IS ECONOMIC PLANNING CONSTITUTIONAL?
A RE-EXAMINATION OF THE CONCEPT OF PUBLIC INTEREST

PARTS VI TO X *

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VI.

In order that we may understand why legislative action abolishing the common law was necessary in order to permit the introduction of free trade, we must take a closer view of the common law as it actually was.

There are three outstanding names in the English common law, and “our author” (Hale) is one of them. The other two are Coke and Blackstone. When one knows what Coke, Hale, and Blackstone have said as to the common law of any subject, one knows the common law as it was during the seventeenth and eighteenth centuries.

In his sketch of Lord Hale, in *Fourteen English Judges*, Lord (Chancellor) Birkenhead speaks of Hale’s position in “the succession from Coke to Blackstone.” What he says in this connection is sufficiently interesting to excuse its reproduction in the margin. But the important point

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1 “Coke, essentially the fighting advocate, used his law as a weapon. His writings are for practical use, and, like many another advocate, he often uses information which he imperfectly assimilated and, therefore, wrongly estimated. As I have pointed out elsewhere, Coke was
is that there was a "succession from Coke to Blackstone," and that it went through Hale. Each in his own generation was the embodiment of the common law, and Blackstone was at the end of the line through which it was transmitted to us.

What then is the common law of our subject according to Coke, Hale, and Blackstone?

Our inquiry must begin with the problem of place. The very first requirement of freedom of trade is that you may trade anywhere and everywhere. But this fundamental requirement of the freedom of trade was denied by the common law. Trade, according to the common law, could be carried on only at designated places, known as fairs and markets, by way of special privilege, granted by authority. And, usually one had to pay for the privilege of trading—both for the privilege of establishing a fair or market and for trading therein. According to Coke, this rule of the common law antedates not only the omnipotence of Parliament, but even the Tudor and Stuart "despotisms" and any earlier despotism of which we have any record. It even goes behind that feudalism which has been blamed by some of our judges for the exceptional trades—the regulation of which, under the common law, even they must admit—and he traces its origin into the hoary antiquity of our "Anglo-Saxon" ancestry beyond a man who gathered the legal knowledge of the Middle Ages and transformed it into a living system convenient for the future development of the country. Hale had not to do this work over again. The Abridgments and the Reports had, by his day, provided the working tools of a practising lawyer. There was available a body of law stated in current language by contemporary judges. Hale, with judicial mind and inquiring culture, was the first of the modern commentators on English law. The age did not as yet enable him to disregard the only public he could have, those who followed the law or engaged in the legal and constitutional controversies of the day. The method and arrangements of his subject were still dictated by the practical convenience of the professional lawyer, but his knowledge of Roman law and his philosophic studies equipped him to plan afresh in such a way that, when Blackstone arose, he was able to transmute the laws of England into a systematic 'exposition' arranged on a plan which admitted a logical division while it indulged the demands of practice. Nevertheless, Hale was still living in the age when men could and did search the authorities, not by way of antiquarian research, but for the solution of existing problems."
which "the memory of man goeth not." In this claim he seems to be sustained by modern historians.\(^2\)

In commenting on the XXXI Chapter of the famous statute of *Westminster First,\(^3\)* "touching outrageous tolls," Coke explains that the necessity for the statute arose from the fact that during the reign of King Henry the Third, many persons in possession of fairs and markets took advantage of the disturbed conditions of the times to exact outrageous tolls instead of the reasonable tolls to which they were entitled under the common law—to the great hurt of those who were compelled to resort to these places for trading purposes. He then proceeds to state that under the laws of some of the old "Anglo-Saxon" kings of pre-Norman days, no sales of any kind were permitted except at certain designated places and under great formalities, and that that gave rise to the institution of market places and to the tolls paid for trading at them. He then proceeds to lay down the common law rules which, in his opinion, govern the right to exact tolls.\(^4\)

\(^2\) "When the old English kingdoms became one under the King of Essex, the law on the subject was incorporated in the written laws of the Anglo-Saxons, which in many cases were codifications of older unwritten customs. In the laws of Edward the Elder, a special penalty—the *offerhyrnnesse*—was imposed for offences against the King, including the offence of buying outside markets; while a law of Athelstan, circ. ad. 930, ordained that no man buy any property out of port over XX pence; but let him buy therewithin, on the witness of the port-reeve, or of another unlying man, or further on the witness of the reeves at the folkmote. * * * Like prohibitions are to be found in the laws of the Norman Kings." Sanderson, *Restraint of Trade in English Law*, 95.

\(^3\) 3 Edw. I (1275).

\(^4\) Coke, *Second Institute*, 220ff: "Every one that hath a faire or market, ought to have it by graunt or prescription; if the king graunt to a man a faire or market, and graunt no toll, the patentee shall have no toll, for toll being a matter of private [advantage] for the benefit of the lord is not incident to a faire or market so graunted without a special graunt, as it was adjudged in the case of Northampton, for such a faire or market is accounted a free faire or market; * * * *

But if the king graunt unto one a faire or market, he shall have without any graunt a court of record, called a court of pipowdres, as incident thereunto, for that is for advancement and expedition of justice, and for the supporting and maintenance of the faire or market, and so note a diversity between the private and the publique.

No toll for any thing tollable brought to the faire or market to be
The fact that the toll was to be paid by the buyer instead of the seller is very important as well as interesting. It shows that the toll paid to the lord was not in the nature of a rent for the use of his premises, but purely for the privilege of trading—and also that not only selling, but buying was a privilege. Perhaps this is the place to remove another misapprehension as to the true conception of trade during the time when the English common law was developing. It is sometimes said that the restrictions upon trade, included under the terms forestalling, engrossing and regrating, were really attempts to foster competition within markets. It is a sufficient answer to that, that while the laws regulating the offenses mentioned were in force, there were also laws which prohibited manufacturers from selling directly to consumers in shops of their own. This law of the market, which is thus co-eval with the earliest English law that we know of, never ceased to be the law of England during any period of the existence of the common law well into the nineteenth century. If it is not the law today, and an Englishman can trade wherever he pleases without paying any toll therefor, it is due to the fact that, fortunately for him, the English have no constitution in which “the fundamental principles of the common law” are enshrined.

At any rate, such was the law of England at the time sold, shall be paid to the owner of the faire or market before the sale thereof, unlesse it be by custome time out of mind used, which custom none can challenge that claime the faire or market by graunt within the time of memory, viz. since the raigns of king R. 1. which is a point worthy of observation for the suppression of many outrageous and unjust tolls incroached upon the subject to be punished within the purview of this statute. So note, it is better to have a faire by prescription, then by graunt.

Also if the lord or owner of the faire or market doe take toll of the seller of horses, etc., he is to be punished within this statute, for he ought to take it of the buyer onely. Vide 2 & 3 Ph. & Mar. & 31·Eliz. And so dc communi jure no toll shall be paid for things brought to the faire or market, unlesse they be sold, and then toll to be taken of the buyer; but in anciente faires and markets toll may be paid for the standing in the faire or market, though nothing be sold.”

Post note 13.

Smith, Wealth of Nations, Book IV, c. V.
we severed our political connection with the mother country and took possession of our legal heritage. For Blackstone stated the law on the eve of the American Revolution to be the same as Coke stated it a century and a half earlier.\(^7\)

And not only was the place designated, but also how often, or on what days of the week, the market could be held. This was usually designated in the charter, if it was a “new” market, or by prescription, if it was an “old” one. And, according to Coke, the common law said that it could only be held on the designated days from sunup to sundown.\(^8\)

The right to hold fairs or markets was an exclusive right by common law, irrespective of whether or not it was made exclusive by the grant under which it was being operated. This exclusiveness was also imported by the common law into those markets which were operated by prescription—that is to say, which had no written grant to show for it. The common law made this exclusiveness a property right which could be enforced by those who enjoyed the privilege, against those who did not have the

\(^7\) Blackstone, 2 Commentaries, 448-9: “But property may also in some cases be transferred by sale, though the vendor hath none at all in the goods: for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of law is, that all sales and contracts of any thing vendible, in fairs or markets overt (that is, open), shall not only be good between the parties, but also be binding on all those that have any right or property therein. And for this purpose, the Miroir informs us, were tolls established in markets, viz. to testify the making of contracts; for every private contract was discountenanced by law: insomuch, that our Saxon ancestors prohibited the sale of any thing above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses. Market overt in the country is only held on the special days, provided for particular towns by charter or prescription; but in London every day, except Sunday, is market day. The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt; but in London every shop in which goods are exposed publicly to sale, is market overt, for such things only as the owner professes to trade in."

\(^8\) Op. Cit. supra note 4, at 714: “He that had a faire or market, either by grant or prescription, had power to hold it per unum diem, sen duos, vel tres dies, &c., where (dies) is taken for dies solaris.”
privilege. When the common law reached its maturity, it laid down the rule that these exclusive privileges to trade were so sacred that even the king, from whom they were supposed to emanate, could not interfere with them. As we shall see further below the later common law held that the king in granting these privileges was acting on behalf of the community, and could not, therefore, give them or interfere with them at his pleasure. For the present, let us hear what Blackstone has to say on the subject:

"Also—says our authority—if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that he does me a prejudice, it is a nuisance to the freehold which I have in my market or fair. But in order to make this out to be nuisance, it is necessary, 1. That my market or fair be the elder, otherwise the nuisance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine. For Sir Matthew Hale construes the dieta, or reasonable day's journey mentioned by Bracton, to be twenty miles; as indeed it is usually understood not only in our own law, but also in the civil, from which we probably borrowed it. So that if the new market be not within seven miles of the old one, it is no nuisance; for it is held reasonable that every man should have a market within one-third of a day's journey from his own home; that the day being divided into three parts, he may spend one part in going, another in returning and the third in transacting his necessary business there. If such market or fair be on the same day with mine, it is prima facie a nuisance to mine, and there needs no proof of it, but the law will intend it to be so; but if it be on any other day, it may be a nuisance; though whether it is so or not, cannot be intended or presumed, but I must make proof of it to the jury."

In this connection, it is interesting to note that, if Mr. Justice Story had had his way in the Charles River Bridge

9 Op. Cit. supra notes 4 & 8, at 406: "Here it is to be observed, that if one had a market, either by prescription, or by letters patent of the King, and another obtains a market to the nusans of the former market, he shall not tarry till he have avoided the letters patents of the latter market by courts of law, but he may have an assize of nusans. * * * Now in what cases a faire or market shall be said to be levied to the nusans of another, you may read in our old and latter books."

No property right was, however, sacred against interference by the legislature under the common law.

Case,\textsuperscript{11} and had his famous dissenting opinion been the prevailing opinion, the common law principles thus laid down by Blackstone would have been our constitutional law today. To Blackstone and his predecessor "sages of law," the notion of an impotent legislature was, of course, utterly foreign. And when he and his fellow expositors of the common law said that even the king could not interfere with existing privileges, even though they emanated from royal hand, they gave us the reason that these privileges were not the private property of the king to give and withdraw at his pleasure, but were intended for the benefit of the community; that is to say, a method of control and regulation of trade by the community, and he could not, therefore, act to the "prejudice of the citizen" without the sanction of the community itself as represented by Parliament. There is no question, of course, that Parliament could interfere with all existing privileges of this nature. But when we began to administer our "heritage" for ourselves, an attempt was made by the Marshall-Story school of constitutional law so to enshrine this common law into our constitution as to make the limitations upon the power of the king, which the common law prescribed for the protection of the community, limitations upon the power of the community itself. In other words, this school of constitutional law sought to perpetuate the fetters and limitations upon trade, existing in the common law of England at the time of the American Revolution, which could always be changed by the community, acting through Parliament, into the unchangeable constitutional law of the United States. It was, therefore, fortunate indeed for our future economic development that Marshall, who is supposed to have approved of Judge Story's opinion, was dead, and had been succeeded by Taney, who presided over a court the majority of whose members belonged to a different school from that of which Mr. Justice Story was so able an exponent.\textsuperscript{12}

\textsuperscript{11}Charles River Bridge \textit{v.} Warren Bridge, 11 Pet. 420, 9 L. Ed. 773 (1837).

\textsuperscript{12}The danger in the United States was, of course, not from fairs and markets, but from ferries and turnpike roads, which could have blocked the building of railroads, on which the future economic development of the country so much depended. How serious this could have be-
Having limited the places where business could be done, the common law proceeded to restrict the manner in which it could be done. This was accomplished principally through the law of forestalling, engrossing, and regrating, which were criminal offenses.13

**Forestalling** consisted in "the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there."

**Engrossing** consisted in "the getting into one's possession, or buying up, large quantities of corn or other dead victuals, with intent to sell them again."

**Regrating** consisted in "the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place."

These offenses were regulated by statute, but both Coke and Blackstone assured us that they were offenses at common law.14 But these were not the only offenses against "fair trade" as conceived by the common law. So, Blackstone assures us, that there was also an offense known as **owling.**15

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13 *Supra* note 5.

14 *Op. cit. supra* notes 4, 8, & 9, at III, c. 89: "That no merchant or any other may buy within the realm any victual or other merchandise in gross, and sell the same in gross again, for then he is an ingrosser, and punishable, *ut supra:* for by this means the price of victuals and other merchandise shall be enhanced to the grievance of the subject. * * * Observe well this judgment, that it is against the common law of England to sell corn in sheaves before it is threshed and measured, and the reason therefor seemeth to be, for that by such sale the market in effect is forestalled."

See also *op. cit. supra* notes 7 & 10, at IV, c. 12.

15 *Op. cit. supra* notes 7, 10 & 14, at 154: "Owling—says our authority—so called from its being usually carried on in the night, which is the offence of transporting wool or sheep out of this kingdom, to the detriment of its staple manufacture. This was forbidden at common law and more particularly by statute 11 Edw. III. c. 1. when the importance of our woolen manufacture was first attended to; and there are now many later statutes relating to this offence, the most useful and principal of which are those enacted in the reign of Queen
Blackstone's approval of the statutes with respect to owling is in striking contrast with Judge Peckham's horror of the same laws, as shown in the passage from his dissenting opinion in the Budd Case quoted above. This is of crucial importance in our connection, because Blackstone's attitude was the attitude of all the "sages of the law" from Coke to Blackstone and beyond, and had reference not to any particular law or set of laws, or any particular subject, but to all regulations—whether of trade, industry or occupations; and the prevalent notion that Coke, or any of the other "sages of the law" believed in unregulated trade, commerce, industry or occupations, is based on a misconception of the history and development of English law. Coke, particularly, is sometimes referred to as sponsor of the doctrine of "freedom of labor" or "freedom of occupation" as common law principle. This, I believe, is based entirely on a misconception of the great common lawyer's attitude, as we shall further see below.

It appears from the foregoing discussion that all of the offenses which the "sages of the law" said were offenses at common law were regulated by statute. The claim of the exponents of the common law that these matters were offenses at common law is based on the theory that there is no real distinction between the common law and statute law, and that common law is, in fact, statutory law, ex-

Elizabeth, and since. The statute 8 Eliz. c. 3. makes the transportation of live sheep, or embarking them on board any ship, for the first offence forfeiture of goods, and imprisonment for a year, and that at the end of the year the left hand shall be cut off in some public market, and shall be there nailed up in the openest place; and the second offence is a felony. The statutes 12 Car. II. c. 32. and 7 & 8 W. III. c. 28. make the exportation of wool, sheep, or fuller's earth, liable to pecuniary penalties, and the forfeiture of the interest of the ship and cargo by the owners, if privy; and confiscation of goods, and three years imprisonment to the master and all the mariners. And the statute 4 Geo. I. c. 11. (amended and further enforced by 12 Geo. II. c. 21. and 19 Geo. II. c. 34.) makes it transportation for seven years, if the penalties be not paid."

Interesting modern instances of the offense of "Owling" in this country are Ga. CRIM. CODE (1914), art. 26, § 555, and Ala. CRIM. CODE (1923) §3229.

16 People v. Budd, 117 N. Y. 1, 22 N. Y. 670 (1889); the quotation referred to appears in footnote 31, p. 268 of the March, 1933, issue of this JOURNAL.
cept that we have lost the original text of the statutes because of their antiquity, plus the fact that certain fragmentary collections of old—that is, pre-Norman laws—are still extant, in which the matters in question are more or less regulated. We need not enter here upon a discussion of the mooted question, whether these early enactments were legislation in our sense or mere codifications of existing customs. Suffice it to say, that, generally speaking, when a thing was known to be an offense before the date of the first statute, the date of the enactment of which is known to us, it was considered common law. It so happens that all of the written laws we possess governing occupations are of a later date, and are, therefore, according to our conventional division, statutory regulations. The first statute extant goes back, however, to 1351-52, and the legislative policy which that statute inaugurated, if it did inaugurate it, has lasted practically as long as the other restrictions upon trade which we have already considered.

In this connection another matter must be considered, and that is: That during the middle ages, occupations were authoritatively regulated without statutes by the guilds, which were almost as old as the trades themselves as "trades." The fact, therefore, that no "sage of the law" has said in so many words that a certain regulation of labor or occupation is part of the common law does not mean that it was not to all intents and purposes as much a part of the law of England as any other rule which these "sages of the law" expounded, or that they made any distinction in the nature of the "right" or "obligation" which flows from the common law as against the "right" or "obligation" which flows from statutory law.

The general attitude of the "sages of the law" on the subject of occupations is thus stated by Blackstone, at the end of the "succession:"

"To exercise a trade in any town—says he—without having previously served as an apprentice for seven years, is looked upon to be detrimental to public trade, upon the supposed want of suffi-

17 Statute of Labourers, 25 Edw. III.
cient skill in the trader: and therefore is punished by statute 5 Eliz. c. 4, with the forfeiture of forty shillings by the month.”

