreted by like standards it appears that originally it "simply required judicial proceedings, according to the nature of the case; the duel, ordeal, or compurgation, in criminal cases, the duel, witnesses, charters, or recognition in property cases." [1] The words appear at least twice in Glanvill, each time apparently in the technical sense. And yet it is equally clear that this older and technical signification of the phrase, *per legem terræ*, was gradually forgotten as the term "law of the land" ripened into the wider meaning expressed by it in the popular speech of to-day. The wider meaning clearly appears in the statutes reaffirming, expanding, or explaining the Great Charter. The important series of such statutes passed in the reigns of Edward III and Richard II illustrate how the *per legem terræ* of 1215 was read in the fourteenth century as equivalent to the wider phrase "by due process of law." When we remember that, by that time, the jury system, grand and petit, had developed, it is not strange that the act of 1352, for example, after reciting the charter provision in question, insisted on the necessity of "indictment or presentment of good and lawful people of the same neighborhood where such deeds be done." Evidently founding his

[1] Bigelow, History of Procedure, 155n.

exposition on these fourteenth century statutes Coke[1] makes "*per legem terræ*" of the Charter equivalent to "by due process of law," and that again to "by indictment or presentment of good and lawful men." Thus by a *nunc pro tunc* process of statutory interpretation Magna Charta was made to enshrine the jury system which did not exist at the time of its execution. A master of the subject has told us that "The Framers of the Petition of Right read the same words (*per legem terræ*) as a prohibition, not only of imprisonment 'without any cause showed' but also of proceedings under martial law, thus interpreting the aims of King John's opponents in the light of the misdeeds of King Charles, and applying to the rude system established by Henry of Anjou reforms more appropriate to the highly developed administration of the Tudors."[2] By such a process of statutory and popular interpretation the Charter provision in question was widened until it became usual to read it as containing an original promise of trial by jury to all Englishmen; as absolutely prohibiting arbitrary commitment; and as undertaking solemnly to dispense a full, free, speedy, and equal justice to all. To state the final outcome of such a method of interpretation in the words of Hallam: "It protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land."[3] Or, if we adopt the words of Creasy: "The ultimate effect of this charter was to give and guarantee full protection for person and property to every human being that breathes English air."[4] Such was the process of evolution through which came into being the popular and traditional construction of that clause in the Great Charter which, in the widest terms, is taken as a promise of law and liberty, and good government to every one; a promise upon which rests the supremacy of the law over the functionary which no one has ever attempted to transplant from the soil inhabited by Anglican peoples.

When the English colonies in America were formed English law was made the basis of Colonial rights. In the famous charter granted by James I, in 1666, it was expressly provided "that all and every the persons, being our subjects which shall go and inhabit within the said colony and plantation, and every their children and posterity, which shall happen to be born within the limits thereof, shall have and enjoy all liberties, franchises, and immunities of free denizens and natural subjects within any of our other dominions, to all intents and purposes as if they had been abiding and born within this our realm of England, or in any other of our dominions."[5] When the tie which bound the colonies to the mother country was severed they rapidly developed into

[1] Second Institute, p. 46.
[2] McKechnie, Magna Charta, p. 442.
[3] Middle Ages, Vol. II, p. 448.
[4] Eng. Const., p. 151*n*.
[5] Charters and Consts., part ii, p. 1891.

a group of independent commonwealths in which each individual member was, in its organic structure, a substantial reproduction of the English kingdom. The foundation of the entire fabric was English law; the provisions of the Great Charter became the substructure of every state constitution. When the first ten amendments were added as a Bill of Rights to our federal Constitution, in the fifth was embodied the traditional construction of that part of the Great Charter which guarantees the supremacy of the law, or, as we usually express it, due process of law. In a line of cases extending from United States *vs.* Peters, 5 Cranch 115, the Supreme Court has given a most elaborate exposition of the doctrine which declares that here, as in the mother country, every official, from the President of the United States down to a tax collector, is under the same responsibility for every act done without legal justification as any other citizen; and that the legality of any such act when assailed may be tested in the ordinary tribunals under the law of the land. The most notable, however, of all of these cases is that of United States *vs.* Lee, 106 U.S. p. 169, in which Mr. Justice Miller, — in my humble judgment the greatest expounder of the Constitution since Chief Justice Marshall, — in speaking for the Court said: "In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by officers of the government professing to act in its name. . . . What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further because it appears that certain military officers, acting under the orders of the President, have seized this estate and converted one part of it into a military fort and another into a cemetery. It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation. . . . No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is

only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives." I cannot doubt that these golden sentences, whose lightest words are weighty, will stand forth for all time as the profoundest expression ever made of the basic principle of the supremacy of the law peculiar to lands inhabited by Anglican peoples. When we consider that the subject-matter of the suit in question was the ancestral estate of the vanquished chief of a fallen cause, an estate which for years had been held by the government of the victors as a resting-place for its dead, it is impossible to overestimate the moral grandeur of the judgment which gave it back with the ashes of the dead because, in the midst of civil war, it had not been taken away according to the law of the land. Is it going too far to say that the five who joined in that judgment — Miller, Field, Harlan, Matthews, and Blatchford — are entitled to be ranked among the ideal jurists of the world? The four who dissented from that judgment recorded, in clear and emphatic terms, their willingness to establish here the principle of the *droit administratif* as it exists in the continental nations. As stated heretofore, the essence of that administrative law is the right of the official, when the legality of his act is challenged in a civil tribunal under the ordinary law of the land, to deny its jurisdiction upon the ground that the validity of such acts cannot be tested in that manner. In the case in question the Attorney-General made that special plea in a suggestion, "respectfully insisting that the court has no jurisdiction of the subject in controversy," and the minority held that "the court having no authority to proceed with the suit, the judgment afterwards rendered for the plaintiff was erroneous." Let us not exaggerate the apparent danger that existed when we remember that the alien principle set up by the minority failed to triumph by only a single vote. If that vote had been forthcoming and a contrary doctrine had been announced in that particular case it would have lived only for a moment. Such an exotic, so contrary to the spirit of our institutions, could never have taken root in a land dominated by Anglican law whose basic principles have been slowly maturing during a period of a thousand years.

REGULATION BY COMMISSION

By Samuel O. Dunn, Editor of the Railway Age Gazette

(From the *North American Review*, February, 1914)

The spread of regulation of business by administrative commissions is one of the most marked and important politico-economic developments in the United States in this generation. The policy was first

applied by a few States to railways. It has now been adopted as to railways by the Nation and most of the States, and has been extended by several States to public utilities of many kinds. Recently men prominent in business and politics have advocated regulation of large industrial concerns by commissions as a substitute for their regulation, or, rather, dissolution, under the Sherman Act.

The development of the policy of regulation by commission has grown out of the belief that lawmaking bodies, courts, and ordinary executive officials are incompetent to deal with the problems raised by unsatisfactory relations between public utilities and the public. The legislatures cannot deal with these problems intelligently and effectively, because to do so requires a body possessing expert knowledge and in practically continuous session. In both of these respects lawmaking bodies are deficient. The courts cannot satisfactorily deal with these problems because they lack expert knowledge and have many other kinds of business to transact, and because their slow, cumbrous, and formal process excludes classes of evidence which, while logically irrelevant to a lawsuit, are precisely the considerations that would influence a business man in deciding a business proposition. The ordinary executive or law-enforcing officials are incompetent to deal with the problems of regulation because they lack expert knowledge, because they have other and entirely differing duties to perform, and because a regulating body should approach its work in a judicial spirit which is incompatible with the executive spirit by which the ordinary law-enforcing officials should be animated.

It long seemed that we must accept either unregulated management of public utilities, with its attendant abuses; or unwise and inefficient regulation by the courts and legislatures; or public ownership. It was out of this confused condition of affairs that there grew up the idea of creating commissions having at once legislative, judicial, and administrative functions, and especially qualified and empowered to deal solely with this problem of public regulation.

Many persons regard the development of the regulating commission with much enthusiasm and optimism. They consider it a great discovery in political science, and think it the best if not the only means by which we can steer clear of both the Scylla of uncontrolled and rapacious private management and the Charybdis of public ownership. The principle underlying regulation of public utilities by commission is sound. But sound principles are valueless without sound practice. Whether our practice will be sound will depend mainly on two things — the personnel of the commission, and their legal powers.

We have recently given much attention to their powers. We have conferred on many of them very great authority. We have given much less attention to the question of the kind of men who should exercise this authority. But in all political and business affairs the kind of

men to whom authority is intrusted is as important as the amount and character of the authority conferred. Capable, public-spirited men will accomplish much more good with small powers than incapable, self-seeking men with large powers. In truth, the greater the powers you give incompetency, especially if it be associated with selfish ambition, the less is the good and the greater the evil it will usually do.

The disqualifications of legislatures, courts, and ordinary executive officials for the regulation of business suggest some of the qualifications that ought to be possessed by the members of regulating commissions. Ability, expert knowledge, fairness in utterance and act, moral courage to resist public opinion when it is wrong, as well as to enforce their duty on refractory public utility managements when they are wrong — these are prime essentials. While some members of our regulating commissions have had the needful qualifications in a high degree, many of them have hardly had them at all. In more cases State commissioners have been elected chiefly because, as politicians and lawyers, they have participated in agitation and litigation against the railways. Such men can hardly be unbiased. Most of the commissioners have been wanting in expert knowledge; many have been without business capacity or professional attainments and ignorant of elementary economic principles.

By what means may we more generally secure for the commissions the sort of men of which they ought to be composed? First, we must pay their members reasonable salaries. We may get able men to serve temporarily in emergencies for inadequate pay; but we cannot long retain capable men in the public service for small compensation. The salaries now paid are usually too low. In New York the salary is fifteen thousand dollars a year, which certainly ought to be ample even there. In a very few States it is five thousand dollars, or a little more. In most of them it is less than this; in some only twelve hundred to fifteen hundred dollars. It is impossible to believe that in a large and important State competent men can be induced to sit long on a commission for less than five thousand dollars to ten thousand dollars. The members of the Interstate Commerce Commission are paid ten thousand dollars. In view of the high qualifications they should possess and the laboriousness and extreme importance of their duties they should be paid more.

Secondly, the kind of men chosen depends largely on the mode of choice. Reason would suggest, and experience shows, that qualified men are more apt to be secured by appointment than election. Occasionally capable men are elected; and frequently unfit men are appointed; but on the whole the appointive commissions are superior in personnel to the elective. The voters have both less fitness and less opportunity to select good men than the Governor of a State or the President of the United States. Almost every one of

the shining examples of wholly unfit commissioners is a product of election.

Third, the term of office should be fairly long — certainly not less than four years, and preferably longer. The duties are not only technical, but they relate to a diversity of subjects. Railway commissions now regulate railway traffic, operation, and accounting, and in some States the issuance of securities. On railways only the higher executive officers usually have a working knowledge of all the various departments, and most students of railway matters outside of railway service specialize along only one or a few lines. Therefore, a new commissioner, even though formerly a railway officer or a diligent student of railway affairs, is apt to have a knowledge of only one or a few branches of the railway business. As commissions deal with all branches of the business, their members must, if they are to perform all their duties fairly and intelligently, be given long terms so that they may acquire the broad knowledge and experience that the performance of all their duties requires. The members of the Interstate Commerce Commission are appointed for seven years, and we seem now to have definitely adopted the wise practice of repeatedly reappointing those who desire reappointment. The terms of the members of most State commissions are very short; and there are frequent changes in them. When commissions regulate not only railways but all kinds of public utilities, the need for appointing their members for long terms, and profiting by their experience by repeated reappointments, is much greater than when they regulate only railways. There is a general tendency to thus extend the jurisdiction of commissions originally created to regulate railways only.

Finally, the commissioners should be possessed when they are chosen of special knowledge of the businesses they are to regulate. There is a feeling that officers of railways, the most important utilities subjected to regulation, would, if chosen to commissions, be somewhat biased in favor of the railways. That probably would be true in some cases. But surely they are no more apt to be biased in favor of railways than shippers or politicians who have participated in agitations against them are apt to be biased against them; and it is hard to see in what way the one kind of bias is any better or worse than the other.

However, it is not necessary to go to the public utilities themselves for men having some special qualifications for commissioners. In Germany, the "land of damned professors," as Palmerston called it, the government has learned to make good use in public affairs of earnest and intelligent students. No one questions that B. H. Meyer is one of the fairest, ablest, and best-equipped members of the Interstate Commerce Commission. Mr. Meyer formerly served on the Wisconsin Commission, and before that was a professor in the University of Wisconsin, where he specialized on transportation.

It is not meant to suggest that we should fill our commissions with university professors, but merely that our commissions would be much strengthened and our policy of regulation much improved if we would put fewer politicians on them, and more men, such as Mr. Meyer, who have devoted themselves to the study of the problem with which regulating bodies must deal. Unfortunately, we have never had much use in public affairs in this country for the man who prefers investigation to guessing and meditation to agitation.

President Hadley, one of the earliest and greatest of academic students of transportation in the United States, years ago pointed out that a railway commission having the right sort of personnel does not need to possess or exercise extensive coercive legal powers in order to be an effective regulating body. The Massachusetts Railroad Commission has never possessed extensive legal powers; yet no commission ever has done work at once more effective and salutary than the Massachusetts Commission did in its early history. This was because it was dominated by Charles Francis Adams, a man having in eminent degree all the qualifications of a great public utility commissioner. As Dr. Hadley has said: "This absence of specific powers was just what Mr. Adams welcomed. It threw the commission back on the power of common sense — which does not seem as strong as statutory power to prosecute people and put them in prison, but which in the hands of a man who possesses it is actually very much stronger." The great influence that a commission may exert while possessing very limited statutory powers is illustrated by the fact that in the long life of the Massachusetts Commission the railways have failed to act in accordance with a formal recommendation made by it in only a single unimportant instance.

However, I am not one of those who now believe in what are called "weak" commissions. I believe in strong commissions — strong in personnel, and strong in the power to compel the managements of public utilities to do what they should when compulsion is necessary. Compulsion would be necessary less frequently if our commissions were uniformly fair and expert; but that it is often necessary there is no doubt. But, as the Supreme Court of the United States said in one case, "the public is not a general manager of the railways"; nor is it a general manager of other public utilities. Public utilities are not public property with which the public may legally or equitably do as it pleases. The public may become their general manager by becoming their owner; but it has no right to assert the authority of management until it is prepared to assume the responsibility and bear the expenses of management and ownership. Not only has it no right to do so, but for it to do so would be highly inexpedient. Public management of public utilities under public ownership might succeed. Public regulation of private property may succeed. Public manage-

ment of private property could not succeed. It would involve divided responsibility in its worst form. There would be incessant struggles between the officers selected to represent the owners, seeking to recover the authority they had lost, and the authorities representing the public, seeking to hold the authority they had gained. Each side would exert itself more to nullify the work of the other than by its own policy to get results. The capital needed for adequate development would not be forthcoming; for the public could not lay it out so long as the ownership was private, and private capitalists would not — probably could not — supply it while the management was public. The resulting conditions would be intolerable, and both the owners of the utilities and the public might throw themselves into the arms of government ownership as the only haven of escape.

Where, then, does the proper jurisdiction of the management end, and that of the regulating commission begin? We shall most accurately trace the line of demarcation if we consider the precise nature of a public utility. A public utility has been defined by the courts as private property affected with a public use. The same meaning has been conveyed when it has been said that a public utility is private property devoted to a public service. The property is as private in its ownership as a farm or store or factory. It is the fact that it is devoted to the service of the public that gives the public a right to regulate it. There are water plants, electric light and power plants, gas plants, and small railroads that are private not only in their ownership, but also in their service; and the public has no more right or power to regulate them than any other strictly private business. It is when, and because, property is devoted to the service of the public, and that thereby there is established a most important relation between its owners and managers and the public, that the right and power of the public to regulate emerges. Continuing to be private in its ownership, its owners retain both the moral and the legal right to manage it as they see fit so long as it renders good service to the public at reasonable rates. It remains the province of the management to perform in the first instance all the functions performed by the management of any business concern — to fix the rates to be charged, to determine the amount and character of the service to be rendered, and to decide how the company's financial necessities shall be provided for. And if the rates fixed are all fair and reasonable, if the service rendered is adequate and good, if the financing is honest and conservative, there is nothing for any regulating body to do.

But experience has shown that the managers of public utilities, being human, are just as good and just as bad as the rest of mankind. There are farmers who put all the large apples at the top of the barrel, and sell impure milk to poison little children. There are merchants who sell short weight. There are manufacturers who underclassify

the goods they ship and thereby rob the railways. And there are some managers of public utilities who, having the same human shortcomings as some farmers, some merchants, and some manufacturers, seek to exact excessive rates, to discriminate unfairly in their charges, and to render service that is poor and inadequate. It is to stop and prevent these abuses that regulating bodies are created.

In brief, the proper function of the management is executive in the broadest sense; that of the regulating commission corrective. This is the only rational and practical view of the matter. For no commission exercising regulating authority over numerous utilities can possibly acquire that intimate knowledge of all the conditions and needs of the business of each of them which their managers have, and which is essential to their wise and efficient management; and, therefore, when the commission oversteps the limits of its appropriate field its influence ceases to be intelligent and corrective, and begins to be ignorant, meddlesome, and harmful.

There are several important phases of the business of public utilities to which the corrective authority of the regulating commission may, should, and in many cases does, apply. Practically all commissions have considerable, and many large, authority over rate-making. Many persons think commissions should have authority to initiate all rates. But, in the railway business at least, the initiation of rates is plainly a function of management. No commission can possibly know so well what the rates as a whole can and ought to be made as the traffic men of the railways. But the judgment of the traffic men at times goes wrong; they are at times influenced by considerations out of harmony with the rights and interests of the public; and commissions ought to have the power, after full investigation, to order needed changes in the specific rates or schedules of rates which they have investigated. Their authority should include the raising as well as the reducing of rates, for often an unfair discrimination may better be corrected by raising a rate that is too low than by reducing one that is too high. The Interstate Commerce Commission has not power to raise a rate; but some of its principal members, and perhaps all of them, believe it ought to have that power.

Commissions often have been given less authority over physical operation than over rate-making. There seems no sound ground for this. There appears no good reason why they should not have the same authority, after full investigation, to issue orders to correct defects of service as defects in the rate structure. Congress and the State legislatures have been passing numerous laws to regulate the hours of service of railway employees, the number of men in railway train crews, the kind of headlights that shall be used on locomotives, etc. There is just as much reason why matters such as these should not be regulated by legislatures and why they should be regulated by

public-utility commissions as there is why rates should be regulated by the commissions. Regulation of operation, to be fair and beneficial, requires just as thorough investigation, just as much impartiality, and just as much expert knowledge as regulation of rates. Most of the laws for regulation of railway operation that have been passed recently, such as full-crew laws, and laws to regulate the length of freight trains, have been passed in the name of safety. But many of them do not seem intended to promote safety, and are not adapted to save a single limb or life. They increase the number of men that railways must employ; and their only effect, so far as the public is concerned, is to tend to increase the cost of transportation. The lawmakers have passed many of them either ignorantly or to win votes. A lawmaker who permits himself to be bribed with the votes of labor is not a whit better than one who permits himself to be bribed with the money of capital.

One of the most important matters with which public regulation should deal is the relations between railways and other public utilities and their employees. The Federal Erdman Act, as recently amended by the Newlands Act, creates a mediation board of three members whose duty it is, when a strike or a lockout of employees concerned with the operation of trains is threatened on railways, to tender their good offices to prevent a rupture. If mediation fails, the law provides for voluntary arbitration by a board composed of two representatives of the railways, two representatives of the employees, and two representatives of the public. While arbitration under the act is voluntary, proceedings may be brought in a court of equity to enforce the award. This law is an improvement over the original Erdman Act; but it is very defective in some important respects. The controversy between the Eastern railways and their engineers last year was submitted to arbitration by a board composed of five eminent and disinterested citizens — Oscar S. Straus, of New York; Charles R. Van Hise, president of the University of Wisconsin; Frederick N. Judson, of St. Louis; Albert Shaw, editor of the *Review of Reviews;* and Otto M. Eidlitz, former president of the Building Trades Association of New York — and one representative of the railways, Daniel Willard, president of the Baltimore & Ohio; and one representative of the employees, P. H. Morrissey, formerly head of the Brotherhood of Railroad Trainmen. This board, after a thorough investigation, fully discussed in its report the railway labor situation and recommended certain important legislation. Recognizing the great harm to the public that would be caused by a tie-up of the railways and the equal or greater harm that would result from a long series of unreasonable and unjust settlements of labor controversies, the board recommended the creation of national and State wage commissions and the prohibition of strikes and lockouts until after arbitration. Strikes and lockouts on public utilities should, in

the interest of the public welfare, be prohibited until after arbitration, at least; and each arbitration board should contain a clear majority of representatives of the public. There seems no very good reason why differences between public utilities and their employees should not be settled by the usual regulating commissions. They arbitrate differences between shippers and railways as to how much the shippers shall pay the railways. Why should they not also arbitrate differences between the railways and their employees as to how much the railways shall pay the employees? Is it not best that the same body shall look at both sides of the ledger — that the body that regulates the income of public utilities shall also regulate their outgo?

Regulation by commission often extends to the finances of public utilities, relating to the issuance of securities by them or to the profits they are permitted to earn, or to both. The most thorough and expert investigation of the subject of regulation of security issues ever made was that by the Railroad Securities Commission, of which President Hadley of Yale was chairman, and which rendered its report in 1911. That commission expressed the opinion "that it is far more important to ascertain just what are the facts concerning the issue of securities and what is actually done with whatever money has in fact been realized from the stock which is issued, than merely to make sure that the par value of the stock was paid in at the time of issue." It is said that if railway rates were materially influenced by the amount of the outstanding securities it would be desirable for securities to be issued under governmental regulation, but it is believed "that the amount and face value of outstanding securities has only an indirect influence on the making of rates, and that it should have little, if any, weight in their regulation. . . . If railroad securities were to be issued only after express authorization of each particular issue by the Interstate Commerce Commission or other governmental agency, it is difficult to see how the government could thereafter escape the moral, if not the legal, obligation to recognize these securities in the regulation of railroad rates. . . . The possible consequences of such a system are too serious to warrant its adoption at the present time." The Commission therefore confined itself to recommending legislation to require each railway to file with the Interstate Commerce Commission prior to the date of issuance of any securities, a full statement of their character and amount; to furnish to the Commission, at such times as it may require, full statements of its financial transactions which the Commission may make public at its discretion; and to compile, for the information of its stockholders, such information and in such form as the Commission may require regarding its financial transactions during the fiscal year, and any interests that its directors may have in any transaction under investigation.

These are eminently wise recommendations; but they have not

been acted on by Congress, which seems likely to pass more radical legislation — legislation which will be less wise in proportion as it is more radical. The purpose of regulation of security issues is to prevent over-capitalization of railways, with the evils attributed to it, some of them very real and some fanciful. But before we attempt to prevent over-capitalization it might be well to decide what it is; and few persons agree on a definition of it. A railway like the Chicago Great Western, with a capitalization of eighty-five thousand dollars a mile; gross earnings of eighty-five hundred dollars a mile, net earnings of but twenty-one hundred and twenty-nine dollars a mile, and neither paying nor earning anything on its stock, is obviously overcapitalized. Equally obvious is it that a railway like the Delaware, Lackawanna & Western, with gross earnings of forty thousand dollars a mile, net earnings of sixteen thousand dollars a mile, a capitalization of only thirty-three thousand dollars a mile, and paying regular dividends of twenty per cent., and frequently extra dividends, is greatly undercapitalized. Its property could not be reproduced for several times its capitalization. When we have such extreme examples our definition of over-capitalization, and idea of what should be done about it, become a matter of the point of view. Do we mean by it that securities have been issued as a bonus or sold at a discount? That has been done, and it can be prohibited; but this would seriously interfere with the construction of new, independent railways, which seldom can market any securities at par except bonds, and bonds only when they bear a very high rate of interest or a stock bonus is given with them. Do we mean by over-capitalization security issues in excess of cost? But in few if any cases do we know or can we ascertain the cost of the original construction of and the permanent improvements in our railways. Do we mean that capitalization exceeds the present cost of reproducing the railways? Congress has now provided for a valuation of railways by the Interstate Commerce Commission; and perhaps after it is made security issues might be based on it. But it is practically certain that if the cost of reproduction is given preponderant weight in the valuation, as the decisions of the Supreme Court indicate it must be, the valuations of most railways and of the railways as a whole will exceed their capitalization. Would we then authorize the railways whose capitalizations were smaller than their valuations to equalize them by issuing stock dividends? This question of regulating securities is much less simple than many think; and good sense dictates that for the present we should follow the conservative recommendations of the Hadley Commission.

Almost every time an order is issued by a regulating body regarding either rates or operation net earnings are more or less affected. There is a tendency to try to limit the profits of railways and other utilities to what is called a "fair return"; and there is an impression that the

courts have held that this is the maximum they may be permitted to have. What the courts have held is not that public utilities may not earn more than a fair return, but that they may not be restricted to less. They have fixed a minimum, but not a maximum limit. What, if anything, a public utility may earn in excess of the so-called "fair return," usually placed at six or seven per cent., is a question for the regulating body to determine, and should be dealt with by it as a matter of public expediency. Public expediency dictates that the return permitted to be earned shall be sufficient to attract enough capital into public utilities to enable them to render good and adequate service; and that efficient management shall be rewarded with larger returns than inefficient management, because if it is not there will soon be no efficient management.

Once the public has created regulating commissions of satisfactory personnel and adequate powers it would seem that it should be content to let them proceed with the performance of their difficult, delicate, and arduous duties without unnecessary and harmful interference. This, however, has seldom been done. The legislatures, after having created the commissions, often have passed laws for the regulation of rates and operation against the judgment, and even over the opposition, of the commissions. In some States the people themselves by referendum votes recently have passed laws to regulate matters whose regulation was within the special scope of the commissions' authority. This is contrary to sound principles of regulation by commission. Again, after having adopted special laws for the regulation and control of public utilities, we have applied to them Federal and (in many cases) State anti-trust laws, whose object is to enforce competition. Now, competition in rates, in the ordinary sense, and effective and wholesome public regulation are incompatible. You cannot have competition in, and effective regulation of, railway rates at the same time, any more than you can at the same time ride two horses going rapidly in opposite directions. The main aim of regulation of rates is to prevent unfair discrimination in rates. But competition inevitably leads to discrimination. When railways compete in rates they inevitably compete harder for the business of large shippers than of small shippers. That means secret rates and rebates, which are in violation of the Interstate Commerce Act, the provisions of which the Interstate Commerce Commission exists chiefly to enforce.

The true theory of regulation by commission seems to be this: The management of public utilities should be left in the hands of the owners or those that they choose to represent them. The regulating commissions should be made strong enough in personnel and statutory power to exercise corrective authority over the managements when the acts of the managements are unreasonable and unjust to the public. And such commissions having been created, they should be left free

to perform their duties without interference from the public or any public body except the courts, and then only when it can be shown that the commissions have exceeded their constitutional authority in a manner plainly unreasonable and unjust to the concerns over which their jurisdiction extends. The success of regulation probably will be in proportion to the consistency, fairness, and integrity with which we carry out these principles.

Some people think that the courts should have no authority to review and set aside orders of regulating commissions unless they are confiscatory. It has been contended, not only that this ought to be, but that it is the law. The making of rates, the Interstate Commerce Commission said, in its annual report for 1911, is a legislative function. "That being so, the dicretionary power involved in reaching a conclusion that a particular rate is or is not reasonable for the future, or that a particular discrimination is or is not undue, is a legislative discretion which cannot be reviewed by the courts." The same reasoning would equally limit the power of the courts to review orders regarding service and other matters. The Supreme Court of the United States in a recent decision [1] has refused to accept this theory. It holds that such authority as the commission has claimed, "however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power." In other words, the railway or other public utility can always appeal to the courts, not only to determine if an order of a commission is confiscatory, but to determine if it is reasonable and based on substantial evidence. The courts may not annul an order of a commission unless it is plainly unreasonable. But when it is so they must set it aside.

The main principle on which the Government of the United States rests is that it should be a government of laws and not of men; that no one should have his life, liberty, or property taken without the right to be fully apprised of the reason and to appeal to the courts to determine if the taking is just. The doctrine that regulating commissions or other administrative bodies should be given any arbitrary power over public utilities is simply the doctrine that the property rights of the owners of public utilities should not be given the same protection as the property rights of other persons. It is a doctrine that seems inherently wrong and unjust; at least it is one that the Supreme Court has condemned as unconstitutional. On the other hand, the decisions of the courts leave an ample field for administrative regulating commissions to work in and to accomplish all of the great good which, with a suitable personnel and large powers, it is practicable for them to accomplish.

[1] I. C. C. & U. S. vs. L. & N. R.R. Co.

SOME FEATURES OF STATE REGULATION OF PUBLIC UTILITIES

By John H. Roemer of the Milwaukee Bar, Member of the Railroad Commission of Wisconsin

(From an Address Delivered before the Wisconsin State Bar Association at Milwaukee, September 1, 1909)

This article shows the working of the Wisconsin public utilities law, during the first two years of its operation. — Editor's Note.

The doctrine that the public has an interest in the use of the property of a public utility employed in a public service, though resting upon the principles of the common law, was not agreeable to the managements of public service corporations when state regulation and supervision of such corporations were first proposed. Nor has there ever been a full assent to this doctrine or a frank submission to the regulatory measures adopted by the state on the part of many such corporations. The view that their undertakings, except to a limited extent in the case of common carriers, were purely private business enterprises which could be conducted upon like principles as those prevailing in other commercial pursuits, controlled the managements in the transaction of all the affairs of the corporations, whether pertaining to their private corporate functions or to those relating to their public callings. While the view thus taken has long since become obsolete, it is not at all strange that it should have been entertained when we consider the persistence of both nation and states in maintaining the economic policy of *laissez-faire* in the evolution of our industrial system prior to the civil war. The fundamental distinction between public callings and private callings was then generally either disregarded or not recognized. In accordance with the prevailing economic theory of the times, competition, whether active, or potential, that is, theoretically possible though practically improbable, was regarded as the efficacious means of securing to the general public adequate service at reasonable prices from individuals and corporations engaged in businesses now classified as public callings.

Even the right of the public in the use of property which was devoted to a public service by virtue of legislative authority, and which could not be so employed without such authority, was almost wholly ignored and, in fact, in certain instances, expressly denied. Thus, in 1858 the Supreme Court of New Jersey [1] held that a gas company

[1] Patterson Gas Lt. Co. *vs.* Brady, 27 N. J. L. 248.

chartered by the state and occupying public streets of a city with its distribution system by virtue of a local franchise was under no obligation to supply gas to any one, that it could choose its customers the same as any other manufacturer, and make such charges as it desired. The following year the Court of Common Pleas[1] of Great Britain denied any right in a consumer to have gas supplied to him in the absence of a contract with the company providing for the same. Lord Chief Justice Cockburn said: "We cannot imply a contract from the accidental circumstance of this company having a monopoly of the supply of gas to the neighborhood. I see nothing whatever to bind either the one party to take or the other to furnish the supply any longer than their convenience, or their caprice, if you will, may induce them to take or to supply." In 1862 we find the Supreme Court of Connecticut[2] declaring that the "manufacture and sale of gas is a business which may be prosecuted or discontinued at the will of the party engaged in it; that the relations between the maker and the consumer originate in the contract between them, and their respective rights and obligations are controlled entirely by the stipulations of such contract, and as, (where no contract prohibits) the one may refuse to take the article at his pleasure, so may the other at his pleasure refuse to supply it"; and that there is no reason discovered "for subjecting the maker of gas to duties or liabilities beyond those to which the manufacturers and venders of other commodities are subjected by the rules of law." As late as 1866 the Supreme Court of Massachusetts[3] expressed the same view, although seventeen years previous Chief Justice Shaw,[4] passing upon the constitutionality of an act conferring the power of eminent domain upon a water company, said: "The supply of a large number of inhabitants with pure water is a public purpose." This conclusion, however, was based upon an interpretation of the terms of the company's charter, which, as has been said, "was plainly unjustifiable unless there was an underlying public duty." The logic of these decisions found no favor with the Supreme Court of Wisconsin, for at the same time, in 1858, that the Supreme Court of New Jersey was considering whether a gas company was engaged in a public or a private calling, the same question was under consideration by our Supreme Court in the case of Shepard *vs.* The Milwaukee Gas Light Co., 6 Wis. 539, in which the arguments which led to the doctrine of the courts of the Atlantic states and Great Britain were refuted and a contrary opinion expressed. This case is important as it is the first to give partial recognition, at least, to the principle that when any business of general public

[1] Huddesdon Gas Co. *vs.* Haselwood, 6 C. B. (N. S.) 239.
[2] McCune *vs.* Norwich City Gas Co., 30 Conn. 523.
[3] Commonwealth *vs.* Lowell Gas Light Co., 12 Allen 77.
[4] Lombard *vs.* Stearns, 7 Cush. 62.

concern is in its nature or by reason of circumstances a virtual monopoly it ceases to be *stricti privati*, falls within the class of public callings and is subject to the rules of the common law relating to such enterprises.

In considering the obligation of those engaged in operating public utilities to serve the public, the courts generally seem to view the same as a duty imposed by specific charter or general legislative provision rather than as resting upon a common law right in the public arising out of the nature and character of the business. The latter basis is certainly the sounder, and, in the absence of any specific legislation on the subject, would, it is safe to say, if the situation should arise in any case at the present day, receive judicial recognition in any court, for in the last analysis the fundamental distinction between a public calling and a private calling is an economic one. In the one case there is virtual monopoly; in the other, virtual competition.

It was not, however, until Munn *vs.* Illinois,[1] the first of the so-called Granger Cases, reached the Supreme Court of the United States and was there decided, that the right of the public in the use of private property devoted to a public purpose which, in its nature and because of economic conditions, clothed the owner with a practical monopoly, was fully recognized in its economic aspects and as legally grounded upon the principles of the common law. This case marks the beginning of a new epoch in economic legislation affecting public service corporations in this country. The existing regulatory means of nation and states respecting common carriers now provided by express legislative enactments were the inevitable consequences of the decision in the Munn Case. The agitation of Federal control of interstate carriers at once began in Congress and continued until the enactment of the Interstate Commerce Act. State after state took up the subject and enacted laws along the lines of the Federal act until to-day a number of states have provided state agencies for the control and supervision of transportation by railroads and other common carriers. Perhaps the most efficient and certainly the most carefully considered law on the subject is the Railroad Commission Act of Wisconsin. Since its enactment the Wisconsin law has been the prototype of practically all legislation upon the subject in other states where intelligent and effective regulation has been desired.

While the attention of the public was centered upon a resolution of the question of the regulation of transportation because of its general importance, it was apparent upon the slightest reflection by the observer of the trend of economic thought and events of the time that it would not be long until all public utilities would be subjected to state supervision; for the same causes which led the state to exercise its governmental function of regulating railroads, existed in the

[1] 94 U.S. 113.

case of all public utilities, but were generally unknown to the public. In fact, when the railroad problem was being seriously considered by the people of this state, students of economic science, who were active in urging state control of railroads by a state commission, were contemplating the final adoption of a more comprehensive scheme which would place all public utilities under a common state control. Much sooner than was at the time anticipated their expectations were realized, for in less than two years from the time the Railroad Commission Act became effective, the propaganda resulted in inducing the legislature to supplement the Railroad Act with the Public Utilities Law now in force. The scheme of state supervision of public utilities embraced in this law is the most comprehensive in all its economic aspects and the most effective of any law of the kind in existence. . . .

Certain features of the Public Utilities Law are revolutionary in their character, and upon these hangs the fate of every public utility operating within the state. These features are worthy of consideration.

Valuation and its Effect on Securities

Among the most important and salutary provisions of the law is that providing for the valuation of the property of all public utilities operating within the state. The Supreme Court of the United States having in effect determined that the owner of private property devoted to a public use is entitled to exact from the public such charges for the services rendered or product furnished by him to the public as will generally produce revenue sufficient to meet operating expenses, cost of maintenance, and depreciation of the plant, and also to provide a reasonable return upon a fair value of the property so employed, it was necessary to provide for an appraisal of such property in order to have a lawful basis upon which to determine intelligently the question of rates and charges. As most public utility plants are owned and operated by public service corporations whose corporate securities as a rule bear no relation either to the actual investment in or present value of such plants, some other measure of the value of such plants was required. In fact, the capital stock of a public service corporation often represents little more, if anything, than the capitalization of an image of the vivid imagination of some not over-scrupulous promoter.

That every legitimate element of value, whether tangible or intangible, might be considered, the law provides for the valuation of the physical property and of all the property of a public utility "actually used and useful for the convenience of the public." In view of the indefinite and uncertain statements found in the opinions of most of the courts regarding the elements of value that properly

and necessarily enter into the matter and must, therefore, be considered in arriving at the fair and just valuation of the active property of a public utility, the legislature wisely extended the latitude of the inquiry so that no infirmity in the scheme of valuation proposed might exist because, perchance, of some transgression of the provisions of either the state or the Federal constitution inhibiting the taking of private property for public purposes without just compensation being made to the owner thereof. Between the Scylla of a physical valuation and the Charybdis of a stock and bond valuation the Commission is thus left by the law to steer its course in arriving at a valuation for earning purposes which will be just to the legitimate investment upon the one hand and fair and equitable to the public upon the other hand. The duty thus imposed upon the Commission is the gravest and most important of all its functions. The value of every security of a public service corporation in this state will be determined and perhaps irrevocably fixed by the appraisal made by the Commission of the property of such corporation upon the credit of which such security was issued. There can be no escape from this conclusion. The effect will be of far reaching importance. Fair and reasonable as such appraisal may be, it will signify to the world that in the future public utilities in this state will cease to be subjects for speculative investments. It will also indicate that which is more important, to-wit, that actual and *bona fide* investments in such concerns, when providently made, will be secure under state supervision and the adequacy of the security will be maintained by a strict enforcement of the law requiring, wherever and whenever possible, an adequate depreciation reserve fund to be set aside so that the physical plant may at all times be maintained to a maximum of efficiency, and the integrity of the investment may not be impaired from any cause or contingency incident to the operation and use of the property.

The need of additional capital to extend existing plants to meet the public requirements may be met at less sacrifice, in my judgment, under such circumstances, than the customary bond discounts of the present day, and if we are to accept the word of some of our leading financiers, capital under the conditions mentioned will be available at less rates than are at present in vogue. A leading banker and financier of this state, in testifying before the Commission, expressed his view of the probable effect the Public Utilities Law would have upon such securities as follows: "I think it (the law) will have a very favorable influence upon all classes of securities. I think what capital wants is a steady return and I think they are satisfied with a greatly reduced return if there is a guarantee they will have it steady." As the revenues of public service corporations are usually less affected by industrial depressions and general financial disturbances than those of most manufacturing and mercantile concerns, steady returns upon

securities representing actual investments in public utilities are more likely to occur, as a rule, than in the case of industrial stocks.

There is no reason why the bonds of public service corporations at a low rate of interest should not compete in a measure with public securities for the favor of those seeking secure investments and such as are readily convertible into cash. In some of the New England states, notably Massachusetts, they stand on a parity with public securities, and by law are permitted to be purchased by savings banks and to become investments for trust funds. Doubtless in time we may find the same conditions prevailing here, but before such is likely to be the case many, if not most, of our public utilities will have to undergo a financial regeneration. To insure stability to the securities it is essential that they approximate a truthful representation of the investment. When the disparity between the actual investment and that reflected by the capitalization becomes a matter of public record, the self-interest of the security holders will doubtless bring about a readjustment of the capitalization upon a sound and truthful basis. This has occurred in almost every public service corporation of any importance in the country, and in some has occurred more than once.

Those who desire to withstand any scaling of capitalization when the latter is discredited by financiers and becomes an impediment to business extension often contend, but never successfully, that the capitalization of a public service corporation does not concern the public; that the securities of such a corporation are mere private corporate contracts between the parties thereto, and should therefore be permitted to assume such lawful form as the parties in interest may agree upon. The contention in relation to stock issues contains an element of truth, but in relation to bond issues and other evidences of indebtedness it is without any moral or reasonable basis for support; but even before it can be conceded as sound in connection with the issue of capital stock there must be a radical change in the character of such securities. If each share of stock represented upon its face but an aliquot part of the property of the corporation, the number of parts into which the corporators should divide the corporate holdings would be of no public consequence, and this is particularly true in this state under the Public Utilities Law, by the terms of which the return to the investors is based upon the fair value of the active property of the corporation which forms the measure of the value of the securities issued against it. But so long as each share of stock bears upon its face the suggestion or implication that it represents a fixed sum acutally invested in the property, it is a matter of morals as well as of grave public interest that the representation be true, for as a rule the poorer the security the more widely it is distributed, and those who ultimately receive it are generally persons that can ill afford to bear the loss.

The fear has been expressed that under the new order of public utility affairs in this state foreign capitalists will dispose of their public utility holdings and refuse to consider further investments in such enterprises. I doubt very much the timidity of capital seeking safe investments either to remain in or to enter a field where substance and not illusion is to be the basis of any issue of corporate securities. Even if there should be a redistribution of public utility securities for any reason, it will be found that citizens of Wisconsin who are cognizant of the purposes of the people of this state in placing all public utilities under state surveillance will regard such securities as inviting investments and seize the opportunity to acquire them. There would be an advantage in this, for it would inure to the benefit of communities if public utilities were generally owned by the people whom they serve and who have the greatest interest in their welfare. It would also result in a fuller appreciation on the part of the people of the true relation which such utilities bear to the public, and bring about a closer and more harmonious coöperation between the managements of such concerns and the public authorities.

Perhaps the best assurance that investors in the *bona fide* securities of public service corporations will be protected in their investments, is the policy indicated by the Supreme Court of the state that should govern the Commission in its requirements of such corporations. Justice Timlin in the case of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company *vs.* Railroad Commission, 116 N. W. 913, delivering the opinion of the court says:

> In determining whether or not the order of the commission is unreasonable, it must also be considered that every unnecessary burden imposed upon the railroad impairs its net receipts and diminishes that margin, if there be one, between the amount sufficient to assure a fair return on the value of its property, plus the amount of its fixed charges and operating expenses, and its gross receipts. In this margin the public and the railroad are interested, because it is only when this exists that betterments in construction or improvements in service not imperative or indispensable, or reduction in rates, will ordinarily be voluntarily made by the railroad or can ordinarily be ordered or enforced by the commission. We are not now speaking of those extreme cases where public duty must be discharged, whatever the financial consequences to the railroad. But in ordinary cases to waste this margin is to waste the fund in which the whole public is interested. This should never be done for the benefit of the few, as against the interests of the many.
>
> It is also to be considered that this margin ought not ordinarily to be exhausted or swept away by orders or requirements of the Railroad Commission as fast as accumulated, because human nature or railroad nature is such that no one will long economize on operating or other expenses if his economy only furnishes a larger basis for further exactions.

Uniform System of Accounting

The uniform system of accounting required of all public utilities under the provisions of the law has already demonstrated the wisdom of its adoption. The statistics thus afforded are being carefully analyzed and compared by those engaged in the management and operation of utility plants, and as a result great interest is being aroused in the matter. As the utilities are classified according to size for the purpose of accounting, it enables each utility to compare the results of its own operations and management with those of other utilities more nearly resembling it in important characteristics and thus to benefit by the experience of others engaged in a like service under approximately similar circumstances. The balance sheets and accompanying reports are becoming matters of increasing interest and investigation on the part of the public, and as they reflect the experience and result of operation of each plant, it is obvious that self-interest as well as public sentiment that will be engendered by a comparative study of such statistics by the press and public authorities, will induce alertness in the managements of such enterprises to observe and adopt economies in operation, extend the business, improve the service and lower the cost to the patron.

While the system of accounting comprehends a scientific and carefully arranged separation of accounts, its application to the various situations and conditions under which the utilities are operating may result in certain modifications which experience may demonstrate to be necessary before the method of accounting will be permanently established.

But the principles upon which the system has been constructed, being in accord with the best thought and practice on the subject, will not be changed. Nor will the system be weakened to satisfy the theory of those who believe that the public should be satisfied with general statements of receipts and expenditures rather than detailed reports differentiating the items in accounts that will enable an intelligent judgment to be formed of the various details of operation and management. Any alteration in established business methods necessarily meets with the opposition of the non-progressive and self-satisfied manager, but when a change is once inaugurated such resistance passes away and a return to the old methods would be met with equal aversion.

All municipal public utilities will be required to keep their accounts in conformity with the established system. This is essential for the sake of comparison and also for judging the efficiency of the management. Communities owning and operating their own plants will be afforded an opportunity of measuring the business ability and competency of those intrusted with the management and operation of

such plants. Extravagance or inefficiency in administration will be readily detected and public opinion may be relied upon to bring about a reform where needed and to enforce a business administration of such municipal commercial enterprises.

The most vital objection urged against municipal ownership and operation of public utility plants has been the lack of business ability generally displayed in such undertakings. While there is considerable force to the objection, as municipal plants have often been intrusted to incompetent servants and are subject to be so intrusted because of local political expediency or from other improper motives, the evil, in my judgment, wherever it exists, has arisen and been permitted to exist because of the fact that the public has had no certain criterion by which to determine the real situation of affairs. However, under the plan of accounting provided by the law and with the exercise of reasonable diligence on the part of those charged with its execution, I see no reason why municipal plants may not be administrated as efficiently and economically as those controlled by private capital. Those in control of such plants will be obliged, under the circumstances, to forego all other considerations except to so manage the affairs of the business that the results of their administration will compare favorably with those of others engaged in similar undertakings, whether publicly or privately controlled and operated, or, in case of inability to thus demonstrate to the public the efficiency of their services, they will be required to relinquish their trust to more competent hands.

The Work of the Engineering Staff

Previous to the enactment of the Public Utilities Law a considerable staff of engineers had been jointly serving the tax and railroad commissions, chiefly in connection with the valuation of the physical properties of the steam and electric railways of Wisconsin. There are upwards of twenty electric railway properties in the state, and one-half of these latter companies are also engaged in the sale of electric current for lighting and industrial power. Due to this association of properties for operating purposes and to these earlier railway valuations, there arose the fortunate condition that a substantial beginning had already been made in the work of valuation of certain of the more important public utilities properties by the time that administrative action by the Commission had fairly begun under the Utilities Law.

It was further found to be a comparatively simple matter to provide for the standardization work contemplated by the Utilities Law by the addition of other branches or departments of technical service, and by widening somewhat the scope of the work performed by the

experts previously engaged in the joint engineering work for the two commissions.

It is a matter of particular interest that this use of a joint engineering staff is peculiar to Wisconsin. The scope of this service may be better appreciated, perhaps, by an enumeration of the titles of the laws under which the need of this expert staff has arisen. These are, in part, as follows: The Tax Commission Law, the Railroad Commission Law, the Steam Railroad Ad Valorem Assessment Law, the Street Railway Assessment Law, the Public Utilities Law, the law regulating stock and bond issues of railway and utilities companies, the "Public Convenience and Necessity" Law, the "Two-Mile" Industry Track Law, and the laws relating to railroad crossings and safety appliances. These laws, it is interesting to observe, for the most part have been enacted within the past six years.

The joint engineering staff is made up of several departments designated according to the kind of work customarily performed by each. The following statement, drawn from the last annual report of the Commission, details quite fully the duties relating specifically to the public utilities, together with those touching the various other lines of activity engaging the attention of the technical staff.

1. *Civil Engineering Staff.* Engaged in the inspection and valuation of those details of the physical property of steam and electric railways and public utilities plants which are customarily purchased, constructed, or maintained under the direction of civil engineers; including such items as the following: Lands, track, track structures and bridges; buildings and miscellaneous structures, such as gas holders, standpipes, reservoirs, dams, wells and foundations; earthwork and paving, pipe distribution systems for water, gas and steam heating plants, including tunnels for same; office furniture and appliances; horses and wagons; tools, stores and supplies pertaining to the foregoing items; etc. Also investigations, in coöperation with other departments, with a view to suggest improvements in the operating conditions of railways, waterworks plants, etc.

2. *Mechanical Engineering Staff.* Engaged in the inspection and valuation of those details of the physical property of steam and electric railways and public utilities plants which are customarily purchased, constructed or operated under the direction of mechanical experts or engineers; including such items as the following: Power plant machinery and equipment (exclusive of electrical features); steam and hot water plants (except street mains); steam road locomotives and rolling stock; ship tools and machinery; tools, stores and supplies pertaining to the above items; etc. Also investigations, in coöperation with other departments, with a view to suggest improvements in the operating conditions of waterworks, heating plants, power plants, etc.

3. *Electrical Engineering Staff.* Engaged in the inspection and valuation of those details of the physical property of steam and electric railways and public utilities plants which are usually constructed, purchased or operated under the direction of electrical experts or engineers, including

electrical machinery and appliances in power plants and elsewhere; electric railway rolling stock; electrical distribution systems, overhead and underground; telephone plants; signaling appliances; tools, stores and supplies related to the above items; etc. Also investigations, in coöperation with other departments, with a view to suggest improvements in the operating conditions of electric railways, power plants, telephone properties, etc.

4. *Gas Engineering Staff.* Engaged in the inspection and valuation of machinery and appliances for the manufacture of gas; tools, stores and supplies pertaining to the same; etc. Also investigations, in coöperation with other departments, with a view to suggest improvements in the operating conditions of gas plants.

5. *Gas and Electric Service Inspections.* Engaged in inspections and investigations of gas and electric service; studies with reference to the establishment and revision of standards of service and the formulation of rules for the same; tests and calibrations of instruments used in service measurements; investigations with reference to the electrolysis of water and gas mains; etc. Also investigations, in coöperation with other departments, with a view to suggest improvements in the operating conditions of gas and electric plants.

6. *Miscellaneous.* Experts engaged temporarily for special service of various kinds, either independently or in coöperation with one or more of the foregoing departments. Such service hitherto rendered has included such matters as the following: Consultation with prominent architect relative to valuation of costly city buildings; service of expert in investigations as to the safety of an important bridge; expert valuation of the horses, harness, etc., belonging to a large electric railway and lighting company; expert assistance in establishing a basis for valuing street railway special work; etc.

The work of the expert staff under the Utilities Law falls under three general heads, (1) valuation work, (2) service inspectional work, and (3) studies of operating conditions.

Valuation Work

The Utilities Law prescribes (sect. 1797m–5) that "the commission shall value all the property of every public utility actually used and useful for the convenience of the public," and further provides that "in making such valuation the commission may avail itself of any information in possession of the state board of assessment."

The valuations thus far made have been undertaken for the most part in connection with rate complaint cases, although, as above indicated, the law contemplates the ultimate valuation of every utilities property in the state.

The methods employed by the engineering staff in the valuation of the physical property of public utilities plants are in most respects in close agreement with those adopted early in 1907 for the valuation of the electric railway properties of the state for the joint purposes of

the two commissions. These methods in general embrace the following somewhat distinct steps or processes:

1. The preparation of a detailed descriptive inventory.
2. Field examinations of the property by a trained staff.
3. Determination of the "cost new" of each item.
4. Estimation of the depreciation on each item of property.
5. Calculation of the present value.
6. Summing up the detailed valuations by groups.

Without entering into a detailed description of the methods used in this work, it will suffice for the purposes of this discussion to state that the engineering staff endeavors to determine as accurately as possible the true "cost of reproduction" of each item of physical property included in the inventory. All available evidence is carefully weighed with a definite purpose of arriving at a "middle-ground" decision on the value of each detail of the property, both as to the "cost new" and the depreciated or "present value." Throughout its work the attitude of the staff is carefully guarded against bias of any kind, with the intention that the service rendered to the Commission shall be identical in kind and quality with that of a technical expert chosen independently by the court to give expert advice or opinions in technical matters. This balance of judgment, it is believed, is strongly sustained by the fact that the staff is continually engaged in physical valuations for both taxation and rate-making purposes.

In the course of its work, extending through a period of years and covering the widest possible range or variety of detail of physical properties, there has been accumulated a vast fund of cost data and other information invaluable in work of this kind, much of the data naturally being of a confidential character. An important feature of the valuation staff work is the collection and assimilation of this information.

The reports of the staff submitted to the Commission are customarily designated "tentative valuations," copies of which are submitted to the interested parties to serve as a basis of discussion at the formal hearings. In a fair proportion of the cases expert testimony is submitted by the interested parties. Such testimony often shows a natural tendency to partisanship and bias, although there is usually a gratifying disposition to be fair. After all evidence is in, the engineering staff is asked to review the record and make any revisions it may desire before submitting the final or revised report, which is then weighed with other evidence by the Commission. Throughout this work the staff is left to reach its own conclusions without influence or suggestion from the Commission.

During the year 1908 the valuations reported upon by the staff

to the two commissions aggregated upwards of $277,000,000 including some twenty-four reports on public utilities properties valued by the staff at roughly $6,405,000, the remainder covering some fifty-two steam railroad properties (7090 miles), twenty-four street and interurban railway properties, besides five cases of valuation for stock and bond issue purposes.

The utilities valuations thus far reported upon embrace some of the most important properties in the state. In several of the larger cities all the utilities have been reported upon. At the present time valuations are being made of the municipally owned waterworks plants at both Milwaukee and Madison, in both of which cities the Commission now has in progress a review of the water rate situation. These two cases are probably the first investigations of the kind ever undertaken under similar circumstances.

Public Utilities Service Inspections

Among the earliest matters to claim the attention of the Railroad Commission in the execution of the Public Utilities Law was the question of units and standards of service and tests of meters. It was early seen that proper administration of certain provisions of the law[1] would necessitate the establishment of a central laboratory equipment for the purpose of investigating the various kinds of public utilities service, with a view to fixing legal units and standards and also to putting the same into practice on a permanent and uniform basis throughout the state. After some preliminary discussions and conferences, arrangements were made whereby the laboratory facilities of the University of Wisconsin were made available for the purposes of the Railroad Commission, with the understanding that there should be reciprocal use of the instrumental equipment to be purchased subsequently by the Commission. The readiness with which this fortunate arrangement was effected was due largely to the established policy of the University of Wisconsin with reference to serving the state in every possible way. Following closely upon the agreement above mentioned, the coöperation of the U.S. Department

[1] Note. *Units of Product of Service*, Sect. 22. The commission shall ascertain and prescribe for each kind of public utility suitable and convenient standard commercial units of product or of service. These shall be the lawful units for the purposes of this act.

Standard Measurements; Accurate Appliances, Sect. 23. (1) The commission shall ascertain and fix adequate and serviceable standards for the measurement of quality, pressure, initial voltage or other condition pertaining to the supply of the product or service rendered by any public utility and prescribe reasonable regulations for examination and testing of such product or service and for the measurement thereof.

(2) It shall establish reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurements, and every public utility is required to carry into effect all orders issued by the commission relative thereto. . . .

Sect. 24. (1) The commission shall provide for the examination and testing of any and all appliances used for the measuring of any product or service of a public utility.

of Standards at Washington was secured and definite arrangements made whereby the standards used in the administration of the Wisconsin Public Utilities Law shall be subject to verification and control with reference to the official government standards at Washington.

The arrangements above outlined, it should be explained, while intended to apply to any phase of the question of units or standards which might arise under the Public Utilities Law, were most directly of use to the Commission in connection with gas and electric service, concerning which service the necessity of establishing standards first arose.

With a view to gathering data for the intelligent working out of the rules and regulations mentioned in the section of the law above quoted, a provisional staff was organized and a series of tests of gas and electric service undertaken in a number of the cities of the state. After some progress had been made in this investigation, a general conference or hearing was held (March, 1908) at which the owners and operating officials and experts of the various gas and electric companies as well as the municipal authorities of the state were given an opportunity to express their views.

The proceedings of this conference were supplemented by communications received from other sources, and further important information was gathered from the tests of service throughout the state. After giving careful consideration to all available information the Commission proceeded to formulate a set of rules which were officially adopted on July 24, 1908, to become effective three months thereafter (see decision, *In re* Standards for Gas and Electric Service in the State of Wisconsin, 2 W. R. C. R. 632). These regulations consist of some twenty-five rules classified as follows: Gas Service: (1) accuracy of meters, rules 1–7; (2) heating value, rules 8, 9; (3) candle power (no rule); (4) gas pressure, rules 10, 11; (5) purity of gas, rules 12, 13. Electric Service: (1) accuracy of meters, rules 14–21; (2) regulation of pressure and control of service, rules 22–25. Lack of space forbids quoting these rules in full in this paper, but reference should be made to an important departure from previous practice, consisting in the adoption of the heating value as a test for the quality of gas, to the exclusion of the customary photometric or candle power test.

The expert staff has just submitted to the Commission an elaborate review of all available data touching upon the gas and electric service of the state, with conclusions and recommendations drafted in the light of two years' experience under the Public Utilities Law. The details of this report have not as yet been made public, but it is gratifying to be able to state that the rules appear to have substantially satisfied all requirements in this important pioneer movement.

That true reform must come from within the utilities rather than

from without, is strikingly illustrated by the response of the gas and electric companies throughout the state with respect to these rules. In a quiet but generally efficient way there is now going on a steady improvement in the quality of service rendered by most of these companies, almost wholly as spontaneous or voluntary action towards compliance with the spirit of the sections of the law providing for adequate service. Some of these attempts are naturally ineffectual, owing, it appears, to ignorance as to how to go about it, rather than to a desire to evade the requirements of the law.

Special emphasis is laid upon this phase of the matter for the reason that it is one of the points most likely to be overlooked by the casual observer, and especially because it is in matters of this sort that a purely local control must prove defective and inadequate. The establishment of an official standard of quality of service, combined with a scheme of continuous inspections by which there shall be periodical contact between each utilities company and a central authority, is one of the vitally important features of the Wisconsin Utilities Law.

Studies of Operating Conditions

A word should be said with reference to a phase of the work of the engineering staff which promises far-reaching results when more fully developed. Special studies of local conditions, with a view of discovering the underlying causes for defective service and of pointing out the best manner of remedying such defects, affords the sole means of successfully attacking some of the problems which confront the Commission.

The Commission has carefully guarded against assigning its staff to those lines of service which properly should be undertaken by the engineer in private practice. Such intrusion may perhaps not be wholly avoided, but slight encroachments, if they occasionally occur, are quite certain to be outweighed by the frequent opportunities which already have arisen to suggest to inquiring officials the names of eligible practicing engineers to render a specific service beyond the legitimate scope of the work of the staff. This latter delicate service has been rendered in a number of cases by suggesting the names of several engineers eligible for a given service.

A few typical cases of these special studies thus far undertaken are the following: Investigations of the causes leading to deficient fire service, with recommendations of remedy, and satisfactory re-test after plant was overhauled; investigation of serious fires with respect to adequacy of reserve supply, etc.; investigation of alleged systematic overcharges for gas and electric service; investigation of relative economy of gasoline gas and water gas for small villages; studies of

costs of repairs and renewals of gas plants; studies of errors of gas and electric meters as affected by operating conditions; comparative studies of street lighting efficiency; study of comparative operating conditions of electric plants of the state; investigation of causes of defective service of heating plants.

In this same connection reference should be made to special studies by members of the staff in the laboratories of the University of Wisconsin, especially those relating to gas calorimetry in coöperation with the committee of the American Gas Institute.

Although not directly concerned with the Public Utilities Law itself, mention may appropriately be made of the exhaustive study of the service rendered by the Milwaukee street railway company, the staff report on which was recently given to the public.

These contacts with the public have clearly demonstrated the need for a disinterested investigating staff directed by a central authority having powers similar to those conferred upon the Railroad Commission by the Public Utilities Law.

Indeterminate Permit

One of the fundamental principles of the law is a general recognition of the fact that public utilities are virtual monopolies by nature and must be dealt with as such in any just and comprehensive system of state regulation. Without protection of such monopolies only a limited supervision of their affairs by public authorities can be morally justified. This is almost axiomatic. Under the New York statute protection against competition is thrown about every public utilify subject to its provisions, regardless of the character of its franchises or the time of their acquisition. The policy of our law is to grant a monopoly in the first instance only to public service corporations whose secondary franchises are acquired subsequent to its enactment and therefore subject to its provisions in every particular. This policy was adopted principally because it was the desire of the authors of the measure to relieve municipalities and individuals of existing contracts for services for extended periods at inequitable rates for municipal purposes and private purposes, and, hence, the condition was imposed upon all corporations operating under franchises granted prior to the enactment of the statute, that the right to insist upon the enforcement of such contracts must be forfeited before their franchises would become exclusive and perpetual. A somewhat novel and perhaps unnecessary, though cautious, scheme or method of procedure was devised to accomplish such purpose. In order to perpetuate and render exclusive secondary franchises granted prior to the passage of the act, it is necessary for the corporate proprietor to give notice to the authorities designated in the act of its surrender of its

franchises and simultaneous with such surrender a franchise issues to such corporation by operation of law, which embraces the surrendered franchises *as previously modified by the regulatory powers conferred upon the Commission.* In other words, it places the corporation upon the same basis in all respects with corporations acquiring their privileges of doing business in the communities which they serve since the act became effective. By limiting the time within which such action could be taken by public utilities it was believed at the time of the passage of the act that the opportunity of securing exclusive rights and privileges in perpetuity, subject, of course, to the right of purchase by the municipality of the active properties of such utilities, would be a sufficient inducement to cause a surrender of all secondary franchises within the period fixed by the statute, but much to the surprise of those who conceived the plan less than one in ten of the public service corporations availed themselves of the privilege. Various reasons have been assigned for the general failure of such corporations to act in accordance with the desire of the legislature, but the controlling reasons for the attitude assumed by such corporations in the matter seem to have been (1) a doubt as to the legal right of the directors and stockholders to make the surrender without the consent of the bondholders whose mortgage security covers and includes the franchises of the corporation, (2) the practical impossibility of ascertaining all the bondholders and acquiring their consent, and (3) the erroneous, though perhaps not ill-founded, conception of the value of such franchises. The latter reason was advanced in but few instances and is scarcely tenable. As all secondary or special franchises granted directly or indirectly by the legislature are non-exclusive, subject to eminent domain by municipalities, and resting entirely upon the good faith of the people of the state, as they may be repealed at any time by the legislature, I can see no element of value in such franchises that makes them a more desirable acquisition of a public service corporation than the practically perpetual exclusive franchises provided by the statute.

The fact that a new phrase, "indeterminate permit," [1] was coined and employed in the act to denominate a franchise when used in its generic sense, that is, as embracing all the secondary or special franchises granted to a public service corporation, either directly by the state under general legislative provision or indirectly by the state

[1] NOTE. Sect. 1797m–1. 5. The term "indeterminate permit" as used in this act shall mean and embrace every grant, directly or indirectly from the state, to any corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, of power, right or privilege to own, operate, manage or control any plant or equipment or any part of a plant or equipment within this state for the production, transmission, delivery or furnishing of heat, light, water or power, either directly or indirectly, to or for the public, which shall continue in force until such time as the municipality shall exercise its option to purchase as provided in this act or until it shall be otherwise terminated according to law.

through a common council or other municipal body duly authorized thereto, has had a deterring effect upon such corporations and notwithstanding the legislature has again opened the season for exchanging franchises there has been no perceptible change in the attitude of the corporations toward the proposition. The statement often made, that until there has been a judicial interpretation of the meaning and scope of the phrase "indeterminate permit" corporations will hesitate to trade their rights or franchises which have a definite meaning in the law for those that have not yet been defined by the courts, does not appear to have any substantial basis for support. In fact, the statute contains as explicit a definition as is possible to make and leaves nothing for interpretation or explanation.

As the utilities are generally desirous of canceling their long time discriminatory contracts with municipalities for service for municipal purposes and those with individuals for private purposes, it would have been, perhaps, better if the legislature had in the first instance attached less importance to such contracts and amended every franchise by making it exclusive and practically perpetual, although subject to termination by the acquisition of the physical property of the utility under eminent domain. The necessity of coining a new phrase to denominate a well-established legal right or privilege might have been thus avoided or, if deemed desirable, might have been employed without causing any anxiety on the part of those whose rights were being enlarged rather than curtailed by the amendment. No honest or intelligent opposition can ever be brought against carrying out in some satisfactory manner the economic purpose designed to be accomplished by the provisions of the law relating to franchises.

In considering the features of the law, hereinbefore discussed, in their broader aspects it would appear that the unbiased mind must necessarily come to the conclusion that the system of state regulation and aid provided by the Public Utilities Law of this state is capable of producing eventually more permanent and satisfactory results than any system of local control that can be conceived. It recognizes that public utilities are business enterprises requiring a high character of scientific skill as well as business ability for their successful operation and management. Any public control which ignores this fact must of necessity fail. Local control, as commonly practiced, consists of nothing more nor less than spasmodic attacks upon rates and services of public utilities regardless of the physical conditions of their plants, their financial needs or possibilities. Because of local attacks public service corporations have not infrequently yielded to local pressure and reduced their charges for the sake of peace when public interest, if the situation had been properly understood, would have been best served by maintaining the revenues so as to have enabled them to make improvements by adopting new inventions

and thereby rendering better service at a permanently reduced cost. To compel a public utility to improvidently curtail expenditures of operation, neglect proper maintenance and improvements and make no provisions for depreciation will, in the end, result in an increased burden upon the public. The time will come when these omissions must be supplied and the public will be obliged to supply them or go without the service. To meet the requirements when they occur is the only economic method that can be adopted in the administration of a public utility. That public regulation which does not deal intelligently with the business interests as well as the physical property of a public service corporation will prove disastrous in the end.

FACTORS DETERMINING A REASONABLE CHARGE FOR PUBLIC UTILITY SERVICE

AN ADDRESS AT THE ANNUAL DINNER OF THE WESTERN SOCIETY OF ENGINEERS, HOTEL LA SALLE, CHICAGO, JANUARY 7, 1914

By M. E. Cooley, Dean of the College of Engineering, University of Michigan

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Probably no question of greater importance confronts our people to-day than the relations of the public and the public service corporations. I refer to relations of a domestic character, rather than foreign, those which affect us as a nation considered as a family in which the interests of all of its members are, or should be, entwined, interwoven, in such manner that whatever is good for one is good for another.

Naturally in treating my subject I shall have in mind ideals which may require years for their realization, but I shall hope to appeal to you with arguments based so firmly on actual facts that I shall not be accused of being academic. I shall endeavor to throw upon my subject the light of nearly fifteen years of experience in the investigation of public utility properties, and I shall hope to leave with you the impression that my views have been expressed with due regard to proper perspective. That is to say, I shall hope to avoid being accused by any one of even *appearing* to favor one side of the question as against the other. My desire is to speak of what may be seen from the hilltop of any one who will divorce himself from the interests of either side, and try to look upon the problem with unbiased vision.

There are, of course, two sides to this question as there must be in order that any question can exist. There is the side of the public and the side of the public service corporation. To-day they are wide apart. They are wide apart for one principal reason, namely, ignorance. While it may be no disgrace to be ignorant, it is disgraceful to remain ignorant when so little education is required to dispel it. The education required is not difficult; indeed, it is very simple; but the trouble is that very many of those who most need it are not willing to be educated. Various motives exist, which I will not discuss here, further than to mention that chief among them is a spirit of antagonism, akin to revenge on the part of the public, in localities where the opportunity exists for its manifestation.

It is, I believe, generally considered by the officers of public service corporations that they are, or rather were, themselves responsible for the unfriendly attitude of the public toward them which is now almost general in this country. The public service corporation has in the past proceeded on the theory that the words *public service* had no particular meaning, and that like any other corporation it was at liberty, and indeed had the right, to make as much money as possible out of its business. The public service corporation has in the past ignored the fact that its right to do business is a public grant, a grant which in the very nature of it precluded others from engaging in the same business in the same locality. True, in theory, at least, others might be admitted to the field and thus create competition, but practically it has not worked out that way. Ordinarily there is not enough business for two, and even if there were, great inconvenience is likely to result; as for instance in the use of two telephone systems, two waterworks systems, and several street car systems in the same city. It is much to the advantage of the public, both in convenience and expense, to have a single utility of the different kinds serve it when that service can be had on fair terms.

What are fair terms? That is what is partly meant by the words *reasonable charge* in the title of this paper. I say *partly* meant. In the broad sense they may be synonymous. To illustrate: The service rendered by a public service corporation may be very poor without any good excuse for it. In such a case a reasonable charge would be less than when the service was entirely satisfactory. Careless or unintelligent management, or a desire to increase the dividend rate, would lead to this result. Again, the service rendered may be very poor and yet be the best possible and keep the business alive; that is, were the rates higher a better service could be rendered. This may be found in small towns where the extent of the business will not support anything better. Further, the service may be very unsatisfactory and still be the best possible to render regardless of rates; that is, physical conditions may limit the ability to render satisfactory

service. This may be found in large cities, an example being a street railroad system which cannot be extended except by building elevated or underground systems.

Fair terms, then, means fair service, or the best possible under the conditions, to the public on the one hand, and a reasonable charge for that service to the corporation on the other hand. They are, or should be, the two members of an equation which are equal to each other. Like an equation, given the service demanded and certain other factors involved, the fair rate, or the reasonable charge, can be readily determined. It is these factors we come now to consider. They embrace, *first*, the capital investment upon which the interest return is made either in the form of interest or dividends, or both; *second*, the operating expenses which include maintenance and repairs of all the elements of the physical property, and taxes; *third*, a depreciation fund out of which can be replaced elements of the physical property which are worn out, or have become obsolete, so that they can no longer be used economically; and, *fourth*, a sinking fund to provide for the loss of capital due to depreciation, or the difference between the cost of the property when new and when disposed of at the expiration of its franchise life. Let us take them up in order, capital investment first.

It should be understood at the outset that no capital can be made available for a public utility, or for any other business, for that matter, without a sufficient return on the money to tempt its investment in the business. Capital obeys the law of supply and demand like any commodity. Thus, if capital be invited for investment in a service which is desired by the public, then the public must expect to pay the price in the form of interest or dividends which is necessary to secure it.

However much in the past capital may have been tempted into the field without invitation in the hope of large returns, those days are rapidly disappearing; and before very long, if not now, we shall be obliged, not only to extend an invitation, but to offer inducements to bring capital to our door. Those inducements must be not only a fair return on the capital investment but a welcome guaranteed throughout a term of years. Capital may be compared with the guest in our household. While she bides with us she is entitled to the treatment accorded to a guest. She may have worn out her welcome but at the same time have become indispensable to our domestic affairs, so that we must continue to suffer her presence. We, the public, cannot invite the guest and then while she is with us slap her face; on the other hand, the guest cannot with impunity proceed to rob us once she is in our home.

There is at present a very natural distrust on the part of the public. Capital in the past having very often been self-invited, and having

been at first welcomed, then tolerated, has finally worn out both welcome and toleration. The logical result, one might think, would be to get along without capital. But of course that would be impossible. Whether the utility be built and operated by the public or by a corporation, capital is necessary. It is true that for a municipally owned utility, capital may be had on more favorable terms with the security which the public can offer; but it does not follow that the service rendered *would* be had at correspondingly low rates or reasonable charges. It *could* perhaps, but the experience of the past favors the belief that such expectation would be utopian rather than practical.

The time is coming, if not already here, when it will make no difference whether capital be invested under the direct security afforded by a municipally owned utility or the more indirect security afforded by a franchise to a corporation. This time will have arrived when the public comes to understand the elements of cost, and all of them, which enter into the construction of a public utility plant. Those elements of cost are the same, or substantially the same, whether the plant be constructed by the public or by the corporation. The public must have a board intrusted with the construction and management of the utility. This board corresponds practically to the corporation's board of directors.

The board, whichever it may be, becomes the agent of the public. It makes the preliminary investigations, employs legal counsel, real estate men to procure the necessary right of way, conducts condemnation proceedings, obtains property consents, and attends to all matters connected with the proper launching of the project. It employs engineers to prepare the plans and specifications, invites bids, awards the contracts, and looks after the work during the construction period. It makes arrangements for the necessary funds to finance the project, the necessary working capital, and finally, after the work of construction is completed, puts the plant into operation.

Before its work has been done completely, the business must be thoroughly established, that is, converted from an inanimate to an animate condition. The earnings from operation must as speedily as possible be brought to a point where they will support all of the expenses. During the period of insufficient earnings, the deficits must be cared for. When the earnings become sufficient to meet all expenses, including interest on the cost of the property, the utility may be said to have become fully a *going concern*.

In all of this work the duties of the board or city officials representing the public or of the officers representing the corporation, have been the same. The elements of costs have been the same. The principles involved have been the same. The only difference has been one of degree on some of the items, as for instance, less difficulty possibly in securing rights-of-way, and more favorable terms in

financing. But as already stated, these advantages may in the ultimate results be more *apparent* than *real*. That phase I have no intention of discussing in this paper.

The principal cause of the difference of opinion between the public and the public service corporation, as I have come to see it, lies in the failure of the public to comprehend all of the elements of cost entering into the construction of a public utility plant. Not only that but a failure also to understand all of the elements of expense which must be incurred in operating the property and maintaining its integrity, once the plant has been built and the business established. The corporation itself is only beginning to understand some of these things. Its officers intrusted with the management of the property have been obliged to make the best of things, striving on the one hand to earn the dividends called for by the stockholders, and on the other, to maintain the property so as to give satisfactory service. Without in any way excusing the corporation from its sins of the past or of the present where they still exist, the trouble is now understood by the corporation, partly at least; and it must be conceded, I think, that just at present the fault lies more with the public than with the corporation. Let us now take up the elements of cost constituting the capital investment.

It will be easier of understanding if individuals will consider themselves a party to the enterprise. Assume, for instance, that you are one of a number of men brought together to consider the building of a public utility property. What is the first step? Naturally you will all want to know whether the project is feasible. This will always involve preliminary investigations, the sounding of public sentiment to know to what extent the proposed service would be demanded, what concessions would have to be obtained in the matter of property consents and the conditions under which a franchise could be obtained. If these inquiries have resulted favorably, the next step would be to employ engineers to look over the field and make preliminary estimates of cost and determine upon the feasibility of the project. With the information thus far accumulated, the bankers must be consulted to determine whether the necessary money can be had. At this point the project may fall through as there may not be a sufficient promise of financial return to induce capital to come into the enterprise.

All of this preliminary investigation has involved expense which must be borne by some one. It may run from 0.2 to 0.5 per cent of the cost of the proposed property. In case of failure to go further it would fall upon the individuals taking part in the investigation. They have gambled and lost. But should the future promise be great enough to interest capital *mildly*, let us say, then the bankers might be induced to gamble a bit, and by being given sufficient odds in the

way of discount on bonds and blocks of capital stock depending for their value on future earnings, be induced to come in. The less of gamble there may be, the less the odds demanded by the banks; but at the present time these keepers of the vital life of all business enterprises must, like the well-fed trout, have bait of some form on the hook to interest them at all. Not so, however, with the rank and file who, like the hungry bullhead, bite at anything, even in the dark, if only the light of a candle be exposed to show in the faintest outline the nature of the bait. But public utility properties for the most part are not financed by the rank and file, but by bankers and trust companies. It is, therefore, a real "condition, and not a theory," which confronts the promoter when he seeks to finance a proposition.

If, finally, the preliminary work has resulted in the determination to proceed, there comes the organization of the company, the employment of legal counsel to draw up the necessary papers, the procuring of the franchises, the obtaining of the necessary property consents, the securing of the right of way by purchase or otherwise, the employment of engineers to make the final surveys, prepare the plans and specifications, the bidding and award of contracts. The actual work of construction then begins.

It is at this point that the public conceives the cost of the property to begin; and for the reason that the average citizen, skilled as he may be in the work of his own pursuit, has little or no knowledge of the skill required in another's pursuit. Yet this average citizen must be consulted because the project is a public utility. It furnishes him heat, light and power, transports him to his business, and provides him with other fixed necessities of life. This being so, let the condition be met, and first of all let this average citizen be educated to understand the requirements which must be met if he is to be furnished these necessities of our modern civilization. Once he understands, there will not be, so far as he is concerned, any further trouble. The average citizen is fair minded, and asks for only the square deal.

There is, however, another type of citizen who, however much explaining there may be, persists in seeing things his own way. He may be a self-appointed guardian of the people's interest; sincere enough and honest enough, but too often his zeal results in confusion of understanding, if not perniciousness. Another type belongs to the political class. He sees gain in one form or another, if he can keep alive the troubles between the public and the public service corporation.