It may be noted here that Coke approved of the same statute for another reason, namely, that it kept the youth from roaming around idle and getting into mischief. He also approved of the Elizabethan legislation with respect to cottages which so horrified Judge Peckham.

This brings us to the claim that Coke is responsible for the doctrine that at common law every one had a “right” to make such use of his labor, and to engage in such trade

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18 Op. cit. supra notes 7, 10, 14 & 15, at III, 162. The following paragraph from Blackstone’s Commentaries, which follows immediately upon the one quoted in the text, may also be interesting as showing how completely all phases of business were regulated in England on the eve of the American Revolution, and how natural such regulation seemed to the expositors of the laws of England:

“Lastly, to prevent the destruction of our home manufacturers, by transporting and seducing our artists to settle abroad, it is provided by statute 5 Geo. I, c. 27, that such as so entice or seduce them shall be fined 100L. and be imprisoned three months; and for the second offence shall be fined at discretion, and be imprisoned a year; and the artificers, so going into foreign countries, and not returning within six months after warning given them by the British ambassador where they reside, shall be deemed aliens, and forfeit all their lands and goods, and shall be incapable of any legacy or gift. By statute 23 Geo. II. c. 13. the seducers incur, for the first offence, a forfeiture of 500L. for each artificer contracted with to be sent abroad, and imprison for twelve months; and for the second, 100L. and are liable to two years imprisonment: and by the same statute, connected with 14 Geo. III. c. 71. if any person exports any tools or utensils used in the silk, linen, cotton, or woollen manufactures, (excepting woolcards to North America,) he forfeits the same and 200L. and the captain of the ship (having knowledge thereof) 100L. and if any captain of a king’s ship, or officer of the customs, knowingly suffers such exportation, he forfeits 100L. and his employment; and is for ever made incapable of bearing any public office: and every person collecting such tools or utensils, in order to export the same, shall, on conviction at the assizes, forfeit such tools and also 200L.”


20 Op. cit. supra notes 4, 8, 9 & 14, at III, 204: “We have not read of any act of Parliament now in force made against the excess of building, or touching the order or manner of building; but it is wasting evill, whereunto some wise men are subject.” III Institute, cap. 97.
or occupation as he saw fit. In view of Coke’s great au-
thority, it is well worth while to go into this question more
fully. We shall, therefore, consider in some detail the
three cases bearing on this question, reported by Coke in
his †Reports. 21

The first case involved an ordinance of the London Com-
mon Council that no broadcloth be “put to sale” in the
City of London before it be brought to Blackwell Hall “to
be viewed and searched,” and “hallage” of 1d. for every
cloth paid, on penalty of 6s. 8d. for every cloth. The
action was one in debt to recover the penalty for a viola-
tion of the ordinance. The plaintiff was allowed to re-
cover. In reporting this case, which was tried in the
Court of Kings Bench, Michaelmas Term, 32 and 33 Eliz.,
Coke said:

“It appears by many precedents, that it hath been used within
the City of London time out of mind, for those of London to make
ordinance and constitutions for the good order and government
of the citizens, &c. consonant to law and reason, which they call
Acts of Common Council. Also all other customs are confirmed
by divers Acts of Parliament, and all such ordinances, constitu-
tions, or by-laws are allowed by the law, which are made for the
true and due execution of the laws or statutes of the realm, or
for the well government and order of the body incorporate. And
all others which are contrary or repugnant to the laws or statutes
of the realm are void and of no effect.”

It will be noticed that, according to Coke, where there
is a “custom,” the common council of a town may make
any regulations whatsoever—the only limitation being
that they must not be contrary or repugnant to the laws
or statutes of the realm. Of course, they must also be for
the “well government and order of the body incorporate.”
But that evidently includes the regulation of trade either
by the town itself or by any of its guilds, as can be seen
from the decision in the case. In a footnote to this case,
originating from Lord Hale or the learned Mr. Hargrave,
it is expressly stated that a by-law in restraint of trade
is only void in the absence of a custom, and it is spe-
cifically stated that a by-law founded upon a custom to

21 Chamberlain of London’s case, 5 Co. Rep. 62b; Case of the City of
London, 8 id. 121b; Case of the Tailors of Ipswich, supra note 19.
exclude all from trading in the town who had not been admitted to one of the guilds is good.22

The second case involved a custom of the City of London. And it held that a custom "that no person whatsoever, not being free of the City of London, shall by any colour, way, or means whatsoever, directly or indirectly, by himself or any other, keep in shop or any other place, inward or outward, for shew or putting to sale of any wares or merchandizes whatsoever by way of retail, or use any trade, occupation, mystery, or handicraft, for hire, gain or sale, within the City of London" is a good custom. In reporting this case, Coke said:

"But the Court took advisement upon one part of the retorn, by which is averred, Quod Jacobus Wagoner usus est manuati occupacione de tallow chandler, &c. and doth not shew that he sold any candles, &c. for if he made them for his own use, without selling any for lucre or gain, he might well do it, as everyone may bake or brew, &c. for his own use, without selling bread or beer: but it seems that is implied by the said averment, that it is his trade; by which he lives by sale of his commodities of his trade, and not only to make them for his own use, for it is not properly said, that one uses a manual occupation, when he makes no more than for himself, as he who brews or bakes for his own use, it is not properly said, that he uses the manual occupation of a brewer or baker, and that appears by the statute of 5 Eliz. cap. 4. for there it is enacted, 'That every person being a householder, and four-and-twenty years old, &c. and using and exercising any art, mystery, or manual occupation, shall, &c. have and retain, &c. an apprentice, &c.' but without question, he who uses the making of any manufacture for his own use, as making of candles, &c. cannot retain any apprentice within the statute of 5 Eliz. So in another part of the Act it is enacted, 'That it shall not be lawful to any person or persons, &c. to set up, occupy, use, or exercise, any craft, by-laws founded, upon a custom, to exclude all from trading, &c. in the borough who had not been admitted to one of the guilds is good, Bodwic v. Fennell, 1 Wils. 233. So a by-law founded on a custom which restrains brewers' servants to certain hours for being in the streets with their drays is good, Bosworth v. Hearne, 2 Strange, 1085. So also a by-law where there is a custom, that none but free porters carry corn, &c. is good, Fazakerley v. Wiltshire, 1 Strange, 462. But where a by-law is not in restraint, but only a regulation of trade it may be good without a custom, Vid. Cammel v. Camerat Civit. London, 1 Strange, 675, and the cases quoted in the note by the editor. Rex v. Corporation of Faversham, 8 T. R. 352. Adley v. Reeves, 2 M. & S. 60."

22 "A by-law founded, upon a custom, to exclude all from trading, &c. in the borough who had not been admitted to one of the guilds is good, Bodwic v. Fennell, 1 Wils. 233. So a by-law founded on a custom which restrains brewers' servants to certain hours for being in the streets with their drays is good, Bosworth v. Hearne, 2 Strange, 1085. So also a by-law where there is a custom, that none but free porters carry corn, &c. is good, Fazakerley v. Wiltshire, 1 Strange, 462. But where a by-law is not in restraint, but only a regulation of trade it may be good without a custom, Vid. Cammel v. Camerat Civit. London, 1 Strange, 675, and the cases quoted in the note by the editor. Rex v. Corporation of Faversham, 8 T. R. 352. Adley v. Reeves, 2 M. & S. 60."
mystery, or manual occupation, except he shall have been brought up therein seven years at the least as an apprentice, &c.

"And yet he who bakes, brews, makes candles, &c. for his own use, is not said in law to use any manual occupation; and upon this branch, and much to this purpose, a judgment was given in the Court of Exchequer, and afterwards affirmed in a writ of error in the Exchequer, and Chamber, Mich. 6 Jacobi; and the case, worthy to be known, was such. Taylor did inform in the Exchequer, on the statute of 5 Eliz. c. 4. tam pro dom' Rege, quam pro seipso, against Shoile, that he had exercised the art and mystery of a brewer, &c. for divers months against the said Act; and averred, that the defendant did not use or exercise the art or mystery of a brewer at the time of the making of the said Act, nor had been an apprentice for seven years at the least, in the art and mystery of a brewer, according to the said Act &c. * * * As to the first, it was resolved, that the art of a brewer, scil. to keep a common brewhouse to sell beer to any other, is an art, mystery, and manual occupation within the said branch of the Act; for in the beginning of the Act it is enacted, 'That no person shall retain for less time than a whole year in any of the sciences, crafts, mysteries, or arts of clothing, &c. bakers, brewers, &c. cooks, &c.' so that by the judgment of that very Parliament, the trade of a brewer is an art and mystery; which words are in the said branch upon which the said information is grounded. And it was resolved, that he who brews or bakes, &c. for his own use, doth not use or exercise any art, mystery, or manual occupation against the said Act; for the said words imply, that he so uses or exercises the art, mystery or manual occupation, that by sale of the commodities of his occupation he gets his living."

The third case 23 is the one which is usually cited in proof of the "freedom" which the common law guarantees. But upon inspection, it will be found to mean considerably less than what is claimed for it. The case was as follows:

The corporation of the Tailors of Ipswich sued to recover a penalty for the violation of their ordinance which prohibited anyone from exercising the trade of tailor until he had presented himself before them, or until they had allowed him to work at the trade. The defendant pleaded that he had complied with the statute concerning apprentices by serving a seven-years' apprenticeship in order to qualify himself for the art of a tailor; and also that the exercise of the trade complained of consisted in that one Anthony Penny, Esq., an inhabitant of Ipswich, retained him to be his domestic servant to serve him for a year, and

23 Supra notes 19 & 21.
that during that year, he, the defendant, made clothes and garments for his master and his wife and children, at his master's command. To this, the plaintiff demurred, but the demurrer was overruled, and the defense held good. There is nothing in the decision itself which should startle anyone, since, under the rules of law as laid down in the cases already discussed, such an ordinance would be clearly illegal unless there had been a custom to that effect, and no such custom was pleaded. But this case, or its report, happened about the time when Coke was becoming politically ambitious, and was filling his Reports with dissertations on behalf of the "freedom of the subject." And so he took occasion to write such a dissertation again. What he said on this occasion is interesting, however, as showing that by no flight of the imagination could what he said be construed as a limitation upon legislative power, or that Coke in any way intended to limit the doctrine of the other cases, which gave to the trade guilds the right to make ordinances in restraint of trade where a custom to that effect existed. We are, therefore, reproducing the principal portion of his opinion in that branch of the case in the margin, together with some later cases which clearly show that Coke's rhetoric must not be taken for more than it was really worth.  

24 "And in this case, upon argument at the Bar and Bench, divers points were resolved. 1. That at the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil, otium omnium vitiorum mater, and especially in young men, who ought in their youth (which is their seed time), to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age; and therefore the common law abhors all monopolies, which prohibit any from working in any lawful trade. * * * And the statute of 5 Eliz. 4. which prohibits every person from using or exercising any craft, mystery or occupation, unless he has been an apprentice by the space of seven years, was not enacted only to the intent that workmen should be skillful, but also that youth should not be nourished in idleness, but brought up and educated in lawful sciences and trades: and thereby it appears that, without an Act of Parliament, none can be in any manner restrained from working in any lawful trade. Also the common law doth not prohibit any person from using several arts or mysteries at his pleasure, nemo prohibetur plures negotiationes sive artes exercere, until it was prohibited by Act of Parliament 37 Ed. 3. cap. 6. scil. That the artifi-
Considerable light is thrown on the *Tailors of Ipswich* case, as well as upon our subject generally, by the report of Lord Hobart, who was Coke's successor as Chief Justice of the Common Pleas and one of his great admirers, in *Norris v. Staps*.

cers and people of mystery hold themselves everyone to one mystery, and that none use other mystery than that which he has chosen; but this restraint of trade and traffic was immediately found prejudicial to the commonwealth, and therefore at the next Parliament it was enacted that all people should be as free as they were at any time before the said ordinance. That the said restraint of the defendant for more than the said Act of 5 Eliz. as made, was against the law; and therefore forasmuch as the statute has not restrained him who has served as an apprentice for seven years from exercising the trade of a tailor, the said ordinance cannot prohibit him from exercising his trade, till he has presented himself before them; or till they allow him to be a workman; for these are against the liberty and freedom of the subject, and are a means of extortion in drawing money from them, either by delay, or some other subtle device, or of oppression of young tradesmen by the old and rich of the same trade, not permitting them to work in their trade freely; and all this is against the common law, and the commonwealth; but ordinances for the good order and government of men of trades and mysteries are good, but not to restrain anyone in his lawful mystery."

Supra notes 19, 21 & 23.

Hobart 211: "But the question, which was chiefly intended, is indeed great, whether a new corporation, having no prescription to appropriate and exclude others, can make a law to exclude all persons to use an art or trade in their town, whereunto they were not apprentices within the same town, though they served their apprenticehoods to it elsewhere?

Wherein the question is between the particular privileges of towns, and the general liberties of the people, which is fit to receive a determination; for it runs through the realm. But this point was not spoken to at the Bench, as not necessary but reserved 'till any other action should require it.

Observe these degrees in the consideration of this case.

First, the common law did not forbid any man to exercise any trade, were he trained or not trained to it, or to exercise more trades than one. But if any man professing a *publick* trade would perform it falsely, or insufficiently he were answerable.

Secondly, that the law, as it now stands, forbids no man to use any *trade privately*, as to be a taylor in any house, or the like, *for that is not a trade, but a service*, that is at mine own peril, be it ill or well done.

Thirdly, that the law (as it now stands) forbids no man to exercise *a trade publickly*, that hath been an apprentice to it wheresoever. See the case of *The Taylor of Ipswich*, Co. lib. 11. 53."
The extremely limited application of the liberty so grandiloquently put by Coke is even more apparent in the case of *Wood v. Searl.* This was an action in trespass for carrying away plaintiff's goods. Defendant justified on the ground that he distrained the goods in question in pursuance to an order for a fine laid against the defendant by the Society of Cordwainers of the City of Exeter for violation of a by-law to the effect "that no person, burgess, or foreigner, not being a brother of the said society, should make, sell, or offer to sell, or procure to be sold within the aforesaid city of Exon, the county or liberty thereof, any boots, shoes," etc. The judgment went in favor of the plaintiff on the ground that the ordinance was too broad, showing Coke's influence which was being

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27 123 Eng. Rep. 1257: Said the Court: "This by-law does exceed their power in the things prohibited, and that in two things: first, that none shall make any boots, shoes, &c. within the city or county, whereby every man is restrained to make such things for his own use, or for his master or family, and such restraint is clearly against law and reason: for although that companies of trades in cities and towns are allowed by the law, yet they cannot by any custom restrain a man from making anything pertaining to their art for his private use; and therefore if this by-law had been, that none should use the art of a shoomaker within the city, this had been good; but to restrain, that he may not make shoes for himself within the city, this is void. Vide Cooks 8 Rep. 129, Wagons case: where it was resolved, that he might make candles for his own use; and so everyone may bake and brew for their own use.

Furthermore, the defendants have not alleged any custom, that none shall make any shoes, &c. within the city, &c. except those of the society, but only that they may make by-laws for the good government and profit of the society of the art; and the making of shoes for one's private use is nothing concerning their society: and this is proved by the resolution in the said case, and by the Statute of the 5th of Elizab. that none shall use any art, in which he hath not been educated as apprentice for seven years; yet it is lawful for any to bake or brew, or to make any manufacture for his private use, without any offense to the statute. So Cooks 8 Rep. 125, Sir George Farmers case: he as lord of the manor of Torchester did prescribe to have a bakehouse, and no other baker should sell bread there, this was a good custom, but to restrain any from baking for himself cannot be a good custom. And the case of *The Taylors of Ipswich,* 11 Rep. fol. 55, that none should use the trade of a taylor, until he be presented to the master and wardens, and allowed by them; yet one may make clothes for his master and family, in case the said constitution were good."
exerted for the purpose of curbing the excesses of the guilds. But the opinion of the court clearly shows that the principle of regulation was not only recognized but was applied in a manner to be far-reaching and all pervading.

More light is thrown by the discussion in the case of Mayor and Commonalty of Colchester v. Goodwin,\textsuperscript{28} decided in the same court about fifty years later, in which Bridgman, Chief Justice, said:

“All my brothers agree upon the matter, the meer right to be in the mayor and commonalty. The custom is, that no foreigner tradesman shall use a trade within the town, &c. a custom in such a case will warrant that which a grant cannot do. Say they, by-laws for restraint of trade ought to be taken strictly. I deny that, when they are to strengthen a corporation, and to regulate a trade, they ought not to be taken strictly. A general liberty of trade, without a regulation, doth more hurt than good.”

Freemantle v. The Company of Silk-Throwsters,\textsuperscript{29} is even more interesting. In that case a by-law that no silk-throwster shall make more than so many spindles a week was held good even in the absence of a custom.

Even more interesting are two cases decided by Lord Mansfield, and for two reasons: first, because they were decided almost on the eve of the American Revolution, and, therefore, at the end of the “succession” from Coke to Blackstone; and, second, because Lord Mansfield was not only a great lawyer and judge, but was considered to be particularly representative of the commercial interests

\textsuperscript{28} Carter 114, 18 Car. II (1667-68).

\textsuperscript{29} 1 Lev. 229, Hill. 19 & 20 Car. II (1667-68). Said the Court: “This case was referred by the Privy Council to be tried, whether a by-law made by the Company of Silk throwsters, that none of the company should have above such a number of spindles in one week, be a good by-law or not? And after verdict for the plaintiff, on a trial of the fact, it was moved in arrest of judgment, that it being a by-law in restraint of trade, and founded on their charter of incorporation, with power to make by-laws, and not on any custom, was a monopoly, and void, to which it was answered and resolved by the whole Court, that this is not a monopoly, but restraint of a monopoly, that none might engross the whole trade; being rather to provide for an equality of trade, according to what is convenient, and good: and they gave judgment for the plaintiff.”
and a supporter of the "enlightened economics" introduced by Adam Smith. In fact, Lord Birkenhead says of him that he was a free-trader before Smith. The first case was *Hesketh v. Braddock*, in which Lord Mansfield held good a by-law of the City of Chester based on a custom which provided that no one but a freeman of the city "could keep open shop and exercise the trade of grocer within that city." The second was *Green v. Mayor of Durham*, a mandamus to compel the mayor to admit plaintiff "into the place and office of a freeman of the Company or Fraternity of Free-Masons of the City of Durham." Plaintiff had been duly elected to the fraternity, but there was a by-law that such election must be approved by the mayor. It was claimed that this by-law was in restraint of trade, but it was held good.

How little effect the new and "enlightened" economics introduced by Adam Smith had upon the basic problem of regulation can be seen from two cases decided half a century after the appearance of the *Wealth of Nations*. In the case of *Prince v. Lewis*, the owner, the proprietor of the famous Covent Garden Market in London, sued the defendant because he had sold vegetables on a public street within seventy-two yards of plaintiff's market. And the only reason the plaintiff did not succeed was that it appeared that he had used part of the market-space described

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30 3 Burr. 1847 (1766).
31 1 Burr. 130 (1757). In delivering the opinion of the court, Lord Mansfield said: "It has been argued that the bye-law is void, upon two grounds;
1st. From want of authority to make it,
2dly. From the subject matter. * * *

As to the second—that the bye-law is unreasonable and void: for it is likened to the case of *The Taylors of Ipswich*, 11 Co. 53. A bye-law 'that none should work at his trade, until he had presented himself to the Company of Taylors, and prove that he had served seven years as apprentice, and admitted by them to be a sufficient workman."

Answer: *In that case, the bye-law was against law: it was against the 5th of Eliz., and a farther restraint than that Act had made. But this bye-law is not against the law—it is not a restraint upon trade: it seems a reasonable regulation, to prevent persons being unduly made free, who are not intitled by birthright, service, or purchase. It provided a method for previously examining into the right of those who claim to be made free.*"
in the grant under which the market was established (a grant by Charles II to the Earl of Bedford) for other than market purposes, and had not left enough room for vendors to place all their wares for sale within the market.

The case of *Corporation of Stamford v. Pawlett*,\(^3^4\) was an action for debt for tolls in a market. The defense was based on the fact that the grant under which the market was operated (a charter granted by Queen Anne) did not specify the tolls. The action was for 1s. 4d., and was plainly brought as a test case. An array of famous counsel argued the case on both sides. The plaintiff had judgment in the Court of Exchequer, in a long and learned opinion written by Alexander, L. C. B., and this judgment was approved on appeal by the Lord Chancellor after taking advice, as the report says, with the Chief Justices of the King's Bench and Common Pleas.

The opinions in the last two cases clearly show that up to the time when the common law was abolished by statute, freedom of trade was unknown to the English law, and complete and far-reaching regulation was the law not only by statute but by common law.

Turning back to *Tailors of Ipswich Case*,\(^3^5\) what Coke said, however, on the second branch of that case, namely, the *manner* of the exercise of the trade pleaded by the defendant, is directly in point, as stating the Hale doctrine of Public Interest; and I, therefore, reproduce it here. Said he:

> "It was resolved, that the said branch of the Act of 5 Eliz. is intended of a public use and exercise of a trade to all who will come, and not of him who is a private cook, tailor, brewer, baker, &c. in the house of any for the use of a family; and therefore if the said ordinance had been good and consonant to law, such a private exercise and use had not been within it, for everyone may work in such a private manner, although he has never been an apprentice in the trade."

The division of trades into public and private is, I respectfully submit, exactly the same division as is made by

\(^3^3\) 5 B. & G. 362 (1826).
\(^3^4\) 1 Cr. & J. 57, 148 Eng. Rep. 1334 (1830).
\(^3^5\) Supra notes 19, 21, 23 & 24.
Lord Hale in his famous doctrine here under consideration, and that “affectation with a public interest” is but another way of restating the Coke doctrine as here announced. Neither doctrine was a limitation upon legislation—which was out of the question. But both “sages of the law” were applying a fundamental division recognized by the common law: one, in the construction of a statute, and the other in the application of the common law doctrine of “reasonable charge.” And in each case the point of distinction was whether one was exercising the trade in question, or using the property in question, as a business intended to serve all comers. In other words, the distinction lay not in the nature of the business, but in the manner it was conducted.

VII.

This brings us back to Lord Hale and his doctrine. Before considering his doctrine, however, we must say a few words about what Lord Birkenhead has referred to as Hale’s position in the succession from Coke to Blackstone. In view of the fact that the basic principles of the law with respect to the matters here under consideration were the same in both Coke and Blackstone, we should need no evidence for the assumption that their conception was also Hale’s. But there is such evidence. Hale did not leave us any such ambitious work as Coke’s Institutes and Reports, or Blackstone’s Commentaries, and the evidence is, therefore, not as abundant. But he has left enough to prove the case beyond peradventure of a doubt. Aside from his general attitude toward the branch of the law here under consideration as shown in his Pleas of the Crown and his Treatise on Maritime Law,35a to be considered further below, we have his Analysis of the Law, which, mere sketch though it be, is sufficient to prove our point.

Section V of this sketch of the civil law as conceived by Hale is entitled “Concerning the King’s Rights of Dominion or Power of Empire”; and among the “rights” enumerated in this division are those “in relation to the regulation of trade and commerce.” Among these rights,
says Hale, are “his designation of places of public com-
merce” and “his right to institute and regulate the instru-
ments of public commerce.” And among the latter is ex-
pressly mentioned *excessive prices*. Section XLI of the
*Analysis* is entitled “Of wrongs in relation to rights of
things. And first, of things personal.” This section ends
as follows:

“In persons that undertake a *Common Trust*, it is implied, *That
They Perform It*; otherwise an action on the case lies. As for
instance; in the case of, a *common host*, that he secure goods in
his inn. A *common carrier or bargeman*, that he secure the goods
he carries. A *common farrier*, that he perform his work well,
without hurting the horse. A *common taylor*, that he does his work
well; and so of other tradesmen, etc.”

It will be noted that the “common tailor” is classed by
Hale with the “common carrier.” Evidently, Hale was
unaware that the common law was making the funda-
mental distinction between the two which had been dis-
covered on this side of the ocean some two hundred-odd
years after his death, not only in the common law, but in
his formulation of it.

Bearing in mind this conception of the common law,
which was common to Coke, Hale, and Blackstone, we may
now turn to the tract in which occurs the phrase “affected
with a public interest,” which was destined to play such
an important rôle in the United States of America some
two hundred and fifty years after it was used by him,
even though it had hardly been noticed in all of this time
in England itself.36

The phrase occurs in the second part of Hale’s treatise

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36 We may note some curious dates. Hale died in 1676, just one
hundred years prior to the Declaration of Independence and the ap-
pearance of the *Wealth of Nations*. According to Judge Sutherland,
the Declaration perpetuated Hale’s doctrines of the common law on
this side of the ocean; while according to Judge Peckham, Smith’s
work destroyed it. *Munn v. Illinois*, 94 U. S. 113, was argued in
1876—two hundred years after Hale’s death, and one hundred years
after the Declaration. *Tyson v. Banton*, 273 U. S. 418, was argued in
1926—exactly half a century after Hale’s doctrine was first introduced
into our constitutional law. It was in this case that Hale’s doctrine
finally became part of the United States Constitution—at least nomi-
nally.
on the law of rivers and harbors. This part is entitled *de Portibus Maris*, and deals generally with the law of ports. It is a general statement of the law, and is an attempt to apply Hale's conception of the principles and rules of the common law to ports and other maritime questions.

It starts out with the fundamental principle that "every publick port is a franchise or liberty, as a market or a fair, and much more." The reason for the "much more" is that a port is, in fact, an aggregation of franchises, being a composite of at least three franchises. For, 1st, "it is a place of *Common resort* of merchants and shipping," "within itself a franchise"; 2nd, every port has a *market*—a market being, of course, a franchise; 3rd, every public port has certain *common tolls* incident thereto, which cannot be collected without a special grant of franchise, as we know.

But, says Hale, although a port is a franchise like a market, the law applicable to the two is different with respect to the giving of new franchises in competition with earlier ones. The difference in the rules is due to the fact that the common good requires the application of different rules. The king may, therefore, erect a new port right next to an old one, although he cannot close a port, or take away the emoluments thereof from the owner. *That* can only be done by an act of Parliament. We then get the first intimation of the application of the general division of the common law between private affairs and public business, by the statement that where a man owns the soil of a creek or haven where ships may safely arrive and come to anchor, he may "bring thither for his own private use his own boats and vessels to carry off and bring in his own goods, that are not customable, as fish, etc., but he may not use it as a public port or admit foreigners unless in case of necessity, nor take toll or anchorage there."

Hale then proceeds to discuss the law on this subject under its three aspects, *jus privatum* 36a (private rights), *jus publicum* (the rights of the particular public whose interests are directly affected), and *jus regium*—the rights of the king as representative of the entire commonwealth.

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36a Supra note 35a; post note 75.
The *jus privatum*, says he, includes the following: (1) the right of the lord or owner of the port; (2) the right of those that have the "propriety" of the shore contiguous to the port; and (3) the right of the town that is the *caput portus*, and the inhabitants thereof. The ownership of the port, says he further, is of two kinds, that of "propriety," or ownership of the soil of the body of water involved; and that of the franchise. And the two need not necessarily be in one person, although they usually are. The former is a strictly private right, while the second is not strictly private, since, as we shall see later, it is affected with a public interest. The ownership of the franchise gives the right of what might be called strictly port tolls, such as anchorage and similar things, in which the water or the soil of the port proper are involved, as distinguished from shore duties, in which the shore contiguous to the water is involved, which shore may be owned by persons different from both the owner of the soil of the creek and the owner of the port franchise.

After discussing the various port-tolls, he turns to the discussion of the rights which flow from the ownership of the shore contiguous to the port. These, he says, are "many and various." Our interest is limited, however, to two of them—cranage and wharfage. *Cranage*, we are told, is a "duty" paid "for the taking up or lading on a ship any goods or merchandise by that engine." *Wharfage* or *keyage*, is "a toll or duty" paid "for the pitching or lading of goods upon a wharf."

It is in discussing these latter that the famous phrase "affected with a public interest" occurs. Following the very proper suggestion of Mr. Justice Sutherland in the *Tyson Case*, that this phrase should be considered in the context in which it was used, we shall reproduce the entire statement of which it is a part. It is as follows:

"First—says he—touching conventional duties, and *how* and *where* they may be taken, I shall deliver in these ensuing positions:

"1. As we have observed, no man can erect a new publick port without the king's licence; neither can he take out of a port any

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37 *Supra* note 36.

38 That is, arrived at by special agreement instead of being a generally established charge or toll. My italics.
certain constant rates of the lading of merchandizes, but he may make particular agreements with everyone that comes there by his consent to land his goods. This was resolved, P. II. Car. B. R. in Morgan's case, for taking twopence for every barrel of beer landed at Crockhamphill, for which constant taking he was fined 100 marks.\(^\text{38a}\)

"2. A man for his own private advantage may in a port town set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, houselage, pesage; for he doth no more than is lawful for any man to do, viz. makes the most of his own. And such are coal-wharfs, and wood-wharfs, and timber-wharfs, in the port of London and some other ports. But such wharfs cannot take customable goods against the provision of the statute of 1. Eliz. cap. II.

"3. If the king or subject have a publick wharf, unto which all persons that come to the port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, according to the statute of 1. Eliz. cap. 1. or because there is no other wharf in the 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, &c. neither can they be inanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's licence or charter. For then the wharf and crane and other conveniences are affected with a publick interest, and they cease to be juris privati only; as if a man set out a street in new building on his land, it is then no longer bare private interest, but it is affected with a publick interest.

"4. But in that case the king may limit by his charter and licence him to take reasonable tolls, though it be a new port or wharf, and made publick; because he is to be at the charge to maintain and repair it, and find those conveniences that are fit for it, as cranes and weights."

At first glance, these "positions" are extremely confusing and puzzling. Why should a man have a right to make different charges to different people for lading merchandise on his property, but have no right to make a constant, that is, uniform, rate for everybody, and be severely fined if he does—as was poor Mr. Morgan in the case referred to by Lord Hale. For, mark you well, reader, as my Lord Coke would have said, Mr. Morgan was fined not for the taking, but for the constant taking—"constant" meaning "uniform" in this connection. We shall have occasion to refer again to Mr. Morgan, since his activities in this con-

\(^{38a}\) See post note 74.
nection were rather important. For the present, we may venture the explanation that Mr. Morgan was fined so grievously, not for charging a uniform rate to all his customers, but because the charging of a uniform rate was proof of the fact that he was making a regular business of having people lade their merchandise on his shore. Establishing a uniform rate was evidence of an invitation to the public at large to come and do business. But he had no right to do that, since doing business with the public at large is a public business, and can only be done in places permitted by public regulations, and Mr. Morgan was evidently trying to run a business “on his own.”

But Lord Justice Hale’s phrase must not only be considered in the immediate context in which it was used, but also in the general context—that is, the entire work in which it was used—as well as the even larger context of the entire common law of which he was an expounder, and particularly bearing in mind his doctrine, which is also Coke’s doctrine, that the common law differentiates between a private and a public use of one’s faculties or property.

The first “position,” therefore, is that dealing with the public at large is a public business or employment; and, therefore, can be engaged in only by public authority. The next “position” is that it can be engaged in only subject to public regulation. All tolls—that is, rates established for dealing with the public at large—must be reasonable. That much we know from our knowledge of the common law generally. Also, there are special statutes against outrageous tolls, as we have already seen. But there may be exceptional cases, where a man in the course of his private business also does occasional business with the public—a sort of “twilight zone.” Such was evidently the case of certain coal merchants, wood merchants, and timber merchants, in the port of London and some other ports. These people were evidently in the same position in which the owners of the North Dakota grain elevators in Brass v. North Dakota 39 claimed to be—namely, their wharfs were primarily established for their own use. They may have been coal merchants, wood merchants, or

timber merchants, but since they were not used all the time for their own purposes, others would occasionally use them. In such a case, Lord Hale tells us, the owner of the wharf "may take what rates he and his customer can agree." But such wharfs cannot take "customable goods" because, under the statute of 1 Eliz. c. II, customable goods must only be discharged on wharfs previously designated by public authority, and that is not the kind of wharf he is considering in this "position."

This brings him to "position" number "3"—in which our famous doctrine is specifically stated. What, if a man own a wharf in a public port, which he uses for his own purposes, and does not care to deal with the public and does not establish a public rate, but the wharf nevertheless becomes public by reason of circumstances? Such a situation may arise where the importers, located in the port, who own their own wharfs, are the only ones who have licensed wharfs, and other importers may, therefore, have to resort to their wharfs for the purpose of unlading their goods. Or, again, it may be a new port, and there may be only one wharf, licensed or unlicensed. That would make no difference, because everybody must come to this wharf anyway. In such a case, Hale tells us, arbitrary and excessive duties cannot be taken. In fact, no one, not even the king, has a right to authorize the charge of unreasonable or immoderate duties to the public at large. In such a case, the wharfs in question, even though strictly private and intended for private use, are "affected with a public interest." The wharf ceases, in such event, to be a matter of private right only, for the public have certain rights in the matter. The public always have rights where they are concerned. But in that case, says Hale, there really should have been a regular and established "toll," since the owners of these private wharfs must, in fact, deal with the public at large. That is his position number "4."

One thing is certain from a reading of Lord Hale's book, and that is this: Lord Hale was not dividing occupations of businesses into classes—one public, and one private. All businesses and all occupations fall into one class or the other, according to the manner in which they are con-
ducted. And that manner has only one "test:" Is the occupation or business such that its dealings are with the public at large? Or, are the matters under consideration casual and private transactions in which the public at large are not interested? Once the business is part of general trade and commerce, the public are interested, and the matter is subject to regulation not only by statutory enactments emanating from the omnipotent Parliament, but also from the common law of which the judges are the special guardians. Private transaction Lord Hale knew. But "private business" was a conception utterly foreign to his mode of thinking. For his mode of thinking was the mode of thinking so abhorrent to Mr. Justice Brewer, commonly called paternalism. As Judge Peckham very correctly pointed out, it could not be otherwise: Lord Hale lived in an age in which the modern doctrines of laissez-faire had not yet been dreamed of.

And this was true not only of Hale, but also of Blackstone, who wrote some one hundred years later, on the very eve of the American Revolution:

"Another light,"—says Blackstone—"in which the laws of England consider the king with regard to domestic concerns, is as the arbiter of commerce. * * *

With us in England, the king's prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles:

First, the establishment of public marts, or places of buying and selling, such as markets, and fairs, with the tolls thereunto belonging. These can only be set up by virtue of the king's grant, or by long and immemorial usage and prescription, which presupposes such a grant. The limitation of these public resorts, to such time and such place as may be most convenient for the neighborhood, forms a part of economics, or domestic polity, which, considering the kingdom as a large family, and the king as the master of it, he clearly has a right to dispose and order as he pleases."40

VIII.

This continued to be a law of England for a considerable time beyond the American Revolution. For the doctrines of laissez-faire, so utterly foreign to the genius of the

common law, had no easy task in penetrating into the courts and the legal profession generally. As already stated, it needed some legislation to help this process of penetration of the newer economics into the unreceptive soil of the common law.

We have already taken note of the two market cases which occurred about half a century after the American Revolution. We must now take note of a few other cases, among them the Allnutt Case, cited by Chief Justice Waite in Munn v. Illinois, and considerably misinterpreted by other judges since.