There is no greater service to be rendered the people of our country to-day than that which could be rendered by the newspapers if they would but go at this matter with the idea of acquainting their readers with the facts on both sides. I mean that they should not treat the quarrels between the public and public service corporations

as items of news merely, but detail men on their staffs to make a study of the questions involved, bringing to their aid the skill of the accountant, the engineer, the manager, the public officers intrusted with the affairs of these corporations, the business man, and the man who has devoted a lifetime, it may be, to a study of this class of problems. This work should not be done in a haphazard manner, but systematically and with one object in view, namely, to bring about as speedily as possible a clear understanding of all the facts on both sides. Such a work by our newspapers would not only add to the sum total of our happiness, but promote the prosperity and welfare of the communities which they serve. I sometimes wonder why the proprietors of newspapers do not see that their own business is in the nature of a public utility, morally at least.

It is perhaps unnecessary to refer in detail to all of the different items entering into the cost of the physical property of a public utility. Such items as the following are in general capable of being classified in an inventory, and are readily understood: Land for railroad rights-of-way, electric transmission lines, and pond flowage; land for the many kinds of buildings required, such as office and station buildings, round houses, car barns, power houses for steam and hydraulic plants; and land for reservoirs, dams, waterworks and gas plants. The buildings themselves, together with their furnishings and fixtures. The roadbed, rails, ties and bridges of a railroad; and the locomotive, passenger and freight equipment. The dam structure, water wheels, and generator of a hydroelectric plant. The boilers, engines and generators of a steam plant. The tunnels and pipe lines of a heating plant. The pumping engines, water mains, hydrants and distribution system of a waterworks. The machinery, gas holders, and distribution system of a gas works. The conduits, manholes and distribution systems of electric lighting and power plants. The switchboard, machinery and apparatus of a telephone exchange; and the wires, pole lines, conduits and instruments of the distribution system. All of these items, and vastly many more, make up the physical structure of public utility plants. They are tangible, that is, they can be seen, counted, measured, weighed, and their costs determined. Materials and labor are the principal items in their creation and installation.

The plans and specifications of a utility plant having been completed, proposals for its construction are invited. The contractor figures the cost of every item as nearly as possible, adding various percentages to cover contingencies, that is, unforeseen difficulties of construction and oversights, some large and some small. He adds the costs of the necessary permits, the insurance required on the men employed and on the buildings during their construction; and finally he adds another percentage on the whole for his profits. The pro-

priety of these percentages in figuring the cost of work in advance is so apparent as to cause wonderment that any question should ever have arisen as to the equal propriety of including them in making an appraisal of a property at any time after it was built. Happily this ignorance concerning many of the physical elements has been dispelled, and there no longer is any question of allowing the necessary percentages to cover contingencies, insurance, contractors' profits, engineering and superintendence.

In amount the contingency percentages, varying on the different things from 2 to 20 per cent and upwards, may be assumed to average not less than 10 per cent. One half is usually applied directly to the items themselves, the other half as a percentage on the total cost of all the items. Insurance varies from 0.5 to 1 per cent. The contractor's profit should be estimated at not less than 10 per cent. Engineering and superintendence, like contingencies, varies with the different items from 2 to 10 per cent and over, an average being, say, 5 per cent. One-half is applied directly to the items themselves, the other half, as a percentage on the total cost of all the items, including contingencies and contractor's profits. If the insurance has not been included with the contractor's costs it should follow after engineering and superintendence, and may then be combined with taxes in a percentage varying from 0.5 to 1.5 per cent. In the application of these percentages, only the *general* engineering percentage should be applied to land, the cost of which embraces its own particular expenses of acquiring, including damages, deeds of transfer and the like.

In case the contract has been awarded to a general contractor, he may sublet the different parts to other contractors, each of whom includes in his bid contingencies and other items proper for his particular part of the work and his profits. In such cases the cost of the plant includes, besides the contingencies and profits of the subcontractor, similar items for the general contractor. A general contractor responsible to the owners for the success of all building operations would probably demand and receive not less than 10 per cent of the cost of the entire work covered by his contract; and instances are known where the general contractor's profit has been large, — 20 per cent and more. The measure of his profit is usually determined by the nature of the work, that is, the difficulties and uncertainties involved. The building of the Detroit River tunnel is an example of where the general contractor made a large profit; but the uncertainties were such that it was not known in advance by any one whether his profit would be large or small, or whether there would not be an actual loss.

Another method in vogue is to place all building operations in the hands of an engineering firm who makes all surveys, prepares the plans and specifications, and superintends the work from start to finish,

making a charge therefor of 10 per cent on the actual cost of the work. This virtually amounts to a profit of 10 per cent, as the cost on which the percentage is based usually includes the salaries and wages of the men employed in the engineering work, and all traveling and office expenses as well. It is known as the "cost plus a percentage" plan. The engineering firm may be likened to the general contractor with this difference: The former takes his percentage on actual costs determined after the work is completed; and the latter, on the estimated costs made before the work is begun. Obviously the uncertainties involved would cause the general contractor to guard himself by making liberal estimates.

We come now to discuss certain other expenses chargeable to capital, but which are not so well understood. Taxes during the construction period is an item usually overlooked by the public. Obviously, any real estate acquired by a corporation for public utility purposes would be taxed the same as similar property owned by an individual. Taxes not infrequently are also imposed on structures built, even before any use is actually made of them. One very common error of the public is to assume that if municipally owned there would be no taxes on a public utility property. True, there would be no taxes levied directly against the property, but there would be the indirect taxes which every taxpayer would have to meet. To illustrate: A public service corporation has to pay certain taxes on its property, and they may be very large. If this property be acquired by the city, it bears no taxes. The same amount of money being required to meet the expenses of government, after as before, it follows that the citizens must make up the amount formerly paid by the corporation. If, however, the earnings remain the same, there will be money to pay the taxes out of earnings. But in that case presumably the rates or charges for service would remain the same, so that one of the alleged benefits of public ownership would disappear. The item of taxes is, in an appraisal, frequently combined with insurance, the amount of the item then varying from 0.5 to 1.5 per cent.

The item of organization, administration, and legal expenses usually follows insurance and taxes and precedes interest during construction. As used by some the term is rather elastic in being made to include all preliminary expenses, costs of promotion, certificates of necessity, mortgage tax, fees of incorporation, securing of franchises, and other general expenses. It is usually expressed as a percentage varying from 2.5 to 5 per cent, being applied to the sum of all preceding costs, including lands.

There arise in connection with many utility projects certain expenses which have come to be known as costs of promotion and promoter's profits. The terms themselves are rather infrequently used in appraisals, these expenses, if considered at all, being included under

costs of administration. Administration is frequently combined with organization and legal expenses. Whatever may be said for and against costs of promotion and promoter's profits in the sense that they represent intangible elements in the nature of "rake-offs," there are, in a totally different sense, certain expenditures during both the construction period and the early operative period which are legitimate and necessary and best described as promotion costs. In the sense that a promoter forwards, advances and encourages, that is, contributes to the growth, enlargement and excellence of a utility project desired by the public, there can be no question that such costs are entitled to consideration in determining a reasonable charge for service.

As to a promoter's profit, its propriety may possibly be decided by considering to what extent one would be willing to contribute to a project, independent of its construction cost, to procure its establishment; or, were a utility now serving the public in some necessary capacity to be taken away, to what extent would you, as one served by it, be willing to contribute to it rather than lose it. Put it another way: A man says he can make a success of a utility the citizens want, or now have. You doubt its possibility but consent to a trial, and he does it. How much are you willing to compensate him for his energy and brains? This implies a conception free of bias, broad-gauged and just to all interests concerned, which can be had only by being fair and open-minded, and by carefully refraining from reaching any conclusion in advance. Obviously no percentage could be given for promoter's profits, but appraisals in which the costs of promotion have been ascertainable indicate that a proper charge may be as much as 2 per cent. Its allowance must depend on circumstances, and if included as a separate item, it must of course be excluded from administration costs.

Interest during the period of construction is an important item often overlooked in the past. This means simply that the money which has been expended from time to time during the progress of the work cannot be had without interest. If borrowed, it is secure by interest bearing notes; and if provided through the sale of bonds, these bonds bear interest. Ordinarily, the interest charge is based on the assumption that the money expended starts at zero, and mounts uniformly to the total at the end of the construction period. Thus the rate of interest is applied to one-half the total cost, or one-half the rate is applied to the total cost. The construction period varies with different kinds of property, one year, two years and three years being common lengths of time. It extends to the time when the property is put into operation and begins to earn. A rate of 6 per cent per annum is usually assumed.

The management of a public utility requires a home for its officers

and the necessary furniture and fixtures. These may be rented, in which case the rent becomes an operating expense; or the company may own its offices and furniture and the special fixtures needed for its business. The cost then becomes a capital charge. In large properties, street and steam railways particularly, the offices, furniture and fixtures are frequently items of considerable expense. The cost of the equipment of offices, if incurred at the end of the construction period, does not involve interest during the construction period and the item can follow this interest. If, however, it has come earlier, its cost should enter into the sum on which interest during construction is computed.

Certain necessary stores and supplies must be provided ready for use in emergencies before the property can be put into operation. After the plant has been in operation for a time, these gradually adjust themselves as to quantities of the various items. The money represented by stores and supplies can bear no interest unless it be incorporated in the capital, or be carried as a floating debt. In either case the interest on this money becomes a proper charge against earnings. The amount considered is usually an average taken from the books.

Another item which occasions surprise is working capital. By this is meant the money which must always be available to pay bills, labor and the ordinary expenses of operation, and which in the very nature of the fund cannot bear interest except it be incorporated in capital, or be borne as a floating debt with interest paid out of earnings. In either case it becomes a charge against earnings, and therefore takes part as a factor in determining reasonable rates or charges. As between a capital charge and a floating debt it may be pointed out that as a capital charge the rate of interest would presumably be less than as a floating debt. A working capital is as necessary an expense as any other in the production of a public utility property. Without it the business for which the property was constructed could not be done. How often have we known of the failure of apparently good business enterprises merely for the lack of sufficient working capital? The amount of working capital, like stores and supplies, is usually an average taken from the books.

We have now reached the point at which the property has been completed, having considered items, all of which may enter into the capital investment, and are ready to take up the *second* principal factor, namely, operating expenses. With a working capital to hand, the property has been put into operation. It begins to earn but a considerable time must elapse ordinarily before the earnings from operation suffice to meet all of the expenditures. By all of the expenditures I mean, interest on the cost of construction, taxes, operating expenses, a fund out of which the expenses of maintaining the integrity of the property can be borne, and another fund to provide

for losses of capital at the end of the franchise period. These latter I will discuss separately under the head of "Depreciation" and "Sinking Fund," respectively. During this period of insufficient earnings, money must be borrowed to make up deficits; not only that, but interest must be paid on this borrowed money until the time that the earnings suffice to meet all expenses. This accumulated deficit constitutes what may be termed the cost of procuring a going concern; in other words, the cost of establishing the business. Were the property to change hands at the time the earnings just suffice to pay all expenses, the cost of establishing the business would become the going concern value of the property, and be a part of the total value of the property as a going concern *at that time*. It is a difficult element of cost to determine satisfactorily, in the absence of well-kept accounts, starting with the property itself.

Not infrequently the point is made that the longer it takes to establish the business, that is, the greater the sum of its deficits in earlier years, the greater is its value as a going concern. This apparent inconsistency is explained by the fact that these deficits are real costs, and necessary if the utility is to be had at all. The utility being a necessity, it must be supported by the public the same as any other necessity. The cost of establishing the business therefore becomes a factor in determining reasonable rates or charges. This cost, like that of working capital, if incorporated in the interest bearing capital, becomes less of a burden against earnings than if carried as a floating debt.

Probably the least understood factor of expense in connection with a public utility property is depreciation. I have called this the *third* factor in determining a reasonable charge for public utility service. By depreciation, I mean the money required to be paid out of earnings in order to meet the expenses of maintaining the integrity of the property. Depreciation is the result of wear and tear and exposure to the elements. It also includes the replacement of machinery which, while not yet worn out, has become obsolete, that is, no longer economical to use; or if still economical, no longer satisfactory to the public. Depreciation includes, further, the wrecking of machinery due to accident, or to the acts of God.

In the building of a public utility property all of the elements are originally new, but as time goes on, these elements suffer wear or decay, some in one degree, some in another. When an element has become worn to a point where it is no longer profitable to keep it in service, it is replaced. Thus in time we have a property which as a whole is made up of old and new elements, the condition of which in the aggregate is something less than the first cost of these elements new. In the very nature of the property, it is impossible ever after it is once started to have present in it the full 100 per cent represented

by all new elements. It can, however, be maintained in some condition less than 100 per cent, and it is usual and necessary to maintain it at a point which will enable the most satisfactory service to be rendered with the smallest expense consistent with satisfactory service. This point may be anywhere between 80 and 90 per cent, depending on the kind of property.

The expense necessary to keep an element in service during the useful life is a plain operating expense classed under maintenance and repairs, and is not included under depreciation as I am describing it. The depreciation fund is properly a separate fund, maintained as such as distinctly as an interest fund. It is the fund which insures the prolongation of the life of the property indefinitely and always in a condition to render satisfactory service. It is not, however, a fund out of which additions, extensions or betterments may be made, which in their nature constitute additions to capital.

Thus understood, depreciation becomes a factor, and indeed a very important factor in determining reasonable charges for public utility service. Unhappily, the practice of providing this fund is not uniform with the different utilities; not uniform either in principle or practice. It has long been common for some utilities, railroads for instance, to wear down in lean years and build up in fat years. Thus the condition of the property is not maintained in some uniform condition expressed as a definite percentage of the cost of all new elements, as for example, 80 per cent, but may vary all the way from 75 per cent to 85 per cent.

It is commonly believed by the public that a utility property should not be permitted to earn on more than the so-called present value of its physical elements, that is, their cost new, less depreciation, say 80 per cent of the cost new or less. As bearing on this, I have pointed out that the property, which by means of a proper depreciation fund can be maintained at some definite percentage which enables it to render satisfactory service, has cost 100 per cent. That is, the 80 per cent property cannot be had at all without expending the 100 per cent. Thus in order to have an 80 per cent physical condition, we must have a capital charge of 100 per cent. From this it becomes apparent that in determining a reasonable charge we must base it not on the percentage which represents condition, but on the cost of the property which cannot be maintained economically above an 80 per cent condition.

If, however, it be insisted that only that percentage of the total cost which is represented by the maintained condition of the property can bear an interest return, the loss of capital and interest thus incurred must be provided for out of earnings in another way, namely, by a sinking fund. This then is the *fourth* factor determining a reasonable charge for public utility service. It is to be borne in mind that

in this entire discussion I am assuming only actual costs in the capital investment, and only such an interest rate as will induce the investment of the capital in the utility. At the end of the franchise period it is necessary to make good both principle and interest.

The importance of this sinking fund and its magnitude depend on the attitude of the public towards the utility company. The public service corporation works under a franchise, which is simply a grant by the public of the right to do business. With certain kinds of utilities the franchise is perpetual; with others, the life is limited to a definite period, say, 30 years. In some states, Wisconsin for instance, indeterminate franchises are granted; that is, franchises which can be called in, or surrendered at any time, subject to control by the Railroad Commission of that state. In the case of a limited franchise under which the utility company must cease operations and close up its business at the end of a definite period, the company must make not only enough to pay the interest on the cost of the plant and maintain it always in condition to render the service demanded by the public, as well as the operating expenses, including taxes, insurance and repairs, but also an additional amount to cover whatever part of the plant must be sacrificed at the end. This means a sinking fund to retire portions of the cost, if not the entire cost. In other words, the company must earn enough during its life to pay back whatever part of the principal has to be sacrificed, as well as the interest on the principal, in addition to maintaining and operating the plant satisfactorily during the franchise life.

This sinking fund is not always, indeed I may say, is not generally kept as a separate account in this country, but is taken out in the form of distributed earnings from year to year in excess of the amount normally required as interest on the cost. Not infrequently what appears as an abnormally large dividend will on analysis be found to be only sufficient in the end to make good to the investor both the interest on his money and the principal sacrificed when the business is closed out.

It should be clear from this that in general a long term franchise is more favorable to the public, so far as charges for service are concerned, than a short term. To illustrate: assume that the plant must be sold for what it will bring as scrap or second-hand material; the difference between its cost and sale value must be made up out of earnings during the life of the franchise. Thus, if the franchise life be short, say 25 years, the sinking fund annuity must be much larger than if the life be 50 years. No annuity is required, when the life is perpetual. No doubt longer term franchises will be granted in the future, particularly now that the control of them is being lodged by the states in public service commissions.

I am not discussing in this paper conditions which have existed in

the past, or may exist now, in connection with old properties, but am confining myself to fundamental things, those which should guide us in our future relations; those relations which will come to exist when the public service corporation is permitted to earn only enough on its investment to bring capital into the field; that is, the critical condition, as it were.

There remains for me only one more topic, and this I have put off until the last, always shying at it and going around when possible. I refer to discounts on securities. This I have found: no bond house will even consider financing a public service corporation without a bond discount. I refer particularly to utilities built and operated under a limited franchise. It will have to be a good property to secure better than 15 per cent discount. It is an excellent property which commands as low as 10 per cent discount. The best discount I have ever come across in my own investigations is 8 per cent. This does not apply to municipalities, however, at least not to the same extent.

The simple conclusion is that if the public utility is a necessity and the money for it is obtained in the usual way, one element of cost is the discount on the bonds, which in effect starts the property off with some water in its securities. It is, or is not, water, as you view it. Anyhow it is necessary in the ordinary way of financing properties. Thus we are obliged, in determining a reasonable charge for public utility service, to consider not merely the actual cost as I have previously given it, but something more, namely, the face of the securities which command an interest return. Opinions differ on whether it is better for this discount to be absorbed as a capital charge or carried as an interest charge. So far as the purpose of this paper is concerned it is not material, as in either case there must be a charge against earnings to take care of the discount.

It will be convenient to bring together the several elements which take part in determining a reasonable charge for public utility service. Not all of them take part at the same time necessarily, for some may appear in one case and not in another; or several may be combined in a single item. In a general way, and in a somewhat natural order, they may be summarized as follows:

I. Capital Investment

1. Preliminary costs covering investigations as to feasibility of project.[1]

2. The physical property; the several items making up the whole arranged in order, each affected with its proper allowances to cover

[1] Organization, promotion, administration, and legal expenses, engineering and superintendence during construction, which are distributed over the whole period of construction, are more conveniently placed later in the schedule.

contingencies, special engineering, and other costs peculiar to the item; land first, followed by clearing and grubbing, then the various structures and equipment; sub-contractor's profits included with the separate items.

3. General contingencies applicable to the property as a whole as distinguished from special contingencies applicable to particular items.

4. General contractor's profits; or, the profits to an engineering firm building the property on the "cost plus a percentage" plan.

5. General engineering, and superintendence during construction.

6. Insurance and taxes.

7. Organization, administration and legal expenses.

8. Cost of promotion and promoter's profits.

9. Interest during the construction period.

10. Office furniture and fixtures.

11. Stores and supplies.

12. Working capital.

II. Operating Expenses

13. Operating expenses per se; that is, salaries, wages, fuel and other supplies, repairs and upkeep; all expenditures required in rendering the service of the utility, including insurance and taxes.

14. Interest on the capital investment (the actual cost of the property), *i.e.*, interest on securities which must be paid regularly.

15. Interest on floating debts; this may include the discount on bonds, and the cost of financing, if these have not been incorporated with the capital.

16. Cost of establishing the business; the sums of money required to be borrowed, with interest on the same, to make good the differences between the earnings and expenditures up to the time the earnings become sufficient to meet all expenditures. This may be made a capital charge, or carried as a floating debt to be paid out of future earnings.

III. Depreciation Fund

17. The regular contribution to the depreciation fund, out of which the integrity of the property is to be maintained.

IV. Sinking Fund

18. The annuity required to retire such portions of the securities as may be necessary at the expiration of the franchise life of the property, in order that the investor may receive back his entire principal when the business is closed out.

It will surprise everyone not familiar with the cost of building

public utility plants to learn that the so-called overhead charges are in the aggregate a large percentage of the costs of labor and the material things entering into their construction. An examination of the various percentages mentioned in discussing the elements of cost, omitting items 1, 4, 8, 15 and 16, will disclose that if the individual contingencies of construction, special engineering charges, and contractor's profits be assumed to be embraced in item 2, the total percentage may vary from 12 to 25 per cent; and if these inside percentages be added to the outside, or general, percentages, the total percentage may vary from 30 to 60 per cent.

It is to be regretted that engineers, and others who have had experience in building properties, and valuing them afterwards, have not done more towards disseminating knowledge of the actual conditions found in such work. We should then be much further along towards the mutual understanding which must exist before the public and the public service corporation can get together on common ground. But engineers have many times hesitated to use the larger percentages, fearing to be accused of favoring the corporation. They have preferred instead to secure the equivalent of them by using larger units of costs; or have used the smaller percentages, influenced by the feeling, unconsciously perhaps, that all things considered, the results were fair enough. In combining the judicial with their engineering function, they have unwittingly only obscured the issue. All too frequently engineers have felt obliged to exert themselves to the utmost in favor of their client, leaving the interests of the other side to be fought for with equal solicitude by an opposing engineer. Thus they have become advocates. This, in my opinion, is not the best way to handle these momentous problems. It would be far better in these troublesome times to throw open the blinds and let in all the light, our motto being *veritas vincit.*

A WORD ABOUT COMMISSIONS

By Herbert J. Friedman of the Chicago Bar

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At the outset, the question arises as to the nature of the duties of a commission. If a commission is an administrative body or a legislative body, then the course of procedure before it is likely to take an entirely different form from that it would take were it a judicial body. . . .

Are the acts and the doings of the ordinary commission legislative,

executive, or judicial? In an interesting case before the Supreme Court of the United States,[1] the court went quite extensively into the question whether the duties of the State Corporation Commission of Virginia were judicial or legislative. The constitution creating the commission provided that it should have the power and be charged with the duty of supervising, regulating, and controlling all transportation and transmission companies doing business in the state, in all matters relating to their performance of their public duties and their charges therefor, and of correcting abuse thereof — to enforce such rates, charges, rules, and regulations, and require the companies to maintain such service facilities and conveniences as might be reasonable, and to prevent unjust discrimination. The act further provided that the commission should have the power to administer oaths, compel attendance of witnesses, and to punish for contempt. There were further provisions in the act giving it certain powers to enforce its findings. There the court, in its opinion by Mr. Justice Holmes, said:

> But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by Section 720. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial in kind, as seems to be fully recognized by the supreme court of appeals (Com. *vs.* Atlantic Coast Line R. Co., 106 Va. 61, 64, 7 L. R. A. N. S. 1086, 117 Am. St. Rep. 983, 55 S. E. 572), and especially by its learned president in his pointed remarks in Winchester & S. R. Co. *vs.* Com., 106 Va. 264, 281, 55 S. E. 692.

The court cited other authorities in support of this proposition.

Chief Justice Fuller, while agreeing with the conclusion of the court, dissented from the opinion. He was of the belief that the act was a judicial one, not legislative. In the course of his opinion he said:

> The Virginia State Corporation Commission was created and its functions, powers, duties, and the essentials of its procedure were prescribed in detail by the Constitution of the State as well as by statute. It was made primarily a judicial court of record of limited jurisdiction, possessing also certain special legislative and executive powers. When it proposed to make a change in a rate of a public service corporation, or otherwise to prescribe a new regulation therefor, the commission was required, sitting as a court, to issue its process, in the nature of a rule, against the corporation concerned, requiring it to appear before the commission at a certain time

[1] Prentis *vs.* Atlantic Coast Line, 211 U.S. 210, 29 Sup. Ct. 67 (1908).

and place and show cause, if any it could, why the proposed rate should not be prescribed. The judicial question involved on the return to such rule was whether or not the contemplated rate was confiscatory, or otherwise unjust or unreasonable, and in the hearing and disposition of this question the proceedings of the commission, as prescribed by law, were in every respect, the same as those of any other judicial court of record. It issued, executed, and enforced its own writs and processes; it could issue and enforce writs of *mandamus* and injunction; it punished for contempt; and kept a complete record and docket of its proceedings; it summoned witnesses and compelled their attendance and the production of ducuments; it ruled upon the admissibility of evidence; it certified any exception to its rulings; and its judgments, decrees, and orders had the same force and effect as those of any other court of record in the state, and were enforced by its own proper processes. It was not subject to restraint by any other state court, and from any and every ruling or decision by it an appeal lay to the supreme court of appeals of the state, and was heard upon the record made for and certified by the commission, exactly as in the case of appeals from any other court; and, pending the decision of such appeal, the order appealed from might, by *supersedeas*, be suspended in its operation.

Mr. Justice Harlan was also of the opinion that the act of the Virginia State Corporation Commission was in every sense judicial.[1]

A similar question arose as to the nature of the acts of the Public Service Commission in the State of New York.[2] There the court, after reviewing the Prentis case, expressly held the acts of such a commission judicial and not legislative. The court expressly denied that the acts of the commission were necessarily non-judicial because it enforced or attempted to enforce a rule of conduct for the future. It pointed out that a judicial decision often determines in advance what future action will be a discharge of all existing liabilities or obligations. Thus, it pointed out that in the specific enforcement of contracts which are to extend over a long period of time the court may dictate the details of performance. The court also indicated that in actions for divorce or separation it is the constant practice of the courts to prescribe for the custody and care of children and to provide for the subsequent modification of such provisions from time to time as circumstances may necessitate.

On the other hand, there have been a vast number of the most eminent authorities that have held that the functions of a commission are purely administrative. In giving its opinion to the Massachusetts House of Representatives as to the constitutionality of the Civil Service Law of that state[3] the Supreme Judicial Court of Massachusetts said:[4]

[1] See also Interstate Commerce Commission *vs.* Cincinnati, N. O. & T. P. Ry. Co., 167 U.S. 479, 17 Sup. Ct. 896 (1896).
[2] People *ex rel.* Railroad *vs.* Willcox, 194 N.Y. 383, 87 N.E. 517 (1909).
[3] Laws of 1884, c. 320.
[4] Opinion of the Justices, 138 Mass. 601 (1885).

The object of the statute before us is to provide for a board of commissioners, who shall make rules for the selection of persons to fill such offices in the government of the Commonwealth, and of the several cities thereof, and supervise the administration of such rules. We think the Legislature has the constitutional right to provide for the appointment of such commissioners, and to delegate to them the power to make rules, not inconsistent with existing laws, to guide and control their discretion and the discretion of the officers of the State or of the cities in whom the appointing power is vested. This is not a delegation of the power to enact laws; it is merely a delegation of administrative powers and duties, and there is no provision of the Constitution which prevents the Legislature from enacting that such rules, when duly made, shall be binding upon the officers and citizens to whom they apply, and that they may be enforced by suitable penalties, as provided in the last section of the statute.

The United States Supreme Court apparently agreed with this view of the law in the case of Stone *vs.* Farmers' Loan & Trust Company.[1]

In the case of the City of Aurora *vs.* Schoeberlein [2] the Supreme Court of the State of Illinois passed upon a clause of the Civil Service Act of 1903 which permitted an appeal to the circuit court from any decision of the commission discharging an employee, and which permitted the circuit court to set aside the findings of the commission. The court held that this section of the act was unconstitutional for the reason that the government of the state of Illinois was divided by the constitution into three separate functions, — legislative, executive, and judicial; that the removal of an officer in a civil service proceeding was an executive act, and that the allowance of an appeal to the circuit court for the purpose of reviewing an executive act was vesting the circuit court with executive powers, which was contrary to the constitution of the state.[3]

And the United States Supreme Court, in a line of cases where the acts performed were of a similar nature, has held them to be administrative. Thus the United States Supreme Court, in a decision rendered by Mr. Justice Brewer, in the case of Burfenning *vs.* The Chicago, St. Paul, etc. Ry. Co.,[4] strongly intimates that the Land Department in passing upon the question whether a certain tract of land was swamp land or not, saline land or not, mineral land or not, was passing upon an administrative question. In the case of American School of Magnetic Healing *vs.* McAnnulty,[5] the United States Supreme Court held that the Post Office Department, in passing upon the question of whether certain printed matter should be excluded from the mails on the ground that it was fraudulent, was performing

[1] 116 U.S. 307, 336, 6 Sup. Ct. 334, 338, 1191 (1886).
[2] 230 Ill. 496, 82 N.E. 860 (1807).
[3] See also Wyman, Public Service Corporations, Sect. 1404, p. 1235.
[4] 163 U.S. 321, 16 Sup. Ct. 1018 (1896).
[5] 187 U.S. 94, 108, 23 Sup. Ct. 33 (1902).

a purely administrative act. So, too, the United States Supreme Court, in a number of cases involving the rights and powers of an immigration inspector, has invariably been inclined to hold that his duties were administrative. The most important case upon this subject probably is United States *vs.* Ju Toy.[1] In that particular case the petitioner filed a petition for a writ of *habeas corpus*, and alleged that he was about to be wrongfully deported on the ground that he was an alien, born in China, while in fact he was a native-born citizen of the United States. It appeared, however, that the immigration inspector had taken evidence and decided that the petitioner had not been born in the United States, and had denied him admission to the United States and ordered him deported. It would be hard to support this case on any theory other than that the act of the immigration inspector was an administrative one, and all the more so for the reason that the court held that if the inspector had not abused his authority the act of the department must be absolutely final and conclusive, and that even though the question of citizenship might be raised, the court had no power to review such finding.

The question of what may constitute a just and reasonable rate is necessarily a question of fact to be determined from a mass of intricate facts. The question of what may or may not be a pure food, or what may constitute a pure drug, or what may or may not be an adulterated paint, is likewise a conclusion of fact to be drawn from a group of facts somewhat less complicated. Whether a civil service employee has disobeyed the rules established by a civil service commission or the head of a department, or is so inefficient in his work that he should be discharged, necessarily is a similar conclusion. This must likewise be true of the duties of an immigration inspector when he passes upon the question of a man seeking admission to this country as an alien or as a citizen. It would seem to follow that the dities of all these bodies are one and the same, and that if some are administrative in their nature, others likewise must be administrative. These commissions are doing the duties of highly specialized juries. They are passing upon and resolving very important questions of fact. Of course if a commission is to have any authority whatsoever, it must have the right to compel the attendance of witnesses, and the power to punish witnesses or to cause their punishment in the event of their refusal to attend. It must be taken for granted that if the acts of a commission are to have any weight, it must have some power to enforce its findings. Consequently, the reasons that some of the judges of the United States Supreme Court gave in the Prentis case why the Virginia State Corporation Commission is a judicial body do not seem to be conclusive.

It should be noted that commissions only in a limited sense pass

[1] 198 U.S. 253, 25 Sup. Ct. 644 (1905).

upon property rights. They do not decide that a certain property belongs to A or to B. They do say that certain property that belongs to A can be used by him only in a certain way. They tell public service corporations how they must run their trains, or what rates they may charge in the sale of their gas or electricity, or whether they may establish new rates or not. They tell those who manufacture drugs or food products that they can sell them only if they do not contain certain ingredients. The right to hold an office may or may not be regarded as a property right, but even in those states where it is regarded as one, nevertheless, all that a civil service commission does is to see to it that the man who holds his office complies with the rules, and both does the things that are required of him and abstains from doing those acts that are forbidden. In other words, a commission merely passes upon the method that a man must adopt in using what belongs to him.

Every legislative body has the power to enforce obedience to its *subpœna* and to compel witnesses to testify before it. The land commission, the immigration inspectors, and the civil service commission, have a like power. Would it not be better to say that legislative, administrative, and judicial bodies, if given the authority by the legislature, may compel witnesses to come before them and to attend, than to hold that because such a body has that power it is therefore a judicial body?

Nor does it seem clear that the majority of the court in the Prentis case was correct in holding the commission a legislative body. The real test that the court applied was that the commission had authority to make rules and regulations. It is almost fair to say that every civil service commission in the United States has this same power. Nevertheless, it is apparent that the civil service commission in its nature is administrative. It must be conceded that civil service commissions have merely taken over certain powers that were formerly given to the administrative head of the government. The mayor of a city or the governor of a state where there is a civil service act has been shorn of his power, for the most part, to appoint employees or to remove them. This was a power he had in the past. Certainly in the past, when the head of the government exercised this power, it was not a legislative function. The legislature has taken this function from him and placed it in the hands of an impartial body. It has transferred from one head to another certain administrative powers. In creating civil service commissions the legislature transfers the employment bureau of the government to a new body. Formerly the mayor or governor may have made certain rules on which he based the appointment, advancement, and removal of employees. This is exactly what the civil service commission does after it is once constituted. But in the nature of things does it follow from the

mere fact that the law gives it the express right to make such rules, that therefore the legislature made it a legislative body?

A court is given the right to make its rules, to guide it and to aid it in the management of the business that comes before it. These rules very often are of the greatest importance, but no one has ever been inclined to hold that because a court may make rules and regulations governing either it or litigants, it is therefore a legislative body. It therefore does not seem a fair test to hold that because a body may make rules and regulations, it is a legislative body.

If a commission is regarded as an administrative or a legislative body on the one hand or a judicial body on the other, not only may we expect to see a different development in the method of its procedure and in the rules of evidence that will prevail and in the method of reviewing the findings of its decisions, but we are also likely to see a substantial difference in the nature of the men who may be appointed to constitute such commissions. If it is a judicial body, then it seems to be highly important that its members may be those who are versed in law, in order that they may correctly interpret the law of the land. If it is a judicial body, then questions of law are more likely to be emphasized. If, however, the commission is regarded as an administrative body, then the legal features will be minimized; then it will not be necessary that those who may be its members be versed in the substantive and adjective law of the land. The law will not be emphasized. Men then will be more likely to be appointed to its membership who have specialized in that particular part of our industrial and social life that the commission is called upon to regulate; and it is highly important that this should be so. There is no reason why a lawyer should be of any particular aid in determining what may be a fair and remunerative rate for a public service corporation. There is every reason, however, why a man who has given a life study to gas, electric and power plants, and to railroads may be of the greatest assistance in establishing a fair rate. If our commissions are to be of value, it is to be hoped that those who are appointed to them will be experts, and that in reaching their conclusions they will not be hindered by the vexatious delays of legal technicalities.

An administrative body will probably listen to hearsay evidence and give it such weight as it considers it worth. It may dispense with the technical proof of the execution of documents or of signatures; it may hear witnesses of either side in such order and at such times as it may see fit. On the other hand, a judicial body is quite likely to find itself bound by the rules of evidence, and to have its decisions and findings reversed if it allows improper evidence or refuses to permit proper evidence as determined by the forms and standards of law. If the commission is regarded as an administrative body, the conclusion of the commission on the question of fact

should not be subject to review by a court unless such conclusion in some way violates a law of the land. It should not be subject to attack because in the eyes of the court it may or may not have been sustained by the weight of the evidence presented. In the event, however, that the commission is a judicial body, the conclusion is more likely to be set aside because it was not sustained by the preponderance of evidence that may have been introduced. So, too, if the functions of a commission are regarded as judicial on the one hand or executive on the other, there is likely to be a great difference in the law of appealing from or reviewing the findings and decisions of the commission. The law seems to have been fairly and definitely settled as to the powers of the court to review and set aside the findings of the commission where it has been held to be an administrative body. It is not clear, however, what the powers of a higher court may be in reviewing or setting aside the findings of a commission where it is regarded as a judicial or legislative body.

In the case of Burfenning *vs.* Chicago, St. Paul, etc. Ry.,[1] the Supreme Court held that the findings of the land commission were final and could not be reviewed. The court said in that opinion that it had been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final.[2] This has been affirmed by a long series of cases.[3]

So, too, in the immigration cases, where the immigration inspector passes upon one of the most important of all possible questions from a governmental point of view — that of citizenship — it has been held that his finding is not subject to review. In the case of United States *vs.* Tu Toy,[4] the immigration inspector had held that the petitioner was an alien, born in China, and that he was admitted to come into the United States in violation of the immigration act, and therefore had ordered him to be deported. The court, in a decision rendered by Mr. Justice Holmes, there held that the decision of the department was final, whatever the grounds on which the right to enter the country was claimed. And the court was apparently of the opinion that the decision of the Secretary of Commerce and Labor in the matter was conclusive and not subject to review.[5]

In the State of Illinois this point has been established by innumerable

[1] 163 U.S. 321, 16 Sup. Ct. 1018 (1896).

[2] See Bates & Guild Co. *vs.* Payne, 194 U.S. 106, 24 Sup. Ct. 595 (1904); Heath *vs.* Wallace, 138 U.S. 573, 11 Sup. Ct. 380 (1891).

[3] See American School of Magnetic Healing *vs.* McAnnulty, 187 U.S. 94, 23 Sup. Ct. 35 (1902); Public Clearance House *vs.* Coyne, 194 U.S. 497, 508, 24 Sup. Ct. 789 (1904).

[4] 198 U.S. 253, 25 Sup. Ct. 644 (1905).

[5] See also Edsell *vs.* Mark, 179 Fed. 292 (1910); Lem Moon Sing *vs.* United States, 158 U.S. 538, top p. 544, 15 Sup. Ct. 967 (1895); United States *vs.* Sing Tuck, 194 U.S. 161, 24 Sup. Ct. 621 (1903); Yamataya *vs.* Fisher, 189 U.S. 86, 23 Sup. Ct. 611 (1903).

decisions. Thus in the case of People *ex rel.* Hayes *vs.* City of Chicago [1] the court said:

> It makes no difference whether the review is attempted by *certiorari* or in a petition for *mandamus;* the inquiry on our part and on the part of the Circuit and Superior Courts is limited to the questions whether the Commission had jurisdiction and whether it followed the form of prodecure legally applicable in such cases. This is what the Supreme Court said in People *vs.* Lindblom, 182 Ill. 241, and we have repeated in the Heaney case and in other cases.
>
> With the justice or injustice of the Commission's findings and sentence the courts have nothing to do, nor with the severity of the punishment, provided always that the findings and action are within its jurisdiction and the proceedings regular.

And numerous authorities have held that an administrative commission is not bound by the ordinary technical rules of evidence or procedure.[2]

To make the working of our commissions efficient and expeditious in order that they may give satisfaction to the community as a whole, and be a benefit to our times, they must be relieved from the technicalities and delays that have surrounded our courts. Technicality has been the mother of delay in our courts. In this great branch of our government the law is at the threshold of new interpretation. It is to be hoped that these laws will be interpreted in a broad and comprehensive manner so that the working of the commission will not be interfered with, and may result in the greatest possible benefit to us.

The death-knell of the *laissez faire* doctrine that prevailed at the end of the eighteenth century and the beginning of the nineteenth century has been sounded. The commission has been instrumental in burying it. It is developing, as a public servant, the technical man. Commissions have been created where technical knowledge is of the greatest possible value and necessity. So long as commissions continue to give satisfaction, we must expect that the pubic will demand new commissions from time to time touching new branches of industry and society. And so we are rapidly coming to be governed by commissions.

[1] 142 Ill. App. 103 (1908).

[2] See Joyce *vs.* City of Chicago, 216 Ill. 466, 75 N.E. 184 (1905); City of Chicago *vs.* People *ex rel.* Gray, 210 Ill. 84, 92, 71 N.E. 816 (1904); People *ex rel.* Maloney *vs.* Lindblom, 182 Ill. 241, 244, 55 N.E. 358 (1899); People *ex rel.* Weston *vs.* McClave, 123 N.Y. 512, 25 N.E. 1047 (1890); Avery *vs.* Studley, Mayor, 74 Conn. 272, 50 Atl. 752 (1901); State *ex rel.* McDonald *vs.* Corteney, 23 S.C. 180 (1885). An analysis will show that the United States immigration, land, and post office cases are to the same effect.

CONCLUSIVENESS OF ADMINISTRATIVE DETERMINATIONS IN THE FEDERAL GOVERNMENT

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The Federal Constitution provides that no person shall be deprived of life, liberty or property without due process of law, and vests in the Federal Supreme Court the ultimate power to determine what is due process. The legality of any interference with person or property may always be questioned in judicial proceedings, and therefore depends, in the last analysis, upon its conformity to a rule of law laid down by the courts.

The most usual method of disturbing the individual in the enjoyment of his personal and property rights is by judicial proceedings, and no person without authority of some branch of the government can constitutionally imprison him or permanently appropriate his property by any other means. Conceivably, the doctrine might have obtained that the government and its agents acting in official capacities must also have recourse to the courts in any undertaking affecting private rights. But "due process" has been interpreted as meaning process in conformity with certain fundamental principles, rather than any specific and required mode of procedure. The courts have held that, in certain instances, the government may interfere with private rights through the action of its administrative agents, and that such agents may be vested with the power of final and conclusive determination of the facts on which their action is based.

There are, of course, two limitations upon this administrative power, one legislative, the other judicial, or, more correctly, constitutional. The Constitution itself vests in the executive branch of the government, power to act in several matters which necessarily have an indirect effect upon private rights, (Luther *vs.* Borden, 7 Howard 1), but the authority to determine finally questions directly affecting such rights must depend upon express legislative enactment.

Further, it remains for the judiciary to determine whether such enactment conforms to the requirement of the Constitution.

No thoroughly satisfying and all inclusive definition of due process has ever been evolved. We can best understand the real value of the constitutional provision by ascertaining what deeds may be done in its name.

An examination of the cases will show the theories upon which this administrative power is based, the distinction between determinations of fact and the decision of matters of law or application of rules of law to determine facts, the control which the courts retain over administrative procedure, and the limitations on the legislature in respect to the objects for which the power may be conferred.

I. Determinations affecting Property

The leading case for the doctrine that "due process of law" does not of necessity require judicial proceedings is Murray's Lessee *vs.* the Hoboken Land and Improvement Co., 18 Howard 272 (1856). It was there decided that Congress might clothe the administration with power to determine the amount due from a government officer, and to enforce its collection by means of a distress warrant, issued by the solicitor of the treasury, without resort to judicial process. The decision was reached the more easily because such summary methods had long been employed and the legislative construction of the Constitution was therefore entitled to weight, and because the matter was one of the internal law of administration, where discretionary and arbitrary power in superior officers is essential to administrative discipline and effectiveness. "Due process" was defined as having the same meaning as "the law of the land." It was asserted that the law of the land had long authorized more summary procedure for the collection of public than for the collection of private debts, and the distinction between the two was declared to be founded on "imperative necessity."

The same principle was applied where the administration was given power to act summarily in collecting a tax from a citizen, not a member of the administration, by a warrant issued by the collector. Springer *vs.* U.S., 102 U.S. 586 (1880). Precedent and governmental necessity were both invoked in support of the decision. The court said: "The power to distrain personal property for the payment of taxes is almost as old as the common law"; and, further on: "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason. If laws here in question involve any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government."

It is not to be inferred, however, that the administration is subject to no judicial restraints. The government secured title through administrative action, but to obtain possession, it was compelled to resort to judicial proceedings, in which such questions as the legality

of the tax, the authority of the officer and the ownership of the land could be raised and passed on adversely to the administration.

In other instances, the finality of administrative determinations of fact has been sustained upon the principle that, when a matter is confided to a special tribunal, its decision within its authority is conclusive on all others. Johnson *vs.* Towsley, 13 Wall. 72 (1871). In this case, the expression was *obiter*, because the court reviewed matters of law upon which the administration was held to have erred, but the opinion is of value as an indication that the court based the administrative power on the general rule of law stated, and not upon an interpretation of the statute. In Smelting Co. *vs.* Kemp, 104 U.S. 636 (1881), the principle was fairly laid down. To impeach the validity of a land patent, the defendant offered in evidence the record of the proceedings in the land department, as tending to show that, owing to the quantity of land in the claim and the method of locating it in order to obtain the patent, the land office had no authority in law to proceed as it did. The evidence was, however, held inadmissible, on the ground that the decision of the land department of facts within its jurisdiction was final and not to be reviewed by the courts. The patent was said to be in the nature of an official declaration by that branch of the government to which the alienation of the public lands under the law was intrusted, that all the requirements preliminary to its issue had been complied with.

The extent of the doctrine was stated by Mr. Justice Field, as follows:

> A patent, in a court of law, is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed.

This case suggests and the preceding one decides that this power of final determination is confined strictly to the decision of those facts within the jurisdiction vested by the statute in the special tribunal. Though, by an erroneous finding of fact, the department may grant a patent under circumstances not contemplated by the statute, its action when based on a misinterpretation of law or the decision of facts not committed to its determination, may be set aside in judicial proceedings. To quote again from Smelting Co. *vs.* Kemp: "On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that

the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called in question; but its authority to act at all is denied, and shown never to have existed."

In these cases in the land department, however, owing to the fact that two conflicting claims may both be based upon administrative determinations and because of the jurisdiction of equity in several matters dealing with real estate, there must always be a wider range of judicial review than in the other administrative determinations which we have to consider. As Mr. Justice Miller queries in Johnson *vs.* Towsley, cited *supra:* "What conclusiveness or inflexible finality can be attached to a tribunal whose acts are in their nature so inconclusive?" In referring to the instances where equity has reviewed findings of fact, he repeats the doctrine previously established: "Undoubtedly there has been in all of them some special ground for the exercise of the equitable jurisdiction, for this court does not and never has asserted that all the matters passed upon by the land office are open to review in the courts. On the contrary, it is fully conceded that when these officers decide controverted questions of fact, in the absence of fraud, or impositions, or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede that when, in the application of the facts as found by them they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief." Chief Justice Marshall had held in Polk's Lessee *vs.* Wendall, 9 Cranch 87 (1815), that when North Carolina had granted certain lands to the United States, reserving the right to complete incipient grants to individuals, the question whether a certain grantee of the State had an incipient title at the time of the cession, went to the title of the grantor and the jurisdiction of the officers passing upon the grant, and remained therefore a question of law for the court. Likewise in Silver *vs.* Ladd, 7 Wall 219, the court reviewed the interpretation of law by a superior officer in the land department, laid down the correct doctrine and ordered the land conveyed to the one rightfully entitled to it.

The court recognizes the same power of finality in special tribunals to determine facts arising in customs matters. In 1846, in a suit against a collector where the jury appraised the goods at the invoice value and the collector had followed the higher estimate of the appraiser, it was held that the finding of the appraiser governed the case. Rankin *vs.* Hoyt, 4 How 327.

The case of Bartlett *vs.* Kane, 16 How 263 (1853), is stronger still, for there, the court denied any review of the appraisement, although it was of the opinion that the method of chemical analysis employed to ascertain the value was not to be relied upon as a safe guide, and was inferior to the plan of fixing the value by ascertaining the cost price in the markets of its production. The court remarked that the appraisers were appointed with power "by all reasonable ways and means" to appraise the value, and that the exercise of the power involved a knowledge, judgment and discretion, and then invoked the general principle "that when power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confined to his or their discretion, the acts so done are binding and valid as to the subject matter." The necessity for the decision was justified in the following language: "The interposition of the courts in the appraisement of importations would involve the collection of the revenue in inextricable confusion and embarrassment."

In Hilton *vs.* Merritt, 110 U.S. 97 (1884), it was held that "in the absence of fraud, the decision of the customs officers is final and conclusive, and their appraisement, in contemplation of law, becomes, for the purpose of calculating and assessing the duties due to the United States, the true dutiable value of the importation." The plaintiff offered evidence showing the true value of the goods and the experience of the appraisers and the care exercised by them in making the appraisal, but the court ruled that it was immaterial, as it did not tend to show that they were assuming powers not conferred by the statute, but merely carelessness or irregularity in the discharge of their duties. The denial of the right to judicial review was sustained on the principle laid down in Murray's Lessee *vs.* Hoboken, etc., Co., and the court observed that "if in every suit brought to recover duties paid under protest, the jury were allowed to review the appraisement made by the customs officers, the result would be great uncertainty and inequality in the collection of duties on imports. It is quite possible that no two juries would agree upon the value of different invoices of the same goods."

The power vested in the customs officials was supported on somewhat different grounds in Buttfield *vs.* Stranahan, 192 U.S. 470 (1904), where the court stated that the plenary power of congress over foreign commerce carried with it absolute power to exclude articles of any particular grade, and that, as no one had a vested right to import, the determination of an administrative board that any specific articles were not up to the standard was in no sense a taking of property, but simply a determination of whether the conditions existed, which conferred the right to import. Under the doctrine of Field *vs.* Clark, 134 U.S. 649 (1891), it was held proper to delegate to the board the power to fix the standard and to apply it, and further, that its exercise was

not conditioned upon the granting of a hearing to the individual whom the determination was to affect. The administration was allowed to enforce its own determination without judicial process, as in the oft-cited case of Murray's Lessee *vs.* Hoboken, etc., Co.

The same principle underlies the series of cases sustaining the power vested in the postmaster-general to issue fraud orders barring the mail of concerns whose business he deems to be fraudulent, though they are by the statute denied the right to a judicial review of the facts on which his decision is based. In Public Clearing House *vs.* Coyne, 194 U.S. 497 (1904), the court say that, as the postal service is no necessary part of the civil government, but a public function assumed for the general welfare, congress may annex to its use such conditions as it chooses, classify the recipients of mail matter, and forbid the delivery of letters to such as in its judgment are making use of the mails for the purpose of fraud or deception. As in the case of Buttfield *vs.* Stranahan, the determination whether a specific article or individual is within the class excluded from the privilege by congress, is held properly vested in the administration, though the statute provides no hearing for the person whom the determination is to affect. The case rests also upon governmental necessity:

> If the ordinary daily transactions of the departments which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of government. . . . It would practically arrest the executive arm of the government if the heads of departments were required to obtain the sanction of the courts upon the multifarious questions arising in their departments, before action were taken, in any matter which might involve the temporary disposition of private property. Each executive department has certain public functions and duties, the performance of which is absolutely necessary to the existence of the government, but it may temporarily, at least, operate with seeming harshness upon individuals. But it is wisely indicated that the rights of the public must in those particulars override the rights of individuals, provided there be reserved to them an ultimate recourse to the judiciary.

As we have before noted, this ultimate recourse is always available. The limitations upon the reviewing power of the courts are, and must be, in the last analysis, self-imposed ones — a restraint which may be thrown off whenever the spirit of the Constitution demands it. But the cases establish clearly that the court will still withhold relief when the only grievance is that the individual did not have a judicial hearing upon the facts on which the administration based its action in applying the general law which is the source of its jurisdiction and authority.

But those facts, when found, must be such as to justify the action of the administration. Whether upon a determined state of facts the ac-

tion taken conforms to the dictates of the statute, remains a question for the courts. School of Magnetic Healing *vs.* McAnnulty, 187 U.S. 94 (1902). In that case, the postmaster-general, instead of investigating the actual conduct of the complainant's business and holding it fraudulent, based his action in issuing the fraud order, upon the established fact that they offered medical advice founded on the proposition that the mind is largely responsible for physical ailments, and the race possesses the power through proper use of the mind to remedy those ills. The court observed that the statute never meant the question of fraud to depend upon the opinion of the postmaster-general as to the efficacy of any particular method of healing, and ruled that since the facts found would in no aspect be sufficient to justify his action under the statute and the evidence before him in any view of the facts failed to show a violation of the law, his determination that such violation existed was a pure mistake of law on his part, against which the complainants were entitled to relief.

But the courts will not invariably review the determination of the administration simply because the complainant disputes the correctness of the application of admitted principles of law to a determined state of facts; or rather, the courts will not invariably substitute their application of the law to the facts for the application of the administrative officer. In Bates & Guild Co. *vs.* Payne, 194 U.S. 106 (1904), it is said:

> Where there is a mixed question of law and fact, and the court cannot so separate it as to show clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.

The necessity for the rule is again invoked: "The consequence of a different rule would be that the court might be flooded with appeals of this kind to review the decision of the postmaster-general in every individual instance." But the court insists on its power to review such determinations, and must in fact consider the law and the facts if properly raised, though they will substitute their determination for that of the postmaster-general only when clearly of the opinion he was wrong.

The construction of the statute given by the administrative officers has a certain presumption in its favor, but as the court says in Houghton *vs.* Payne, 194 U.S. 88 (1904):

> The doctrine does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the department, however long continued by successive officers, must yield to the positive language of the statute.

In that case, the postmaster-general reversed the ruling of his predecessors as to the classification of certain mail matter, and, though

are very properly and necessarily presumed to be reasonable, lawful and correct. The burden of proof is placed on the party attacking their action and unless the weight of evidence is clearly against the findings of the commission they will be sustained and their orders enforced on appeal to the courts, unless they are clearly illegal.

By statute in California the findings and conclusions of the commission on question of fact are properly made final and not subject to judicial review; and it is provided that questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.[1] In Colorado it is provided that the findings and conclusions of the commission on disputed questions of fact shall be final and shall not be subject to review by the courts.[2] The statutory provisions of Idaho make the findings and conclusions of the commission on questions of fact *prima facie* just, reasonable and correct; such questions of fact to include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.[3] In Illinois the statute provides that the findings and conclusions of the commission on questions of fact shall be *prima facie* true, and their rules, regulations, orders or decisions *prima facie* reasonable; thereby shifting the burden of proof on all issues, as is done in practically all other states, upon the party appealing therefrom.[4] The New Hampshire statute provides that all findings of the commission upon all questions of fact properly brought before it shall be *prima facie* lawful and reasonable.[5] And in Pennsylvania the orders of the commission are made *prima facie* evidence of their reasonableness.[6]

Within a limited time, usually thirty days, after the final action of the commission, appeal therefrom lies to the county or district court where the matter in question arose, to such courts having jurisdiction where the commission sits or to the supreme or the court of last resort in the state. Appeals may be taken only within thirty days and directly to the supreme court in the state of California, where on review the court may only determine whether the commission has regularly pursued its authority and whether the order or decision being reviewed violates any constitutional right of the petitioner; and the judgment of the supreme court must either affirm or set aside the order or decision of the commission.[7] In Colorado the right of appeal is likewise limited to the supreme court which has authority in addition to that granted the California court to determine whether

[1] *Stats. 1911*, 1st ex. sess., chapter 14, Sect. 67.
[2] *Laws 1913*, chapter 127, Sect. 52.
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the order of the commission is just and reasonable and whether its conclusions are in accordance with the evidence, and the court may affirm, set aside or modify the order or decision of the commission.[1] Similar provisions for review on *certiorari* by the supreme court are made by the statutes of Idaho where, however, the judgment of the court must either affirm or set aside the action of the commissions.[2] In Maine the right of appeal is expressly limited to a decision by the supreme court on questions of law, submitted on an agreed statement of facts or on facts found by the commission which together with copies of the arguments of counsel must be filed with the court.[3] The supreme judicial court of Massachusetts is given jurisdiction in equity to review, annul, modify or amend rulings and orders of the commission in so far as they are unlawful.[4]

Any party affected and dissatisfied with the action of the commission in Nebraska may resort to the supreme court which may reverse, vacate, or modify such action.[5] In New Hampshire provision is made for appeal direct to the supreme court which shall not set aside the order or decision of the commission except for errors of law unless the court is clearly satisfied under the evidence that the order is unjust and unreasonable, when in its judgment the court must dismiss the appeal or vacate the order in whole or in part, in which case the matter may be remanded to the commission for such further proceedings not inconsistent with the judgment, as in the opinion of the commission justice may require.[6] Review of the proceedings of the commission by the supreme court alone is also provided for in New Jersey,[7] New Mexico,[8] Ohio,[9] Oklahoma,[10] Rhode Island,[11] Vermont,[12] Virginia,[13] and in West Virginia.[14]

Within fifteen days after final action by the Connecticut commission, which it may extend to thirty days, an appeal lies to the superior court of the county in which the matter arose, or if the question is not local, to the court of Hartford County, the seat of the commission. The decision of this local court is made conclusive, subject to review by the supreme court of errors on questions of law.[15] In Georgia the court of Fulton County, the domicile of the commission, is given

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[5] *Stats. 1911*, Sect. 10655.
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[7] *Laws 1911*, chapter 195, Sect. 38.
[8] Const., Article XI, Section 7.
[9] *Laws 1911*, p. 549, Sect. 33.
[10] Const., Article 9, Section 20.
[11] *Laws 1912*, chapter 795, Sect. 34.
[12] *Laws 1908*, chapter 116, Sect. 12.
[13] Const., Section 156.
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exclusive jurisdiction of appeals, except that the supreme court may be resorted to in enforcing penalties[1] as also in Alabama[2] and Arizona where the judgment of the local court is final unless notice of appeal therefrom is given at the time judgment is entered.[3] Within thirty days after action by the commission and a hearing or petition therefor under the statutes of Illinois appeal lies to the circuit court of Sangamon County, the seat of the commission, and from its decision to the supreme court within sixty days.[4] Similar provisions for appeal to the court of the county in which the commission sits and thence to the supreme court of the state are made in Louisiana,[5] Pennsylvania,[6] Tennessee[7] and Wisconsin.[8]

In Indiana the appeal lies within sixty days to the court of any county in which the order is operative and thence within sixty days to the supreme court. A transcript of the evidence and of all the proceedings of the commission, as in most states, constitutes the record on appeal and the commission is required to file a certified copy of such transcript with the clerk of the court before the trial. The answer of the commission to the complaint or petition on appeal must be filed ten days after it is served with notice of the appeal, and all such actions are given precedence over other civil cases. If evidence is introduced in the trial on appeal which the court finds to be different from that considered by the commission or additional thereto, unless by agreement the parties stipulate to the contrary, the court must transmit a copy of such evidence to the commission and stay court proceedings for fifteen days. After considering such evidence the commission may sustain, modify or revoke its order and must report its action thereon to the court in ten days. The judgment of the court is then rendered on the case as modified, if any, by the commission.[9] Similar provisions as to additional or different evidence being transmitted to the commission, pending the consideration of which the court stays its proceedings, is made by statute in the District of Columbia,[10] Maryland,[11] Michigan,[12] Montana,[13] Nevada,[14] New Hampshire,[15] Oregon,[16] and Wisconsin.[17]

Where new or different evidence is discovered in Pennsylvania the case may be remanded to the commission.[18] In this state, also, it is interesting to note, the party taking the appeal must make affidavit

[1] *Code 1910*, Sects. 2625, 2668.
[2] *Acts 1907*, sp. sess. no. 17, Sect. 15.
[3] *Laws 1912*, chapter 90, Sect. 67.
[4] *Laws 1913*, p. 459, Sects. 68, 69.
[5] Const., Article 285.
[6] *Laws 1913*, no. 854, Art. VI, Sect. 17.
[7] *Acts 1913*, chapter 32, Sect. 13.
[8] *Stats. 1911*, Sect. 1797 M–64.
[9] *Acts 1913*, chapter 76, Sects. 69–83.
[10] Appropriation act, March 4, 1913, Sect. 8.
[11] *Ann. code 1911*, art. 23, Sect. 458.
[12] *Pub. acts 1913*, no. 206, Sect. 16.
[13] *Laws 1913*, chapter 52, Sect. 26.
[14] *Rev. laws 1912*, Sect. 4564.
[15] *Laws 1913*, chapter 145, Sect. 18, adding section 22 to 1911, chapter 164.
[16] *Laws 1911*, chapter 279, Sect. 56.
[17] *Stats. 1911*, chapter 9, Sect. 1797 M–67.
[18] *Laws 1913*, no. 854, art. VI, Sect. 25.

that it is not taken for the purpose of delay but in the belief that injustice has been done. In Illinois, if the commission refuses to receive proper evidence, the court must remand the case to the commission with instructions to receive the same and enter a new order based upon all the evidence [1] In Massachusetts a petition for appeal must be accompanied by a certificate of opinion that the case is a proper one for judicial inquiry and that the appeal is not intended for delay, and in the event the court finds to the contrary it shall assess double costs upon such appellant.[2]

The effectiveness of the orders of the commission and the extent of its control are largely determined by the conclusiveness of its findings and the validity of its orders pending appeals taken therefrom. For the same reasons and practically to the same extent that as a matter of evidence on appeal presumptions are indulged in favor of the action of the commission, their orders are generally not suspended while an appeal for judicial review is pending except on motion of the commission or by the court after notice and the giving of sufficient bond. For the commission to be most efficient and of the greatest practical value many of its orders and regulations issued after due investigation must become and remain effective with the final disposition of the commission. The necessary delay attending reviews by the courts and their lack of time and opportunity for investigating situations at first hand and as a current operating concern constitute at once the occasion and the chief reason for commission control. Suspending their orders pending appeals and while the same are being reviewed by the different courts interferes materially with the effectiveness of the commission, detracts from the validity of its action and often postpones indefinitely the enjoyment of the results of its investigations and findings.

By constitutional provision as well as statutory enactment in Arizona the rules, regulations, orders and decrees of the commission remain in force pending the decision of the courts.[3] In Florida it is expressly provided by statute that all orders, judgments or decrees of inferior courts in favor of the commission shall remain effective until finally disposed of by the appellate court.[4] The constitution of Louisiana provides also that orders of the commission shall remain in force until set aside by the final judgment of a court of competent jurisdiction.[5] In Montana all rates fixed by the commission remain in full force and effect until final determination by the courts having jurisdiction,[6] and similar provision is made by statute in Nevada [7] and North Dakota.[8] When a rate which has been effective for a year or

[1] *Laws 1913*, p. 459, Sect. 68.
[2] *Acts 1913*, chapter 784, Sect. 27.
[3] Const., Article XV, Section 17; *Laws 1912*, chapter 90, Sects. 66–68.
[4] *Gen. stats. 1906*, Section 2923.
[5] Const., Article 286, as amended 1908.
[6] *Laws 1913*, chapter 52, Sect. 26.
[7] *Rev. laws 1912*, Sect. 4546.
[8] *Rev. codes 1905*, Sect. 4351.

more is advanced, the order of the commission, reinstating the former rate in whole or in part, may not be suspended pending the final determination of the matter by the courts according to the provisions of the statutes in Illinois [1] and in Washington.[2]

In Connecticut, however, appeals supersede the order or decision appealed from as a rule, although the court may order to the contrary if the appeal is for purposes of delay, or if justice, public safety or expediency may require;[3] and this same provision is made by statute in Rhode Island;[4] while in Tennessee the rate, rule, order or regulation is suspended only in case legal proceedings are instituted within ten days, and then only upon injunction issued after notice and subject to large penalties if procured in bad faith.[5]

As a general rule, in most jurisdictions having commissions, their orders and regulations may be enjoined by the courts, after a hearing and notice, upon good cause shown and the giving of sufficient bond to cover costs and damages resulting in case the action for injunction was not well founded and the order is finally sustained; but the fact that a writ of appeal or review is pending does not suspend the order or regulation. In addition to the ordinary cost bond which is generally required as a condition of granting an injunction and suspending the order of the commission, the statutes in a number of jurisdictions having commissions, provide for the giving of a *supersedeas* or suspending bond conditioned and sufficient in amount to insure the prompt and complete refunding to all parties entitled thereto of all charges or rates for service paid in excess of the rate fixed by the commission and sustained by the courts on review. Verified accounts showing the amount of such excess rates and from whom received and to whom payable are often required of all parties as a condition for the suspension of any order or rate regulation of the commission, as is expressly provided in California,[6] Colorado,[7] Idaho,[8] Illinois,[9] Missouri,[10] Nebraska,[11] Ohio,[12] Oklahoma,[13] Oregon,[14] Pennsylvania,[15] South Dakota,[16] and Washington.[17] In North Carolina the additional amount

[1] *Laws 1913*, p. 459, Sect. 71.
[2] *Laws 1911*, chapter 117, Sect. 82.
[3] *Pub. acts 1911*, chapter 128, Sect. 33.
[4] *Laws 1912*, chapter 795, Sect. 35.
[5] *Acts 1913*, chapter 32, Sect. 13.
[6] *Stats. 1911*, 1st ex. sess., chapter 14, Sect. 68.
[7] *Laws 1913*, chapter 127, Sect. 51.
[8] Ibid. chapter 61, Sects. 63–64.
[9] Ibid. p. 459, Sect. 71.
[10] Ibid. p. 556, Sect. 112.
[11] *Stats. 1911*, Sect. 10655.
[12] *Laws 1913*, p. 804, Sects. 37–41.
[13] Const., Article 9, Section 21; *Laws 1913*, chapter 10, Sect. 3.
[14] *Laws 1911*, chapter 279, Sect. 55.
[15] *Laws 1913*, no. 854, Art. VI, Sect. 19.
[16] Ibid. chapter 312, Sect. 5.
[17] *Laws 1911*, chapter 117, Sect. 87.

collected because of the excess rate being in effect must be paid to the state every three months.[1] In New Hampshire the conditions for securing the repayment of the amounts received under the excessive rates to the parties originally paying the same are fixed by the court, and a failure to make such repayments promptly as provided by the court is punishable as a contempt of court.[2]

The effectiveness of the control of municipal public utilities by state commissions is largely determined by the attitude of the courts in their construction of the public utility acts and in their review of commission findings and orders on appeal. That public utility commissions are practical business necessities and entirely consistent with constitutional rights has been fully recognized by all the courts which have been called upon to construe these statutory enactments, and their decisions freely admit that such state commissions are necessary administrative agencies and furnish the most satisfactory solution of the many intricate and comprehensive business questions that are constantly arising in increasing numbers in connection with the regulation and control of public utilities which every one now regards as natural monopolies and every-day business necessities.

The federal court in the case of Des Moines Gas Company *vs.* Des Moines [3] frankly recognized the necessity and practical advantage of this method of regulation and control by conceding that:

> Much of this kind of litigation, and practically all of the expense, would be avoided if Iowa, like so many of the other, including some neighboring, states, had an impartial and city non-resident commission or tribunal, with power to fix these rates at a public hearing, all interested parties present, with the tribunal selecting its own engineers, auditors and accountants.

The court of New York concurring with those of many other jurisdictions expressed unqualified approval of the plan of commission control in the case of Saratoga Springs *vs.* Saratoga Gas, etc., Company [4] in saying:

> That the most appropriate method (speaking from a practical, not necessarily constitutional, point of view) is the creation of a commission or body of experts to determine the particular rates, has been said several times in the opinions rendered by the supreme court of the United States in the various railroad commission cases and in those of state courts.

And in the recent case of People *ex rel.* New York Edison Company *vs.* Willcox [5] this same court said:

[1] Rev. 1905, Sect. 1082.
[2] *Laws 1913* chapter 145, Sect. 18; adding Sect. 22 to 1911, chapter 164.
[3] 199 Fed, 204.
[4] 190 N.Y. 562; 83 N.E. 693; 18 L. R. A. (N.S.) 713.
[5] 207 N.Y. 86; 100 N.E. 705.

That law (*i.e.* public service commissions law) was enacted in response to a pronounced and insistent public opinion, and was a radical and important modification of the relations and policy of the people toward the corporations, which are its subjects. Its paramount purpose was to protect and enforce the rights of the public. It made the commission the guardians of the public by enabling them to prevent the issue of stock and bonds for other than statutory purposes, or in appreciable and unfair excess of the value of the assets securing them, and to prevent also unneeded or extortionate competition, or indifferent and unaccommodating methods of operation, or oppressive or discriminating charges or rates. It provides for a regulation and control which were intended to prevent, on the one hand, the evils of an unrestricted right of competition, and, on the other hand, the abuses of monopoly.

The supreme court of Wisconsin has also fully sustained and very frankly approved the plan of commission control in the case of Calumet Service Company *vs.* Chilton,[1] where the court says:

Control by the trained impartial state commission, so as to effect the one supreme purpose, *i.e.*, the best service practicable at reasonable cost to consumers in all cases and as near a uniform rate for service as varying circumstances and conditions would permit [is] a condition as near the ideal probably as could be attained.

This uniformly favorable attitude of our courts towards the principle of commission control is pertinent and deserves consideration in connection with their holding that the right of appeal and judicial review is statutory and therefore subject to the will of the legislature within the constitutional limitations of due process and equal protection of the law with respect to the preservation of property and contract rights. The nature and extent of the right to appeal from the commission's action, together with the reason for the rule, are well expressed in the case of Minneapolis, etc., Company *vs.* Railroad Commissioners[2] where the court said:

Being purely the creature of statute, the right of appeal from the decision of the commission to the district court, if it exists, must be found in express provisions of the act. . . . But it is not to be presumed that the legislature intended to turn the courts into appellate railroad commissions, which should retry the facts, and pass upon matters of a purely administrative nature, relating to the maintenance and operation of railways, and involving merely questions of policy affecting the security or convenience of the public. Indeed, if the act assumed to confer upon the courts jurisdiction over matters so entirely foreign to the judicial function, it would be of doubtful validity to say the least of it.

There being no inherent right of appeal, the nature and extent of the power and authority of such commissions to issue orders, from

[1] 148 Wis. 334; 135 N.W. 131.

[2] 44 Minn. 336; 46 N.W. 559.

which there is actually no such right, are concisely stated in the case of Interstate Commerce Commission *vs.* Union Pacific Railway Company [1] as follows:

> The orders of the commission are final unless (1) beyond the power which it could constitutionally exercise, or (2) beyond its statutory power, or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law, or (5) if the commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it, or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. . . . "The findings of the commission are made by law *prima facie* true and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. Its conclusion of course is subject to review, but, when supported by evidence, is accepted as final."

JUDICIAL REVIEW OF PUBLIC REGULATION [2]

By Milo R. Maltbie, Public Service Commissioner, First District, New York

(From the *Journal of Political Economy*, May, 1912)

In the discussion of government regulation of public service corporations, attention has been centered upon the organization, powers, and duties of administrative commissions. Many have forgotten that the success of government regulation depends in large measure upon the attitude of the courts and the scope of judicial review. No matter how perfect the plan enacted by the legislature, it may soon resemble a toothless invertebrate if judicial review is unlimited; and excellent results may be obtained under an inferior plan, if the courts support and strengthen it.

It is generally admitted that there should be some method whereby the acts of a commission may be reviewed by the courts. The theories upon which our political system is based require that it shall be possible for a person injuriously affected by a decision of an administrative body to appeal to the courts at some stage of the proceeding. The question is not, therefore, whether there should be any judicial

[1] 222 U.S. 541.

[2] This article embodies the substance of an address before the Western Economic Society, at Chicago, March 1, 1912.

control, but rather how far that control should extend, and upon what grounds the courts may set aside the decisions of coördinate branches of the government.

Judicial Questions

Probably all will agree that the courts should decide whether an act of an administrative body violates a constitutional provision of the state or of the United States. The right to a decision upon this point is unquestioned. The finding of the court may be wrong, but it is the law until the constitution is changed or the court reverses its opinion. This principle is of general application, for an act of the legislature may be declared unconstitutional just as effectually as an administrative order.

It is likewise clear that the courts should determine whether the regulative body is acting within the authority delegated to it by the legislature or by the constitution. Any order that is issued without such authority is illegal, and the determination of the question of authority is a judicial function. If authority may be exercised under certain conditions, the courts will determine whether those conditions have been met.[1]

In the third place, it is proper that the courts should have the right to review the procedure leading up to the issuance of an order or the performance of an act by a regulative authority, so that they may determine whether the course followed was regular in every way.

In every one of these cases, the courts are called upon to apply a law already existing to a specific instance. But in no case are the courts supposed to enact a new law, or substitute a perfect order for an imperfect one, or declare a statute or order illegal merely because in their opinion it is unwise or inexpedient.[2] They may not add one jot or one tittle on their own initiative. As the United States Supreme Court has said (Prentiss et al. *vs.* Atlantic Coast Line Co., 211 U.S. 210, 226):

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. . . . Litigation cannot arise until the moment of legislation is past.

Scope of Court Review

We have now reached the point of divergence. There are those who claim that the courts are fully competent to regulate public

[1] Interstate Commerce Commission *vs.* N. Pacific Ry. Co., 216 U.S. 538.
[2] Interstate Commerce Commission *vs.* Ill. Central R.R. Co., 215 U.S. 452.

service corporations, even to the extent of fixing rates. In a recent decision by the New York Court of Appeals, it was said (People *ex rel.* Joline *et al. vs.* Willcox *et al.*, 194 N. Y. 383, 387):

> If a judicial tribunal is competent to decide that the exaction of five cents is extortionate, and that a tender of three cents is inadequate, it is difficult to see why it may not be empowered to also decide that four cents is a reasonable and proper rate, and that such rate shall continue until circumstances so change that the judgment of the tribunal may again be invoked. The obligation of a carrier to carry at a reasonable rate, in the absence of any statutory rate, rests on statute or on the common law; the decree of a court does not create an obligation, but measures an existing one.

It is true that the obligation to supply service at reasonable rates is not new and that it has existed for generations; but it is equally true that appeal to the courts, as a method of securing reasonable rates and adequate control, has been seldom used and has proven ineffectual, for reasons which will be discussed later.

Others, who recognize the impossibility of securing effective control through ordinary judicial procedure, favor the creation of commissions, but insist that the courts should be empowered to determine whether in their opinion an order of a regulative authority is wise, expedient, and reasonable, and whether the evidence justifies the order. Those who favor limited judicial review assert that such a policy would be destructive of efficient regulation, and that it is not proper for a court to nullify an order of a commission simply because its judgment of what is wise and reasonable differs from that of the commission. Between these two ideas there is a third, which requires that orders be upheld by the courts unless they are unsupported by any evidence of record in the case. It is evident that there is room here for great difference of opinion as to the amount of discretion which should be allowed to the regulating body. Even in those states that have expressly provided for an appeal to the courts, there is considerable difference between the decisions.

Varying State Practice

In Oklahoma, where the constitution provides that the Supreme Court shall determine the "reasonableness and justness of the action of the commission" and that it "shall be regarded as prima facie just, reasonable, and correct," in practice the court considers the matter *de novo*, acts as if it were a commission or the legislature and issues an order such as the commission ought to have made. Apparently, consideration is given to the special knowledge and skill of the commissioners,[1] but any presumption in their favor may be easily

[1] A. T. & S. F. Ry. Co. *vs.* State, 23 Oklahoma 510; Ft. Smith & W. Ry. Co. *vs.* State, 108 Pac. Rep. 407.

rebutted.[1] Their orders have not the same standing as decisions of lower courts considered upon appeal.

The courts in other states refuse to go so far. For example, the Supreme Court of Maine recently said in relation to a decision of the Railroad Commissioners, apportioning the expense of repairing a bridge between a railroad company and the town: "Their apportionment must stand unless manifestly illegal or unjust." [2] Similarly, the Kansas Supreme Court said, relative to an elimination of a grade crossing: "Its [Board of Railroad Commissioners] decision, in the absence of exceptional circumstances, must be final. Of course, if its action had been arbitrary or capricious, the courts could afford relief. . . . The court cannot presume to pass upon the fitness of the plans adopted." [3]

Numerous other decisions could be cited which show a strong tendency in many states away from the theory of broad court review. In Minnesota, the Supreme Court said that if the statute intended that the state district court should try a matter decided by the commission, without regard to the findings of the state commission, the act would be unconstitutional. The judge writing the opinion went on to say that the court may review such findings only so far as to determine whether the rates fixed "are so unreasonable as to be confiscatory, just as an appellate court reviews the verdict of a jury for the purpose of determining whether it is so excessive that it cannot stand," and that every reasonable doubt should be resolved in favor of the findings; all this notwithstanding the fact that the statute provided the district court should determine questions of fact as well as of law.[4]

In a Louisiana case, the following doctrine was laid down:

> The mere reference of disputed issues between the parties to this court for adjudication was not intended to constitute it an "administrative" board, revisory in character over the orders and conclusions of the Commission. Our action is judicial, not administrative. It was not intended that we should substitute our judgment for that of the Commission every time there is a dispute touching the particular place on a line of railroad where it would be best for the public interest that a station or a depot should be placed.[5]

The Wisconsin Supreme Court, in a case involving the construction of a new railway station and the stoppage of trains thereat, ruled

[1] Twin Valley Tel. Co. *vs.* Mitchell, 27 Oklahoma 388; 113 Pac. Rep. 914; St. Louis & S. F. R.R. Co. *vs.* Reynolds, 26 Oklahoma 804; 110 Pac. Rep. 668; St. Louis, I. M. & S. Ry. Co. *vs.* State, 111 Pac. Rep. 396.

[2] Inhabitants of Orono *vs.* Bangor Ry. and Electric Co., 105 Me. 428.

[3] State *vs.* Railway Co., 81 Kansas, 430. Cf. Matter of Amsterdam, Johnstown and Gloversville R.R. Co., 86 Hun 578.

[4] Steenerson *vs.* Great Northern Ry. Co., 69 Minn. 353.

[5] Railroad and Steamship Co. *vs.* Railroad Com., 109 La. 247, 263.

that the degree of proof necessary to warrant the reversal of a decision of the Railroad Commission was that required to prove fraud or a mistake in a written document. The court says that if it were sitting as a railroad commission, it would not issue the order in question; but as it found that competent and reasonable men might differ upon this point, the decision of the lower court upholding the commission would not be overturned.[1]

The United States courts, particularly the Supreme Court, have gone very much farther than any state court in their refusal to interfere with the orders or decisions of administrative bodies. A suit was brought before a circuit court in Pennsylvania to prevent the enforcement of a rate order of the Interstate Commerce Commission. At that time the law provided that the orders of the commission could be suspended or set aside by the courts. The court said:[2]

> The fixing of rates as an incident to the regulation of commerce, being a non-judicial function, it follows that when the legislative branch has itself acted therein, or by proper delegation of its powers has acted through the executive branch, such action, provided no legal, constitutional, or natural right has been violated, is not to be suspended or vacated by a court. . . .
>
> It is therefore apparent that, when the question of suspending or setting aside an executive act comes before a court under such statute, the question is one of law, namely, whether the executive transcended its power or exercised such power without due regard to law. If, for example, there was a failure to comply with statutory requisites of notice, or to afford a statutory hearing, or the action taken was confiscatory — these are all elements a court might consider and in exercising such jurisdiction inquire into the facts to ascertain the real subject involved as throwing light upon the lawful or unlawful character of the order under review.

The learned judge then declares that the court's jurisdiction in the case at bar is the same as that in cases relating to fraud orders. This comparison is interesting in view of the great difficulty in getting the courts to review postal fraud orders issued by the Post-office Department. Indeed, it is practically impossible to get the United States Supreme Court to review the acts of any executive department to determine questions of fact. In a well-known case, the court would not allow a finding of a master in chancery of a circuit court to upset the ruling of the Secretary of Commerce and Labor as to the place of birth of a Chinaman.[3]

The Supreme Court will not set aside an order merely because it is unreasonable. It must be so unreasonable that it violates a constitutional provision; it must be so unreasonable that it is

[1] Minn., St. Paul & Sault Ste. Marie R.R. Co. App. *vs.* Railroad Com., 136 Wis. 146; also 116 Northwestern Rep. 905.

[2] Phila. & Reading Ry. Co. *et al. vs.* Interstate Commerce Com., 174 Fed. Rep. 687, 688–689.

[3] United States *vs.* Ju Toy, 198 U.S. 253.

confiscatory, and confiscatory "beyond any just or fair doubt." The burden of proof is upon the corporation affected; and in case of doubt as to the illegality of the act, a fair trial under the new rate should be given. Between an extortionate rate and a confiscatory rate, there is usually wide range. It is not a judicial function to determine what the reasonable rate should be, or to substitute the opinion of the court for that of an administrative body.[1]

The newly created Commerce Court has indicated its intention to go farther, to consider the weight of evidence, and to overturn the decisions of the Interstate Commerce Commission, unless the evidence in the case before them justifies the finding. If this position is sustained by the Supreme Court, it will have a serious effect upon the work of the commission. The expert knowledge and wide familiarity with public utilities, which are the result of years of experience, will count for little, for the commissioners may not use their own knowledge unless it agrees with evidence in the record. Facts garnered from other cases are not pertinent unless put in evidence in the case at bar. The testimony of witnesses may not be disregarded unless other witnesses are called who testify differently, although the commissioners may be certain from their experience that the evidence is not worthy of much consideration. Yet, everyone knows how easy it is to get "expert" evidence to support almost any proposition, and how important it is in order to judge of the weight of evidence to hear the testimony.

Wisdom of Legislative Acts not Reviewable

Regarding court review of administrative acts, it should be pointed out in the first place that acts of the legislature may not be overturned by the courts upon the ground that, in their opinion, such acts are unwise, inexpedient, or unwarranted. This principle is too well known to need discussion. If, therefore, the legislature delegates its power to regulate corporations to an administrative body, and if the courts are to have the right to consider the reasonableness, propriety, etc., of its acts, the corporations thus obtain an additional method of review which they did not heretofore possess. It is generally supposed that their rights were already amply protected, and that existing constitutional guaranties were sufficient. The purpose of regulation is to curb the power of corporations, not to provide additional means to delay and prevent action.

Further, legislatures are not bound by rules of evidence. They are not required to have evidence or to follow it. They need not give hearings; they may act on their own initiative. If commissions

[1] Cf. City of Knoxville *vs.* Knoxville Water Co., 212 U.S. 1; Willcox *vs.* Consolidated Gas Co., 212 U.S. 19.

are required to hold hearings so that any company likely to be affected may have an opportunity to be heard, it has greater protection than is guaranteed it under legislative control.

But someone may say: What if these commissions are unfair, are not guided by the evidence, and do not exercise good judgment; should it not be possible to appeal to a higher authority? The same question might be asked in relation to the legislature, but there is no appeal to the courts upon such grounds. Further, is it likely that administrative bodies will be less fair than legislatures? Is it not likely that a body created and selected for one specific purpose will perform this one function with as great efficiency, fairness, and wisdom as another which has a multitude of other duties to perform and is not in continuous session?

Control of Commissions

However, administrative bodies are not irresponsible autocrats, subject to no restraint and accountable to no one. In the first place, they are responsible to the person who appoints them, or to the electorate if they are elected. Their terms are comparatively short in most cases — much shorter than the terms of many judges. If their decisions are manifestly unfair and improper, they may not be re-elected or reappointed. There is usually a method of removing them from office in case of gross incompetence.

Commissions are also responsible to the legislature in three ways. The very offices which they hold may be abolished; the authority under which they act may be curtailed; their decisions in any specific case or class of cases may be set aside, for an act of the legislature will supersede a decision of a commission. In these ways, commissions are subject to greater and more direct control than the legislature itself, and certainly to more control than the courts. A decision of the courts upon constitutional grounds cannot be set aside except in a laborious way and only after considerable time has elapsed. In many cases, indeed, this process is so difficult that a decision of the courts is final and practically beyond review.

Argument against Broad Review

Is it necessary, in addition to the above methods of control and the constitutional jurisdiction which courts have over administrative acts, to provide that the courts may also determine whether an order is wise, warranted by the evidence, and a reasonable exercise of the discretionary power conferred?

One reason why the courts should not be given unlimited authority to review orders of commissions is that judges are not selected primarily for this function. They are chosen presumably because of

their legal knowledge, and not because of any familiarity with public utilities or methods of regulation, or of knowledge of the needs of the public. To impose a duty upon them which they are not fitted to perform, for which they were not chosen primarily, and which has no relation whatever to their legal duties, would be unwise. The universal experience in governmental administration is that the union of widely different functions in one person or body ordinarily results in inefficiency in some one direction or in every direction. In this case, either legal questions would be less wisely decided or public regulation would be inefficient.

In Steenerson *vs.* Great Northern Railway Co., 69 Minn., 353, 377, Mr. Justice Canty said, after referring to the peculiar qualities which members of commissions should have:

> How is a judge, who is not supposed to have any of this special learning or experience, and could not take judicial notice of it if he had it, to review the decision of commissioners, who should have it and should act upon it? It seems to us that such a judge is not fit to act in such a matter. It is not a case of the blind leading the blind, but of one who has always been deaf and blind insisting that he can see and hear better than one who has always had his eyesight and hearing, and has always used them to the utmost advantage in ascertaining the truth in regard to the matter in question.

In this connection it is to be noted that one of the principal reasons for the creation of special administrative bodies to supervise corporations, is that judicial methods and remedies have been neither effective nor satisfactory to the public. The long delays, the great expense, and the heavy burden upon the private citizen or organization, attending any attempt to force a corporation to do what is required by law, only in general terms, have made recourse to the courts quite impracticable. The private citizen is at a big disadvantage, and there have been few cases where he has tried his theoretical remedy. To give the courts the right to review the acts of administrative bodies exercising legislative functions would be a backward step and would increase the difficulties of securing proper relief. Corporations cannot be regulated by private lawsuits.

Judicial bodies are not well organized to regulate public service corporations. They are governed by strict rules of evidence. Their procedure usually spells delay. They pass only upon evidence presented to them. They have no permanent technical staff to make investigations and to assist them to analyze and digest the voluminous testimony often presented. The questions that arise are often so technical that expert assistance is necessary to a wise decision. Even if the investigation were made in first instance by an administrative body, and an appeal were provided to a court upon the question of reasonableness, whether the evidence justified the order, etc., the

special knowledge of the administrative body would, in large measure, become of little value. The establishment of such an appeal would probably change the administrative body into a judicial body. But what is the use of a commission with a competent staff of experts, if a court with no such staff is to make the final decision, not only as to the law, but as to the facts and their application to the conditions which surround an intricate case? The fundamental theory of public regulation by an administrative body is that it is a special function requiring special qualifications and knowledge upon the part of those who exercise it, a staff of technical experts, who are as familiar with the industries to be regulated as the corporations themselves, ample time and opportunity to investigate every subject, and sufficient authority to carry out the conclusions reached.

A few illustrations will suffice to show the burden which a careful review of the evidence will place upon the courts. A case relating to transfers between the various street-car companies in the Borough of Manhattan was recently closed before the Public Service Commission for the First District, N.Y. The record covers nearly 4000 typewritten pages, including nearly 200 exhibits, many of which are elaborate statistical comparisons. In another case, relating to the reorganization of a company, about 2400 typewritten pages of testimony were taken, including about 130 exhibits. It is evident that if a court is to analyze such a voluminous record and decide whether the commission wisely reached the conclusion appealed from, either other cases must wait, clerical and expert assistance must be had, or a decision must be reached without the careful examination necessary.

Broad court review will almost inevitably decrease efficiency. If a corporation may appeal to the courts because it believes an order is not justified by the record, and if it may secure a review of such evidence by a lower court and then by a higher court, a final decision may be put off and off, until the public is worn out and effective regulation greatly hampered. It is said that even under a system of judicial control limited to purely legal and constitutional questions, such a result may follow. True, but that is no reason for increasing the excuses for delay; and every time a new subject is added to the list upon which appeal may be taken, delay is facilitated.

The advantages accruing to a corporation from litigation are often so considerable that suits may be started even where the prospect of success is small. In the first place, it may pay to litigate; and it is not always feasible to require a company to reimburse its patrons or consumers if it loses. In the case of service orders, if the court issues a stay but later sustains the order, the public has irretrievably lost the benefits from the better service it should have had while the litigation was proceeding. Information may be needed to decide a rate case; but if the company may contest the order for such data through

the courts, and prevent a decision while that is being done, it is evident the receipts from the contested rates may more than offset the cost of litigation.

Secondly, the threat of a long contest in the courts may be used to secure a compromise. Complainants and commissions are apt to reason that it is better to accept a result which is less than the facts warrant, if by so doing an immediate settlement is obtained. This virtually places a reward upon belligerency and often prevents the public from securing that to which it is fairly entitled. Every means that contributes to that end is certainly undesirable.

Again, the complainant is at a decided disadvantage usually when the case goes into the courts. It is difficult and expensive for him to litigate. The interest of any one person is ordinarily small as compared with that of the corporation. But if there is to be an appeal to the courts, the complainants or the public ought to have an equal right to appeal from a decision that does not please them.

Another objection to the theory of broad judicial control is that it will tend to lessen responsibility. When administrators know that their decisions are final, so far as "reasonableness" is concerned, they will naturally exercise care and diligence. The centralization of responsibility increases the realization of this responsibility. But if they know that even in any unimportant matter an appeal may be taken, the tendency will be to transfer the responsibility to the courts and to reach conclusions hastily in order that the appeal may be taken immediately. It will also enable inefficient bodies to shift the responsibility for inefficiency upon the courts.

The rôle of the prophet is always hazardous and thankless, but one may safely predict that if a system of court review is generally adopted, whereby a corporation that is dissatisfied with any act or order may appeal to the courts and thereby delay for a long period a final decision, and perhaps upset the conclusion reached by the administrative body because the court has a different opinion of what is wise, expedient, or warranted by the facts, a return may be made to legislative regulation which is subject to no such review, whenever it seems likely that advantage is to be taken of litigation to secure delay. The corporations have ample protection without unlimited review, and their real interests, as well as those of the public, do not lie in this direction. Further, if public regulation does not prove to be satisfactory, another and more radical remedy will certainly be tried.

VI

LABOR LAWS AND THE LABOR CONTRACT

PROGRESSIVE TENDENCIES IN LABOR LAW ADMINISTRATION IN AMERICA

By John B. Andrews, Secretary American Association for Labor Legislation

(From *American Labor Legislation Review*, December, 1913)

One of the most important phases of the newer relations the government is assuming toward industry is discovered in the rapidly multiplying laws affecting labor: they embrace not only factory regulations, but laws pertaining to the labor contract, hours, wages, employers' liability. The attitude of the courts towards labor laws and labor disputes, especially towards boycotts, is of growing importance. — Editor's Note.

Numerous as the obstacles usually are to securing the enactment of wise labor laws, to secure their efficient enforcement is even more difficult. Much of our labor law in the past has failed of its purpose on account of defective administration.

During the first fifty years of labor legislation in America little attention was given to the problems of enforcement. No special machinery was created to inquire into the operation of these laws. No new authorities were given the responsibility of enforcing them.

But beginning in Massachusetts in the year 1869, with the formation of the first state Labor Bureau in the world, a new chapter opened in which is recorded a long succession of attempts to organize state machinery for the systematic investigation of labor conditions and the publication of labor statistics. It was not until several years later, however, that state bureaus were created for the definite purpose of inspecting work places to discover and prosecute violations of the law. State after state has established bureaus of factory inspection and labor statistics until such bureaus exist to-day in forty-two states. Indeed, in several instances, within a single commonwealth the various recognized functions of a labor bureau are scattered through more than half-a-dozen different bureaus, boards or departments. This lack of unity of authority and responsibility has been one of the causes of lax

administration. And in spite of much good work accomplished in certain limited portions of the field or in a few states, the results as a whole may not unfairly be described as thirty years of ineffective organization.

The principal functions of these state bureaus have been (1) the investigation of labor conditions, (2) the publication of statistical reports, and (3) the enforcement of labor laws. An influential labor editor as early as 1887 criticized these bureaus in scathing terms. He characterized their reports as of little practical value, and, after deploring the inconvenient and unattractive arrangement of material, he declared in disgust that "the index should be written by the author even if the book is not!"

The greatest cause for dissatisfaction, however, has been the failure of these bureaus to enforce the law. And the reasons for such failure are not hard to understand. The inherent technical difficulties are great; appropriations have been insufficient; the form of organization has been faulty; the work to be accomplished, concerning as it frequently does the most vital relations between employers and employees, is of a very delicate nature. The successful mediator in time of strikes, for example, should command the confidence of both parties to the dispute. He should be possessed of unusual tact. He should be impartial. Again, the intelligent collection and tabulation of statistics requires a certain amount of scientific training. The preparation and publication of a report presupposes the ability to put facts in a form that will instruct. Finally, any administrative authority that, on account of the nature and extent of the problem, must depend for its success upon the coöperation of the principal groups in the community, must itself inspire a spirit of coöperation.

The old idea of labor law enforcement, of *policing* a state, no longer commands respect. The "detective method," valuable and necessary as it is at times in covering hidden violations of the law, is nevertheless to be condemned when it becomes the habitual form of inspection. An army of the most skilled factory inspectors would be totally unable to enforce every provision of the factory laws. In a state like Pennsylvania, for example, there are more than 28,000 manufacturing establishments alone, scattered over an area of 45,000 square miles. Moreover, few inspectors, even with previous technical training, would be able intelligently to pass upon proper provisions for safety, comfort, and health in a succession of establishments including processes and danger points so varied as those to be found in the manufacture of steel and silk, carpets and chemicals, shirt waists and shovels, or in the construction of sky-scrapers and subways.

Unfortunately, the successful candidates for factory inspection positions have not in the majority of instances been selected on account of peculiar fitness for the work. Frequently they have been appointed

from lists of political henchmen, as a cheap way of paying off political debts. In only nine states at the present time — as graphically indicated by the colored map printed elsewhere in this volume — is there a merit or civil service system for the selection of factory inspectors, and even there frequent exemptions for trivial causes have brought that system almost into disrepute. In the work of safeguarding dangerous machinery; in the highly technical task of removing from the workrooms poisonous dusts and fumes; in short, in the scientific work of conserving the comfort, health and safety of the millions of men, women and children who labor in factory, workshop and mine, even the workers themselves have too often thought first, not of the protection of human life, but of the paltry, political job.

It should be definitely understood that control of this highly important function of the government by any single interested group would be undesirable. The practical experience of the worker, the resourcefulness of the employer, the critical, constructive ability of the expert — all are needed in the framing of reasonable standards of protection. It is the lack of coöperation of these three groups in the past that has left unnumbered thousands yearly to suffer for the want of protection; it is the new spirit of coöperation in the administration of labor laws that is the promise of the future.

Within the last three years we have entered upon a new era in factory inspection. The recognition that administration is the most important problem in labor legislation is working a revolution in this field. There is a new spirit in the work — the spirit of coöperation.

Beginning with the organization of the Wisconsin Industrial Commission in 1911, and followed in 1913 by somewhat similar organizations in the states of California, Massachusetts, New York, Ohio and Pennsylvania, almost one-half of the industrial working population of this country is offered a new form of protection. Formerly in these states, and elsewhere in America, labor legislation was frequently a result of strategy, of fevered lobbying, of buttonholing perplexed or harassed politicians, of publicity campaigns and much letter writing — often resulting either in the death or the passage of some sort of an emasculated bill. When the bill passed — if it did pass — its advocates were only too apt to sit back complacently with the feeling that they had accomplished a great and lasting good, and quickly to forget all about the law. If it happened to be in one of those states where factory inspectors are sent into the field looking for violations of the law, employers were sometimes haled into court. Here it frequently happened that the word of the inspector was offset by the word of the employer, and the magistrate, bewildered by his own ignorance of industrial conditions, either dismissed the case or, as the records too often show, upon finding the employer guilty soothed

his uncertain soul with the remark that the court knew the employer to be "a humane man" and consequently would "suspend sentence." Result: the inspector was disgusted, the employer was angry, and most lamentable of all, the worker was left unprotected.

Wisconsin, like other states, went through years of this attempted regulation, but finally decided to reorganize on a new principle. An industrial commission of three members with salaries of $5000 a year was created to unify the work of factory inspection, labor law enforcement, and the publication of reports. The form and scope of organization was similar to the suggestive outline which forms the frontispiece to this volume. The legislature handed over to this commission a great public trust and said, "Make the work places safe." Safety was defined in the law as *such freedom from danger to life, health or safety as the nature of the employment will reasonably permit.*

With this authority from the legislature, and with an instructive background of experience and judicial sanction from the public utility field, the industrial commissioners turned to their task. They called to the service of their state one of the most capable safety experts in America. He served as secretary to unpaid committees which were organized in the various industries. Each industry was represented on its safety committee by both employers and employees. Rules for safeguarding were outlined by each committee for its own industry. Then the industrial commission advertised a public hearing at which the rules were presented for further criticism. When finally drafted on the basis of such criticism the rules were issued through the newspapers in the form of administrative orders to go into effect at the end of thirty days with all the force of law. Under this new system the industry itself makes the laws for its own shop government. Employers and employees, with the aid of impartial experts, are learning through self-expression the importance and the practicability of the now popular motto "Safety First."

Other phases of the problem of making industry safe are to be taken up in the same way until mechanical safety is supplemented by scientific sanitation, until the labor market is organized through employment exchanges, until for women, at least, the hours are regulated according to the dangers of the occupation and wages are put upon an adequate basis.

No longer is it necessary in Wisconsin to wait two long years for a session of the legislature in order to submit proposals for the proper protection of the workers. No longer need specific rigid provisions be drafted into bills and thrust upon the bewildered attention of the legislators while temporarily in session at the state capitol. The legislature has laid down the law in a broad way; the industrial commission, as rapidly as circumstances permit, may fill in the administrative detail.

If any one objects to the orders issued by the commission, there is recourse in the courts. But not to the local magistrate who has for so long nullified much labor legislation. And no injunction can be issued. The appeal is first to the circuit court of the county which is the seat of the state government; and afterward only to the Supreme Court of the state. But if at any time in the proceedings any new evidence as to facts is introduced, the case goes automatically back to the industrial commission which may call a new public hearing and amend or reënforce the order.

Meanwhile, under the industrial commission plan, the factory inspectors, armed with simple rules drawn from the experience and skill of industry, are growing more confident, and likewise more respected because more helpful. Much of their time is now devoted to educational work. Traveling exhibits of photographs and diagrams, popular lectures with lantern slides, illustrated bulletins issued at frequent intervals according to the need — all of these are revolutionizing the work of the factory inspector and at the same time are helping to develop throughout the state that true reverence for the law which Abraham Lincoln said should become the political religion of the nation.

Aside from the steady growth of social insurance, it may be expected that within another five years the legislatures in all of the more important industrial states will cease to concern themselves much with specific labor legislation. The work of formulating detailed regulations is rapidly being turned over to administrative commissions much better fitted to develop scientific standards for the protection of the workers.

This burden of responsibility for safeguarding the workers, hitherto shifted about uneasily by the leaders of political factions in legislative halls, is to rest more definitely — and it is hoped more securely — upon a few commissioners. Plenty there will be to remind them that a commissioner is a person charged with a commission or trust; that they as labor commissioners are charged with a public trust and therefore responsible to the people. The people are becoming more alert, better informed, more insistent that it is a function of government to conserve the most valuable of all of its resources, human life.

Is the legal machinery for the administration of our labor laws properly constructed and maintained to give us maximum service with minimum friction and expense? What are the main points of strength and weakness? Which states have administrative machinery that might well serve as a model for less progressive neighbors? These are a few of the interesting questions that ought to be answered after investigations in the field and on lines that should appeal to the imagination of a great federal commission. But without years of delay it is possible now for many states to work important changes which will

vastly increase the effectiveness of their labor laws. That the state labor bureau officials are leading in this movement and inviting the coöperation of others is a fortunate circumstance.

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CONSTITUTIONAL LIMITATIONS AND LABOR LEGISLATION [1]

By Ernst Freund of the College of Law, Chicago University

(From the *Proceedings of the American Association for Labor Legislation*, Third Annual Meeting, December 28–30, 1909)

In the development of legal principles twenty-five years is not a very long period. In 1884 the body of constitutional doctrine by which labor legislation has since been judged, was practically non-existent and it is consequently a growth of a span of time within the legal memory of most of us. There had been previously a solitary decision of the Supreme Court of Massachusetts [2] in which the Court was obviously a good deal puzzled how to deal with the objections raised, disposing of them in a rather offhand, and not altogether satisfactory, fashion. This dated back as far as 1876. In 1877 the decision of the Federal Supreme Court in the Granger cases [3] established the principle of public control of economic interests, although without a proper appreciation of the limits that have since been recognized. The control was also asserted only with reference to businesses affected with a public interest, and a significant observation fell from Ch. J. Waite, that the Constitution does not confer power upon the whole people to control rights which are purely and exclusively private.

The decision of the New York Court of Appeals in the Tenement Labor Case in 1885,[4] was the first to take a decided stand against the power of the State in a case where labor was involved. The freedom in that case, however, was asserted in favor of the individual workman and the relation between employer and employees was not directly discussed. The novel doctrine of freedom of contract between capital and labor was inaugurated in 1886 by two decisions; one from Pennsylvania,[5] the other from Illinois.[6] It is not until the 90's that the judicial mind can be said to be aroused to the realization that important con-

[1] Copyrighted; all rights reserved.
[2] Com. *vs.* Hamilton Mfg. Co., 120 Mass. 383.
[3] Munn *vs.* Illinois, 94 U.S. 113, and cases following.
[4] *In re* Jacobs, 98 N.Y. 98.
[5] Godcharles *vs.* Wigeman, 131 Pa. St. 431.
[6] Millet *vs.* People, 117 Ill. 294.

stitutional problems are involved in labor legislation. Yet the same period of time has been long enough to see nearly all the judges who pronounced the leading decisions in the respective States pass from the bench and in many instances the entire membership of the court has changed.

What then is the legacy which this past generation of judges has bequeathed to their successors of the present day?

A survey of judicial decisions on labor legislation may be summarized as follows: The great mass of labor statutes have not been contested in the courts. This by itself must not be taken to mean that they have been accepted as valid, for it is notorious that a great many laws have never been enforced. Of these that have been questioned in the courts, practically all that had any immediate bearing on safety, sanitation, or decency, have been sustained, the few exceptions being due to special features not going to the root of the law.[1] Neither the question of the control or restraint of organizations, nor that of liability or compensation or insurance, nor that of arbitration, have as yet been considered by the courts to any extent from a constitutional point of view. The controversy has revolved mainly around three subjects: the protection of labor organizations, the method of payment of wages, the limitation of hours of labor. There have been in the neighborhood of twenty decisions declaring as many statutes on those points unconstitutional, and while, with reference at least to the two subjects last mentioned, there have been weighty decisions and opinions the other way so that it is difficult to assign a distinct preponderance of authority to either side, it is undeniable that the adverse decisions coming from many different sections of the country have produced a great impression upon the legal profession and the community at large and created a general sense of uncertainty as to the extent of permissible legislation.

It is important to consider to what extent this impression is justified.

I shall pass over the cases dealing with the protection of labor organizations against coercion or discrimination practiced on the part of employers in hiring or discharging workmen, not because the problem involved in the legislation is without interest or importance, but because, as the acts were framed or as the courts interpreted them, the issue has been narrowed down to a point where it is deprived of deeper significance.

If this legislation necessarily means that a relation is to be forced upon the employer which the employee is free to let alone or discontinue, it is not surprising that the courts have, with practical unanimity, pronounced against its validity. It deserves further consideration whether it is not possible to frame a valid law which will respect the right of the employer to form and sever relations of employment

[1] See, *e.g.*, Starne *vs.* People, 222 Ill. 189.

with the same freedom as that enjoyed by the employee, and will yet compel him to maintain at least an outward attitude of neutrality toward labor organizations by forbidding offensive threats and other forms of coercion and intimidation either to harm or to benefit them.

The cases concerning truck and other wage payment acts have been conspicuous for the part which they have played in the judicial history of labor legislation, those concerning hours of labor for the general interest which they have drawn to the issues involved. Both presented the issues between individual liberty and the power of public regulation, but, as the further discussion will show, in very different aspects, althought it is customary to cite them indiscriminately.

It will be of advantage to recall to the mind very briefly the course of the judicial decisions. The keynote was struck by the brief and pointed denunciation of a store order act which is found in the first case already referred to, decided by the Supreme Court of Pennsylvania.[1] The Act was declared to be an infringement alike of the right of the employer and the employee; "More than this, it is an insulting attempt to put the laborer under a legislative tutelage which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges and consequently vicious and void."

The cases in Illinois involving coal weighing, store order, and weekly payment legislation, were less pronounced.[2] In annulling the statutes in question the elements of discrimination which the court found in them were chiefly relied upon. The insistence upon the freedom of contract, however, which was at first subordinate, was gradually more emphasized and finally the Supreme Court declared it to have been a controlling feature of those decisions.[3] West Virginia and Indiana have been uncertain in their position and their decisions are difficult to reconcile with each other. In both States the latest rulings are favorable to the legislation, but with qualifications.[4] Missouri in 1893, against a strong dissent, condemned a store order act, likewise relying mainly upon unjustifiable discrimination.[5] But it took the broader ground of constitutional liberty when the legislation was made general and was again contested.[6] Decisions condemning the

[1] Godcharles *vs.* Wigeman, 113 Pa. St. 431.

[2] Millet *vs.* People, 117 Ill. 294; Frorer *vs.* People, 141 Ill. 171; Braceville Coal Co. *vs.* People, 147 Ill.. 66; Ramsey *vs.* People, 142 Ill. 380; Harding *vs.* People, 160 Ill. 459.

[3] Vogel *vs.* Pekoe, 157 Ill. 339.

[4] State *vs.* Fire Creek Co., 33 W.Va. 188; Peel Splint Coal Co *vs.* State, 36 W.Va. 802; Hancock *vs.* Yaden, 121 Ind. 366; Republic Iron & Steel Co. *vs.* State, 160 Ind. 379; Seeleyville Coal & Mining Co. *vs.* McGlosson, 166 Ind. 561.

[5] State *vs.* Loomis, 115 Mo. 307.

[6] State *vs.* Missouri Tie & Timber Co., 181 Mo. 536.

attempt to control the method or time of payment of wages are found moreover in Ohio,[1] Kansas[2] and Texas.[3] Against these must be set the authority of the United States Supreme Court,[4] which in two decisions has strongly asserted the legislative power to protect the workman against methods of paying or computing his wages which may operate to his disadvantage. The same position is taken by a number of state courts,[5] but it should be observed that Missouri maintained its ground after the decision of the Supreme Court of the United States had been rendered. It would indeed be futile to ignore the trend of judicial opinion which is represented in the holdings which are adverse to this kind of legislation, or to dispose of the matter by attempting to establish a preponderance of authority against them by simply counting up the number of decisions on either side.

The decisions regarding hours of labor stand as follows:

In 1876 Massachusetts sustained a ten-hour day for women;[6] Nebraska annulled a general ten-hour day (subject to certain exceptions) in 1894,[7] and Illinois, an eight-hour day for women in 1895;[8] Utah in 1896 sustained an eight-hour day for mines and smelting works.[9] This was confirmed by the United States Supreme Court in 1898,[10] but in 1899 the same legislation was declared unconstitutional in Colorado.[11] In 1900 an inferior court in Pennsylvania sustained a twelve-hour day for women, limited to 60 hours per week.[12] In 1902 Nebraska and Washington sustained ten-hour days for women.[13] In 1903 Missouri sustained an eight-hour day for mines,[14] and in 1904 a similar decision was rendered in Nevada.[15] In 1904 New York sustained a ten-hour day for bakers,[16] but was reversed by the United States Supreme Court which declared the law unconstitutional in 1905.[17] A ten-hour day for women was sustained in Oregon in 1906;[18] but a law forbidding the night labor of women was declared

[1] *Re* Preston, 63 Oh. St. 428.
[2] State *vs.* Haun, 61 Kan. 146.
[3] Jordan *vs.* State, 51 Tex. Cr. 531.
[4] Knoxville Iron Co. *vs.* Harbison, 183 U.S. 13, aff'g 103 Tenn. 421; McLean *vs.* Arkansas, 211 U.S. 539.
[5] Opinions of Justices in Massachusetts, 163 Mass. 589; Colorado, 23 Col. 504; South Carolina, 47 S.E. 695; Washington, 88 Pac. 212; Vermont, 64 Atl. 1091. There are decisions sustaining the legislation with reference to corporations in Arkansas, Maryland and Rhode Island.
[6] Com. *vs.* Hamilton Mfg. Co., 120 Mass. 383.
[7] Low. *vs.* Rees Printing Co., 41 Neb. 127.
[8] Ritchie *vs.* People, 155 Ill. 98.
[9] 14 Utah 71, 96.
[10] Holden *vs.* Hardy, 169 U.S. 366.
[11] *Re* Morgan, 26 Colo. 415.
[12] Com. *vs.* Beattie, 15 Pa. Super 5.
[13] Wenham *vs.* State, 65 Neb. 400; State *vs.* Buchanan, 29 Wash. 603.
[14] State *vs.* Cantwell, 179 Mo. 245.
[15] *Re* Boyce, 27 Nev. 299.
[16] People *vs.* Lochner, 177 N.Y. 145.
[17] Lochner *vs.* New York, 198 U.S. 45.
[18] State *vs.* Muller, 48 Or. 252.

unconstitutional in New York in 1907.[1] In the following year, however, the decision in the Oregon case was affirmed by the Federal Supreme Court.[2] A ten-hour day law is now before the Illinois Supreme Court. The decisions stand eleven to five in favor of regulation, in the United States Supreme Court two to one; with regard to women the proportion is six to two; with regard to men, five to three. It is moreover proper to advert to some facts which bear upon the adverse decisions. In Nebraska the unfavorable ruling is offset by a later one that is favorable. The decision in Colorado was followed by a constitutional amendment which would leave a new law subject only to the Federal Constitution, which has been construed in favor of it. The decision on the night work of women in New York was dictated by submission to the supposed doctrine of the United States Supreme Court, the decision of that court in the case from Oregon not having then been rendered. And with reference to the first case from Illinois, it might be deemed advisable to suspend judgment until the pending case shall be decided. Under these circumstances there might be some temptation to make light of the decisions adverse to the legislative power. In view of the position taken by the Federal Supreme Court with reference to the bakers' ten-hour law, this would be obviously a mistake. And it is to be noted particularly that there is not one among the decisions which have sustained this legislation that does not clearly intimate that if the legislature should overstep certain not very clearly defined limits in this form of legislation, the courts would be bound to afford relief.

It is this general adhesion to the principle of limitation and control which is significant. Its recognition implies a fundamental difference between the European and our conception of legislative power. In all civilized countries the legislature acknowledges itself bound to the observance of certain fundamental principles of individual right, and although without judicial sanction, these principles are on the whole scrupulously and inviolably respected. But these principles are not supposed to include the acceptance of any theory of economic liberty. However firmly economic principles may be adhered to, they are still regarded as matters of policy and not of right, and hence within the acknowledged control of the legislature.

There is no evidence whatever to indicate that, until within a relatively recent period, our general constitutional theory of legislative power was different, except that, through the exercise of a power nowhere conferred in express terms, the judicial sanction which had been lacking in Europe had come to be supplied.

Where fundamental rights were sought to be asserted against the exercise of general legislative power, they were invariably associated

[1] People *vs.* Williams, 189 N.Y. 131.
[2] Muller *vs.* Oregon, 208 U.S. 412.

with the impairment of the obligation of contracts, which implied a vested right. The standard treatises on constitutional law contained no suggestion that the due process clauses could be relied upon to build up new limitations, and when Mr. Justice Field in his dissenting opinion in Munn *vs.* Illinois contended for a limitation of the legislative power upon this basis, he was in a position to cite any authority in support of his view.

It was, therefore, an innovation upon established constitutional doctrine when the labor decisions recognized traditional immunities from public control as positive and primary constitutional rights in the face of which legislation would have to justify itself before the courts by showing some affirmative ground of interference.

The supposed advance or gain consisted in extending the protection previously accorded only to the vested right of property, to a merely potential right, the capacity to earn, to use one's faculties for individual advancement — on the face of it a principle of strong democratic implication. This implication was further emphasized by using the phrase that labor was property. The general formula, however, under which the doctrine was proclaimed was that of freedom of contract.

The terms used were calculated to convey the impression that the rights involved were those of the workman as well as of the employer. This is not entirely without plausibility as far as hours of labor are concerned;[1] with reference to the wage payment acts it is an obvious fallacy, unless the liberty to compete for employment upon unfavorable terms be regarded as a valuable right.

Payment at frequent intervals or redemption of store orders in cash is a pure benefit, and in having the right to this benefit made inalienable, the workman surrenders absolutely nothing except through the remote contingency that the obligations which the law imposes upon the employer, may deter from entering the business or drive him into insolvency, and that consequently the opportunity to earn a living may be diminished. Where an arrangement operates necessarily to the detriment of one party of the contract, its prohibition cannot in any just sense be denounced as an infringement upon his liberty. Under such circumstances to proclaim a freedom of contract is a misleading phrase which obscures the real issue involved in this legislation.

The only real right at issue in the wage payment acts is that of the employer, the right of the owner of a business to direct its internal arrangements according to his own discretion.

Let us remember that a century after the beginning of factory

[1] That even organized labor may have an interest in not having hours of labor reduced by law, is shown by the opposition of strong sections of English coal miners to the introduction of the eight-hour law. See Ashley, Adjustment of Wages, pp. 80-82.

legislation, American courts questioned whether the police power was properly exercised where there was no danger except to employees who voluntarily incurred it,[1] that the same idea is still potent in the law of liability, that the State even now does not undertake to regulate purely domestic arrangements, although those exposed to the consequences of mismanagement and neglect do not enter voluntarily and are not free to escape, and that as a matter of history the law of employment has grown out of that of domestic control, and we may understand something of the spirit that says: The gates are mine to open as the gates are mine to close, and I set my house in order.

There can of course to-day be no reasonable doubt of the right of the State to legislate under the old established heads of the police power, for the protection of the employees of the business as well as of the general public, and these would include not only safety, health, morals and decency, but also the protection against fraud, and certain forms of oppression and exploitation which the history of legislation has treated as equivalent to fraud.

If it were possible to establish that the various forms of statutes relating to the payment of wages were aimed merely at the suppression of fraudulent or unconscionable practices, they would clearly fall within the principle of the traditional exercise of the police power and the case would be plain. With reference to truck legislation, this view was strongly and ably pressed in a dissenting opinion delivered in the first Missouri case, and the antiquity of this legislation which reaches back to the middle of the fifteenth century indicates the existence of widespread and old grievances in this matter. There is also considerable evidence tending to show that the coal weighing acts were occasioned by the prevalence of methods which were at least capable of being abused to the prejudice of the mine workers. From this point of view it would be quite impossible to support the denunciation of this legislation, so far as its general principle is concerned, upon any consistent theory.

Without very much fuller data than seem to be available concerning conditions in different industries and localities, it is difficult to pass final judgment on the character and effect of the practices which the statutes sought to abolish.[2] With reference to the requirement of

[1] *Re* Morgan, 26 Col. 415. "How can an alleged law that purports to be the result of an exercise of the police power, be such in reality, when it has for its only object, not the protection of others or the public health, safety, morals or general welfare, but the welfare of him whose act is prohibited, when, if committed, it will injure him who commits it and him only?"

In re Jacobs, 98 N.Y. 98, "To justify this law it would not be sufficient that the use of tobacco may be injurious to some persons or that its manipulation may be injurious to those who are engaged in its preparation and manufacture." Quoted with approval in Ritchie *vs.* People, 155 Ill. 98.

[2] There is some testimony as to conditions in the Colorado mining industry in the Report of the Industrial Commission, Vol. XII, pp. lxv–lxxii, as to Illinois, see the Report of Bureau of Labor Statistics, 1890, Appendix.

the weekly or bi-weekly payment of wages especially it must be observed that the customary practice of longer intervals of payment not only could not in any proper sense be termed an abuse or form of oppression, but that the new requirement, where sustained, in many cases worked such hardship that its rigorous enforcement proved at first impracticable.[1]

However this may be, the controlling fact for the purpose of understanding the decisions is that the courts declined to see in the forbidden practices merely an unconscionable form of oppression or exploitation, but treated the matter as one of fair controversy between employer and employee.

The legitimacy of this point of view assumed or conceded, the conflict of decisions turns upon a very important issue. The problem would be this: If the old established landmarks of the police power are abandoned, at what point is the right of the owner to control his own business and the relation to his employees secure from legislative interference?

The Granger cases had established the principles that certain classes of business of a monopolistic character were subject to control in the economic interest of the general community.

Was there an analogous principle according to which the employment of labor might be regulated in the economic interest of the employees? To some of our courts this undoubtedly seemed to be the issue involved in the legislation, the validity of which was contested before them, and it is easy to gather from the tone of the decisions that they considered a determined resistance to the new principle necessary. Some of the adverse decisions certainly lend themselves to the construction that the principle was repudiated without any qualification. In annulling the statutory requirements, they did not rely upon the hardship or injustice they inflicted upon the employers. The points in which the legislature had sought to impose terms upon the contract of employment had not touched any very vital elements in the relation. In Illinois, where the legislation was chiefly aimed at conditions in the coal mines, all the points successfully contested before the courts were subsequently conceded to the miners by the free agreement of the operators. This very course of development, however, shows that there was no imperative need of legislative interference.

On the other hand, the courts which have sustained the statutes in question have done so in a half-hearted way without committing themselves to more than the particular provisions absolutely required. They stand, apparently, upon no principle but the equities of the legislation, and while recognizing limitations, refuse to define them. It would be pure speculation to attempt to predict upon what principles

[1] See New York Factory Inspectors Report, 1890, pp. 102, 103.

limitations will be eventually worked out. The difficulty of assigning limits to the power, once it is recognized, may serve to explain the uncompromising stand taken against its recognition at the outset in so many jurisdictions.

Under a system of elective judges holding office for fixed terms, it is at least a fair presumption that a principle involving questions of public policy cannot gain a strong foothold if squarely opposed to generally prevailing notions of justice. More than once in recent times the courts have spoken of the inequality between the parties to the labor contract as justifying legislative interference. If this inequality were hopeless or permanent, the so-called doctrine of freedom of contract would be opposed to every principle of social justice. If it can be maintained, it is only because there is some possibility of contracting on equal terms through the power of collective bargaining. Constitutional limitations upon the power to legislate in the interest of labor would, in other words, be impracticable were it not for the fact that organization furnishes a substitute for legislation.

Two questions suggest themselves in this connection, which at the same time may demand an answer:

1. If the adjustment of labor difficulties is to be left entirely to the power of combination, will not the State be ultimately compelled to have a voice in the control of its organization? We have seen that in recent years the political party has thus been treated as an instrument of government, and in connection with the machinery of the election laws has become an object of legal regulation. If the labor organization is in a similar way essential to the working of the industrial system, a similar result may have to follow. State regulation may thus come at this point if repudiated at the other.

2. How should the attitude of the state be affected by the absence of organization? Mr. Justice Brewer, in the Oregon case, seemed inclined to assign to women an inferior political status, relying upon their dependent nature and other temperamental peculiarities. It would have been more satisfactory if he had pointed out that the industrial work of women, owing to the dominating influence of domestic functions or prospects, is of an adventitious rather than of a professional character, and that consequently the inducement and the opportunity for organization is seriously diminished. An argument for larger control might be placed on this ground, to which women could take no just exception. Similar considerations might apply in the other classes of labor which, owing to peculiar conditions, must remain without effective organization, and the exceptional treatment of sailors may be explained upon this basis.

There are, moreover, two conditions implied in the acceptance of collective voluntary effort as a substitute for legislation: one, that it prove equal to the adequate performance of its functions, the other,

that the power of organization be not used in such a manner as to make the substitution of the power of the state a practical necessity.

These are serious but undeniable qualifications attaching to the operation of the prevailing constitutional theory.

If there could be any serious doubt of the hold which this theory has upon our courts, it would be dispelled by a study of the decisions concerning hours of labor. Contrary to the impression produced by the variety of rulings, these cases have given rise to no serious conflict of principles. The courts seem unanimous in the view that the right of the workman to utilize his capacity for work is a valuable constitutional right which will yield to statutory restraints, where excessive labor involves some appreciable danger to the particular class of employees or to the community, but not where it is only a question of realizing those aims and ideals which are involved in the eight-hour day.

The conflict of decisions seems to be entirely due to the manner in which this principle is applied. Conceding that it requires some tangible element of danger to compel a reduction of hours of labor, the existence or non-existence of this danger is a question of fact. The fact may be notorious, or the relevant conditions may be doubtful and obscure, and ascertainable only by special study and observation. It is the latter contingency which creates the whole difficulty in this branch of labor legislation.

A theory has gained considerable currency according to which the courts judge of the validity of the grounds upon which legislation is enacted, but the actual existence of the conditions which give the abstract ground concrete reality — the exigency — is a matter for the legislature to determine.[1]

The faithful application of this theory would, in many cases, amount to a total surrender of judicial control. It would only be necessary to entitle an act for the limitation of hours of labor as an act to safeguard the health of those engaged in it, or to make a recital to that effect, in order to insure the validity of the act in all cases in which the maximum number of hours was not absurdly low. Would it be seriously contended that such a title or recital would have saved the women's eight-hour law in Illinois, or the bakers' ten-hour law in the Supreme Court of the United States? It certainly did not help the tenement labor law in New York, that it designated itself as an act to improve the public health, and in the Lochner case the Supreme Court expressly denies that it is bound by the proclaimed purpose of the statute. No other construction can be placed upon these

[1] It was first enumerated by the Supreme Court of Illinois in Lake View *vs.* Rose Hill Cemetery Co., 70 Ill. 91, 195: "As a general proposition it may be stated it is the province of the lawmaking power to determine when the exigency exists calling into exercise this (the police) power. What are the subjects of its exercise, is clearly a judicial question."

decisions than that the courts assume the power to look into the question of fact.

Concede that there are constitutional rights which should not be impaired unless some danger to the public welfare demands it, concede the possibility of the enactment of measures impairing these rights although the danger does not in fact exist, and it follows that the judicial protection of constitutional rights may, under circumstances, involve the questioning of the legislative judgment which is implied in the passage of the statute. And every one knows that the supposed contingency is not wholly imaginary. The theory of the conclusiveness of the legislative finding of fact, therefore, not only is not followed, but it cannot be followed, if constitutional rights are to be effectually protected by the courts.

The requirement of due process is now generally applied to legislation. Were it applied in its original and proper sense, it would mean that the legislature must hear and determine with at least some of the guaranties of impartiality that are supposed to belong to judicial procedure. That would not be an extraordinary demand, and perhaps at some future time the legislature will voluntarily satisfy it. But as long as, under the constitutions, the legislative bodies have absolute control over their own rules, the courts obviously cannot set up any procedural standards for legislative action upon compliance with which they may insist. There is consequently no formal test by which the courts can judge the fairness of the legislative judgment. Upon what basis then may they exercise their control, if there is serious doubt as to the reality of the exigency? The question presents a peculiar and, in a manner, unprecedented problem. The courts are required to take cognizance of questions of fact, which are not so notorious that judicial notice may be taken of them, and which yet cannot be subject to the ordinary rules of evidence since they are part of the law of the case. The testimony of experts has in some cases been rejected. "If the constitutionality of all laws enacted for the promotion of public health and safety can be assailed in this manner," says the Supreme Court of Missouri *vs.* Cantwell, 179 Mo. 245, "truly and sadly would it be declared that our laws rest upon a very weak and unstable foundation." [1]

Conceivably the court might with the aid of counsel enter upon an independent investigation of the relevant facts and conditions, and determine for itself the preponderance of evidence as to the existence or non-existence of the exigency. Assuming that the legislative conclusion is not to be trusted implicitly, and considering that it is the obscure and half understood agencies, concerning which it is easiest to create exaggerated impressions and apprehensions, and which can

[1] Expert testimony was admitted in the Oleomargarine case in New York: People *vs.* Marx, 99 N.Y. 377.

best be made to serve special interests, such a course would perhaps furnish the only adequate protection to private rights. However this is not the practice, and in many cases would be impracticable. The courts could not command the necessary funds for an independent examination, and the result would be that the more resourceful of the two parties would succeed in presenting the stronger case. Something less must therefore be sufficient.

But why should not the courts demand in cases of genuine doubt, that the legislative judgment be supported by a respectable body of fact and opinion accessible to the public, and sufficient in strength that it might reasonably have persuaded the legislature of the existence of the exigency? Such a course would furnish a safeguard, not adequate in all cases, yet sufficient to protect against a gross abuse of power, and the best available under the circumstances. The significance of the briefs of Mr. Louis Brandeis in the women's ten-hour cases lies in the compliance with this unexpressed demand.

For the present, however, there is no certain standard as to what the courts require or even as to whether they require any evidence. The Supreme Court of the United States in Holden *vs.* Hardy, the Utah eight-hour case, speaks of "reasonable grounds for believing that the legislative determination is supported by the fact." But it does not appear how these reasonable grounds are to be made manifest. And as long as this is a matter of speculation there must be a considerable amount of arbitrariness in the exercise of judicial control. Judicial may be substituted for legislative conjecture, and it is quite as possible that right legislation will be annulled as that wrong legislation will be sustained. After the eight-hour law for miners had been sustained, the disapproval of the ten-hour law for bakers was, to say the least, a grave inconsistency.

The course of decisions in the matter of hours of labor reveals a judicial censorhip which is based upon no fixed principle, and which, however conscientiously exercised, cannot be expected to inspire that confidence which is essential to the well working of judicial institutions. The substitution of some intelligible and uniform principle of control is therefore a requirement of policy as well as of justice. The analogy of the appellate review of judicial decisions of fact suggests such a principle, approved by long experience. Applied to the statutes in question, it would mean that there must have been evidence of facts within the reach of the legislature sufficient to support its judgment that an exigency existed for its interference. Such a test would not be unduly rigorous; and its effect upon legislation itself could not be otherwise than salutary.[1]

[1] The same theory of judicial control might also be applied to the problem of special legislation. In most cases it is entirely a question of fact whether there is invalid discrimination or valid classification. If it were understood that the need of differentiation must be established to the satisfaction of the courts, much of the prevailing uncertainty apparent and arbitrariness of this phase of constitutional law would disappear.

For the protection of constitutional rights such a principle would be more important than the insistence upon those limitations of a more substantive character which within so recent a period have sought to crystallize economic theories into rules of constitutional law.

In the case of Muller *vs.* Oregon, the court declared it to be the peculiar nature of a written constitution, that it places in unchanging form limitations upon legislative action and gives a permanence and stability to popular government which otherwise would be lacking. The applicability of this observation to the limitations upon labor legislation may well be doubted.

These limitations are entirely the product of judicial action. They may be supposed to have been created in conformity to widespread and ruling convictions as to the nature of our institutions, but these convictions bear no guaranty of permanence.

Our views on social relations and public control may undergo considerable changes. A certain standard of living may come to seem as important as the preservation of health; industrial employment may become affected with a public interest, and regulation may supersede contract as contract has superseded statutes.

If such changes come it will require no constitutional amendment to give them relief. It has, perhaps, been a matter of deliberate judicial policy that this branch of the law has been left the least exact in our constitutional system; not one of the principles of limitation has been formulated in so explicit a manner that its abandonment would require much more than the familiar process of distinguishing precedents. All that is vague, shifting or contradictory in the present doctrines will facilitate their modification or abandonment, if necessary, so that there will be no difficulty in accommodating the substantive content of constitutional rights to altered social or economic conceptions.

And it is quite possible that after another quarter of a century the limitations which our courts treat to-day as fixed and essential requirements of American institutions, will appear to have been an interesting, perhaps an inevitable, but after all a merely passing phase of our constitutional development.

THE LEGAL MINIMUM WAGE IN THE UNITED STATES

By A. N. Holcombe of Harvard University

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Several recent events have revived the interest of American economists in proposals for the public regulation of wages in private employments. Two years ago the parliament of Great Britain passed

the Trade Boards act to provide for certain British industries a procedure for the regulation of wages, modeled upon that of the minimum wage boards originally established in the Australian state of Victoria by the Factory and Shops act of 1896. In the present year bills to provide for the fixing of minimum wages in underpaid employments by authority of law were introduced into the legislatures of two American states, Minnesota and Wisconsin, and in a third, Massachusetts, a commission was appointed to investigate the wages of women and minors employed within the state and report to the next legislature upon the advisability of the establishment of minimum wage boards.[1] Recently, proposals have also been brought forward for the establishment by federal legislation of a standard minimum wage for alien immigrants.

Underlying this various legislation, actual and proposed, are various different purposes. The Victorian legislation, unlike the contemporary New Zealand and subsequent Australian legislation with reference to so-called compulsory arbitration, seems to have owed its origin primarily to the desire to abolish sweating, that is, certain undesirable conditions of employment, such as excessively long hours and excessively low rates of wages. There was a further purpose to protect the white Australian's standard of living from the insidious competition of colored races, particularly of the Chinese. Victorian minimum wage boards consist of from four to ten members, half selected by or on behalf of the employers, half by or on behalf of the employees, and an impartial chairman. The boards are established for such trades as the state legislature may direct, a special board being established for each trade, and are authorized to fix the lowest rates of wages that may be lawfully paid in their respective trades. There is no attempt at a statutory definition of a standard living wage for all Victorian wage-earners. Indeed the amending act of 1903 contained a clause expressly providing that the determinations of wage boards should be based on the "average prices or rates of payment paid by reputable employers to employees of average capacity." Although "reputable" was generally interpreted as "best," yet it was generally felt that the provision seriously hampered the boards, and in 1907 it was stricken out, giving them complete discretion in the fixing of a minimum wage. The Victorian wage boards are not restricted in their activity to the fixing of minimum wages for work-people receiving less than a standard living wage. They may, with equal propriety, fix the lowest lawful rates of payment for skilled and other highly paid grades of labor, and for the unskilled and oppressed; and wage boards may even be established for industries in which no wage-earners are employed at or below the living wage level.

[1] Written in 1911. The Massachusetts commission has since reported (January, 1912) in favor of legislation for the fixing of minimum wages for women and minors.

In 1903 a court of industrial appeals was established, consisting of one judge of the supreme court of the state, for the purpose of hearing appeals from determinations of the wage boards. The appeal may be taken by the employers or employees in a trade, or by the government, but no appeal has the effect of suspending or delaying the operation of the determination. In hearing and deciding such appeals, the court of industrial appeals possesses all the powers of the state supreme court, and "shall in every case be guided by the real justice of the matter without regard to legal forms." [1] The court of industrial appeals is further instructed to consider whether a determination brought before it has had or may have the effect of prejudicing the progress of a trade or the maintenance or scope of employment therein, "and if of opinion that it has had or may have such effect the court shall make such alterations as in its opinion may be necessary to remove or prevent such effect and at the same time to secure a living to the employees." [2] The law takes no notice of the possibility that there may be trades in which the maintenance of the trade in the face of uncontrollable competition and the payment of a living wage to the employees may be incompatible.

In practice there have been few appeals to the court. The boards have taken their cue from the language of the statute, and instead of attempting to determine the cost of the standard living in the state they have attempted rather to bring together employers and wage-earners in the several industries for which they have been established for the adoption of common rules for the trade, including among the rest mutually acceptable rates of wages. Thus their chief concern is to ascertain and publish the normal "going" wages for the various grades of labor in the several industries, and to provide suitable machinery for the readjustment of wages and conditions of employment generally to changing economic conditions. In this they have been successful. The number of special boards has been continually increased until there are now nearly a hundred in commission, regulating wages and hours of labor for nearly all the wage-earners, both men and women, of the state. For ten years there was no strike of any importance in a trade under a special board. In 1907 a strike took place, when the bakers' union ordered the journeymen out, not against a determination of a wage board, however, but against a decision of the court of industrial appeals, annulling an increase of wages determined by the board. It was quickly ended in a victory for the strikers. Whatever may have been the original purpose of the Victorian wage boards, their chief function to-day is to establish a more solid foundation for industrial peace. The protection of the standard of living is merely incidental thereto. This function has become so well recognized in

[1] Factories and Shops Act, 1907, No. 2137.
[2] Factories and Shops Act, 1905, No. 1905.

Australia, that upon the temporary collapse of the system of compulsory arbitration in New South Wales in 1908, an attempt was made by the government then in office to introduce the Victorian system in its stead. The Labor party vigorously opposed this attempt, ultimately with apparent success. In short, the Victorian wage boards serve to-day primarily to foster collective bargaining between capital and labor with a view to the peaceful conciliation of industrial disputes.

The Victorian wage boards are trade boards, and as such have certain advantages over a district board as a mode of industrial conciliation. They bring together more effectually than district boards do, the employers and employees concerned in a particular dispute, and they are more competent to deal with a complicated industrial wage-scale than is a board partly composed of representatives of other trades. Their organization by law renders them available for grades of workpeople who are incapable of organizing effectually for themselves. Their official character gives their determinations a force beyond that ordinarily attained by the determinations of voluntary boards. But they add no peculiar sanctity to the results of collective bargaining. Strikes in trades for which determinations have been lawfully made are not criminal acts, and there is no effectual remedy for the aggrieved party. Since 1908, however, the government has reserved the power to suspend a determination in case of a strike, thus enabling the employers to hire strike-breakers in the cheapest market. Fortunately, the mere process of getting together the representatives of employers and employees in a trade seems to contain within itself the prerequisites of industrial peace under ordinary circumstances. A proposal to establish wage boards upon the Victorian model in the United States, however, must be advocated upon different grounds, and will have a different constitutional status from that of a proposal to establish wage boards for the sole purpose of fixing a minimum standard-of-living wage.

The British legislation of 1909 does not attempt to cope with the board problem of industrial warfare. The object of the act is the abolition of sweating, that is, the reduction of abnormally long hours of labor and the raising of abnormally low rates of wages, and in general, so far as may be through the regulation of the terms of employment, the maintenance of normal living conditions according to British notions of normal living. The boards, the establishment of which was made mandatory by the terms of the act, were to deal with the trades in which sweating was supposed to be most intolerable, or most susceptible to that particular mode of treatment. It is of interest to note how far the British trade boards, as they are called, are a true copy and how far they have departed from the type of the Victorian original. In size they are larger. Otherwise they are constituted after the fashion of their prototypes. There is likewise an appeal, the reviewing

body being the Board of Trade. The trade boards themselves have adopted the procedure of the Victorian boards. Their determinations are the results of bargaining, not of inquiry into the cost of living and the establishment of a standard-of-living wage, irrespective of trade conditions in the trades to which the determinations are to apply. The prescribed minimum, therefore, varies from trade to trade, and unequal minimum wages are prescribed for normal adult workers within the same trade employed in different branches thereof. This system of regulating wages is more than the establishing of a minimum standard-of-living wage. It amounts to the regulating of wages generally in the trades for which the boards have been established, and hence, though its scope is now more limited, economically, and from the American standpoint, constitutionally, it must be classed with the Victorian system of wage regulation.

Hithero Americans generally have refused to consider proposals for the regulation of rates of wages in private employments by authority of law. It has been assumed that no such proposals could escape conflict with the fundamental law. To be sure, if any scheme for the public regulation of rates of wages gave promise of being desirable upon economic grounds under conditions known to exist in any American state — the fact of its assumed or even demonstrated unconstitutionality would not be a bar to its discussion by economists. Nevertheless, the path of any proposal for novel legislation is made smoother by the dissipation of doubts concerning its constitutional status, even if those doubts be resolved in an unfavorable sense. Hence, before considering the economic validity of the several schemes for fixing legal minimum wages, the question of their constitutionality should first be examined.

The doctrine of the judicial review of the exercise of legislative authority owes its present importance in the United States to two circumstances. One is the interpretation placed upon a certain clause of the fourteenth amendment to the federal constitution by the federal supreme court. The other is the manning of our courts with a set of judges whose economic training was received mainly from the so-called classical school of political economists. Since 1868 no person may be deprived of life, liberty or property, without due process of law, as interpreted by the federal courts. There has been much controversy over the meaning of the terms "deprived of liberty" and "property," and this controversy directly concerns the status of the proposal to regulate wages in private employments by law. Is constitutional liberty simply freedom from physical restraint, or does the term mean freedom from control in any manner except in so far as may be necessary to assure a like freedom to others? If the former, a statute regulating wages in private employments will not work a deprivation of liberty, since it carries with it no restraint of the body, but merely

of the legal capacity to enter into a contract. If the latter, such a statute will work a deprivation of liberty, since it will restrict the freedom of the individual employer to buy labor in the cheapest market, and of the individual wage-earner to sell his labor for what it will fetch. Again, is constitutional property simply things of value the possession of which is recognized by law, or does the term include also things of value which may be acquired, provided the individual's legal privileges at the moment are preserved unaltered. If the former, a statute regulating wages will not work a deprivation of property since it will not of itself diminish the quantity of a person's possessions. If the latter, such a statute, by imposing a new limitation upon the privilege of making lawful contracts, may deprive a person of an opportunity to enter into a supposedly advantageous agreement to buy or sell labor. The federal supreme court has interpreted the fundamental law in each of the pair of alternatives in the latter sense. The effect of such judicial interpretation has been to read into the constitution a doctrine that is nowhere expressed therein, namely, a doctrine of freedom of contract.

In most of our states, however, this constitutional freedom of contract is for men only. Women and children are regarded as under the tutelage of the state, and the law may impose such restrictions upon their privilege of entering into contracts as may be deemed necessary and proper. A law fixing the rates of wages in private employments for women and minors is not open in such states to the constitutional objection that might lie against such a law for men. Partly in recognition of this circumstance and partly on account of the supposed greater need of protection against industrial exploitation for women and minors, the advocates of minimum wage legislation in the United States upon the Victorian and British models have lately directed their efforts to securing legislation which shall apply only to women and minors. Thus the Minnesota bill of the present year was frankly founded upon the Victorian and British models, but was designed to put an end to the evils of sweating, so far only as women and minors might be concerned. The scope of the investigation to be made by the Massachusetts commission is also limited to wage-earning women and minors. In several of the states, on the other hand, including states like Illinois, in which the evils of sweating are most apparent, women enjoy the same constitutional rights and privileges as men, and such bills as that introduced into the Minnesota legislature would have no better prospect of withstanding the scrutiny of the courts than a similar bill for all adults, male and female alike. Nor is it clear upon economic grounds that the underpayment of women is a more serious menace to society than the underpayment of men, upon whom as the heads of families, the majority of women are dependent for support. The minimum standard-of-living wage, if it be sound in

principle, would appear to apply with most propriety to men in their capacity of heads of families. Women, in their capacity of joint heads of families, would be entitled to their proper share in the family income. The single woman, following a trade, would not be entitled to more, unless it should appear that the supply of marriageable women could not be maintained without the payment of more. The justification of the minimum standard-of-living wage must be found, if at all, in the social necessity for the maintenance of the family. If, in the application of the principle, the evidence should show that, as a matter of fact, women were oppressed to a greater degree than men by employment in sweated trades, that would be a matter with which the enforcing authority would properly deal.

Now a statute regulating the wages of men in private employments undoubtedly places a restriction upon the freedom of contract. This circumstance alone, however, does not render such a statute unconstitutional. There is no constitutional objection to the limitation of the freedom of contract, provided that the limitation is not accomplished without due process of law. If the established requirements of legal procedure are properly complied with, there would appear to be no sufficient cause for a refusal on the part of the federal courts to enforce a statute regulating wages in private employments. The constitutionality of such legislation depends, therefore, upon the possession by some legislative body of authority to accomplish its enactment. Such authority may be found in the ordinary police power of the state to provide for the common defense and general welfare of its citizens. This power is restricted only by expressed limitations in the state constitutions, by the delegation of certain powers to the federal government, and by the requirement that the legislature in its exercise of the police power shall be guided by reason. The only state constitution to contain a prohibition against the legal regulation of wages in private employments is that of Louisiana. The power to legislate with regard to interstate and foreign commerce is vested exclusively in the United States, which may prevent the application of state minimum wage laws to persons engaged in interstate commerce. In all other fields of labor, reasonable restrictions upon the freedom of contract may be imposed by state legislation for the purpose of protecting the public against the evil results of accidents, disease, bad habits (such as, for example, the abuse of intoxicating liquor), overwork, under-payment, and all other things whatsoever that may be deemed inimical to the well-being of society. The United States may do the same in the field delegated to it. What is or is not, under given circumstances, a reasonable restriction is in the first instance to be determined by a legislative body, subject to subsequent review by the judiciary, whenever cases of alleged unreasonable use of the police power are properly brought before them. The prevalent

uncertainty concerning the constitutionality of the legal regulation of wages in private employments arises, not from the boldness and vigor with which our courts have become accustomed to use their power of reviewing the reasonableness of legislation under the police power, but from their general acceptance of an economic theory now being discarded by the mass of the people.

The phrase, freedom of contract, is new in American legal terminology. Francis Lieber in his "Civil Liberty and Self-Government" (1825) makes no mention of it. It is first found in a reported decision of a Pennsylvania court handed down in the year 1886. The idea which is embodied in the phrase is not much older. In substance our courts have read into the federal constitution not simply a phrase, but a whole theory of government. As Mr. Justice Holmes tersely remarked in his dissenting opinion in the New York Bakers' Ten Hours case, the majority of the court had read into the fourteenth amendment the *Social Statics* of Herbert Spencer. The effect is that our fundamental law now not only guarantees to the states a republican form of government, but also guarantees the conduct of state affairs according to the principles of laissez faire.

The phrase "due process of law" is a part of the American heritage from the English constitution. It was first inserted in the federal constitution in 1790 as a part of the fifth amendment, and had then the same meaning that it had in England at that time. Yet in England at that time and for more than a score of years afterward, wages in private employments were fixed by public authority under the Elizabethan statute of artificers, and no one complained that it was done without due process of law. To the layman there is no convincing evidence that the "fathers" intended to establish the rule of laissez faire by the fifth amendment to the federal constitution. Nor is there any convincing evidence that when the same phrase was embodied in the fourteenth amendment seventy-eight years later, anything more was intended by the people of the United States than to enable the federal courts to protect the freedmen in the enjoyment of the same personal and property rights as white men. The construction of the fourteenth amendment that threatens the capacity of the state legislatures to regulate wages in private employments, if they deem it necessary and proper for the protection of the public, is not the work of the American people in 1868, but of the courts in subsequent years. Like all acts of government, constituting government by men and not by law, this novel interpretation of the fundamental law can be undone by a change in the men who interpret it. The principles of laissez faire, having been read into the constitution, can be read out again.

The assumption that no such proposal as that to regulate wages in private employments can be enforced through the courts is premature. It is first indispensable, however, that the American people

should be convinced that some action for the protection of the American standard of living is necessary, and that the proposed remedy is appropriate. Whereas the Illinois court of last resort once refused to enforce a law regulating the hours of labor of women, and then, in the light of further reflection and a more thorough acquaintance with the actual conditions of employment in the state (in the second Ritchie case) reversed its earlier decision, so social reformers who can prove their case for the minimum wage may expect equally favorable consideration from the courts. There is no essential difference, so far as constitutional status is concerned, between the legal regulation of the hours of labor, and the legal regulation of wages. The constitutionality of both alike is solely a matter of producing sufficient evidence showing the necessity and appropriateness of the proposed legislation. Socialism itself would be constitutional, if a social revolution could be shown to be necessary, and if that particular kind of a social revolution could be shown to be appropriate to the occasion. Our constitutional system is susceptible of adaptation to any social condition. The constitutionality of plans for the legal regulation of wages depends, then, upon the necessities of the case to which they are to be applied, and the appropriateness of the particular plans presented.

There is one further consideration. A legislative body may not delegate legislative power to another branch of government. A minimum wage board, constitutionally regarded, is an administrative body, and may not be entrusted with legislative power. In the United States, therefore, the legislature may not delegate the whole function of regulating wages to a set of special boards. The legislature itself must define the principles of just and reasonable wages, which the boards are to administer for their respective trades and localities. Now it is certain that no legislative body in the United States to-day is prepared to define the principles of just and reasonable wages. It is, therefore, beyond the power of an American legislature to enact a constitutional system of wage boards upon the Victorian and British models. There are two alternatives. The legislatures may declare all private employments to be affected with a public interest to the extent that just and reasonable rates of wages shall be paid to all wage-earners. This would place upon the courts in the last analysis the responsibility for the definition of justice and reasonableness with respect to the rates of wages, as is the case to-day with respect to the rates of railways and other public utilities. Such a system of public regulation of wages would be substantially the same as the New Zealand and Australian system of compulsory arbitration, and would require for its constitutional justification a wholly different array of evidence from that required for the justification of a minimum standard-of-living wage. The former would require evidence showing the public need for protection against the evil results of unrestrained

industrial warfare; the latter would require evidence showing the public need for protection against the evil results of unrestrained underpayment of workpeople.

The other alternative is not to attempt to define the principles of just and reasonable wages generally, but to define the principle of a minimum standard-of-living wage only. The bill introduced into the legislature of Wisconsin was founded upon a correct analysis of the peculiar American constitutional situation. This bill assumed the existence of sufficient evidence showing the necessity of protecting the public against the evil results of employment at less than standard-of-living wages, and defined the minimum wage as such compensation for labor performed under reasonable conditions as should enable employees to secure for themselves and those who are, or may be, reasonably dependent upon them, the necessary comforts of life. The term "necessary comforts of life" is not defined in the bill. The same term, however, is employed in the constitutions of seven states, Indiana, Minnesota, Montana, Nevada, North and South Dakota and Wisconsin, in connection with the grant to their respective legislatures of the power to enact debtors' exemption laws, and has consequently been authoritatively defined by the courts themselves. "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws exempting a reasonable amount of property." This same privilege of enjoying the necessary comforts of life the advocates of the Wisconsin minimum wage bill proposed to extend to all adult wage-earners laboring under reasonable conditions. The bill did not guarantee employment to the unemployable, but it did guarantee reasonable conditions of employment and a minimum standard-of-living wage to all who are employed. This guaranty was ultimately to be enforced by an industrial commission, which, under a broad grant of power to investigate, hold public hearings, ascertain and classify each oppressive employment, and fix for each underpaid employee the standard-of-living wage, would have ample power to establish minimum wage boards of the British type for the provisional translation of the standard-of-living wage into wage scales suitable to the peculiar conditions in the various sweated industries of the state. The Wisconsin industrial commission, like the British Board of Trade, would itself have to assume the responsibility for the final determinations. Thus the Wisconsin bill, like the British Trade Boards act, was designed to protect all the victims of sweating, but not to regulate wages except in so far as required for the maintenance of the standard of living.[1]

[1] The Massachusetts bill of 1912 is drafted upon similar principles. It defines underpayment, against which the public should be protected, as the payment of wages "inadequate to supply the necessary cost of living and to maintain the worker in health." The bill applies to women and minors only, and provides that a minimum wage commission

It is now in order to examine the evidence relied upon by the advocates of the legal protection of the standard of living to show the necessity for action. The most recent, and probably the most satisfactory, attempt to determine the cost of maintaining the normal American standard of living is that of Mr. Frank H. Streightoff. He places the minimum family income adequate to the maintenance of normal living conditions in the smaller cities of the North, according to the generally prevailing American notions of decent living, at $650 a year. Dr. Chapin places the figure at $800 or over in New York, but in order to avoid the appearance of exaggeration let us take the figure of $600. The most recent and probably the best evidence concerning the number of households receiving less than this minimum family income is contained in the reports of the Immigration Commission. In the official abstract of the report on immigrants in manufacturing and mining the public is informed that the average annual family income in sixteen leading industries in which a large number of typical households, representing all nationalities, native and foreign, were intensively studied, is $721. The report does not indicate what percentage of this number of households receive an annual income of less than $600, but it is stated that no less than 31.3 per cent receive less than $500, and 7.6 per cent receive less than $300. The annual earnings of male heads of families alone are lower. More than half earn less than $500 a year, and nearly two-thirds earn less than $600 a year. If we examine the official abstract of the report on immigrants in cities we find even more depressing conditions. Of 5825 families dwelling in typical congested blocks in New York, Chicago, Philadelphia, Boston, Cleveland, Buffalo and Milwaukee, the male heads earned on an average only $475. No less than 72.2 per cent of the whole number earned less than $600 a year, and 41.2 per cent earned less than $400. The average annual earnings of the 3609 females in the households studied and reported in the abstract on immigrants in manufacturing and mining were $304. No less than 26.4 per cent of them earned less than $200 a year. The average annual earnings of the 2595 females eighteen years of age or over working for wages and reported in the abstract on immigrants in cities were $239. No less than 67.9 per cent of these earned under $300 a year, and 44.8 per cent earned under $200 a year. With these latest official figures in mind concerning the extent and intensity of underpayment, we are prepared to accept Mr. Streightoff's estimate that at least five million adult males receive less than $600 a year for their labor. Not all of these are the heads of families, but on the other hand, there must be many thousands of single women who are not receiving half of $600, and probably are quite as

shall inquire into the rates of wages paid to such employees and establish wage boards in trades in which wages are found to be unduly low. Upon the recommendation of such a board, the commission may then fix the minimum wage in the trade.

unable to maintain normal American living conditions as the head of a household earning under $600. Mr. Streightoff writes in no controversial spirit, but he does not conceal his belief that the current wage for unskilled labor is too low to meet the requirements of a decent standard. He finds abundant evidence of families deteriorating physically because of insufficient income, and even where the wage suffices for food, clothing and shelter, little or nothing remains to meet the wants of the intellectual and spiritual life. In the light of these and other recent investigations into the standard of living among the industrial population of the United States, the fact that a very considerable number of workpeople are now employed in the United States at less than an American standard-of-living wage may be regarded as sufficiently established.

The final consideration with respect to the legal protection of the American standard of living by means of minimum wage legislation, is its appropriateness to the existing situation. The minimum wage in itself is not unfamiliar. It is a standard feature of trade-unionism, and involves no new principle. It restricts somewhat the field of competition, but does not disturb the foundations of the competitive system. The select committee on home work of the British House of Commons reported in 1908: "Your committee are of opinion that it is quite as legitimate to establish by legislation a minimum standard of remuneration as it is to establish such a standard of sanitation, cleanliness, ventilation, air-space, and hours of work." The economic reasoning underlying proposals to establish minimum standards of remuneration and conditions of employment generally is familiar to economists, and requires no further elaboration in this place. The student who desires to pursue further the economic argument in favor of the minimum standard of remuneration in particular should consult the Webbs' "Industrial Democracy," part III, chap. iii.[1]

The immediate direct effect of the establishment of a minimum standard-of-living wage would be to put an end to the employment of normal adult workers at lower rates. Not every wage-earner who had been employed at lower rates would necessarily be deprived of employment, nor would the wage of every such wage-earner neeessarily be increased to the standard minimum rate. Some employees would receive the increase and some would lose their employment. The actual effect of the legal establishment of the minimum would depend in particular cases, partly upon the efficiency of the particular wage-earners concerned, and partly upon the character of the demand for their services. In industries like department stores and steam laundries, which serve local markets and are free from outside competition, probably the increase of wages, caused by the establishment of

[1] Sections *d*, *e* and *f*; pp. 749–788 of 1902 ed. Cf. F. W. Taussig, Principles of Economics, chap. lvi, Sect. 5; chap. lvii, Sects. 6, 7; Vol. II, pp. 297–302, 316–322.

a standard minimum, could be paid to all employees below the minimum without so increasing the cost of production as to produce any material decline of the demand. But in industries serving a wider market and subject to outside competition, such as cotton mills and shoe factories, the establishment of a legal minimum wage might reduce employment rather than increase wages. The outcome would depend largely upon the extent of the necessary increase, and the rapidity with which it should be put into force. Some sweated industries, parasitic industries as the Webbs call them, might be altogether incapable of maintaining themselves, if prevented from exploiting unprotected labor by the payment of abnormally low wages. Such industries as these, the country is better without. They fall in the same class with lotteries and other noxious enterprises, and the community should either pay for their products a price sufficient to maintain the normal conditions of remuneration and employment, or supply itself from abroad.

The greatest difficulty arises in the cases where workpeople of distinctly different standards of living come into competition with one another in industries to which the legal minimum wage is to be applied. Unless the various groups of workpeople are of equal efficiency, the attempt to establish a single standard for all might result in securing the industry to the most efficient group and excluding the others from all prospect of employment therein. Such would be the result, for example, in the Victorian furniture industry, if the white Australian standard could be forced upon the Chinese. In fact, it is impossible to enforce the determinations of the furniture board in the Chinese factories, and the latter hold their position in the industry. The same conditions might be found to exist in certain industries in the United States, were the experiment attempted of fixing the American standard-of-living wage as a minimum for all groups of wage-earners. The truth is that there is no single American standard of living to-day. There are several standards of living among the industrial population of the United States, and in consequence a tendency towards an occupational division of labor between different races. The Immigration Commission reports in the volume first cited above, that 59.6 per cent of the negro families intensively studied received under $500 a year, 41.6 per cent of the foreign born received under $500 a year, whereas only 19 per cent of the native born of foreign father (mostly of races from the Northwest of Europe rather than from the Southeast, as is the case with most of the recent immigrants), and 15.7 per cent of the native born of native white father received under $500 a year. To attempt to establish the principle of an American standard-of-living wage of alien races of distinctly lower standards and lower efficiency, would probably result in the exclusion of many aliens from employment within the country. It would also result in the exclusion

of most of the negroes from the occupations in which the wage should be adjusted to the efficiency of the native whites.

Yet one of the most striking facts indicated by a comparison of the earnings of the races in different industries is that within certain limits earning capacity is more the outcome of industrial opportunity than of racial efficiency. This fact becomes evident when the average weekly earnings of the members of a single race in the cotton or woolen and worsted goods industries, as reported in the official abstract of the Immigration Commission's report on immigrants in manufactures and mining, are compared with the earnings of the same race in other industries. The Lithuanians, for example, earn an average of $12.24 weekly in the manufacture of agricultural implements and vehicles, $11.60 in clothing, $13.60 in copper mining and smelting, $9.87 in furniture, $12.89 in iron and steel, $11.98 in iron-ore mining, $9.50 in leather, $12.85 in oil refining, $10.87 in shoes, $10.67 in sugar refining, but only $7.86 in cotton and $7.97 in woolen and worsted goods manufacturing. A legal minimum wage would apparently be of advantage in promoting a better distribution of such immigrants among our various industries.