We shall first note the case of Rex v. Rusby, decided in the year 1800. The defendant was indicted for regrating. He was charged and found guilty of the crime of having bought thirty quarters of oats at 41s. per quarter,

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41 Supra notes 33 & 34.
42 Allnutt v. Inglis, 12 East. 527 (1810).
43 Supra notes 36 & 37.
44 Peake, Add. Cas. 192 (1800). In passing sentence, Lord Chief Justice Kenyon said: “The law has not been disputed for though in an evil hour all the statutes which had been existing above a century were at one blow repealed, yet, thank God, the provisions of the common law were not destroyed. The common law, though not to be found in the written records of the realm, yet has been long well known. It is coeval with civilized society itself, and was formed from time to time by the wisdom of man. Good sense did not come with the Conquest, or at any other one time, but grew and increased from time to time with the wisdom of mankind. Even amongst the laws of the Saxons are to be found many wise provisions against forestalling and offences of this kind, and those laws laid the foundations of our common law. That it remains an offence nobody has controverted; the only question which has been made in this cause is whether it has been committed by the present defendant. Speculation has said that the fear of such an offence is ridiculous; and a very learned man, a good writer, has said you might as well fear witchcraft. I wish Dr. Adam Smith had lived to hear the evidence of to-day, and then he would have seen whether such an offence exists, and whether it is to be dreaded. If he had been told that cattle and corn had been brought to market, and then bought by a man whose purse happened to be longer than his neighbors, so that the poor man walks the street and earns his daily bread by his daily labour could get none but through his hands, and at the price he chose to demand; that it had been raised 3d., 6d., 9., 1s., 2s., and more a quarter on the same day; would he have said there was no danger from such an offence?”
and of having resold them on the same day and in the same market at 43s. The indictment was not laid under any statute; and the court's attention was called to the fact that the statute 12 Geo. III expressly repealed the statutes against regrating. But this availed him little, and the defendant was fined and committed to jail.

We must next note a group of two cases in which a certain Mr. Waddington was involved. It seems that Mr. Waddington was a hops-merchant in a big way; and was in the habit of backing up the farmers, growing that article by advancing them money against their crops. He got into difficulties by trying to "peg" the price of hops when it was going down. As a result, he was indicted in two places for forestalling and engrossing, was convicted on both indictments, and sent to jail, besides being fined heavily. The legally interesting point is that although the statutes of Edward the Sixth and the subsequent statutes against forestalling and engrossing had been repealed by the statute of 12 Geo. III, already mentioned, the indictments were held good because the judges, in the year 1800, followed the law laid down by Coke, Hale, and Blackstone, to the effect that these things were offenses at common law. Just what Mr. Waddington did, and how the "spirit" of the common law, as embodied in the highest judges of England, showed itself in the year 1800, can be seen from the excerpts quoted in the margin from the opinion of Grose, J., in sentencing Mr. Waddington.45

45 The King v. Waddington, 1 East. 143; 167 (1800): "It appears from the evidence"—says Justice Grose—"that he being a merchant living in a distant county, in the months of March and April last went to the City of Worcester, where was held a considerable market for hops * * * the price in the January preceding had been between 15L. and 16L. per cwt., the market price in March was from 11L. to 13L. per cwt., so low that the defendant thought fit to observe upon it, and state publicly in the market, which was very full, that the law price of hops was owing to a prosecution instituted against him. It appears that he then assured the by-standers, whether truly or not he best knew, that the prosecution against him was dropped, and that of course hops must rise again. Nothing, however, of that sort was proved; and therefore the ground of the assertion, that hops would of course rise again, seems to have been not perfectly correct. He then further asserted, that the stock of hops in the hands of the brewers was nearly exhausted; (an assertion for which there did not
It will be observed that the defendant was not charged with any conspiracy to enhance prices by secret agreements with others. Nor did he do anything to raise the price above what it had been two months before, although Mr. Justice Grose says that he intended to do so. What he actually did was to offer to buy a certain quantity of hops periodically at a graduated price up to the price at which hops had stood the preceding January, and he did it openly by bidding in the open market, and making contracts for delivery. But this was held to be a crime under the common law, and poor Mr. Waddington found himself mulcted in heavy fines and serving terms in jail. In commenting
upon the law applicable to the facts as stated by him, Mr. Justice Grose said:

"When however we recollect the anxiety shewn by our ancestors to prevent the commission of this class of offences; and when we recollect what the common law as handed down to us by our ablest reporters and commentators upon this subject is; we cannot but deem that it would be a precedent of most awful moment for this Court to declare, that hops, which are an article of merchandize, and which we are compelled to use for the preservation of the common beverage of the people of this country, are not an article the price of which it is a crime by undue means to enhance; or that the stat. 12 Geo. 3, c. 71, which expressly repeals certain specified statutes, was intended to repeal other statutes not specified, and to repeal that which the common law of the land has ordained for the protection of the poor, in preventing the advancing of the price of those commodities without which they cannot exist."

The next case to be noted is Allnutt v. Inglis, decided in 1810. This is one of the two English cases referred to by Chief Justice Waite in his opinion in Munn v. Illinois, as applying Lord Hale's doctrine of affectation with a public interest. Before considering the case itself, it is interesting to note that Chief Justice Waite could find only two cases in which the Hale doctrine was specifically applied; and, as far as we know, those are the only two cases in which it was formally applied. At first glance that would seem very odd, when we remember how much ado there has been in this country about that doctrine since it was first used by Chief Justice Waite. But after what has been stated above, there should be no surprise at that at all. In reality, Hale said nothing that was new, startling, or unusual. He was merely applying a well-known common law rule to a particular set of facts. The doctrine he was applying was at least as old as Coke's doctrine in the Ipswich Tailors' Case. Coke said that a statute passed to cover a situation in which the public was interested should not be applied to a private transaction in which the public was not interested. Hale said, that under the common law, a property right which one

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46 Supra note 42.
47 Supra notes 36, 37 & 43.
48 Supra notes 19, 21, 23, 25 & 35.
possessed when he used his property in a purely private manner did not avail him when he used the same property in a manner to make it of public interest. What was there, in this, to fuss about?

But when, in this country, the common law of England, which was there the law of the judges when the legislature was silent on the subject became a question of power, or rather lack of power, in sovereign legislatures, the matter of necessity assumed an importance which it could not possess in England.

And what was true of the doctrine itself is also true of the *Allnutt Case.* That case received considerable attention in this country since it was first cited and quoted by Chief Justice Waite; and what Lord Ellenborough said in that case assumed with us an importance which it had never had in England. For here, again, our judges who used the *Allnutt Case* against the power of the legislature to control business usually forgot to mention that Lord Ellenborough was discussing the common law of England and not legislative power; and where Lord Ellenborough had said that a certain thing was not the law of England, they talked as if it could not be the law of England; and they, therefore, held that it could not be the law in the United States. So, Mr. Justice Lamar in his dissenting opinion in the *German Alliance Insurance Co. v. Lewis Case,* said, in speaking of what Lord Ellenborough thought about fixing insurance rates:

"For in answering the argument that if the rates of a public wharf could be fixed, insurance rates could also be fixed, he clearly intimates that this could not be done."

Of course, Lord Ellenborough said nothing of the kind,

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49 *Supra* notes 42 & 46.

50 233 U. S. 389, 58 L. Ed. 1011 (1914); note 71, p. 271, in March issue of this *Journal.* It is true that earlier in the same opinion, Mr. Justice Lamar did speak of the difference in constitutional theory between England and this country, but by the time he got to discussing insurance he forgot all about it. Lord Ellenborough did not say that "this could not be done"—meaning that insurance rates could not be fixed—but merely that the courts would, or could, not fix them in the absence of legislation. Or, rather, that it did not follow from what he was about to decide about wharfs that he would, or could, decide the same way about insurance.
nor could he have said it. But what he did say, and the
decision in the case, is still of interest today, because it
shows that as late as 1810, great English lawyers and
judges still adhered to the common law conception of prop­
erty in business rather than to the doctrine which was
then being urged upon them by the more "enlightened"
economists.

This was an action by wine merchants against the Lon­
don Dock Company because of its refusal to receive the
plaintiffs' wines for storage in their bonded warehouse
upon tender of reasonable fees—the company insisting
upon the payment of their established rates. It seems that
under the Act under which the company was incorporated
it enjoyed a monopoly for the landing of certain classes
of merchandise. It also enjoyed the privilege of having
a bonded warehouse—that is to say, importers could store
their merchandise in "bond," i. e., without paying the
custom duties immediately upon landing, and had a cer­
tain time within which to pay it. The Act of Parliament
prescribed the charges which vessels must pay for the
landing of merchandise on the company's docks, but said
nothing as to the charges that the company could make for
warehousing.

Counsel for the company argued, first, that since the
company did not enjoy an actual monopoly of warehous­
ing, and that there were many other warehouses in Lon­
don in which the plaintiff could place his merchandise, the
company's warehouses were not "affected with a public
interest; and, second, that since Parliament did prescribe
the rates in one case, but not in the other, it was the mani­
fest intention of the legislature that the company may
charge for warehousing whatever it saw fit. The action
of the legislature in not manifesting any interest in the
subject of warehousing rates, while it actually had the
subject of rates under consideration, showed, they claimed,
that there was no public interest in the subject.51

But the Court held otherwise. It is true, said the Court,

51 The case was actually even stronger for the defendant company—
for Parliament had prescribed the rates for the warehousing of certain
commodities, such as tobacco, but not for others, such as wines, the
commodity which the plaintiff sought to store.
in effect, that the defendant had no monopoly of the warehousing business, but then it had a special privilege in connection with it which gave it a virtual monopoly and the public an interest in its business, since all importers had to resort to its warehouse if they wanted to receive the benefit of that privilege. Under these circumstances, said the Court, it would not hold that the omission of the legislature to regulate the charges for the warehousing of wines, while it regulated the other charges, was intended as a carte blanche to the defendant to fix whatever charges it pleased, but that the matter of charges must still be regulated under common law principles as laid down by Lord Hale.52

The real "spirit" of the common law is best shown in the stubborn resistance which the English courts, administering the common law, offered to the attempt of the English Parliament to reform the existing law which looked upon competition as a grave crime. Shortly before the American Revolution, partly because of the necessities of modern business and partly because of the influence of "speculation," the English Parliament repealed the statutes enacted during the reign of Edward VI, in which the crimes of forestalling, engrossing and regrating were first defined, and the subsequent statutes amendatory thereof. But the courts proceeded to nullify that reform by declaring that the repeal of those statutes made no difference, and that the crimes defined by those statutes were still part of the law of the land under the common law. The attitude of the Court is well exemplified in Lord Kenyon's animadversions in the Rusby Case53 to the "evil hour," in which Parliament had repealed the old statutes, and on the "speculations" of Dr. Adam Smith54 and the other economists under whose influence the legislature had acted. As a result, competition remained a crime under the law of England until 1844, when, as part of the great free trade movement which culminated in the famous Repeal of the Corn Laws, Parliament passed an Act,55 which not only re-

52 Supra notes 42 & 46.
53 Supra note 44.
54 Supra notes 6 & 32.
55 7 & 8 Vict. 1844.
pealed all the statutes on the subject, but specifically pro-
vided that no prosecution should be had for these offenses
under the common law.

IX.

The situation was not different, in principle, at least, in
this country at that period—notwithstanding the many
judicial and other assurances to the contrary. It is usu-
ally assumed, and has been frequently stated at the Bar
and from the Bench, that in this country, the principle
of regulation, and particularly of price-fixing, was prac-
tically unknown.\(^{56}\) This impression is entirely erroneous,
for the principle of regulation was brought over by the

\(^{56}\) Mr. Albert Stickney, in his *State Control of Trade and Com-
merce*, 3-4 (1897), says: "The experience of this country has been
somewhat different from that of England. In our early colonial legal
history there is an almost entire absence of attempts to fix prices, of
either labor or merchandise, or to interfere in any degree with the
full freedom of the citizen in the exercise of his lawful right to sell
his own labor, and his own merchandise, on his own terms, or to
refuse to sell it at all. Such attempts, so far as they have come under
my notice, were first made at least to any considerable extent, during
the war of the revolution, when the depreciation of the continental
and state paper currencies, in connection with the severe burden of
public expenditures, caused such widespread distress, that, by a
common impulse, resort was had to legislation, in different forms,
in the attempt to alleviate that distress. In the year 1777, we find
action taken in the Continental Congress, and in several of the state
legislatures, looking to a protection of the community by legislation,
against the advance in the prices of labor and merchandise, and the
fall in the prices of the different kinds of paper money. That action
took different forms. But those forms, substantially all of them, con-
sisted in attempts to regulate prices by statute."

Mr. Stickney knows of the extensive regulation during the revolu-
tionary period, about which some noted writers and highly-placed
judges have forgotten. On the other hand, he knows little of the
colonial period and nothing of what followed our revolutionary period.
This, I respectfully suggest, is due to the prevailing ignorance, even
in very high places, of our early legal history—due not only to our
general lack of interest in legal history, whether English or our own,
but also to the deliberate attempt of most of those who are interested
in the subject to minimize the importance of any statutes that might
be found, which frequently becomes a tendency to deny or overlook
their existence. Some illustrations of this tendency will appear in
the discussion, post.
founders of this nation together with the rest of the common law, and was made use of during the colonial period as well as after the severance of the political connection with the mother country. Of course, in view of the different conditions in this country, the application of the principle could not be as extensive as it was in England. But the principle was there, and was used whenever deemed necessary.

We have no legal reports from the colonial period, and very few of our state reports antedate the last of the English cases which we have considered—that is to say, the reports of our adjudicated cases only commence at the period when the principle of *laissez-faire* was beginning to displace the common law in England. Nevertheless, there are such reported cases in this country. And while they are few in number, they show that the application of the principle was much more common than is usually assumed. One of these cases is the *Alabama Case* cited by Chief Justice Waite in his opinion in *Munn v. Illinois*. Another is a *Louisiana Case*, decided as late as 1857.

Before looking at these cases, however, we should take note of some early authoritative expressions of opinion on the subject; and in this connection, I would like to call attention to Tucker's *Blackstone*, which appeared in 1803, as it contains some notes which are rather illuminating in this connection. One of these notes is particularly interesting. It is a note to the last passage quoted above from *Blackstone*, the one which expresses his opinion that the King of England is *pater familias* in all matters relating to trade and commerce. Apropos of this, Judge Tucker observes:

"It may be presumed that these powers belong exclusively to the state legislature. Amdts. C. U. S. Art. 12 (sic). *They have been repeatedly exercised by the legislature of Virginia.*"

The *Alabama Case* cited by Chief Justice Waite, was

57 Mobile v. Yuille, 3 Ala. (N. S.) 137 (1841).
58 Supra notes 36, 37, 43 & 47.
60 Supra note 40.
61 Supra note 57.
decided in 1841, and involved an ordinance of the City of Mobile. The charter of that city enacted by the legislature of Alabama in 1819, empowered the city to "license bakers and regulate the weight and price of bread, and prohibit the baking for sale except by those licensed." The ordinance in question seems to have been passed in 1826. It provided for licensing and inspection of bakeries; and provided further that all bread must be initialled with the baker's name or mark, and the price marked thereon. It also fixed the price at which bread may be sold—not absolutely, but with relation to the market price of flour. It provided that loaves were to be priced at 2½c. and 6¼c., and then prescribed the weight of the loaves to be sold at these prices, the weight to be according to the state of the price of flour in the market. 62

In the margin is quotation from the opinion of the Alabama Supreme Court, sustaining the ordinance. 63

62 See note 23, p. 264, of March, 1933, issue of this Journal, on Mr. Justice Field's treatment of this case in Munn v. Illinois.
63 Ormond, J., said: "Where a great number of persons are collected together in a town or city, a regular supply of wholesome bread is a matter of the utmost importance; and whatever doubts may have been thrown over the question by the theories of political economists, it would seem that experience has shown that this great end is better secured by licensing a sufficient number of bakers and by an assize of bread, than by leaving it to the voluntary acts of individuals. By this means a constant supply is obtained without that fluctuation in quantity which would be the inevitable result of throwing the trade entirely open, and the consequent rise in price, when from accident or design a sufficient supply was not produced. The interest of the city in always having an abundant supply will be sufficient guarantee against any abuse of the right. * * *

The legislature having full power to pass such laws as is deemed necessary for the public good, their acts cannot be impeached on the ground that they are unwise, or not in accordance with just and enlightened views of political economy, as understood at the present day. * * *

If, however, such an inquiry were open, it would be very difficult to satisfy this court, that the assize of bread in a populous city or town, is an unwise regulation. The practice has prevailed too long, and has been too generally, not to say, almost universally acquiesced in, and continued, to permit us to doubt, that some regulation on this interesting subject, is necessary and proper. * * *

There is no motive, however, for this interference on the part of the legislature with the lawful actions of individuals or the mode in
The *Louisiana Case* was very similar to the *Alabama Case*, and the remark made by Prof. Walton H. Hamilton that the *Alabama Case* was "a belated instance of the assize of bread," applies also to the *Louisiana Case*. But the *Louisiana Case* occurred full sixteen years later, and had some modern trappings. It was nothing less than an injunction suit to restrain the enforcement of an ordinance. The ordinance in question was one "Establishing the assize and regulating the weight of bread"; and the question to be decided in the Louisiana Supreme Court was thus stated by counsel for the appellant, who attacked the validity of the ordinance:

"The issue submitted to this court is whether there is any such law as would authorize the defendant to pass and enforce the ordinance referred to above—marking out the bakers of New Orleans as a peculiar set of traders, and holding that the bread manufactured by their skill and labor is not property, and its worth depends not on the market price. If no such law exists, the ordinance is an oppressive municipal assumption of power. If a provision is designated, as a warrant for the action of the city, it must, like all legislation in derogation of common right, be strictly construed. And the duty would then arise for this court to see how far such an exceptional law could stand the test of the Constitution."

The attack upon the ordinance was based upon a claim that the provisions of the charter of the City of New Orleans did not give it the right to pass such ordinance, but the argument went beyond that field and involved the power of the legislature to enable the city to pass such ordinance. In giving the unanimous opinion, the court sustained the ordinance.

which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people."

64 *Supra* note 59.

65 *Supra* notes 57, 61, 62 & 63.

66 Merrick, C. J., said: "We find that by the Act of 1816, the legislature conferred upon the city, among other things, the right—

"To establish one or more market places, and to determine the mode of inspection for all comestibles sold publicly, either in said markets or in other places; to regulate everything which relates to bakers, butchers, tavern-keepers, or to grog shops, and other persons keeping public houses, draymen, horse drivers, water carriers, and slaves em-
Mr. Justice Field either did not know of the existence of this case, or chose to ignore it. On the other hand, Mr. Justice Lamar, who does refer to theis case in his dissenting opinion in the German Alliance Case,\(^6\) says that this is the "only American case" which sustains the right to fix prices for other than a commodity or service furnished by a public utility company—ignoring Mobile v. Yuille,\(^8\) or else uncritically accepting Mr. Justice Field's construc-

ployed as day laborers; to fix the salaries of the said draymen, horse drivers, water carriers and day laborers, and to make any other regulation which may contribute to the better administration of the affairs of the said corporation, as well as for the maintenance of the police, tranquility and safety of said city. * * *

This power, however, was accompanied by a proviso, that the Mayor and council should not have the power of fixing the price of any article sold in market or other places. But in regard to butchers' meat, and to the bakers of bread, the statutes of 1807 and 1814 seem to have expressly conferred the power to regulate the price, and by the 7th section of the Act of 1816 it was provided that no powers before granted were withdrawn from the Mayor and council by that Act. * * *

We do not think it (the Consolidation Act of 1856) could be held, under any of the ordinary rules of construction, to have conferred the right to regulate the assize, that is the weight and price of bread, for this is a power not absolutely necessary for the proper government of the city, although it is a power we presume expressly conferred upon most cities by their charters. * * *

* * * the city and formerly the municipalities, having had the right 'to regulate everything which relates to bakers,' (provided they allowed them the proper profit upon a barrel of flour), the Act of 1856 has not deprived the present city authorities of that power.

Coming now to examine the particular portions of the ordinance complained of, we see nothing unconstitutional or illegal in those parts of the ordinance requiring every baker to cause the bread to be marked with his initials or some other mark, nor in regulating the size of the loaves of bread to be sold. The fifth section which authorizes, between the rising and the setting of the sun, certain police officers to enter any bake-house, shop, storehouse, &c., where bread is kept, and stop and detain all bakers carrying bread for sale, to examine whether the same is marked, and ascertain the weight thereof, and in case it is unstamped or wanting in weight, or not baked according to the ordinance to conduct the offender before the Recorder, there to be dealt with, is no violation of Article 6 of the amendments to the Constitution of the United States."

\(^6\) Supra note 50.

\(^8\) Supra notes 57, 61, 62, 63 & 65.
tion of that case. Irrespective, however, of American cases directly sustaining such power, it is quite evident from the opinions quoted from the Alabama and Louisiana cases, that the fact of regulation was quite general—at least during the first half century after the establishment of independence. It is perhaps because of the generality of the phenomenon, and the general assumption that such regulation is legal, that the matter seldom came before the courts in a manner to attract the attention of reporters. The existence and the exercise of such power has, however, left some traces even in the reported cases, and we are sure that diligent search would disclose quite a respectable number of them. We know, for instance, that the original municipal character of the present city of Rochester, N. Y., gave the municipality the right to institute an assize of bread—and specifically to fix the price of bread. We also know that as late as 1820, Congress "understood to confer," to use Mr. Justice Field's language, upon the City of Washington, the power to regulate the rates at private wharfs and the fees for sweeping chimneys. See Mr. Justice Field's dissenting opinion in Munn v. Illinois.

Before concluding this discussion, we should note two other points which require attention because of the special circumstances in the Oklahoma Ice Case, which distinguished it from the earlier cases in which our doctrine was under consideration. In all of the discussions of our subject from Munn v. Illinois to the eve of the decision in the Oklahoma Ice Case the emphasis was upon that part of the regulation of business which dealt with price-fixing. Lord Hale's use of the phrase "affected with a public interest" was used in connection with charges or rates, al-

69 See supra note 62.
70 Dunham v. Trustees of Rochester, 5 Cow. 462 (1826).
71 Supra notes 36, 37, 43, 47 & 58.
73 Supra notes 36, 37, 43, 47, 58 & 71.
though it was stated in general terms and would apply to all forms of regulation. In view, however, of the problem actually involved in the Oklahoma Ice Case, attention must be called to another portion of the "context" in which Lord Hale used his celebrated phrase. And this brings us back to Mr. Morgan, whose case\textsuperscript{74} is referred to in Lord Hale's "position" No. 1 of the statement quoted.

The phrase "affected with a public interest" was used in connection with the private rights of the owners of the shore contiguous to the waters of the port. But, as we have seen, there were other private rights in connection with the law of the ports, such as the rights of the caput portus and its inhabitants. In discussing these rights a little farther on in his work, Lord Hale refers to the exclusiveness of the business of ports, which is similar to the exclusiveness of markets, considered in an earlier portion of this article. But he notes a difference between ports and markets, somewhat similar to the difference already noted, giving the king the right to erect new ports under circumstances which would not permit the establishment of a new market. In this case, it is an enlargement of this right of exclusiveness rather than a narrowing. For, while in the case of markets the right belongs to the lord of the market exclusively, in the case of ports it belongs not only to the lord of the port, but also to the town and its inhabitants. In this connection, Hale says:\textsuperscript{75}

"I come to the jus privatum of the caput portus, or town which is the port-town. And here I shall not take in those liberties which a port-town may acquire, either by the king's charter, or by the prescription, or by act of parliament, for these may be various as well in port-towns as inland towns; but those liberties or rights which seem incident to a port-town qua tale. And some indeed are common to every port-town, which is this; that every port-town, if they be able, should furnish the provisions for the ships and mariners that come to that port; and that there should be no forestalling of the port, either by interloping with provisions, or by new buildings between them and the sea, which may withdraw the resort of mariners from the port-town. * * *

I come therefore to judicial records; and begin with the notable case, the suit between the town of Newcastle * * * against the prior of Tinnsmouth. * * *

\textsuperscript{74} Supra note 38a.

\textsuperscript{75} Supra notes 35a & 36a.
The prior of Tinmouth his land lay between the town of New-
castle and the sea. * * *

And consonant to this was the solemn decree that passed in the
exchequer chamber, which is entered in the book of orders, T. 11
Car. 1. fol. 303, between the city of Bristol plaintiff, and Richard
Morgan and others defendants * * * that it appeared that the
houses were erected at Crockhamphill for seamen to dwell in.
That those erections were between the sea and the town of Bristol
* * * and it is confessed, that the inhabitants of those houses sell
ale and beer and other victuals, in great abundance; which the
court declares to be a manifest damage to the port and town of
Bristol, and is against the custom of maritime and coast
towns. * * *"

Evidently Mr. Richard Morgan not only engaged in the
unauthorized business of running a "public" wharf, but he
also erected houses between the port of Bristol and the
sea, which he rented to seamen, and these houses were
used by himself or others for the sale of ale and beer—
all of which was unauthorized by the common law, accord­
ing to Lord Hale and the "judicial records" referred to by
him.

It is true that the property in question was his own,
and, abstractly speaking, a man has a right to use his
property for any "lawful" advantage.76 Also, there can be
no doubt of the fact that erecting houses and renting them
to seamen, and selling ale and beer, are strictly private
businesses. But abstract notions are but empty vessels,
and the actual result depends on what you put into them.
Therefore, what is lawful, and what is private depends
entirely on one's point of view; and the point of view of
the "enlightened" economists of laissez-faire is certainly
not the same as that of the common law expounded by
Lord Hale—or by any other "sage of the law," for that
matter, during the entire "succession from Coke to Black-
stone," and beyond. There can be no question of the fact

76 True to his time, Lord Hale was a great believer in securing to
owners of property all the benefits that could possibly be derived from
it, as may be seen from his discussion, a little further in the same
work, of what he conceived should be the right of the owners of the
soil of the bed of the river Severn—but all the benefits must be
reasonable, in the true spirit of the sweet reasonableness of the com-
mon law as conceived by Lord Justice Hale and the other "sages of
the law" in the "succession."
that at common law, no one had an absolute right to engage in any business or occupation which dealt with the public at large except by permission and under the regulation of public authority. That is why Mr. Morgan was beaten in all his lawsuits.

So far, therefore, as the right to declare regulatory legislation, such as is involved in the Oklahoma Ice Case,\textsuperscript{7} is based upon the claim that the United States Constitution enshrined certain common law principles, which are beyond the reach of state legislatures, clearly the contenders are out of court. Or they should be, if the real nature of the common law and of our Constitution, and the relation of the two to each other, were better known and understood.

This brings us to the second point we desire to make, particularly in connection with the Oklahoma Ice Case. Mr. Justice Brandeis in his epoch-making dissenting opinion—insofar as a dissenting opinion may be said to be epoch-making—begins the discussion by saying:

"The Oklahoma statute makes entry into the business of manufacturing ice for sale and distribution dependent, in effect, upon a certificate of public convenience and necessity. Such a certificate was unknown to the common law. It is a creature of the machine age, in which plants have displaced tools and businesses are substituted for trades."

Literally speaking, this is, of course, true. And yet, I respectfully submit, that the great jurist has made an entirely unnecessary concession to his opponents. While it is true that the certificate of public convenience and necessity, properly so-called, was unknown to the common law, it was actually in use in England for centuries under common law principles—the very principles laid down by Lord Hale in his celebrated tract, but which applied to all business whether in ports or inland.

In discussing the law of markets, we have noted the fact that the private right of the "owner," of a market included, among other things, the right not to have anybody go into competition with him by establishing another market so near to his own as to compete for the same

\textsuperscript{7} Supra note 72.
custom. But this common law right of no competition was found to be rather inconvenient and against the public good as time went on and the country was becoming more thickly populated and centers of trade and activity shifted from place to place. And since, in England, under the beneficient system of the common law as they knew it, the public good was always paramount, and no private rights were permitted to stand in the way, they invented what came to be known as the writ ad quod damnum or dampnum.

When application was made for the establishment of a new market, they did exactly what is done now when an application is made for a certificate of convenience and necessity. The sheriff was directed to hold an inquiry as to whether the interests of the king or any of his subjects would be prejudicated by the erection of the new market. Theoretically, this was supposed to be an inquiry as to whether or not there was already in existence a market upon which the new market would encroach, but there was never really any law which definitely settled the area of a market's exclusiveness, although there were opinions about it. Besides, since, as Blackstone tells us, the circumference of exclusiveness was measured not only by the greed of the owners of the existing market but also by the convenience of those who were to trade in it, the limits must have been changing in the course of the development of the country. At any rate, in the course of time, the inquiry actually developed into one whether or not a new market should be, or ought to be, established in view of all of the interests involved, which had to be balanced. In later days, it became the practice that the charter containing the grant of the market referred to the fact that the writ ad quod damnum had been issued, the inquiry had, and that the inquiry established the fact that the market ought or should be established.

All of this is well illustrated in Sir Oliver Butler's Case. That was a scire facias brought to repeal a patent granted by King Charles II to Sir Oliver Butler for a market to be kept at Chatham. The process recited that

78 Supra note 10.
79 2 Vent. 344 (1679-80).
there was an ancient market kept at Rochester within half a mile of Chatham, and that there had been an *ad quod damnum* taken out before the new patent was granted, and an inquest thereupon taken, at which inquest it was found that the new patent would not be to the damage of any one. It then alleged that the writ *ad quod damnum* was executed by surprise and without notice; and that the new market was actually to the great damage of the former market. To this, the defendant demurred, and his counsel argued that since the pleading stated that the writ *ad quod damnum* had issued, the inquest held, and a finding made that there was no damage, the plaintiff could not succeed. But the Court decided against him, holding that since the demurrer admitted the allegation of damage the plaintiff was entitled to judgment.

The case was taken to the House of Lords, but the judgment was affirmed in a very interesting opinion, in which the Court held that the monopoly of trade created by the establishment of a market, which gave the lord of the market, or the burgesses of the town in which the market was established, as the case may be, the right to exclude competition within their area, was *jure Regio* by the common law. *This right of non-competition*, being a common law right, was not dependent on the terms of the patent establishing the market, and every patent for a new market, therefore, carried in it the implied condition that it is not in competition with any existing market within the rules laid down by the common law.

"In all such patents—says the court—the condition is implied, viz. that it be not *ad damnum* of the neighboring merchants; and in this case it is confessed by the demurrer, that the patent is *ad damnum* of Rochester."

This was the end of *Sir Oliver Butler's Case*, but not the end of the market at Chatham. For the learned reporter who reported this important case—one of the judges who sat in the case—adds the following note:

"But afterwards, as I heard, the defendant sued another writ of *ad quod damnum*, and took a new patent, which was granted because a market at Chatham was very convenient, if not (abso-
We do not believe that the United States Constitution perpetuated the common law forever as the law of this land—any more than that the Fourteenth Amendment enacted Mr. Herbert Spencer's *Social Statics*. But the constitutional theory which seems to have been recognized since *Munn v. Illinois*, and which has flourished particularly during the past forty years, is the other way. Ever since *Munn v. Illinois*, liberals and conservatives alike look, or at least profess to look, at the common law as the source of our constitutional rights. It is, therefore, of importance to know that not only is the common law on the side of the liberal interpretation of the Constitution, but that it goes way beyond that, and, in fact, sanctions regulations undreamed of by those who framed the Oklahoma Ice Statute, or by any one of the plans recently advanced for the regulation of business. It is doubtful, to say the least, whether even Mr. Norman Thomas' planning could not be brought within the principles of the common law. As far as the tentative attempts at regulation are concerned, such as are involved in the *Oklahoma Ice Case*, not only are they within the principles of the common law, but the very instruments which are used in this attempt were well known to the law which we consider our heritage from the mother country.

There can, therefore, be no doubt as to the answer that must be given to the question "Is Economic Planning Constitutional?" if we rely on the written Constitution, the benefits of which Mr. Justice Sutherland has called to our attention in the concluding paragraph of his opinion in the *Tyson Case*, or if we look to any consistent theory of our constitutional law as laid down by the United States Supreme Court since Marshall and until the present day. But, as Judge Manton, the Senior Circuit Judge of the Second Circuit, told us, the other day, in his "speculations"

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80 3 Lev. 220 (1602-3).
81 *Supra* notes 36, 37, 43, 47, 58, 71 & 73.
82 *Supra* notes 72 & 77.
83 *Supra* notes 36, 37, 43, 47, 58, 71, 73 & 81.
called forth by the laying of the corner stone of the new United States Supreme Court Building, only repeating, however, what is known to every student of our Constitution:

"The Constitution is what the judges say it is, and the Supreme Court is the ultimate tribunal."84

Unfortunately, the Supreme Court has spoken, and it has decided the other way. And the spokesman of the Court, through whom the majority of the Court spoke on this occasion, does not believe in any flexible rules of interpreting the Constitution—at least, when flexibility would permit regulation. In speaking for the majority of the Court on this very question in the Tyson Case,85 he concluded by saying:

"Constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship or injustice."

Nor is it likely that Mr. Justice Sutherland and the present majority of the Supreme Court should relent because of the possible danger to the capitalistic system, as to which Mr. Justice Brandeis has warned his brethren on the Bench. For people, who believe as Mr. Justice Sutherland and the present majority of the Court do, are usually so attuned psychologically that they cannot see such a danger until it is too late to avert it.

84 (Sept. 28, 1932) N. Y. L. J., Historical Fragments Pertaining to the United States Supreme Court.
85 Supra notes 36, 37, 43, 47, 58, 71, 73, 81 & 83.
ONE may inquire whether the study of the writings of the early Fathers from a legal point of view is only a matter of culture or if it has any practical importance. It is the aim of this paper to show that such a study has a practical importance not only in the field of law, but even in that of theology. Here we are concerned only with the writings of St. Augustine. The writings of this Father present many phases, because he was a theologian, a philosopher, a moralist, an historian, a writer, an orator, a jurist.¹

The juridical culture of Augustine is very extensive. In his writings he covers the entire field of law; public and private law; constitutional and penal law; and in private law, the law of persons, the substantive law and the adjective law. Really he did not intend to put down legal writings; above all he was a Father, so he cannot be called a jurist in a strict sense, although we can be sure that he knew the law.

It is a mystery how Augustine acquired his legal culture. Perhaps he engaged in the study of law in his youth, during his training as a rhetorician and orator. Perhaps he continued this study for the sake of culture with his companion and pupil Alipius, who was a lawyer. It seems that he had the ambition to secure a “Praesidatus,” i. e., of becoming an officer of the Roman administrative and judiciary machine.² If so, we can take for

¹ In 1930 the Catholic University of Milan, Italy, on the occasion of the fifteenth centenary of St. Augustine’s death (Aug. 28, 430, A. D.), commemorated his multifarious activities in a volume: ST. AGOSTINO; Milano, Societa Editrice, Vita e Pensiero.

² Conf. 6, 11.
granted he would have also a juridical qualification for such an office. But anyhow we are sure he had a large amount of legal culture, and this is evidenced by his writings.

The writings of St. Augustine are very numerous, and it is not our purpose even to name them. The most complete collection of his works numbers 15 volumes in quarto of about 1000 pages each; it was edited by Migne in his Patrology. This is the edition quoted in this article. Evidently the huge quantity of Augustine's writings renders the enterprise of a research more difficult. Perhaps this furnishes an explanation of the lack of existing studies on St. Augustine as a jurist. In this kind of work it is customary to look into all the writings of a Father. This difficulty of research explains also why this paper is incomplete, in the sense that the research has not been exhaustive; I confess I did not read the fifteen volumes. From this point of view this paper aims to be only an essay, a sample, of the legal culture of St. Augustine.