The indirect economic effects of the establishment of a minimum standard-of-living wage may be mentioned summarily. First, the establishment by legislation of a minimum standard-of-living wage would make available to the poorest and most helpless of the laboring population a share in the advantages obtained by the better-to-do and stronger through voluntary association. Well-conducted, powerful labor unions do more for their members than merely to establish a minimum wage and maximum hours of employment, but the weak and poverty-stricken unions of the sweated workers are scarcely better than none at all. The advantage of the establishment of a minimum wage and standard conditions of employment generally by law instead of leaving it to the action of private trade associations is the greater security for the protection of the interests of the public against the abuse of irresponsible power in the interests of special classes. Secondly, the line would be drawn more sharply between the unemployable and the merely unemployed. The unemployable are always with us, and must be provided for by some means in any event. The establishment of a minimum standard-of-living wage would define more accurately the limits of that unfortunate class, and thus facilitate the task of giving its members treatment suitable to their condition. Although the number of the unemployable might be greater than that of the destitute under present conditions, the isolation of one more of the causes of destitution would be a gain to the cause of scientific poor relief. It would also tend to restrict the influx of the unemployable from abroad, thus at once checking the increase of inferior labor and raising the average efficiency of the domestic supply. Thirdly,

there would result a restriction of the field of competition between workpeople. The wage-earner whose chief recommendation is willingness to work for a pittance would lose the advantage of his submissiveness, and strength and skill would become of greater importance in the obtaining of employment. Fourthly, there would result a restriction of the field of competition between employers. The employer whose chief stock in trade is his shrewdness in driving hard bargains with his employees would lose the advantage of that pernicious superiority. The peculiar qualities of the best type of business man, imagination, judgment and courage in undertaking legitimate business risks, and sagacity in the management of his establishment, would become of greater importance in the achievement of success, especially in the sweated industries. In short, the indirect economic effect of the establishment of a minimum standard-of-living wage would be to promote the concentration of competition between workpeople and between employers upon efficiency.

The ultimate consequences of a legal minimum wage are not so certain. The legal protection of the standard of living cannot directly bring about a rise in the general level of wages. In the first instance, it can affect only the wage-earners who are earning less than the minimum. To such as these it offers the hope of employment at the standard-of-living wage. It cannot guarantee such employment. In the long run wages must depend upon efficiency. Temporarily, by the establishment of a legal minimum workpeople may be able to secure a higher wage than they are worth. In the long run, however, unless they increase their output to correspond to their increased income, they will not be worth to the community what the community is undertaking to pay them. The state which assumes the responsibility for establishment of a minimum wage must also assume the responsibility for the establishment of a minimum standard of efficiency.

Minimum wage legislation and industrial education must go hand in hand together. In such a country as the United States it may also be necessary to restrict the supply of labor of the lower grades. The establishment of a legal minimum wage would of itself tend somewhat to obstruct the influx of laborers of low efficiency; but the otherwise unrestricted influx of laborers of low efficiency would also tend to obstruct the maintenance of a minimum wage at the native standard-of-living level. Probably some further means of restricting immigration would be necessary. It must not be forgotten, too, that a minimum wage law cannot cure the evils that arise from the foolish spending of incomes, small or great. Some immediate protection, however, for the American standard of living is necessary, and an appropriate means is the establishment by legislation of a minimum wage.

EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION LAWS

By J. Walter Lord, of the Baltimore Bar

(From an Address delivered at the Seventeenth Annual Meeting of the Maryland State Bar Association, July, 1912)

The subject which I shall undertake to discuss in the following paper is one that has received elaborate consideration in this country, particularly within the past three years. The paper, therefore, does not reflect any original thought on the part of the writer, but is rather an attempt to compress, within unobjectionable limits, the conditions out of which the movement toward the enactment of workmen's compensation acts in this country has developed, and the constitutional and economic questions related to that problem. My justification for selecting this subject is not so much that these questions are academically novel and interesting, as that the subject is itself a timely one, and that we may feel reasonably assured that the "law of negligence," in cases of occupational injuries, will very soon be superseded generally in this country, as, indeed, it has been almost everywhere else, by the "law of compensation."

It is a somewhat interesting coincidence that contemporaneously with the decision of the English Court of Exchequer in Priestly *vs.* Fowler (3 M. & W. 1, decided in 1837) — the case which is considered as the genesis of the doctrines of fellow-servant and assumption of risks — the Kingdom of Prussia took the initial step in the recognition of the principle that the employer should be held to an absolute liability in the case of occupational injuries. The replacement, by Prussia, of the old law of negligence by its first liability law of November 3, 1838, relating only to railway employees, was doubtless based upon the obvious hazard of that industry, which had just then been introduced in the country. Had there been presented to Lord Abinger, in Priestly *vs.* Fowler, a situation where the employment in which the injury occurred was intrinsically hazardous, or a case wherein the circumstances of the injury were more complex than those involved in the extremely simple case of a butcher's helper injured through the carelessness of his master's wagon driver, with whom he customarily worked, it is not improbable that the current of our law respecting a master's liability for his servant's injuries might have been changed. However that may be, it is of some interest to note, that from these contemporaneous events there has developed in Germany a system of workmen's compensation and industrial insurance which gives prompt and effectual pecuniary relief, without economic waste, in all

cases of occupational injuries, whilst in England and America, through rigorous applications of the doctrines of fellow-servant and assumed risks, there developed a situation characterized by denial of pecuniary relief in the great majority of cases of industrial accidents, great economic waste arising out of the conduct and defense of damage suits and resultant antagonism between employer and employee.

The present movement in the direction of workmen's compensation laws has proceeded from a recognition that the rules of law governing the workmen's remedy for injury received in the course of his employment, as formulated in the safe and simple industrial conditions of the early nineteenth century, are not adapted to the hazardous and complex conditions of modern day industry; and it derives quite as much of its strength from practical considerations as from sentimental humanitarianism.

Employers' Liability Legislation

The forerunners of the present movement are the so-called employer's liability laws, abrogating or modifying the defense of fellow-servant and, in some instances, the defense of assumption of risks. As early as 1855 the State of Georgia passed a law, applicable to railroads only, abolishing the defense of fellow-servant. In 1872 the State of Iowa passed a similar law; and the example thus set was followed by Kansas in 1874, and Wisconsin in 1875. The first statute relating to all employments was passed in England in 1880. That act, however, did not abolish these defenses; it merely modified them. The courts of England had gone to a considerable extent in the application of the doctrines of fellow-servant and assumption of risks, and the object of this law was to restrict the scope of those doctrines. This act has served as a model for Alabama (1884), Massachusetts (1887), Indiana (1893), New York (1902), Pennsylvania (1907), New Jersey (1909), Vermont (1910). In addition to the States thus enumerated, other States, as well as the Federal Government, have passed laws, applicable to railroads only, *abolishing* the defense of fellow-servant; so that in 1910, when the first workmen's compensation act was passed in this country, the situation on this side of the water in respect of employers' liability laws was as follows: Eight jurisdictions had laws modifying, but not entirely abrogating, the defenses of fellow-servant and assumption of risks in all employments; two jurisdictions had abolished the fellow-servant defense in the case of all corporations, and one (Colorado) in the case of all employments; fourteen had abolished it, but only in the case of railroads, and three had modified it in the case of railroads.

After seventeen years of experience under her employers' liability law, England decided that it was a failure; that it did not adequately

meet the conditions of modern industry. Indeed, this was the conservative opinion in the early nineties, when, in a memorandum from the Home office to the Royal Commission of Labor (1893), which bore the approval of Sir Frederick Pollock, we find it said: "The truth is that to the workman litigation under the act has more than its usual terrors. It is not merely that litigation is expensive, and that he is a poor man and his employer comparatively a rich one, it is that when a workman goes to law with his employer he, as it were, declares war against the person on whom his future probably depends; he seeks to compel him by legal force to pay money, and his only mode of doing so is the odious one of proving that his employer or his agents — his own fellow-servants — have been guilty of negligence. Add to this that the legal proof of such negligence is often extremely difficult, the broad result is that a legal claim for damages only answers where the injury is very great, and the workman is prepared to leave his master's services." (Report of Wainwright Commission, New York, 1910, p. 40.) The feeling in England that the employers' liability law was inadequate culminated in 1897, in her first workmen's compensation act, which was limited in its scope to what were deemed hazardous employments. The act was extended later (1906) so as to embrace all occupations, including even domestic service. But the wisdom of this extension, in the light of experience under the act, may be open to serious question.

There is no reason to suppose that the employers' liability laws in this country have been any more effectual than the one in England. Those which are not modeled strictly upon the English Act, but which abrogate the fellow-servant defense, are limited, in the main, to railroads; and this is only one of the many hazardous industries in this country. It is conservatively estimated that the number of industrial accidents resulting in death in this country approximated 35,000 annually, whilst the non-fatal injuries exceed 500,000. It is, of course, impossible to know in what percentage of these there is a substantial recovery; but from cases studied by the State Commissions of New York and Wisconsin (ibid. p. 88, et seq.) it would appear that in not more than 20 per cent is there actually litigation, and that as to the balance, in 60 per cent of the cases of death, and in a like percentage of the cases of non-fatal injury, the claimant has received either nothing at all or, at the most, only funeral or medical expenses.

Under the broadest kind of an employers' liability law there still rests upon the injured workman, as a prerequisite to his recovery, the burden of proving personal negligence on the part of some one as the proximate cause of injury. Industrial experts tell us that in the highly developed state of organized industry there are, in the case of accidents not due entirely to the dereliction of the workman himself, a great many contributory factors in the chain of causation, which are

either in the nature of minor personal faults or referable to what are commonly known as "trade risks" — a risk inevitably attendant upon the prosecution of the work, and in respect to which negligence, in the sense of moral obliquity, cannot be imputed to any one. It is undoubtedly true that in a very few cases can an accident be said to be due exclusively to a trade risk; but, on the other hand, particularly in hazardous employments, the trade risk, though minor faults may also concur, is ordinarily a very responsible factor in accident causation. This consideration, coupled with the fact that the invariable presence of the trade risk and the involved machinery of the modern industrial establishment, unite to render difficult the proof of personal faults concurring in the chain of causation, is the primary justification for the imposition of an absolute liability upon the employer. And the obligation, independently of fault, to compensate the injured workman is the principal feature of the workmen's compensation act.

The other feature is that the measure of indemnity is made as nearly just and automatic as is possible. One of the defects of the present system, as well under employers' liability statutes as under the common law, is that the *quantum* of damages is left to the determination, or, rather, conjecture, of a jury. In a workmen's compensation act the indemnity is, to a large extent, predetermined — the standard being the average weekly earnings of the workman at the time of his injury. Upon this standard, the computation of indemnity is rather a question of mathematics than of prejudice, sentiment or a compromise verdict.

One of the particular industrial evils, resulting from the present system, is the antagonism that is necessarily created between the employer and employee when the injury has occurred. The doubt surrounding the question of fault, the extreme divergence of individual view as to the proper amount of compensation, tend to place the parties in immediate hostility to each other, and to furnish a strong inducement for each to suppress or distort the facts relative to the cause of the injury, and thus close the doors to scientific investigation of accident causation and prevention. By eliminating the cause of hostility the workman's compensation act is calculated to promote harmony between capital and labor, and by destroying the motive to distort the facts relative to the cause of an injury, a serious impediment to progress along the line of industrial safety, would, in all probability, be removed.

Compensation Acts

Having thus considered the objects of the compensation act, let us address ourselves to the methods, as proposed, for the accomplishment of these objects. Various forms of workmen's compensation acts, some of which have been enacted into laws, are now receiving serious consideration in this country. With regard to their essential points

of difference, it may be said that they are divided, perpendicularly, into two classes, the direct and the indirect, and, horizontally, into two classes, the compulsory and the elective.

Taking the first classification, the difference between the direct and the indirect is this: In the direct, or, as it is sometimes called, the simple plan of compensation, the obligation to indemnify the workman rests immediately upon the person in whose employment the injury occurred. Under the indirect, or state insurance plan, employers are required by the state to pay an annual tax, graded in accordance with the nature of the industry, and proportioned to the payroll of the particular establishment. When the injury occurs, the workman is paid indemnity out of this fund — the fund being administered by state officials.

Taking the second classification, the difference between the compulsory and elective is this: The compulsory imposes an absolute obligation upon the employer to pay the compensation in the one case, or the annual tax in the other. The elective, however, formulates a plan of compensation, and then seeks to coerce the employer into accepting it, by imposing the dreadful alternative of a wide-open liability law; that is, it says to him, "Unless you elect to come under this scheme, you may not, in the event of suit for damages, avail yourself of the following defenses: contributory negligence, assumption of risks or negligence of fellow-servant. Elective laws are peculiar to this country, and were devised in order to circumvent the difficulties which, it is supposed, are presented by our written constitutions to the enactment of a compulsory law. In March, 1911, the New York Court of Appeals held that a compulsory direct compensation act was unconstitutional, because the imposition of liability upon the employer, irrespective of his negligence, amounted to a deprivation of his property without due process of law (Ives *vs.* South Buffalo Railway, 201 N. Y. 271). On the other hand, in September of the same year a statute of the state of Washington, embodying a compulsory indirect or state insurance plan, was sustained by the Supreme Court of that state as a legitimate exercise of the police power, the court expressly disapproving the New York decision and regarding it as a direct authority against their position (The People ex rel. Davis-Smith Company *vs.* State Auditor, 107 Pacific 1101). In 1911 Nevada passed a direct compulsory act; but the other states which have passed compensation acts have preferred to avoid the constitutional difficulties, and have enacted elective laws — either direct elective laws or elective laws framed on the indirect or state insurance plan. These to date are New Jersey, New Hampshire, Wisconsin, Illinois, California, Kansas, Rhode Island and Michigan, which have adopted the direct method of compensation; Ohio, which has adopted substantially the indirect plan; and Massachusetts, where

the employer, if he elects to come into the plan, must insure either in a private company or in an employees' insurance association. The constitutionality of the elective law has been affirmed. (Borgnis *vs.* Falk Company, 147 Wisconsin 327; Opinion of Justices, 209 Mass. 607; Yaple *vs.* Creamer, 85 Ohio St.)

Now, a word in regard to the elective law. A strong objection to this form of enactment is that it is not true legislation, but legislative highwaymanship. "Get into the plan," says the legislature to the employer. "If you don't I will take away most of your defenses and leave you to the tender mercies of a jury, who will penalize you with their verdict for not doing so." Though perhaps they successfully evade the constitutional objections which are supposed to inhere in compulsory acts, elective acts are nevertheless fundamentally unsound. They are opposed to the theory of legislation. The function of legislation is to prescribe rules of conduct, and to give these rules uniform application. Here, the legislature declares a legislative policy which is deemed to be wise and expedient in the light of industrial conditions, and embodies that policy in a rule of conduct, but the rule becomes operative only when assented to by the individual. It is not only an entirely novel and anomalous form of legislation, but if there were any likelihood of the permanency of elective acts, it might prove to be a dangerous precedent. Elective acts cannot be considered as anything more than a temporary makeshift in the progress of the workmen's compensation movement. Employers have not, as a rule, with the possible exception of New Jersey, availed themselves of the plan of compensation so provided, and it may be said that these acts have failed to possess the coerciveness expected of them. The prevailing opinion is that, as measures of reform, they have demonstrated their ineffectiveness, that they possess no practical advantages over employers' liability acts, and that anything short of a compulsory law will be of no real benefit. This trend of thought is reflected in the action of the Federal Commission, appointed to draft a national workmen's compensation act applicable to interstate railroads. After giving due consideration to the supposed constitutional difficulties, the Commission has recommended a compulsory act embodying the direct plan of compensation, and the bill as submitted by it has passed the Senate.

Being thus confronted with the consideration that if a workmen's compensation act is to possess any real merit as such, it must first of all be compulsory, and there appearing to be a diversity of view, reflected in the laws already passed, as to which method of compensation — the direct or the indirect — possesses the greater merit, it becomes of some interest to consider the constitutional questions involved in a compulsory law, and to weigh the relative merits of these two methods.

Under the direct method there is imposed upon the particular em-

ployer an obligation to compensate the workman for every injury "arising out of, and in the course of, the employment," irrespective of the cause of the injury, save in this respect, that if it be proved the injury resulted from the workman's intoxication or from his deliberate intention to cause the injury, or from some breach of statutory regulations, no compensation is payable. The act may superimpose this obligation upon the common law liability of the employer to respond in unliquidated damages, if the injury were caused by his personal fault, leaving it optional with the workman, after the injury, to accept compensation or to sue at law; or the act may make the remedy of compensation exclusive of all others. Having regard to the purpose of workmen's compensation acts, the exclusive act is to be preferred. The alternative remedy in tort would make the employers' obligation uncertain, and would appeal too strongly to the gambling spirit of the injured workman. The scale of compensation is based upon the earnings of the workman during his period of employment. The particular amount of compensation in non-fatal cases, depends upon whether total or only partial incapacity for work results, and is payable in weekly amounts during the period of disability, with an appropriate limit, say, eight years. In case of his death the particular amount of compensation is conditioned upon the extent to which his survivors, if he leaves any, were dependent upon his earnings. In a non-fatal case the act would prescribe, for instance, that during total incapacity he should receive 50 per cent of his average weekly earnings, but in no case more than, say, ten dollars a week. In case of partial incapacity this weekly compensation would be diminished as the circumstances of his incapacity warranted. In the case of death, if his survivors were wholly dependent upon his earnings, they would receive, for instance, a sum equal to, say, two hundred times his average weekly earnings during his term of employment, subject to a maximum of, say, $3000. If his survivors were only partly dependent upon his earnings, then this sum would be diminished as the circumstances of their dependency warranted. If he left no dependents, the compensation would be limited to medical and funeral expenses. Although it is thus attempted to make the scheme of compensation as nearly just and automatic as possible, and although the ingredient of employers' fault is eliminated, questions would be likely to arise within the scope of the plan as so defined. Did the injury arise out of and in the course of the employment? Did it result from intentional misconduct on the part of the workman? Is the incapacity total or only partial? If partial, how much compensation would be just? If it was originally a total incapacity, has it since diminished? Or if originally partial, has it since increased? The act should seek to encourage the adjustment of these disputes in the first instance, by agreement between the parties, and, failing that, by submission to a

disinterested arbitrator selected by the parties or an adjuster appointed by the court, the decision of either to be subject to review by a court or jury upon the application of either party. The Federal bill adopts this procedure, and provides for the appointment of an adjuster for each judicial district, to whom, in the first instance, disputes are to be submitted.

The State Insurance plan is best exemplified in the Session Laws of the State of Washington for 1911, chapter 74. The salient features of that act are these: The act first declares itself to be an exercise of the police power; it then enumerates the various industries in the state which are deemed to be hazardous, classifies these industries, and imposes an annual tax upon the employers therein for the maintenance of an industrial insurance fund. This tax takes the form of a percentage of the particular employer's payroll, and the percentages range, over the list of classified industries, from 10 per cent in the case of powder works to 1½ per cent in the least hazardous. The act provides for the administration of the fund by an industrial insurance department, consisting of three commissioners; provides that in the event of injury (unless due to his intentional misconduct), the workman may either pursue his common law remedy against the employer or assign his right of action to the commission, and take the compensation provided in the act; this compensation takes the form of periodic payments by the commission during the period of disability, somewhat in the nature of the payments to which I have just alluded under the direct method. Periodic payments are also made to the dependents in the case of death, but these may be commuted by the payment of a lump sum. The act also provides for a court review of any decision of the commissioners.

From this outline of the two methods of compensation, as now proposed, it is interesting to observe a fundamental difference in the principle involved. The direct method is the more logical development of our common law, and is constructed upon the idea of individualism. The indirect is constructed upon the idea of collectivism, and in that respect it is socialistic in its conception. The direct is a system of compensation, pure and simple. The indirect partakes more of the nature of poor relief than of compensation.

Constitutionality of the Compulsory Act

Now, what are the constitutional questions presented in the case of a compulsory act? The principal ones are these: (*a*) Does the imposition of a liability in the absence of negligence amount to a deprivation of property without due process of law? (*b*) In the case of an exclusive act, does the abolition of the workman's common law remedy in liquidated damages for employer's negligence violate this

or kindred constitutional provisions? (*c*) If amounting to a deprivation of property, may these acts, nevertheless, be sustained as a legitimate exercise of the police power? There are other constitutional questions which must be considered in the drafting of compensation acts, such as, for instance, the question of trial by jury and the guaranty as to the equal protection of the laws; but the ones I have enumerated are the fundamental and basic questions, and I shall limit my discussion to these.

(*a*) First, then, does the imposition of a liability upon the employer, irrespective of his negligence or the personal negligence of his agents, amount to a deprivation of his property, within the meaning of the prohibition, common to the Federal and all State Constitutions, that one may not be deprived of "life, liberty or property without due process of law," or, as synonymously phrased in the Maryland Constitution (Declaration of Rights, Article 23), "except by the law of the land"?

Independently of the police power, the legislature has the reserved power, in the exercise of its wisdom and discretion, to regulate rules of conduct, and to adjust and readjust rights and duties arising in the social relations. Within the limitations placed by the written Constitution upon its exercise, this power is supreme. It is repeatedly exercised by legislatures to amend and repeal the rules of the common law, and could, therefore, with equal propriety be exercised to amend or repeal the rule of the common law relating to employers' liability unless prohibited by some constitutional limitation. Is the exercise of this power in such a manner prohibited by the limitation to which I have just alluded? The New York Court of Appeals, in the Ives case, says that it is, because, to state, in the court's own language, the proposition upon which its view is rested: "When our Constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another."

It is entirely true that due process of law means in accordance with the law of the land at the time our Constitutions were adopted; but when the court says that, under the law of the land, no man who was without fault or negligence could be held liable in damages for injuries sustained by another, the court undoubtedly misconceived the scope and meaning of the phrase — "the law of the land." In applying that standard to legislative enactments we are presented with two very opposite considerations. On the one hand, to quote the words of Daniel Webster in the Dartmouth College case, "everything which may pass under the form of an enactment is not to be considered the law of the land," and on the other, it is self evident that the constitutional limitation respecting due process of law was not intended to put the legislature in a strait-jacket, so

that it might effect no repeal nor amendment of the rules of law as they existed when our Constitutions were adopted. In determining whether a statutory modification of the common law contravenes the due process clause, the oft-quoted language of Mr. Justice Johnson, of the Supreme Court of the United States, in Bank of Columbia *vs.* Okeley (2 Wheaton 244), is very much in point. He says: "As to the words from the Magna Charta, incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this — that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." Referring to this constitutional limitation, Judge Alvey says (Rock Hill College *vs.* Jones, 47 Md. 18): "But a right to be within its protection must be a vested right. It must be something more than a mere expectation based upon the anticipated continuance of the existing law." Chief Justice Waite in Munn *vs.* Illinois (94 U.S. 134) uses the following language, which is most appropriate to the point now under consideration, and which has been reaffirmed time and again by the United States Supreme Court: "A person has no property, no vested interest in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will of any legislature unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

It would seem, therefore, that when we are to determine whether the constitutional limitation in question is transgressed by a statutory modification or repeal of an existing rule of liability under the common law, our concern should be whether the alteration is *arbitrary*, in that it violates the fundamental principle of our jurisprudence, upon which the preëxisting rule of liability rests. A statute which undertook to so modify the law of contract as to require a man to pay his neighbor's debts would conceivably be unconstitutional; similarly would a statute which undertook to change the law of tort by making one employer directly liable, independently of his causal connection, to compensate the workman of another employer for injuries received. These would be arbitrary. How about a statute making an employer liable to compensate for injuries to his own workman, due not to the negligence or fault of the employer or that of his agents, but rising out of, and in the course of, a hazardous employment? Is that arbitrary? Does that violate the principle upon which the rule of liability for negligence rests? In saying that it was the law of the land that no

man who was without fault or negligence could be held liable in damages for injuries sustained by another, the New York Court of Appeals obviously confused a rule of negligence with a principle of tort liability, and accorded to the employer a vested right in the former. As the law of the land has reference not to the mere rules of law in particular cases, but to the fundamental principles of liability, it is not true that, at the time our Constitutions were adopted, it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. Liability for personal injuries sustained by another is not predicated fundamentally upon fault or negligence, but rather upon the question whether the individual to be charged with liability is such a factor in the chain of causation as that he may be deemed to have had a responsible connection with the injury; and if the instrumentality through which the injury is caused be conducted primarily for the benefit of the individual, he has that responsible connection with the injury, and it is not arbitrary, but reasonable and just, if he be made to indemnify the injured person. Numerous instances of liability at common law illustrate that the principle of tort liability is related to these considerations, rather than to the concept of fault on the part of the individual charged. Take, for instance, the liability of a shipowner for the care and maintenance of disabled seamen. The rule of personal liability embodied in the maxim *qui facit per alium facit per se* rests not upon a notion of actual fault on the part of the individual charged with liability, but upon the reasonable imputation of fault arising out of his responsible connection with the instrumentality through which the injury was caused. The rule of *respondent superior* rests upon even broader considerations of justice; it is directly opposed to the concept of fault, either actual or imputed, upon the part of the principal, for it is applied to cases where he actually disapproved or forbade the act which caused the injury. The rule embodied in the maxim *sic utere tuo ut alienum non laedas*, requiring the owner of a dangerous, but lawful, contrivance to operate it at his peril, is but a further illustration of the fact that, under the law of the land, liability for injuries to another is not necessarily related to fault or negligence. The same is true, in a measure, of the doctrine of *res ipsa loquitur*, under which a person for whose benefit an undertaking likely to cause injury is conducted, may be held liable for the consequences thereof, even though the undertaking be conducted by an independent contractor.

Mainly upon these considerations the Supreme Court of the United States has recognized and applied the doctrine that a state legislature may impose a liability without fault. In the case of Railroad Company *vs.* Matthews (165 U.S. 9) the court sustained a statute imposing upon railroad companies an absolute liability for loss resulting from fires from their engines. In the case of Clark *vs.* Russell (97 Fed. 900)

the Circuit Court of Appeals for the Eighth Circuit applied the same doctrine to a statute of Nebraska imposing liability upon railroad companies for all physical injuries to passengers unless due to the criminal negligence of the passenger himself. In a case involving the validity of the same statute, Chicago Railroad *vs.* Zernecke (183 U.S. 582) the Supreme Court of the United States discussed at length the right of a legislature to impose such a liability, irrespective of fault, and reaffirmed that rule of constitutional law, but sustained the particular statute on other grounds.

It would seem to follow, therefore, both on reason and authority, that there is nothing arbitrary, nothing violative of vested rights, nothing in contravention of the law of the land for a state legislature to impose upon employers engaged in occupations which experience fairly demonstrates are intrinsically hazardous, a liability, irrespective of the employer's negligence, to compensate his workmen for occupational injuries; and that such a law may be sustained, independently of the police power. But it would seem to follow that such a law must be one of direct liability, and that the taxation of employers generally to maintain a state insurance fund involving, as it does, the taking of the property of one employer to pay the obligations of another for injuries with which the former has no responsible connection, can be sustained, if at all, only as a legitimate exercise of the police power.

(*b*) When we come to the question as to whether a compensation act may be made exclusive; that is, whether the workman's common law remedy in tort for the employer's negligence may be abrogated, it would seem, on first impression, that the observations heretofore made with respect to the power of the legislature to repeal a rule of negligence would apply with equal force. If the legislature may abolish a defense based upon a rule of negligence, may it not also abolish a right of action arising out of negligence? If the employer has no vested right in a rule of negligence, has the employee a vested right in a common law cause of action for negligence which has not yet accrued? The Supreme Court of the United States has answered this in the negative by sustaining a statute of Pennsylvania which, in substance, abolished a common law right of action for personal injury arising out of another's negligence. The court said that "If it be conceded that the plaintiff in error could have recovered but for the statute, it does not follow that the Legislature of Pennsylvania in preventing a recovery took away a vested right or a right of property. As the accident from which the cause of action is asserted to have arisen occurred long after the passage of the statue, it is difficult to grasp the contention that the statute deprived the plaintiff in error of the rights just stated" (Martin *vs.* Pittsburg & C. R. Co., 203 U.S. 284, 295). See also views of Mr. Justice Holmes in Atchison & C. R.R. *vs.* Sowers, 213 U.S. 55, and Sawyer *vs.* El Paso & C. R. Co.

(Texas), 108 S. W. 719. Upon the views thus expressed the Federal Commission has recommended an exclusive compensation act for railroads.

With reference to the law of the land, however, it cannot be said that the right of action for personal injuries arising from the negligence of another rests upon exactly the same considerations as the defense of non-liability except for negligence. There may, as we have seen, be cases in the common law of tort liability for personal injury, independently of negligence; but, on the other hand, does the common law afford any illustrations where there is no right of action for personal injury directly caused by the intentional misconduct, fault or moral obliquity of another, if he be *sui juris?* In point of principle, the abolition of the workman's common law remedy, without more, might conceivably be open to the objection that it is "an arbitrary exercise of the powers of government unrestrained by the established principles of . . . distributive justice"; but if, at the same time, he is given, in lieu thereof, the benefit of a plan of compensation which, under existing conditions, fully accords with the notion of distributive justice, the objection would seem to fade away.

This question would, perhaps, be rendered more difficult in Maryland because of the further provision in our Declaration of Rights (Art. 19): "That every man for any injury done him in his person or property ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land." Would the remedy under a plan of compensation be a remedy within the contemplation of this provision? It is not a remedy which was known to the common law. It is a brand new remedy created by statute, which logic and experience demonstrate is more suited to our modern conditions, and more promotive of average justice. The constitutional provision does not in terms guarantee the continuance of common law remedies, but says that a man "ought to have remedy by *the course* of the Law of the Land," and "ought to have justice and right . . . according to the Law of the Land." Was it intended by these words to perpetuate all preëxisting common law remedies? As we have observed, the law of the land does not necessarily mean the rules of the common law, but rather the abstract principles of justice, which find their concrete expression in these rules. May it not be fairly argued, then, upon the same considerations that the due process of law clause is construed, that the purpose of this provision was to preclude such arbitrary action as the virtual denial of redress for injuries? And if a preëxisting common law remedy be modified by the substitution of a substantial and adequate remedy, which may reasonably be said, in the interests of distributive justice, to be more suited to our changed conditions, and if the individual be

allowed his day in court for the enforcement of that remedy, is that such arbitrary action as would contravene the spirit and intent of this Declaration of Rights? In states where a similar provision, embodied in the Constitution itself, embraced also injuries to reputation or character, the question has been presented as to the constitutionality of a statute which, under certain circumstances, limited the remedy in a libel suit to damages to property rights—thus eliminating damages to reputation — and there are conflicting decisions as to the validity of such a statute (Parker *vs.* Detroit Free Press, 72 Mich. 56; Allen *vs.* Pioneer Press, 40 Minn. 117; Hanson *vs.* Krechtril, 68 Kansas 670). In these cases the statute abridged the remedy at common law, but it did so by abolishing that part of it which related to injuries to reputation, and in respect of such injuries (a remedy for which was guaranteed by the Constitution) the legislature gave no equivalent remedy. The workman's compensation act, however, proposes to substitute for the narrower remedy based upon negligence the broader remedy of compensation for all occupational injuries — a remedy which is more just, more appropriate and, in the light of experience in England, where, in death cases, the average of compensation awards has exceeded the average damages recovered under the alternative remedy in tort, it is a remedy of more actual value to the workman. (Report of Federal Commission on Workman's Compensation, p. 102.)

(*c*) We have thus far regarded the compulsory act without reference to the police power. Let us now consider whether the compulsory act in either form — direct or indirect — has any substantial basis as a legitimate exercise of the police power, and if so, which of these two methods has the stronger claim on consideration in that respect.

There can be no doubt that the police power of the state survived the constitutional limitations which we have thus far discussed. "That a state, in the *bona fide* exercise of its police power may interfere with private property, and even order its destruction, is as well settled as any legislative power can be." So says the Supreme Court of the United States, accompanying its statement of the proposition with numerous concrete illustrations (Sentell *vs.* Orleans and C. R. Co., 166 U S. 698).

In the Ives case (*supra*) the New York Court of Appeals, having a direct liability act before it, says that such an act cannot be justified under the police power, because "it does nothing to conserve the health, safety or morals of the employees, and it imposes upon the employer no new or affirmative duties or responsibilities in the conduct of his business. Its sole purpose is to make him liable for injuries which may be sustained wholly without his fault. . . ." On the other hand, the Supreme Court of Washington rested the validity of the Insurance Act of that State upon the police power.

The scope of the police power has never been susceptible of accurate definition. The views of various courts have ranged from the narrow definition that the enactment must be directly related to the public health, safety or morals, to the recently expressed view of Mr. Justice Holmes (Noble State Bank *vs.* Haskell, 219 U.S. 104, 111) that "It may be put forth in aid of what is sanctioned by usage or held by prevailing morality to be greatly and immediately necessary to the public welfare." An undoubted attribute of compensation acts is that they would have a tendency to alleviate material suffering and to prevent pauperism. But it is doubtful whether this is a sufficient consideration upon which to justify them as a legitimate exercise of governmental powers. (See opinion late Justice Brewer while sitting on Supreme Court of Kansas in State *vs.* Owaskee Township, 14 Kansas 418; also Lowell *vs.* Boston, 111 Mass. 454. Cf. North Dakota *vs.* Nelson County, 1 N. D. 89). The court in the Washington case alludes to the fact that under the common law the losses arising from occupational accidents "have been borne by the injured workmen themselves, by their dependents or by the state at large," and imputes to the legislature, in enacting the law, a belief "that they should be borne by the industries causing them, or, perhaps more accurately, by the consumers of the products of those industries." "That the principle thus sought to be put into effect," continues the court, "is economically, sociologically and morally sound we think must be conceded. . . . Indeed, so universal is the sentiment that to assert the contrary is to turn the face against the enlightened opinion of mankind."

To thus determine the scope of the police power may seem to conservatives a rather advanced position to take, and though we ought not shut our eyes to economic, sociological and moral considerations (there is a seeming tendency in courts to attach great importance to these in determining the validity of acts related to social betterment), their application in the determination of constitutional questions, unless analyzed with finer discrimination than was exhibited by the Washington Court, is likely to create dangerous precedents. Be that as it may, however, all that was observed in respect of the Washington act applies with equal truth to a direct liability act; and the latter possesses an additional attribute which gives it greater claim upon our consideration as an exercise of the police power. The imposition of direct liability upon the employer, incidentally, but much more effectually, accomplishes the same results as factory regulations. Inasmuch as the burden of compensation falls directly upon the individual employer, there is an active inducement for him to adopt every measure of safety, in order to minimize the likelihood of injury to his workmen. Results under the English Compensation Act of 1897 seem to demonstrate that this is true in practice. Does this

attribute of the direct liability method applied to dangerous trades bring it within the purview of the police power? Undoubtedly factory regulations designed to conserve the safety of employees by reducing the number of injuries may be justified under the police power. Does it make any substantial difference that instead of imposing specific duties upon employers, and a civil liability or criminal penalty for violation of those duties, the legislature uses an indirect method to accomplish the same result? The language of the Supreme Court of the United States in Atchison Railroad *vs.* Matthews (174 U.S. 96, 102) seems very much in point. The court, in passing upon the validity of a Kansas statute which imposed upon railroad companies an absolute liabillty in cases of fire communicated by their engines, says: "If, in order to accomplish a given beneficial result — a result which depends on the action of a corporation, the legislature has the power to prescribe a specific duty and punish a failure to comply therewith by a penalty, either double damages or attorney's fees, has it not equal power to prescribe the same penalty for failing to accomplish the same result, leaving to the corporation the selection of the means it deems best therefor? Does the power of the legislature depend on the method it pursues to accomplish the result?"

The contrast between the opinion of the New York Court of Appeals and that of the Supreme Court of Washington is interesting, because it denotes the extreme conservatism of the one and the rather advanced views of the other. Upon the whole, it would seem that, in the aspect of constitutionality, the statute which the New York Court declared invalid is supported by weightier considerations than the one which the Washington Court sustained; and the same is true as regards its economic and political aspects. These I shall refer to only in the most general manner.

As we have observed, a direct liability law has a regulative effect, a tendency to minimize accidents, a result which cannot be predicated of a system which imposes the burden of compensation, primarily, not upon the employer himself, but upon a state fund maintained by a general tax — a system which in reality subsidizes the carelessly conducted concerns at the expense of their more efficient competitors. Furthermore, the administration of relief by the public authorities is more likely, either through good nature, undue sympathy or the indisposition to antagonize the voter, to lead to imposition, frauds and to encourage malingering. Once the disabled workman has fastened himself upon the benevolence of a state insurance fund, there is more likelihood of his continuing as a beneficiary long after his disability has in reality ceased, than if he had to deal with a private individual.

As weighing against these objections it is claimed that the state

insurance system protects the individual employer against the shock of substantial casualty, and also affords security to the injured workman against the insolvency of his employer. This, however, rests upon the assumption that the private employer will not insure his liability in casualty companies — an assumption which is at variance with the modern business tendency. It has been suggested, as a means of making the direct liability law more perfect in this respect, that the law compel the employer to transfer his liability to some approved casualty company, but as this would place the employer at the mercy of the casualty company in the matter of premiums, it is suggested that the state also conduct an insurance fund to which the employer might transfer his liability upon payment of premiums fixed by the state authorities. But this means that the state must engage in the casualty business, and under more difficult circumstances than in the case of an outright insurance act; for experience in Continental countries, where that system prevails, shows that in competition with private companies these companies take only the best business, while the state gets all the bad risks.

Regarding the subject broadly, it would seem that the form of legislation possessing the greatest merit is the exclusive direct compulsory act without any incidental insurance feature. As compared with other methods, it is certainly the most logical development of our common law. It possesses what the elective system lacks — the attribute of uniformity — and, unlike state insurance, it preserves the principle of individualism which underlies our institutions.

* * * * * * *

Conclusion

I have undertaken in this paper to outline the development of the movement toward workmen's compensation acts, and the reasons for such legislation, and to discuss the more important legal questions involved in the compulsory law. That form of enactment is, in my opinion, the only one that will be effective, the only one that will prove satisfactory, and the one which we must eventually adopt if we are to have any permanent legislation of this character. In the adoption of such a law there is a consideration of prime importance to which I have not alluded, and it is this: To what extent can the industrial concerns of a particular state stand the added burden of the cost of compensation, whether that burden take the form of insurance premiums or otherwise. At this point we find the advocates of state insurance claiming that because of the economic waste in private insurance incident to commissions, administration and adjustment expenses and overhead charges, the state insurance plan is the cheaper.

But I think that if it were to prove cheaper, it would only do so in the derogatory sense of being cheap and nasty. Apart from the laxity which might attend the administration of a state-wide insurance fund (in which the workmen themselves have no interest other than the obtention of relief), not to mention the lack of inducement to the employer under such a system to keep his operations up to a high standard of efficiency (for in private insurance the premium would be adjusted to the risk of the particular establishment), it is not a sound principle for a state to embark in private business; and particularly is this true of a business like insurance, which not only involves hazard and risk, but is essentially conducted on these principles, and depends for its success upon a much wider field of "averages" than is embraced within state lines. As to whether the elective system, with its freedom of choice, is less burdensome in the matter of the cost of compensation, it may be observed that in many jurisdictions juries have become imbued with the spirit of the times, and are giving much higher verdicts than formerly; and so under some elective laws it is found that the cost of employers' liability is almost as great as the cost of compensation.

The practice of other states in the formulation of compensation laws has been to appoint a commission, with an adequate appropriation, to conduct an exhaustive examination of the subject. Much general information, both of a practical and theoretical nature, is now available in a convenient form, as a result of investigations already conducted. The question, however, in its particular application to local conditions, is by no means clear; and if Maryland is to adopt a workmen's compensation act, one of the most important considerations should be the probable effect that any act, either as to the scope of the obligation or scale of compensation, would have as an additional tax on our local industries. Pending the adoption of a real compensation act, however, we may feel reasonably assured that Chapter 837, of the Acts of 1912, will prove neither mischievous nor beneficial.

REPORT OF COMMISSION ON EMPLOYERS' LIABILITY, TOGETHER WITH THE EVIDENCE AND TESTIMONY TAKEN

REPORT TO GOVERNOR

Many States have passed employer's liability laws, most of them based upon the reports of investigating commissions. The New Jersey commission's work is typical of the better class of these reports, and the New Jersey law is, in many respects, a model statute. — EDITOR'S NOTE.

STATE OF NEW JERSEY
EMPLOYERS' LIABILITY COMMISSION
OFFICE: NEWARK BOARD OF TRADE ROOM

January 16, 1911

MY DEAR SIR — The Commission to inquire into the question of Employers' Liability, pursuant to Senate Joint Resolution No. 3, Laws of 1910, reports as follows:

* * * * * * *

Public hearings have been held. At these hearings employers and representatives of labor presented their views as set forth in the minutes, a copy of which is transmitted herewith. While the statements made at these hearings have a certain value as showing the trend of public opinion, yet, generally speaking, those advocating radical changes in the present law had little or no appreciation of the limitations imposed on legislation by the Federal and State Constitutions.

The hearings have served a useful purpose in acquainting those present in a general way with some of the constitutional difficulties, thereby making possible a more intelligent discussion, both among employers and workmen, of the problems involved in making changes in the law.

The President and Secretary of the Commission participated in a conference of Commissioners on Compensation for Industrial Accidents from ten States, held at Chicago, November 10th, 11th and 12th, 1910, at which conclusions were reached, as shown in the attached Appendix, marked A. These conclusions were not unanimous in every case, but fairly reflected the opinion of the majority of those present.

At the conclusion of the conference a committee was appointed to draft two bills, one of which was to be a compulsory compensation act, based on the assumption that such an act would be constitutional, and the other an elective act based on the assumption that the first-named would be unconstitutional. . . .

The Commission has sent out to certain members of the bar a letter reading as follows:

> The Employers' Liability Commission of New Jersey, recently appointed by Governor Fort under authority of a resolution of the last Legislature has held during the past summer a series of open meetings, at which a large number of employers and representative associations of workmen appeared.
>
> As a result of these meetings and from a general study of the working of the present system of administering the law of employers' liability in this State, the Commission is convinced that, speaking generally, the present status of the law is not satisfactory either to the employer or the employee.

While convinced that some changes are desirable, we are duly impressed with the fact that if the work of the Commission is to have any practical results, any modifications of the present common or statute law must be in harmony with the requirements of the Federal and State Constitutions.

Having in view the importance of the above requirement, the Commission desires to ascertain the views of prominent members of the bar of this State as to the constitutionality of certain suggested changes. The members of the Commission are serving without compensation; the small appropriation ($1300) being used exclusively for office and other incidental expenses. The Commission has no express authority nor has it means to employ counsel. We therefore seek legal assistance from such public-spirited members of the bar as are willing to give us the benefit of their views as a public duty.

The particular questions on which we wish your opinion are as follows:

Are there constitutional objections to the enactment by the Legislature of this State of statutes to the following effect:

1. A statute abrogating as a defense the doctrine of "fellow servant."

2. A statute abrogating as a defense the doctrine of "assumption of risk."

3. A statute providing that contributory negligence of the employee should not bar the action, but that the damages should be assessed by the jury in proportion to the comparative negligence of the parties.

4. A statute providing that the burden of proof as to contributory negligence shall be upon the employer.

5. A statute providing that no claim for legal services or disbursements shall be a lien upon the recovery or enforceable in law unless the same be taxed and approved by a court of record.

6. A statute providing that the employer shall be directly liable to compensate the employee injured in his employment (without regard to the question of neglect or failure of duty of the employer) unless the injury was intentionally caused by the employee himself, but also providing that the compensation so paid be fixed in amount.

7. If the answer to query No. 6 is in the negative — A statute making void any agreement to forego or limit the liabilities imposed by the statute suggested in query No. 6.

8. If the answer to query No. 6 is in the affirmative, would you consider a permissive or elective act to the same effect constitutional and desirable?

9. A statute providing that every employer and employee as a part of their express or implied contract of employment shall be presumed to have accepted the provisions of the proposed workmen's compensation act, unless they give written notice to the contrary to some designated public official.

10. A statute providing that an employer who does not accept the provisions of the proposed workmen's compensation act and forces his employee to bring suit at common law, shall not escape liability by reason of (1) the fellow-servant rule; (2) the rule of assumption of risk, or (3) the contributory negligence of the employee, unless that contributory negligence be greater than the negligence of the employer; burden of proof to be on the employer.

This statute would also provide that an employee who refuses to accept

the provisions of the proposed act, and sues at common law, shall be subject to all three of the defenses named as they now stand.

Aside from the question of constitutionality of each of the above suggested statutes, we would be glad to have your opinion as to the desirability in each instance of making these changes in the law of the State, or as to any other changes pertinent to the subject.

They have also sent to certain judges a letter reading as follows:

We are addressing a letter to prominent members of the bar of this State, a copy of which is inclosed.

We recognize the fact that in view of your judicial office it would be improper to ask you to give an opinion as to the constitutionality of the proposed legislation. We feel, however, that your experience at the bar and on the bench has given you exceptional opportunity to form definite views as to the efficiency of the existing employers' liability laws.

If you are willing to express opinions as to the practical merits of the suggestions contained in our letter they will be greatly appreciated.

The members of the Commission are unanimous in their belief that compensation to injured workmen is a legitimate charge against the cost of manufacture, and that the victim of an industrial accident, or his dependents, should receive compensation, not as an act of grace on the part of his employer, but as a matter of justice.

The burden of industrial accidents now falls in the most haphazard and unscientific manner on the victim himself and his dependents, the benevolent employer, the sympathetic fellow workmen, or the public authorities, or on all of these.

We regret, however, that we are forced to the conclusion that the weight of legal opinions received by correspondence and verbally is against the constitutionality of an act which would compel an employer to compensate an injured employee without regard to the fault or negligence of the employer.

We are advised that, as the law stands at present, the employer is held liable only when the accident is due to his fault or neglect. He is not liable — (*a*) when the negligence of the employee contributes to the accident; (*b*) when the accident is due to a natural risk of the employment; (*c*) or when the accident is due to the act of a fellow-servant.

Contributory Negligence

As to the first of these defenses of the employer, *i.e.*, the contributory negligence of the employee, we believe that the theory of this defense is founded on principles of justice. A change has been suggested to the so-called doctrine of comparative negligence which involves on the part of the court or jury a balancing of the relative amount of fault or negligence as between employer and employee.

While this doctrine is theoretically sound, we are advised that, in those States where it has been adopted, in practice it has resulted in substantially a complete abrogation of the defense by the employer of negligence by the employee. We are unable, therefore, to recommend the complete abrogation of this defense until constitutional barriers are removed which now prevent the adoption of a comprehensive scheme of compulsory compensation which shall distribute the burden of industrial accidents fairly among all employers, and through them on the purchasers of their products.

In order, however, to prevent the nonsuiting of the injured employee on a mere technicality, *i.e.*, where his negligence is relatively trivial, we recommend the modification of the present law as stated in our proposed bill requiring the proof of "willful negligence." While, technically, these words are a contradiction of terms, we are advised that they have a well-established meaning in judicial procedure.

In this connection the members of the Commission desire to emphasize the fact that they are unanimous in their belief that as a practical question compensation to an injured employee should be based on the fact of the accident or injury and not on the question of fault or negligence.

In the elective section of our proposed bill we therefore eliminate entirely the question of contributory negligence.

As to the second and third of these defenses, *i.e.*, "assumption of risk" and "fellow-servant," we believe that, however just these may have been at the time of their adoption, they are unjust as applied to modern conditions of employment for the following reasons:

Assumption of Risk

While, theoretically, a workman may be presumed to have a choice in the selection of his employment, taking into account the natural risks inherent therein, as a matter of fact in the vast majority of cases the choice is narrowed down to the acceptance of such risks or no work.

Fellow-Servant

In the great majority of cases the employee has no voice in the selection of his fellow-servants, and the mere fact of having the same employer should not, in itself, release the employer from a liability which he would otherwise incur. The injustice of this rule may be illustrated thus: "An accident occurs, due to the act of an employee, which results in the injury of a fellow-employee and also of an outsider in no way connected with the work. The outsider may, and often does, secure redress, while the fellow-employee is barred solely on account of his being a fellow-servant."

We therefore believe that the time has come in the development of our civic life for the abrogation of these two defenses, and we have incorporated this recommendation in the proposed bill which we present herewith. While, for reasons stated, we are unable to recommend the passage of a compulsory compensation act, we recommend the elective act which is included in the bill. This is done with the expectation that such an elective act will be generally accepted by both employers and employees for the following reasons:

By the employer:

1st. Because his liability is limited and he is thus relieved of the danger of harassing law suits for excessive damages.

2d. By reason of the abrogation of the two defenses of "Assumption of Risk" and "Fellow-Servant," the position of the employer who refuses to accept the elective law will be less tenable.

3d. Because he can in a large measure add the expense to cost of manufacture and recover it in his selling price.

4th. Because he can readily insure his liability.

By the employee:

1st. The practical certainty of settlement in accordance with the schedule as against the uncertainty of an appeal to common law rights.

2d. Promptness in settlement as against the "law's delay."

3d. All of the money is paid to the injured person or his dependents as against the heavy attorneys' fees and court expenses of the suit at law.

CONSTRUCTIVE INVESTIGATION AND THE INDUSTRIAL COMMISSION OF WISCONSIN[1]

By John R. Commons, Member of the Wisconsin Industrial Commission

(From the *Survey*, January 4, 1913)

This article details the experience of one of the first potent State industrial commissions. — Editor's Note.

Employers of Wisconsin paid $1,025,000 to liability insurance companies in 1911; scarcely $300,000 of it reached the pockets of the employees or their dependents. Ten thousand industrial accidents occur in Wisconsin each year; 100 of these are fatal; the others cause disability of seven days or more. But scarcely 10 per cent of the injured received any share of the $300,000.

This is the big problem of the Industrial Commission of Wisconsin

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— to reduce the $1,025,000 paid by employers, to raise the $300,000 received by employees, and to distribute it among 10,000 instead of 1000 employees. The commission has a margin of $725,000 to work upon, and a great margin of public welfare to promote. It can reduce the $1,025,000 by reducing accidents and improving the health of employees. It can increase the $300,000 and distribute it better by fixing definitely the compensation for all employees.

Instead of creating a commission to administer the compensation law, and then leaving the factory inspector to enforce the safety laws, as other states have done, the Wisconsin legislature of 1911 consolidated the two departments in a single commission. And instead of specifying the many details of factory inspection, the legislature boiled them down into one paragraph, requiring the employer to protect the life, safety, health and welfare of employees, and authorizing the commission to draw up rules and orders specifying the details as to how it should be done.

What the Commission Is

The commission is a fourth branch of government combining, but not usurping, the work of the three other branches. It is a legislature continually in session, yet the power of legislation is not delegated. It is an executive sharing with the governor the enforcement of laws, but also enforcing its own orders. It is a court, deciding cases that the judiciary formerly decided, but not assuming the authority of the courts.

This fourth function of government is sometimes designated as the administrative function. But administration, as usually understood, is merely the details of execution. Administration and execution are synonymous. The real distinction which entitles the commission to its position as a fourth branch of government, is not administration, but investigation and research. But its investigations are not the academic research of the laboratory and study, nor the journalistic investigation of the agitator, but the constructive investigation of the administrator. It is this constructive investigation that gives to the commission its lawful position in government and its effective position in the enforcement of law.

Function of Constructive Investigation

Constructive investigation should tell us whether the damage to the employee is public in its nature, requiring legislation, or only private, requiring exhortation. It should reveal the nature and cause of the injury, its cure and the practicability of its prevention. It should lead to such administration of the law that those enjoined to obey it would respect and support it.

We concede that in legislation and administration for the protection of health and safety of employees, we are behind the nations of Europe. This is due partly to ignorance through lack of investigation, partly to piecemeal legislation that hits one evil at a time when it gets sufficiently exposed, partly to the veto of our courts. To those who, perhaps, look upon Americans as materialistic, we might protest that we have put into practice Plato's ideal of government by philosophers, for we have set apart a faculty of sociological philosophers in each state and the nation, who have the last word on our laws and their administration. Their vetoes often expound the philosophy that preceded the French Revolution, numbering such sages as Grotius, Rousseau and Montesquieu, and such doctrines as the law of nature, natural rights and the general will. In harmony with the latter, and in conformity with constitutions framed during the vogue of that philosophy, they separate the body politic into three departments — the legislative, representing the general will, the executive, physically enforcing it, and the judiciary, the intellect over all.

Recently some dissatisfaction has arisen over this division of functions. It has shown itself in threats to "recall" the judges or to "recall their decisions." For some time, too, the executive departments, from president down to policeman, have not been content blindly to follow the legislature as the sole custodian of the general will, and have taken to themselves considerable discretion in enforcing the laws. Citizens, also, take liberties with the general will, trusting to slip through somewhere between the three branches of government.

But the courts have begun to recognize another branch of government. This branch has come forth especially to provide for that extension of the police power required to meet the rapidly changing and widely varying conditions of modern life and business. It, therefore, combines to a certain degree, the activities of legislation, execution and judgment; but its peculiar activity, which gives it a separate place as the custodian of the police power in the body politic, is that of investigation. It is upon the validity of its investigations that it is allowed to execute the general will and to survive the scrutiny of the courts.

The "Reasonableness" of Investigation

The doctrine which the court applies to this function of investigation is both the noblest and the most practical of legal doctrines — "reasonableness." By this doctrine the court applies its philosophy to the particular facts, but requires that all of the facts be taken into account. The drastic program of disciplining the courts by the recall, on the ground that they are removed from acquaintance with the

common life and are living in an eighteenth century philosophy, might be somewhat modified if advantage were taken of this exalted doctrine. It may be that the critics of the judiciary have not performed their part in bringing before the court all of the facts of the modern development of industry and society which the doctrine of reasonableness requires. Counsel often leaves the court in the predicament of falling back on its own knowledge of what is "common knowledge." Often this kind of knowledge is several years behind the times, because a serious injury to the common good usually arises and spreads extensively before the scientific experts and the journalistic agitators are able to make it a matter of common knowledge. The investigative branch of government should be the one that furnishes the court with judicial knowledge of injury to the public in advance of common knowledge. Being also an administrative branch, it should carry over promptly the results of scientific investigation into their practical application. Its function of the police power is the power of reasonable regulation through constructive investigation.

The legal doctrine of reasonableness provides ample opportunity for protective legislation if once its principles and procedure are complied with. It requires that all of the facts must be considered and weighed "as may be just and right in each case." It prohibits class legislation but permits classification. The one is based on merely private or class benefit, the other on public benefit ascertained by investigation. While permitting reasonable classification it requires equal treatment of all in the same class. Its conclusions must be practicable under existing conditions.

The procedure for securing these standards are well known to the law. They center on the main requirement that all parties affected shall have opportunity to be heard, and when this is complied with, the findings of the properly constituted board or commission become *prima facie* the facts of the case and the reasonable regulation to be enforced. Its findings are the conclusive results of constructive investigation.

Thus, in addition to the legislature expressing the general will, the judiciary testing it by its political philosophy of the constitution, and the executive enforcing it, we have the administrative branch of government investigating its application to existing conditions in the light of existing science and practice, for the information of all branches of government.

The several states and the federal Congress have recently sought in various fields to elevate this work of investigation to the high position in our frame of government that the courts had assigned to it in the procedure of government. The legislatures had previously from time to time broken up the executive department by creating separate departments to execute specific commands of the legislature.

Usually a single officer was placed at the head of each of these departments, until a great variety of minor executives had arisen, such as the health officer, the factory inspector, the railroad commissioner, and so on.

At the same time the legislature attempted to enumerate in detail the things that each officer should do and each citizen obey. Two difficulties appeared. The courts often declared their elaborate laws unconstitutional, as being unreasonable, and the executives were restrained from dealing with any specific evil that the legislature had failed to enumerate. These difficulties first appeared in the health department, and the legislatures proceeded to change the character of that department by creating a board of physicians, with power to issue orders based on their expert knowledge, and having the force of law, though not enumerated in the law. Next, in the regulation of railroads, instead of the detailed schedules of rates that characterized the early granger laws, the legislatures advanced to the position which culminated in the railroad and public utility laws of Wisconsin, — of merely declaring (what the courts had already declared) that rates and services should be "reasonable," but creating a commission with powers of investigation equal to those of the courts, to discover and announce in each case as it arose what was the reasonable rate or service. Where the investigations of the courts are limited by the technical rules of testimony, the commission can investigate, on its own initiative and in its own way, all the circumstances that it considers relevant. In fact, the commission is made a kind of standing referee of the court, directed by the legislature to report all of the facts that go to determine what is reasonable. Instead of a referee appointed by the court, usually a lawyer with the lawyer's limitations as to the relative value of different facts, the commission is a body of men compelled by their duties to give weight to social and economic facts that otherwise do not get before the court.

Extension of this Principle

Wisconsin now has ventured to adopt this same principle in matters of labor legislation. The occasion grew out of the adoption of a workmen's compensation law, wherein it was deemed necessary to create a state Industrial Accident Board with power to decide all disputed claims for compensation. These claims, in the Wisconsin law, are not specific amounts for enumerated injuries, but are a certain proportion of the loss in wages. The accident board was made the investigating body to ascertain the actual loss in each case where appeal was made, and to make an award on that basis.

At the same time it was realized that compensation should not be merely a new kind of employer's liability, but should be an additional

means of preventing accidents. Consequently, the legislature proceeded to abolish the old bureau of factory inspection, as well as the industrial accident board, which it had just created, and to merge the two into a new administrative and investigating board, to be known as the Industrial Commission. Instead of the long list of dangerous points, such as set screws, belts, fire escapes, dust, etc., which successive legislatures had accumulated during the past thirty years, the new law expresses the general will in the most general way, as the duty of the employer to safeguard the life, health, safety and welfare of employees and frequenters, and the duty of employees to coöperate with their employers.

The law applies as broadly as possible, not to enumerated factories, shops, etc., but to all "places of employment," except agricultural and domestic employments not using mechanical power. In effect, all physical property used to furnish employment to labor is declared to be "affected by a public use," and must be so managed as to promote the public welfare in the persons of those who come within its zone of danger.

The definition of safety is not that of the "ordinary" safety of the common law, but "such freedom from danger to the life, health or safety of employees or frequenters, as the nature of the employment will reasonably permit." The definition of welfare is "comfort, decency and moral well being."

Field of the Commission

Here, then, is the field of investigation assigned to the commission. It must call to its aid scientific experts in engineering and hygiene. It must ascertain where danger lies and where life, health, safety and welfare are menaced. It must discover the devices, processes and management that will avoid these dangers, and must ascertain whether they are practicable. This is the constructive investigation that conforms to reasonableness. Once ascertained and published as an "order" of the commission, the conclusions of its investigations have the force of law, the will of the legislature is executed, the philosophy of the court is observed.

As a matter of economy to the state and convenience to employers, as well as recognition of the wide scope of administrative investigation, all of the departments dealing with employees and employment were consolidated under the same commission. These include the state employment offices, the board of arbitration, child labor, street trades, truancy, women's hours of labor, apprenticeship, etc. In the matter of employment the commission is authorized to use all of its power to eliminate unemployment, by the establishment of free offices, supervision of private agencies, coöperation with agencies for voca-

tional and industrial education, etc. In the matter of arbitration it is limited to voluntary conciliation, with powers of compulsory investigation. The legislature did not go so far as to authorize the commission to investigate and determine reasonable hours of labor for women and children, apart from the rigid limits laid down in the law, so that the procedure described in this article applies mainly to life, health, safety, welfare and compensation, with limited application to unemployment, conciliation and street trades.

In the matter of organization, such a combination of duties as deliberation, investigation, hearings, findings of fact, and execution of laws, suggests a board or commission of more than one member, acting jointly, instead of the single head of an executive department. Although each matter is determined jointly, yet each requires to be handled from the three standpoints of legality, investigation and execution. The members cannot be experts in all the technical fields of engineering, hygiene, sanitation and so on, but they certainly must be capable of conducting investigations and determining their scope and the legality of their action, as well as organizing and handling a field force of inspectors and deputies. The industrial commission law leaves to the governor and senate a wide range of selection, in that the specific qualifications of commissioners are not prescribed, but the selections actually made at the inauguration of the present commission have been made with this threefold division of law, investigation and execution in mind.

Decisive Factors in Administration

It goes without saying that the selection of commissioners and the selection of subordinates are the two decisive factors that determine the success or failure of administration. Wisconsin has had for seven years a Civil Service Commission, and nearly all of the employees of the Industrial Commission were placed under the provisions of the civil service law. This has worked to advantage, although the industrial commission law has required a reversal of the original theory of civil service examinations. Instead of classified positions and salaries fixed by the legislature, the Industrial Commission fixes the compensation of its employees, makes its own classification and transfers employees from one class to another. The legislature creates but two positions, that of "deputies" and that of clerks. The intention is to substitute for the competition of candidates for a job fixed by the legislature, the opposite process of competing against other employers for the services of employees fitted for positions which the commission creates. The civil service law is indispensable, in that it offers a permanent tenure similar to that of private employment. It obstructs, if conducted in such a way that those who are doing the best work

for private employers are unwilling to become candidates in a formal examination for a public office. The Civil Service Commission of Wisconsin adapts its examinations to these conditions, so that through coöperation of the two commissions, the deputies of the Industrial Commission are coming to have the full confidence of employers and employees as practical men.

This, it will be seen, is essential in the conduct of investigations and the administration of orders that shall comply with the doctrine of reasonableness. When the commission began its work of selecting its staff it had entertained the idea that it should place at the head of its safety and sanitation work engineering and medical experts. But after interviewing a number of these experts, it was discovered that they considered their problem to be that of drawing up ideal or standard specifications, which the commission should then go out with a "big stick" and compel employers to adopt.

For two reasons, this was decided to be impossible. A monarchical country, like Germany, with its executive independent of political changes, might call in its experts and be governed by them, but a democratic country would not consent to be ruled by those whose ideal standards might be removed from the everyday conditions of business. This decision of the commission also conforms to the doctrine of reasonableness, which requires practicability adapted to existing conditions. It was found that most of the successful work in safety and sanitation during the past ten years had not been in charge of technical engineers, but had been in charge of shopmen or even claim agents of the corporation; and their success had come about, not mainly through their knowledge as mechanical experts, but through their ability to get the services of engineers and medical men when needed, and especially their ability to get the coöperation of superintendents, foremen and workmen in a united effort to stop accidents and preserve health. In other words, they were experts in arousing the spirit of "safety first" and in organizing the shop so as to keep that spirit on top. For, scarcely a third of the accidents can be prevented merely by mechanical safeguards — at least two-thirds must be prevented by attention, instruction and discipline.

The Technical Expert

It is also this spirit of safety among the shopmen that brings out the most effective safeguards — effective in the sense of full protection without interfering with output. The engineer can devise safeguards — he needs the shopman to safeguard the output. The "safety expert" is the one who can bring these two elements together and thus work out the practical rules for the commission to adopt. He guides the investigators who determine what is "reasonable" both in the

shop and in court. It is for this reason that the Wisconsin Commission has not been able to follow the remarkable and extensive safeguards devised and enforced in Germany. They seem to lack that element of practicability, which the shopman, as distinguished from the technical expert, insists upon.

But in the arrangement finally decided upon, the scientist, the engineer, the physician, the sanitarian, who are the technical experts, are called in and utilized, just as they are in private employment, when their services are needed and when the practical men have problems beyond their technical knowledge. If, however, the scientists dominated the investigations, their results, however brilliant and conclusive, might not be reasonable. Their investigations are indispensable and fundamental, and must be taken into account, and should be liberally provided for. But, unless they lead to practicability, which only can be supplied by the practical man, they run the risk of unconstitutionality. It is for this reason that the representative of the Wisconsin Commission, at the meeting of the section on hygiene of occupations of the recent International Congress on Hygiene and Demography, resisted the proposed resolution of turning over all investigations of industrial hygiene to medical men. A similar resolution had been adopted, naturally enough, at a previous session held in Europe. The American delegates were willing to accept the substitute that investigations in physiology and pathology should be intrusted to medical men, but this substitute was not approved by the permanent commission. Constructive investigation differs from scientific investigation in that it must be guided towards practical ends under existing conditions. The distinction is vital in America, if not in Europe, for that which is scientific may be unconstitutional, because not reasonably practical.

The Use of Advisors

But the selection of a proper staff is not enough to insure practicability. The Wisconsin law authorizes the commission to appoint "advisors" without compensation, to assist the commission in any of its duties. Acting on this authority the commission invited the Wisconsin Manufacturers' Association and the Merchants' and Manufacturers' Association of Milwaukee as well as other associations of special trades, such as the master bakers, the woodworkers, etc., to name representatives; also the State Federation of Labor, the employers' liability insurance companies and the Mutual Employers' Liability Association organized in Wisconsin after the German model under the compensation law; and in addition the commission invited certain corporations which had done the best safety work in the state to permit their safety experts to meet with the committees. The

commission also secured the assistance of physicians on special subjects, of the chief sanitary officers of the cities of Milwaukee and Chicago, of the State Board of Health and the State Hygienic Laboratory, and representatives of the Consumers' League and the State Federation of Women's Clubs. These various representatives were grouped into a main Committee on Safety and Sanitation, with subcommittees on boilers, elevators, bakeries, sanitation, and so on, and deputies of the commission were assigned to work with them. In this way the commission has had the assistance of scientific experts, of representatives of the interests affected by the orders to be issued, representatives of the public as consumers, representatives of overlapping agencies such as insurance companies and boards of health, and its own experts.

This has brought to the commission the assistance of some of the leading men of the state in their several lines of work. These men have given an astonishing amount of time, at their own expense, which, if paid for at commercial rates, would have required an expenditure far beyond the appropriation which the legislature allowed to the commission. Such men have looked upon their work not merely as a public service, but mainly as a vital matter in the future conduct of manufacturing in the state. The following partial list of these advisory committees indicates the wide range of representative expert and practical men to whom the commission and the state are indebted for this fundamental part of its work:

Committee on Safety and Sanitation: representing Wisconsin State Federation of Labor: Joseph Gressler, machinist, Milwaukee; George Krogstad, pattern maker, Milwaukee.

Representing Milwaukee Merchants & Manufacturers' Association: Charles P. Bossert, Pfister & Vogel Leather Company; Edward J. Kearney, Kearney & Trecker Company (machinery), chairman of committee.

Representing Milwaukee Health Department: Joseph Derfus, chief sanitary inspector.

Representing Wisconsin Manufacturers' Association: Thomas McNeill, Sheboygan Chair Company, Sheboygan; H. W. Bolens, Gilson Manufacturing Company (engines), Port Washington.

Representing Employers' Mutual Liability Company, Wausau: W. C. Landon (lumber), Wausau.

Representing Industrial Commission of Wisconsin: John W. Mapel, Pfister & Vogel Leather Company; Fred W. McKee, Fairbanks-Morse Company (engines), Beloit; Ira L. Lockney, deputy to the Industrial Commission; C. W. Price, assistant to the Industrial Commission and secretary of the committee.

Sub-committee on Elevators: C. F. Ringer, inspector of buildings, City of Milwaukee; Otto Fischer, inspector of elevators, City of Milwaukee; P. Jermain, Otis Elevator Company: F. A. Barker, inspector of safety, Ætna Life Insurance Company; G. N. Chapman, inspector of safety,

Travelers' Insurance Company; John Humphrey, deputy to Industrial Commission; C. W. Price, assistant to Industrial Commission.

Sub-committee on Boilers: Theodore Vilter, superintendent Vilter Manufacturing Company (boilers); W. D. Johnson, secretary, Milwaukee Boiler Company; H. F. Bowie, boiler inspector, Hartford Steam Boiler Insurance & Inspection Company; J. Humphrey, deputy to Industrial Commission; R. Kunz, chief examiner and inspector of stationary engines, Board of Examiners of Milwaukee.

Sub-committee on Electricity: Walter Nield, chief electrician Illinois Steel Company, Milwaukee; Charles Dietz, chief electrician, Commonwealth Power Company, Milwaukee; Thomas E. Barnum, chief electrician of a company making controlling apparatus, and chairman of the Electric Engineers' Society of Milwaukee; P. A. Schroeder and W. S. Gute, State Federation of Labor.

Sub-committee on Sanitation: Fred Swartz, Pfister & Vogel Leather Company, Milwaukee; H. W. Page, Sturtevant Company; A. W. Ruttan, Metal Polishers' Union, Milwaukee; C. B. Ball, chief sanitary inspector, Board of Health, Chicago.

Committee on Safety Exhibit: Walter Goll, factory manager, Fort Wayne Electric Works, Madison; Hobart S. Johnson, vice president, Gisholt Machine Company, Madison; Frank C. Niebuhr, Carpenters' Union, Madison.

Committee on Bakeries: Frank Schiffer, Association of Master Bakers, Milwaukee; August Schmitt, Association of Master Bakers, Milwaukee; M. H. Carpenter, Wisconsin Association of Master Bakers, Milwaukee; R. Colvin, Wisconsin Wholesale Bakers' Association, Janesville; C. B. Ball, chief sanitary inspector, Board of Health, Chicago; C. J. Kremer, bakery inspector, Industrial Commission.

These committees proceed to make their investigations, to draw up tentative rules and to submit them to the commission for public hearings. After the hearings, the rules are referred back to the committee for further investigation, and finally, as rapidly as completed, are issued by the commission as "General Orders" applying to the entire state, and are published in the official paper and in the bulletins of the commission.

The commission has also been greatly aided by the federal Bureau of Labor, which made investigations of laundries and pea canning establishments in the state, availing itself of contemporaneous investigations made by the commission. The bureau's investigation, of course, had reference to the adoption of rules that would be applicable to all the states. These investigations suggest an invaluable arrangement that might be made by which the federal bureau could furnish scientific experts and investigators whose work would be at the disposal of the states. The latter are not always in position to carry on systematically this line of investigation, and if they should do so the great object of uniformity throughout all the states would not be sufficiently cared for. Besides, the federal bureau, not being en-

cumbered with administrative duties, is in a position to carry on scientific investigations, which would be all the more valuable when directed towards the constructive needs of the state departments.

Educating the Bad Employers

The fact that both the law and the commission contemplated the coöperation of employers and employees, has resulted in a code of rules which are not only reasonable in law but reasonable in the minds of employers. It is an application of the well-recognized principle of political economy that the competition of the worst employers tends to drag down the best employers to their level. In this case, however, the corollary law is brought into play. The most progressive employers in the line of safety and sanitation draw up the law, and the business of the commission is to go out and bring the backward ones up to their level. As a matter of fact, it has been found that the employers on the committees have been more exacting in their search for the highest practicable standards than the representatives of labor on the committees. As a consequence, the work of the commission in bringing other employers up to their level has been almost entirely transformed from what they consider an irritating and arbitrary interference in their business, into a work of instruction and education. The employer who resists the adoption of safeguards and processes approved by his fellow employers is not only unreasonable in the opinion of his peers, but *prima facie* unreasonable in court.

The work of education which the commission has naturally resorted to has been that of bringing to the attention of employers not only the rules but the devices and methods which will comply with them. A safety exhibit, or rather a triplicate exhibit, after being passed upon by an advisory committee, has been inaugurated. It consists of photographs and blue prints, and is transported with the inspectors on their rounds over the state. This exhibit is installed in a public place during the period of local inspection, and one of the exhibits is kept permanently in the rooms of the Merchants' and Manufacturers' Association of Milwaukee. It is found that these photographic exhibits have a certain advantage over the "museums of safety" of European countries, where the actual machines with safeguards are installed permanently in a building, because, not only is the expense reduced, but the exhibit can be carried almost to the doors of the employer and his superintendents, foremen and mechanics. The commissioners and their deputies usually arrange for an evening of lectures in connection with the exhibit, when the various laws are explained and questions answered. These are attended by representatives of practically all the employing establishments in the town and surrounding country. The exhibit itself is built up and improved

by photographs which the deputies take on their rounds, and the main object is to arouse the "safety spirit" and to show how practicable it is for establishments to devise and install their own safeguards without depending too much on patented articles.

The way in which this conversion of an executive department into a department of investigation and education appeals to the employers of the state, may be judged by the following extract from a speech recently made by George W. Bruce, secretary of the Merchants' and Manufacturers' Association of Milwaukee, before the National Congress on Safety and Sanitation, October 1, 1912:

> The success which has been attained in Wisconsin on the subject of safety and sanitation is due not only to a good law, but also to a wise administration of the same. The authorities approached their difficult task in a spirit of absolute fairness. But, they did more. They drew the manufacturers into their confidence and secured their loyal coöperation in the administration of the law.
>
> They assumed that the manufacturer is a law-abiding citizen and that if he were asked to give meaning and force to the new law he would respond. The attitude which the Industrial Commission maintained through the introductory period of their exacting and herculean task was bound to be followed by success.
>
> But, the commission practiced wisdom also in bringing to its work experts of character and efficiency. Favoritism was cast to the winds. The men best fitted for the task were selected.
>
> Men like Mr. Crownhart and Mr. Beck of the commission realized that an antagonistic or arbitrary spirit would be resented and cause difficulty. They were tactful and discreet, but made it absolutely plain that both the spirit and the letter of the law must be carried out. Would the manufacturer lend his coöperation? And he did.
>
> Men like Price, capable and judicious, formerly at the head of similar work with the International Harvester Company, were chosen to perform the delicate and difficult task of working out, together with the manufacturer, a reasonable and workable program.
>
> They not only succeeded in creating a coöperative attitude on the part of the manufacturer, but they also secured much valuable time and effort at the hands of some of the most important manufacturers in the state.
>
> Thus, I am safe in saying the work of industrial safety and sanitation in Wisconsin which is progressing in a most successful manner, has the good will and support of the manufacturing interests of the state.

Legal Effect of Commission's Orders

The legal effect of the commission's orders turns upon the constitutional position which belongs to constructive investigation. These orders are not a delegation of legislative power, but an investigation and publication of facts. The courts have long held that the legislature may determine that a given law shall go into effect at a future

date on the occurrence of a specified event. The law in this case is the obligation placed on employers to protect the life, health, safety and welfare of employees. The future occurrence when it takes effect is thirty days after official publication of the findings of the commission.

Neither are the commission's investigations and findings a usurpation of the authority of the courts. This is cared for by the procedure. Formerly a factory inspector issued orders on the spot, and prosecuted for disobedience in the trial courts. The court was at liberty to raise the question whether the order was necessary, or whether too expensive or confiscatory, or whether the manufacturer was not as competent as the inspector to determine the effectiveness of his safeguards. Now these questions of reasonableness cannot be raised in the trial court. Only the fact of compliance or non-compliance can be raised. If the question of reasonableness is raised it must come up in an action against the commission in the county court at the state capital, and thence in the Supreme Court of the state. Furthermore, if the petitioner introduces evidence which was not before the commission, the case must be remanded back to the commission with the new evidence, and the commission must be given opportunity to change its order if it so determines. The case can then go back to the court.

In this way, the commission's complete power of investigation is protected, its orders are made *prima facie* reasonable, and the burden is on the petitioner to break them down in court. The court retains all of its powers of investigation and philosophy, as far as it chooses to use them. But the commission's investigations are not limited by the strict rules of evidence prevailing in court. It can consider all of the facts without objection. It can initiate investigations. It is, in fact, a body of social and economic investigators, rather than a tribunal restricted to technical rules of evidence. The Supreme Court of the state has sustained the commission, so far as it affects procedure under the compensation law. The procedure respecting safety and health is similar, but has not as yet been passed upon, although in the case of the Railroad Commission, with similar procedure respecting reasonable rates and services, its findings of fact have been held to be conclusive.

Commission an Administrative Court

The Industrial Commission is also made an appellate administrative court in all cases of local boards of health, common councils or other local bodies that issue orders on places of employment. Their authority to issue such orders has not been infringed upon, but they are protected against court injunctions by the requirement that appeal shall first be made to the Industrial Commission. The latter, on investigation, may affirm the local order, or may substitute a "reason-

able one," and the petitioner must then proceed against the commission as above explained, in place of the local authority. The commission has endeavored to bring about agreement with local boards by securing their representatives on the advisory committees and it is expected in this way that state and local inspectors will not issue conflicting orders on employers.

Advisory committees of employers and employees have also been enlisted in the administration of the free employment offices. The Milwaukee committee consists of representatives of the manufacturers' association and representatives of the trade-unions. They assist the Civil Service Commission in the examination of applicants, and have thus overcome the two greatest obstacles in the way of successful operation of such offices by the state — politics and trade-unions. The superintendents and assistants of these offices are not only removed from political influence but are removed from all suspicion of using their position for or against employer or employee in the case of strikes. The growth of business transacted by the Milwaukee office has been phenomenal during the first year of this method of management, and its transformation from a mere charitable agency to find work for unemployables, into a labor exchange bringing employer and employee together, is evidenced by the following statement made by the chairman of the committee and representative of the employers, A. T. VanScoy of the International Harvester Company:

> I was not particularly enthusiastic at first over this movement, but have changed my views in regard to it, and believe it has been of great benefit to the working people in that it has, through what might be called a clearing house, enabled them to obtain employment quickly and without expense, and it has also been equally valuable to the employer, in that it has enabled him through this employment bureau or clearing house to obtain, usually without effort on his part other than telephoning his wants, the help desired. Its work is broadening all the time, employers learning that an effort is made, and generally successfully, to furnish them with the kind of help desired, instead of sending men promiscuously, and employees learning that the quickest and most expeditious way for them to obtain employment is through the bureau.

The opinion of the trade-unions is represented by the following statement of the representative of the Federated Trades Council:

> Without blare of trumpets the free state employment office in Milwaukee is doing one of the best works at present going on in the city. It is supplying a head center where men needing work may go and where work seeking men may also apply. Its offices on Fourth Street, just north of Grand Avenue, always present a busy scene. . . . While the work of such offices seems local, the unemployed problem is a state-wide problem and even more, and can best be met and handled as it is now being handled under the Industrial Commission with coöperating offices in the principal

cities of the state. One praiseworthy thing that the free employment office has done must not be overlooked. It has cut down the crowds of hundreds of work-hungry men at the factory gates mornings. This sort of a scramble, often by men almost despairing, with families waiting to learn of the success or failure of the quest, is not only a pathetic sight, but often downright tragedy. The free employment office provides the better way, and the manufacturers themselves have come to realize it. It is certainly more humane for the men, saves them a lot of tramping, and is a great convenience in the securing of workmen. Nay, more, it saves his feelings, for it is found that the rebuffs that he gets at factory gates have a souring effect on a man in spite of himself.

A peculiar use of advisory committees has been undertaken in the administration of the street trades law in Milwaukee. The law is supplementary to the child labor law in that the children concerned are mainly not employees but are merchants, and therefore without employers who can be held liable for violation of the child labor and truancy laws. The newsboys, numbering about 4000, have been organized in the "Newsboys' Republic" for the purpose of enforcing the law. The Republic itself, including certain adults chosen jointly by the boys and the commission, constitutes a lively advisory committee to the commission. The plan is only now in process of installation, after careful investigation had been made of the administration of similar laws, and especially of the similar organization in Boston.

In the administration of the new apprenticeship law, supplementing the industrial education law, the commission is aided by a committee of the Manufacturers' Association.

Service of Advisory Committees

Wherever practicable, the commission has found that these advisory committees are invaluable in the enforcement of laws under its charge. They are being extended wherever it is found that the commission needs the coöperation of the classes affected by the administration of the law or their judgment upon the reasonableness of its orders. It will be seen, too, that this practice meets the political objection against the multiplication of commissions and "government by commissions." The Industrial Commission consolidates what otherwise might be three or four commissions and executives, thus reducing the expense. It does not remove government "from the people" and place it in the hands of "experts," for it necessarily and actually, both in full compliance with the doctrine of reasonableness and in securing full coöperation of the public in understanding and enforcing the laws, brings the government directly into the hands of the people. It is certain that the state must have executives in order to enforce the labor laws, as well as other laws. To object to them is

like urging your son to learn to swim but forbidding him to go near the water. The real question is not how to avoid commissions, but how to organize them, how to do away with overlapping commissions, how to make them efficient and economical, how to keep them near to the actual life of the people, in short, how to make them the branch that fills the gap of constructive investigation in our scheme of government.

It has been suggested by inquirers from other states, and it might be inferred from the emphasis here laid on investigation, that the executive part of the commission's work should be kept separate with a single head, as it has been in the past, in order to center responsibility for the enforcement of laws. In that case a board of experts might be created for the purpose of investigating and drafting the rules, which the independent executive would be required to enforce. For several reasons, this separation of departments would probably be impracticable. The most valuable agents for the kind of investigation required are the inspectors, whose duty it is to enforce the rules. By associating them with the advisory committees, they enter into the spirit of coöperation, they learn the principle of reasonableness, and they acquire the virtue of tact. If they have no knowledge of the reasons for the rules, and therefore no particular interest in bringing about their enforcement through patient instruction of employers and superintendents, their attitude is likely to be that of the typical factory inspector who says to the employer, "Well, I didn't make the law — there it is, and you've got to obey it." Instead of inspiring the "safety spirit" throughout the state, they stir up needless opposition and friction between the factory inspector and the board of experts.

Furthermore, no system of general rules laid down in advance can anticipate all of the special conditions or obstacles in the way of enforcement. The Wisconsin law cares for this by means of "special orders" in addition to "general orders." But these special orders can only be issued on investigation and public hearing, precisely the same as the general orders. The inspector, therefore, instead of insisting upon something impracticable, can join with the employer in asking for a special order before proceeding to prosecution. If the inspector is subject to an independent executive, desirous of making a reputation for the enforcement of law, not only is he tempted to discredit the work of the expert commission, but he is under no obligation to join with the commission in perfecting its orders so as to conform to the rule of reasonableness. The deputies of the Industrial Commission are continually reporting omitted points or impracticable applications, and the execution of the law becomes a continuous investigation and progress towards reasonableness. With separate departments for investigation and execution, the investigations would doubtless fall

into the hands of experts not familiar with the great variety of conditions to be met, and the execution would be that perfunctory and blind enforcement which has already brought discredit on much of the American factory inspection.

Finally, the commissioners themselves cannot divide their work into the separate fields of law, investigation and execution, especially where, as with the Wisconsin commission, such a wide range as fourteen departments are brought together under one head. Each commissioner must take his share in the executive work of different departments, and each must carry on continually the constructive investigation that the law implies. It is only by this means of administration and investigation combined in a single commission that friction and antagonism between overlapping officials can be avoided, coöperation with employers and employees secured, and obedience to the authority of the judiciary observed.

Distinction between Industrial and Railroad Commissions

While the Industrial Commission is modeled after the law creating the Railroad Commission, its field is widely different. The Railroad Commission regulates monopoly — the Industrial Commission regulates competition. It endeavors to enforce "reasonable" competition in so far as dealings with employers are concerned, by raising the level of labor competition. The distinction offers a practicable suggestion for the creation of a commission by the federal government for the regulation of "trusts." Such a commission need not have the power to regulate prices, as the Railroad Commission does, on the theory that monopoly is inevitable, nor to give special privileges to so-called "good" trusts that accept federal incorporation or federal license, and agree to abide by the commission's orders. Rather should a federal commission be a "free trade" commission, controlling all interstate trade so far as necessary, for the purpose of investigating and prohibiting all kinds of "unfair competition." It would take the place which the federal courts now assume, of dissolving and regulating corporations. But instead of committing this power to lawyers it would be committed to a body of men representing the every-day life of all the people, equipped to conduct constructive investigations, to prosecute for violations of the anti-trust laws, to prescribe and enforce rules of reasonable competition and so to raise the level of business competition.

JUDICIAL REASONS FOR ILLEGALITY OF BOYCOTTS

By Harry W. Laidler

(Chapter XII, "Boycotts and the Labor Struggle," John Lane Company, New York. Copyrighted.)

While the primary boycott has secured the sanction of most courts, secondary and compound boycotts have been vigorously condemned by the majority. The legal reasoning is often not well defined, and in many instances, is obscured by legal verbiage which, to the layman, often seems unnecessary and confusing.

Generally boycotting has been considered an outlawed weapon on the ground that it constituted a common law conspiracy. A conspiracy has been defined as a combination of two or more organized to accomplish an illegal end, or a legal end by illegal means.

Some courts have decided that the boycott is reprehensible because the means employed are illegal. The former position has generally been taken toward the secondary boycott; the latter, toward the compound boycott. The judges holding that the object of the boycott is illegal, declare that it proposes to do one of the following things, each of which is illegal:

To injure another in his trade, business or property.
To restrain or block the avenues of trade or commerce.
To induce another to break his contract.

Others admit that the ultimate object of the boycott, that of improving the condition of labor, might be a legal one, but declare that its immediate object is that of injury, and that the law can take cognizance only of this immediate object. Still other judges in this group pronounce the boycott illegal, not merely on the ground of injury, but because such injury is accompanied by malice or is without justifiable cause.

The second general class of judges emphasizes the illegal means employed — threats, coercion, intimidation, violence, extortion, misrepresentation — and proclaims the boycott's illegality because of the employment of one or more of these means. The question of whether a suppression of boycotts interferes with freedom of speech and of the press has brought forward special arguments. Let us analyze more closely the reasoning of the court.

The Law of Combination

Ignoring the charge that boycotting constitutes a nuisance, we find that the early courts were prone to argue that all combinations

formed to injure the business or property of another, to obstruct or interfere with another in the conduct of his lawful trade or employment, to induce another to break his contracts, or to block the avenues of trade and commerce had *an unlawful end in view*, and should therefore be condemned as conspiracies. The judges admitted that each man individually had a right to refuse to deal with another, but contended that *an agreement with others* so to refuse introduced an illegal element. In justifying this contention they argued that a combination of two or more greatly increased the power for evil and often rendered the members of the combination subject to the arbitrary and malicious action of the majority thereof. Judge Harlan thus states the distinction:

It is one thing for a single individual or for several individuals, each acting on his own responsibility and not in coöperation with others, to form the purpose of inflicting actual injury upon the property or rights of others. It is quite a different thing in the eye of the law for many persons to combine or conspire together with the intent not simply of asserting their rights or of accomplishing lawful ends by peaceable methods, but of employing their united energies to injure others or the public. An intent on the part of a single person to injure the rights of others or of the public is not in itself a wrong of which the law will take cognizance unless some injurious act be done in execution of the lawful intent. But *a combination of two or more persons* with such intent, and under circumstances that *give them, when so combined, a power to do an injury they would not possess as individuals* acting singly has always been recognized as in itself wrongful and illegal.[1]

Ex-President Taft, then Judge Taft, argued in a like vein:

A combination may make oppressive or dangerous that which, if proceeding from a single person, would be otherwise, and the very fact of the combination *may show that the object is simply to do harm*, and not to exercise one's own justifiable rights.[2]

Judge Carpenter, the first judge of a court of last resort declaring a boycott in America illegal, contended that separately men were powerless, but combined, formidable.

The supposed surrender of the discretion of each individual to the direction of the combination is thought by Vice Chancellor Green to be the chief evil of combination. He declared:

The whole strength of which (the combination) lies in the fact that each individual has surrendered his own discretion and will to the direction of the accredited representatives of all the organizations. He no longer uses his own judgment, but by entering the combination agrees to be bound by its decree. A member asserts his independence of judgment and action at

[1] Arthur *vs.* Oakes, U. S. Circ. Ct. of Ap., 1894, 63 Fed. 310, 321, 322. Italics are the author's.

[2] Moores *vs.* Bricklayers, Ohio, 1890. Italics are the author's.

risk of all association with fellow members. They will not eat, drink, live or work in his company. Branded by the peculiarly offensive epithets adopted, he must exist ostracised, socially, and industrially, so far as his former associations are concerned.[1]

Malicious and arbitrary actions are more likely to be found in combinations, contends Judge Robb in the Buck's Stove case:

The loss of trade of a single individual ordinarily affects a given dealer very little. Being discriminating, the purchasing public, if left free to exercise its own judgment, will not act arbitrarily or maliciously, but will be controlled by natural considerations. But a powerful combination to boycott immediately deflects the natural course of trade, and ruin follows in its wake because of the unlawful design of the conspirators to coerce or destroy the object of their displeasure. In other words, it is the conspiracy, and not the natural causes, which is responsible for the result. From time immemorial the law has frowned upon combinations formed for the purpose of doing harm.[2]

"A grain of gunpowder is harmless," observed Lord Brampton, in Quinn *vs.* Leathem (1901), an English case, "but a pound may be highly destructive."

In attempting in a somewhat scientific manner to describe the difference between the acts of the combination and of the individual, Mr. Justice Gibson, nearly a century ago, said:

There is between the different parts of the body politic reciprocity of action on each other, which, like the action of antagonistic muscles in the natural body, not only prescribes to each other its appropriate state and condition, but regulates the motion of the whole. The efforts of an individual to disturb this equilibrium can never be perceptible, nor carry the operation of his interest on that or any other individual, beyond the limits of fair competition. But the increase of power of combination means, being in geometrical proportion to the numbers concerned, an association may be able to give an impulse not only oppressive to individuals but mischievous to the public at large; and it is the employment of an instrument so powerful and dangerous that gives criminality to an act which would be perfectly innocent, at least, in a legal view, when done by an individual.[3]

The Boycott and Illegal Ends

Injury to the property or business of another, interference with the lawful conduct of business and the free employment of one's capital and labor power, and undue restraint of trade are among the so-called illegal ends of a combination which have warranted the con-

[1] Barr *vs.* Essex, Conn., 1894, 30 Atl. 881, 889.
[2] A. F. of L. *vs.* Buck's Stove and Range Co., Ct. of Ap., D. of C., 1909, 33 App. Cases, D. of C. 83, 107.
[3] Commonwealth *vs.* Carlisle, Pa., 1821.

demning of boycotts. These ends are condemned by some judges only when malice or coercive measures accompany them.

"If it (the boycott) means, as some high in the confidence of the trade unions assert, absolute ruin to the business of the person boycotted unless he yields," states Judge Carpenter in the first of the boycott cases, "then it is criminal." [1]

"All the authorities hold that a combination to injure or destroy the trade or business of another by threatening to produce injury to the trade, business or occupation of those who have business relations with him is an unlawful conspiracy," is the principle laid down in a recent Missouri case.[2]

Whether or not the business or the good will of one can reasonably be called a property right, and consequently whether the concerted agreement to discontinue such business relations and to induce others so to do may be considered an injury to such right, has been the bone of contention in a number of cases. Judge Wright in the Buck's Stove case contends that it is such a right.[3]

> A business, be it mercantile, manufacturing or other, which has, for a long time, been successfully operated and developed, possesses a greater value than a like business newly launched, although the latter be exactly equivalent in respect to stock, equipment, money and all other physical possessions; the basis of the excess in value of the one over the other is termed the "good will"; it is the advantage which exists in established trade relations with not only habitual customers, but with the trading public generally; the advantage of an established public repute for punctuality in dealing, or superior excellence in goods or product; finally, in last analysis, a good will, when it exists, is one's return for the expenditure of time, money, energy and effort in development; it is a thing of value in the sense that it is a subject of bargain and sale; oftentimes of a value that exceeds that of all physical assets taken together; in that it may possess exchange value, it may be "property"; when it does possess "exchange" value, property it is; and the combination for the purpose of destroying it is for an "unlawful act," whether you call the combination a "labor union" or a "trust."

Judge Gould also took this position and cited numerous cases to prove "that business is property within the meaning of the law." [4]

The law also condemns, as illegal objects, the interference with and restraining of trade or business and of the power to dispose of one's capital and labor power as one wishes. Many judges have pronounced this object illegal if carried out by individuals as well as combinations. In some courts the element of coercion and in others, that of malice, must be present to render the acts illegal.

[1] State *vs.* Glidden, Conn., 1887, 8 Atl. 890, 897.
[2] Lohse Patent Door Co. *vs.* Fuella, Mo., 1909, 114 S.W. 997, 1003.
[3] Buck's Stove and Range Co. *vs.* A. F. of L., Sup. Ct., D. of C., 1908.
[4] Ibid. 1907, 70 Al. L. J. 8, 10, 11.

"No person or combination of persons can legally, by direct or indirect means, *obstruct or interfere with another in the conduct of his lawful business*," declares an Illinois court.[1]

Judge Robb in the Buck's Stove case quotes with approval the views of Chief Justice Fuller regarding the illegality of a *combination in restraint of trade.*

> The combination charged falls within the class of restraints of trade aimed at, compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes; and there is no doubt (to quote from the well-known work of Chief Justice Earle on Trade Unions) at common law every person has individually, and the public has collectively, a right to require that the course of trade should be kept free from unreasonable obstruction.

The right to employ one's talents without interference is jeopardized by the boycott, according to some decisions. Thus a Vermont Court argues:

> The principle upon which the cases, English and American, proceed is that every man has the right to employ his talents, industry and capital as he pleases, free from dictation of others, and if two or more persons combine to coerce his choice in this behalf it is a criminal conspiracy.[1]

"Every person," says the Michigan Court (Beck *vs.* Railway), "has a right under the law as between himself and his fellow subjects to dispose of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others."

Of the same tenor are the decisions of the courts in Connecticut (State *vs.* Glidden), Illinois (London Guarantee Co. *vs.* Horn), Indiana (Jackson *vs.* Stanfield), New Jersey (State *vs.* Donaldson), Maryland (Lucke *vs.* Clothing Cutters), Massachusetts (Carew *vs.* Rutherford), and others.

Inasmuch as the strike had been declared legal, even though it resulted in injury to the business or property of another, and interfered with the free course of commerce, the many judges soon found that it would be necessary to modify their declarations of illegality in respect to combinations to injure the property of another. They, therefore, sought to distinguish between *combinations whose immediate purpose was to injure the business of another, placing boycotts in this category, and those whose immediate object was that of bettering the conditions of labor*, although the incidental result of the latter might be

[1] State *vs.* Stewart, Vt., 1887, 9 Atl. 559, 568.

injury. Strikes were placed in this class. Boycotts and other combinations whose immediate intent was said to be that of injury were condemned in spite of the fact that their ultimate purpose or motive was to benefit labor, while strikes were pronounced legal.

Judge Gould of the Supreme Court, District of Columbia, thus refers to this distinction in the Buck's Stove case (1907):

> Defendants claim the motive of wishing to benefit their condition affords such legal justification; but this motive is too remote compared with their immediate motive, which is to show that punishment and disaster necessarily follow a defiance of their claims. As quoted with approval by the Supreme Court of Pennsylvania, in Purvis *vs.* Brotherhood: "True, the defendants contend and testify that their purpose was to benefit their own members. This, doubtless, in a sense, is true, but the benefits sought were the remote purpose, which was to be secured through the more immediate purpose of coercing the plaintiffs into complying with their demands, or otherwise injuring them in their business, and *the court cannot, in this proceeding, look beyond the immediate purpose to the remote results.*" Such is the doctrine laid down in Eddy on Combinations, and quoted with approval in the case of Erdman *vs.* Mitchell, 56 Atl. 327, as follows: "The benefit of the members of the combination is so remote, as compared to the direct and immediate injury inflicted upon the non-union workmen (in this case non-union mill owners) that the law does not look beyond the immediate loss and damage to the innocent parties to the remote benefit that might result to the union.[1]

An Illinois Court follows the same line of reasoning:

> The law allows laborers to combine for the purpose of obtaining lawful benefits to themselves, but it gives no sanction to combinations either of employers or employed which have for their immediate purpose the injury of another.[2]

The same argument was suggested in State *vs.* Glidden and in numerous other cases. In making this distinction between the immediate and the ultimate object, some have named the immediate object the "intent" and the remote, the "motive." Mr. Jeremiah Smith thus declares:

> Intent is used to denote the immediate object aimed at by the doer of the act, the immediate result desired by the actor. Motive is used, not to signify the object of the result immediately aimed at, but the cause for entertaining that desire, the feeling that makes the actor desire to attain that result. . . . The defendant frequently intends immediate harm to the plaintiff, but generally as a means of attaining the end of benefiting himself. In 99 labor cases out of 100, the defendant's motive (or, in other words, his ultimate intent) is to promote his own advantage. A man may

[1] Buck's Stove, etc., *vs.* A. F. of L., 1907.
[2] Barnes *vs.* Typographical Union, Ill., 1908, 83 N.E. 940, 945.

kill a king in order to benefit a people. The intention is to kill the king, the motive, to benefit. A defendant denies intent to harm plaintiff when he really means only to deny a bad motive for the intent. Defendant means that he did not do harm as an end in itself, but merely as a means to some further end legitimately desired.[1]

The Boycott and the Doctrine of Malice

Later many of the courts contended that no combination employing lawful means could be considered illegal, unless it contained the element of malice, *or unless it was formed without justifiable cause.* After an examination of the facts of the case, the judges generally conclude that malice could be found in connection with the use of the boycott, or that there was no legal justification for its employment.

The essential elements of malice in most instances are not clearly set forth. In fact the judges are in hopeless disagreement as to what constitutes malice. Some argue that there must be *a sole intent to injure;* others that there *must be no pecuniary advantage to the boycotters.* Some are of the opinion that malice is shown *if the benefit derived is at the expense of the boycotted,* while *intent to wrong without justifiable cause* is the essential factor with others. Still another group argue *that no legal malice is possible without an unlawful act.* Following are some of the explanations:

If the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act.[2] (Bowen *vs.* Hall, an English case), quoted with approval by Barnes *vs.* Typog. Union (Ill., 1908).

"Practically it is better to remember the old definition that malice in its legal sense *means an unlawful act, done intentionally* without just cause or excuse."[3]

When we speak in this connection of an act done with a malicious motive it does not necessarily imply that the defendants were actuated in their proceedings by spite or malice against the complainant, Mr. Barr, in the sense that their motive was to injure him personally, but *that they desired to injure him in his business in order to force him not to do what he had a perfect right to do.*[4]

It is said that in each case (where malice is an element) the *basis of the action is the doing of an act which the law already regards as illegal,* but that the doer of the act is protected from its usual consequence in the event that he was actuated by an honest desire to perform a public or private duty. Allen *vs.* Flood (English, 1898).

[1] *Harvard Law Review,* Vol. 20, pp. 451, 453.
[2] 83 N.E. 940, 944.
[3] Foster *vs.* Retail Clerk's Association, N.Y., 78 N.Y. Supp. 865, 866, 1902, and Joyce *vs.* Gt. No. R'way, Minn., 1907. Italics are the author's.
[4] Barr *vs.* Essex, N.J., 1894, 30 Atl. 881, 886. Italics are the author's.

Boycotts, time without number, have been condemned on the ground that in their operation that vague, indefinable something known as malice was a prominent feature. Definitions that really define, however, are, for the most part, absent.

Most recently, judges in a number of states, concluding that the word "malice" introduced too uncertain a factor on which to base their decision, approved "justifiable cause" as the true criterion. What constitutes justifiable cause? This expression is used by some judges as indicative of the lack of maliciousness. Others, however, take a broader view. Generally it resolves itself into the question as to whether the possible gain to the promoter will reasonably compensate for the possible injury inflicted.

"In many cases," asserts Judge Hammond, "the lawfulness of an act which causes damage to another may depend upon whether an act is for justifiable cause; and this justification may be found sometimes in *the circumstances under which it is done*, irrespective of the motive, *sometimes in the motive alone*, and *sometimes in the circumstances and motive combined.*"

Judge Hammond decided in this case, which involved the right to threaten a strike should certain workers refuse to join the union, that justifiable cause did not exist, and that the necessity that the plaintiff join the union was not so great, nor was "the relation to the rights of the defendants as compared with the rights of the plaintiff to be free from molestation such as to bring the acts of the defendants under the shelter of the principle of trade competition." Mr. E. W. Huffcut clearly explains the position of compensating advantage held by some:

> There is presumptively a privilege to employ any lawful means in social or industrial relations . . . and the general and common privilege to employ these can be overcome only by showing that they are employed for an *unjustifiable end*, that is, an *end which intentionally inflicts a damage upon a particular individual without a corresponding and compensating advantage to the one who inflicts it*, or to those whom he represents. . . . The question of justification resolves itself into this — *do the desire and expectancy of accomplishing this particular end warrant the interference with the contracts or business of one who stands in the way of the accomplishment?* If that end be only the gratification of feeling, whether of ill will or good will, it is not of such substantial character which justifies inflicting pecuniary loss upon another. To gratify a feeling of malice toward the plaintiff will hardly be thought a justification for inducing third parties not to deal with him. To gratify a feeling of sympathy or good will toward X will hardly justify inducing third persons not to deal with the plaintiff unless there be some special relation between X and the defendant which warrants the defendant in acting for X. Even the remote advantage the defendant might derive as one of a large class, from the success of X in the competitive struggle with the plaintiff, would not be sufficient.[1]

[1] *Harvard Law Review*, Vol. 18, p. 439.

The elements which are essential to justify injury are clearly stated by Mr. Jeremiah Smith: [1]

1. There must be a conflict of interest between plaintiff and defendant as to the subject matter in regard to which the damage is done, or at least *there must be a legitimate interest of defendant* to be directly served as to that subject matter.

2. The damaging *act must be reasonably calculated to advance substantially the interests of the defendants.*

3. *The damage resulting* to the plaintiff or to the general public (including the employer) *must not be excessive in proportion to the benefit to the defendant.* In other words, there must be a reasonable proportion between the benefit to the defendant and the damage to the plaintiff or to the public.

4. Even where the propositions one, two and three are made out, the justification must be confined to those cases where defendant uses only his own conduct as a lever, and therewith operates directly upon the possible employer or customer of the plaintiff. Defendant can never justify his right to work or not to work (or any other right) as a temporal inducement to influence an outsider or fourth person, to exert pressure upon the possible employer or customer of the plaintiff.

A number of the decisions in the Massachusetts cases are based on this doctrine.

"The crucial question is whether there is justifiable cause for the act," runs the decision in Martell *vs.* White (Mass., 1904). "If the injury be inflicted without justifiable cause or excuse, then it is actionable."

Justice Holmes contended in Vegelahn *vs.* Guntner (Mass., 1896) that, "unless defendant prove some ground of excuse or justification," a combination to injure the business of another would be illegal. That such justification is a sufficient legal excuse is the belief expressed in the Parkinson case (Cal., 1908).

While the consideration of justifiable cause is a great advance over the early reasonings in boycott cases, some jurists have advanced still further, and have expressly based their decisions on what they consider to be the *social advantage.* Justice Holmes, for instance, contends that "the true grounds of decisions *are considerations of policy and of social advantage,* and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes." The part which public policy should play in the determination of legal questions is stated by Judge Andrews:

> It is a truism that there are many acts directly injuring the property of another, yet which do not give rise to a cause of action. The phrase, *damnum absque injuria,* was invented to meet such cases. *A* may make

[1] Ibid. Vol. 20, p. 361.

such erections upon his land as he chooses, notwithstanding the consequent injury to his neighbor. *B* may by fierce and continuous competition ruin a business rival. *C* may advise his friend to patronize one physician rather than another. Of course all these matters have their limits. If *A* goes too far he may create a nuisance. If *B's* competition is too strenuous, he may be guilty of fraud. If *C* says too much, he may become liable for slander. In the last analysis this freedom to commit injury and the bounds imposed upon it *are regulated by what has been thought to be public policy*. The injury itself is never good, but to suffer it may entail less injury than to attempt to check it by legal means.[1]

Boycotts and Illegal Means

Still other courts prefer to look for the element of illegality in the *means employed by the boycotters*. If, to effect their purpose of injuring others, the combination used coercion, intimidation, force, violence, misrepresentation or fraud, or induced others to break their contracts, it is looked upon as illegal. Many a judicial controversy has been fought over the question as to what really constitutes coercive measures, threats, and other illegal means. Some judges have contended that any threat, direct or indirect, of loss of business such party to cease business relations with another, is coercive and intimidating in its nature and therefore illegal, if it forces a man against his will to grant the conditions demanded. Others have averred that the same reasoning which is applied to ordinary business dealings should also obtain in the discussion of labor combinations; and that, in the competitive struggle of the business world, parties are daily compelled to grant financial concessions through threats of which it is impossible for the law to take cognizance.

To declare a boycott illegal because a threat is made to boycott another if he continues to trade with the boycotted firm is, furthermore, vicious reasoning in a circle. Some judges, therefore, argue that unless the means used are such as will be considered illegal if used by one individual, such as the application of physical violence, the use of fraud, the inducing of another to break his contract, the combination should be permitted.

If we analyze the attitude of the judges as to what constitutes coercive measures, we will find that, generally speaking, proof of physical violence is not necessary.

"The clear weight of authority undoubtedly is that a man may be intimidated into doing or refraining from doing by fear of loss of business, property or reputation, as well as by dread of loss of life, or injury to health or limb, and that *the extent of this fear need not be abject, but only such as to overcome his judgment, or induce him to do*

[1] Foster *vs.* Retail Clerks' etc., N.Y., 1902, 78 N.Y. Supp. 860, 864. Italics are the author's.

or not to do that which otherwise he would have done or left undone," declared Vice Chancellor Green.[1]

The Massachusetts,[2] Pennsylvania, and other courts take a similar view. Actual threats are not necessary,[3] in the view of some. Judge Andrews declares on this:

> It should be remembered . . . that to constitute intimidation it is not necessary that there should be any direct threat, still less any actual act of violence. *It is enough that the mere attitude assumed by the defendants is intimidating.* And this may be shown by all the circumstances in the case, by the methods of the defendants, their circulars, their numbers, their devices.[4]

That the imposition of fines on members of the labor organizations who refuse to boycott third parties constitutes coercion is held by some of the courts in Vermont,[5] Indiana,[6] and elsewhere.

Not only the actual coercive or intimidating measures, but threats to adopt such measures, are considered as illegal means by the majority of the judges, and "threats" also cover a multitude of deeds. The Cyclopædia of Law and Procedure concludes, citing Boutwell case:

> It is clear that every one has a right to withdraw patronage when he pleases, but equally clear that *he has no right to employ threats* or intimidation to divert the patronage of another.[7]

A Michigan Court thus summarizes:

> The boycott condemned by law is not alone that accompanied by violence and threats of violence, *but that where the means used are threatening in their nature,* and intended and naturally tend to overcome by fear of loss of property the will of others, and compel them to do things they could not otherwise do.[8]

The use of the word "boycott" is in itself a threat wrote the judge in an early Pennsylvania case (Brace *vs.* Evans, Pa., 1888). "In popular acceptation it is an organized effort to exclude a person from business relations with others by persuasion, intimidation and other acts which tend to violence, and thereby coerce him, through fear of resulting injury, to submit to dictation in the management of his affairs."[9]

[1] Barr *vs.* Essex, N.J., 1891, 30 Atl. 881, 889.
[2] Plant *vs.* Woods, Mass., 1900.
[3] Purvis *vs.* United Brotherhood, Pa., 1906.
[4] Foster *vs.* Retail Clerks' etc., N.Y., 1902, 78 N.Y. Supp. 860, 863. Italics are the author's.
[5] Boutwell *vs.* Marr, Vt., 1899.
[6] Jackson *vs.* Stanfield, Ind., 1893.
[7] Italics are the author's.
[8] Beck *vs.* Teamsters' Union, Mich., 1898, 77 N.W. 13, 24. Italics are the author's.
[9] 5 Pa. Co. Ct. 163, 171. Italics are the author's.

Threats will often be read into language which in form is mere persuasion. The kind of threat it is necessary to make in order to render the act illegal is not stated in many of the decisions. Some contend that the threat must be to do an unlawful act. A Tennessee Court concludes:

> In law a threat is a declaration of an intention or determination to injure another *by the commission of some unlawful act.* . . . If the act intended to be done is not lawful, then the declaration is not a threat in law, and the effect thereof is not intimidation in a legal sense.[1]

Many of the courts, indeed, have shown great skill in reading into mere requests this illegal deed of threatening. In Plant *vs.* Woods, for instance (Mass., 1900), the workers on a strike visited the employers of other union men to inquire whether the former would use their good services in having the men reinstated. During the conversation, the workers were asked whether it would mean trouble, if the request was not granted, and the men replied that it might. This was a threat, in the eyes of the court.

Violence, of course, is considered an illegal means.

"The labor and skill of the workmen; the equipment of the farmer; the investment of commerce are all, in equal sense, commerce. If men, by overt acts of violence, destroy either, they are guilty of crime."[2]

Freedom of Speech and Press

Boycotters have often contended that to prevent them from publishing notices of the boycotts, and otherwise announcing them in print, is an infringement of the freedom of the press, granted by the Constitution. The courts, however, have for the most part held that when such publication is one of the means employed in carrying out an illegal purpose — that of boycotting — the free-speech argument is without merit. It is also contended that no right is absolute, and that, when its unbridled exercise infringes on the equal rights of others, and deprives them of such rights as that of acquiring, possessing and protecting property, the law can and should interfere.

In granting the injunction against Mr. Gompers, Judge Gouly examined the contention of the defendants that, if plaintiff had any redress for such publication, it was for action for the libel, and that equity will not enjoin a libel. He added:

> All this would have merit if the act of the defendants in making such publication stood alone, unconnected with other conduct both preceding and following it. But it is not an isolated fact; according to the allegations of the bill and the supporting affidavits, *it is an act in a conspiracy to destroy*

[1] Payne *vs.* R.R., Tenn., 1884, 49 Am. Rep. 666, 674.
[2] State *vs.* Stewart, Vt., 1887.

plaintiff's business, an act which has a definite meaning and instruction to those associated with defendants and an act which is the basis of conduct on the part of defendant's associates which unlawfully interferes with plaintiff's right of freedom to trade with those whom he pleases. The argument of counsel is fully answered by the language of Mr. Justice Holmes in the case of Aikens *vs.* Wisconsin, 195 U.S. 194: "No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and, if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law." [1]

The same general principle, though not so stringent an application thereof, was held by Judge Robb of the Court of Appeals, in affirming a portion of the injunction.[2]

"While the right of free speech is guaranteed to all citizens by the Constitution," holds a California judge (Jordahl *vs.* Hayda, Cal., 1905), "there is also guaranteed to them by the same Constitution the right 'of acquiring, possessing and protecting property and obtaining safety and happiness' (see Art. 1, Sect. I); . . . and it is a maxim of jurisprudence prescribed by the statute law of this State that one must use his rights so as not to infringe upon the rights of another. (Civil Code, Sect. 3514.)"

"It would be strange indeed," wrote Judge Taft, "if that right (to assemble and free speech) could be used to sustain the carrying out of such an unlawful and criminal conspiracy as we have seen this to be. . . . If the obstruction to the operation of the road by the receiver was unlawful and malicious, it is not less contemptible because the instrument which he used to effect it was his tongue rather than his hand." [3]

[1] Buck's Stove and Range Co. *vs.* A. F. of L., Sup. Ct., D. of C., 1907, 70 Al. L. J. 8, 10. Italics are the author's.

[2] A. F. of L. *vs.* Buck's Stove and Range Co., Ct. of Ap., D. of C. 1909. Italics are the author's.

[3] Thomas *vs.* Cinn., N. O. and T. P. Ry. Co., U. S. Circ. Ct., Ohio, 1894, 62 Fed. 803, 822.

VII

TENDENCIES TOWARD FEDERAL CONTROL OF COMMERCE AND INDUSTRY

CONSTITUTIONAL ASPECTS OF FEDERAL REGULATION OF BUSINESS[1]

By James Parker Hall, Dean of the College of Law, Chicago University

(From the *Journal of Political Economy*, May, 1912)

It is a consequence of American theories of constitutional government that all important legislation affecting property rights and economic opportunity must at some stage run the gauntlet of professional legal opinion in the courts. It, of course, does not follow that such opinion will necessarily or properly be adverse to such proposals merely because they are novel, nor that the process of obtaining this opinion should be unduly beset by delay and uncertainty. Nor is it meant to arrogate to courts any more than to legislatures, nor to lawyers any more than to sociologists, any permanent or authoritative control over the course of social evolution. Courts and constitutions yield and should yield to the pressure of actual economic and social conditions, just as do the other organs of any government properly responsible to the movements of deliberate public opinion. For the purposes of the present discussion, however, I shall assume the validity of the construction now placed upon the federal Constitution by the courts, and shall briefly inquire what warrant this would give for such regulation of business by the federal government as has been proposed in recent discussion.

At the risk of repeating what is doubtless already well understood, let me first recall that the Constitution divides all powers of government between the states and the United States, save a few which it prohibits altogether, like that of taxing exports. It accomplishes this by granting to the United States certain enumerated powers,

[1] A paper read before the Western Economic Society at Chicago, March 1, 1912.

which, with those fairly to be implied from them, mark the limits within which the federal government may act. All of the non-granted powers of government are reserved to the states. Now if Congress wishes effectively to regulate an industry like the steel business, or a corporation like the International Harvester Company, it must bring its legislation, in principle and in details, within the scope of the powers granted to it by the Constitution, and must not trespass upon regulative powers reserved to the states. This is one of the embarrassments inherent in a federal form of government like ours, which must be met as best it may.

The powers upon which the United States must chiefly depend, should it undertake such a regulation of business, are the power to regulate commerce among the states and with foreign nations, the power of taxation, and perhaps the power over the postal service.

The power to regulate commerce among the states, it will be observed, falls considerably short of the power to regulate business in general. In the first place it is confined to "commerce," and in the second place to commerce "among the states." In colloquial speech "commerce" is frequently used as synonymous with *business*, but in the Constitution it is well settled that "commerce" is confined to those forms of business that involve *intercourse* or are fairly incidental thereto. Thus defined, it includes all activities substantially affecting the transportation of any kind of property or property symbol, the transmission of intelligence in any form, and all modes of personal travel. Doubtless the transmission of any form of energy will also be included when the case arises. The phrases "among the states" and "with foreign nations" still further confine the action of Congress to such intercourse as crosses state lines. Intercourse between places in the same state, which does not at any point pass outside, is not interstate or foreign commerce.

The courts have been fairly liberal in including within the notion of "intercourse" activities that are incidental to the actual intercourse or transmission itself. Thus, the sale or the solicitation of the sale of commodities for the purpose of transmission between the states, or their sale for the first time in the original packages after transmission, have been held to be part of interstate commerce itself. But the *production* of commodities, whether by manufacturing, agriculture, mining, or fishing, has repeatedly been said to be no part of such commerce. The interstate transportation or marketing of goods may thus be controlled by Congress (the Sherman Anti-Trust law being an instance of such control), but is there any method by which it might indirectly also control capitalization and production? I venture to suggest that there are several ways in which, if desired by Congress, this could be done.

In the first place the power to regulate interstate commerce is

given to Congress unqualifiedly, and is subject to no limitation except the general prohibitions upon congressional action to be found in the Constitution, the most important of which in this connection is that liberty and property shall not be taken without due process of law. It is apparently well settled that Congress may exercise its granted powers for any purpose it pleases (subject to the above-mentioned prohibitions), even though the object and effect of its action be to accomplish indirectly what it could not do by direct action. For instance, Congress has no power directly to prohibit lotteries in a state. It did, however, forbid the transmission of lottery matter through the mails — not at all in the interest of the postal service as such, or in furtherance of any other power granted to Congress, but solely in order to embarrass the operations of lotteries in states where they were legal and where Congress was under the Constitution powerless directly to forbid them. When this hindrance to lotteries proved insufficient, Congress absolutely forbade the carriage of lottery tickets from one state to another under its power to regulate interstate commerce. Obviously no commercial object was sought by this — only the suppression of lotteries in places where under the Constitution they were legal. But the law was upheld on the ground that Congress could regulate interstate commerce for any purpose not *forbidden* by the Constitution, not merely for purposes *granted* by the Constitution.

In like manner, may not Congress indirectly control methods of production in industry in a state by forbidding the privileges of interstate commerce to the product unless its rules regarding production are complied with? Witness the Meat Inspection law which excludes from interstate commerce all meat not submitted to federal inspection, and the Pure Food and Drugs law which requires the proper labeling of these articles before their admission to interstate commerce. It may be argued that these laws aim at securing more healthful articles of commerce and the prevention of fraud in commerce. Granted — but what was the object of the law against lottery tickets? Not to prevent sickness or fraud, but to suppress an economic and social evil. And so the recent federal law against bringing women into a state for immoral purposes has no commercial object, but only a moral one.

Now Congress cannot directly forbid child labor in North Carolina, or a 14-hour day in the Pittsburgh steel mills, but, if it wishes seriously to hinder such practices, can it not forbid the products of such labor from being carried to other states, where they compete with products produced under better but more expensive conditions and so tend to render economically difficult or impossible the maintenance of improved conditions in industry elsewhere? One of the stock arguments against laws for the betterment of industrial conditions in every state has been the protest, "If you make us do that, we can't compete

with employers in other states who don't have to do it." Surely Congress may as readily use its commercial powers to prevent sweatshop and child-labor competition in interstate commerce, as to secure freedom from combination, or fraud, or gambling in that commerce.

In the second place, Congress probably has considerably more power over corporations engaged in interstate commerce than it would have over individuals similarly engaged. As practically all business important enough to require federal regulation is conducted by corporations, this consideration is of great importance. The argument that appears to establish it runs as follows:

The right to become a corporation or to act in corporate form is not a natural right of individuals protected from arbitrary interference by the liberty and due process clauses of our constitutions, as is the right to engage individually in harmless business pursuits. The right to act in corporate form is a franchise, permission to exercise which must be granted by a government, state or national, before it can lawfully be exercised by any one for any purpose no matter how innocent. Thus, Illinois could not deny absolutely to individuals the right to sell wholesome sugar as an article of food or to till the soil — these being arbitrary interferences with the natural liberty of the individual. But Illinois may decline, for any reason or for no reason, to grant to any one a franchise to sell sugar or to conduct farming operations *in corporate form*, and may thus confine these activities to individual effort. What Illinois may absolutely forbid, it may of course grant on terms, and so may require, as the price of its consent to a grant of corporate privileges, that corporations submit to exactions and regulations that could not be demanded from individuals. The state may thus gain the right to supervise a corporation's issues of stock and bonds, its methods of production and distribution, its obligations to employees and to the public, and all of the details of its organization and business, including its rates and dividends.

As regards corporations of other states seeking to do business in Illinois, the same principles apply, with two exceptions. Illinois may, of course, if it sees fit, admit foreign corporations to do business there without restriction. If Illinois takes no action whatever upon the matter, it is assumed to assent to this; but, if it dissents, foreign corporations must submit to such terms as Illinois may prescribe for admission to do business in the state. The two exceptions to this are corporations employed in the service of the United States, and those engaged in interstate commerce. Such corporations may not be excluded by a state, because the business in which they are engaged is by the Constitution placed within the control of the United States instead of the separate states.

Now what control has Congress over corporations engaged in interstate commerce? Has it not the same power over them that the

states have over those engaged in purely internal commerce? And, if so, may it not use this power of corporate control as rigorously as the states may and do? The argument from analogy seems strong. A state-chartered corporation may engage in interstate commerce until Congress dissents, just as a New Jersey corporation may do internal business in Illinois until Illinois dissents. If Illinois chooses, however, it may require a license from the foreign corporation, the compliance with conditions laid down by the state, or even reincorporation in Illinois, as a prerequisite to the doing of internal business in Illinois in corporate form. So, also, it would seem that the United States could require state corporations doing interstate commerce either to obtain a federal license, comply with conditions laid down by Congress, or take out federal charters altogether, as a prerequisite to engaging in interstate commerce in corporate form.

If so, what conditions may be imposed as the price of either license or charter? If a charter is required, of course stock and bonds may be regulated as well as all other details of corporate management. If a license is required, it may be conditioned upon compliance with congressional regulations as to production, distribution, methods of competition, publicity of accounts, prices, and so forth, that would give Congress a virtual control over many matters other than those directly connected with the interstate transmission of commodities by such corporations. If Congress has the same measure of control over interstate commerce by corporations that a state has over internal commerce by corporations, such conditions would be valid; and the convenience and necessity of carrying on large businesses in corporate form would compel the acceptance of such conditions provided they were at all reasonable. The nature of a corporation as the basis of governmental control must play an important part in the legal theory of any thoroughgoing measure of federal regulation of business.

In the third place, Congress is likely to find the power of taxation an important instrument of regulation. The power to levy taxes (except upon exports) is conferred upon the United States without express limitation, save that direct taxes must be apportioned and all taxes must be geographically uniform throughout the states. It has been decided that this power of taxation is not confined to cases where the object and effect of the law is to raise revenue, but that the United States may tax where the result is regulation or prohibition of the act or object taxed. In 1902 Congress imposed a tax of 10 cents a pound upon all artificially colored oleomargarine, an amount assumed to be prohibitive of its manufacture. Congress of course had no direct power to prohibit the manufacture of this article in a state, but the tax was upheld by the Supreme Court, a decision which seems to establish in regard to taxation the principle previously recognized in regard to the postal and commercial powers of the

United States — that they may be exercised for any indirect purpose not so arbitrary as to be a taking of property without due process of law.

Within this principle Congress may apparently regulate the purely internal business of a state by taxing objectionable features of it so heavily that they will no longer be profitable. Regulation by taxation may thus become an important item in future governmental programs. One instance of it we have already in operation as incidental to the present federal tax upon corporate earnings, namely the requirement of a certain amount of publicity regarding corporate business. The Esch Phosphorus law is another.

Finally, as a last resort, Congress might deny the privileges of the mails to businesses, which, though operating wholly within a state, persisted in practices that Congress within a reasonable discretion saw fit to disapprove, following the precedent of the lottery cases.

To sum up, therefore, through taxation, through its postal powers, through its control over interstate commerce, and particularly through its control over corporations engaged in interstate commerce, Congress probably has the power effectively to regulate the capitalization, the production, and the distribution of all large commercial businesses in this country. The practical difficulties of doing this wisely are obviously very great, but I believe that statutes, carefully drawn to effect their purpose within the limits here indicated, may constitutionally provide for any form of regulation of big business in this country that has as yet been seriously proposed.

THE CONSTITUTIONALITY OF GOVERNMENT AID

By Frank J. Goodnow, President of Johns Hopkins University

(From "Social Reform and the Constitution," chap. viii. The Macmillan Co. Copyrighted)

I. Proper Purposes of Taxation

The question of the constitutionality of government aid to the needy classes in the community may arise because of the existence of the rule which forbids the exercise of the powers of taxation and eminent domain for any but a public purpose.

The general principle that the purpose for which taxes may be levied and property may be taken must be public is perfectly clear, but the principle is to be applied in the light of our history. For a long time prior to the adoption of the principle, both these powers

had been used for purposes which could be considered as public, only if regard were had to the indirect advantages which the public secured from their exercise. Thus from a very early time in the history of both England and this country the taxing power had been used to provide funds for the support of the poor, while private persons under legislative authorization had been permitted to make use of water courses for the development of water power, which was to be used by them for purposes of private profit. These poor laws and these mill acts, as they were called, have been regarded as constitutional, notwithstanding the general rule of constitutional law to which allusion has been made.

As new conditions have appeared to make necessary attempts on the part of the legislature to accord aid to various classes of individuals in the community, the courts have been called upon to determine whether such attempts are forbidden by the principle requiring that the purpose of the legislature shall have been public, or whether they fairly come under some of the exceptions to the rule which have been shown always to have existed.

The validity of such attempts is to be determined in the first place by a consideration of the purpose and effect of the fourteenth amendment. There was nothing in the original constitution of the United States or in the original amendments thereto which could be regarded as limiting the taxing power of the states to public purposes. In Loan Association *vs.* Topeka [1] it is true the Supreme Court affirmed a decision of the circuit court, which had obtained jurisdiction through diversity of citizenship, holding invalid certain bonds issued by a municipal corporation in aid of a private manufacturing enterprise. The grounds for the decision were that there are, as Mr. Justice Miller expressed it, certain —

> rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all a despotism. . . . To lay with one hand the power of the government on the property of the citizen and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes is none the less a robbery, because it is done under the forms of law and called taxation. . . . We have established, we think beyond cavil, that there can be no lawful tax which is not levied for a public purpose.

This was said as to the meaning to be given to the constitution of the state of Kansas which the court was called upon to apply in the absence of decisions by the state courts interpreting it.[2]

[1] 20 Wall. 655.
[2] See Fallbrook Irrigation District *vs.* Bradley, 164 U.S. 112–155.

Mr. Justice Clifford dissented from the conclusions of the court on the ground that:

> Courts cannot nullify an act of the state legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people and convert the government into a judicial despotism.

The views of Mr. Justice Clifford are approved in Fallbrook Irrigation District *vs.* Bradley,[1] where it is said that, if an act of a state legislature does not violate some provision of the federal constitution, "there is no justification for the federal courts to run counter to the decisions of the highest state courts upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law." The court, after making this statement, proceeds to decide the case before it on the theory that state taxation for a private purpose would be forbidden by the fourteenth amendment.

It may therefore be said that the employment by the state of the power of taxation for a private purpose is unconstitutional from the point of view of the United States constitution.

What now is the distinction made by the United States Supreme Court between a public purpose, taxation for which is proper, and a private purpose, taxation for which is improper? In its decision of this question the Supreme Court has never overruled the decision of a state court that a given purpose, for which state taxes had been levied, was public in character.[2] Indeed, in Fallbrook Irrigation District *vs.* Bradley,[1] the court, while denying that the determinations of state courts are conclusive "upon the question as to what is due process of law, and as incident thereto, what is a public use," observed:[3]

> It is obvious, however, that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned.

In this case the court held, for example, that irrigation was a public use in arid districts, and said:

[1] 164 U.S. 112.

[2] Ibid.

[3] In Olcott *vs.* Supervisors, 16 Wall. 689, the Supreme Court did, indeed, claim that it was not bound by the decisions of the state courts as to what is a public purpose for which taxes may be levied, and was of the opinion that a purpose was public which had been declared to be private by the state court. The case would appear, however, to have been decided on other grounds.

The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances than can any one who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own state. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that state on this question.

The same position is taken by the court in Welch *vs.* Swagey[1] where it is said that the court —

feels the greatest reluctance in interfering with the well-considered judgments of the courts of a state whose people are to be affected by the operation of a law. The highest court of the state in which statutes of the kind under consideration [viz. statutes regulating the height of buildings in cities] are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature) and with the general situation surrounding the subject matter of the legislation than this court can possibly be. We do not, of course, intend to say that under such circumstances the judgment of the state court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong.[2]

While the California case recognized differences due to climate and geographical conditions, this case from Massachusetts recognized that the same influence was to be accorded to social conditions. For what has been quoted was said with regard to a law passed to remedy through limitations imposed upon the height of buildings, the evils resulting from the uncontrolled use of land, in urban conditions such as exist in a great city like Boston.

Whether the court will carry this idea of the local autonomy of the states in deciding what should be the remedies to be applied to the evils attendant upon an intense industrial life under conditions of freedom of individual action, of course cannot be said, but the logic of the argument cannot be avoided if the court can be brought to see that the differences in conditions due to the varied occupations of the people in different parts of the country are in reality just as great as

[1] 214 U.S. 91.

[2] See also Wurts *vs.* Hoagland, 114 U.S. 606, applying the same principle to the draining of swampy lands for which, even though the lands are in private hands, the power of taxation may be used.

the differences in climate and social conditions which were recognized in the opinions from which quotations have been given.[1]

It may therefore be concluded both from these opinions and from the absence of decisions overruling the determinations of state courts on the subject that each of the states has quite a large freedom of action in determining, in the circumstances and conditions existing within it, what purposes are public from the viewpoint of its power of taxation.

We are thus brought to a consideration, in the second place, of the decisions of the state courts as to what are public purposes for which the power of taxation may be exercised.

The state courts have been influenced in their determination of this question by the fact that the undertaking which was being aided by the exercise of the power of taxation was or was not in the control and management of private corporations or individuals. Where the control and management are private, they are more apt to regard the purpose as private than where such control is in the hands of the state or local authorities. Thus the Supreme Court of Ohio has held that even under a constitution recognizing a duty upon the part of the state to support the indigent blind in public institutions it is improper for the legislature to grant out of public funds an allowance to an indigent blind person not supported in a public institution.[2]

When it is said that the courts are influenced by the fact that the undertaking is under private control, it is not meant to indicate that the character of the control is decisive. For it has frequently been held that where the character of the purpose is unquestionably public, the character of the control is immaterial. Thus the use of the taxing power to aid railway corporations has almost universally been upheld as constitutional.[3] It is usually where the character of the purpose is doubtful that the character of the control affects the decision.

In what now does doubt as to the character of the purpose consist? In answering this question we have, as has been intimated, to resort to history, which has such a potent influence on the decision of constitutional cases. Nowhere, perhaps, is the historical argument more forcibly expressed than in Loan Association *vs.* Topeka,[4] where the court says:

[1] See also Missouri *vs.* Lewis, 101 U.S. 22, for a recognition of the principle that varying conditions of population may under the fourteenth amendment be subjected to different treatment by the states. See also Noble State Bank *vs.* Haskell, 31 S. C. R. 186, upholding an assessment on banks to provide a bank depositors' guaranty fund. *Infra*, p. 324.

[2] Lucas Co. *vs.* State, 75 Ohio St. 114. See also Wisconsin Keely Inst. Co. *vs.* Milwaukee Co., 95 Wis. 153, where a payment to a private corporation for the cure of an indigent drunkard was declared to be improper. But see Mayor *vs.* Keely Inst., 81 Md. 106; *In re* House, 46 Pac. (Col.) 117; and White *vs.* Inebriates' Home, 141 N.Y. 123.

[3] See *e.g.* Olcott *vs.* Supervisors, 16 Wall. 689.

[4] 20 Wall. 655.

In deciding whether, in the given case, the subject for which the taxes are assessed falls upon one side or the other of this line, they [the courts] must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by a long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

It follows, therefore, that the objects for which taxes have been levied in the past are public purposes from this point of view. Thus roads, schools, highways, and the protection of the peace, of the public health and safety, are all public purposes for which taxes may be levied. It is for this reason that taxes may be levied to aid the state or municipalities in providing for the public ownership and operation of what we call public utilities. For the question involved is not the character of the control, the constitutionality of which is to be determined from a consideration of other constitutional principles than that requiring the purpose of taxation to be public. What is here to be considered is the purpose for which the tax is levied which in the case of a municipally owned and operated street railway, *e.g.*, is the provision of public means of communication.

It is only when we come to the new functions, the discharge of which changed economic and social conditions make it seem necessary for the state in either its central or local organizations to assume, that we meet with difficulty. What criterion are we to adopt when we come to consider such subjects as old age, accident, and sickness insurance or pensions, which in some form would appear to be essential parts of the program of social reform in Germany, England, and Australasia?

II. Pensions in Case of Old Age, Accident, or Sickness

As no attempt has been as yet made in this country to establish old age, sickness, and accident pensions, we have no decisions directly in point. We have, it is true, a few decisions on the subject of pensions to government employees. But they cannot be regarded when favorable as having any particular force, since such pensions are regarded rather as a part of the compensation attached to government employment than as gratuities.[1] Indeed, we have a few decisions which hold such pensions to be improper where they are awarded to persons who have already been retired from the public service,[2] or who, while in

[1] See *e.g.* Commonwealth *vs.* Walton, 182 Pa. St. 373.
[2] See *e.g.* In the Matter of Mahon, 171 N.Y. 263.

the public service, are not induced to continue in service as a result of their award.[1] On the other hand, the cases holding service pensions of this character to be unconstitutional cannot be regarded as deciding that old-age pensions, *e.g.*, are improper where such pensions are confined to the indigent, since no attempt has been made in providing for service pensions to confine them to those who are in pecuniary need.

In endeavoring to answer the question as to the constitutionality of old age, accident, and sickness pensions, we must study the cases which have been decided as to doubtful purposes of taxation — *i.e.* doubtful from the point of view of their being public or private — and then try to reason by analogy from them to the question in hand. A study of the cases which have held purposes to be private and therefore to be improper purposes of taxation, can hardly fail to force the conclusion that any purpose is an improper purpose for taxation which consists in the grant of public moneys to individuals who are not in the service of the government or who cannot be regarded, because of their poverty, as fit subjects of public charity. An old age, accident, or sickness pension which is not conditioned upon poverty would probably be regarded by the courts as unconstitutional where the funds from which it was paid were derived from taxation.

Nor would the benefits to the general social system which might conceivably be derived from such a pension have very great effect upon the attitude of the courts. Even if these advantages were conceded, the pensions would still be declared unconstitutional unless former decisions were overruled. For, very generally, the advantages derived by the public from the expenditure of public money do not make public the purpose of the taxes from which such money is obtained. In Lowell *vs.* Boston[2] an act of the Massachusetts legislature which was passed soon after the Boston fire was under consideration. This act provided for an issue of city bonds to be ultimately paid for out of taxes, the proceeds of which bonds were to be loaned to individuals in order to enable them to rebuild in the burnt districts. The act was declared to be unconstitutional as providing for the exercise of the power to tax for a private purpose. In the course of the opinion the court said:

> Resulting advantage to the public does not of itself give to the means by which it is produced the character of a public use. . . . There is no public use or public service declared in the statute now under consideration, and we are of opinion that none can be found in the purposes of its provisions. . . . The fund raised is intended to be appropriated distributively, by separate loans to numerous individuals, each one of which will be independent of any relation to the others, or to any general purpose, except that of aiding

[1] See State *vs.* Ziegenheim, 144 Mo. 283.
[2] 111 Mass. 454.

individual enterprise in matters of private business. The property thus created will remain exclusively private property . . . with no obligation to render any service or duty to the commonwealth or to the city — except to repay the loan — or to the community at large or any part of it.

The court goes on to say that the fact that the city will be indirectly benefited through increase in trade and business does not affect the judicial aspect of the case in any way. This case has never been overruled, and has been approved, by the Supreme Court of the United States.[1] There is also a series of cases of which Loan Association *vs.* Topeka is an example, holding that the issue of city or state bonds payable out of the proceeds of taxation to aid private manufacturing corporations is improper as providing taxation for a private purpose.

Lowell *vs.* Boston and Loan Association *vs.* Topeka were decided many years ago (1873 and 1874, respectively). But while there has been no indication of an attempt to reverse them as to the particular points of the law which they decided, they have not been extended in their operation. There are also a number of cases further, some decided by the Supreme Court of the United States, which have extended the principle of the Railway Aid Bond cases so as to include mills for grinding grain which are open to all comers at a fixed toll,[2] thus recognizing large powers of social coöperation in local communities, as well as one case in a state court which has likewise somewhat extended the conception of public charity so as in districts affected by droughts and other calamities to permit the use of the taxing power to obtain capital for the purchase of seed corn by needy farmers, who, while not at the time paupers, were in great danger of becoming such did they not receive aid.[3]

But it will be noticed that none of the cases upon this subject has recognized the constitutionality of acts which make grants of public moneys derived from taxation to persons not either performing a public service similar to that performed by a public officer or a common carrier, or not assimilated to the position of paupers. In State *vs.* Osawkee Township, in which the opinion was given by Judge Brewer, afterwards a member of the United States Supreme Court, the constitutionality of the act was denied because the recipients of the aid given were not actually paupers.

The only case which shows any tendency to regard as a public

[1] See also State *vs.* Osawkee Township, 14 Kan. 418, which declared the grant of aid to poor farmers to purchase grain for seed and feed, in districts affected by drought, was not a public purpose. This case was decided in 1875, only two years after Lowell *vs.* Boston. Cf. William Deering Co. *vs.* Peterson, 75 Minn. 118.

[2] See *e.g.* Burlington *vs.* Beasley, 14 U.S. 310; Blair *vs.* Cumming Co., 111 U.S. 363. These cases are also interesting as showing how closely the Supreme Court follows the decisions of state courts as to what are public purposes and therefore proper purposes for taxation in their respective states.

[3] North Dakota *vs.* Nelson Co., 1 N.D. 88.

purpose the use of the power of taxation, with the idea of preventing pauperism, is the North Dakota case where it is said:

> If the destitute farmers of the frontier of North Dakota were now actually in the almshouses of the various counties in which they reside, all the adjudications of the courts, state or federal, upon this subject, could be marshaled as precedents in support of any taxation, however onerous, which might become necessary for their support. But is it not competent for the legislature to make small loans, secured by prospective crops, to those whose condition is so impoverished and desperate as to reasonably justify the fear that unless they receive help, they and their families will become a charge upon the counties in which they live?

What now has been the attitude of the state courts towards the granting under present constitutional provisions of pensions or allowances to persons regarded as paupers? In answering this question, it would seem to be necessary to bear in mind the character of the control of the funds granted. If that is private, the tendency of the courts is, as has been pointed out, to regard the purpose as also private. Courts which recognize education as a proper purpose of taxation sometimes consider as improper the grant of public moneys to educational institutions under private control.[1] It is true that this question of grants of money to private schools is somewhat complicated by the fact that private educational institutions which desire public aid are usually at the same time sectarian institutions, and on that account for other constitutional reasons not proper recipients of public charity. But there are cases which have taken the same view with regard to charitable institutions under private control which have been established with the idea of offering aid to particular classes of indigent persons.[2] Opposed to them, however, is an imposing array of cases which refuse to apply in charitable matters the rule that the private character of the control necessarily makes the character of the purpose private.[3]

But even if we assume that the better rule is that public moneys may constitutionally be granted to private corporations established for charitable purposes, we have by no means proved that public moneys may be granted to indigent individuals. For corporations under such conditions are regarded as acting as agents of the state in discharging the public function of supporting the poor. They do not receive the funds granted them for their own benefit.

In order to uphold from a constitutional point of view the grant of pensions to individuals, we may attempt to show that such pensions

[1] Jenkins *vs.* Andover, 103 Mass. 94.

[2] Such are the Keely Cure cases decided in Wisconsin, *e.g.* Wisconsin Keely Inst. Co. *vs.* Milwaukee Co., 95 Wis. 153.

[3] Mayor *vs.* Keely Inst., 81 Md. 106; *In re* House, 46 Pac. (Col.) 117; White *vs.* Inebriates Home, 141 N.Y. 123; Shepherd's Fold *vs.* New York, 96 N.Y. 137.

are justified by the historical argument, as being a form of poor relief, and are not to be regarded as improper by the logic of the decisions rendered with regard to the propriety of particular attempts to provide poor relief.

May old age, accident, and sickness pensions granted to indigent persons properly be regarded as a form of outdoor relief? The cases on the subject of relief to paupers are legion, but the question as to the constitutionality of the numerous statutes providing for the grant of outdoor relief and regulating the respective relations of the persons receiving it, ordering it, and dispensing it has apparently not been raised. Such statutes are assumed to be constitutional, and the decisions have concerned themselves with determining the reciprocal rights and duties of individuals under the statutes.

On general principles we can therefore assume that such pensions, if granted to indigent persons under the limitations set forth, would be constitutional as a form of outdoor poor relief, unless the courts are of the opinion that the historical argument is inapplicable and that such pensions are evidence of an attempt to adopt for our free, independent, and self-supporting American population a new and unprecedented form of relief originating outside of England or the United States and, *e.g.*, in one of the paternalistic governments of Europe.

It must be admitted that certain remarks made in the course of deciding one or two concrete cases tend to force the conclusion that all the state courts, at any rate, are not as yet prepared to regard pensions even to indigent individuals as constitutionally proper in this land of individual freedom and private initiative. These cases are Lucas County *vs.* State [1] and State *vs.* Switzler.[2] In the former the legislature provided for granting to all adult blind persons "who have been residents of the state for five years and of the county one year, and have no property or means with which to support themselves" allowances not to exceed twenty-five dollars quarterly. The court declared the act to be unconstitutional largely on the ground that it provided for the expenditure of public funds for a private purpose and closed its argument by saying:

> If the power of the legislature to confer an annuity upon any class of needy citizens is admitted upon the ground that its tendency will be to prevent them from becoming a public charge, innumerable classes may clamor for similar bounties, and if not upon equally meritorious ground, still on ground that is valid in point of law, and it is doubted that any line could be drawn short of an equal distribution of property.

The court was influenced in a negative way by the historical argument already touched upon. After quoting the formulation of it by Mr. Justice Miller in Loan Association *vs.* Topeka, it remarked, "If

[1] 75 Ohio State 114. [2] 143 Mo. 287.

that rule is applied here, it must be said that the act under consideration is without precedent in this state."

In the Missouri case the legislature passed an act providing for the levy of a progressive inheritance tax, which was regarded by the court as unconstitutional both because of its progressive character, and because of the purpose for which it was levied, viz. to provide fellowships in the State University for students dependent upon their own exertions for their education and "financially unable otherwise to obtain the same." In the course of the opinion the court took occasion to say that:

> Paternalism, whether state or federal as the derivation of the term implies, is an assumption by the government of a quasi-fatherly relation to the citizen and his family, involving excessive governmental regulation of the private affairs and business methods and interests of the people, upon the theory that the people are incapable of managing their own affairs, and is pernicious in its tendencies. In a word, it minimizes the citizen and maximizes the government. Our federal and state governments are founded upon a principle wholly antagonistic to such a doctrine. Our fathers believed the people of these free and independent states were capable of self-government; a system in which the people are the sovereigns and the government their creatures to carry out their commands. Such a government is founded on the willingness and right of the people to take care of their own affairs and an indisposition to look to the government for everything. The citizen is the unit. It is his province to support the government and not the government's to support him. Under self-government we have advanced in all the elements of a great people more rapidly than any nation that has ever existed upon the earth, and there is greater need now than ever before in our history of adhering to it. Paternalism is a plant which should receive no nourishment upon the soil of Missouri.

It is to be noticed that the historical argument which is in large degree the controlling argument in these cases, when taken together with the insistence upon that political and economic theory known as *laisser faire*, to which is accorded an absolute and universal application at all times and under all circumstances, both makes social reform impossible, so far as its concrete measures cannot be justified by our own history, and regards political and economic conditions as static rather than progressive in character. The result of its universal application will be to fix upon the country for all time institutions, which, as has been pointed out, were established in the eighteenth century to deal with conditions then existing, but which may in this the twentieth century be unsuitable because of the economic, social, and political changes which have taken place in the last hundred years.

The emphasis given to this historical argument, furthermore, is not justified by the attitude of the Supreme Court of the United States. For Mr. Justice Miller after formulating the argument in his

opinion in Loan Association *vs.* Topeka was careful to indicate his feeling that it was not controlling by saying: "Though this may not be the only criterion of rightful taxation," while the court in its more recent decisions on what is due process of law under the fourteenth amendment has shown very clearly that in its opinion the decision of the question is to be influenced by the geographical and social conditions attendant upon the particular case in which the question is raised.

Such an application of the historical argument will, where the constitution is not easily susceptible of amendment, preclude the possibility of orderly and legal change in our conception of the powers of government, made necessary by changes in economic and social conditions, and may conceivably make unavoidable resort to revolutionary methods of change.

It may then be said that until the state constitutions have been changed and the state courts have decided that such changes are from the viewpoint of the federal constitution proper, there is no great likelihood that a system of state pensions in the case of old age, sickness, or accident which is based even on the indigence of the recipients of such pensions would be regarded as constitutional. Whether, where provisions have been inserted into the state constitutions making such pensions clearly constitutional, and the approval by the state courts of their propriety from the viewpoint of the federal constitution has been secured, the United States Supreme Court will be guided by the decisions of the state courts, is a question about which we may indulge in an almost indefinite amount of speculation, but as to which a certain answer cannot be given. It is well, however, to remember that the Supreme Court has several times held that the due process of law and the equal protection of the laws required by the fourteenth amendment are not the same thing in all parts of the country. That body has already recognized that certain climatic and population conditions have the effect of making state laws constitutional which under different conditions might be regarded as improper. It does not seem a long step from this position to the further position that industrial, *i.e.* economic, rather than climatic and social conditions, shall have the same effect, and it is always to be borne in mind that the Supreme Court has said more than once that the decision of state legislatures and state courts, which have knowledge of local conditions, is entitled to the greatest respect and will not be overruled except in a perfectly clear case.

The states, however, are not the only authorities in our government which may conceivably wish to establish systems of pensions of the class under consideration. For in Great Britain and in the German Empire, which is a federal government like our own, it is the imperial and not the local government which has made provision for these

pensions or something very like them. Can Congress constitutionally provide for such pensions?

The constitution of the United States contains no limitations upon the purposes for which federal taxes may be levied, except those contained in Article I, Section 8, Paragraph 1, which says: "Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States." Inasmuch as the government of the United States is regarded as one of enumerated powers, it is considered that the latter part of this clause does not contain a grant of new power, but rather imposes a limitation upon the purposes for which the taxing power may be used. So we may assume that the purposes of federal taxation are limited to paying the debts and providing for the common defense and general welfare.

We have, however, practically no judicial decisions upon the question of the propriety of the purposes of federal taxation, and naturally also none as to old age, sickness, and accident pensions. There are, it is true, a great number of cases construing the laws under which pensions have been granted to persons who at one time were soldiers or sailors of the United States. But in these cases the question of the constitutionality of this disposition of the public funds has not been discussed. On the contrary, the constitutionality has been assumed and the cases have been concerned with the nature of the right to the pension, which has been held to be a gratuity;[1] or with the criminal provisions of pension laws adopted with the idea of preventing the grant of the pensions to improper persons.[2] It is true that, since military pensions have been held to be gratuities, the power of Congress to provide for gratuitous allowances to private individuals out of public funds has been thus indirectly upheld; but it is to be remembered that these military pensions have been given to a class of persons who by reason of the services they have rendered have been regarded as having special claims to the bounty of the government.

The only cases which we have where the courts have been asked to exercise a control over the discretion of Congress in the expenditure of public funds derived through the exercise of the power of taxation are the Sugar Bounty case,[3] and the Panama Canal case.[4]

In both these cases the Supreme Court refused to take jurisdiction, and in the Panama Canal case the court said in reference to the demand of the plaintiff that the Secretary of the Treasury be enjoined from paying out money for the canal: "The magnitude of the plaintiff's demand is somewhat startling. . . . For the courts to interfere

[1] Walton *vs.* Cotton, 19 Howard 355; United States *vs.* Teller, 107 U.S. 621.
[2] See *e.g.* Frisbie *vs.* United States, 157 U.S. 160.
[3] United States *vs.* Realty Co., 163 U.S. 427.
[4] Wilson *vs.* Shaw, 204 U.S. 24.

and at the instance of a citizen who does not disclose the amount of his interest, to stay the work of construction by stopping the payment of money from the Treasury of the United States therefor would be an exercise of judicial power which, to say the least, is novel and extraordinary."

An even stronger position is taken in the Sugar Bounty case. In this case Congress passed an act making an appropriation for the payment of the claims of those persons who, relying upon an act of Congress providing for the payment of bounties, had engaged in the manufacture of sugar. The bounty act was subsequently repealed, but this appropriation had been made in order to tide over the sugar manufacturers, who were regarded as having a moral claim against the government. The proper disbursing officer of the government, acting upon the theory that both the original bounty act and the subsequent appropriation act were unconstitutional as appropriating public funds for a private purpose, refused to pay the bounty, and a mandamus was asked to force him to make the payment. The lower court held the act to be unconstitutional and denied the motion. After this decision had been reached, the plaintiffs in the suit sued the United States government in one of the circuit courts of the United States acting as court of claims, which gave judgment for the plaintiffs, and the case was brought by writ of error to the United States Supreme Court. That court, believing that the case could be decided without entering upon a discussion of the validity of the original sugar bounty acts, affirmed the judgment of the lower court. It did so on the theory that the "debts of the United States," to pay which Congress may by the constitution levy and collect taxes, include moral as well as legal obligations, saying: "Payments to individuals not of right or of a merely legal claim, but payments in the nature of gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of the acts of Congress appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity." It is, of course, a far cry from claims of this sort to old age, accident, and sickness pensions, and it is doubtful if the moral obligation upon which payments to individuals have been based could be so extended as to include a moral obligation of the government to its needy classes. Yet that obligation has from time immemorial been recognized in the laws of England and this country with regard to poor relief.

Furthermore, if it is said that the granting of old age, sickness, and accident pensions is an unwarrantable extension of the activity of the federal government, it may be answered that such action is no more of an extension of that activity than the grant of bounties for the encouragement of manufacturing, which is subject to state rather than to federal regulation, or than the grant of money to educational insti-

tutions as is provided by the Morrill Act, or the gratuitous distribution of seeds to farmers.

Finally, it is to be remembered, as the court says in closing its opinion in this sugar bounty case, that —

> in regard to the question whether the facts existing in any given case bring it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject for review by the judicial branch of the government.

It must therefore be said that there is at least some ground to be found in the decided cases and our legislative precedents for holding that pensions in case of old age, sickness, or accident which are payable to indigent persons only may be provided for by the Congress of the United States. Even if this is not the case, it would be difficult to find a judicial remedy by applying which the courts could interfere. The two cases from whose opinions quotations have been made would seem to indicate that the courts of the United States will not interfere to prevent the expenditure of public funds. And if the pensions were to be paid out of the proceeds of taxes which were levied for other purposes as well as for the payment of these pensions, the taxpayer could not bring the matter up through contesting on this ground the constitutionality of a tax which from other points of view was constitutional.

If a precedent is desired for the distribution by the national government of public property to the needy classes in order to subserve some social end conceived of as desirable, one need only point to the policy which has for so many years been followed by the government in its laws with regard to the public lands. Originally, the public domain was regarded as an asset to be used to pay the public debt and a portion of the current expense of the government. Later on, viz. in 1830, it was used to encourage settlement through the plan of preemption in accordance with which bona fide settlers were permitted to take up land up to a maximum amount, viz. a quarter section, at the minimum price of $1.25 an acre. Still later, viz. in 1862, the Homestead Act was passed. Under this act land might be acquired for nothing by a five years' occupation, which might be commuted at stated periods by the payment of a regular purchase price. Finally, from the beginning of our history, land has been granted outright either to specified classes of persons such as soldiers, or railway companies, or for specified purposes as in the case of the swamp land grants. The purpose of the government was twofold. It was first

to develop the resources of the country; it was second to secure a class of small proprietors in the belief that such a class made a good economic basis for democratic government. Public property was granted to private persons not merely to develop the country, but to offer greater equality of economic opportunity to the less well-endowed classes of the community, and no attempt was made to declare unconstitutional the action of the government. It is, of course, true that Congress gets its power to legislate with regard to the public lands from a special clause in the constitution, but its discretion as to the purposes for which this power may be exercised is no greater than it is as to the purposes for which the power of taxation may be used.

Who, in view of the history of the public domain, will venture to say that the constitution limits the power of Congress to dispose of the public funds as it sees fit in order to promote what it considers to be the "public welfare of the United States" to provide for which the constitution specifically says the taxing power may be used?

Our conclusions then, as to the constitutionality of old age, accident, and sickness pensions are, assuming that the courts do not change their view:

1. Such pensions when provided by state action are not prohibited by the fourteenth amendment or any other provision of the federal constitution, particularly if they are confined to indigent persons.

2. If not confined to indigent persons, they are unconstitutional under the ordinary provisions of the state constitutions.

3. Even if confined to indigent persons, they are probably unconstitutional under the ordinary provisions of the state constitutions, although there is some reason for believing they might be justified as a form of outdoor poor relief.

4. There is much ground for the belief that such pensions, particularly if confined to indigent persons, might constitutionally be provided by the federal government.

III. Provision for the Housing of the Working Classes in Cities

The discussion of what are public purposes of taxation, which has already been had, cannot have failed to throw some light on the question of the constitutionality of advances of public funds to persons not actually in need to aid them, for example, in acquiring homes. It may hardly be claimed in the light of what we have seen that under the existing state constitutions the power of taxation may be used for this purpose. But it may be said of such schemes as well as of pensions that there is apparently no objection to them from the point of view of the limitations of the federal constitution on the expendi-

ture of public funds if the funds to which resort is had are derived from other sources than taxation. If, *e.g.*, the states or municipalities had derived large funds from some system of public insurance which had been provided for the working or other classes, there would seem to be no constitutional objection to their making use of them in the manner suggested, in the same way that Germany is now doing, with the twofold purpose of investment and social reform. Similar disposition might also be made of the surplus revenue from profitable quasi-commercial undertakings such as railways, gas, water and electric light works. The loaning to individuals of public funds not derived from taxation is not prohibited by the federal constitution, but is at the present time by most of the state constitutions. Indeed, the misuse of the power by the states is probably responsible for the provisions prohibiting it which we so commonly find. The state of New York, however, for many years loaned to individuals the fund known as the United States Deposit Fund, which originated in the distribution of the surplus of the United States government in 1837.

The constitutionality of such schemes may, however, be questioned from another point of view. For their successful realization would in most cases involve resort to the exercise by the government, either state or municipal, of the power of eminent domain, and this power, like the power of taxation, may be exercised only for public purposes. The question therefore naturally arises, — What purposes are public from the viewpoint of the constitutional limitations on the exercise of the power of eminent domain? At the outset, it must be noted that, because compensation must be paid to the party whose property is taken under the power of eminent domain, while no such compensation can in the nature of things be given when it is the power of taxation which is exercised, the courts are more apt to regard a purpose as public in the former than in the latter case. Thus, while it is unquestionably unconstitutional to tax one person for the construction of a private factory not open to general public use, it is perfectly proper, on granting compensation, to give one riparian owner the right to build for the purposes of a private factory a dam, the necessary effect of which will be to deprive the riparian owners farther up the stream of property rights. This principle was apparently applied originally in the case of grist mills, which, it has been shown, are *quasi* public enterprises. But it was later applied to ordinary private factories, and this application of the principle was upheld partly at any rate on the ground of the general benefit the public derived from it, long before the adoption of the fourteenth amendment. Since the adoption of that amendment the constitutionality of such legislation has been upheld also by the Supreme Court.[1] It may therefore be said that that provision of the federal constitution was in this instance

[1] Head *vs.* Amoskeag Mfg. Co., 113 U.S. 9.

interpreted in the light of existing conditions and that the Mill Act cases, although showing that there are exceptions to the general rule, do not have great authority upon the question at issue.