The number of Augustinian passages of legal flavor is tremendous. Moreover, as I have said, they cover the entire field of law. A selection was therefore imperative. The passages registered here refer to the branch of private law and specifically to some institutions of substantive law. An explanation for this is necessary. The search for legal fragments in early patristic literature concerns, of course, the system of law in force at those times, i.e., Roman Law. In such a research one of the most important points is to see whether the Fathers were fostering Roman Law conceptions, accepted Roman Law viewpoints, or they opposed it, trying to reform it. In a word, through the Fathers one sees the possible influence of Christian Doctrine in Roman Law. In this big question, nowadays, the Romanists admit the influence of Christianity in Roman Law in various fields. One point, however, is still under discussion; whether Christian conceptions had any bearing in the field of substantive law. Dr. Riccobono favors

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3 It was necessary to quote Augustinian passages in their original Latin here, because even an ideal translation cannot render the precision of the legal Latin terms.

4 Here I submit only a few passages of those I have found.
this view.\(^5\) Starting the research on St. Augustine I had this question in mind; that explains therefore the reason why the Augustinian passages registered here refer to substantive law.

### ON OWNERSHIP

#### On the Nature of Ownership.

*In Joann. Evangel. Tract. 6, 25; M. 3, 1437*  
*Enarr. in Ps. 49, 17; M. 4, 576*

#### On the Use of Riches.

*Sermo. 50, 4; M. 5, 327*  
*Epist. III cl., epist. 153, 26; M. 2, 665*

#### On the Superfluous.

*Sermo. 206, 2; M. 5, 1041*  
*Enarr. in Ps. 147, 12; M. 4, 1922*

#### On Heredity.

*De divers. quaest. 83, 75, 1; M. 6, 86*  
*Enarr. in Ps. 49, 2; M. 4, 565*  
*Enarr. in Ps. 36, 18; M. 4, 393*

In substantive law ownership is a fundamental institution. St. Augustine dealing with this matter shows his technical knowledge of the Roman Law conception of the right of property, but he patronizes the more liberal Christian conception.

These two paragraphs\(^6\) evidence a fundamental dis-

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\(^5\) Riccobono, Influenza del Cristianesimo sulla Codificazione di Guis-\n
\(^6\) In Joann. Evang. Tract. 6, 25; Migne 3, 1437: “... jure divino,  

Domini est terra et plenitudine ejus: pauperes et divites una terra sup-\n
portat. Jure tamen humano ... haec villa mea est, haec domus mea,  

hic servus meus. Jure ergo humano, jure imperatorum. Vultis legem leges imperatorum, et secundum ipsas agamus de villis? Si jure  

humano vultis possidere, rectemus leges imperatorum. Sed quid mihi  

est imperator? Secundum jus ipsius possides terram. Aut tolle juru  

imperatorum, et quis audet dicere: mea est illa villa, aut meus est ille  

servus, aut domus haec mea est? ...”\(^\text{6}\)  

Enarr. in Ps. 49, 17; M. 4, 576: “... mea sunt illa (bestiae ferae)  

quae non possides, mea sunt ista (pecora) quae possides (dicit Dom-\n
inus). Si enim servus es tu, totum peculium tuum meum est. Neque  

enim est peculium domini quod sibi servus comparavit, et non erit  

decum Domini quod ipse Dominus servo creavit? Ergo meae sunt  

bestiae silvae quas tu non cepisti: mea sunt et pecora in montibus  

quae tua sunt, et boves qui sunt ad praesepe tuum: omnia mea sunt,  

quia ego creavi ea.”
tinction made by Augustine in matter of ownership. According to the law of man, the law of the Emperors, the property of the world is fractioned, divided, and we speak of this house of mine, of your slave, etc. But according to the law of God, the whole property, the earth, belongs to God. How, therefore, can one say “This house is mine, that is yours, that is your slave?” (In Joann. Evangel. Tract. 6, 25.)

In Enarr. in Ps. 49, 17, he passes to analyze more closely what is property for man.

Note here his accurate terminology. “Only God owns,” and Augustine uses the “meum esse,” the classical legal expression for ownership, the Roman dominium. For property of man he uses “possessio,” which renders the meaning of possession versus “dominium,” of holding a thing vs. that of owning it. He illustrates this expression further with the example of slaves. A slave cannot own, he simply possesses. The possession of a slave is legally called “peculium.” The peculium is owned by the master of the slave, the slave simply possesses it, whether it has been given him by his master, or it has been acquired by the slave himself. God is the Master, man compared with God, is like a slave, he is God’s creature.

From this Christian conception of ownership, that is, that man has not the real ownership of his property, but is only a possessor of it, a user, Augustine draws practical conclusions: one must use his possessions fairly; one must give the superfluous to the poor.

On the Use of Riches. St. Augustine here speaks of the

7 Sermo 50, 4; M. 5, 327: Illius est ergo aurum et argentum qui novit uti auro et argento. Nam etiam inter ipsos homines tunc quisque habere aliquid dicendus est, quando bene utitur. Nam quod juste non tractat, jure non tenet. Quod autem jure non tenet, si suum esse dixerit, non erit vox justi possessoris, sed impudentis incubatoris improbitas.”

Epist. Cl. III, epist. 153, 26; M. 2, 665: “... nonne omnes qui sibi videntur gaudere licite conquitis, eisque uti nesciunt, aliena possidere convincimus? Hoc enim certum alienum non est, quod jure possidetur: hoc autem jure quod juste, et hoc juste quod bene. Omne igitur quod male possidetur alienum est; male autem possidet qui male utitur. ... Sed inter haec tolleratur iniquitas male habentium, et quaedam inter eos jura constituuntur, quae appellantur civilia: non quod hinc ut bene utentes sint, sed ut male utentes minus molesti sint. ...”
fair use of worldly possessions. In his dialectical ability he forms a kind of sorites here; it is according to the right what is right, it is right what is good, therefore what is not good, it is not according to the right, "jure quod juste, juste quod bene ... igitur quod male possidetur alienum est." This in scholastic terminology could be rendered thus: "Mine and right are reversible, therefore what is right is mine, and what is not right cannot be mine."

This Augustinian conception, so striking as it is rendered here, was not entirely foreign to Roman Law before the time of Augustine, if we remember the fragment of Gaius "One ought not to misuse his right" (Male ... nostro iure uti non debemus), but such a doctrine was not developed until later, particularly in the codification of Justinian. Then it took deeper root, a more definite form in the doctrine that prohibits the unfair use of one's right. So the Augustinian expressions seem to be a kind of anticipation in this legal development of property conception. Augustine himself points here to some provisions of civil law in this matter, but of course they are faint, they aim not to the "better use" of possessions, but only to the "less noxious" use.

On the Superfluous. To give the superfluous to the poor, is therefore but a consequence of the stated doctrine, and Augustine says that the superfluous is not in our ownership and we must give it away.

On Heredity. In matter of acquisition of property there are some Augustinian fragments which deal about hereditary succession, and precisely about the title of succession. St. Augustine talks about this matter in a figurative way, explaining theological conceptions and using for that purpose Roman Law terminology.

St. Paul says that Christians are "the heirs of God, and

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8 G. 1, 53.
9 Sermo, 206, 2; M. 5, 1041: "... Intelligit animus christianus, quantum remotus esse debit a fraude alienae rei; quando sentet simile esse fraudi, si superflua sua non tribuerit indigenti."
Enarr. in Ps. 147, 12; M. 4, 1922: Caetera quae superflua jacent, aliorum sunt necessaria. Superflua divitum, necessaria sunt pauperum. Res alienae possidentur cum superflua possidentur."
joint heirs of Christ," and Augustine explains how that happens.

Note here how he stresses the title of succession to God, the filiation from God; and the brotherhood with Christ. These are the strongest titles also in Roman Law.

He stresses the point of the joint heredity of Christ and Christians.

An important matter in case of succession was not only to have a title but to have a good judge at hand who would assess the patrimony of the heredity to the title-holder, because it happened also in the days of Roman Law that quarrels, counter-claims, were frequent in such instances. And Augustine comes in to assure the Christians they will find a good judge in God Himself who is at one time the Testator and the Judge.

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10 Ad. Rom. VIII, 17.

11De diversis quaest. 83, 75, 1; M. 6, 86: "Sicut Apostolus ad Hebraeos dicit 'testamentum testatoris morte firmatur'; propterea mortuo pro nobis Christo, Novum Testamentum firmatum esse asserit. . . Si ergo queramus quomodo simus, secundum ejusdem Apostoli verba 'cohaeredes Christi, et filii atque haeredes Dei': cum etiam hereditas morte decessoris firma teneatur, nec ullo alio modo possit hereditas intelligi; respondetur, ipso quidem mortuo factos nos esse haeredes, quoniam et filii ejus etiam dicti sumus. . . Haeredes ergo ejus dicimur, quia reliquit nobis pacis ecclesiasticae possessionem. . . Cohaeredes autem ejus efficiemur, cum in fine saeculi mors absorbetur in victoriam. Tunc enim similes Ei erimus, quanto videbimus eum sicuti est. . ."

12 Enarr. in Ps. 49, 2; M. 4, 565: "Tanta enim charitas est in illo haerede (Christo), ut voluerit habere cohaeredes. Quis hoc avarus homo velit habere cohaeredes? Sed et qui inventur velle dividit cum eis haereditatem, minus habens ipse dividens quam si solus possideret: haeredatas autem in qua cohaeredes Christi sumus, non minuitur copia possessorum, nec fit angustior numerositate cohaeredum; sed tanta est multis quanta paucus, tanta singulis quanta omnibus."

13 Enarr. in Ps. 36, 18; M. 4, 393: "Fratres . . . custodite hereditatem nostram de qua securi sumus nos in testamento Patris nostri esse: non in aliqua charta frivolae aliquus hominis, sed in testamento Patris nostri. Inde securi sumus: quia qui fecit testamentum haeredit suum ipse judicabit de testamento suo. In rebus humanis alius est testator, alius judex: et tamen qui tenet testamentum, vincit apud judicem alterum, non apud alterum judicem mortuum. Quam ergo secura est nostra victoria, cum ille judicabit qui testatus est, etsi enim mortuus est Christus ad tempus, sed jam vivit in aeternum."
ON OBLIGATIONS

On *Mutuum. commodatum*. *De Ser., Dom. in monte*. lib. 1, c. 20, 68. M. 3, 1263.


*Serm. ad popul.*, *Serm. 39, 6*. Migne, 5, 239.

*Serm. 358, 5*. Migne, 5, 1586.

*Enarr. in Ps.* 36, 26. M. 4, 1386.

*Ps.* 54, 12. M. 4, 638.


*Ps.* 57, 2. M. 4, 674.


*Serm. 177, 10*. M. 5, 959

*Enarr. in Ps.* 70, *Serm. 1, 17*. M. 4, 886.

*Serm. 329, 1*. M. 5, 1454.

*Serm. 336, 4*. M. 5, 1473.


*Serm. 223, 1*. M. 5, 1112.


*De Serm. Dom. in monte lib. 1, 62 and 66*. M. 3, 1263.


*Enarr. in Ps.* 14, 3. M. 4, 143.

*Ps.* 5, 8. M. 11, 86


This section deals with personal rights. Roman Law sources classify this matter in two items: obligations arising from agreement or contracts (*obligationes ex contractu*); and obligations arising not from agreement but from the contingency of certain facts, *e.g.*, torts (*obligationes ex delicto, etc*). Here we contemplate examples of contracts; *mutuum, commodatum, depositum*, sale, the contract of labor, and examples of delicts: theft, and insults.
On Mutuum, Commodatum, Donatio. Mutuum is a loan of money or of things which are consumed by using them, e.g., wine, oil, etc., with the agreement that the borrower has the obligation to return the same amount of the same quality he has received. Commodatum, on the contrary, consists of a loan of things not consumable by use, e.g., a barrel, a carriage, etc. The essential element of mutuum and commodatum consists in the obligation of returning what has been borrowed.

Donatio, a promise to make a gratuity, creates also an obligation, but of course, here it is essential that the thing given must not be returned.

St. Augustine shows a thorough knowledge of these three Roman obligations, and puts two questions thereof. First, when a Christian makes a gratuity to his brother for the sake of charity, this donation could even be considered as a loan, because although his brother does not make any return, God Himself makes restitution for that, and therefore there is a kind of mutuum. The second question is: according to the legal conception that mutuum and commodatum require the return of the thing borrowed, can a Christian have any merit before God if he lends to his brother and expects a return from him? St. Augustine says that even mutuum and commodatum are meritorious, because the Gospel says "From him that would borrow of thee turn not away."

The whole Augustinian terminology of this fragment is

14 De sermone Domini in monte, lib. 1, 20, 68; M. 3, 1263: "... 'Qui voluerit a te mutuari ne aversatus fueris.' Mutuatur autem omnis qui accipit, etiam si non ipse soluturus est: cum enim misericors Deus plura restituat, omnis qui beneficium praestat, feneratur. Aut si non placet accipere mutuamentem nisi cum qui accipit redditurus, intelligendum est Dominum duo ipsa genera praestandā esse complexum. Namque aut donamus quod damus benevole, aut reddituro commodamus. Et plerumque homines, qui proposito divino praemio donare parati sunt, ad dandum quod mutuum petitur pigri sunt, quasi nihil recepturī a Deo, cum rem quae datur, ille qui accipit exsolvat. Recte itaque ad hoc beneficii tribuendi genus nos divina hortatur auctoritas dicens, 'et qui voluerit a te mutuare, ne aversatus fueris': id est ne properterea voluntatem alienæ ab eo qui petit, quia et pecunia tua vacabit, et Deus tibi non redditurus est, cum homo reddiderit: sed cum ex præcepto Dei facis, apud illum quae haec jubet, infructuosum esse non potest...."

15 Matth. V, 42.
legal, mutuum, commodatum, fenarari, donatio, dare, praeestare, solutio. Note particularly the technical use of "dare" for passing ownership and not mere possession, in "ad dandum quod mutuum petitur," and in "donamus quod damus."

On Usura, Fenus.16 Usura and fenus mean interest on loans. In Roman Law mutuum and commodatum, loans are gratuitous contracts, i. e., they do not admit as such any payment of interest. The borrower must return only the same amount of the same quality he has received and not a cent more. This is essential to such contracts, because they are gratuitous obligations. But this simply means that interest was not included in the mutuum and commodatum themselves, that is, in the contract itself; not that interest was prohibited. Romans met this difficulty by adding to the contract of loan another agreement for the interest, so interest was due not by loans (ex mutuuo), but by another distinct agreement only motivated by the loan. In conclusion, in case of loans with interest we have two contracts, the loan, and the stipulation for the interest.

The rate of interest varied according to different periods. In the times of St. Augustine, 6 per cent was the ordinary maximum lawful interest.17 Interest above this rate was considered usurious and was punished by the penalty of quadruple, i. e., the victim could recover 4 times the amount of interest paid.18

St. Augustine in this matter disagrees with Roman Law. We took note in his above mentioned fragments on mutuum and commodatum, that he accepts the Roman Law conception that the return of the thing borrowed is essential to these contracts. Here once more he implicitly agrees with Roman Law, admitting another essential character of this contract, i. e., that they are gratuitous. But he stands

16 Epist. cl. 2, epist. 43, 25; M. 2, 665: "... quid dicam de usuris, quas etiam ipsae leges et judices reddi jubent? An crudelior est qui subtrahit aliquid vel eripit diviti, quam qui trucidat pauperem fenore? Haec atque hujusmodi male utique possidentur, et vellem restituerentur: sed non est quo judice repetantur."

17 C. Th. 2, 33, 4.

18 C. Th. 2, 33, 2.
strongly against agreements of interest,\textsuperscript{19} denouncing them as an unjust appropriation "\textit{male . . . possidentur.}" Evidently he does not admit any interest at all, because he does not talk about excessive interest, but only about interest which is protected by law and courts, and says that it must be returned, although, he adds, no court enforces this view.

It is admitted that the Church in the past forbade any interest on loans; here we have an evidence of the matter.

This fragment is also important because it gives an example of how Christianity tried to correct Roman Law, although this very instance did not influence the codification of Justinian.

In the following passages St. Augustine discusses the matter of \textit{usura} once more, but from another point of view.\textsuperscript{20} He repeats that \textit{usura}, that is, interest on loans is forbidden, but only between man and man, but not between man and God. God invites men to make such bargains with Him directly by works of mercy. The Scripture says "He that hath mercy on the poor, lendeth to the Lord; and He will repay him." The Latin text of St. Jerome, contemporary of Augustine, renders the legal terminology better "\textit{fenaratur Domino qui miseretur pau-''

\textsuperscript{19} Epist. 43, 25.
The Latin "feneratur" means here to make a loan with interest. Augustine brings this legal fiction of lending to God further. What place is given to God in this bargain? What is God’s connection with lender and borrower? The loan does not go to God Himself, but to the poor. Well, Roman Law is at hand once more. In matter of loan, the responsibility of restitution can rest not only on the borrower, but also on a third person as surety. In such a case when the borrower cannot meet his duty the surety is liable for the fulfillment of the obligation. This is the institution called "fideijussio." St. Augustine applies such a conception in this case and says; "When the poor prays for thee, he says, as it were, to God, ‘Lord I have borrowed this, be Thou surety for me’; then, though you have no bond on the poor man to compel his repayment, you shall have a responsible security (in God)."

It is worthy of notice that St. Augustine uses the technical terminology of "fideijussio." Moreover he uses quite a peculiar expression that is rarely found in the Roman Law sources, the word "fidedicere" (saying the surety). Commonly the sources say "fidem dare" (to give surety), or "fidem promittere" (to promise a surety), but seldom use "fidem dicere" as Scaevola.