Bearing in mind then that a purpose which may be private from the point of view of the power of taxation may be public from the point of view of the power of eminent domain, let us examine some of the cases which have decided what purposes are either public or private from the latter point of view. There are four classes of cases bearing on this point:

In the first place, there are those which, like the Tax cases, hold that the purpose is public where the enterprise for which the property is condemned is one of which the public generally make use.[1]

The second class of cases includes those decided in view of peculiar and very stringent provisions of state constitutions strictly limiting the legislature in its power to grant the right of eminent domain to private persons. The cases in this class do not permit the exercise of the right of eminent domain for a purpose which does not benefit the public generally.[2]

The third class includes those cases which decide that under the ordinary constitutional provisions the power of eminent domain may not be given to a private person where the undertaking for which it is employed is not one of which the public may make use.[3]

Finally, there are the cases which, applying the principle at the bottom of the original Mill Acts, hold under the ordinary constitutional provisions that where the economic development of the country or the advantageous use of property requires, the legislature may on providing for compensation authorize one person to take the property of another for a private purpose, *i.e.* private in the sense that the general public does not have the right to make use of the undertaking for which the power of eminent domain is exercised.[4] It must be said,

[1] A case of this sort is Cotton *vs.* Miss. & Boom Co., 22 Minn. 372, where a law giving a boom company on the Mississippi River the right to condemn riparian rights was held to be constitutional.

[2] A good example of this class is Healy Lumber Company *vs.* Morris, 33 Wash. 490, where an act of the legislature granting the right to condemn property for a lumber road or flume was held unconstitutional.

[3] See *e.g.* Matter of Eureka Basin & Mfg. Co., 96 N.Y. 42; see also Missouri Ry. Co. *vs.* Nebraska, 164 U.S. 403, which held unconstitutional as using the power of eminent domain for a private purpose an act of a state legislature obliging a railway company to permit private persons to build a private grain elevator on its right of way.

[4] See *e.g.* The Hand Gold Mining Company *vs.* Parker, 59 Ga. 419. In this case an act was held constitutional which gave a mining company the right on payment of damages to construct a flume or aqueduct over vacant lands in a specified county. The court justified its decision partly by the consideration that "the increased production of gold from the mines of Lumpkin County by the means as provided for in the defendant's charter, must necessarily be for the public good, inasmuch as it will increase for the use of the public a safe, sound, constitutional circulating medium, which is of vital importance to the permanent welfare and prosperity of the people of the State of Georgia as well as of the people of the United States." See also New Central Coal Co. *vs.* Granges Creek Co., 37 Md. 537; and Turner *vs.* Nye, 154 Mass. 579 where a statute was held constitutional which permitted

however, that apart from the Mill Act cases, these cases are very few in number. There are also other similar cases based on peculiar provisions of the state constitutions which, like the constitution of Colorado, specifically declare some particular occupation like mining to be a public one.

Such, however, is the doctrine which the Supreme Court of the United States applies to the decision whether under the fourteenth amendment a given purpose is a proper one for the exercise of the right of eminent domain. This practical result was reached as far back as 1884 in Head *vs.* Amoskeag Mfg. Co.,[1] when the court, following the rule adopted in the New England States, based its decision that a mill act affecting merely private mills was constitutional on the ground that such a statute may be "considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed with a due regard to the interests of all and the public good." The court in this case did not seem to think its decision required a consideration of what it called "the important and far-reaching question" whether the Mill Acts authorize a taking of private property for public use. In a later case, however, decided in 1904, viz. Clark *vs.* Nash,[2] the court adopted the view that the grant by an act of the legislature to an individual of the right to condemn land for the purpose of a ditch to be used to convey water for either irrigation or mining was constitutional under the conditions present in the particular case. The most important fact which influenced the court would appear to have been the aridity of the region and the impossibility of the development of the resources of the state, viz. Utah, if the act were held unconstitutional. The court reiterates the statement it made in the Fallbrook Irrigation case that in the determination of these questions it must rely very largely on the decision of the legislature and courts of the state in which the case arises, as to the necessity or expediency of the legislation attacked.

In Strickland *vs.* Highland Boy Mining Co.[3] the Supreme Court reaffirmed Clark *vs.* Nash and upheld the exercise of the right of eminent domain for the purpose of an aërial railway to be used by a mine. It says of Clarke *vs.* Nash that

> in discussing what constitutes a public use it recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon

one person for purposes of private fish culture to flood lands of another on the theory that the legislature could regulate the rights of owners of lands so as to provide for the most advantageous use thereof, even where one owner might as a result of the act be deprived of the title to his property against his will but upon compensation.

[1] 113 U.S. 9. [2] 198 U.S. 361. [3] 200 U.S. 527.

due compensation which under other circumstances would be left wholly to voluntary consent. In such unusual circumstances there is nothing in the fourteenth amendment which prevents a state from requiring such concessions.[1]

Perhaps the farthest the Supreme Court has gone in upholding the exercise of the power of eminent domain by a state is in Offield *vs.* New York, New Haven & Hartford Railroad.[2] In this case the court upheld a state law, authorizing a railway company which owns more than three fourths of the capital stock of any other railroad corporation, and which "cannot agree with the holders of outstanding stock for the purchase of the same, upon a finding by a judge of the Superior Court that such purchase will be for the public interest" to "cause such outstanding stock to be appraised." The act provided further that when the amount of such appraisal shall have been paid or deposited the stockholder or stockholders whose stock shall have been so appraised shall cease to have any interest therein and shall on demand surrender all certificates for such stock with duly executed powers of attorney for transfer thereon to the corporation applying for such appraisal. The court held that this statute did not deprive the stockholder of his property without due process of law and did not impair the obligation of a contract in that it abrogated the lease of one railroad by the other, since whatever value the lease gave the shares of stock would be represented in their appraisement.

The power of the state notwithstanding the fourteenth amendment to deprive a person of his property even without direct compensation, where the public good would seem to require it is also recognized in a recent case,[3] which upheld a state law making provision for a bank depositors' guaranty fund. This fund was formed from assessments levied upon all state banks to the extent of one per cent of their deposits, and in case the cash of an insolvent bank immediately available was not sufficient to pay depositors in full the state authorities were to withdraw from the fund and from additional assessments if required the amount needed to make up the deficiency. It was objected to this law that it deprived persons of their property without due process of law by taking private property for private use without compensation. In answer to this objection, the court, Mr. Justice Holmes delivering the opinion, says:

In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use [citing the cases

[1] See also Byrnes *vs.* Douglas, 27 C. C. A. 399, where the condemnation of property for a tunnel for a mine was held perfectly proper though without any consideration of the constitutionality of the proceeding from the view-point of the fourteenth amendment.

[2] 203 U.S. 372.

[3] Noble State Bank *vs.* Haskell, 31 S. C. R. 186.

just referred to] and in the next it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See Ohio Oil Co. *vs.* Indiana, 177 U.S. 190.[1]

In all these cases both in the state courts and in the Supreme Court of the United States, it will be noted that the consideration appealing with particular force to the courts was the necessity of extending the conception of public purpose at the expense of rights in private property in order to secure the most advantageous development of the natural resources of the region. In New England this has consisted for the most part in the development of water power for manufacturing purposes. In the arid or mountainous regions of the West and middle West it has consisted in the development of the agricultural or mining industries. In none of these cases has the question been raised whether in the conditions of economic inequality incident to industrial and urban life the character of the purpose for which the right of eminent domain may be exercised may be influenced by those conditions, whether, in other words, the power may be used in order to secure not more effective production but more economic equality, *i.e.* more equality in distribution or opportunity.

The question here, as before, whether the Supreme Court will give the same effect to the peculiar economic conditions which are developed by our industrial civilization as it recognizes should be given to the peculiar economic conditions resulting from climatic and geographical situation, is one to which no certain answer can be given. But if it should recognize that economic or social conditions are to have the same effect as climatic conditions, it can hardly be doubted that it would consider the power of eminent domain as used for a public purpose where it was used in such conditions of population congestion as exist, *e.g.*, in the city of New York to provide homes for the poorer classes in the community either at a moderate rental, or at a price and under such conditions of sale as would enable the needy classes to acquire homes. If an intimate connection can be shown between the enterprise for the purpose of which the power is exercised and the public health, an additional reason for upholding the constitutionality of the enterprise is of course secured. For considerations of health are very apt to control the decision of the court.

[1] Another interesting expression by the Supreme Court of its opinion as to the effect of the fourteenth amendment on the power of the states is to be found in Interstate &c. Railway Company *vs.* Commonwealth, 207 U.S. 79, 87, where Mr. Justice Holmes says: "If the fourteenth amendment is not to be a greater hamper upon the established practices of States in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amendment was passed."

Intimately connected with this question is the question whether in order more effectively to carry out some local improvement or in order to participate in the increase in the value of the land due to the new improvement, a city, *e.g.*, may be authorized to condemn a larger amount of land than is absolutely necessary for the purposes of the specific improvement. This is what is known popularly as excess condemnation. This method is adopted in Germany and has been applied also in a few specific instances in England. It has rarely, however, been resorted to in the United States in such a manner as to make an adjudication upon the question at issue necessary, and as a result there are few cases exactly in point.

There are, however, a number of cases which hold that a city, which with the intention, *e.g.*, of making a park, has obtained land by the exercise of the right of eminent domain, and finds that it has more land on its hands than is necessary, may sell such lands to private persons.[1] These cases may not, however, be regarded as authorities for the general proposition that the legislature may provide for excess condemnation with the direct intention of using the excess condemned for a private purpose. Thus, in the Matter of the City of Rochester the court distinctly says in speaking of an act of the legislature which authorized the Park Commissioners of the city to sell at auction lands acquired by condemnation for a park which such commissioners should determine were not necessary for park purposes:

> It is claimed that this provision is in conflict with the provision of the constitution respecting the taking of private property for public use, as it in fact authorizes the city to take it for a purpose not public. We think the objection without merit or substance. Of course the city would not take private property for the purpose of selling or dealing in it, but having once acquired it for a park and it becoming, in the course of time, unnecessary or useless for that purpose by the growth of the city or other changes in situation, a sale in the manner prescribed by the statute would be within the legitimate functions of the city as a municipal corporation and power to that end conferred by the state at any time or in the act authorizing the taking cannot invalidate the delegated right to exercise the right of eminent domain.

Furthermore, the question would appear to have been decided against the constitutionality of taking by condemnation any land in amount in excess of what is required for public purposes by Embury *vs.* Conner.[2] It may therefore be said that excess condemnation is improper under the ordinary limitations of the state constitution. The very general belief that excess condemnation is unconstitutional under the state constitutional provisions is probably responsible for

[1] Brooklyn Park Com. *vs.* Armstrong, 45 N.Y. 70; Matter of the City of Rochester, 127 N.Y. 243.

[2] 3 N.Y. 511.

the fact that we have no decisions of the United States Supreme Court on the question.

It is, however, to be noticed that the same reasons which have led the Supreme Court of the United States to uphold the constitutionality of the Mill Acts and other similar legislation, viz. the desirability of permitting the power of the government to be so applied as to bring about the most profitable use of economic resources, would be present in the case of attempts upon the part of city governments, *e.g.*, to condemn an amount of land in excess of what was needed for a particular improvement. For in many cases it is only through such action that a city can most economically carry out its plan.

There is then considerable justification for the belief that our constitutional limitations are, if liberally interpreted, not a serious obstacle to the adoption of most of the measures which are being put into force by modern governments for the aid of the needy classes. The only point in which great doubt may be felt is as to the power of taxation whose use for anything but a distinctly public purpose has met with the disapproval of the courts.

THE REGULATION OF RAILWAY RATES UNDER THE FOURTEENTH AMENDMENT [1]

By J. F. Swayze of the Supreme Court of New Jersey

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I

In 1873 the Supreme Court of the United States, in the first decision [2] that involved the construction of the Fourteenth Amendment, limited its application in a way that must have surprised both those who had advocated and those who had opposed its adoption on the floor of Congress. The court held that the privileges and immunities of citizens of the United States protected by the amendment were not the general privileges and immunities of citizens, but only those special privileges and immunities that belonged to citizens of the United States as such, — the right to come to the seat of government,

[1] This paper gives the substance of lectures delivered at Harvard University on the Fourteenth Amendment.

[2] Slaughter House Cases, 16 Wallace, 36.

It may not be amiss to quote the language of that part of the first section of the Fourteenth Amendment which is here under consideration:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The reader need hardly be reminded that this Amendment was made after the Civil War, being ratified in 1868.

to assert claims against the national government, to transact business with it, to seek its protection, to share its offices, to have free access to its seaports, subtreasuries, land offices, and the courts of justice of the several states, to demand its care and protection over life, liberty, and property when on the high seas or in the jurisdiction of a foreign government, to assemble and petition for redress of grievances, and to have the writ of habeas corpus; to use the navigable waters of the United States, and to enjoy all rights secured by treaty with foreign nations, to change citizenship from one state to another with the same rights as other citizens of that state. Important as these rights are, they are not the ordinary everyday rights that closely affect the citizen. For these he was left to the protection of the states. Though the actual decision related only to one clause of the amendment, the opinion of Mr. Justice Miller, who spoke for the court, intimated strongly that the clause forbidding the states to deprive any person of life, liberty, and property without due process of law, and to deny to any person within its jurisdiction the equal protection of the laws, was intended to protect against unjust discrimination the negro race only.

Three years later, however, in the Granger Cases[1] (1876), it was taken for granted that the scope of the latter clause of the amendment was broader, and that it protected not merely those of the negro race, but all persons. The court in fact followed the dissenting opinions of Justices Field and Bradley, not the dictum of the prevailing opinion of Justice Miller.

The Granger Cases settled the authority of the state legislatures to control the charges of a business affected with a public interest. Some of the language used by the court went far in denying any right of the court to interfere. It was said distinctly that though the power conceded to the legislature was liable to be abused, the people must resort for protection against abuses to the polls and not to the courts. It was conceded that under some circumstances, but not under all, statutory regulations might deprive the owner of his property without due process of law; but it was held that the amendment did not change the law; "it simply prevents the States from doing that which will operate as such a deprivation."

The question of rates seemed by these decisions determined to be a legislative, not a judicial question. Six years later,[2] the court held that a railroad company, whose board of directors was by the charter authorized to establish rates, could not, as against a general law of the state, exact more than three cents per mile per passenger. The

[1] Munn *vs.* Illinois, 94 U.S. 113. [1877.] Chicago, B. & Q. R.R. Co. *vs.* Iowa, 94 U.S. 155. Peik *vs.* Chicago and N. W. Railway Co., Lawrence *vs.* Same, 94 U.S. 164. Chicago, M. & St. C. R.R. Co. *vs.* Ackley, 94 U.S. 179. Winona & St. Peter R.R. Co. *vs.* Blake, 94 U.S. 180. Stone *vs.* Wisconsin, 94 U.S. 181.

[2] Ruggles *vs.* Illinois, 108 U.S. 526. [1883.]

reasoning was put on a narrow basis, involving only the construction of the charter. The power granted was to determine the rates by by-laws; the power to pass by-laws was limited to such as were not repugnant to the laws of the state, and hence it was held that the by-laws could not fix a greater rate than was permitted by the general legislation; "grants of immunity from legitimate control," said the Chief Justice, "are never to be presumed."

The states soon began to avail themselves of the power to control business affected with a public interest. The first important case concerning the limitation of their powers arose in California.[1] It decided that the rates of a water company might be fixed by a county board in which the water company was not represented, although the charter of the company provided for its representation. The court expressly reserved the question what might be done in case the municipal authorities did not exercise an honest judgment or fixed a price manifestly unreasonable. Two years later,[2] it was decided that railroad charges might be fixed by a Railroad Commission, although charters provided that the companies themselves might fix the tolls and charges. The legislature of Mississippi, by legislation subsequent to the charters, created a Railroad Commission with power to revise rates and increase or reduce them as experience and business operation might show to be just. It was argued that the legislature by the provision in the charters had surrendered the power of control over fares and freights. It was conceded that the rates must by the rule of the common law be reasonable, and the court held that the state was left free to act on the subject of reasonableness within the limits of its general authority as circumstances might require. "The right to fix reasonable charges has been granted," said Chief Justice Waite, "but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power, it would have been easy to say so; not having said so, the conclusive presumption is there was no such intention." The court, however, was careful to guard against an inference that the power of regulation was without limit. "The power to regulate," it was said, "is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

The statute was held not to be in conflict with the due process clause and the equal protection clause of the Fourteenth Amendment. "General statutes fixing maximum rates," it was said, "do not neces-

[1] Spring Valley Water Works *vs.* Schottler, 110 U.S. 347. [1884.]
[2] Railroad Commission Cases, 116 U.S. 307. [1886.]

sarily deprive the railroad company of its property contrary to the amendment." The importance of the qualifying word "necessarily" appeared in subsequent decisions when it was held that such statutes might sometimes be void. The decisions thus far were in favor of public control, and against review by the courts.

II

Four years later, in the Minnesota Rate Cases,[1] the court took a position hard to reconcile with what was said in Munn *vs.* Illinois and the succeeding cases. The Minnesota Commission had ordered a reduction of rates for transportation of milk from three cents to two and a half cents a gallon; and for switching cars from $1.25 and $1.50 per car to $1.00 per car. The railroads resisted and, upon application to the state courts, a mandamus was issued to put in force the rates fixed by the commission. The Supreme Court reversed this action. Justice Blatchford rested the reversal upon the fact that the decision of the railroad commission was made a finality under Minnesota law; he said that the commission could not be regarded as clothed with judicial functions or possessing the machinery of a court of justice. "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

The court seemed by this language to decide that the question of rates was always a judicial question, and not, as had been held before and has been held since, a legislative question; that it could therefore be settled by a judicial tribunal only; that if a railroad company was not allowed to charge reasonable rates, its constitutional rights were violated; and that it was entitled to reasonable profits in the same sense as other persons not engaged in a public calling. It is difficult to see how the right to profit as individuals not engaged in a public calling can be consistent with the right of the state to regulate the rates of those engaged in such a calling. The opinion, carried to its

[1] Chicago, M. & St. P. Railway Co. *vs.* Minnesota, 134 U.S. 418. [1890.] Minneapolis Eastern Railway Co. *vs.* Minnesota, 134 U.S. 467. [1890.]

logical conclusion, would substitute the courts for the commission as final arbiter; and in effect would throw the whole burden of rate making upon the judicial machinery. No wonder the opinion did not command the unanimous voice of the court. Justice Miller concurred in the result, but upon the ground that the commission had applied to the courts to enforce their order; that in substance this was asking the courts to determine that the order was reasonable, and hence the court had the right and duty to inquire into the reasonableness of the tariff of rates.

Justice Bradley, speaking for himself and Justices Gray and Lamar, dissented. He pointed out that the decision practically overruled Munn *vs.* Illinois and the railroad cases decided with it; that the question of the reasonableness of a charge, so far from being a judicial question, was preëminently a legislative one involving considerations of policy as well as of remuneration; that in practice it had usually been determined by the legislature by fixing a maximum in the charter of the company or afterwards if there were no binding contract; that the question only became judicial when the legislature enacted simply that rates should be reasonable, thus necessarily submitting the question what was in fact reasonable to the judicial tribunals; but that the legislature might itself or by its commission fix the rates; and that for that purpose their decision was final, unless they so acted as to deprive parties of their property without due process of law; but that a mere difference of judgment as to amount between the commission and the companies without any indication of intent on the part of the commission to do injustice, did not amount to a deprivation of property. The real difference between Justice Blatchford and Justice Bradley was as to the question presented in a rate case. According to the former it was: "is the rate a reasonable one, and such as would afford the same profit as could be realized by one not subject to regulation?" According to the latter it was: "is the rate so unreasonable as to be arbitrary and amount to confiscation of property rather than mere regulation of a rate?" The difference is striking and fundamental. If the legislature had the right to regulate rates, as had been settled in the Granger cases, then the property of the railroads was qualified by that public right, and there could be no deprivation of such qualified property as long as the legislature confined itself to fair regulation and did not undertake to confiscate under the guise of regulation. The view of the minority has finally prevailed.[1]

Justice Bradley in the course of his opinion took occasion to speak of the relations between the courts and the legislature. His words are worth quoting: "It is always a delicate thing for the courts to make an issue with the legislative department of the government, and they should never do so if it is possible to avoid it. By the

[1] Atlantic Coast Line *vs.* No. Car. Corp. Comm., 206 U.S. 1. [1907.]

decision now made we declare, in effect, that the judiciary, and not the legislature is the final arbiter in the regulation of fares and freights of railroads and the charges of other public accommodations. It is an assumption of authority on the part of the judiciary, which, it seems to me, with all due deference to the judgment of my brethren, it has no right to make."

The decision of the court in the Minnesota Rate Cases, it was further pointed out, gave a new extension to the meaning of the words "due process of law." Justice Blatchford's language must mean that due process of law requires judicial procedure "with the forms and machinery," to quote his language, "provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy." Long before this decision the court had held in an elaborate opinion by Mr. Justice Curtis[1] that the same words in the Fifth Amendment did not necessarily imply a regular proceeding in a court of justice or after the manner of such courts; and this view had been adopted and applied in the construction of the Fourteenth Amendment. The difficulty of Mr. Justice Blatchford's view becomes apparent if it is applied to the taking of the property of the citizen by taxation, by assessments for public improvements, or by administrative measures under the police power; or to restraint of the person made necessary by our immigration laws. "In judging what is due process of law," said Mr. Justice Bradley, "respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these: and if found to be suitable or admissible in the special case, it will be adjudged to be due process of law, but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'"

The decision in the Minnesota Rate Case inevitably led to repeated efforts to secure review by the courts of rates fixed by statute, or the orders of public commission.

After an unsuccessful effort by a friendly litigation to have a particular rate declared unreasonable,[2] the question next arose in the great case of Reagan *vs.* Farmers' Loan & Trust Co.,[3] noteworthy because it was the first successful effort to enjoin the enforcement of rates fixed by a commission.

The question was squarely raised, for the defendant denied the power of the court to entertain the inquiry at all, and insisted that the fixing of rates for carriage by a public carrier was a matter wholly within the power of the legislative department of the government and beyond examination by the courts. To this the court, through

[1] Murray's Lessee *vs.* Hoboken Land and Improvement Co., 18 How. 272. [1856.]
[2] Chicago & Grand Trunk Railway Co. *vs.* Wellman, 143 U.S. 339. [1892.]
[3] 154 U.S. 362. [1894.]

Mr. Justice Brewer, answered: "The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

The complainants challenged the tariff as a whole and the court's inquiry was limited to its effect as a whole. The facts were thus stated by the court:

The cost of this railroad property was $40,000,000; it cannot be replaced to-day for less than $25,000,000. There are $15,000,000 of mortgage bonds outstanding against it, and nearly $10,000,000 of stock. These bonds and stock represent money invested in the construction of this road. The owners of the stock have never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. The earnings for the last three years prior to the establishment of these rates were insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in interest the stockholders have put their hands in their pockets and advanced over a million of dollars. The supplies for the road have been purchased at as cheap a rate as possible. The officers and employees have been paid no more than is necessary to secure men of the skill and knowledge requisite to suitable operation of the road. . . . The actual reduction by virtue of this tariff in the receipts during the six or eight months that it has been enforced amounts to over $150,000.

Upon these facts the court said:

A general averment in a bill that a tariff as established is unjust and unreasonable, is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company have been for ten years steadily decreasing until the aggregate decrease has been more than fifty per cent; that under the rates thus voluntarily established, the stock, which represents two-fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one-half the

interest on the bonded debt above the operating expenses; and that such an averment so supported, will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree reversing it being put in force.

In deciding whether a tariff is so unreasonable and unjust as practically to destroy the value of the carrier's property, it is of course essential to fix the standard or principle upon which that value is to be determined. Upon this question the Reagan case is indecisive. Some of the language suggests that cost of the property is the proper measure of its value; other language, cost of replacement; and still other language, present value. The question was left for discussion in the later cases.

The Reagan case had dealt with the effect of the tariff of rates as a whole. Similar questions arose in St. Louis and San Francisco Railway *vs.* Gill,[1] where it was decided that the correct test was the effect of the rates on the whole line of the carrier's road, and not the effect upon that portion which was formerly a part of one of the consolidating roads; that a company cannot claim the right to earn a net profit for every mile of road, nor attack as unjust a regulation which fixes a rate at which some part would be unremunerative; that the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the State. The last qualification presents a new difficulty, — that of severing a railroad into parts divided by the imaginary state lines. The later effort to segregate intrastate and interstate business has led to difficult problems still in process of solution. The Gill case was a suit for a penalty, and the court in referring to Justice Miller's statement in the Minnesota Rate cases that the rates were binding until judicially determined to be void, added that in cases where the legislature itself fixed the rates, a bill in equity was impracticable because there was no public functionary or commission which could be made to respond, and the companies, if they were to have any relief, must have the right to raise the question by way of defense to an action for penalties. This remark was unnecessary to the decision, since the result of the case on the facts was against the carrier. The remedy by injunction to restrain legal officers of the state from prosecuting, came later.

The same principle that applies to the case of a carrier, applies also to a turnpike company. In Covington, etc., Turnpike Company *vs.* Sandford,[2] the court held that the facts that the tolls for several years prior to 1890 had not admitted of dividends greater than 4 per cent on the par value of the stock; that the proposed reduction would so diminish the income of the company that it could not maintain

[1] 156 U.S. 649. [1895.]

[2] 164 U.S. 578. [1896.]

its road, meet its ordinary expenses, and earn any dividends whatever for stockholders, showed that the constitutional rights of the turnpike company were violated. Justice Harlan was careful to say that a mere failure of the rates to suffice to earn four per cent on the stock would not justify holding the rates to be void. "It cannot be said," he added, "that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. . . . The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends." In dealing with the question how the reasonableness of rates was to be ascertained, the court was not very satisfactory. The inquiry was said to involve a consideration of the right of the public to use the road on paying reasonable tolls, and also of the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise. It was held that there might be other circumstances, not then necessary to state; that each case must depend upon its special facts; and justice might require different rates for different roads. In short, the opinion merely holds that rates must be reasonable and fair both to the public and the company and must not be so low as practically to deprive the company of its property. No standard was fixed, and the case decided only that the particular rates infringed the constitutional provision. The language of the court indicates that it is the actual and necessary investment of the company that is to be considered. This seems to mean the actual necessary cost as distinguished from cost of replacement or present value.

The results reached up to this point may be thus summarized. State enactments or regulations establishing rates that will not permit of the carrier earning such compensation as under all the circumstances is just to it and the public, infringe the provisions of the Fourteenth Amendment; and the question whether rates are so unreasonably low as to deprive the carrier of its property cannot be conclusively determined by the legislative authority of the state, but may be the subject of judicial inquiry.

III

These general principles do not go far to solve the question in a particular case. The decision in the Nebraska Maximum Rate Cases[1] took a further step. It was contended on behalf of the State that the compensation to be allowed the carrier after payment of operating expenses was purely a question of public policy to be determined by the legislature and not by the courts. "It cannot be successfully contended," said counsel for the State, "that so long as the rate

[1] Smyth *vs.* Ames. Smyth *vs.* Smith. Smyth *vs.* Higginson, 169 U.S. 466. [1898.]

fixed pays something above operating expenses to the corporation for the carrying of property, it amounts to the taking either of the use or of the property." "It must follow then, that, so long as the rate fixed by the law will pay the operating expenses when economically administered, and something in addition thereto, the power of the court ends, and the extent to which rates must produce profits is one of political policy." In short, the contention was that the right of property in a railroad consisted in the title and possession and the privilege to operate it economically, with the right to such additional compensation, however small, as the legislature chose to allow from time to time. The successful maintenance of this proposition would plainly have ended the control of the courts over the subject. It went to the very root of the matter. It might logically be contended that a property right that was subject to legislative regulation, as settled by the Granger Cases, was not taken away when the legislature did in fact regulate; but it was nevertheless true that the power to regulate was not a power to destroy. The case involved really a definition of the word "property" as applied to a common carrier; and in view of the earlier decisions, the court very naturally answered the contention of counsel by saying:

> The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land.

The definition of "property" becomes, therefore, in the last resort a matter for the courts.

The Nebraska case involved also the question of rates within a state over railroads extending through other states. It was said that rates reasonable in Iowa might be unreasonable in Nebraska since the density of population, and hence of traffic, might be greater in the former, while the cost of construction and maintenance might be less. It was held that the reasonableness of rates on traffic wholly within the state must be determined without reference to the interstate business done by the carrier or to the profits derived from it. "The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for out of a common fund, and that its capitalization is on its entire line, within and without the state, can have no

application where the State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business." Whether the attempt thus made to sever the intrastate from the interstate business can be carried out successfully is a question involved in later litigation and not yet settled. It involves a determination of the proportion of value of plant and cost of traffic to be attributed to the lines within the state. In view of the interaction of the various elements of cost and of revenue within and without the state upon each other, the problem is most difficult, and may prove possible of solution only by an approximation.

The court in the Nebraska case considered also the question on what amount the railroads were entitled to earn a revenue. The companies contended that they were entitled to such rates as would enable them at all times, not only to pay operating expenses, but also to meet the interest regularly accruing upon all outstanding obligations and to justify a dividend on all their stock; less than that, it was said, would deprive them of property without due process of law. The court held, however, that this contention practically excluded from consideration the fair value of the property used, omitted the right of the public to be exempt from unreasonable exactions, would justify the railroad in trying to earn interest on bonds in excess of its fair value and dividends on fictitious capitalization. The court was still indefinite in laying down the basis of the valuation on which earnings might fairly be had. It said the rights of the public would be ignored if rates were exacted without reference to the fair value of the property used for the public or the fair value of the services rendered. But these two bases of calculation are far from leading to the same result. To base rates upon the value of the property, involves the value of the plant in its entirety and the net result of all the rates on thousands of items. To base them upon the value of the services rendered, involves a consideration only of particular items and may involve a consideration of the value of the services to the shipper. The two methods are incommensurate. What the court decided was that the basis of all calculations as to the reasonableness of rates must be the fair value of the property used; that in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of the bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under the particular rates prescribed, and the sum required to meet operating expenses, are all matters for consideration, to be given such weight as may be just and right in each case. Justice Harlan was careful to add: "We do not say that there may not be other matters to be regarded in estimating the value of the property."

Many of these elements required and have received and are destined to receive further definition and analysis. What other elements are to be considered may never be finally settled, so infinitely various are the circumstances that distinguish each case as it arises.

The court soon had occasion to apply the rule, and the opinion shows no greater certainty in the basis of valuation.[1] A water company insisted that the court should consider the cost of the plant, the annual cost of operation including interest on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company either by way of interest on the money expended for the public use, or upon some other fair and equitable basis. All these matters the court conceded ought to be taken into consideration, but it held that the basis of calculation was defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. The opinion, however, points to no more definite rule. "What the company is entitled to demand," says the court, "in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public." This adopts present value as the standard, but leaves unsettled how the reasonable value of the property is to be ascertained, and what is a fair return.

The opinion in the next case[2] sought to make a distinction between public service companies and companies which without any intent of public service have placed their property in such a position that the public has an interest in its use. As to the first class, Justice Brewer said the owner intentionally devoted his property to the discharge of a public service, and undertook that which is a proper work for the State, and might be said to accept voluntarily all the conditions of public service which attach to like service performed by the State itself. As to the second class, the owner placed his property in such a position willingly or unwillingly, that the public acquire an interest in its use, but he submits only to those necessary interferences and regulations which the public interests require. Of the former it was said, that, since the State was not guided solely by a question of profit but might conduct the business at a loss having in view a larger general interest, so perhaps an individual who had shown his willingness to undertake the work of the State might be held to perform that service without profit. The suggestion was put in the form of an interrogation, since it was confessedly unnecessary in the pending case to determine the question. It seems to conflict with Smyth *vs.* Ames, and the court has never yet decided that the legal right of

[1] San Diego Land Co. *vs.* National City, 174 U.S. 739. [1899.]
[2] Cotting *vs.* Kansas City Stock Yards Co., 183 U.S. 79. [1901.]

regulation goes to this extent. The decided case involves a corporation of the other class, which was not doing the work of the State, was not performing a public service, and had acquired from the State none of its governmental powers. The business was that of a stock yard at Kansas City. The business was held to be so affected with a public interest, being at the gateway of a great commerce of which it was an important, if not a necessary, adjunct, that its charges, like those of a grain elevator, were subject to public regulation. But the court said the "business in all matters of purchase and sale is subject to the ordinary conditions of the market and the freedom of contract. He (the owner) can force no one to sell to him, he cannot prescribe the price which he shall pay. . . . If under such circumstances he is bound by all the conditions of ordinary mercantile transactions, he may justly claim some of the privileges which attach to those engaged in such transactions. And while he cannot claim immunity from all state regulation, he may rightfully say that such regulation shall not operate to deprive him of the ordinary privileges of others engaged in mercantile business." The difference in practical result suggested in the opinion is, that in the case of a business affected with a public interest, although not devoted to the public service, the state's regulation of charges is not to be measured by the aggregate of profits determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction. "The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered. He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large. Such was the rule of the common law even in respect to those engaged in a *quasi* public service independent of legislative action. In any action to recover for an excessive charge, prior to all legislative action, who ever knew of an inquiry as to the amount of the total profits of the party making the charge?"

The distinction suggested by Justice Brewer and his expressions with reference to the subject are interesting and suggestive; but the opinion was not the opinion of the court. Six out of nine judges assented to the judgment upon the ground that the Kansas statute violated the Fourteenth Amendment because it applied only to one stock-yards company, and not to other corporations engaged in like business in Kansas, and therefore denied to that company the equal protection of the laws. They were careful to say that they expressed no opinion upon the question whether it deprived the company of its

property without due process of law. This, and not Justice Brewer's elaborate opinion, expresses the view of the court. Under the facts of the case, it amounted to saying that the answer was doubtful to the question whether rates that enabled a company to earn 5.3 per cent on the value of the property used for stock-yards purposes, instead of about 10 per cent previously earned, amounted to depriving it of property without due process of law; the propriety of any rate of return was not decided.

The suggestion that a public service company, doing the work of the state, might properly do it for an unremunerative rate, bore fruit in the Minnesota Coal Rate case.[1] That case is important because it sustained an unremunerative rate upon coal fixed by the state commission. The ruling is in conflict with the reasoning of Smyth *vs.* Ames (the Nebraska cases) and the court recognizes the necessity of explaining the distinction. It says that while the reasonableness or unreasonableness of rates for intrastate traffic must be determined without reference to the interstate business, it does not follow that the companies are entitled to earn the same percentage of profits on all classes of freight carried. This hardly justifies the conclusion that the carrier may be compelled to carry some goods at a loss; for if so, the power to select those goods involves a power to discriminate quite at variance with fundamental principles; if the railroad can be compelled to carry coal at a loss, it may also be compelled to carry other goods at a loss; and since it is entitled to a fair return upon the whole business, this loss must be made up by the imposition of a heavier rate on other goods than would naturally fall thereon; the public authorities are then permitted to discriminate against some shippers and in favor of others, a discrimination which has always been condemned, and was held to be illegal by the New Jersey Supreme Court,[2] upon the ground that carriers were engaged in a public employment, three years before the United States Supreme Court decided the Granger cases.

The court in the Minnesota Coal Rate case, sought to justify the losing rate upon the ground that for purposes of ultimate profit and of building up a future trade, railways carry both freight and passengers at a positive loss. No doubt such is the fact, and if railways were to be left free to fix rates according to their own pleasure, and to discriminate at their pleasure between shippers, the practice of sowing seed to reap a future crop might be permissible. The difficulty is that considerations of that kind are not reducible to a legal rule, but involve considerations of business policy.

It is not only difficult to determine how much of the value of an entire railroad shall be attributed to the portion within a state, but

[1] Minneapolis & St. Louis R'd Co. *vs.* Minnesota, 186 U.S. 257. [1902.]
[2] Messenger *vs.* Pennsylvania R.R. 700, 407. [1873.]

since even that portion is used in part for intrastate and in part for interstate traffic, the value of the property used for local and for through traffic must also be determined; and since all the business is done by the same men, with the same equipment, the total cost of conducting the business must also be apportioned. As might be expected from the intricacy of the problem, the results thus far reached are not satisfactory. In the Gill case it was held that every mile need not pay, from which it would seem to result that the system must be treated as an entity, and that losses on local traffic might be balanced by profit on through traffic or vice versa. Smyth *vs.* Ames decided the contrary, and made necessary the determination of the proper basis for apportionment of value and cost. The South Dakota case[1] rejected gross receipts as a proper basis for the apportionment. The other basis suggested is that of the volume of traffic determined according to ton mileage. The tendency of the more recent cases in the lower federal courts seems to be in the direction of apportioning cost and value according to gross receipts. The question is still unsettled in the Supreme Court. In the Florida Phosphate cases,[2] the court leaned to the ton mile basis, at least as far as concerns the cost of doing the business.

The question to be decided when the protection of the Fourteenth Amendment is invoked, is whether the rates as a whole afford a sufficient return, or are so low as to amount to confiscation. When, as in the South Dakota Coal case or the Florida Phosphate cases, the rate upon a single article only is involved, it is impossible to determine the effect of that single rate upon gross or net returns on the entire traffic, and hence impossible to prove that the rate fixed is so low as to amount to confiscation. Such was the result in the Florida Phosphate cases, and it is quite conceivable that the court might be forced to decide that one unremunerative rate after another was not in conflict with the property right of the carrier, until an entire schedule of unremunerative rates might have been sustained. In the Phosphate cases the question did not arise, since the rate permitted exceeded the average receipts per ton per mile under the previous tariff. But the possibility of the result I have indicated illustrates the danger of the decision in the Minnesota Coal case, that a carrier may be required to carry a particular commodity at an unremunerative rate.

IV

The reasonable value of the property used was by 1903 pretty well recognized as the proper standard upon which returns may be earned. In San Diego Land & Town Co. *vs.* Jasper[3] the court said: "It no

[1] Chicago, M. & St. P. R'y. *vs.* Tompkins, 176 U.S. 167.

[2] Atlantic Coast Line *vs.* Florida, 203 U.S. 256. [1906.] Seaboard Air Line *vs.* Florida, 203 U.S. 261. [1906.]

[3] 189 U.S. 439. [1903.]

longer is open to dispute that under the Constitution what the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public." That standard is adopted as against a standard based on actual cost, less depreciation. Actual cost, selling price, valuation for taxation, may all be evidence of the actual value. But actual value may sometimes be enhanced by the fact that the plant is larger than is needed. Is the company entitled to earn a revenue on an unnecessary expenditure? To this question, the court answers, no. Upon the value as fixed by the local board, rates were fixed with the intention of securing a yield of 6 per cent. The court found no sufficient evidence that this rate was confiscatory. But the local board had fixed the rates as if the water company supplied the whole 6000 acres outside the city for which the works were intended. In fact it supplied less, and its receipts were therefore less than the supervisors estimated. The result might give the appellant less than 6 per cent on the value of the plant. But the court said that if the plant was built for a larger area than it could supply, the Constitution did not require that two-thirds of the contemplated area should pay a full return. The case is therefore important because it holds that a failure to pay 6 per cent on present value is not necessarily decisive of the question whether rates are confiscatory so as to violate the constitutional provision. The present value on which the company is entitled to a return is only the present value of what is reasonably necessary for the public service.

A water company in California [1] was incorporated under a statute which empowered the county board of supervisors to regulate rates, but not to reduce them so low as to yield to stockholders less than 1½ per cent a month on the capital actually invested. After the company had invested about a million dollars in its plant, a new statute empowered the supervisors to so adjust the rates as to yield not less than 6 nor more than 18 per cent per annum upon the value of the property actually used and useful for the supply of water. The court held that there was no contract the obligation of which was impaired, and that even if there was a contract, the legislature might alter or amend the original statute under its reserved power. For our present purpose the important point decided is that it is not a confiscation nor a taking of property without due process, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of six per cent upon the then value of the property actually used, even though the company had prior thereto been allowed to fix rates that would secure to it 18 per cent upon the capital actually invested. The right of property of a water company under the California statute,

[1] Stanislaus County *vs.* San Joaquin and King's River Canal and Irrigation Co., 192 U.S. 201. [1904.]

so far as it is protected by the Fourteenth Amendment, is no more than a right to earn 6 per cent on present value, regardless of actual investment or previous statutory provisions permitting a larger return.

The method of determining present value still remains to be settled. To ascertain the value of tangible property, such as lands or buildings, for the purpose of determining the just compensation required to be made when it is taken for public use, has always been a sufficiently difficult question. To ascertain the value for the purpose of determining whether a schedule of rates is confiscatory is more difficult still.

In the Knoxville Water Company case,[1] the value had been based on cost of reproduction, to which there was added $10,000 for organization and promotion expenses, and $60,000 for value as a going concern. The court declined to decide upon the propriety of including these two items in the estimate, and expressly reserved them for consideration when the question necessarily arose. The Knoxville case turned upon the failure of the court below to make a proper deduction for depreciation arising from age and use. It was held that the water company was not entitled to value an old plant as if it were a new one. The more interesting question was as to the right of the company to add to the present value of its plant, the cost of what had been lost through destruction or obsolescence, and what had been impaired in value although still in use. There was little discussion of the question in the opinion, no doubt because the circumstances of the particular case did not call for discussion. The court held that it was the duty of the company to use enough of its earnings to keep its plant good, before coming to the question of the amount of its profits, and that if it failed to keep its investment unimpaired, whether because it declared unwarranted dividends on over-issues of securities, or because it failed to exact proper prices for its output, it could not enhance the present value of its property by the addition of the costs of its mistakes. The question is likely to arise, as it has already in some cases, in a more difficult form, where fruitless but necessary experiments have been made, or plant has become obsolete in a rapidly advancing industry before it could possibly be made good out of current earnings. It arose before the Interstate Commerce Commission, in the converse case where the corporation, in order to reduce its apparent rate of earnings, sought to charge against current earnings the cost of betterments from which it was likely to profit for years to come. The Supreme Court approved the ruling of the Interstate Commerce Commission and held that the instrumentalities that are to be used for years should not be paid for by the revenues of a day or year.[2] A public service company cannot use more money in a year

[1] Knoxville *vs.* Water Co., 212 U.S. 1. [1909.]
[2] Illinois Cent. R.R. *vs.* Inter. Com. Comm., 206 U.S. 441. [1907.]

than is required for actual depreciation, and carry the excess as an addition to capital for the purpose of estimating the amount on which it is entitled to dividends, in determining whether a rate is confiscatory.[1] Novel questions of this character will arise with increasing frequency, and require the most careful consideration. Like most other questions in every department of the law, they are in their origin rather questions of fact than questions of law, although in course of time the rules become settled and thus become rules of law. In their origin, and as yet, many questions are questions of sound business management and engineering science. The law prescribes reasonable returns upon a reasonable valuation. What is a reasonable return and what is a reasonable valuation must vary with the circumstances of each particular case.

The basis of present value adopted in the Knoxville Water Company case, was cost of reproduction, less an allowance for depreciation, in order to make up the difference between the value of new and old. Such a basis in the case of land, especially in a growing city, tends to make the cost of reproduction exceed the original cost, and in the case of railroads especially is almost sure to make present value greatly in excess of cost to the companies. It has therefore been contended with much ingenuity and force, that the basis for rate regulation should not exceed the capital actually invested. In Willcox *vs.* Consolidated Gas Co.,[2] it was argued that one gas company should not be permitted to charge more than another, for the sole reason that movements of population, uninfluenced by either company, had caused the site of its plant to be more valuable if vacated and sold; for it was said, that, although the fortunate company was entitled to obtain the full value of the land when sold, the unrealized profit meanwhile did not represent profit used in the manufacture and distribution of gas, but rather represented wealth which the manufacture and distribution of gas keeps out of use. This argument seems sound. The circumstances of the case did not call for an answer by the court. It did, however, distinctly reject the basis of actual cost even in the case of land. It held that the value of the property must be determined as of the time when the inquiry was made regarding rates; that the company was entitled to the benefit of any increase of value. That is in harmony with general rule of law which permits the owner of real estate to profit by any increase in the value of his land. Obviously, however, if we are to uphold the rule that a public service corporation is entitled only to a reasonable return, and that the public are entitled to be served at reasonable rates, we must apply the rule of reasonableness to the amount of the investment, as was done in the San Diego Water case. The court recognized this, for it said there might be an exception to the

[1] Louisiana R.R. Comm. *vs.* Cumberland Tel. Co., 212 U.S. 414. [1909.]
[2] 212 U.S. 19. [1909.]

rule where the property had increased so enormously in value as to render a rate permitting a reasonable return upon such increased value, unjust to the public. This makes the reasonableness of the amount allowed for value of the property depend on the reasonableness of the rate to the public; but since the rate must afford a reasonable return to the company also, we are at once reasoning in a circle. The basis suggested by Mr. Whitney, in his argument as counsel, seems a better one, — that the value allowed should be the estimated cost of replacing the land in use with other land capable of accomplishing the same result. Probably no one would contend that if a gas company had been so fortunate as to locate its works at the corner of Broad and Wall Streets, and its land had attained the enormous value that there prevails, it should be entitled to a return from its gas sales on the present value of the site. Prudent management would require removal to a less expensive site better adapted for the business.

The more difficult question that arose in the Gas Company case was the valuation of the franchise. As to the general question of the propriety of including the value of the franchise in the valuation of the property, the opinion gives little light. All that was decided was that it was proper to include in the valuation, the value attributed with the consent of the state to the franchises at the time of the consolidation of the companies, upon which investors had relied; and that it was wrong to hold, as the court of first instance did, that the value of the franchise had increased in the same ratio as the value of the tangible property. When it came to the general question, the court said that to allow for increased value of the franchise was too much a matter of pure speculation and also opposed to the principle upon which such valuation should be made. Whether the court meant merely that the evidence in the particular case was not sufficiently certain to justify the increased valuation, or whether it meant that upon principle the valuation of the franchise ought not under ordinary circumstances to be included, the opinion leaves in doubt.

The court calls attention to the fact that the franchise was subject to the legislative right to so regulate the price of gas as to permit no more than a fair return upon the reasonable value of the property. It would have been but a step to hold that to base the return to the company upon the value of such a franchise would be impossible, since the value of the franchise in turn depended on the rates. The two being dependent, one on the other, neither could furnish a substantial basis for fixing the other. As Judge Savage well said in a case in Maine[1] "to say that the reasonableness of rates depends upon the fair value of the property use and that the fair value of the property used depends upon the rates which may be reasonably charged seems to be arguing in a circle." There is, however, as he points out, a sense

[1] Brunswick & T. Water District *vs.* Maine Water Co., 59 Atl. Rep. 537. [1904]

in which the value of the franchise must be considered. It is the franchise, the right to operate, and if possible to earn a dividend, that makes the difference between a lot of junk, — old rails, pipes, and the like, — not worth recovering from their situation in and upon the ground, and a completed plant, railroad, water works, gas works, as the case may be. This is a part of the value of a going concern, the allowance for which the court refused to pass upon in the Knoxville Water Co. case. Even though the franchise is revocable, the fact that the plant has a legal right to exist gives added value to the physical structures. The value of a rightfully existing structure which may be lawfully used is very different from the value of the same structure without the legal right to use it for the purpose for which it was assembled. Quite recently, in the valuation of the Omaha Water Works,[1] the court has expressly approved an appraisal of the value as a going concern. "The difference between a dead plant and a live one," said Justice Lurton, "is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers."

Although ordinarily the value of a franchise is not enhanced by the prospective profit from any particular schedule of rates, there is an exception where, by reason of a contract protected by the contract clause of the federal constitution, the corporation may continue to charge specified rates for a definite time.[2] The courts insist on finding the elements of a contract as they would between individuals. There must be an agreement upon sufficient consideration. Where the contract is made by a municipality, there must be legislative authority in the municipality to make the contract; and such legislation is construed strictly in favor of the public; authority to fix and determine rates does not authorize a municipality to make a bargain by which it ties itself up for the future.[3] Another exception may be suggested, — the investment by present owners in reliance upon the continuance or value of the franchise. To what extent, if at all, this element may enter into the calculation has not been expressly decided, nor does the Gas Company case settle the question. It settles indeed that under some circumstances such allowance must be made; but no attempt is made to define the circumstances with precision.

[1] Omaha *vs.* Omaha Water Co., 218 U.S. 180. [1910.]

[2] Los Angeles *vs.* Los Angeles City Water Co., 177 U.S. 558 (1900); Detroit *vs.* Detroit Citizens Street Railway Co., 184 U.S. 368; Cleveland *vs.* Cleveland City Ry. Co., 194 U.S. 517 (1904); Cleveland *vs.* Cleveland Electric Railway Co., 201 U.S. 529 (1906); Vicksburg *vs.* Vicksburg Water Works Co., 206 U.S. 496 (1907). See also New Orleans Water Works Co. *vs.* Rivers, 115 U.S. 674 (1885) (sustaining an exclusive right to supply water); New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U.S. 650 (1885); (sustaining an exclusive right to supply gas); Walla Walla *vs.* Walla Walla Water Co., 172 U.S. 1 (1898).

[3] Freeport Water Co. *vs.* Freeport City, 180 U.S. 587 (1901); Danville Water Co. *vs.* Danville City, 180 U.S. 619 (1901); Rogers Park Water Co. *vs.* Fergus, 180 U.S. 624 (1901); Knoxville Water Co. *vs.* Knoxville, 189 U.S. 434; Home Telephone Co. *vs.* Los Angeles, 211 U.S. 265 (1908).

The court held that the Gas Company case was not one for the valuation of good will because the complainant had a monopoly in fact and the consumer must take gas from it or go without; he must resort to the old stand whether he would or no. The court held also that there was no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises; the amount of risk, the locality where the business is conducted, the rate expected and usually realized there upon investments similar in character, were all mentioned as factors, and it was held that under the circumstances of the gas business in the City of New York, six per cent was a proper return.

The element of wages of superintendence, which Mr. Whitney in his argument conceded must be covered by the returns to the company, was left out. In one sense this is not a return upon capital, but wages of labor, and if it were possible for earnings due to the skill with which the business is managed to be secured to those alone whose skill produced the result, perhaps no more need be said. Practically, however, the earnings depend in part, sometimes in large part, not upon the skill in actual present-day management, but upon the satisfaction with which the public has been served in the past, perhaps by men long since dead. Given equal and reasonable rates, one company will be able to earn large dividends, and another perhaps unable to pay its way; and this result may be due not to any less efficient management, but merely to the fact that one has been long in satisfactory operation, while the other is new and not yet in vogue. The greater earnings of the one may even be due to the mere caprice of fashion. But to whatever cause it is due, difficulty will arise unless allowance be made, either by increasing the capital valuation on which the company is permitted to earn a return, by way of a valuation of a going concern, or the value of the probability of an already assured income, or else by allowing an additional return on the valuation minus this increment, by way of extra compensation for the greater skill or the greater satisfaction with which it serves the public. Even in the case of so close a monopoly as the Gas Company in New York City, it is not impossible that some of its earnings may have been due to this cause; for, although it had a monopoly of the supply of gas through pipes in the streets, it may have had competition, in the supply of light, heat, and power, from the electric companies. Although legally permissible, it would often be impracticable to cut down rates to a level that would afford a fair return to one company upon a valuation that failed to take into account the element of value of a going concern or an assured income, without ruining its weaker competitor. In some cases such lowering of rates would prove inadvisable, especially in the case of railroads. One road may, through fortunate investments, the discovery of valuable minerals along its route, the opening of fertile territory, and a rapid

increase of population, prove a highly profitable investment; another at the same rates may barely pay its way; yet to cut down rates on the prosperous road so as to reduce its high dividends to a normal level, would emphasize and accentuate the advantage already possessed by those along its line over those along the line of the less prosperous road. Either the prosperous road must be allowed to earn a higher return upon the valuation, or the valuation must allow for these elements.

Up to the present time, the United States Supreme Court has not been called upon to decide what elements are proper to be considered in determining the present value of a plant of a public service company. That the value of the plant as a going concern, not only ready for business but with business actually established, is greater than the bare cost of reproduction of the physical plant, is recognized by cases in other courts. It must be so, leaving out of view altogether the element of good will, which in the case of a strict monopoly ought to be disregarded. A going concern has necessarily expended money in various ways aside from the cost of physical plant in order to get going. The cost of promotion of the enterprise, of corporate organization, of obtaining the necessary franchises, permissions, and consents, of securing the necessary connections with other companies by rail or wire; the cost of experiments necessary in every new industry, and the often rapid substitution of improved appliances before the cost of the old can have been recouped out of earnings; the cost of developing the business including the oft-times necessary loss attending the incomplete stage of the plant, or the introduction of new appliances and methods; the cost of financing the enterprise, including interest on capital sunk before any returns begin to come in, — all go to make up the cost of a complete going plant, and are all expenses that a new enterprise must needs incur.

The United States Supreme Court has not as yet been called upon to analyze the costs of operation and to decide what items of cost of operation ought to be included in the annual charges before the profit can be ascertained. Professor Wyman has dealt with the subject in a satisfactory way[1] and the scope of this article does not call for its further discussion.

The question presented by a schedule of rates under the Fourteenth Amendment, is whether the schedule permits a fair return upon a reasonable valuation or is so low as to amount to confiscation. This involves different considerations from those involved when the only question is the propriety of the rate on a single article. It cannot be foretold what effect a change of certain rates, for example on coal or gas, will produce on the net revenue of the business as a whole. This difficulty has been met by the adoption of a tentative course, leaving

[1] Wyman on Public Service Corporations, Sect. 1150.

it for time and experience to determine whether constitutional rights have been infringed.[1]

A most serious difficulty is presented by our dual form of government. It is beyond the scope of the present discussion to treat the numerous cases dealing with the commerce clause, and the question what is interstate and what is intrastate commerce. The net return to a railroad company, — and it is to railway traffic that the questions most frequently relate, — depends on the relation between its income from whatever source derived and its outgoes whether for the conduct of interstate or intrastate business. The two are inextricably intermingled, and the problem of preserving the rights and powers of both the state and the federal governments is one of the problems of the future.

THE CONTROL OF CONGRESS OVER MANUFACTURE AND PRODUCTION[2]

By Thomas H. Calvert

(Chapter IV of "Regulation of Commerce under the Federal Constitution," by Thomas H. Calvert. (Copyrighted) Edward Thompson Co., 1907)

As the power delegated to Congress is limited to "commerce with foreign nations, and among the several States, and with the Indian tribes," there is an internal commerce which is subject to the exclusive control of the States. The principle that manufacture and production are not commerce was clearly stated by Mr. Justice Lamar in Kidd *vs.* Pearson.[3] He said: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation — the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation." And it was said by Chief Justice Fuller, in U.S. *vs.* E. C. Knight Co.,[4] that "Commerce succeeds to manufacture, and is not a part of it."

In the Kidd *vs.* Pearson case, *supra*, it was held that a statute of Iowa which, as construed by the State Supreme Court, provided that

[1] Willcox *vs.* Consolidated Gas Co., 212 U.S. 19; Northern Pacific R'y *vs.* North Dakota, 216 U.S. 579.

[2] Copyrighted.

[3] (1888) 128 U.S. 1.

Packing houses are not engaged in interstate commerce. U.S. *vs.* Boyer, (1898) 85 Fed. Rep. 425.

[4] (1895) 156 U.S. 1.

intoxicating liquors might be manufactured and sold within the State for chemical, medicinal, culinary, and sacramental purposes, but for no other — not even for the purpose of transportation beyond the limits of the State — was within the police power of the State, and that one who manufactured liquors exclusively for exportation and sale outside the State was within the prohibition of the statute. The court distinctly recognized and applied the rule that the fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce within the meaning of the Constitution.[1]

This question of the power of a State to control corporations engaged in manufacture was raised in a peculiar way under a statute of Wisconsin requiring that a company incorporated elsewhere file a copy of its charter with the Secretary of State, and pay a small fee as a condition of doing business there. A foreign corporation entered into a contract within the State for the erection of a factory to be operated under the supervision of the officers of the foreign corporation, and the fact that the product was intended to be used outside the State, and that indeed, very little could be used within the State, was held not to exempt the foreign corporation from compliance with the requirements of the State statutes.[2] An Ohio statute allowing the manufacture and sale of oleomargarine when free from any coloring matter or other ingredient causing it to look like or to appear to be butter as defined in the statute, and expressly forbidding the manufacture or sale within the State of any oleomargarine which contained any methyl orange, butter yellow, annotto, aniline dye, or any other coloring matter, was held not to violate this clause when all the acts of the corporation which were complained of related to oleomargarine manufactured by it in the State of Ohio, in violation of the laws of that State, and therefore operated on the corporation within the State and affected the product manufactured by it before it had become a subject of interstate commerce.[3]

In Addyston Pipe, etc., Co. *vs.* U. S.[4] the defendants were engaged in the manufacture, sale, and transportation of iron pipe at their respective places of business in the States of their residence, and had entered into a combination among themselves by which they agreed that there should be no competition between them in any of the States or Territories mentioned in the agreement in regard to the manufacture and sale of cast-iron pipe. Thus provision was made, not alone for the manufacture but for the sale of the manufactured product, and the contract directly affected, not as a mere incident of

[1] Mugler *vs.* Kansas (1887) 123 U.S. 623.
[2] Diamond Glue Co. *vs.* U.S. Glue Co. (1903) 187 U.S. 611.
[3] Capital City Dairy Co. *vs.* Ohio (1902) 183 U.S. 238.
[4] (1899) 175 U.S. 211.

manufacture, the sale of the articles over the territory embraced in the contract. The contract was held to be within the terms and purpose of the Sherman Anti-Trust Act.[1]

It was urged that this case was within the principle of the decision in the E. C. Knight Co. case, *supra*. In that case it was held that although the American Sugar Refining Company, by means of a combination, had obtained a practical monopoly of the business of manufacturing sugar, yet the Act of Congress did not touch the case, because the combination related to manufacture only and not to commerce among the States or with foreign nations. The direct purpose was the control of the manufacture of sugar; there was no combination or agreement, in terms, regarding the future disposition of the manufactured article, nothing looking to a transaction in the nature of interstate commerce. On the other hand, in the Addyston Pipe, etc., Co. case, *supra*, while no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention to increase, directly and by means of such combination, the price for which all contracts for delivery within the territory embraced by the contract should be made.

As giving point to the distinction between the domestic business of the defendants, so far as it consisted of the manufacture and sale wholly within their respective States, and that part of their business which related to the delivery of pipe after manufacture from their respective States to the other States and Territories covered by their contract, the court modified the judgment of the Court of Appeals so far as it included in its scope the enjoining of the defendants from combining in regard to contracts for selling pipe in their own State, and limited it to that portion of the combination or agreement which had relation to interstate sales.

And as adding further emphasis to this distinction, Mr. Justice Harlan, after reviewing, in the case of Northern Securities Co. *vs.* U. S.,[2] the cases which had been decided under the statute, summarized the propositions deducible therefrom, and having special reference to the question decided in the Addyston Pipe, etc., Co. case, *supra*, said: "Although the Act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations. . . .

[1] Act of Congress of July 2, 1890, c. 64, 7 Fed. Stat. Annot. 336.
[2] (1904) 193 U.S. 197.

Combinations even among private manufacturers or dealers whereby interstate or international commerce is restrained are equally embraced by the Act."

The power of Congress in some measure indirectly to regulate production and manufacture must be conceded. By denying the facilities of interstate transportation in the case of commodities which have not been manufactured under federal supervision, this object may be attained. To insure the interstate and foreign trade in pure and unadulterated foods, and to prevent frauds upon purchasers of goods, which are upon the interstate and foreign market, Congress would seem to have ample power. But there must be some limit, some line of demarcation between the power of Congress and of the States, in controlling the processes of manufacture, beyond which Congress cannot step. That there must be a limit to the power of Congress in this regard is evident both from the nature of the subject and from the judicial recognition and insistence that manufacture is not commerce, or, at any rate, that in and of itself it is a matter of domestic concern.

The remark of Chief Justice Fuller, that "commerce succeeds to manufacture," in the E. C. Knight Co. case, *supra*, is very suggestive in this connection.[1] It will have been noticed that in the Addyston Pipe, etc., Co. case, *supra*, while the contract or combination was entered into with respect to articles to be thereafter manufactured, the contract nevertheless had reference to contracts of sale and delivery in other States and Territories than those in which the respective manufacturers resided, and as it tended to restrain interstate trade in those articles, in violation of the statute, the conspirators were enjoined from carrying out that part of their contract, but neither their right to manufacture nor their purely domestic trade could be affected by a federal statute. And in the supposed cases of indirect interference, by denying the privileges of interstate transportation in the interest of the consumer, the exercise by Congress of such a right would seem to be referable to a power in the nature of an ultraconstitutional or federal police regulation. To the extent that manufacturers, in so far as their business is concerned in finding an interstate or foreign market for their products, may be subject to the rules prescribed by Congress by which that commerce shall be governed, as by the rule of free competition, and to such regulations as may be adopted to insure the quality of the articles transported and for the prevention of fraud and imposition — to this limit, the power of Congress may probably be exerted.

But if, under the guise of its power to regulate interstate and foreign

[1] As is also that of Chief Justice Waite, that "commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade," made in McCready *vs.* Virginia (1876) 94 U.S. 391, wherein the right of a State to grant the exclusive use of the land under its waters to its own citizens for the propagation of oysters was affirmed.

transportation, Congress were to attempt to control the processes of production and manufacture, with the avowed or ostensible purpose of regulating matters which are of purely domestic or local concern, and with no federal policy to be promoted, it must be that the line, faint though it be, which marks the boundary of federal and State power, would seemingly be overstepped. For instance, labor laws, strictly so called, are assuredly matters of State regulation. It may be, in order to secure the purity or quality of articles to be transported from one State to another and to foreign countries, that Congress can prohibit the transportation of articles which have not been produced under conditions guaranteeing their purity and fitness for consumption, and can probably stipulate for the freedom from certain diseases of the persons employed, as well as for the sanitary conditions of the premises. Here there would be an element of the federal policy — a national guaranty of the quality of the article. But federal laws regulating the hours of labor and prohibiting the employment of children, and making a conformity to those laws a condition to the interstate transportation of the goods manufactured, proper subjects of regulation though these may be, can have no relation to anything more than matters of local concern, as it is difficult to see how such regulations can be embraced by any conceivable rule of commerce, or how they can be considered such police regulations as would serve any distinctively federal purpose.

USURPATION IN ADMINISTRATIVE LAW

By Franklin Pierce of the New York Bar

This chapter presents the more cautious view of the question of centralization of legislative power over business. — Editor's Note.

In no branch of law to-day is there so great necessity for clear and definite ideas as in administrative law. The numerous commissions described in the last chapter, their existence in every state of the Union, the rapidity of their growth, the complexity of modern commercial life, the power of interstate commerce commissions to fix the rates of railways, the multiplication of commissions in the national government, the imperial domain peopled by tens of millions of people, and the great consolidation of economic interests, together with the impatience of our people for quick results, are all forces which, unless checked, will increase the field of administrative law. Just in pro-

portion as it is increased the rights and liberties of the citizen will be abridged.

The nature of administrative law can be better determined by a description of its sources and its operation than by a definition. Administrative law is made by the rulings of a multitude of commissioners, and the heads and officials of departments in both the national and state governments. It involves the administration of all these commissions and departments. Private law regulates the relations of individuals between themselves and is administered by the courts. Administrative law, in the main, regulates the relations between the individual citizen in the state and the state itself as represented by its officials. Of course this does not include criminal law nor constitutional law, but administrative law is the supplemental and detailed application of all laws passed pursuant to the Constitution, and includes the nature of the relations between the administration and its agents, on the one side, and the private citizen, on the other, whenever he comes in contact with mere administrative officers. The making of by-laws, the assessment of taxes, the fixing of rates by the Interstate Commerce Commission, the decisions of the Secretary of War requiring the removal or alteration of bridges upon the ground that they have become an obstruction of navigation, the decision of each of the heads of departments the determination of values of imported goods by the customs appraisers, the decisions of the superintendent of education, the boards of health, the boards of fish and game protectors, and of hundreds of commissions created under the national and state governments, these all afford illustrations of administrative law.

The number of commissions has been so great in recent years that it may be well said that we have government by commission. In 1903 alone, about one hundred and forty new permanent state boards and offices were created, as well as some seventy-five temporary commissions and thirty-nine investigating committees.[1] Scores of statutes are being passed every year giving to governmental agencies more power with the idea of remedying abuses. The worse the abuse sought to be remedied the greater the temptation to exercise arbitrary power by the commissions. We look with interest to the Russian bureaucracy, but we fail to observe that we are drifting toward just such absolute government at home. We are a republic in the occident ruled largely by commissions, and an empire in the orient ruled by military power. From year to year we are adopting precisely the same methods of bureaucratic government that have long existed in France, Russia, and Prussia.

One of the most terrible abuses of administrative law in recent years was involved in the decision of the United States Supreme Court in

[1] New York State Library Bulletin, *Review of Legislation*, 1903.

the case entitled United States against Ju Toy.[1] Ju Toy, in the year 1903, was a passenger on the steamship *Dorick*, returning from China to San Francisco. The immigration officers of San Francisco detained him as a person not allowed to enter the country under our laws. Ju Toy declared that he was born in the United States, had always lived here, and that they had no right to turn him over to the master of the vessel to be returned to China. Now observe the kind of a hearing he had. The rules of the Immigration Bureau require its officers to prevent communication between a Chinese immigrant and any one aside from the immigration officers. They conduct a private examination to determine whether he has the right to land, the head of the commission designating the only witnesses who may be present upon the examination. Generally no opportunity is given to the person to procure counsel. After such a hearing as this, Ju Toy was held by the Commissioner of Immigration as not entitled to admission. The only remedy for such a decision is an appeal to the Secretary of the Treasury.[2] The person who has been tried and found not entitled to enter the country must take this appeal within two days after the decision. Within three days thereafter the record must be sent to the Secretary of the Treasury at Washington. The rules of the Department require that every doubtful question shall be settled in favor of the government, and that the burden of proof in such a case rests upon the person claiming the right of admission. The Secretary of the Treasury heard this appeal and affirmed the decision.

Then Ju Toy procured a writ of *habeas corpus* from a District Judge of the United States, alleging that he had been born in the United States, that he was a citizen thereof, that he had gone to China on a visit, and that he had returned to this country and had been denied admission by the head of the Commission of Immigration, that an appeal had been taken to the Secretary of the Treasury, and that the decision had been affirmed, and that he was wrongfully deprived of his liberty. The District Judge granted the writ of *habeas corpus*, and upon the return thereof the Court refused to dismiss the writ, but appointed a referee to take the testimony of the witnesses, and report his findings of fact as to whether Ju Toy had been born in this country and was a citizen. After a thorough examination the referee found, as a matter of fact, that Ju Toy was a citizen of the United States, and this decision was confirmed by the District Court.

An appeal was taken from this decision to the Circuit Court of the United States, and the Court, being divided as to the correctness of the decision, certified interrogatories to the United States Supreme Court. The important question certified was this: "Should the court treat the finding and action of such executive officers" (referring to the Immigration Commissioner and the Secretary of the Treasury)

[1] 198 U.S. 253. [2] United States vs. Sing Tuck, 194 U.S. 161.

"upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same and *as final and conclusive*, unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them, or in some other way, in hearing and determining the same committed prejudicial error." The United States Supreme Court, Mr. Justice Holmes writing the opinion, found, as a matter of law, that it mattered not whether this man was a citizen of the United States or not, if this administrative tribunal, the Commissioners of Immigration, decided that he had not been born in the United States, and was not entitled to enter the country, and the Secretary of the Treasury upon the evidence taken confirmed that finding on appeal, that it was conclusive, and that there was no redress for Ju Toy. Justices Brewer, Peckham, and Day dissented, Justice Brewer writing a vigorous opinion.

So we have this condition: if a Chinaman is born in the United States and unquestionably is a citizen of this country, and goes back to China for a visit and returns, and is subjected to such a summary trial as to citizenship and found by the Immigration Commissioner not to have been a citizen, and the papers are certified to the Secretary of the Treasury who determines that the decision of the Commissioner is correct, the man must be banished from the country, although he is a citizen, because the finding of the Commission, under such circumstances, is conclusive upon him, and no court has the power to interpose and protect his liberties.

Outside of Russia and Turkey there is not a country in Europe today where it would be possible for such a wrong to occur. The result of such a decision is so far-reaching in its effects as to imperil the liberty of every citizen in this country. If the United States Supreme Court can make the decisions of such administrative bodies binding upon the citizen, under rules and regulations where it is practically impossible for him to protect himself, and he can be banished from the country and deprived of his constitutional rights in this manner, his liberty is not worth a fig. The learned Justice writing this opinion says: "If, for the purpose of argument, we assume that the Fifth Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial." [1] Due process of law before a commission — without an opportunity to talk with any one but the officers, without opportunity to procure witnesses, without chance to cross-examine witnesses, without any counsel, with the whole matter involving a right almost as dear as life itself disposed of summarily by administrative officials in a country where the Bill of Rights, which has secured to Englishmen their liber-

[1] 198 U.S. 263.

ties for hundreds of years, is made a part of the Constitution? The liberty of the citizen is indeed precarious if this is due process of law. Can a citizen of the United States be excluded from his country except in punishment for a crime? Dreyfus, under military rule in France, was tried by court-martial, found guilty, and banished to solitary confinement in a distant island of the Atlantic; and the conditions of his conviction showed more care for the rights of a citizen than existed in this case. The injustice done Dreyfus eventually created a great disturbance even in France, and our people and all other liberty-loving people jeered at the French for their disregard of the liberties of a citizen.

Again, Mr. Justice Holmes says: "It is unnecessary to repeat the often quoted remarks of Mr. Justice Curtis, speaking for the whole court in Murray's Lessee *vs.* Hoboken Land and Improvement Co., 18 How. 272, 280, to show that the requirement of a judicial trial does not prevail in every case." Yet the case cited by the learned judge was a mere distress warrant issued by the solicitor of the United States Treasury, involving simply the rights of property, and the court in that case said: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination." Is that case a justification for banishing a man from his own country to avoid holding that a mere administrative tribunal's decision was not conclusive? Thus Ju Toy was compelled to suffer banishment, and was not permitted to be relieved by a writ of *habeas corpus* even after a referee had reported that he was a citizen of the United States.

We are given to boasting of our liberties. We pity the Chinamen subject to arbitrary power. The Emperor of China is said to have the right, after examination and determination that one of his subjects had committed a crime, to drive bamboo splinters under the disrespectful finger nails of the subject, and then chop off his head to relieve the pain. Such exercise of power, however, is little more arbitrary than that which the United States Supreme Court approved in the Ju Toy case. We are told in these days that the law should be administered upon considerations "of what is expedient for the community concerned," and "that views of public policy should control"; and Mr. Justice Holmes, in the *Youth's Companion*, some time ago said: "A system of law at any time is the result of present needs and present notions and of what is wise and right on the one hand, and on the other of rules handed down from the earliest states of society and embodying needs and notions which more or less have passed away." The present notions of men as to what is wise and

right is not law, and to allow it to subvert the constitutional guarantees of personal liberty endangers every man's freedom. If the security which the Constitution has afforded to the citizen is unnecessary, and the first eight amendments embody "needs and notions which more or less have passed away," then the people should be allowed to determine that question and not the courts. Amendment to the Constitution by judicial construction is simply usurpation, and is especially blameworthy because it is done by those who are the guardians of the people's rights.

The truth is that for the last fifteen years momentous changes have been going on of which the people take little note. During this period the rights of property, through the decisions of the courts, have been growing more and more sacred, while the liberties of the citizen, secured to him by constitutional guarantees, have been gradually impaired. Let us observe an illustration of this change. In January, 1891, the Appellate Supreme Court of Massachusetts, in the case of Miller against Horton,[1] Mr. Justice Holmes writing the opinion, held that the decision of the Massachusetts State Commissioners on Contagious Diseases among Domestic Animals to the effect that the plaintiff's horse was affected by glanders and directing the Board of Health of Rehoboth to kill the horse, would not protect the Board of Health in so doing if it turned out upon the trial that the horse was not affected by glanders, and that the plaintiff in such a case could recover damages from the members of the board. Now a man's horse, of the value of perhaps a hundred or so dollars, was involved in that decision. A man's right to live in his own country and the country of his birth was involved in the Ju Toy decision. In the one case the decision of the Commission on Contagious Diseases is held not conclusive. In the other case the decision of the Secretary of the Treasury is held conclusive, although the referee appointed by the District Judge, upon oral evidence taken with opportunity for cross-examination, had reported that Ju Toy was a citizen, and his report had been confirmed. Ju Toy has no legal remedy for this wrong. He cannot sue the Secretary of the Treasury, and his action being in tort is not cognizable before the Court of Claims.[2]

It was the rights of man which engaged the attention of the political thinkers at the time of the Declaration of Independence. It is the rights of property which absorb the attention of the courts to-day. Power when interpreted by the one who is to exercise the power is always construed with great latitude. The Immigration Commission and the Secretary of the Treasury, according to this decision, exercise exclusive power, and the tendency is to increase that kind of power. Such tribunals generally will have all the power that they choose to

[1] 152 Mass. 540.
[2] Goodnow, Comparative Administrative Law, pp. 156–161.

exercise. As expressed in the original Constitution of Massachusetts, "A frequent recurrence to the principles of the Constitution is one of the things absolutely necessary to preserve the advantages of liberty and to maintain a free government." We look upon our government as a thing established and capable of maintaining itself without any personal efforts on the part of the citizen. The power to check, held by these commissioners, is often extended into a power to decree and to enact. Their exercise of power is purely arbitrary with apparently no limitation. If the people are not aroused to the danger of the exercise of such power it will not be many years before their liberties are subverted.

Another illustration of the danger of government by the decisions of administrative officers is found in the provision allowing the stoppage of mail by fraud orders. Now it is undoubtedly true that the mails are frequently used for improper purposes, that obscene matter is sent through them, that rascals who should be in state prisons employ them to carry out their nefarious schemes for defrauding simple, credulous people, and that all the abuses exist which Postmaster-General Cortelyou set forth in a recent review article.[1] Usurpations of power spring into existence to suppress just such wrongs as exist in the Post-office Department. Government always finds in the existence of similar abuses to-day excuses for usurpation. President Adams and Congress, in the passage of the Alien and Sedition laws, were seeking to correct real abuses. The conduct of the French immigrants, who had taken advantage of our gratitude to France, was such as to be worthy of punishment. It was the unconstitutional means of securing that punishment which aroused the American people, brought about the defeat of the Federalists, and placed in power the Democratic party for over fifty years. The danger of arbitrary power is always greater where the purposes for which it is exercised are good purposes, because the great majority of men do not see the danger from such exercise if it accomplishes good results. In no other way could arbitrary power take on a form more popular with good men than in attempts to suppress obscene literature, or letters and pamphlets intended to swindle the unwary. Of course we all desire that such men should be punished, but if one is acquainted with human history and its lessons he will never wish even such evils suppressed by the exercise of arbitrary power.

In 1836 President Jackson recommended to Congress the propriety of a law to exclude from the mails anti-slavery literature of an incendiary character. Mr. Calhoun, condemning in the strongest terms such publications, insisted that Congress had no such power because it would abridge the liberty of the press. Daniel Webster acquiesced in this opinion. James Buchanan, at that time Senator

[1] *North American Review*, April 19, 1907.

from Pennsylvania, supported a bill of this character, on the ground that the power of Congress to carry mails necessarily involved the right to exclude such mails as it saw fit. This bill was voted down. The Post-office Department now proscribes the use of the mails for the carrying of obscene matter and letters or pamphlets intended to defraud; and also, without any provision of law sustaining its action, debars from the mails pamphlets criticizing the acts of the national government.

Few Americans have ever given so much time to the reading and studying of political economy and other kindred subjects, upon which the welfare of mankind depends, as the late Edward Atkinson, of Boston. For thirty years or more before his death he never failed to espouse the cause of what he believed to be just, without any hope of reward except the consciousness of having done his duty. He believed that he saw in the imperialistic policy of President McKinley's administration a great danger to his country, and when Mr. Atkinson was satisfied that his purpose was a good one he was absolutely fearless in carrying out that purpose. The following is his statement of what occurred: "In the latter part of 1898 I privately printed a pamphlet containing two treatises: first, 'The Cost of a National Crime,' and second, 'The Hell of War and its Penalties.' . . . In February, 1899, the President had submitted to the dictates of the conspirators against the liberties of the Philippine Islands, and had committed 'criminal aggression' upon them. These facts were exposed in a second pamphlet containing a third treatise entitled 'Criminal Aggression — By Whom Committed?' . . . I then learned on apparently authentic information that the volunteers who had enlisted for the War with Spain and for service with Cuba had been sent against their will and against their convictions of right to the Philippine Islands and were there held in service after their terms of enlistment had expired, which to many of them was abhorrent. I also learned on apparently good authority that telegraphic messages from their relatives in this country were not permitted to reach them. This outrage made me think it suitable to send copies of my pamphlets to these volunteers who were held against their will in order that they might know they had support in the maintenance of their rights in this country. To that end I addressed a letter to the Secretary of War asking the addresses of the different regiments, inclosing copies of the pamphlets and announcing my purpose to send them to these troops. I did not discriminate between the volunteers and the soldiers of the regular army, but should not have sent to the latter lest the soldiers themselves should be embarrassed or exposed to hazard by their acceptance. After waiting a sufficient time for reply from Secretary Alger, I mailed eight copies as a test to Admiral George Dewey, Professor Shurman, Professor Worcester, General H. G. Otis, General Lawton, General

Miller, and J. F. Bass, correspondent of *Harper's Weekly*. The Secretary of War did not answer my letter, but apparently he and some of his associates were alarmed by my action lest the volunteers held against their will should demand relief from the abhorrent service of slaughtering our allies, and at the instance of the Postmaster-General the Postmaster in San Francisco violated the United States mail and took these pamphlets from it without authority of law and in violation of the rights of citizens."

Now there can be no doubt that there was nothing in the pamphlet which Mr. Atkinson sent to the Secretary of War, and which he afterwards mailed to Admiral Dewey, Professor Schurman, Professor Worcester, General Otis, and the others, which could have been injurious to them. But that is not the question. He had the legal right, if men have any legal rights left under imperial government, to express his opinions and to send them through the mail to any man, and yet these pamphlets were taken from the mail and destroyed by the order of the Postmaster-General without the slightest authority in law.

Let us now observe the method through which a fraud order is issued by the Post-office Department. Inspectors of the Department are assigned to various sections of the country, with the duty to investigate all cases in their districts in which it is alleged that the mails are being used in violation of the law. When a discovery is made by these inspectors (and what inspector or police officer ever lived that could not discover many things that do not exist?), in the language of Mr. Cortelyou: "When the character of the scheme to defraud is such that its continued operation, during this examination and consideration of the charges, threatens to result in losses to the public, temporary orders are at once issued to the Postmaster simply to withhold the mail pending the inquiry." [1] So to start with, we have the mail of one of the patrons of the Post Office, possibly engaged in a large business, where the withholding of his mail, even for a few days, may result in the practical destruction of his business, having that mail stopped without any hearing and without any chance of explanation. The man who engages in lynching adopts the theory of killing the suspected person and then trying him afterwards. The Postmaster-General exercises the same power of destroying a man's business, and then giving him a hearing and ascertaining whether he is guilty.

Now having held up the man's mail, the inspector reports the facts to the Assistant Attorney-General for the Post-office Department and, as Mr. Cortelyou says: "If these facts establish a *prima facie* case of fraud, the person or concern involved is at once notified of the pendency and the nature of the charges brought, and is then afforded an opportunity to appear before the Assistant Attorney-General for the

[1] *North American Review*, April 19, 1907, p. 809.

Post-office Department, either in person or in writing, or both, making such answers and statements as it may be desired to have the Department consider in disposing of the matter." Now the victim of such action may be two or three thousand miles distant from Washington. He is given an opportunity to be heard by the Assistant Attorney-General, who has already passed upon the case. The examination is not one through witnesses, with examination and cross-examination, but is in fact a mere formal examination, and the decision of the Assistant Attorney-General confirmed by the Postmaster-General is absolute, as in the Ju Toy case, upon the rights of the accused.

The right to do business is a legal right. Upon this right is founded most of the injunctions against labor unions and laborers engaged in a strike. Their employers are carrying on the business of manufacturing or some other commendable enterprise. Their men strike, they attempt, possibly by forcible means, to prevent other laboring men from taking their places, and the employer applies to the court for an injunction, which is granted, because the right to do business is a property right, and the action of his late employees is destructive of that right. Now apply this law to the case of a man whose mail is stopped by a fraud order. Such an order practically destroys his business even before a hearing. It will avail him little to go before the Assistant Attorney-General, because upon the evidence of the detective he has already decided the case, and at least before the hearing could be had the man's business is destroyed.

In 1905 a man by the name of E. G. Lewis was carrying on in the city of St. Louis a business known as the People's United States Bank. A fraud order was issued against him, and proceedings were taken in the United States Court for the purpose of appointing a receiver of his corporation, and a receiver was appointed. The fraud order was issued against both the corporation and Lewis. All letters thereafter addressed to him personally were returned with the usual word "fraudulent" stamped thereon. A letter from his wife, from his attorney, from any close friend in any part of the world, would have been returned with the word "fraudulent" stamped upon the outside. This fraud order actually shut him off from any intercourse through the mails with any human being and apparently for all time.

Mr. Cortelyou says about such cases:[1] "It is particularly true, too, that comparatively little direct evidence can be brought into court against the majority of these fraudulent operators," and he tells us that it is very difficult to find evidence which will insure the conviction of such operators. We are also assured by him that there is much justification for the remark recently made that "the Post-office Department of the United States is the most effective agency in the world for the detection and prevention of crime and the apprehension

[1] *North American Review*, April 19, 1907, p. 812.

of the criminal." [1] Now what have we? The most effective agency in the world for the detection of crime is able to obtain little evidence against those it accuses, and yet it has issued since the enactment of the present legislation 2,400 fraud orders. I am credibly informed that in the case of Mr. Lewis and his People's United States Bank, upon liquidation by the receiver, it paid one hundred cents on the dollar with interest in full to creditors, together with dividends to the stockholders of eighty-five per cent.

In the second session of the Fifty-ninth Congress a bill was introduced into the House of Representatives providing that the mail addressed to the person or firm against whom the fraud order is issued, instead of being stamped "fraudulent" and being returned at once to the senders, should be held in the Post Office for fifteen days before being sent back. In that period the business concern was permitted to institute an action in the United States Circuit Court, on giving a bond to pay the entire costs of the action in case the fraud order was finally held to be valid. This bill passed the House without a division, but failed to pass the Senate. When the wisdom of the proposed act was being discussed before the Congressional Postal Commission, one of the speakers said: "We are expected to live up to rulings, regulations, and decisions that we are unable to find and never heard of. The publisher is informed by mail that he has violated some rule, that his publications can be no longer mailed at a second-class rate, but the rule is new to him. His paper is held up until he can find out what is the matter. . . And when he has his hearing he finds out that it is a purely arbitrary affair, surrounded by none of the safeguards which are allowed other American citizens who are contesting for their right to do business." Of course it is not surrounded by any of the safeguards allowed other American citizens, because their safeguards are secured to them by laws and by a regular judicial procedure. On the other hand, administrative tribunals, at least in our own country, have always been arbitrary.tribunals depriving the citizen of his property and his good name without any of the safeguards prescribed by law.

In another case, where the publication had been stopped because of alleged obscene matter, an acquaintance of the publisher sought by repeated letters to discover what the precise matter in the publication was which the Post-office Department regarded as objectionable. Finally the only statement which he could procure from the officials was that it was "not practicable for the department to attempt to point out the offensive passages," and they practically refused to give any information as to what matter contained in the publication suppressed was regarded by them as offensive. In common-law courts the law requires the facts constituting the crime to be specifically

[1] Ibid. April 19, 1907, p. 816.

stated in the indictment so that the accused may know exactly the offense with which he is charged. He is given the processes of the court to procure his witnesses, and must be confronted with the witnesses against him. How different is all this from administrative tribunals.

This proceeding on the part of the Postmaster-General is quite as arbitrary as any which we find in Russia, Prussia, or Austria. The Russian censor blots out the objectionable parts of the newspapers and permits the rest to go through the mails. But our censor suppresses the whole edition, the good along with the bad. In Austria the business of printing a newspaper cannot be carried on without a license from the government, and every number of the periodical must be submitted to the police before publication, so it may be confiscated if it contains anything contrary to law. The censor is said frequently to order portions of the columns of an article to be stricken out, and with these corrections it is allowed to go forth. All arbitrary governments seek to control the press. And with full knowledge of the results of such methods we are deliberately adopting them. As a general rule no man's liberty to print or publish ought to be restrained by government for any reason short of thereby protecting the liberty of other men. So important is the public discussion of questions that all assaults of arbitrary government upon liberty have first appeared in limitations upon the press.

Publications entered as second-class mail matter are said to be subject to no less than seven distinct rates. Such discretion reposed in the officials of the Post Office is wide enough to allow them to suppress all periodicals which are found to be injurious to the interests that they cherish. *Wilshire's Magazine* was a few years excluded from the mail by the Post Office Department. The editor then took his magazine to Canada, where he had no difficulty in securing its entrance to the post office. Three years later a New York printer sought to contract for the publication of this magazine, and to procure its reinstatement in the mails of this country applied to Senator Platt, and the boss easily succeeded in securing at once what years of labor on the part of Wilshire had failed to accomplish. This instance shows the danger of conferring such arbitrary power upon a department of the government. The Star Chamber, which was abolished in 1641, had as one of its special functions the right to try the offenses of the press. "Press law has long constituted," says Mr. Dicey, "and still continues to a certain extent a special department of French legislation, and press offenses have been, under every form of government which has existed in France, a more or less special class of crimes." [1] Under Napoleon Bonaparte no one could print a paper without official authorization, and even to-day the government adopts preventive

[1] Dicey, The Law of the Constitution, p. 248.

measures for guarding against the propagation of unsound or dangerous sentiments.

Yet even in France the arbitrary power exercised by our Post-office Department would not be tolerated for a moment. The *Gaulois*, a Parisian paper, speaking of President Roosevelt's action in excluding from the mails newspapers printing the details of the Thaw trial, said: "That no sovereign in Europe unless it be the Czar and the Sultan had the power to do what the American executive had done." The *Gil Blas*, another paper, commented upon the same matter, saying: "Imagine President Fallières interdicting and expurgating such an account." If publishers must run the gantlet of such secret and irresponsible postal supervision the freedom of the citizen would seem to be greatly impaired. In England, from whence we drew our principles of English liberty and where happily they still continue, the government has no authority to seize the stock of a publisher because it consists of books, pamphlets, and papers which in the opinion of the government contain seditious or dangerous matter.

There are many other instances of abuse of administrative law. One of these is found in the McKinley Act of 1890. Discriminations were being made in Germany against American meats. The act provided that sugar, tea, coffee, molasses, hides, and other articles should be admitted free of duty. In order to arm the government with means of retaliation, Congress conferred the power upon the President that whenever he should be satisfied that unjust discriminations were being made by any foreign state against the importation or sale of any American product, he might by proclamation impose duties upon sugar, tea, coffee, molasses, hides, or any other articles which, by the terms of the McKinley Bill, were admitted free from the country discriminating against us. Thus the President was given a legislative power belonging to the popular branch of the legislature, originally granted for the protection of the people against arbitrary power. The United States Supreme Court, however, held that this provision of the act imposed administrative powers upon the President and was constitutional, Justices Lamar and Fuller dissenting. Justice Lamar said: "It goes further than that and deputes to the President the power to suspend another section in the same act whenever 'he may deem the action of any foreign nation producing and exporting the articles named in that section to be reciprocally unequal and unreasonable'; and it further deputes to him the power to continue that suspension and to impose revenue duties on the articles named 'for such time as he may deem just.'" [1]

On March 9, 1897, Congress created a commission to regulate the importation of teas, and prohibit them, though in fact pure, when below the standard of quality fixed by the Secretary of the Treasury.

[1] Field *vs.* Clark, 143 U.S. 649.

That tea commission is now engaged in the exercise of that dangerous power of requiring the reshipment of teas which do not reach the quality which it prescribes, or, in case they are not reshipped, of destroying them. This act also has been declared constitutional.[1]

There is no such thing as reviewing the action of these administrative boards according to the decision just cited. A recent writer on administrative law observes that our procedure affords even less protection from the arbitrary action of these boards than the French law, though the Bill of Rights is unknown to the French Constitution.[2] According to the statement of this same writer state courts have admitted the finality of the decisions of boards of health in respect to nuisances, so that without a hearing a board of health, in many of the states, has been declared capable of determining that a man's property is a nuisance and binding him by their decision. A different rule, however, prevails in the state of New York.[3] In hundreds and even thousands of cases, where these boards are acting within the scope of the statute creating them upon the subject matter therein fully described, their decisions are final and are not subject to review in the courts.[4] Mr. Wyman, who is enthusiastically favorable to these commissions, says, however: "Things are done in administrative adjudication which could never be done in judicial processes. Principles are violated in administrative processes which are fundamental in the courts." [5]

Ex parte proceedings seem to be just as binding as proceedings upon notice. Even these boards have extensive legislative power. So when a fish and game commission determine that the fish of any brook or stream of the commonwealth are of sufficient value to warrant the prohibition of casting sawdust into the stream where they are found, they may by an order in writing prohibit the same without giving the owner any hearing upon their action.[6] Although the executive, legislative, and judicial departments are carefully divided in our form of government, still the legislative department can confer executive duties upon these commissions and their decisions therein are final.[7] Judge Jackson, many years ago in the Kentucky and Indiana Bridge case, described these commissions as the referee of each and every Circuit Court of the United States.[8] And it has been held that

[1] Buttfield *vs.* Stranahan, 192 U.S. 470.
[2] *Political Science Quarterly*, December, 1906, Bowman, p. 615.
[3] Copcutt *vs.* Board of Health of City of Yonkers, 140 N.Y. 1. See also p. 12.
[4] Wyman, Administrative Law, Sects. 112–136; Miller *vs.* Raum, 135 U.S. 200; Oil Company *vs.* Hitchcock 190 U.S. 316.
[5] Wyman, Administrative Law, Sect. 119.
[6] Ibid. Sect. 121, note; Salem *vs.* Eastern R'y Co., 98 Mass. 431, 443; Nelson *vs.* State Board of Health, 186 Mass. 330, 333.
[7] *Harvard Law Review*, Vol. XX, p. 121; Wyman, Administrative Law, Sect. 121; *in re* Kollock, 165 U.S. 526; Wyman, Administrative Law, Sect. 133, note 103 with Cases.
[8] *Harvard Law Review*, Vol. XX, pp. 123, 124.

one of them may institute proceedings in the courts and become prosecutor and judge in the same case.

Congress voted, in 1898, the payment over to the President of $50,000,000, and under the power of administrative law he expended it in his own discretion without any check whatever. Under this power of administration in 1899, the Secretary of War sent troops into the state of Idaho, without even the petition of the state authorities; martial law was declared by the War Department, the writ of *habeas corpus* was suspended, not by the state authorities but by the general in command of the army, and without any warrant whatever he arrested hundreds of men and carried on government by his own will. Mr. Root, at a New York University Law School Banquet, described administrative law under his direction, as Secretary of War, as follows: "It has been my province during the last four years and a half to deal with arbitrary government. It has been necessary for me not only to make laws and pronounce judgment without any occasion for discussion — except in as far as I would choose to weigh the questions involved in my own mind — affecting ten million people. And not only to make laws and pronounce judgment, but to execute judgment with overwhelming force and great swiftness." Under this administrative law the Philippine Commission on June 1, 1903, by Section 6 of an act numbered 781 of the Philippine Commission, provided for the very same kind of reconcentration of the native population for which we drove Weyler and his Spaniards out of Cuba.[1]

Under administrative law the Secretary of the Interior, by executive order in 1904, decreed that all persons who had served in the army or navy of the United States and had reached the age of sixty-two years, should be presumed to have incurred such disabilities as to entitle them to receive pensions under the Act of Congress approved June 27, 1890. It is under this power that the Interstate Commerce Commission is about to impose rates of traffic upon 200,000 miles of railway in the United States. It is under this administrative power that Secretary Shaw of the Treasury suspended the duties upon importations of coal; accepted, as believed by many, without legal authority, other securities than national bonds to secure the issues of national bank notes; deposited the surplus of the Treasury with national banks in the amount of many millions of dollars, and used all the powers at his disposal to protect and further the interests of these national banks. It is under this administrative power that in all the states of the Union hundreds of commissions are taking the control by license and otherwise of the affairs of men, many of which are not public in their nature. In the case of the People *ex rel.* Lodes against the Department of Health, of New York City, Mr. Justice Gaynor, of the

[1] *North American Review*, Jan. 18, 1907; Blount, Philippine Independence, p. 145.

Supreme Court of New York, speaking of this condition, says:[1] "Those who meditate a recourse to arbitrary power for a good purpose should pause to consider the consequences, for it is a vice which brings in its train all the vices and especially the detestable vices of official extortion and blackmail. Good men in good times should beware of setting bad precedents for bad men in bad times. The sale of impure milk or other food is bad, but far worse, and fraught with far greater evils, would be the growing exercise by executive officials of powers not conferred on them by law. If they were suffered to require licenses for the ordinary occupations of life, and refuse them to whom they willed, how long would it be before such licenses would be sold for money or for political favor or partisan fidelity?" Commissions of this kind, censors of all kinds, restrictive government, multiplication of penal laws, all these methods have been the methods of arbitrary governments. There is not a step in the decay of the Roman Republic and of the Empire which is not marked by a large amount of just such legislation as I have been describing. The endless repetition of legal commands is the unerring sign of impotence and decadence.

It is important to appreciate whither this administrative government is leading. It differs materially from administrative government in France and other European countries. In all these countries all relations between administrative officers and the citizens, growing out of the official duties of those officers, are regulated entirely in administrative courts. The citizen of France is forbade from the bringing of any action against any administrative officer for an official act without the consent of the French Council of State. This does not apply to acts committed by officials not in the exercise of their authority, as, for instance, where the act is a personal fault or a malicious use of lawful powers. But for all other administrative acts of any name or nature the citizen has no recourse against the official committing the wrongful act under claim of authority, except in an administrative court, where there is scarcely hope of redress.[2] These administrative courts are conducted by administrative officials with rules of procedure peculiar to themselves, and with no provision of trial by jury. Will administrative law bring us to the same unfortunate condition?

In Prussia the only remedy of the citizen against an official for a wrong, in the supposed execution of his duty, is to appeal to the authority who supervises the action of that official, or to bring an action before the administrative courts against the official or officials whose conduct is challenged.[3] By reason of this fact a considerable part of all the litigation in Continental Europe is carried on before

[1] 117 App. Div. 865.
[2] Dicey, The Law of the Constitution, chap. xii.
[3] Ashley, Local and Central Government, pp. 302, 303.

administrative courts dependent upon the head of the state,[1] and therefore likely to be safe guardians of the rights of officials. The administrative courts in European countries resent with indignation any attempt on the part of the regular law courts to interfere with their jurisdiction over administrative officials.

There are no strictly technical administrative courts in this country or in England. The public official is liable before our common-law courts for all his torts and wrongs, even though claiming to have performed them in his official capacity. If a board of health wrongfully has declared the property of a citizen to be a nuisance and destroyed it, they are liable in most of the states, at least for damages, in case it was not a nuisance. If they revoke the license of a milk dealer, without a hearing, and for a cause not prescribed by the laws or their written regulations, they are liable, and an equity court will enjoin their action.[2] It may be true that in some cases the official can protect himself by a process which is regular upon its face, but in such a case his superior who issues the process, if void, is liable.

These commissioners will come, by and by, to believe that extraordinary powers belong to them; that they can prohibit a legitimate business by refusing to license it, entirely overlooking the fact that they are given the power to regulate business and not to prohibit it. The President, a few days ago, took away the license of a Mississippi steamboat pilot. It will not be many years, if existing conditions prevail, before the national government, through commissions, will be licensing every locomotive engineer and conductor engaged in interstate commerce, and will be licensing every state corporation doing an interstate business. These licenses will be revocable at the will of the President or the head of the Department of Commerce, and hundreds of thousands, if not millions, of men, and all of the corporate interests of the country, will be at the mercy of the national government. So long as these commissions are allowed to exercise judicial and legislative powers, without the right of review on the part of the regular courts, the citizen's rights are in danger. There is to-day no menace to his rights so great as administrative decisions. Our English ancestors three centuries ago escaped from the administrative courts of England. Let us beware of the danger of returning in our day to that kind of arbitrary government.

[1] Lowell, Governments and Parties in Cont. Europe, Vol. II, pp. 83, 195.

[2] People *ex rel.* Lodes *vs.* Department of Health of the State of New York, 117 App. Div. 856.

VIII

EXCERPTS FROM TESTIMONY GIVEN AT THE HEARINGS BEFORE THE COMMITTEE ON INTERSTATE COMMERCE OF THE UNITED STATES SENATE, INVESTIGATING THE DESIRABILITY OF CHANGING THE LAWS REGULATING AND CONTROLLING CORPORATIONS, PERSONS, AND FIRMS ENGAGED IN INTERSTATE COMMERCE.[1]

A LETTER FROM THE COMMISSIONER OF CORPORATIONS, MR. HERBERT KNOX SMITH[2]

Hon. Francis G. Newlands
United States Senate, Washington

Dear Senator: Your letter of the 2d instant was received, raising certain questions on the bill for an interstate trade commission (S. 2941) introduced by you. . . .

Taking up your questions in order:

(1) "Shall an interstate trade commission be organized?"

If the work is to be simply that of investigation and publicity my experience would indicate that an organization under a single head would be decidedly more efficient. For purely executive or administrative action such form of organization is preferable. If, however, judicial or semijudicial powers are to be exercised the commission form has important advantages; it is better adapted for judicial decision, its judicial rulings would probably carry more weight, and, in any event, it tends to secure stability, continuity of policy, and greater independence of action.

(2) "Shall the Bureau of Corporations be merged in the commission?"

[1] NOTE. All references in this Section are to the Report of Hearings Before the Committee of Interstate Commerce, United States Senate. Sixty-Second Congress, 1911–12. Pursuant to Senate Resolution 98.

[2] Pp. 20 ff.

If the interstate trade commission is to exercise substantially the powers now used by the Bureau of Corporations it seems almost necessary that the bureau should be merged in that commission, as the bureau would have little reason for further separate existence. There is also, however, the very important consideration that the bureau is very necessary to the commission; the bureau is the one unit in the Government service which can immediately supply the experience, trained force, knowledge, and traditions which the commission must have for its work.

(3) "Shall the test of the applicability of the acts to corporations engaged in interstate trade be the annual gross receipts, or the character of the business in which the corporations are engaged—namely, the production of great staple articles?"

The question here is a debatable one, but experience with corporate business leads me to doubt the feasibility of a classification based on kinds of business or staple commodities. Such lines of demarcation are too vague. For example, certain companies deal wholly in the manufacture of lumber, others in its sale, others in the manufacture of goods primarily made out of other materials but having a certain proportion of lumber. Similarly with the steel industry and many others. It would be almost impossible to draw the line in many cases so as to say whether a corporation was engaged in a given industry or not. Many great wholesale houses sell a large amount of hardware. Would they be included, for example, as engaged in the steel industry?

(4) "Shall the power of the commission be confined to investigation and inquest, requirement of statements and publicity, and recommendation to the President and to Congress?"

"If not, shall the additional requirement of registration be made with the accompanying power of denying or canceling registration for certain prescribed offenses or for violation of the regulations of the commission; and shall the punishment of a recalcitrant corporation be confined simply to a cancellation of registration?"

Investigation, publicity, and recommendation should be in any event parts of the system. Personally, I favor strongly registration of corporations with power of cancellation. This gives a very practical means of control, which at the same time has the great advantage that it does not actually attempt the positive regulation of business. It allows credit for proper business conduct and imposes discredit for the reverse, but assumes no power of direction and simply leaves the public to apply corrective pressure through public opinion and the investment of the public's money.

Answering also the last part of the question, it is probably better for the present to provide cancellation of registration as the only penalty for improper business conduct. I feel entirely satisfied that

such United States registration would shortly become a valuable business and financial privilege for any large corporation. The standing of the company with that public opinion that underlies legislative action and the financial status of its securities with the investing public would be affected in a very practical way by the possession or cancellation of such registry. The approval now granted to corporate transactions through existing State public-service commissions has already a very definite market effect on the price of securities and on the attitude of public opinion.

(5) "The preciseness with which the grounds for denial or cancellation should be stated in the law, and whether the commission shall have the power to make regulations, lack of compliance with which will result either in a denial or cancellation?"

The grounds of cancellation should be broadly stated, leaving the commission to apply in specific cases the general rules prescribed by Congress. If power of making regulations be conferred on the commission, it should be simply for such regulations as will carry out the terms of the act and make effective the rules laid down therein.

(6) "As the power to regulate interstate commerce is a legislative power, it has been held that the law turning over the administration of such power to a commission or board shall prescribe the rules or standards under which the power is to be exercised. Would this apply to a mere registration in which no substantial property right is involved?"

The question of whether the delegation of a power is constitutional depends wholly on the nature of the power. Legislative power, strictly speaking, cannot be delegated, but executive power can, of course, be conferred by legislation, and there can also be given quite broad power of executive administration in ascertaining facts and applying to them the rule established by legislation. It seems probable that the powers granted in this bill come under the latter head and are constitutional.

An excellent case on the subject is Union Bridge Co. *vs.* United States (204 U.S. 364), where the earlier cases are reviewed in detail. The case itself involved the question of whether an act of Congress granting to the Secretary of War power to order the removal of the bridge over a navigable stream "whenever the Secretary of War shall have reason to believe that any . . . bridge . . . over any of the navigable waters . . . is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise," was a delegation of legislative power.

The court held that this was not an objectionable delegation of power, and quoted, with approval from Lock's appeal (72 Pa. St. 291), as follows:

"The legislature cannot delegate its power to make a law, but it

can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."

See also other cases cited in this decision.

An excellent legislative precedent is in the steamboat-inspection law, where, by section 4405, Revised Statutes, a board is given power to "establish all necessary regulations required to carry out in the most effective manner the provisions of this title." These regulations now cover over 100 pages.

In the same law, also, the inspectors are given broad power over the licenses of steamboat officers, as follows: "But such license shall be suspended or revoked upon satisfactory proof of bad conduct . . .," a power obviously closely analogous to the power of cancellation provided in your bill.

It should be noted also that the only power delegated is the mere revocation of registration. Registration is not a property right. It is simply a privilege granted through the commission and revocable by it.

Thus, as stated in paragraph 5 above, rules of action and grounds for cancellation of registration should be set forth in the bill itself, with sufficient definition to make clear the intention of Congress as to the class of acts to be covered thereby. For example, the word "overcapitalization" is perhaps sufficiently definite in itself, while "unfair or oppressive methods of competition" would perhaps be too indefinite.

(7) "In case the power to fix prices should be included," etc.

I would prefer not to discuss the form of such power, as I personally believe it unwise to confer any such power on the commission, and do not consider myself competent to treat the subject properly.

In considering any such treatment of our commercial problem as is attempted in this bill, it seems to me, at least, that the Government should not, at present, commit itself, by way of general policy, either to the theory of "unlimited competition" or of "unlimited combination." We are not, I feel, sufficiently advanced to justify us in taking a definite position in favor of either one of these opposing ideas. Any system we adopt now should be so framed as to be alike available for either development. To give the power to fix prices would tend to commit us to a policy of industrial combination.

(8) "Shall the provision regarding registration be simply persuasive or compulsory; and if compulsory as to the large corporations, shall permissive registration be granted to the smaller corporations?"

I believe that the system would be entirely workable, if the publicity, etc., were simply permissive, and that some complications would thus be avoided. But a compulsory system for large corporations should also bring much the same results, especially if coupled with permissive

registration for smaller concerns. The permissive feature for smaller companies seems decidedly desirable.

(9) "Shall the commission, in case of revocation of registration, have power to order that the offending corporation shall not engage in interstate commerce?"

This power is a peculiarly drastic one, and would require rather elaborate machinery for its enforcement. I doubt both the wisdom and the necessity here.

I take the liberty of adding some general considerations, which may be relevant to the discussion of such a system as is proposed by your bill. These views are based on an experience of eight years in the Bureau of Corporations.

(10) The one imperative change now required in our policy toward the "corporate problem," is a change from our present system of treating that problem through occasional prosecution, to a system which will treat it with continuous administrative action. We should advance from a negative policy to a positive constructive policy; from mere occasional prohibition to permanent regulation and prevention.

(11) One of the primary objects of the commission is the providing of proper publicity. This should not be combined with the administration of the Sherman law. It is probably true that efficient publicity is inconsistent with prosecution, at least as administered by the same office. The Bureau of Corporations, the present agent of corporate publicity, secures now at least nine-tenths of its information by voluntary coöperation. The interstate trade commission would continue this work, but should the function of prosecution under the Sherman law be combined with publicity, it is obvious that the present voluntary coöperation of corporations, the main source of information, will very largely be destroyed.

There are of course exceptions to this general principle. At times it would be necessary for the information obtained by the commission and indicating a clear and flagrant violation of law to be turned over to the Department of Justice. The Bureau of Corporations has in this manner given much assistance to the Department of Justice. The numerous prosecutions of the Standard Oil Co. since 1906 for railway rate discriminations were all based on the report of that bureau, and the agents of the bureau furnished much of the evidence and assisted largely in the preparation of the cases.

Similarly, in the recent prosecution of that company under the Sherman law, the case was instituted as a result of the investigations of the bureau, was largely prepared by its agents, and, I venture to say, would not have been successfully presented without their aid. Some of the ablest men in the bureau gave over a year of their time to this case.

But in general such connection with prosecution should be wholly incidental and secondary, and the publicity work of the commission should be directed primarily at furnishing reliable economic and financial information for the general public and not at securing evidence for prosecution.

(12) One of the most important features of such an administrative system of corporate regulation is its provision, as above referred to, for broad corporate publicity. The effects of such publicity have been well shown by the past work of the Bureau of Corporations, as set forth in the annual report of the Commissioner of Corporations for 1910.

The report of the bureau on the transportation of petroleum, published in May, 1906, effected a sweeping decrease in the granting of railway rebates throughout the country. Practically every railroad involved in the railway discriminations described in this report canceled the objectionable rates within six months after the issuance of the report.

The report of the bureau on cotton exchanges resulted within a few months in a marked improvement in the regulations of the New Orleans Cotton Exchange, and while the New York Cotton Exchange has not yet made any changes in its system, that exchange, on March 23, 1911, voted "that it is the sense of this meeting that since . . . the Department of Commerce and Labor has made an exhaustive investigation of the business methods of the cotton exchanges and has criticised the methods and by-laws of the New York Cotton Exchange . . . it will be good judgment on the part of this exchange to, . . . so far as possible, adopt the suggestions made by the Government."

In the tobacco industry the independent manufacturers have in many instances stated that the work of the bureau has caused the cessation of various objectionable methods of competition.

In the problem of waterways, the reports of the bureau, three in number, have very widely influenced public opinion by showing the real questions to be solved and the real advantages to be attained in waterway transportation.

A Federal administrative system of publicity and registration should develop both strength and elasticity. The administration of such a system should result in a definite and broadening policy, based on exact information, establishing definite standards of business action, of public economics, and of Government regulation, in themselves highly effective, and valuable also as the raw material for further statutory enactment.

We may fairly hope to get from it a gradual rise in the standard of business conduct, closer relationship between large business and public authorities, marked improvement in corporate accounting and in the standing of our industrial securities, and the elimination of unfair

practice and business privilege. All of this without any disturbance of properly conducted business.

The time seems ripe for such action. It has been obvious since the Supreme Court decisions on the Standard Oil and Tobacco Co. cases that the public is ready and anxious for an advance to some such administrative system of regulation by the Federal Government. It seems to be true that corporate managers concede more and more the necessity for such regulation and publicity, recognizing both its public necessity and its advantage to fair business.

Very sincerely, yours,

HERBERT KNOX SMITH, *Commissioner.*

FROM THE TESTIMONY OF TAYLOR VINSON, ATTORNEY AT LAW, AND ALSO ENGAGED IN THE COAL BUSINESS, HUNTINGTON, W. VA.[1]

* * * * * * *

The trouble with the business man to-day is that he doesn't know, and his lawyers cannot tell him, whether he is violating the law or whether he doing a legitimate and sane thing.

Now, that is the difficulty with the business man. A man does not know how to do it. They do not want to violate the law, and they will not if they can help it, but there is the condition. Now, I know it is claimed that the atmosphere has been cleared very largely by the recent decisions of the Supreme Court in the oil and the tobacco cases. The construction that the court put upon that statute by putting the word "reasonable" in there, it seems to me, was the only construction that the court could have given it, because we cannot assume that this Congress would propose a law that would require men to do an insane thing or do an unreasonable thing, and to keep from being destroyed, or rather the business being put into bankruptcy, it would be the sane thing or the reasonable thing for any business man to go to his neighbor and say, "I cannot live, this business is ruining me, and I want you to take it over at a fair price," and the law would say this whether you are a trust and using oppressive powers or not.

In my judgment the court is wholly inadequate to do those things. They cannot administer economic laws. Their laws are constitutional laws, and laws, of course, that are passed by Congress. Take, for instance, those two cases which the court has just decided. If we look at the result in those cases we see the complication that must necessarily arise in any and every case that the court passes upon.

[1] Pp. 34–35.

For instance, the court in those cases has said that the combination — take the Standard Oil case as an illustration, composed of thirty-four small companies — must be disintegrated, and each one of those small companies must go on and compete with each other. The stock held by the Standard was returned to the treasury of the small companies and reissued to the stockholders of the Standard. The same controlling stockholders in the Standard have a controlling interest in each one of the small companies. So that the thirty-four companies have control exactly — have stock ownership with the small interests that formerly controlled the Standard. Now, then, the decree is, and the injunction is, that each one of those thirty-four companies must go into real and actual competition one with the other. Gentlemen, in my judgment that is humanly impossible — that two or three gentlemen may get together and own two or three companies engaged in the same business, and they can force and compel, and will force and compel, those companies all to engage in real and actual competition one with the other in the market it seems to me is asking a little bit too much of human nature.

Now, if that is not done — and I do not see how it is possible that it may be done, or could be done — what is going to be the result? The result is that every stockholder, that every one who has any interest in these companies, will be cited a hundred times a month on contempt proceedings, and in my judgment litigation in those cases has only really begun after the court has approved the reorganization plans. I hope I may be mistaken about that, but I do not see any other way out of it.

Now, take the coal industry. It cannot live two years if we form a combination. We do not want to form combinations of any character and then go to the district attorney and tell him to indict us for a criminal offense in order to find out whether we are doing a legitimate business or an illegitimate business.

Now, that is the condition we are in. If the Government proceeds against us by a suit of dissolution, then it would take two or three years, at the very best that can be done, to finally come to a conclusion as to whether or not we are legitimate or whether or not we are violating the law. Now, it would be so much easier, so much simpler, and so much better, gentlemen of this committee, if in the first instance you had four or five men who are skilled in the mining business, from the digging of the coal out of the ground to selling it in the market, to pass upon the legality of these contracts, so that if your contract or your combination which you propose is an illegal one you must not establish it, you must modify it; or, where it is legal, then we put our business upon a legal basis, and we can go on and not only do business but our small men themselves will be in a position where they can

protect their property and their investment and keep on doing business. Otherwise we must go out of business; we must stop.

Now, we ask this Congress to give us that relief. We feel that if this commission is created it will accomplish great purposes, in helping us out of the difficulty we have gotten into. By obeying the law we are running into ruin, and we want the law changed so as to prevent that ruin. Now, the commission can do it. It can do it justly; it can act quickly with all the facts before it, and instantly; not only in these trade agreements which are so necessary under existing economic conditions, but they can administer this miner's relief fund and give those men the relief to which they are entitled and make the charge upon the industry, and they are entitled to it; otherwise we will have to stop the operation of the employers' liability laws over the country; that would be just as disastrous, if not more so — it certainly will be more so so far as explosions and accidents are concerned to the smaller men — than even the operation of the Sherman Antitrust Law.

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LETTER OF HENRY R. TOWNE, ESQ., OF THE YALE AND TOWNE MANUFACTURING COMPANY, INTRODUCED AS TESTIMONY BY HON. SETH LOW[1]

THE SHERMAN ACT IN ITS RELATIONS TO TRADE ORGANIZATIONS — SUGGESTIONS CONCERNING A SIMPLE AMENDMENT

The decisions of the Federal courts thus far rendered in cases arising under the Sherman Antitrust Act of 1890, and involving either attempted monopoly or attempted restraint of interstate commerce, have been confined chiefly, if not wholly, to two classes of cases, viz.: (1) Those in which control was sought through a holding company, by which the operations of a number of corporations, previously independent and competitive, were brought under a single management; and (2) those in which control was sought by the merging, into a single corporation, of the property and ownership of numerous smaller corporations previously independent and competitive.

While these two classes undoubtedly represent the largest and most prominent cases to which the Sherman Act was intended to apply, there remains a third class, which, if less spectacular and prominent as to its units, includes a vastly larger number of cases than either of the other two classes, and which, in aggregate importance in the in-

[1] Pp. 525–527.

dustry and commerce of the country, probably exceeds either if not both of the others. This class embraces the vast number of small industrial and commercial units which form a constituent part of the many lesser industries, each of which latter is important if not essential to the welfare and convenience of the people, or to the efficiency of other related industries. Probably the employees of this group include a large majority of our citizens of both sexes who are engaged in organized industry. Among the units of this great class the practice has prevailed for at least a generation, and probably much longer, of forming coöperative trade associations for mutual protection and benefit. Among the various purposes sought have been the regulation of prices and the pooling of profits, both of which are now held by many authorities to be forbidden by the Sherman Act, although, so far as I know, no decisions have been rendered covering precisely the class of cases to which I refer. Where an association or pool accomplishes or attempts a substantial monopoly of an industry, unquestionably the Sherman Act applies, and should apply. A serious doubt arises, however, whether the Sherman Act does or should apply in cases where most or all of the following conditions prevail, viz.:

(1) The group includes only a fraction of the industry, a substantial number of units remaining outside.

(2) The group maintains uniformity of prices among its members on a level which yields only reasonable profits, which enables the smaller and weaker members of the group to continue in existence, and which, instead of suppressing, tends to encourage competition by maintaining conditions which invite new competitors to enter the field, and which imposes no penalties upon them, but rather confers benefits.

(3) The group attends strictly to its own affairs, without attempting to interfere with or molest outside competitors, in some cases even extending to the latter an invitation to join the group.

(4) The group imposes no restriction upon competition among its members or with outsiders, except as to the maintenance of uniform prices, each member having the same incentive and freedom as before to develop its business as largely as possible and in whatever ways it may find expedient. In other words, there is no restriction of competition except by cutting prices.

(5) In some cases the plan provides not only for the fixing of prices by concurrent action, but also for the pooling of profits. Even so, the members collectively have the same incentive and freedom as before to prosecute and develop the business, the sole qualification being that one who does so unfairly and at the expense of his fellow members forfeits to the latter some share of his excess profits. In this case, as before, however, no limitation of or interference with outside competitors results; on the contrary, such competition is protected

and encouraged by the maintenance of profitable prices by the group. Pooling merely regulates internal competition; it does not affect external competition.

(6) In addition to regulating prices, or the distribution of profits, or both, such industrial groups usually perform many other functions useful to their members and often beneficial to the community, as for example, the ascertainment of credits, the collection of debts, the prosecution of dishonest customers, and the encouragement of regularity of trade practices, thereby preventing unfair discrimination between customers of different kinds or in different localities.

Many thousands of associations of the kind thus indicated have heretofore existed throughout the country and in nearly every branch of organized industry. Many of these were in existence long before the enactment of the Sherman law of 1890 and have been in continuous operation until now. Many, if not all, of their members, aroused by the recent decisions of the courts, have sought legal counsel of late as to whether these operations do or do not come within the scope of the Sherman law. The advice so obtained has differed widely. Some have been advised that the law applies, some that it does not, and all are at sea. The net result has been to produce profound disturbance and unrest, which is felt even more than is expressed, and this in turn is operating adversely upon business of all kinds, especially in the halting of plans for further development and for new undertakings.

Speaking from long and wide experience and as a student of this subject, I express unqualifiedly the conviction that in the great majority of cases these friendly associations of competitors have not only promoted the interests of their members in many and important ways, but on the whole have promoted also the welfare of distributors, and consumers. A striking confirmation of this view is the fact that, in most cases, these associations have been conducted openly, with full knowledge of all concerned, and without protest or objection from any side. Obviously this would not have been the case had their operations been oppressive or injurious or unfair. Thousands of small producers have been enabled by these associations to continue in successful operation which otherwise would have been crushed out of existence by the ruinous competition of their stronger neighbors. The adequate profits realized have largely been devoted to the upbuilding of industries which otherwise would have halted or languished because of inadequate means wherewith to develop. A railroad or a great industrial corporation can obtain the capital needed for growth by successive issues of new securities, but this resource is rarely available or expedient to the small industrial unit. Almost invariably the capital needed for the growth of the latter is obtained by appropriating part, or sometimes all, of the profits of the business

to increased and improved facilities, and it is to the interest of the community that this process should be encouraged and continued. It is possible only when fair profits are realized which leave some surplus available for reinvestment. Under unregulated competition such profits can rarely be earned by the smaller and less-favored units, whereas under regulated competition they prosper and grow and new competitors are encouraged to enter the field as the industry expands.

The class of competitors to which the foregoing arguments apply, whether manufacturers or distributors, includes almost every field of production and a very wide range in size of unit. In aggregate numbers it includes by far the greater part of organized industry. Coöperative arrangements of the kind referred to affect small rather than "big" business, but the aggregate interests included in the former group are undoubtedly greater than those included in the latter. Germany, by her system of "cartels," not only permits but actively encourages coöperative arrangements of the kind in question.

The spirit of the method under discussion is embodied in the phrase "Coöperation is the life of trade." It stands for peace and prosperity, *versus* war and persecution. Under modern conditions of industry and commerce, as in the affairs of nations, "War is hell."

It is not argued that competition should be eliminated, but that it needs to be and should be regulated; that we should aim to retain its beneficent and constructive features while eliminating those which are baneful and destructive. Unbridled competition tends to defeat the end now so urgently sought by destroying the weaker units of an industry, and thus creating a monopoly among the survivors. Cooperative competition tends to promote the end in view, by preserving the smaller units, by helping them to become stronger, and by thus encouraging a true competition which, because healthy and conservative, will be lasting.

At present industry and commerce are in doubt as to the extent to which, if at all, coöperative competition is permissible under the Sherman law as interpreted by recent decisions of the courts. This doubt would be dispelled by an amendatory act further defining the intent and scope of the Sherman law. It has well been said that the proper function of the law is to indicate the things which are prohibited rather than those which are permitted; that every citizen should be free to conduct himself and his affairs in whatever way he may see fit, so long as his acts do not comprise things which are forbidden by the laws. An act clearly defining the things which are forbidden and unlawful in the relations of competitors in the conduct of interstate commerce would greatly, perhaps completely, clear the situation, dispel existing doubts, and restore most if not all our industries and commerce to complete prosperity.

STATEMENT OF ELBERT H. GARY OF NEW YORK, N.Y., CHAIRMAN AND CHIEF EXECUTIVE OFFICER OF THE UNITED STATES STEEL CORPORATION[1]

Mr. Gary, Mr. Chairman, and gentlemen of the committee, I have prepared hastily a very short statement which I will read with the permission of the committee:

I

The great consolidations which have been created during the last 15 years for the conduct of many kinds of business are of public benefit in many ways:

First. By reason of their large resources, their special study of foreign trade conditions, and their manufacture and sale of many kinds and classes of products, these great integrated organizations develop the foreign trade of the country to an extent impossible for individuals, firms, and small business corporations. An example of this is seen in the enormous export business in steel products created by the United States Steel Corporation. Ninety-five per cent of all the steel exported is sold by the United States Steel Corporation, although it sells not more than 50 per cent of the steel used at home.

Second. By reason of their financial resources and power to employ the ablest men in management and scientific research these great organizations are able to conduct experiments and develop new methods which could not be done in the conduct of small business operations.

Third. The extent of their operations allows them to effect economies, reducing the cost to the consumer; and also to conserve the natural resources of the country. An example of these economies is the employment of certain mills wholly in the manufacture of particular classes of goods, instead of attempting to make all classes of goods at the same mill, also the production of goods for certain sections of the country in mills located in those sections, thus avoiding useless expense of transportation. An example of the conservation of natural resources is the utilization of by-products, which usually requires large-scale production and an investment prohibitive in small industries.

Fourth. These great integrated corporations have done much more than it was possible for small business organizations to do toward the improvement of the condition of their workmen, such as profit-sharing plans, pension funds, voluntary accident relief, endeavors to prevent accidents, sanitation, higher wages, and many other efforts to improve the conditions of workmen in which the great integrated business organizations are recognized as the leaders.

Fifth. The creation of these great corporations drawing their capital from the investing public has transferred the ownership of our great basic industries from a comparatively small number of persons to great numbers of the people. The United States Steel Corporation alone probably represents upwards of 150,000 persons who are the holders of its stock and bonds.

[1] Pp. 693 ff.

Great numbers of persons of very small means are thus enabled to share in the profits of enterprises whose conduct requires enormous capital.

II

It is fair to assume that the power of these great business organizations might be used to the detriment of the public.

III

Since great benefits result from these consolidations, and yet possibilities of danger may arise from a misuse of their power, it would seem necessary to find some plan for preserving the benefits and eliminating the dangers by some sort of regulation.

IV

The only regulation adequate in scope and power to deal with these aggregations of capital is regulation by the Federal Government, because the subject matter of the regulation is largely interstate commerce with which the states may not interfere, and the size and extent of the organizations involved is such as to require uniform and national regulation.

V

It is suggested that the dangers which are possible from the great corporations can be eliminated and their benefits as suggested may be preserved by the following plan for their regulation:

First. Every corporation engaged in interstate commerce should be required to obtain a Federal license, which would be granted only upon the following conditions:

(*a*) That the utmost publicity should be observed in all matters specified by the Federal authorities.

(*b*) That there should be no overcapitalization.

(*c*) That prices should be the same to all customers without discrimination between persons or localities.

(*d*) That the business should be conducted in conformity to the laws of the United States and not in contravention thereof.

If there be other regulations capable of general application they could be made conditions of the granting and continuance of these licenses.

Second. A corporation commission should be created, similar to the Interstate Commerce Commission, with power to grant, suspend, and revoke these licenses, subject to a right of appeal to the courts. This commission should be given the following powers:

(*a*) To see to it that the conditions upon which interstate commerce licenses have been granted are strictly observed.

(*b*) To decide questions submitted by the managers of business organizations who desire to observe the law in all respects and to avoid any question of illegality in their actions.

(*c*) To regulate prices so far as necessary to prevent monopoly and restraint of trade; for example, if prices should be established by trade agreements, or if raw materials, such as cotton or tobacco, should be pooled, or if patents should be used to the public detriment, this commission should be empowered to establish maximum prices for the goods thus controlled.

(*d*) Provision should be made for a review of the decisions of this corporation commission by the Commerce Court or some other qualified tribunal, so that the refusal, suspension, or revocation of an interstate-commerce license could be finally determined by the courts.

CONCLUSION

What is needed is fair, honest, and healthy competition. It is the opposite of restraint of trade. Unrestrained competition in the end results in monopoly and the restraint of trade.

I do not know whether you would care to have me elaborate. I shall be very glad to give you my views somewhat more at length, and of course will be willing to have you ask me anything that you may think of.

I believe honest men, whether they are capitalists or poor men, whether they are employers or employees, whether they are Republicans or Democrats, are at the present time generally looking in the same direction, trying to find a solution of the problems under consideration which will protect all interests. No decent man is desirous of violating the laws of the country or of doing anything which is inimical to the public interests. I think people with connections such as myself realize that all over the world at the present time there is a feeling of more or less unrest. A great many things have been suggested which are impracticable and undesirable, and, carried to their natural and logical sequence, will result in a great deal of harm.

I am one of those who believe that it is unwise, if honest; it is impolitic, if decent, to shut our eyes to these conditions. It is the most natural thing in the world for a man who is out of office to want to get in office; for a man who has no property to desire the property of a man who has property, and so on. It always has been a warfare on the part of the "outs" against the "ins."

Now, those are conditions that the business man, I think, must deal with, and it is a great deal better for him to assist in bringing about a fair solution than to oppose what may be suggested by others in that direction and thereby permit the question to drift until it is disposed of by an unthinking and, perhaps, a dishonest man or set of men.

What I have said is more or less apologetic, because I know there are those who think my individual opinion, in view of my connections, is somewhat radical and extreme. I have often been accused of being a

Socialist, or with having socialistic views. I believe what I suggest is the way to prevent the bad results which would come, or might come, from socialism, so called, carried to what I believe to be its extremes. I believe the man — the business man or the statesman — who is conservative and constructive, and who is sufficiently aggressive to bring about conditions which are calculated to thoroughly protect all interests and all sides of these controversies, with injury to no one, is the man, or are the men, the country needs at the present time.

I recognize the fact that during the past years there has been much in the management of great business affairs which was wrong. I think many of the business men in the past, quite likely including myself with all the rest, have had notions concerning the conduct of business which should be changed. It is not necessary to be specific, but when we realize the fact that, with the ability to accomplish great and good results is necessarily involved the power to do wrong, it goes without saying there should be some way of protecting the interests of large aggregations, so far as they are promoting the best interests of the country as well as their own private interests, and yet at the same time of preventing them from doing the great wrong which they have the power to do.

If this country is to keep its position in the contest with other nations of the world for business success, if it is to secure for its people the very best results which come from successful business, there must be large aggregations of wealth. The corporation, having the financial power and strength, can do a great many things which the small capitalist cannot do. Other countries are aggressive. The business men are assisted by the Government. They are making very great progress, and we would soon lose our position, in my opinion, if we should go back to the old style of doing business, which would mean unrestrained competition, destructive competition — destruction of the weaker individuals or companies by the greater, and we would have monopolies, and, more than that, waste and abuse — abuse of the public, abuse of the employees, and abuse of one another.

The great corporation of financial strength, which is compelled in the first place to publish its facts and figures, and in the second place to live up to the requirements of the law, is a great benefit. The first essential, I think, is publicity. We were early taught that the one who loves darkness is the one whose deeds are evil, and that is particularly true of business life. There is nothing like publicity — allowing the public to look into a company to see what it is doing, to know what its figures are. That is the first essential, and the next thing, as I have said, is some way of compelling the company in its daily conduct to live up to the requirements of the law. Of course, the natural suggestion is, Why cannot all the corporations live up to the requirements of the law?

My answer to that is, if you had occupied the position I have occupied, you would know; you could answer the question for yourselves. It is very easy to say the law is simple and clear and the corporation now knows exactly what to do, but I do not agree with the statement. I know that it is not the fact. I know that we have been in a position of great uncertainty during the last few years, and particularly during the last few months. We have been very much troubled to know just exactly what our position ought to be, what our conduct ought to be, and as a result there has been created in this country a feeling of great uncertainty and doubt. Capitalists who have money to invest have been uncertain as to what they ought to do. The corporation or capitalist who has been disposed to make extensions in his business lines has not been willing to make them because he felt uncertain as to what the result might be, and whatever may be said by any one who is not practically connected with the business affairs of life, I do not hesitate to say that this country has been suffering, and is suffering to-day, very much because of this feeling of uncertainty. These men would like to know what they can do; what they have the right to do; what they have the right to do from the standpoint of observance of the laws and from the standpoint of the public sentiment, which is just as important to consider; and they would not only like to know that for their present action, but they would like to know it for their future action.

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Personally I should dislike very much to see any law which would place the business of a corporation absolutely under the control or direction of a department of Government whose officials were unlearned in the law. I think the salvation of the country really is in the courts. I do not believe in the recall of judges at all, and that is not saying anything against the reasons which are given by those who urge it. It goes without saying that a judge may make a mistake; that a judge may do things he ought not to do, but every lawyer on this committee will bear me out in the statement that there is very little corruption, and very little dishonesty among judges.

If judges are all made independent of the people, independent of the rich man and independent of the poor man, so that they are uninfluenced by any question except the question of what is the right thing to do, there will be very little danger of a judge perpetrating a wrong, in my opinion. I would like to see all the judges appointed for life or during good behavior. I would make them removable for cause. When there was cause, then they should be removed, and removed in a hurry, but not otherwise. If a judge is independent of the people, if he is not seeking the influence or the assistance of anybody, if he is absolutely independent; if he is an educated man,

selected because of his merits, as the judges usually are — I do not think we will have any trouble from the courts. This should be the place to which every one might look for final satisfaction, relief, or protection.

* * * * * * *

But it seems to me there ought to be a department, a commission, something like the Interstsate Commerce Commission, that business men could be more or less in consultation with. There are times when the business men could do something for the country which, perhaps, under the present Sherman law and the decisions which have been made, they would hesitate to do.

For instance, during the panic of 1907, as all of you know — some of you better than I, perhaps — the financial people of this country, the bankers, were in very grave doubt as to what the result might be. That feeling was not confined to New York; it extended all over the country, not only in the cities, but in the small places. I know of little bankers in the interior who drew their money, so far as they could, to the extent that they could, from the city banks, and put it in their vaults. They were all frightened; they did not know what the result would be. They wanted to protect themselves regardless of all others. And at that time the steel people were approached in one way or another by bankers, by their customers who had stocks, by the leaders in their mills — by the managers and the foremen in their mills — and by business men generally, with the statement that if there should be such a demoralization in the steel business as there has been in times past, that the panic conditions could not be changed, and the results would be dangerous, and quite probably disastrous.

Now, I was in very great doubt at that time what to do to try to steady the steel business. Without taking any time I will only say that you know, in substance, what I did. I got all the steel people possible together, and after stating to them the conditions, told them that we could not make any agreement of any sort or description, but we could consider one another's interests, and could consider conditions and try to take care of our customers, and could do what was in our power to do, without making agreements, to maintain the general equilibrium of trade.

I endeavored to get the best advice possible; made public what we did; gave it to the newspapers, notified the departments in Washington what we were doing; that is, the Department of Justice and the Department of Commerce and Labor, etc. But I was afraid all the time that there might be some question on the part of some one as to whether or not we were not going too far.

Now, on such an occasion as that, it would be a great relief and a great benefit to have a department that we could go to and say: "Here

are all the facts; here is what we would like to do; here are the results, the probable results; we do not want to antagonize the law; we do not want to do anything that we ought not to do. We would like to be a benefit to the situation if we can. We want your advice."

It would be a great thing to a business man. And that often happens in our relations with foreigners. As you know, there are neutral markets all over the country where steel is not manufactured; the residents are simply purchasers, and the steel manufacturers are selling and delivering to those markets. It would be a great benefit to all of us if we had the right to get together and talk the situation over, and have such maps before us as would show which market is most readily and most cheaply reached by the different steel manufacturers, so that as a natural result we would all save money. Although I believe I could do that now without any agreement whatever by simply coming into contact with them and explaining the situation and talking it over, and trying to satisfy them by argument as to what was for their particular interest, I believe in a perfectly legitimate way, yet I would hesitate to do it now, in view of what has occurred during the last year. It is a pity, because I think we could, legitimately, very materially extend our export business at the present time, and I would like to have a department to which I could go and explain the situation and get advice.

You gentlemen who have practiced law, as I have, know very well it is the last thing that a lawyer wants to do, to violate the law. No man of legal knowledge and legal experience would like to violate any law of the country. At the same time the business interests of the country require that there should be some method, not of restraining trade, but of expanding trade, extending trade, increasing trade. That is what we want to do. Our efforts, the efforts of our company, have been to foster competition, not to suppress it. We have, by our connections, our associations, our friendly meetings, our dinners, etc., endeavored to establish and maintain relations which are calculated not to restrain trade, but to expand trade; not to destroy competition, but to build up competition; not to increase prices, but to prevent them going up as well as preventing them, so far as we legitimately could, from going down, certainly, suddenly. We have never been able to do that, but have done it in a measure.

But you have noticed during the last year the criticisms before some of the committees, possibly in some of the newspapers, though I do not know whether that is accurate, of this conduct on the part of the steel people; and there have been hints that it was really a method of secretly evading the law and obtaining unusual prices, unreasonable prices, etc. And in view of this condition at the present time, and in view of the bill of complaint which has been filed, in which these Gary dinners have been referred to, I am afraid I might antago-

nize public sentiment if I should do anything to try to maintain the equilibrium of trade at the present time. And what is the result? Many of the steel manufacturers are selling to-day below cost, if you take into account wear and tear, take into consideration overhead charges and that sort of thing; making proper and legitimate and necessary deduction. And if this be continued many of them may go into bankruptcy.

Unrestrained competition means the survival of the fittest. This country cannot any more go back to the old method of competition than it can deliberately go back to the doctrine of the survival of the fittest, which means the destruction of the smaller, the weaker, the poorer concerns, and the survival of the few, and, therefore, the necessary forcing of monopoly and restraint of trade.

At least those are my views, and I have studied the question as carefully as any one possibly can.

It is not a fact; it is a mistake to suppose that a business man knows what he can do and what he cannot do at the present time. I have nothing to say against the Sherman law. I have nothing to say against what the Sherman law is intended to prevent. I have nothing to say against the protection of every one. But practically the Sherman law is not adequate to meet the present situation. We need something more. These people who take the opposite view laugh at the idea of the business of a corporation being regulated, and particularly at one connected with a corporation who is willing to have the business regulated. But what are the corporations getting now except regulation?

I reckon if the pupil in the school should feel the rod of the master on his head and should hear the teacher say that he was struck because he had been looking out of the window he would think that was some kind of regulation, and he would prefer to have the teacher tell him in advance that if he looked out of the window he would get hit.

It is a great deal better to have regulation by a department which knows all the facts from day to day and which can advise a corporation than it is to have regulation by a lawsuit, particularly when the corporation does not know that it is violating the law.

Personally, it would not make much difference to our corporation, or some of those who believe as I do, what the form is, but of course we want to protect all interests.

Now, you could say, as some of the members of this committee have said publicly with great force, that you can prevent by law certain things being done; that you can lay down in the law itself certain rules so as to keep the corporation within a certain domain; that you can provide that no corporation shall have more than a certain percentage of the business; that one corporation shall not hold the stock of another corporation, and various other things of that kind; that

there shall be no interlocking directors, etc. The danger of that is that you may restrict a corporation to a point where it cannot reach the highest success for the country, for the people themselves. That is the danger. If large aggregations of capital are beneficial, then I do not know whether or not there is a point beyond which you can say they are not of an increasing benefit. It is just as necessary to have some measure that will protect and promote the interests of capital itself as it is to protect those who are influenced on the outside by capital. And if you can have some kind of governmental control or regulation which absolutely secures the public against imposition and oppression, then it seems to me the importance of these other questions is modified.

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STATEMENT OF J. R. MOOREHEAD, NATIONAL SECRETARY, OF THE NATIONAL FEDERATIONS OF RETAIL MERCHANTS, LEXINGTON, MO.[1]

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Bradstreet reports 1,778,425 as the number of manufacturers, wholesalers, jobbers, retailers, bankers, and trust companies as doing business in this country. I am advised that there are something like 28,000 banks and trust companies thus listed. I am not able to say just how many manufacturers, wholesalers, jobbers, and sundry lines are thus reported, but I am surely safe in saying that more than 1,000,000 of these are retail merchants; in fact, men of small means, absolutely depending upon their retail business for support of themselves and their families. It is safe to say that each of them employs directly at least three people. This million or more of firms and individuals therefore constitute a considerable percentage of our population when we add to their numbers their families and dependents, and when we consider that the progress and prosperity of the thousands of communities in which they do business largely depend upon these retail merchants. And I may add here that all these merchants and their families and employees are consumers upon which the farmers directly depend for their home market, the best market they have to depend upon.

You will all agree that there are grave problems confronting big business of this country, and there are grave problems confronting Congress and the people of the country in dealing with big business. I want to say that although it may not have been intentional on the

[1] Pp. 913–920.

part of those who are responsible for the present situation — and I have no reason to believe that it is — there are also grave problems confronting the small business men of the country. I want to say in the beginning that many of the stones that are being cast at the big fellows are missing the mark and crossing the street and breaking the windows of the little fellows. In other words, the efforts that are being made to curb the powerful, the rich, and the grasping are recoiling upon that class of men in this country for whom we believe it was not intended, those who are the least able and the least organized to secure their rights and combat the opposition. In other words, we know that the antitrust law of the Nation and the States as well is being perverted and is being used for ends that were never intended, and should present conditions continue would bring about a situation that cannot be later on remedied. There are no longer any uncertain theories confronting the little man in business. We have a condition, and had we come here oftener and made our wants known and our influence in politics felt, long since, perhaps, the status of these I have the honor to represent could be better determined.

First. There is a great outcry in this country just now for the elimination of the "middle man," better known as the retail merchant, although the wholesaler and jobber may be classed as such. Our answer to this demand is that we do not propose to be eliminated if concerted action on our part should be able to show the Congress and the legislatures of the several States that we have a place in the economy of the country and that our preservation is for the best interest of the greatest number; best for their economical, political, and social welfare. This outcry emanates from four principal sources: First. The great aggregations of capital known as mail-order houses; second, almost all of what are known as farm journals; third, a great part of the metropolitan press; fourth, many politicians seeking to curry favor with the farming and laboring classes. These elements in our national make-up, along with others of lesser influence, have brought about a condition in the minds of the public adverse to the retail merchants, especially among the farmers and laboring men, that is no less than criminal. To my mind, this is the most serious side of the whole question. Just to think that it has been possible in this country of ours to so organize and conduct a campaign of advertising to so poison the minds of hundreds of thousands of people scattered all over the country against their neighbors, the home merchant, that they will not even give us a chance to meet outside competition. Under these false representations, carried on for so long, the public seems not able to distinguish between our efforts to obtain a fair living and the practice of extortion. They set us down as extortionists, without argument or chance to be heard.

I am not here to criticize the President of the United States or the

Attorney General or any of his assistants. I have had occasion to more particularly call the President's attention to some of these facts and conditions, and the reply to my communication comes through the office of the Attorney General to the effect that "It is not the duty of those upon whom the responsibility of the enforcement of a law is imposed to consider general economic questions in determining whether a prosecution should be had for its violation." This being the case, which I am perfectly willing to admit without any question whatever, then it is the duty of Congress to settle economic questions if it is in their power so to do. I have mentioned four of the principal elements that are just now, intentionally or not, working to the undoing of the little man in business. Gentlemen, the attempt at combination or concentration of business into the hands of a few is no more manifest or real than is now being brought about in the distribution of merchandise of every kind, known as the retail business. This country has been wonderfully prosperous in the last 10 years. I venture to assert that there never was a time in the history of this country, taking into account the last five years or more, when there were so many people in every walk of life who were doing so well, making such a good living, getting such prices for farm products and live stock, making better wages, better housed, better fed, better clothed, and, taking all things into consideration, no greater general prosperity ever existed in the country. We can and do rejoice in this fact. Not one of us would reduce the price of a single item raised upon our farms or produced by our labor; but I am confident that I am within the truth when I say that the million or more retail merchants of this country have received less of the benefits growing out of this great era of prosperity than any one other class of our people. I feel safe in saying that the little merchants of the country have not reaped their share of the reward. Their business nor their profits have grown in proportion to the general prosperity that surrounds us. Certainly there has been a greater consumption of merchandise in the shape of clothing, food, and every other class of goods used by humanity; but the increase has not fallen into the lap of the small retailer.

When you have the opportunity to go amongst your constituents, who are the retailers of merchandise, you will surely find that the great majority of them have done little more than hold their own. Many of them do not do that well. Farm lands have increased beyond all expectations, and I am not saying they are too high. Wages have increased, but I do not say that labor is too well paid. No one knows better than those for whom I speak that upon these two elements rest our security and prosperity, and they have no better friends or defenders in the country than their home merchants, but we do assert, with emphasis, that the business, the storehouses, the homes, the stocks of goods, and the profits of the retailers have not grown in proportion

to that obtained by either of the above-mentioned class or any others. Where has it gone? Who has gathered the harvest? I have said that "mail-order houses" are one of the factors that has brought about this condition of affairs. What are some of the facts? It has gone the rounds of the press, and is no doubt a fact, that one of these houses alone sold more than $63,000,000 of merchandise by mail last year. The business of one increased, it is said, 1000 per cent in three years — so much business that they were scarcely able to take care of it. And while the "control of trusts" and the influence of Wall Street are pertinent questions for debate at this time, I venture to remind you that it is not disputed that the chairman of the board of directors of the largest mail-order house in this country is the president of one of the largest banks in New York. It might not be out of place to suggest that this would be a fruitful field for investigation. If the business of this class is to go on increasing, how long will it be before there will be dictation to the jobber, wholesaler, and manufacturer as to whom they shall sell, and we can imagine what would happen to the little fellow in business.

I have referred to the feeling of public sentiment which has obtained in the public mind against the retail merchant. Ever since this method of merchandising by mail began to take root in this country a great part of their advertising has not been in praise of their wares, but has been a tirade of insinuation, misrepresentation, and abuse for the home merchants, as being nothing more than robbers and thieves, and when we attempt to get together to protect our business, our homes, and our families we find out how they are able to invoke in their own behalf the antitrust laws of the country. Almost without exception the greater part of the advertising revenue of the farm journals comes from the mail-order house, just as the daily press is largely supported by revenues from the large department stores. I think you can readily see why there is rarely ever a good word spoken for the little man in business from these sources. There are undoubtedly exceptions, but they are exceedingly rare.

I want to quote from an editorial which recently appeared in a farm journal which bears the name of one of the most prominent men of our day. It says:

> The fact is that outside of mining and manufacturing districts, and cities where there are colleges, academies, and other schools, the country town exists simply for supplying the wants of the people on the farms. With the exceptions above noted, the country town has no other conceivable reason for its existence.

I want also to quote from an editorial in a daily paper written in connection with the discussion of the passage of a parcels-post law:

But suppose the parcels post should drive the country merchant out of business. This could only happen because of a more effective and economical method of supplying goods to the people, and therefore the country as a whole would be benefited and the country merchant himself could find a more beneficial way of earning a living.

From which editorial I can only infer that economy in distribution, if that were actually true, is the only feature to be considered in determining what is best for the greatest number of our people, and that for a million or more retail merchants to go out and seek other methods of making a living, together with the fifteen or twenty millions depending upon them, is of small consequence to such as preach the doctrine as above quoted. Without going further into details I am sure you can see the trend of public sentiment and the cause therefor. I do not blame the farm journals for standing up for those who support them, for they could not exist without this kind of support. I do not blame the daily press for talking for the great department stores which furnish them with such profitable business; they would be ingrates if they did not. But I do complain, and we believe we have a just complaint, when we find ourselves involved in this already unequal struggle and the Government steps in and says, "Stop; you are restraining the trade of the mail-order house, the manufacturers and the big fellows. You are operating a new kind of trust, a trust of power." What greater trust of power could there be than that of a great aggregation of capital to spread it broadcast through the daily and farm press and catalogues that they can sell their wares at half the price charged by the home merchants?

To be more specific, a United States grand jury in Chicago recently indicted 14 secretaries of as many retail lumber associations, and I am informed upon good authority, by the parties themselves, that the retail implement dealers' association and the retail coal dealers' association are undergoing the same kind of an investigation. It is only fair to presume that these latter two organizations, and perhaps others, will meet the same fate as the lumber secretaries have, for during the recent trip of the President across the country he certainly made it plain that all, at least, would have to submit to the same methods of investigation, and the legal department of the Government seems to be entirely in accord with this plan of procedure. Civil action has also been brought against a number of the lumber associations, and I am quite sure, had the legal department of the Government been willing to stop here, that they would have welcomed the opportunity of finding out whether or not they were violating a law which no one seems to be able to correctly interpret. I call your attention to the fact that in bringing indictments above referred to, the Government had to admit, or at least could not charge, that these

organizations, which their secretaries represented, "had no incorporation, no capital stock, and did not even try to control prices among themselves," and we are safe in saying that other organizations which will have to submit to like treatment will be able to show likewise. But what is the charge? In short, it is that these retail merchants have been guilty of "restraining the trade of certain companies and corporations by furnishing information to its membership." As to their double dealing and duplicity, which I wish to remind you, it is in no wise charged as being false in any particular. If I steal a horse, and my neighbor or a newspaper charges me with the crime and the charge is proven in court, I have no recourse; but if I can show that I did not steal the horse, have I not recourse to the law against my neighbor or the newspaper for libel or damage to character? Nowhere, at no time, has any person, company, or corporation sought redress because of any false statements being made or published. If it is unlawful to furnish information of this character to each other as to the action or practices of a manufacturer, wholesaler, or mail-order house, why is it not also unlawful for Dun's or Bradstreet's to furnish the manufacturers or wholesalers with the information that will enable them to avoid great loss in the sale of merchandise to the retailer? What is the difference? If a manufacturer or wholesaler sells me a stock of goods to be sold at retail and then turns around and sells to my customers, wherein is the difference between my telling or reporting this fact to my fellow merchants and a commercial agency reporting me as not being worthy of credit, or that I had mortgaged my property and was not therefore considered responsible for my obligations? But, gentlemen, that was not the milk in the coconut in the actions referred to.

. . . The retail merchants, for whom I speak, do not ask you to pass any law or make any amendments to the present law that will in any way curtail the rights of those who are surely working to the reduction of the little merchants to nothing more than makeshifts; to serve as an accommodation when the people have no money to send away from home for what they want, when crops fail and when the strike is on. All that we ask is a chance for a fair fight and no favors, but we do insist that this law shall in some way be made so plain along these lines that the threat of being sent to jail will not be hanging over us when we join hands to fight for our business existence, upon which so much depends, our happiness and the welfare of our families and every one in the communities in which we are perchance doing business. It is out of all reason to think that the business man has to submit, or work under a law the uncertainties of which are such that he has no idea or conception of his standing before such a law until he has been brought into court and tried. Therefore, it would seem that it should be the aim of Congress to make it so plain in so far as it affects

voluntary associations of business men not formed for making prices or profits that "he who runs may read." Does this seem to be an unreasonable demand, although the exact terms in which it is to be expressed may not at this time be clear? We are restless under suspicion and surveillance, when Government and State officials are upon our heels and delving into our business.

. . . The retail merchant is not going to be put out of business, but he will be reduced to a mere means of accommodation to those who have not the cash to send away from home to supply their wants. We believe we have a right to more than this. We believe that we are of as much a necessity to the community as the farmer, laborer, the doctor, lawyer, or postmaster. We believe that a good live town, with live merchants making something more than a living, are as much of a necessity in our economy as is the farmer. For you cannot deny that every acre of land is increased in value in proportion to its proximity to a good town or city, and depreciates in value just in proportion to its distance from a good town or city. A good town or city is as much of a necessity to the farmer as the farmer to a good town. It appears to us that such a condition would be ideal in this country and should not be in any wise disturbed or discounted, even though it might be admitted that the farmer or any other citizen might save in a small way upon his purchases when sent to a city. . . .

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STATEMENT OF MR. FRANCIS L. STETSON, LAWYER, OF NEW YORK, N.Y.[1]

MR. STETSON. Mr. Chairman and gentlemen, the question of remedies must be considered with reference to the condition of public sentiment as well as in view of economic requirements.

The experience of the 21 years since the passage of the Sherman law, and analogous enactments, in many of the States indicates an almost unparalleled unanimity and persistence of public sentiment that some such law must be maintained.

Thus it must be conceded that the question of remedy is one not now susceptible of unrestricted consideration, but is what may be done, not what should be done.

This condition may not continue indefinitely, for if, as I believe, the Sherman law, like high protection, involves economic error, then it is certain that ultimately the people will come to a recognition of injustices in laws against all trade combinations and agreements, just as now they are awakening to the evils of high protection.

[1] Pp. 956–964.

For the present, however, they have analyzed the compound term political economy, and disregardful or distrustful of practical economics and those representing them, have made the entire subject one of political consideration and are not prepared to tolerate or to palter with any proposition to weaken the law.

This result involves a remarkable reaction. During the first century of our independence, the ideal of America was business enterprise to a degree unexampled in any previous age or in any other country. To labor, to invent, to save, to accumulate, to invest, and to accumulate still more was the commended career of the so-called successful man in every community and in all callings.

Suddenly and almost without warning a wave of popular reaction coming out of the northwest overspread the country. The granger legislation of the late seventies found sympathetic response in Texas in the early eighties, and resulted in the interstate commerce act of 1887 and the Sherman law of 1890.

The new legislative policy and the public sentiment underlying these acts was a stumbling block and foolishness to the man of affairs, bred and developed in the conditions previously adopted and maintained by all the people.

The ideals of the legislator fairly representing the mass of his constituents, had parted company with the ideals of that portion of his constituents, fewer in number but important in influence, conducting the industries of the country.

The conflict of views and ideals thus developed, like all other conflicts, has had to run its course till one or the other party was exhausted. Now we are at the point of exhaustion of our industries and of those engaged in them.

In the course of the long period of conflict, as always is the case, painful and harmful hatred and regrettable misunderstandings have been fomented. One class has distrusted the motives and the sincerity of the other class. The country has been divided into rival camps, as harmfully hostile as though arrayed for physical warfare.

The time has come to preach a gospel of reconciliation. Let us have peace, not peace at any price, but peace with honor. The law has been interpreted and established. It must be accepted and maintained, but as the law exists not for itself alone but for the prevention of injury to the public, its enforcement should be made practicable with the least possible injury to the vast volume of the industries of the public.

These observations may seem to come within the category of "glittering generalities," but in my opinion no specific or effectual remedy can be found unless sought for under the influence of an earnest and patriotic determination to promote the general welfare and not that of any particular class.

Coming now to the question of specific remedies and disclaiming any peculiar fitness to advise this committee, which of its own motion has honored me with its invitation, I would say I find much to my liking in the late message of President Taft, in the bill of Senator La Follette, and in the suggestions of Judge Gary.

In the message of President Taft, I like his idea of a voluntary Federal incorporation, of permissive Federal license, and of a corporation commission.

In the bill of Senator La Follette, I see light in his definition of things that business may do, though these definitions may be modified before adoption. As an important business man once said to me: "I do not so much care what the law is, as to know what it is; when I know what it is, I will conform to it."

I accept the principles involved in the suggestions of Judge Gary up to the point of governmental regulation of prices which lies somewhat beyond my experience and mode of thought.

My acceptance of these general propositions involves the following considerations:

The Sherman law as it now exists may not be amended, but it should be supplemented.

In whatever cases are committed to it by the wisdom and express enactment of Congress, the proposed corporation commission should have power to make and revoke its declaration of the innocuousness of any particular corporation or agreement, and during the continuance of such declaration, the Department of Justice should be relieved from the duty of proceeding against the corporation in respect of any matter covered by such declaration.

This method of procedure would leave the law unimpaired and also would leave the corporation free to assert its legal defenses, and it would avoid the question of any improper delegation of jurisdiction, either legislative or judicial.

For the protection of the public investing in securities, the proposed corporation commission should have power to make, but not to revoke, a declaration as to the innocuousness of any corporation hereafter formed in its organization, or in the acquisition of properties constituting part of its capital stock; and no prosecution or dissolution of the corporation for any matter covered by such declaration should be permitted after a period to be prescribed by the act.

The definite views that I hold with reference to existing corporations may not properly be made the object of presentation by me at the present juncture, but I may call attention to the difficulty, if not the impossibility, of compelling a recapitalization of stocks and bonds distributed and owned throughout the world as a condition of continuing the business of interstate commerce. As to any important corporation, the suspension of its business during the interval required for

the consummation of any reduction would injure the public more than any conceivable benefit therefrom.

As to holding companies, there are two possible injuries, one that to the dissentient stockholders of the corporations whose stock is held, and the other to the dissentient stockholders of the holding company. These evils could be relieved by providing for the approval and purchase of their shares as in case of consolidation. As a speedy and effective means of consolidation in cases authorized by law, the acquisition of stocks is highly convenient and apparently harmless. (See Hill *vs.* Nisbet, 100 Ind. 341.) For instance, it is wholly immaterial whether the United States Steel Corporation holds any one of its subsidiary New Jersey corporations by owning all of its stock, or by consolidation which is authorized by law.

In advance of any Federal license, corporations should be permitted to register and to proceed thereunder, for the number of corporations applying for license would be so vast as to congest the business of the country awaiting action.

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SENATOR CUMMINS. In the Northern Securities Co. case the power to suppress competition arose not out of the magnitude of corporations, but out of the location of the railway company and its properties, and of course the impossibility of the people in that part of the country resorting to any other means of transportation. But I want to take your mind away from that for a moment to the general industrial corporations which operate everywhere, and can operate everywhere, and ask you whether you believe the law prohibits the organization of a corporation or a combination so large, and embracing so much of the business, that it will be able to dominate the particular field in which it operates even though the power has not been exercised?

MR. STETSON. You ask for my belief?

SENATOR CUMMINS. Yes.

MR. STETSON. I do not believe that it does. I have advised that it does not. That is not only my belief, but my advice.