In this set of fragments, specifically in his commentary on Ps. 54, St. Augustine, in dealing about usura, makes a figurative application of its meaning which is not in any way borrowed from Roman Law, but shows his strong sympathy for legal terminology, and in a broad sense conveys the meaning of the usura, i. e., of asking more than what has been given.

On Depositum. In these passages there is question of

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21 Prov. 19, 17.
22 In D. 17, 1, 62, 1.
23 Enarr. in Ps. 54, 12; M. 4, 638: "Est et alia usura pejor, quando non dimittis quod tibi debetur. . . Verbum contumeliosum audisti, vis exigere damnationis supplicium. Vel tantum exige quantum deducti, fenerator injuriarum. Pugno percussus es, interjectionem quaeris. Usura mala."
24 Enarr. in Ps. 52, 9; M. 4, 618: "... commendatur nescio cui sacellus: non vult reddere, pro suo computat, non putat non posse repeti, jam pro suo habebit, reddere detrectat. Videat quid timeat amittere,
depositum, because all the elements of such a contract are present. There is the depositum, i. e., a bag of money, or a quantity of gold, given to somebody, entrusted; as Augustine says "Commendavit"; this is just the word the Roman Law sources use, in case of a depositum. "Quid est enim aliud commendare quam deponere?" (What else does it mean, the word entrusting, but to deposit). There is the obligation of the depository to return the thing received. There is no compensation for the custody of the thing entrusted. And moreover Augustine stresses the great part that good faith plays in it and this is the typical element that places the depositum among the obligation ex bona fide or bonae fidei.

We can be sure that St. Augustine in the use of the word "faith" meant the legal element required in matter of obligations and not the religious Christian faith. He knows of the distinction of these two meanings of the word faith; he stresses it in the following passage: "de spiritu et littera." 26

On Emptio-Venditio. 27 This passage is very plain. St.

et quid nolit habere: in dubium veniunt pecunia et fides: quae propiosior est, ibi gravius damnun timendum. Tu autem ut aurum teneas fidem perdis.

Enarr. in Ps. 57, 2; M. 4, 674: "Ecce nescio unde amicus venit, et nullo teste aurum commendavit; solus hoc novit, et tu, quantum ad homines attinet. . . . Commendavit ille atque discessit, nulli suorum notum fecit, redditurum se sperans, et ab amico quod dederat receprurum; ut humana sunt, mortuus est, habet heredem, velit qulium: ignorant filius quod pater habuerit, quid tibi commendaverit. . . . Ecce cogitas aurum negare, ecce cogitas heredi amici tui prorsus absendere. Interrogaveram paulo ante quid sit melius, aurum an fides. . . . Ecce locutus es mihi meliorem esse fidem, et in judicio tuo melius duxisti aurum. . . ."


26 De Spiritu et Littera, 31, 54; M. 10, 225: "... (fides) quam adhibemus cum aliquid credimus, non quam damus cum aliquid pollicemur; nam et ipsa dictur fides. Sed aliter dicimus, non mihi habuit fidel: aliter, non mihi servavi fidel. Nam illud est, non credidit quod dixi: illud, non fecit quod dixit. Secundum hanc fidem qua credimus, fideles sumus Deo: secundum illam vero qua fit quod promittitur, etiam Deus ipse fidelis est nobis."

27 Sermo 177, 3; M. 5. 910: "Certe quando pro tuis necessitatibus procedis ad publicum, das nummos, et emis tibi panem, aut vinum, aut oleum, aut lignum, aut aliquam supellectilem: das et accipis, aliquid
Augustine here deals with the contract of sale. A point he stresses is that here we are in the presence of an onerous obligation. In Roman Law not every obligation is onerous, the *mutuum* (loan), the *depositum* (deposit), for instance, are gratuitous obligations in the sense that only one party has a duty, while the other contracting party has no duty. So it happens in other judicial bargains, that one acquires something gratuitously, and Augustine here mentions the case of *inventio* (finding), of donations, of heredity; but sale exists only when for acquiring something one must part with something.

Another element of the Roman sale is touched by Augustine, the price or the payment in money. The buyer must pay for the thing bought, the price is money "*pretium, nummos*"; if he pays not with money, but in kind, there is an "exchange," which is another contract. This point that is touched here only indirectly by Augustine is very clear in the following fragment:

*On Permutatio (Exchange).*

The exchange in Roman Law differs from a sale particularly in the point that the return for the thing given must be another "thing" and not money. St. Augustine shows his clear perception of the difference of sale and exchange; of giving money for "bread, wine, oil, firewood, furniture" in the sale, and giving "gold (not money) for oil" in the exchange; and mentions the utility of exchange to avoid transportation of goods, *e. g.*, between Africa and other places.

In the fragment on exchange he shows, of course, his legal wit by applying the conception of exchange to theology. "In a certain sense, he says, our Lord and God wishes us to be merchants. He makes an exchange with

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amittis, aliquid acquiris: hoc est emere. Nam si nihil amittas, et habeas quod non habebas: aut invenisti, aut donatum accepi, aut hereditate acquisisti. Quando autem aliquid amittis ut aliquid habeas, tunc emis: quod habes emptum est, quod amittis pretium est. . . "
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28 Sermo 177, 10; M. 5,959: "... quodam modo Dominus Deus noster mercatores nos vult esse, mutationem nobiscum facit; quod hic abundat damus, quod ibi abundat accipimus: quemadmodum plerique trajecticias merces faciunt, aliud dant alibi, et quo veniunt aliud accipiunt. Verbi gratia dicit amico suo, accipe hic a me aurum et dami in Africa oleum: et migrat et non migrat; jam quod desiderat accipit."
us: we give (in charity), what here abounds, we receive what there (in heaven) abounds.”

On Trading.29 Here Augustine comments on prices of resale, and admits that a merchant can sell at a price higher than the real cost of the goods, provided he does not conceal with lies or false swearings the real cost.

In the following passage with a verve of a jurist he applies the terminology of the emptio-venditio to the theological conception of the Christ’s Redemption of the World.30 Note the technical words of “commercium, solutus, sacculus (bag) pretii, empti, impensum, reddiderunt.”

And, he discusses the deal of the Cross from the point of view of the dealers and of those who are concerned with it. The persecutor opens the bag, the redeemer pays. Judas is the vendor, the Jew is the buyer. The parties had a bad bargain. The vendor does not get the price and the buyer does not have the “thing” (Christ). The Christian gets the benefit.31

29 Enarr. in Ps. 70; Sermo 1, 17; M. 4. 886: “... inquit (Psalmista), 'tota die salutem tuam quia non cognovi negotiationes.' Quae sunt istae negotiationes? Audiant negotiatores et mutant vitam ... si peccatum est negotiatum. Hinc enim, o negotiator ... quando ... pro pretis rerum quam vendis, non solum mentiris, verum etiam falsum juras: quomodo in ore tuo tota die laus Dei! ... Ergo ... corrigit se Christiani; non negotientur. Sed ait mihi negotiator: ecce ego affero quidem ex longiquo merces ad ea loca in quibus non sunt ea quae attulero, unde vivam, tampilquam mercedem laboris mei peto, ut carius vendam quam emerim. Ubde enim vivam! ... Sed agitur de mendacio, de perjurio. Hoc vitium meum est non negotiationis. ... Non ergo meam culpam actum ad negotium transfero: sed si mentior ego mentior, non negotium. Possem enim dicere: tanto emi sed tanto vendam; si placet, eme. Non enim istam veritatem audienst audiunt repelleretur, et non potius omnes accurrrent: quia plus fidem quam mercedem diligerent. ...”

30 Serm. 329, 1; M. 5, 1454: “Egit enim (Dominus) in cruce grande commercium: ibi solutus est sacculus pretii nostri: quando latus ejus apertura est lancea percussoris, emanavit inde pretium totius orbis. Empti sunt fideles et martyres: sed martyrum fides probata est testis est sanguis. Quod illis impensum est, reddiderunt. ...”

On Locatio Operorum. In these passages St. Augustine shows his legal acquaintance with the *locatio operarum*, the contract of labor. The example of the worker in the vineyard is very technical, because Roman Law in this contract for labor, means only manual labor. So is the word “mercedem,” the hire, the pay for the work.

The doctor contemplates the case of the worker who does not fulfill his obligation: he has no right to the pay: this is also the view of Roman Law because *locatio operarum* is a bilateral contract.

The instance of the dishonest worker in Roman Law would find the sanction of a penalty in a general sense as it is viewed by St. Augustine. Even the expression of the “*paterfamilias*” is Roman, in the sense used here, because he is the only one of the Roman family who can directly be sued for the pay.

On Furtum. St. Augustine commenting on Exodus 22, 2, talked on the permission of killing a thief.

The first part of this fragment refers to the enactment contained in the Exodus and the second part refers to Roman Law. The “*Antiquae Leges Saeculares*” quoted by Augustine are the Twelve Tables. “Si nox furtum faxsit, si im occisis, jure caesus esto (If a theft be committed at night and thief be killed, let his death be deemed lawful);


32 Enarr. in Ps. 93, 12; M. 4, 1201: "In vinea operaris, fac opus tuum accipies mercedem tuam. A patrefamilias non exigeres antequam operareris, et a Deo exigs antequam operers? . . . Quad si dolosus es, vide ne non solum non accipias mercedem, sed et poenam invenias: quia voluisti esse operarius dolosus . . ."

Sermo 233, 1; M. 5, 1112: “… in praesenti vita laboremus: in futura speremus. Modo tempus est operis: tunc mercedis. Qui piger est in exhibendo opere, impudens est in exigenda mercede. . .”

33 Quaest. in Heptateuch. lib. 2, 84; M. 3, 627: “Intelligitur . . . tunc non pertinere ad homicidium, si fur nocturnus occiditur: si autem diurnus, pertinere . . . Poterat quippe discerni quod ad furandum non ad occidendum venisset, et ideo non deberet occidi. Hoc est in legibus antiquis saecularibus, quibus tamen ista est antiquior, invenitur, impune occidi nocturnum furem quoquo modo, diurnum autem si se telo defenderit: jam enim plus est quam fur.”
luci . . . si se telo defendit. . . .” (If in the daytime, only if he defends himself with a weapon). The version of Roman Law given here by St. Augustine corresponds literally to a passage of Cicero: “nocturnum furem ququo modo, diurnum autem, si se telo defenderit.”

This Augustinian fragment has another similarity with another Roman Law source. The “Mosaicarum et Romanarum legum collatio.” This Roman Law collection which aims to show the parallels between the Bible and the Roman Law registers at title 7 the same passage of the Exodus, and compares it, in 7, 2, with the “Sententiae Pauli” 5, 23, 1 and 9. St. Augustine and the unknown author (somebody says that he is a father, Jerome, Ambrose, etc.) of the Collatio work in the same line, with the same matter, and are substantially the same. Mommsen in his edition of the Collatio has discovered other similarities between St. Augustine and the Collatio.

On Injuria. Injuria in Roman Law has several meanings. Sometimes it is used as in D. 9, 2, for a wrong in a general sense, e. g., a damage caused by negligence (an unintentional fault, damnnum injuria datum). Sometimes injuria has a more specific meaning as in D. 47, 10 for an intentional wrong, e. g., an insult. St. Augustine here deals only with injuria in its specific meaning of insult.

In his commentary on Ps. 145, 15, the doctor gives the etymology of injuria, pointing out to the contrast of “jus” (the right) and “injuria” (the wrong), what is un-right, because he says “right and wrong are contrary; jus et injuria contraria sunt.”

34 T. 8, 12 and 13.
35 In his Pro Milone, 3, 9.
36 In Fontes Juris Romani Antejustiniani of Riccobono, etc., p. 485: Mosaicarum et Romanarum legum collatio, 7, 1: “Quod si duodecim tabularum nocturnum furem, quoquo modo, diurnum autem si se audeat telo defendere, interfici jubent, scitote, juris consulti, quia Moyses prius hoc statuit, sicut lectio manifestat. MOYSES dicit: Si perfodisset nocte parietem inventus fuerit fur et percusserit eum alius et mortuus fuerit hic, non est homicida is qui percusserit eum. Si autem sol ortus fuerit super eum, reus est mortis percussor: et ipse morietur.”
37 Enarr. in Ps. 145, 15; M. 4, 1894: “. . . non enim omnis molestia injuria est. Quidquid enim jure pateris non est injuria. . . Latrones multa patiuntur, sed non injuriam. . . Jus et injuria contraria sunt. . . Vide quid feceris, non quid patiaris. Si jus fecisti, injuriam pateris: si injuriam fecisti, jus pateris.”
It seems here as though St. Augustine knew the writings of Ulpian. Ulpian 38 says “It is called *injuria* what is not done lawfully, and it is said that what is not done according to the law is *injuria* (*injuria ex eo dicta est, quod non jure fit; omne enim quod non jure fit, injuria fieri dicitur*”).

Even the case of the robbers seems to have a parallel in other fragments of the classical jurists.39

In his commentary on the Sermon of Mount,40 Augustine enters into a more lengthy discussion of *injuria* as a delict. Two points are particularly important here, the Augustinian legal commentary of the gospel and the opposition of the Christian doctrine to the teaching of the law.41

38 In D. 47, 1, pr.

39 As one of Gaius in D. 9, 2, 4, pr., and another of Ulpian in D. 9, 2, 5, pr.

40 Lib. 1, 62, 66.

41 *De sermone Domini in Monte*, lib. 1, 62 and 66; M. 3, 1263, 62: “In hisce sane generibus trium exemplorum nullum genus injuriae pretermissum esse video. Namque omnia in quibus improbitatem aliquam patimur, in duo genera dividuntur: quorum alterum est quod restitui non potest: alterum quod potest. Sed in illo quod restitui non potest, vindictae solatium quaerenti solet. . ."

66: . . . tenebitur ergo in hoc injuriarum genere, quod per vindictam luitur, iste christianus modus, ut accepta injuria non surgat in odium, sed infirmitatis misericordia paratus sit animus plura perpeti. . .

Aliud injuriarum genus est, quod in integrum restitui potest: cujus duae species. una ad pecuniam, alteram ad operam pertinet. Quapropter illius de tunica et vestimento, hujus de angaria mille passuum et duum millium exempla subjecta sunt: quia et reddi vestimentum potest: et quem adjuveris opera potest te etiam ipse, si opus fuerit adjuvare. Nisi forte ita potius distinguendum est, ut prus quod positum est de percussa maxilla, omnia significet quae sic ingeruntur ab improbis, ut restitui non possint nisi vindicta; secundum quod positum est de vestimento omnia significet quae possunt restitui sine vindicta. . .; tertium vero ex utroque confectum sit, ut et sine vindicta et cum vindicta possit restitui. Nam qui operam indebitam violenter exigit sine ullo judicio, sicut facit qui angariat hominem improbe, et cogit se illicite adjuvari ab invito, et poenam improbitatis potest luere, et operam reddere, si hanc ille repetat, qui improbum pertulit. In his ergo omnibus generibus injuriarum Dominus docet patientissimum et misericordissimum, et ad plura perferenda paratissimum animum Christiani esse oportere.”
According to St. Augustine, who also renders the point of view of Roman Law, *injuriae* (insults) can be classified as follows: Insults, which in their redress imply a restitution of property, *e.g.*, return of a coat that has been taken away; and insults which do not demand a restoration of property, but are repaired only by a penalty, *e.g.*, a fine inflicted on the wrongdoer; and insults which imply compensation and penalty. Our Father applies this juridical cast commenting on Matth. V, 39-41: "If one strike thee on the right cheek, turn him also the other: and if a man will contend with thee in judgment, and take away thy coat, let go the cloak also to him; and whosoever will force thee one mile, go with him other two." The case of the taking away of the coat, which is an insult, enters into the category of those *injuriae* whose redress implies a restoration of property. The slapping in the face is a case of *injuria* which is punished only by a penalty, no restoration of property being possible. The case of "Angariatio," the one who is forced to walk with another, *e.g.*, when one is forced to do something for another, enters into the last category of injuries which can be redressed by a penalty and a compensation, in the way that the wrongdoer may be ordered either to pay or to do some work for the victim who was forced to do some work for him. This evidences how Augustine with much ability picks up evangelical expressions of a legal flavor and comments on them from a legal viewpoint. Note in particular the technical terminology of "*injuria, vindicta, vindictam luere, poenam luere, pecunia, operi*".

In regard to the moral question, after his legal analysis of the gospel, St. Augustine comes out and does not urge his Christians to conform with the teaching of Roman Law, but with that of the gospel. "In all these classes of *injuriae* . . . the Lord says that a Christian must be patient and compassionate and thoroughly prepared to endure many things." This is a practical example of the way in which many Roman legal conceptions have been attacked by Christian Doctrine.
MORE GENERAL ELEMENTS OF OBLIGATIONS

Besides these passages on specific Roman Law obligations there exists in St. Augustine’s works other fragments which refer to more general elements of obligations, e. g., duty of restitution, matter of deceit, etc. Let us have a few examples.

On Restitution (of things which belong to others).42 The first passage shows some legal peculiarities. From it we learn: of the duty the privates had to return to the owner things lost and found (memor legis): of the method of advertisement, i. e., by the privates themselves with public notice (proponere pittacium publice): of the wording of one of these notices: and of the percentage given to the founder (10 per cent, solidi viginti on the ducenti found).