SENATOR CUMMINS. Therefore the antitrust law, from your standpoint, would need no supplement or amendment in order to permit organizations of that character with that power?

MR. STETSON. Not if everybody would be kind enough to accept, as some people do, my opinion upon the subject. But if the question still be regarded by many as still open there is no point whatever of more difficulty with the public than that. For instance, I do not recall that I have advised the formation of any combination since the decision in the Northern Securities case. I do not know what to advise as lawful. I should not advise the formation of any corporation

until that is settled. That is one of the things that has unsettled business. Men are stopping; they are not going on. The reason is that they could not get from their trusted counsel advice that it is wise or prudent to go on. Now, unless the intimations of the court are not to be followed, and possibly it may yet be decided that the law is created by the mere acquisition of power to suppress competition, or by the mere termination of competition between industries combining for legitimate business reasons, a remedy should be given by Congress. The courts cannot and ought not attempt to give it in case they determine to the contrary the meaning of the existing law.

SENATOR CUMMINS. That is one of the uncertainties which now exist in the business world?

MR. STETSON. I think it is the greatest uncertainty in my experience.

SENATOR CUMMINS. If it is entirely apart from any vicious or oppressive practices, the organization which has grown or is immediately combined to the extent that it can dominate in a practical way the business of which it is a part; nobody knows whether that is in violation of the law or not, as yet?

MR. STETSON. I think no one can certainly say. A good many people may think they know, but no one can say with confidence.

SENATOR CUMMINS. At any rate, the people who do the business of the country are not willing to take the risk of the determination of that question.

MR. STETSON. The Attorney General of the United States, at a dinner that was given in New York immediately after his appointment, indicated the disposition of the administration not to view harshly things that had been done before in ignorance. He said, "Hereafter whatever is done is going to expose one to the extreme penalties." With such a warning as that, no one wished to take any chances.

SENATOR CUMMINS. Must it not always be true, Mr. Stetson, that the judgment of a court as to whether an organization of the character I have described is or is not in restraint of trade must depend upon the economic view and training of the judge who announces the opinion?

MR. STETSON. Very largely.

SENATOR CUMMINS. It is not likely in the course of development that any two such combinations or corporations will be so similar and exercise so nearly the same influence that a judgment as to one can be accepted as final or conclusive as to the other?

MR. STETSON. It seems so to me. Therefore I think it is beyond the province of the judge, as I have just said, or the court, to pass upon that question.

SENATOR CUMMINS. Therefore — it may be included in your suggestion, and I rather think it is — do you not think that somewhere or

somehow there should be reposed in a Government tribunal, not judicial, the authority to say when such a combination or organization is proposed whether that particular combination or corporation, by reason of the power that it may exercise, is or is not in violation of the law in advance of its actual organization or creation?

MR. STETSON. That is what I think, or, at least, as I intended to convey in what I said at the outset. Such a declaration should be obtainable promptly upon organization, though perhaps not in advance of the organization. As you know, such projects move very quickly. When a business man entertains an idea it develops almost immediately into practice, and you will, I think, find that the corporation would have to come into existence as a corporation, though before the transaction of business. It is come into that part.

SENATOR CUMMINS. Technically into existence?

MR. STETSON. I mean the mere scheme of a corporation about to be formed could not be submitted.

SENATOR CUMMINS. I agree with you perfectly that it would have to take such form, of course, as to be judged.

MR. STETSON. So that it could be definitely presented and passed upon. Now, what I said or meant to intimate in my statement is that I look with great reluctance upon Congress delegating to a small commission its power to (what in effect is to) legislate, but I think the Sherman law, still standing, with its penalties as they are, Congress could appoint a commission to pass upon propositions such as you have just suggested and could authorize the commission to make a declaration as to the innocuousness of such corporation with the right to revoke it — to revoke not as to its essential constitution but as to its future action.

SENATOR CUMMINS. Precisely.

MR. STETSON. And that during the continuance of that declaration unrevoked the Department of Justice should be relieved from the necessity of prosecuting any such corporation. Thus you would relieve the corporation from the danger of having its great business suddenly broken up by a revocation of the license, and would leave it to justify its acts under the law before the court in the proceeding brought by the Department of Justice. This would not be substituting the commission for the court or for the Congress, and I think, to my mind, nothing is more vital than to avoid an unconstitutional delegation.

SENATOR CUMMINS. I think I understand your statement. I want to pursue it just a little bit further. When such commission is organized, if it ever shall be, it will of course be bound by the law which prohibits combinations or arrangements in restraint of trade. Now, when any such proposition is put before the commission for the purpose of receiving its approval, the commission will be governed by

its judgment as to whether such a proposition if carried out will be in restraint of trade. Now, can you help the committee by suggesting the form in which we ought to put the authority which we thus give to a commission of that character so that it could exercise that judgment more certainly than it could with the simple direction that it must not be in restraint of trade?

MR. STETSON. I purposely avoided the phrase "restraint of trade" and I used the word "innocuous." I think that the object of all laws is to prevent injury to the public, or, as Mr. Jefferson said, "to prevent people from injuring each other." Therefore in answering your question — I would not undertake to advise the committee — but in answering your question, I should authorize that commission upon investigation to issue a declaration that the proposed combination would not be injurious to the public interests.

SENATOR CUMMINS. Do you think that the guide or standard that we would give the commission, if we were to employ the phrase that you have just stated, would be sufficient under the Constitution to validate its acts?

MR. STETSON. I do, because it is not a judicial question that I am discussing. The law stands, and we have got now an interpretation of the law — that the law forbids any restraint of trade, the term being interpreted either "in the light of reason" or according to "the standard of reason," or, perhaps — though I am not clear on this — or as though it read "undue restraint of trade." Now, there is the law as it stands and as it would continue to stand. All that I am suggesting is with respect to such corporations as the commission should find not to be injurious to the public. The Department of Justice should be relieved from proceeding under the act.

Now, there is no constitutional question involved in that.

SENATOR CUMMINS. Suppose, however, we were to say to this commission that if any such proposition were submitted to it, if it found that the powers of the combination or corporations so proposed could be exercised and that there would still remain the opportunity for healthful and reasonable competition, it should not be regarded in restraint of trade?

MR. STETSON. I would like that far better. But that is one of the things I did not consider practicable. If it be open to me so to speak, I should be very glad to see such a provision enacted into law.

SENATOR CUMMINS. I pass now to another branch of the subject. It has been suggested before us many times that a practicable way out of the uncertainties that are said to be in the business world, if such a commission were organized and it were given authority to approve or disapprove trade agreements which had for their chief purpose the fixing of prices, either directly or through limitation of production or division of territory, or in any other way, I assume

that most people will agree that such an agreement now is unlawful because it is in restraint of trade. Such seems to be the trend of judicial as well as popular thought. Now, do you believe that a commission ought to be clothed with any such authority?

MR. STETSON. I answered your first question by saying that I had no practical experience with reference to the conduct of corporations after they are launched. I never had anything to do with nor have I had any knowledge of the existence or the methods of conducting such trade agreements as you have suggested, and which, unquestionably, I should consider as contrary to the law as it has stood since the decision in the Addyston Pipe case.

Now, I have been much impressed by the communication which Mr. Henry R. Towne addressed to your committee with reference to that particular subject. I was, I confess, amazed at the extensive prevalence of such agreements, notwithstanding the existence of the law as thus interpreted; and if, as I said, the keynote of legislation is to prevent injury to the public, it would seem that some legislation is required to meet a condition so extensive as indicated by Mr. Towne.

SENATOR CUMMINS. If that were done, would it not inevitably result, in operation, in the Government fixing prices?

MR. STETSON. I am not certain of that. I have not given thought to that point. As I say, that particular feature of the subject is so new to me that I do not attach very much importance to my conclusions with reference to it; but so far as I have been able to reflect since I have read Mr. Towne's letter, which was only within the last few days, I do not at all see that relief for such agreement necessarily involves the fixing of prices. I should suppose that relief might be found in the power of the commission to denounce the agreement. That is why I said to make and to revoke a declaration as to whether or not an agreement — not an organization — was injurious to the public. If it were injurious to the public, I would terminate the agreement.

SENATOR CUMMINS. I take it that such agreement would be injurious to the public or otherwise, dependent upon the reasonableness of the price.

MR. STETSON. That may be.

SENATOR CUMMINS. At least, that would be one of the great factors.

MR. STETSON. That might be one of the conditions. Of course, it would be an important element.

SENATOR CUMMINS. And if the commission believed that the price established by any such arrangement was an unreasonably high one, it, of course, would have to condemn the arrangement.

MR. STETSON. Well, Senator Cummins, in answer to that, I must say that I am unable to come to the recognition of the wisdom of the Government fixing prices, and if that be the only alternative, it is

my present impression that it would be better not to tolerate the agreement.

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FROM THE TESTIMONY OF LOUIS D. BRANDEIS, ESQ., ATTORNEY AT LAW, BOSTON, MASS.[1]

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SENATOR CUMMINS. Mr. Brandeis, I want to take up for a little while the proposal that has been suggested for licensing corporations engaged in commerce among the States and with foreign nations. So far as this inquiry is concerned, I assume that the ideal condition would be one in which all corporations engaged in interstate commerce were in consonance, so far as organization goes and in respect to their practices and methods, with the antitrust law and any amendment that may be made to it. That is the condition we want to reach. The Interstate Commerce Commission stands very high in the confidence of the people, does it not?

MR. BRANDEIS. To-day; yes, sir.

SENATOR CUMMINS. To-day. It is conclusive evidence that we can establish a commission so independent in its work, so thoroughly devoted to the public welfare, that its service will be wholly in the interests of the people. You recognize that?

MR. BRANDEIS. I think that is the present estimate of the commission.

SENATOR CUMMINS. In our system of government it would not be impossible to establish a commission composed of men of the same high character, intelligence, and capacity to serve the people with regard to general industries?

MR. BRANDEIS. Certainly not, with certain limitations, I think. If I may state them now —

SENATOR CUMMINS. You may state them a little later. I think we will come to that point. Now, suppose a commission, which would have to be of the same character generally, is established for the purpose of passing on the question originally as to whether a given corporation shall be permitted to engage in interstate commerce; that commission would have to be guided and directed by the rules which Congress lays down for its procedure.

I call your attention first to the future, not how we shall act with respect to corporations now in existence but corporations hereafter organized. Now, if such corporation, desiring to engage in interstate commerce, were to apply to the commission that I have sup-

[1] Pp. 1267–1272.

posed to be established for the privilege of so doing, we could, in the first place require the commission to ascertain whether it was so organized in form and had such potential power as to make it an organization in restraint of trade, could we not?

MR. BRANDEIS. That would be possible.

SENATOR CUMMINS. And in the same way, we could ascertain whether a corporation organized as was proposed, by reason of its power or extent would be a monopoly, or an attempt to create a monopoly, under the second section of the antitrust law, could we not?

MR. BRANDEIS. That would be possible.

SENATOR CUMMINS. Now, do you not believe that a commission properly organized could pass on questions of that character so that the people of the country would be better protected than to await the final decision of the court after years of ligitation?

MR. BRANDEIS. I am not certain, Senator Cummins, that I understand your question. But I assume that it applies or would apply to practically all corporations that desire for the future to engage in interstate commerce.

SENATOR CUMMINS. I am imagining now that we have a clean sheet, and are simply providing against the future. I will come to the other in a moment.

MR. BRANDEIS. I said it was possible, and perhaps I might state — showing you more clearly what I have in mind — the difficulties of such a commission. We are to-day especially to be congratulated on the character of the Interstate Commerce Commission and on their accomplishments. Of course, we have got to remember that during a large part of the 24 years of the organization of the commission there was, for one reason or another, not that satisfaction, and that it took a very large number of years and a great deal of additional perfecting legislation to enable the commission to arrive at the point where they could and did satisfy the public needs. Now, the great difficulty which it seems to me to-day the commission still labors under is the multitude of questions and the onerous character of the duties which it is called upon to perform. They have to deal with 236,000 or 240,000 miles of railroad, and the questions which necessarily arise in connection with them are numerous. We have had the situation with regard to some of the most important cases, for instance, like the Intermountain case. Now, wholly aside from the recent interference with its action by the Commerce Court, we have there had a controversy in which the endeavor to adjust what was a proper rate has extended over a large part of a generation.

We have had all these difficulties, although the Interstate Commerce Commission deals only with transportation, and railroad transportation is a business which is practically uniform in its problems

and in which the problems are largely the same yesterday, to-day, and to-morrow. Of course, circumstances differ; but after all, the problems of railroad rates, the problems of discrimination are largely the same problems throughout the country. When we are dealing with rates, one of the commonest methods of decision arrived at by the commission is by comparison — a comparison of the service and of the charges for a similar service on the same or on another railroad.

When you pass from the realm of transportation to the realm of industry the problems, instead of being uniform, are widely varying, and instead of being practically stable, they are ever changing.

The difficulty that I see, or one of the difficulties which I see, in appointing at this time a commission with the power of granting or denying permission to engage in interstate business rests in the fact that the commission would be burdened with the decision of questions so numerous that not only one commision but many commissions would be unable to compass the work.

Take the work of the Bureau of Corporations on these few problems — the Beef, Tobacco, Steel, and Oil Trusts. The inquiry necessary to determine facts in regard to the existing business has occupied six or seven years.

You propose, in the first instance, at all events, to deal only with the future; but an investigation — a very extensive investigation — would have to be made before any commission could justly say that a license should be granted or denied. An investigation of that kind ought to permit the participation of those directly interested, either on behalf of the community or competitors, like at hearings before the Interstate Commerce Commission. That would tend to safety, but also take more time of the commission. We should go exceedingly slow in the development of any plan of control by commission. The first step ought to be investigation only, to enlarge very much the realm and the scope of the powers of investigation.

At present I should feel that a decision, even though a tentative decision by such a commission, resulting in the granting or denial of a license might lead us into many erroneous paths.

SENATOR CUMMINS. It is of course true that the work of the commission would, in the first place, be necessarily confined to the largest corporations. There would have to be a limit of that kind in order to bring the work within the scope of any commission that might be created. But I put to you now this proposition: Suppose that in 1901 — when Mr. Morgan and his associates proposed to organize the United States Steel Corporation with its capitalization of $1,400,000,000, and with its absorption of plants, which were known at the time to do more than one-half of all the business of the United States in that field — now, if such a corporation, or the proposers of

it, had applied to the commission that I have indicated, it would not involve the examination of years of practice and of methods to enable the commission to reach a conclusion as to whether a corporation of that magnitude, drawing to itself that degree of the business, even if conducted in accordance with what we understand to be fair business practices, was or was not a menace to society, was or was not a restraint of trade, or was or was not so near an approach to monopoly that it was forbidden by the second section of the antitrust act. Now, there would not be any difficulty in a commission reaching a conclusion upon such questions, would there?

MR. BRANDEIS. I think there might be considerably more difficulty. Of course, the investigation would have to be elaborate —

SENATOR CUMMINS. I do not mean now that the question that they would be called upon to decide would not be difficult, but I mean that there would be no great, long investigation required in order to reach a conclusion.

MR. BRANDEIS. Of course not long, as compared with what was necessary in the investigation of the Standard Oil and the Tobacco Co., but I think there might be quite a long inquiry in all of these cases where there was a reasonable doubt as to whether the combination would be permissible or not permissible. That is, you never could decide a question, similar to those questions which Senator Newlands asked yesterday, as to whether a particular combination was or was not obnoxious to the law, without a careful inquiry into the whole state of the trade. Such an inquiry would necessarily occupy considerable time. It would have to be of considerable scope. The moment you get to a point where men may reasonably differ — and those are the only cases really that ought ever to come before that court — wherever you reach a point where men may reasonably differ, you have the possibilities of a very considerable inquiry.

I can well conceive this, Senator: If this commission is, as I believe it should be, active in securing the information in regard to every branch of trade, even before a crucial question arises — I mean as it will gradually acquire a very large volume of information, daily added to, in respect to each of the important industries of the country — I can well imagine at a later time it will be a comparatively simple thing for the commission, with that great mass of information at hand, to pass quickly upon a question as to whether a given combination is legal or illegal. But at the present day, in our ignorance, with our lack of authentic information with regard to practically every branch of industry except those few which have been investigated by the Bureau of Corporations, I should be afraid that it should be entering upon a field beset with difficulty to give a commission power to grant or deny licenses.

SENATOR CUMMINS. You have advocated here the passage of a law

which makes forty per cent of the business, I think, prima facie evidence of a violation of the antitrust statute?

MR. BRANDEIS. Presumptive; yes; in case of a combination.

SENATOR CUMMINS. Now, if we can arrive, with the information we have now, generally speaking, at the conclusion that any consolidation or combination that proposes to take in forty per cent of the business is against public policy or against the statute, there certainly would not be very much difficulty in the commission arriving at a similar conclusion, either increasing that percentage or diminishing it, as the case may be. We have enough general information to carry us to some conclusions upon this subject of industry.

MR. BRANDEIS. Well, I think the volume of the accessible information is extremely small. For instance, in connection with the investigation which I was obliged to make in the Tobacco Trust case, I endeavored to ascertain with some exactitude the statutes of the independents. I had the assistance of some of the ablest and best versed of all of the independents who had given some thought not only to their own business but the business of others.

Yet there was an extraordinary lack of knowledge on their part. None of those men were able to give fully the kind of information in respect to their competition — other than the trust — which you and I would wish to act upon in any important affair of life. I dare say if I had had open for me the avenues of the Bureau of Corporations — which must have investigated to a certain extent also the independents as well as the trusts — I could have gotten more information. But whatever information the bureau had was the result of a very wide inquiry, and I think if to-day you would undertake in any branch of industry to ascertain accurately the trade facts you would find that the inquiry would involve a considerable investigation the moment you reached what was termed the other day the "twilight zone."

SENATOR CUMMINS. I have no doubt of that, but you, as it seems to me, are not discriminating as I do at least, between the original organization and its capacity for good or evil, and the things which the corporation does in the course of its business. The latter, of course, could not be determined in advance. I will suggest another illustration. Suppose that in 1907 — I believe that was when the United States Steel Corporation proposed to take in the Tennessee Coal & Iron Co. — there had been such a commission and that it became necessary for that corporation before it acquired that property to apply to a commission such as I have suggested. Now, entirely apart from the merit of the proposition, without attempting to decide whether the consolidation or purchase was lawful or unlawful, or wise or unwise, there would not be very much difficulty, aside from the character of the question itself, on the part of the commission in

deciding whether that additional power, or that additional part of the business to be so taken in, would be a violation of the antitrust law, would there?

MR. BRANDEIS. Well, I can conceive that in some such instances the problem would be readily solved; that is, the facts would be such that men might not reasonably differ about them. But, on the other hand, I think we have found, in connection with every trust problem as it appeared before the commission and before the court, an extraordinary difference — perhaps not extraordinary, perhaps a natural difference — as to mere matters of fact between the combination and the representatives of the people. I entirely sympathize with your purpose to remedy what I deem to be a defect in our administrative system, under which we allow to be created an organization which from its nature will probably defeat the very purposes of the law. I thoroughly sympathize with your purpose, but I see a practical difficulty of applying the full remedy at once.

SENATOR CUMMINS. Of course there are practical difficulties, but in the instance I have just put to you, the Government would have — if we had a commission on the one side and this business on the other — two alternatives in order to prevent the accomplishment of the purpose of the United States Steel Corporation taking in the Tennessee Coal & Iron Co. We would have the injunctive or inquiring process of the court on the one hand and we would have on the other hand, or might have on the other hand, the immediate interposition of the commission. Now it takes us years to ascertain through the courts whether that can or cannot be lawfully done, and in the meanwhile it is done; and if there are evil effects from it the people must suffer during all these years those effects; and their injury, if they receive one, can never be repaired no matter what the court may ultimately do; whereas if the commission could interpose the same effectual forces in the beginning against doing the thing where the courts interpose years after it is done, it seems to me that if the commission acts as wisely and as patriotically as the courts do, that we would be better off.

MR. BRANDEIS. I think if the machinery can be devised that will accomplish what you suggest with certainty and dispatch, it certainly would be desirable. My doubt comes as to the possibility of providing it. It seems to me there is another alternative in addition to the two you suggest. It is this, and it is the very alternative and the very power which is operative in the ordinary affairs of life: You talk about the doubt as to what you can and what you cannot do. Is there not, in large part, in the realm of human activities, the very gravest doubt as to what a man can and what he cannot do? We, as lawyers, have frequent occasion to advise our clients that there is a grave doubt as to what they can do; a particular thing. Our clients

under those circumstances ordinarily refrain from doing the thing. They keep off; they keep back from the precipice. The law is automatically enforced by its deterrent effect.

I believe that a very large part of the transgressions of the antitrust law have resulted from the belief in the community that the Government, and perhaps the American people themselves, were not sincere in the desire to prevent monopoly and to insure competition.

The moment Congress, with the approval of the American people, give the assurance that the law will be enforced, a very large part of all difficulties attending it will vanish. There will be no necessity for these long proceedings. Prosecutions will occur occasionally, but there will not be many of them.

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STATEMENT OF SAMUEL GOMPERS, PRESIDENT OF THE AMERICAN FEDERATION OF LABOR, NEW YORK, N.Y.[1]

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Mr. Chairman and gentlemen, of course you understand that, as a representative of an organization of working people, and assuming to speak in the interests of all the working people, we have, in the Sherman antitrust law the additional interest as it has been made to apply to the working people as such and though we may have some views upon the trust law in its general aspect, we have particular views as that law has been made to affect the working people, and made to affect the working people by reason of the interpretation placed upon that law by the courts of the United States and finally adjudged by the Supreme Court of the United States.

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We are interested in securing relief from the interpretation placed upon the Sherman antitrust law by the Supreme Court of the United States, and the restoration of the working people, either as individuals or in association, to their status before the enactment of the law as interpreted by the court. In so far as the Sherman antitrust law is concerned, as now held as the law of the land, voluntary associations of the working people are regarded as combinations coming under the provisions of the antitrust law and amendable to its civil and penal provisions.

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[1] Pp. 1727–1765.

The convention of the American Federation of Labor at Atlanta, having these matters under consideration, referred them to a committee, which, after reciting the complaints from which labor suffers, made this recommendation to the convention, which was unanimously adopted:

We recommend that this convention authorize and direct the executive council to urge the President of the United States to recommend in his forthcoming message to Congress the amendment of the Sherman antitrust law upon the lines as outlined in the Wilson bill to amend the Sherman antitrust law.

That the executive council be and it is hereby ordered, either as a body or by the selection of a committee thereof, to obtain an interview with the President in furtherance of the purpose of this report.

The executive council is hereby furthermore authorized and directed to take such further action, as its judgment may warrant, to secure the enactment of such legislation at the forthcoming session of Congress as shall secure the legal status of the organized movement of the wage workers for the prevention of unjust discrimination in the exercise of their natural, normal, and constitutional rights through their voluntary associations, and the executive council is further authorized and directed that in the event of a failure on the part of Congress to enact the legislation which we herein seek at the hands of Congress and the President, to take such action as in its judgment the situation may warrant in the presidential and congressional elections of 1912.

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The case in point which resulted in the decision was the case of a strike of a number of workmen hatters, located in Danbury, Conn. They had failed to reach an agreement with an employer to adopt the trade rules in regard to wages, hours, conditions of employment — the rules and wages and hours prevailing to the extent of seven-eighths of the trade throughout the country of the workingmen. It meant either securing from that employer an agreement to conform to the wages and rules and standards largely prevailing in the trade, or encountering the antagonism of the employers who had already adopted those wages and rules by their insisting upon a lower standard and conditions of employment. The strike ensued in order to persuade the employer to come to this general trade agreement. The organization of hatters sent out a few of its men to several parts of the country to solicit the coöperation of dealers with this Connecticut employer — to write letters to him to persuade him to come into this general agreement; and upon the inability of those dealers to accomplish this with this employer, to persuade these dealers not to make their purchases of this manufacturer of hats.

Workmen were appealed to to wait upon dealers to persuade them to follow this course, and the employer, through the instrumentality

of an association of one or two attorneys, with others, perhaps, brought suit in the name of this employer under the provisions of the Sherman antitrust law. The Federal judge, sitting in the circuit court of Connecticut, dismissed the suit, assigning the reason that such an association does not come under the provisions of the Sherman antitrust law.

The case was taken to the circuit court of appeals, and by consent that court certified a series of questions to the Supreme Court of the United States to have the court pass upon the question whether such a suit could be maintained under the provisions of the Sherman antitrust law.

The Supreme Court answered the questions in the affirmative, and remanded the case for trial. I should say that the employer, through his attorneys, quoted sections 1 and 2 in the complaint and petition. The Supreme Court included a third — sections 1, 2, and 7.

At the trial the jury awarded the employer threefold damages, amounting to more than $222,000, against nearly 200 workingmen, many of whom had not known about any of the transactions at all of the union of workmen. For information, not necessarily for the argument, I might say that the case was taken to the circuit court of appeals by the representatives of the hatters, and the court reversed the verdict and award, principally on the ground that at the trial the court had taken from the jury the questions of fact which were involved in the trial and instructed the jury to find for the plaintiff, the employer, the judge leaving to the jury alone to determine the amount of the award. . . .

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SENATOR CUMMINS. Your view is that the antitrust law, which was intended to prevent restraints of trade and monopolies, ought not to apply at all to labor organizations?

MR. GOMPERS. Yes, sir. . . .

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SENATOR CUMMINS. I take it you do not object to responsibility under the law for an unlawful act in some form or other?

MR. GOMPERS. Certainly not.

SENATOR CUMMINS. That is, every man, whether alone or whether in association with others, if he commits a wrong, ought to respond for that act either to the public in a criminal prosecution or to the person who was injured by his unlawful act?

MR. GOMPERS. Unquestionably.

SENATOR CUMMINS. That is fundamental, and that leads me to a little further inquiry of you upon a subject a little more fundamental even than the antitrust law. You are familiar with what is known as the Debs case?

MR. GOMPERS. Fairly well, sir.

SENATOR CUMMINS. There the complaint was, as I remember, that certain persons had forcibly, physically restrained the instrumentalities of commerce; that is, prevented commerce from being carried on. Now, entirely apart from the law through which it would be worked out, do you think that there ought to be a prohibition against acts of that sort?

MR. GOMPERS. There are, without the Sherman antitrust law.

SENATOR CUMMINS. Of course you think there ought to be prohibitions against such acts?

MR. GOMPERS. Unquestionably; any acts which in themselves are unlawful.

SENATOR CUMMINS. But they ought not to be grouped with the restraints of trade and commerce and monopolies that are dealt with in the antitrust law?

MR. GOMPERS. Undoubtedly. I say that the early conception of the association of workmen to discuss, much less to decide upon, the relation of themselves to their employers was not only a conspiracy to "rob their employers of their labor," but a conspiracy punishable by imprisonment and by death. It was I think in 1825 when the British Parliament passed its first act upon this subject, and which finally resulted in a later act that declared that the combinations of working people, having for their object the regulation of wages, hours, and conditions of employment, shall not be construed to be conspiracies or in restraint of trade.

SENATOR CUMMINS. That is still the law, I take it. There is no possibility of any interpretation of the antitrust law that would bring such meetings or such combinations into conflict with the law.

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. . . How far do you believe, as a citizen — and you are speaking in that capacity — such interference ought to be permitted, whether under this law or any other?

MR. GOMPERS. As a legal right, I hold that it has no limitations. I hold that in the case in point, the Hatters' case, no man has the right to use force or violence, but I hold that a man has the right to do what he has a lawful right to do, and I hold that he may even threaten to do that which he has a lawful right to do. I doubt the courtesy involved in a threat. I am of the opinion that it is not contributory to very good feeling. On the contrary, it is likely to jar, and perhaps one of the reasons why I do not threaten is because I prefer to secure that which I believe is right to be secured without threats; but as a legal proposition, no man has any proprietary rights in my patronage or the patronage of any one. It is mine to give or to withhold. I have the right to give it or withhold it or bestow it upon

another for any reason, good or bad, or for no reason at all; and if I may do that, and it is lawful, it cannot be unlawful for two or more to do that thing, and whether the reason be good, bad, or indifferent, or no reason at all. It is not a question of ethics, I take it, that we are discussing. I take it as an inherent legal right.

SENATOR CUMMINS. As I view it, Mr. Gompers, it is largely a question of ethics, inasmuch as it is a lawmaking body, and the question with us is always what ought the law to be, not what it is — except as it may guide us in changes that are proposed. But, viewed from the social or sociological standpoint, it is your opinion, I take it, that the efforts — associated efforts — of the hatters to divert trade from the employer with whom a part of them had difficulty, was an ethical effort; that is, such an effort as men in a country like ours ought to have a right to undertake?

MR. GOMPERS. I do. The motive, after all, is the thing, in most instances, and the motive attributed to us was the destruction of this man's business, the diversion of his business. As a matter of fact, the motive was to bring about contractual relations of mutual advantage and of general advantage and of social advantage.

SENATOR CUMMINS. I am not entering upon the merits of the thing or things demanded by the hatters. I am trying to get your idea as to what instrumentalities, if you please, they ought to be permitted to employ in order to accomplish their purpose. What they wanted was an agreement with their employer which would insure to them better wages and better conditions and improve in every way their place in the social structure. Now, it is your opinion that in order to make it advantageous to the employer to enter into the agreement, that it was legitimate and fair that all the hatters there and elsewhere should use their influence with those who buy hats to take away the trade from this particular employer and turn it into other channels. That is the foundation of it all, is it not?

MR. GOMPERS. Yes, sir.

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SENATOR CUMMINS. I was about to ask you whether you believed that that combination — for there may be good combinations and bad combinations unquestionably — was in restraint of trade?

MR. GOMPERS. Not such as is contemplated by the law.

SENATOR CUMMINS. Do you believe that because you think the law did not intend to include such associations within its scope, or because you believe that if an association which was admittedly within its scope were to employ similar means, it would not be a restraint of trade?

MR. GOMPERS. Not in the sociological sense; not in the sense in which restraint of trade is generally understood. I take it, of course,

that in so far as the Sherman antitrust law is concerned, it might just as well be in either direct or indirect terms as the law is now interpreted by the Supreme Court, because that is the construction placed upon the statute by the Supreme Court.

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MR. GOMPERS. What I intended to say was that, since the Supreme Court has interpreted the Sherman antitrust law so that the labor organizations come under its provisions, in regard to restraints of trade, for all purposes the law contains that provision in affirmative terms. Now, whether it is there in direct affirmative terms or by the interpretation of the Supreme Court, that construction being placed upon it as if it does contain these words, we would in any event then as now come before you and ask that they be excluded from it.

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SENATOR CUMMINS. I think the world generally recognizes that we must put some restriction upon freedom of combination or association along the capitalistic side. You would not advocate for them absolute freedom to do as they please, of course?

MR. GOMPERS. While that is true, sir, it must be borne in mind that a combination of capitalists is to deal with material things — with products of labor, with the products of the ground. The workers in association deal with personal activities, and that which is in violation of life and property and peace is provided by the law, because these acts are specified as being illegal. There is quite a differentiation between the activities of the workers — of the working people — to protect their persons, their bodies, their personal, physical safety and welfare, and the activities of capitalists dealing with the products of labor — material things.

SENATOR CUMMINS. I recognize a very great difference; and, so far as I am concerned, as I have stated many times, I am in favor of taking out the organization of workingmen from the antitrust law. I do not think it was ever rightly in. But taking it out, it will then become necessary for us to consider whether a code of laws should be prescribed for these organizations of working people, and it was with reference to what that code should be that I asked you the questions a few moments ago. You have said that in your opinion — and you have given your reasons for it — the law ought not to make unlawful the combined or associated effort of men to withdraw patronage from one who has offended, or who has refused to enter into an agreement respecting wages and conditions of labor. Do you recognize any difference in the law or in morals — because one ought to be embodied in the other — between the effort of an individual to accomplish this purpose as an individual and the effort of an association of men to accomplish the purpose?

MR. GOMPERS. I see no difference so long as collectively they exercise the rights to which each individual is entitled.

SENATOR CUMMINS. There is a very great difference in the effect, is there not?

MR. GOMPERS. Unquestionably; otherwise, there would be no sense in acting collectively.

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STATEMENT OF JAMES A. EMERY, GENERAL COUNSEL, NATIONAL ASSOCIATION OF MANUFACTURERS, OF NEW YORK CITY[1]

MR. EMERY. Mr. Chairman and gentlemen of the committee, I am general counsel for, I believe, the largest single body of organized manufacturers in the world, representing employers of approximately 2,000,000 men. I am also counsel for a large number, very nearly three hundred commercial and industrial organizations who are keenly interested in the operation of the Sherman Antitrust Act. They have for years followed its interpretation and enforcement and every proposal to amend it with the very greatest interest, and they have regarded as a matter of personal concern its application to combinations of capital and labor.

I think I can say with accuracy that the great body of business men whom I represent do not join in the bitter onslaught upon the act so common during the past two years. I do not mean to deny by that remark that I have not known many of those whom I have the honor to represent at times anxious and in sincere doubt as to whether or not the act did not so apply to business combinations of which they were a part as to forbid legitimate and necessary agreements, but I have learned from personal experience that some business men hold conceptions of the application and scope of the Sherman Act to their own operations as erroneous as those commonly expressed and taught by leaders of labor organizations to their followers.

I think I can say with entire justice that the manufacturers' organizations, as a body, would feel it a very great calamity if the act were so amended as to either invalidate it or destroy its efficiency as a protection against injurious combinations of capital or combinations of labor, interrupting the free flow of trade and menacing the liberty of the trader either by lawless, economic, or physical force.

My attention has been especially directed to a recent statement made by Mr. Samuel Gompers, president of the American Federation of Labor, before this committee. The purpose of that statement, as

[1] Pp. 2072–2104.

I understood it, was to urge upon this committee an amendment that would exempt combinations of labor from the terms of the act, on the theory that it was not the intention of Congress, in the first instance, to include them, and that by their very nature, purpose, and methods they ought not to be included in an act of this character. And, with your indulgence, I desire especially to call the attention of the committee to what I conceive to be the serious legal and historic error of that statement.

I think it is demonstrable that it was the intention of those who may be said to have framed the so-called Sherman Act in the Senate of the United States to include combinations of labor as well as combinations of capital, voluntary as well as corporate organizations and associations, within its terms. Furthermore, the effort to exclude combinations of labor not only failed at the time the act was passed, but subsequent efforts to exempt them have been repulsed, both as a matter of policy and as a proposition of constitutional law, no less than three times, the last formal endeavor meeting refusal in 1908.

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In 1908 a proposal for exempting labor organizations was again submitted, not in so direct a form, but intended to accomplish the same result. It was included in the so-called Hepburn amendment to the Sherman Act. It was part of a measure introduced in the House by Mr. Hepburn and in the Senate by Senator Warren. It was discussed at great length before the Judiciary Committees of the House and Senate. Mr. Littlefield, chairman of the House subcommittee, manifested his opposition to the proposal in public speech and the matter died in his committee, while the Senate Committee on the Judiciary adversely reported the bill of which the proposed amendment was a part.

So throughout the legislative history of this act during the 22 years it has been upon the statute books, while the courts have continued to interpret the act and apply it to certain injurious and malicious acts of unions, as indeed to all classes of combinations which undertake to restrain interstate commerce, a continuous effort has been made by labor organizations to get out from under it. But Congress has continuously refused to make them privileged lawbreakers.

Now, if it were true, Mr. Chairman, that the Sherman Act made labor organizations unlawful per se, so that men could neither combine to protect their wages nor improve their working conditions, or to do any of those lawful although severe acts which are sometimes necessary to justly defend their industrial rights and interests, then it would indeed be time that the Sherman Act should be amended, so that in this day and age of association the fundamental right of

men to organize should be recognized. But, sir, I venture to say that not only is the right of men to organize and act collectively clearly and completely vindicated throughout the judicial decisions interpreting acts in which it was at issue, but I venture to assert that in no other department of litigation are those rights more clearly and explicitly recognized.

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But, sirs, a still more powerful recognition of the just rights of organized labor under the Sherman Act is to be found in the case of Thomas *vs.* Cincinnati (62 Fed. 803), a proceeding in the Circuit Court for the Southern District of Ohio. . . .

. . . The court says, in considering the rights of the parties in question:

> Now, it may be conceded in the outset that the employees of the receiver had the right to organize into or to join a labor union which should take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of a single employee may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices is one of the legitimate objects of such an organization. They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory. It follows, therefore (to give an illustration which will be understood), that if Phelan had come to this city when the receiver reduced the wages of his employees by 10 per cent and had urged a peaceable strike and had succeeded in maintaining one the loss to the business of the receiver would not be ground for recovering damages and Phelan would not have been liable to contempt, even if the strike much impeded the operation of the road under the order of the court.

There, Mr. Chairman, is as fair and complete a vindication of the rights of labor organizations as any reasonable man can ask. What the court condemned in this case is worth just a further quotation, because it plainly reveals and describes with peculiar force those activities which require the Sherman Act to apply to combinations of labor, and clearly distinguishes them from the lawful activities in which a labor organization may engage.

The court says:

But the combination was unlawful without respect to the contract feature —

It is being considered under two aspects, under the Hepburn Act and under the Sherman Act —

It was a boycott. The employees of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They had no complaint against the use of Pullman cars as cars. They came into no natural relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours or in any way determine their services. Simply to injure him in his business they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury on the companies that was very great, and it was unlawful, because it was without lawful excuse. All the employees had the right to quit their employment, but they had no right to combine to quit in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever on the character or reward of their service. It is the motive for quitting and the end sought thereby that make the injury inflicted unlawful and the combination by which it is effected an unlawful conspiracy. The distinction between an ordinary lawful and peaceable strike entered upon to obtain concessions in the terms of the strikers' employment and a boycott is not a fanciful one or one which needs the power of fine distinction to determine which is which. Every laboring man recognizes the one or the other as quickly as the lawyer or the judge. The combination under discussion was a boycott. It was so termed by Debs, Phelan, and all engaged in it. Boycotts, though unaccompanied by violence or intimidation, have been pronounced unlawful in every State of the United States where the question has arisen, unless it be in Minnesota, and they are held to be unlawful in England.

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The absurd theory that argues behind every effort to exempt labor organizations from the Sherman Act is that a combination, which has no capital stock and is not conducted for profit, cannot successfully restrain trade or menace the freedom of a trader and that the Sherman Act was intended to apply only to combinations of business men engaged in interstate business and undertaking by agreement to control prices, establish monopolies, or unlawfully dominate competitors by the destruction or subjection of competitors.

Surely, gentlemen of the committee, there can be nothing clearer than that the law does not confine its condemnation to any one method of restraining, destroying, or obstructing free flow of commerce. It makes no difference whether the obstruction be physical or

economic; "whether," as the Attorney General of the United States said in the Northern Securities case, "it is a mob, a monopoly, or a sand bank"; whether it is a combination of business men undertaking to destroy their competitors by unlawful methods or whether it is individuals conspiring to sink a ship in a channel or destroy a railroad bridge for the express purpose of stopping the movement of interstate commerce. The chief object of the law is to secure and maintain the freedom of those engaged in interstate commerce, each within his own lawful right, to conduct his commerce as he pleases, so long as he does not infringe the equal right of any other man to like liberty. Are there any facts more certain in the history of this country than the repeated demonstrations given in the face of the Nation of the power of combinations of men without capital stock not only to interrupt but absolutely to halt the commerce of the United States by preventing the operation of railroads of any particular section? Judge Taft described one such conspiracy as an effort by a combination to starve the people of the United States into submission, using their suffering as a means of compelling a private employer to yield to the will of the combination.

Can any man who is familiar with recent disclosures believe any longer that a combination without capital stock may not be a most dangerous menace to the flow of commerce in this country, interrupting its movement and rupturing the relations of its human agencies by physical violence if need be? Can any man with the obvious conspiracy that lies behind the confession in the McNamara case deceive himself in that regard?

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I, and all I represent, are firm believers in the right of men to organize for the protection of their hours, labor, and working conditions. Many thousands of men employed by my clients are members of labor organizations of all kinds, and we do not and never have questioned their right to form unions and by legitimate action enforce their demands. We ask for no other restrictions for them than the same law places on all other citizens. We insist that any combination of workmen or employers that deliberately undertakes to compel another man to engage in interstate commerce in accordance with its will or not at all, or that undertakes to ruin the trade and persecute the trader who differs with its economic judgment and will not bow to its economic demands, always has been, and in a free country always must be, condemned by law, whether it assumes corporate or voluntary form. That principle always has been recognized in applying the Sherman Act to combinations of capital or employers, as witness the case of Montague *vs.* Lowry (193 U.S.), which was a voluntary combination of tile dealers; or the case of Coal Dealers' Association (85

Fed. 252), which was condemned and dissolved by the Circuit Court of the United States in California. These and other voluntary associations, without capital stock, and not conducted for profit, in the same sense as a labor organization, have offended the Sherman Act. If we do not continue to restrain or punish combinations of workmen when they undertake to destroy and oppress traders or other workmen engaged in interstate commerce, it will not for equal reasons of principle be possible to protect the same trader against the acts of a voluntary association of employers, who undertake to compel him to do business in accordance with their will and upon their terms, or not at all, as did the combinations of tile dealers and coal dealers.

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Now, what are these boycotts for which the constitution of the American Federation of Labor makes "special provision," and which it is said if the organization were deprived of the power of prosecuting its usefulness to its members would be destroyed? Let me again resort to the organization itself for a description of its favorite weapon and an urgent appeal for its effective use. The proceedings of the convention of the American Federation of Labor, held at Pittsburgh, Pa., November 20, 1905, discloses the following from the report of the committee on boycotts:

> We must recognize the fact that a boycott means war, and to successfully carry on a war we must adopt the tactics that history has shown are most successful in war. The greatest master of war said that "war was the trade of a barbarian, and that the secret of success was to concentrate all your forces upon one point of the enemy, the weakest if possible." In view of these facts the committee recommends that the State federations and central bodies lay aside minor grievances and concentrate their efforts and energies upon the least number of unfair parties or places in their jurisdiction. One would be preferable. If every available means at the command of the State federations and central bodies were concentrated upon one such and kept up until successful, the next on the list would be more easily brought to terms and within a reasonable time none opposed to fair wages, conditions, or hours but would be brought to see the error of their ways and submit to the inevitable. Under the present system our efforts are largely wasted and out ammunition scattered. Let us reduce the boycotts to the lowest possible number and concentrate our efforts upon those, and we feel certain better results will be obtained.

The boycott is war; and it is this war-making power these gentlemen seek to retain by securing exemption from the Sherman Act. The boycott here described is not executed by a body of men merely withdrawing their patronage from one with whom they have a dispute, but a disciplined combination, who systematically go to A, B, C, and D, and others ad infinitum, who have or are likely to have

commercial relations with the individual or firm who incurs their displeasure and say to each of them: "If you engage in commercial relations with A until he satisfactorily adjusts his relationship with us we shall visit our anger upon you to the same extent that we visit it upon him." These are the circumstances presented in the Loewe case and the Buck Stove and Range Company cases, and a thousand others like them. I refer to these two by name merely because they are or have been most prominently before the courts and the public. There was evidence in the Buck Stove and Range case — multiplied evidence — of committee after committee in a hundred cities calling upon long-standing customers of the plaintiff requesting, then demanding, and threatening the business life of the dealer if he did not stop selling the Buck stove and range, and when, as often occurred, the dealer answered, "I have a contract with the Buck Stove and Range Company to handle its stoves that has two or three years to run and I cannot break it without serious legal liability," the committee replied: "Very well; you either stop selling Buck stoves, or we will stop you from selling anything else"; and I am quoting substantially the words of the threat.

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SENATOR CUMMINS. I think we all agree, or may agree for the purpose of this examination, that the things you have described ought to be not only prohibited, but punished. But you stated originally that the labor union, per se, organized simply for the purpose of increasing the wages of its members —

MR. EMERY. Or maintaining them.

SENATOR CUMMINS. Either retaining or increasing the wages of its members was an innocent organization under the law. Do you believe it is innocent because it is not directly related to interstate commerce or do you believe it is innocent, as Judge Taft apparently believed it was innocent, because it was beneficial to the people and promoted the welfare of commerce rather than restricted or restrained commerce? Now, which do you believe?

MR. EMERY. I believe it is lawful for both reasons, because in a Government like ours the tendency is to recognize any proper safeguard which affords efficient and proper protection to the economic welfare of the individual workman.

SENATOR CUMMINS. So that if there is danger that the law will ultimately be applied to the labor union so as to prohibit what you have described as their lawful purposes, namely, the enhancement of their wages, or the betterment of their condition, then they ought to be taken out [of the operation of the anti-trust act], ought they not, so far as those purposes and those objects are concerned?

MR. EMERY. Of course I assume that the law in that regard — as the law in all other regards — will conform itself, as the law always

does, to changing conditions. It grows with us, and is fashioned to new conditions as they arise. The remoteness between the organization affecting wages and the subject matter of interstate commerce, to which you draw my special attention, is recognized in principle by the Supreme Court and by all our Federal courts in the interpretation of the Sherman Act by the refusal to apply that law to those combinations, agreements, or contracts which only remotely and indirectly affect interstate commerce, while it does apply to those in which either as a matter of intention or as a matter of effect a direct restraint is produced.

So I assume that the same distinction would apply in other matters, but if a time arose when a combination or agreement, however indirect, was turned into an instrument that directly and dangerously affected commerce itself, I should assume the law would apply to it. The court would look through the character of the agreement to the effect and purpose —

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SENATOR CUMMINS. To sum it all up, I will ask you simply to reiterate what, indeed, you have already stated, namely, that it ought to be lawful, and you believe it is lawful, for workingmen to combine in unions for the purpose of increasing their wages and bettering the conditions under which they live.

MR. EMERY. By lawful methods.

SENATOR CUMMINS. And only when these labor unions, or members of labor unions, go further and interfere with the rights of others to work should they be condemned by the law?

MR. EMERY. Or to trade. It is not only that they interfere with the right of others to work, but they interfere with the right of others to sell their goods and engage in trade and commerce.

SENATOR CUMMINS. And that the right you have just suggested would not be impaired or interfered with by merely quitting work?

MR. EMERY. No, sir.

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MR. EMERY. I think there is a false notion in the minds of the gentlemen making the distinction as to the phase of the activity of labor combinations, to which the law seems to mainly direct its efforts. In all of the cases that are presented under the Sherman Act no question is raised as to a combination of the working capacities of the men. They are generally exhibited in the act of undertaking to interfere with some person engaged in interstate commerce in order to compel him to agree to some demand which they have made upon him, and they use their purchasing capacity in combination — and sometimes other forms of activity — for the purpose of compelling a particular employer, we will say, to grant some demand which they have made,

under penalty of withdrawing from him their patronage and coercing his other patrons to do likewise. They go down the line and undertake to make each person who deals with the employer party to their dispute, whether he is or not, by compelling him under fear of loss to withdraw his valuable patronage. They undertake to destroy the good will of the employer's business and the business itself — sometimes by physical obstruction and sometimes by economic obstruction.

Now, the labor of an individual is, I think, usually regarded as commodity. We are in the habit of hearing a man speak of selling his labor to another. He sells his physical energy just as a lawyer sells his learning and ability, whatever it may be. He is selling something that is a part of himself as distinguished from some commodity which is distinct and apart from himself. He is selling some power, some experience, some skill which he has, as men have done from the beginning of time. However poor a man is, the power of every man to labor is his capital, and in the last analysis it is the sole treasure house out of which every man pays his own way in the world, whether it be the labor of his hands or the labor of his brain; so, economically speaking, it would seem as though capital itself is simply accumulated labor. Whether it is in the form of money or any other form of wealth, it represents originally labor.

So the distinction sought to be established between men combining labor and men combining capital is from an economic standpoint, a distinction apparently without a difference.

SENATOR BRANDEGEE. What in your opinion is the difference between the organization for profit and the organization which seeks to obtain for its members higher wages?

MR. EMERY. I do not see any relationship whatever between profit as a purpose and any restraint or obstruction that is or may be placed upon commerce by combination, because restraint does not always arise out of the direct intention to make profit. Sometimes the purpose is control, just as it has been asserted again and again that, for instance, the Standard Oil Co. sells oil more cheaply than it was sold under conditions of competition, and it is asserted by many economic writers that monopoly tends, by economy of administration and by the saving of many expenses that exist under competition, to make possible the production, distribution, and sale of a given commodity at a lesser price than under competitive conditions. The difficulty seems to lie in the fact that while a monopoly has the power to produce more cheaply it does not often give the public the benefit of it.

SENATOR BRANDEGEE. I do not think you understood me. What I intended to ask you was what distinction in principle do you see between an organization of men to make money in the shape of profits, and distribute them in the shape of dividends, and an organization of men to obtain more money in wages for themselves?

MR. EMERY. As you state the parallel, I do not see much distinction.

SENATOR BRANDEGEE. It is stated that the labor organization is not an organization for profit, and that the business organization is, and that therefore the labor organization should not be under the control of the Sherman law. I wondered if it were true that when men organized to raise their wages and obtain other advantages and improve their condition — whether that was really an entirely different thing from men who organized to make money and distribute it in the shape of dividends.

MR. EMERY. Well, if one looks at the labor organization simply as a combination to enhance wages and a corporation merely from the standpoint of an organization intended to make profit, there is apparently no distinction of purpose. Each endeavors to make profit for its members or shareholders. They each have something different to sell, but both undertake to make money. One combines to invest capital and produce for profit, and the other combines to act together for the purpose of increasing the pecuniary returns of each member. But let me reply to your former question. In many cases the demand of the labor organization, in a dispute that arises between it and the employer, is not based primarily upon effort to increase wages and, therefore, to make profits. It is based upon an attempt to secure control in an industry. For instance, take the dispute over the open and closed shop. There the primary purpose is not to increase the wage. Many disputes of that kind arise where there are no disagreements as to wage whatever, but where the purpose of the labor organization is to secure recognition of its right to say that none but its members shall be employed. There the primary purpose of combination is to establish a monopoly in order that it may control the conditions of employment, and if it can say who shall be employed, it must ultimately possess the power to say how much they shall receive.

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STATEMENT OF MR. T. J. BROOKS, REPRESENTING THE FARMERS' EDUCATIONAL COÖPERATIVE UNION, ATWOOD, TENN.[1]

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Mr. Chairman and gentlemen of the committee, the particular phase of this question which it is our purpose to discuss relates to that portion of the antitrust law which might be construed to apply to organizations of farmers.

[1] Pp. 2336–2350.

I represent the Farmers' Educational Coöperative Union, the largest organization of farmers in the world. It extends from Virginia to California and from the State of Washington to Florida, including about 30 States.

The efforts upon the part of the farmer to adjust his business to the commercial demands of the age necessarily compel him to organize. When he is organized, for commercial purposes, the object of his organization should be proclaimed without reserve, and understood thoroughly by the public.

The advantages of combination are the advantages of better organization and more effective operation, cheaper production and distribution. The disadvantages of combination have arisen chiefly from the misuse of the power of combination which develops into monopoly.

There is a great deal of difference between a monopoly whose purpose is to coerce and oppress, and coöperative organization whose purpose is to eliminate useless expense without in any degree practicing extortion by withholding from the consumer, regardless of the law of supply and demand, in order to create fictitious values.

A great deal has been said about an elastic system of currency that would meet those periodic demands for enormous amounts of capital to move the great staple crops of the country from the producer to the consumer. In other words, when wheat is thrown on the market at harvest time, a great deal of money is required to purchase this wheat from the farmer, hold it till it is needed by the mills, and finally sold to the consumer — and the same way with cotton. In the fall of the year something over $800,000,000 are required to purchase from the farmer his cotton crop. He usually markets it so fast that this volume of money is taken from other channels of trade to the inconvenience of our financial institutions in order to hold this cotton until the mills can use it. Now, an organization of farmers who grow wheat or who grow cotton, which has for its purpose the establishing of a system whereby the farmer can assume the carrying function, and gradually market his wheat and his cotton throughout the year, should be exempt from any law that would hinder its operation. The purpose of the organization which I represent is to facilitate marketing according to the normal operation of the law of supply and demand, and is in no sense of the word an attempt to corner the market and create artificial prices. It takes a great deal less money to finance the holding of a crop than it does to purchase it outright; and by gradual marketing the periodic disturbance in our commercial world would be lessened, and the evils of the exchanges mitigated.

None of the evils of overcapitalization, oppression of employees, or extortion of the public are inherent in the class of organizations to which we refer. A law whose purpose is to prevent injustice to the public should be so worded as to exempt all legitimate enterprises

where there is no attempt to misuse the public confidence or destroy or pervert the natural operation of the law of supply and demand in the markets of the world. We believe that all corporations doing interstate business should be required to come to the strictest standard of account as to their tangible assets and methods of operation. We wish it to be clearly provided for in any antitrust law that no penalty shall attach to those promoting any organization or combination upon the part of producers having as its purpose the gradual marketing of farm products. We think it would be performing a great public service to so arrange the delivery of our staple crops each year as consumption called for them, instead of dumping them on the market regardless of the demands of trade. This is the basis of our contention, and upon this contention we rest our plea for exemption from antitrust legislation.

I do not claim that the present law makes the farmers' organizations now in existence subject to its penal provisions. I do not say that any amendments proposed would interfere with any business organization of the farmer. But what I do suggest is, that if such provisions could by technical construction be construed to interfere, that they should be eliminated, and when amendments are passed, that they should be so worded as to exempt the organizations to which I refer from any liabilities to its prohibitory features. I suppose there never would have been an antitrust law passed had it not been that there were combinations being formed which were calculated to do an injustice to the public. If any such organization has ever been formed by the agricultural classes I have not seen any notice of it; I have not heard of any organization of farmers being accused of plotting for such a purpose. The condition of the farmer financially, as compared with that of other vocations, would indicate that he has not heretofore made use of any unfair means by which he could extort from his patrons. He is in a sense a manufacturer. He manufactures the soil, the sunshine, and the showers into the raw materials that feed and clothe the people of the world. He has never arrogated to himself the prerogatives that his power might indicate that he could if he so chose. Beginning with ninety per cent of the wealth, when this Government was first launched among the sovereignties of the world, he has now only about one-fifth of the aggregate wealth of the Nation; and only a part of the farmers own this percentage. A great per cent of them are propertyless. In fact, one-half of the plowmen of this Nation have no home. We have, approximately, 93,000,000 people who are supported by about twelve and one-half million actual field hands, who produce the food and raiment that feeds and clothes the 93,000,000 people at home and millions beyond the seas. Is it not an alarming state of affairs that one-half of these producers have no place on this planet that they can call their own? So a combination

of the farmers when organized for mutual benefit should not run against some national statute intended for public protection. According to the census of 1910 the manufacturers of the United States are worth approximately twenty billions of dollars, and their yearly output is valued at the same figures, employing 6,500,000 hands and paying them $3,427,000,000. How is it that the farmer, who has something like twenty-eight billions invested, twice as many hands, and the annual value of his crop, at farm prices, is only $9,000,000,000? We may see here some indication of the cause of the exits from the country to the towns and cities. The cry of "back to the farm," of which we have seen so much in the press of late, is invariably a command to "go" and not an entreaty to "come." In other words, the farmer is not begging the people to come from the city to help him farm, but the city man is urging people to go back to the country, but seldom does he take his own advice. I mention these things merely to show that the farmer is not holding his own in the race of life. We have about one million corporations in the United States, which control 82 per cent of the wealth of the nation.

Organizations among the agricultural classes have taken some form of coöperation. Not all of them have been strictly coöperative associations. In a strictly coöperative enterprise there is no such thing as profit and loss. If it is strictly coöperative, there can be neither profit nor loss under correct management. Therefore, such enterprises do not appeal to great elements of our people who are saturated with the speculative spirit. One reason why bogus stocks can be sold to the people, accompanied by flaming advertisements of promises of unreasonable profits, is because of this speculative mania, this get-rich-quick idea that permeates society. All coöperative undertakings have to combat this speculative spirit. Those who are asked to join the coöperative enterprises must first be convinced that there is as much money in saving losses as there is in receiving dividends on legitimate investments.

Organizations in various parts of the United States have been developed to aid in marketing farm products, and a few of these I wish to call to the attention of the committee, that we may analyze their purpose and system of operation in the light of modern necessity and see whether or not they are justifiable upon grounds of expediency and ethics; if so, then all national laws purporting to regulate combinations of a commercial nature should avoid interfering with such organizations.

The first which I will refer to is the Fruitgrowers' Association of California. I will say, for the sake of the record, that I am not officially representing that organization, but I merely give their methods of doing business as an illustration. Further on I shall come to those organizations which I do represent.

Out in California the citrus-fruit growers were getting returns in red ink for their fruit before they got in earnest and organized. The California Fruit Growers' Exchange is the outgrowth of their troubles. It ships annually 20,000 cars of fruit. The system consists of the local associations, the district exchanges, and the general fruit growers' exchange. Separate contracts link the three together. The grower contracts with the local associations, the local associations contract with the district exchanges, and the district exchanges contract with the California Fruit Exchange. There are more than 80 associations covering every citrus-fruit district of California, and packing nearly 200 guaranteed brands of oranges and lemons. The local exchanges elect the directors of the general exchange. From top to bottom the organization is planned, dominated, and controlled by the growers for the members. No corporation or individual reaps from it any dividends or private gain.

A part of section 9 of the contract between the grower and the local association reads as follows:

> Therefore each of the second parties expressly stipulates and agrees that he will not sell or otherwise dispose of his said fruit to any person or corporation other than to said first party, as herein provided; and that in case he shall fail, refuse, or delay to pick and deliver his said fruit to the first party within five days after demand therefor, the first party shall have the right, at its option, at any time or times thereafter, and from time to time, to enter into the possession of his said premises and to pick his said fruit, or any part thereof, and take the same to the packing house of the first party and pack, sell, and market the same, all at his cost and expense, which said cost and expense shall and may be retained by the first party out of any moneys received from the sale of any of his fruit.

A part of the contract between the local associations and the district exchanges reads as follows:

> The parties of the second part do hereby severally agree to market all fruit now controlled by them or that may hereafter come under their control during the term of this agreement through said first party, it being understood and agreed that the said party of the first part has entered into an agreement with the California Fruit Growers' Exchange for the sale of said fruit in accordance with the general plan adopted by said exchange, to which plan and agreement reference is hereby made, and the same is hereby made a part of this agreement.

A part of the contract between the district exchanges and the general exchange reads as follows:

> Said second party agrees that if at any time during the life of this agreement it fails to ship all its citrous fruits as hereinbefore agreed upon, or shall dispose of any of it elsewhere, or otherwise than as herein agreed upon,

that it will forfeit any pay as liquidated damages to party of the first part an amount equal to twenty-five cents a box on all such citrous fruits which are, or may be shipped or sold elsewhere than as stipulated in this contract, provided the first party was ready and willing to receive and handle such fruit.

Now, it is very clear that the purpose of that organization is to control the marketing of the citrus fruits of California, and the effect of it has been that it has made fruit growing a profit whereas it was a loss before. They certainly had certain powers there that might be construed by some courts as in restraint, or, in other words, regulating the outflow of crops, and thereby, in a measure at least, affecting prices.

Up in the Hood River Valley of Oregon they have an apple-growers' association which does not allow the grower of his apples to gather his fruit, it does not allow him to pack it, it does not allow him to ship it, or to say when it shall be sold, or at what price, or anything of the kind. They voluntarily get together and give the association the authority to do all that for them, and then they abide by it. They have made it a success, and those orchards alone are worth from $1000 to $5000 an acre.

You come to the wheat belt of the Central West, and they have their elevators that are owned by the farmers — some 1400 of them — and they have, of course, as a purpose the regulating of the wheat to the market in a way that they will get better prices than if they auction it off from the thrasher, as they used to do. If those elevators decide to be in one State, or get together under one corporation or one management in order to regulate that price for the market, your law, intended to apply to other corporations, might apply to them. I think you had that in view in writing the law. The last development of that wheat-elevator system of marketing grain is along the line of compelling those who are members of the exchange association to do just as these fruit men have done in California, to deliver their wheat to the elevator which they own; or else, if they sell it otherwise, to pay the same commission that they would have to pay if the elevator handled it, and that enables them to compete with the old-line elevators, which they were not able to do otherwise, because the old-line elevators were getting higher prices than the market would justify for wheat where the farmers' elevator was established until they put it out of business. That is the means that they are applying there to obviate that difficulty.

When we come down to the cotton belt, with which I am more familiar than any of these others that I mave mentioned. The farmers of the South, in the last seven years, have built some 1600 cotton warehouses, with the avowed purpose of storing their cotton in those warehouses and selling it gradually through the year instead of forc-

ing it on the market in the fall faster than consumption could use it. These local warehouses are small companies, and as a matter of course have but little financial connections that can float loans on the cotton that they have stored when cotton is what we call "distressed," or when the people who produce it have to have money to pay their debts and cannot wait to sell it.

Now, that naturally drove these warehouses to consider the proposition of consolidating. Take, as an illustration, Mississippi. All the warehouses in Mississippi are swung together in one corporation, capitalized for a million dollars. They sell through one agent and have one central office. The cotton is stored in the warehouses. It is simply sent to a central office, and an expert grader and classifier makes a record of the cotton, its quality, staple, spinning qualities, etc., and that office is in position to fill any order from any mill by cable or otherwise at any time of the year by having all of these warehouses to draw from, and it gives it financial connections that enable it to borrow money for those farmers that are in debt, and need their money in the fall.

Now, as to whether that could be construed to be in restraint of trade I am not here to say, but it is my purpose, in representing this organization, to present this condition to you in order that you may have it fully in mind in writing a law, or in writing an amendment to the law, as it now is. . . .

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THE CHAIRMAN. Now so far as you have developed this thought, and studied the situation, state as concretely as you can — and of course sufficiently full to cover the subject — what you think the law ought to allow — I am speaking now with reference to the limitations of the Sherman antitrust law.

MR. BROOKS. Well, that would be rather difficult to answer unless I were a lawyer, which I am not.

THE CHAIRMAN. I am not speaking of the legal aspect of it at all. Just ignore that.

MR. BROOKS. Well, we wish to be allowed to continue our system of organizing the farmer and getting him to build his own warehouses, store his own cotton, and combine those warehouses and sell through one agent to the mills. We wish to have him allowed full rein in perfecting that system, and its operation.

THE CHAIRMAN. Well, that is pretty broad. Do you include in that the proposition of turning this cotton over to one man, or one set of men, to determine when it shall be sold?

MR. BROOKS. Yes, sir.

THE CHAIRMAN. That is what you would have if you could have your way?

MR. BROOKS. Yes, sir; if he could not determine when to sell, the regulation could not be effective because there would be such a per cent of the people in the South, including the negro, who would be determined to have their money right now, that it would force it on the market unless he could restrain it from going on the market as fast as the grower wanted to deliver.

THE CHAIRMAN. There are one or two views here that I do not seem to be able to make plain in my attempt to lay them before you. One is a plan whereby the cotton grower can in a manner adjust the credit of all so that the individual cotton grower, if he is in a financial stress, can the more readily get the money to carry his crop. That is one thing. That, I understand, is practically what the present effort is.

MR. BROOKS. Yes, sir.

THE CHAIRMAN. Now, the other involves an agreement by the cotton growers that they will turn over their cotton, and turn over to some man or set of men the power to say when that cotton shall be sold; that is, at what price it shall be sold. That is another proposition.

MR. BROOKS. Yes, sir.

THE CHAIRMAN. Would you go as far as that?

MR. BROOKS. Yes, sir; we go that far for this reason, that while the borrower might take that money that was advanced to him and go ahead and liquidate his debts and buy the necessaries of life, he is not in a position to keep up with the markets of the world and know when would be the proper time for that cotton to really go on the market, while those that he has employed to do this for him, to sell his cotton for him, are in a position to know and would be the proper ones to say how they would sell this week or this month. For instance, it will come down to a system like this: We will sell one-twelfth of this cotton each 30 days; we won't sell any faster or any slower than that — I am merely taking that as an illustration — in order to find the market as consumption demands. If you crowd the market or choke the market you depress the price unnaturally, and we are trying simply to follow the normal operation of the law of supply and demand. The farmer is the only man in all history that has never been able to tell what he is worth. The man who sells dry goods prices them to the consumer. The man who waits on you when you are sick always tells you what his services are worth and you have to pay for them. The lawyer when he pleads your case tells you what his services are worth and you have to pay him. The railroads tell you what you must pay for your tickets. The Government tells what it pays you people to come here and make laws for us and you know beforehand. You are not subject to competition by the lowest bidder. The bootblack will tell you what you must pay him for blacking your shoes. The school-teacher tells what he requires to

teach the children. Everybody is allowed to tell you what he is worth but the farmer.

THE CHAIRMAN. You are making that too broad. A school-teacher does not fix his wages. As to the railroads you are right, and as to these greater industries you are undoubtedly right.

MR. BROOKS. I will say this, the teachers, in their attention to legislative matters, are having a good deal to do with saying how much wages shall be paid to them. While it seems right for almost every person, and I would say in a sense even day laborers, to combine and say for how much they will work per day or per job, yet the farmer has always got to walk up to a customer and say, "What will you give, and what will you take?" It is an unjust exception.

SENATOR POMERENE. I think there are some witnesses around this table who know that they have to pay for their butter and eggs what the farmer demands.

MR. BROOKS. Oh, no, Senator —

THE CHAIRMAN. No; they do not. I beg the Senator's pardon.

MR. BROOKS. No; they do not. The farmer always asks somebody what they will give him for his butter and eggs, and then that party turns around and tells you what you must pay him for them.

SENATOR OLIVER. I think other men in other lines of business have the same experience in having to sell their commodities for whatever the customer will give.

THE CHAIRMAN. Now, getting back to the original proposition, of course you realize that the Sherman antitrust law was designed to protect the public from the imposition which human nature is prone to exercise when it has the arbitrary power to fix prices?

MR. BROOKS. Yes; I understand that.

THE CHAIRMAN. Now, while there is a vast difference in their capacity to control the situation between the steel people, we will say, and the farmer, yet would you consent to a law which would permit all the steel producers to turn over to one man or set of men the power to say when the steel should be sold to the public?

MR. BROOKS. There is no comparison, for this reason: Steel is a product that comes every day in the year. There is no periodic production, and you do not know the amount of production as compared to the amount of consumption that exists in any one year.

THE CHAIRMAN. The effect on the consumer would be precisely the same, would it not?

MR. BROOKS. I think not, because —

THE CHAIRMAN. If one man could fix the price at which all steel products should be sold and just how they should be put out to the market from time to time, it would put the consumer of steel at the absolute mercy of that individual, would it not?

MR. BROOKS. Yes, sir; I would say it would.

THE CHAIRMAN. That principle is the same, then?

MR. BROOKS. The principle is not the same in this respect: There are, I will say, 15,000,000 bales of cotton that have been produced, and that 15,000,000 bales are going to be followed by another 15,000,000 in another twelve months. That 15,000,000 bales can go on the market within that twelve months. Now, the thing for the central office, representing the farmers who grow it, to do is to regulate that by the week until the year is out and finally market it, every bit in a given time. You could not apply that principle to the steel industry.

THE CHAIRMAN. Undoubtedly you are right as to that, provided each farmer does that. . . . Do you think it right to allow all the producers of coal in this country, either soft or hard coal, to turn it over to one man to say when that coal shall be delivered and what price it should bring?

MR. BROOKS. No, sir; I do not think it would be right to do that, because that coal can be limited in production and limited in output so as to charge an exorbitant price for it, or to charge an exorbitant profit, but if there were a certain number of tons demanded each year, and a certain number of tons produced each year, it would not be wrong to allow them to market one fifty-second of it a week, one-twelfth of it a month, and let the market determine the price.

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SENATOR CUMMINS. Take the California Fruit Exchange for an example. There the fruit grower, the man who owns the trees and produces the fruit, agrees absolutely to sell his products to the local association?

MR. BROOKS. Yes, sir.

SENATOR CUMMINS. And the local association agrees absolutely to deliver it to the district exchange?

MR. BROOKS. Yes, sir.

SENATOR CUMMINS. And likewise the district exchange agrees absolutely to deliver it to the California Fruit Exchange?

MR. BROOKS. Yes, sir.

SENATOR CUMMINS. And the California Fruit Exchange, being in that way in possession of all of the citrus fruits in California, fixes the price at which those fruits shall be sold absolutely, does it not?

MR. BROOKS. I would not go quite that far. It affects the prices, of course, very materially, but, of course, the amount that is produced in other parts of the world and the demand for those goods would have a great deal to do with those prices.

SENATOR CUMMINS. I assume it has to meet the competition of foreign countries, and possibly Arizona and Florida; but so far as anyone in California can fix the price, the California Fruit Exchange absolutely fixes it?

MR. BROOKS. Yes, sir.

SENATOR CUMMINS. Do you want the law so amended that what the California Fruit Exchange does can be reproduced in every other agricultural or horticultural product?

MR. BROOKS. I do not know that the law interferes with it at present, and I would not want the law amended so that it would prevent those people from doing as they are doing.

SENATOR CUMMINS. Now, assuming that the law does prevent just that sort of organization — and I do not say whether it does or not — you want it amended or changed so that it will not prohibit it?

MR. BROOKS. Yes, sir; I do.

SENATOR CUMMINS. With respect to elevators, the farmer who enters a coöperative company agrees absolutely to sell his grain through that company, does he not?

MR. BROOKS. If it is a genuinely coöperative elevator, he does, or if he sells outside of that company he pays the same commission as if he had.

SENATOR CUMMINS. But he really agrees that he will market his grain through that elevator. Now, as to the coöperative company, does it bargain with the farmer in respect to the price?

MR. BROOKS. No, sir.

SENATOR CUMMINS. Or does the coöperative elevator company fix the price?

MR. BROOKS. It sells wheat at the best possible price and gives it to the farmer.

SENATOR CUMMINS. And then accounts to the farmer for the amount that it has received for his grain?

MR. BROOKS. Yes, sir.

SENATOR CUMMINS. But the farmer has nothing whatever to do with the fixing of the price?

MR. BROOKS. No, sir; that is fixed by the demand, or the prices they can get for it.

SENATOR CUMMINS. By the act, whatever it may be, of the elevator company. The coöperative company bargains with whomsoever it sells the grain to and gets the best price it can?

MR. BROOKS. Yes, sir; just like any other company.

SENATOR CUMMINS. And you want the cotton business to reach finally the same condition?

MR. BROOKS. Yes, sir; that is the wish of the farmers who raise cotton.

SENATOR CUMMINS. Do you believe that it will be wise if the entire wheat-growing region should finally be combined in a single company that would market the grain of the whole country?

MR. BROOKS. It is not so much the power that one possesses as how it is exercised. Any law should be equal in its application to

the different classes of people. It should not exempt a farmer merely because he is a farmer any more than any other class. In case such a thing became possible that the farmers' organization produced such a power that it coerced and extorted from the public, it is not to be excused any more than any other trust.

SENATOR CUMMINS. But you would make its validity or legality dependent upon the use of the power that it might have rather than upon the mere possession of the power?

MR. BROOKS. Yes, sir; I think the history of the farmer has been such that it ought not to alarm anybody to think that he is going to exercise that power to extort from the world — at least he has not been doing it for 6000 years.

SENATOR CUMMINS. However, you desire the farmer to be at liberty with respect to every product of the soil to enter into an arrangement of that sort?

MR. BROOKS. He should be allowed to scientifically market his crops just as any other commercial firm can market, according to the best advantages, and do it legitimately.

SENATOR CUMMINS. I am coming to that in a moment, but I want to get it clearly on the record what you want. You want the farmer to have the privilege of making this consolidation or arrangement for every product, practically, as the California Fruit Exchange has made the arrangement for the marketing of the citrus fruits of California?

MR. BROOKS. Practically, yes, sir.

SENATOR CUMMINS. Nearly all those products are annual?

MR. BROOKS. Yes, sir.

SENATOR CUMMINS. And it is necessary for the man who produces them to sell one crop before another is produced?

MR. BROOKS. Precisely, and that is the line of distinction between the farmers' products and the output of the steel mills and the coal fields, etc.

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SENATOR CUMMINS. * * * So that nature itself intervenes between such organizations and any injury to the public, and I take it that is your view of it.

MR. BROOKS. Yes, sir.

SENATOR CUMMINS. But while such an organization might for one month or two months create a scarcity in the market and in that way affect the price for that period, yet that would be followed necessarily by such a glut on the market as to correct any evil of the sort?

MR. BROOKS. Yes, sir; the violation of the law of supply and demand would bring its own retribution.

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IX

RECENT FEDERAL LEGISLATION PERTAINING TO FEDERAL CONTROL OF INDUSTRY

AN ACT TO CREATE A FEDERAL TRADE COMMISSION, TO DEFINE ITS POWERS AND DUTIES, AND FOR OTHER PURPOSES

H. R. 15613

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commission shall have an official seal, which shall be judicially noticed.

SECTION 2. That each commissioner shall receive a salary of $10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. The commission shall appoint a secre-

tary, who shall receive a salary of $5000 a year, payable in like manner, and it shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

With the exception of the secretary, a clerk to each commissioner, the attorneys, and such special experts and examiners as the commission may from time to time find necessary for the conduct of its work, all employees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

Until otherwise provided by law, the commission may rent suitable offices for its use.

The Auditor for the State and Other Departments shall receive and examine all accounts of expenditures of the commission.

SECTION 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, papers, and property of the commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by the commission in the exercise of the powers, authority, and duties conferred on it by this Act.

The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

SECTION 4. That the words defined in this section shall have the following meaning when found in this Act, to wit:

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" means all documents, papers, and correspondence in existence at and after the passage of this Act.

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce," approved February fourteenth, eighteen hundred and eighty-seven, and all Acts amendatory thereof and supplementary thereto.

"Antitrust acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen.

SECTION 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said

complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the

facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (*a*) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (*b*) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (*c*) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

SECTION 6. That the commission shall also have power —

(*a*) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices,

and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(*b*) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(*c*) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(*d*) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(*e*) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(*f*) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(*g*) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(*h*) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

SECTION 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

SECTION 8. That the several departments and bureaus of the Government when directed by the President shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the commission as he may direct.

SECTION 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpœnas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission. or to produce documentary evidence if so ordered, or to give evidence touching the matter in question;

and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpœna of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpœna issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

SECTION 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpœna or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1000 nor more than $5000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under

this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1000 nor more than $5000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

SECTION 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

Approved, September 26, 1914.

AN ACT TO SUPPLEMENT EXISTING LAWS AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES, AND FOR OTHER PURPOSES

H. R. 15657

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

SECTION 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the

commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

SECTION 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the district of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

SECTION 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SECTION 5. That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish vio-

lations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

SECTION 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

SECTION 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction

or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

SECTION 8. That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than $5,000,000; and no private banker, or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than $5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer, or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer, or employee has been elected or selected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place: *Provided*, That nothing in this section shall apply to mutual savings banks not

having a capital stock represented by shares: *Provided further*, That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further*, That nothing contained in this section shall forbid a director of class A of a Federal reserve bank, as defined in the Federal Reserve Act from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provisions shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

SECTION 9. Every president, director, officer or manager of any firm, association or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property or assets of such firm, association or coryoration, arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or

to the use of another, shall be deemed guilty of a felony and upon conviction shall be fined not less than $500 or confined in the penitentiary not less than one year nor more than ten years, or both, in the discretion of the court.

Prosecutions hereunder may be in the district court of the United States for the district wherein the offense may have been committed.

That nothing in this section shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any States shall be a bar to any prosecution hereunder for the same act or acts.

SECTION 10. That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall

transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section it shall be fined not exceeding $25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5000, or confined in jail not exceeding one year, or both, in the discretion of the court.

SECTION 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (*a*) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (*b*) by leaving a copy thereof at the principal office or place of business of such person; or (*c*) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

SECTION 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

SECTION 13. That in any suit, action, or proceeding brought by or on behalf of the United States subpœnas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district: *Provided*, That in civil cases no writ of subpœna shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

SECTION 14. That wherever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

SECTION 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpœnas to that end may be served in any district by the marshal thereof.

SECTION 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

SECTION 17. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record,

shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

Nothing in this section contained shall be deemed to alter, repeal, or amend section two hundred and sixty-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

SECTION 18. That, except as otherwise provided in section 16 of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

SECTION 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SECTION 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dis-

pute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacfully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

SECTION 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or things so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SECTION 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however,*

That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give rea onable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1000, nor shall such imprisonment exceed the term of six months: *Provided*, That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

SECTION 23. That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or

any judge of any district court of the United States or any court of the District of Columbia.

SECTION 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

SECTION 25. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

SECTION 26. If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Approved, October 15, 1914.

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