This fragment (and the next, too), shows also the interest taken by Christianity in the support of the law. Augustine narrates the related story to his audience trying to set a good example to be imitated by his Christians. This is a kind of real influence of Christianity in Roman


Epist. cl. 3, epsit. 153; M. 2, 663: “Nolentes ... reddere, quos novimus et male abstulisse et unde reddere habeant, arguimus, increpamus ... aliquando ... sancti altaris communione privamus.”
Law, and it has been known even in earlier periods. We have an example of this in the letter of Pliny to the Emperor Trajan, in which the Roman Governor points out that the law among Christians was enforced by sake of religion.43

The second passage shows how the Church enforced the obligation of restitution even by inflicting ecclesiastical penalties. On Dolus (Deceit).44 In these passages St. Augustine shows his acquaintance with the Roman legal conception of deceit. Dolus in the Roman legal conception implies some kind of fraud and not only a deceiving purpose that sometimes may be permissible. Note that the last passage corresponds almost verbatim with the definition of dolus given by Servius: 45 “Dolum . . . Servius . . . definit cum aliud simulatur et aliud agitur.”

On Plus Petitio (excessive claims).46 This is an interesting passage: from a Roman point of view this is the most interesting argument of the entire list. Outside the application of the “Plus petitio” to the theological case this fragment is important for the history of Roman Law. “Plus petitio” consists in claiming more than what is actually due; and it has been punished in different ways

43 Plinii ad Trajanum 1096: “Adfirmabant autem hanc fuisse summam vel culpae suae vel erroris, quod essent soliti stato die ante lucem convenire carmenque Christo quasi deo dicere secum invicem sacramento non in scelus aliquod obstringere, sed ne furta, ne latrocinia, ne adulteria committerent, ne fidem fallerent, ne depositum appellati abnegarent.”


Enarr. in Ps. 14, 3; M. 4, 143: “. . . lingua agitur dolus, cum aliud ore profertur, aliud pectore tegitur . . .”

Enarr. in Ps. 5, 8; M. 11, 86: “. . . dolus . . . est. cum aliud agitur, aliud simulatur . . .”

45 In D. 4, 3, 1, 2.

46 Enarr. in Ps. 118; sermo 11, 6; M. 4, 1531: “. . . Ipsi primi homines per serpemtem decepti . . . non fuissent . . . nist plusquam facti fuerant esse voluissent. . . Plus enim volentes habere quam acceperant, et quod acceperant amiserunt. Cujus vestigium veritatis quae ubique dispersa est, quo institutum est, et in forensi jure deprehensum est, quo institutum est ut plus petendo causa cadat: id est ut qui plus petierit quam ei debetur, et quod ei debebatur ammittat. . . .”
according to the different period of Roman Law. At the time of Cicero it was punished by losing the claim.\footnote{Cic. De Orat. 1.} So it was in the second century after Christ in the time of Gaius.\footnote{G. 4, 58.} It was still so in the Hermogenian Code 5, at the end of the third century after Christ (294-304 A. D.). This rigor finally was corrected by a constitution of the Emperor Zeno in 486 A. D.,\footnote{C. 3, 10, 1.} and the same provision is taken by Justinian.\footnote{I. 4, 6, 24 and 32.} St. Augustine's testimony that "Plus Petitio" existed at his time, is quite important because it refers to a period in which exists a gap in the Roman Law sources, the period between the Hermogenian Code and the Constitution of Zeno, i. e., between 304 to 486 A. D. The Th. Code of 439 A. D. is silent in this matter.

**CONCLUSIONS**

From a reading of these passages of St. Augustine some conclusions naturally follow, and with these I finish.

1. St. Augustine knew Roman Law. Remember the countless number of legal terms he uses with precision; his ability in applying them in figurative sense; his art of parallelism comparing theology with law; his agility, promptitude, effectiveness of managing legal expressions; his wit. These qualities can hardly be found even in a professional jurist.

2. On the question of interference of Christianity and Roman Law, Augustine's writings show how the Church sometimes adopted and supported Roman Law conceptions even enforcing them, and sometimes took an antagonistic attitude, as evidenced in the Augustinian conception of the nature of ownership, in the prohibition of loans with interest, on the Christian reaction in matter of injuries, and so on. This evidences the effective pressure of Christianity towards the reformation of Roman Law.

3. Augustine's works furnish a sample of the rich harvest that is promised to those who engage in this comparative study of patrology and Roman Law.
4. Reading Augustine’s writings we realize how Roman Law acquaintance is very useful to understand the Fathers who make free use of legal expressions and conceptions.

5. Augustine’s works demonstrate how the writings of the Fathers are very useful to the study of Roman Law; sometimes in the field of the history of the Roman Law sources and institutions; sometimes in the field of criticism of the sources, *e. g.*, for the research of Christian interpolations, and consequently many times in matter of exegesis or interpretation of Roman Law sources.
THE USE OF STATUTORY MATERIALS IN THE TEACHING OF EQUITY*

SIDNEY POST SIMPSON †

We are concerned in this conference with the utilization of statutory materials in teaching courses in the law school other than specialized courses dealing with legislation as such. I propose to indicate briefly what some of the statutory materials relating to equity are and to make some suggestions as to how they may usefully be presented.

When I speak of the teaching of equity, I have reference to law school instruction in such topics as the nature of equity jurisdiction, specific performance of contracts, the law of vendor and purchaser as developed in the equity courts, equitable servitudes on land and chattels, specific reparation and prevention of torts, bills for an account, interpleader, bills of peace, bills quia timet, reformation, and rescission, whether taught in courses labelled "Equity" or distributed among courses on procedure, contracts, sales of land, and so forth. What I say is as applicable to equity taught piecemeal as it is to equity taught as such. I shall not consider the use of statutory materials in the teaching of trusts or mortgages.

Preliminary to a survey of the statutory materials relevant to equity teaching, it will be worth while, I think, to consider the kinds of statutes with which we have to deal in the law school curriculum.

There are the common law statutes—old English statutes which have long since become a part of the very texture of the common law itself—Quia Emptores, the Statute of Uses, the statute of Elizabeth as to fraudulent conveyances, and the like. When we encounter statutes of this sort, we teach them as part of the common law; we

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* Paper read before the round-table conference on Legislation at the annual meeting of the Association of American Law Schools, Dec. 30, 1932. The footnotes have been added.
1 Edw. II (1290).
2 27 Hen. VIII (1536).
hardly treat them as statutes at all. If, as I believe, the most important thing in dealing with statutes affecting private law is to fit them in constructively and intelligently as part of a legal order which includes both common law and legislation, these common law statutes have largely ceased to be a problem.

Then there are the codifying statutes, like the Sales Act and the Negotiable Instruments Law. Here we are dealing with statutory Restatements of the Law, and the pedagogical problem is not essentially different from that involved in dealing with the non-statutory Restatements of the American Law Institute—even with respect to the desirability of critically examining the codified rules.

At the other extreme from the common law statutes and codifications, we find statutes which in themselves create those new branches of the law, such as the Interstate commerce Act, the state public utilities acts, tax statutes, and many others. In dealing with these creative statutes, we are not—or at least we should not be—trying to fit the statute into the common law scheme, but rather attempting to work out a new ordering of some field of human activity on the basis of a creative statutory policy, although using a common law technique. Statutes of this sort are most important in the field of public law; we do not encounter them to any very great extent in equity.

The statutes with which we have most often to deal in equity fall between the codifying statute on the one hand and the creative statute on the other. Unlike the codifications, these statutes change the common law in important respects, and provide new and authoritative premises for legal reasoning; but they do not, like what I have called creative statutes, add whole new domains to the realm of the law. Perhaps we may call these corrective or amendatory statutes. An obvious example of this type of statute is the New York Arbitration Law, to which I shall revert shortly.

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5 N. Y. Cons. Laws (1920), c. 275.
It is, of course, entirely a question of degree into which of these four classes a given statute falls. Some might say that the Workmen's Compensation Acts should be classified as creative legislation adding a new domain to the law. I should prefer to regard this legislation as amendatory of that part of the common law of master and servant relating to the master's duties to his servant. But, whatever we may think as to borderline instances, it is certainly a far cry from the Statute of Uses and the Negotiable Instruments Law to the Transportation Act of 1920 and the Revenue Act of 1932. It is the intermediate types of statutes that are of primary importance in the teaching of equity.

With these considerations before us, let us consider some of the statutory materials relevant to particular topics in equity, with a view to determining their pedagogical importance. For convenience, I shall follow, in doing this, the order of topics in Ames' Cases on Equity Jurisdiction, a book which is familiar to most of you.

We start with materials dealing with what Ames called "the nature of equity jurisdiction." Perhaps a better title would be "the powers of courts of equity." How do courts of equity act? How do they enforce their decrees? Under what circumstances can they act in rem? To what extent will equity enforce the criminal law? In this part of the equity course, we find that statutes are of outstanding importance. If anyone doubts this, let him read Walter Wheeler Cook's penetrating discussion of "The Powers of Courts of Equity," published in the Columbia Law Review eighteen years ago. Statutory materials are even more important now than they were when Cook wrote. The enforcement of equitable decrees for specific performance, for rescission, and for removal of cloud on title has been revolutionized by statutes providing that such decrees shall operate in rem, either directly or through a master's deed; and legislation permitting substituted service has

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6 Supra note 2.
8 47 Stat. 169 (1932).
9 (1915) 15 Col. L. Rev. 37, 106, 228.
10 Huston, Enforcement of Decrees in Equity (1915), 13-38, 71-86.
made such statutes available in suits against non-residents.\textsuperscript{10} If, as Cook has suggested,\textsuperscript{11} equity no longer acts \textit{in personam}, this is largely because of gradual legislative changes in the powers of equity courts. Of recent years, some equity courts are coming to exercise jurisdiction \textit{in rem} without the aid of statute;\textsuperscript{12} but this result would hardly have been reached, I think, if statutes conferring such jurisdiction had not become common.

An especially striking instance of statutory influence on equity procedure is in the matter of the enforcement of money decrees. In the classical period of equity, such decrees were enforced by contempt proceedings, like any other decree, and could not be enforced by execution. Legislation permitting the enforcement of money decrees by execution is now almost universal, and, \textit{per contra}, enforcement of such decrees, other than decrees for alimony, by imprisonment for contempt is in most American jurisdictions held to violate constitutional or statutory inhibitions on imprisonment for debt.\textsuperscript{13} Obviously, students must be introduced to these statutory materials.

One topic to which some attention is given in most introductory equity courses is that of injunctions against foreign suits. Here the provisions of the United States Code\textsuperscript{14} are of importance. Unless this statute is put before the student, he is likely to get erroneous ideas as to how far a Federal court can go in restraining proceedings in a state court, before and after judgment. Certainly the text of the section and at least references to some of the more important decisions under it\textsuperscript{15} should be considered


\textsuperscript{13} Note (1928) 41 HARV. L. R. 786.

\textsuperscript{14} 36 STAT. 1162 (1911), 28 U. S. C. 379 (1926).

in any equity course which deals with injunctions against foreign suits.

The field of what may be called "criminal equity" is very largely statutory. Developments in this field have gone far beyond injunctions against common law public nuisances and purpressests at the suit of the attorney general, and beyond the rather remarkable modern extension of this line of cases in *In re Debs*,\(^{16}\) where the Supreme Court in effect added a new prerogative writ to the Federal Government's legal armory. The practice of making a particular course of conduct a "public nuisance" by legislative fiat in order to avoid the hazards to the prosecution of a jury trial has become increasingly common.\(^{17}\) Statutes of this sort raise problems of equity jurisdiction and problems of constitutional law which lend themselves well to discussion in an introductory course on equity. Then there are statutes like the Sherman Act\(^{18}\) which provide in the alternative for preventive and remedial enforcement by injunction and for punitive enforcement by indictment. Recently, still another form of "criminal equity" has grown up as a result of Blue Sky statutes enforcible only by injunction.\(^{19}\) The procedure under these statutes may be advantageously compared with the "cease and desist orders" of the Federal Trade Commission, which reach much the same result in a slightly different type of case by administrative order instead of by injunction.\(^{20}\)

Turning next to specific performance, we find here also statutory material of large importance. Section 68 of the Sales Act, providing for specific performance at suit of the buyer of specific or ascertained goods "if the court thinks fit" raises nice questions of the technique of interpreting a codifying statute.\(^{21}\) A Maryland statute pro-

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\(^{16}\) 158 U. S. 564, 39 L. Ed. 1092 (1895).

\(^{17}\) Note (1932) 45 Harv. L. Rev. 1096.


\(^{21}\) It has been held that § 68 is merely declaratory of the common law. Outters Grain Co. *v.* Grace, 239 Ill App. 285 (1925); and see Bowman *v.* Adams, 45 Idaho 217, 261 Pac. 679 (1927). *Contra:* Highbanks *v.*
viding for specific performance as a matter of right, regardless of the adequacy of the legal remedy, unless the defendant affirmatively proves his solvency or gives bond to pay such damages as may be assessed at law,\(^\text{22}\) raises questions as to the right to trial by jury, and affords a basis for discussing possible extensions of specific relief in contract cases. Conversely, statutes in terms restricting the jurisdiction of equity to cases where the remedy at law is not "full, adequate and complete," in force in several states and in the Federal courts, give rise to problems of interpreting declaratory legislation.\(^\text{23}\)

The law as to specific performance of contracts involving railroads or other public utilities has been largely affected by modern legislation of the creative type. A case like *Joy v. St. Louis* \(^\text{24}\) could hardly arise now, in view of the provisions of the Transportation Act of 1920,\(^\text{25}\) and a change in emphasis in that portion of the equity course dealing with contracts of this sort seems clearly indicated.

Perhaps the most striking example of corrective legislation amending the common law as to specific performance is to be found in arbitration statutes. The long-continued refusal of equity to enforce contracts to arbi-

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\(^{22}\) *M. Code* (1911), Art. 16, § 231; see *Neal v. Parker*, 98 Md. 254, 57 Atl. 213 (1904); *Baltimore Process Co. v. My-Coca Co.*, 144 Md. 439, 125 Atl. 179 (1924).


\(^{24}\) 138 U. S. 1, 34 L. Ed. 843 (1891).

trate\textsuperscript{26} is of greatly diminished significance in many states as the result of legislation patterned on the pioneer New York Arbitration Law.\textsuperscript{27} Some study of this statute and of the leading decisions under it\textsuperscript{28} seems to me essential if the law as to specific enforcement of contracts to arbitrate is to be taught at all.

The legality of contracts not to compete, which is necessarily dealt with, at least incidentally, in discussing injunctions to enforce negative contracts,\textsuperscript{29} has been considerably affected by statutes in several states.\textsuperscript{30} These statutes vary to such an extent that it may be impractical to teach their substantive provisions, but certainly the fact of their existence should be brought to the students' attention.

The subject of equitable servitudes is increasingly affected by legislation. The recording acts have assimilated such servitudes to legal easements in many respects, while the widespread enactment of zoning laws raises problems of the interrelation of public and private restrictions on the use of property.\textsuperscript{31} Some states, notably Massachusetts,


\textsuperscript{29} Diamond Match Co. \textit{v.} Roeber, 106 N. Y. 473, 13 N. E. 419 (1887), reprinted in part in 1 Ames, \textit{Cases on Equity Jurisdiction}, 123 1904; Carpenter, \textit{Validity of Contracts Not to Compete} (1928), 76 U. OF PA. L. Rev. 244.

\textsuperscript{30} See, for example, Okla. Stat. (1931) §§ 9492-9494.

have imposed limitations on the length of time for which private restrictions may continue; these may be compared as to policy with the established doctrine that an equitable restriction ceases to be binding when the neighborhood changes to such an extent that the original purpose of the restriction can no longer be realized. Consideration of the applicability of the Statute of Frauds to equitable servitudes brings squarely in issue the nature of such servitudes—whether they are property or contract rights—and also makes necessary an analysis of the policy basis of the Statute of Frauds itself.

Equitable conversion by contract has lost some of its former importance as a result of statutory changes in the law of descent and distribution; but it has increased in significance in consequence of statutes as to equitable dower and as to execution on equitable interests. Consideration of these latter statutes is useful to show how statutory changes have helped to make what were originally mere rights in personam into equitable property rights.

The law of vendor and purchaser has been modified by statute in important respects in many states. The much-discussed rule of Rayner v. Preston, denying the purchaser under a land contract any claim to fire insurance payable to the
vendor, even though, under *Paine v. Meller*, the risk of loss is on the purchaser, has been changed by statute in England; and this is not without significance in considering why most American jurisdictions have refused to follow the rule. Again, the unsound and harsh rule enforcing forfeitures of payments under land contracts where time is expressly made of the essence, which is followed in a majority of American jurisdictions, has been changed by statute in several states. Here we have an example of correction by legislation of a judicial error which in many states has become too firmly entrenched to be corrected by the courts themselves.

The subject of part performance of oral land contracts is of interest as showing an early practice of restrictive construction of an unpopular statute, and a later tendency to an interpretation more in accord with the policy behind the statute when that policy came to be more fully appreciated by the courts. Here we have an excellent opportunity to study secular changes in theories and methods of statutory interpretation.

The unfortunate effects of premature codification are illustrated by the experience of California, where the early and unsound rule that lack of "mutuality of remedy" compels the denial of specific performance has been embodied in the Civil Code. This has prevented the courts of California from following the modern trend away from this wholly unnecessary restriction on equitable relief in con-

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38 6 Ves. 349 (1801).
41 2 Williston, *Contracts* (1920), § 791. Extreme cases of this sort are Heckard *v.* Sayre, 34 Ill. 142 (1874) and Doctorman *v.* Schroeder, 92 N. J. Eq. 676, 114 Atl. 810 (1921). Compare the more equitable English rule as enunciated in Steedman *v.* Drinkle [1916], 1 A. C. 275.
tract cases toward the sound doctrine of reasonable mutuality of performance as enunciated by Ames and liberalized by Gilbert and Cook. Recent legislation making possible the specific enforcement in California of crop contracts with farmers' cooperatives in spite of the "mutuality" objection illustrates the tendency of American legislatures to deal with difficulties in procedure, when brought into public notice, by ad hoc legislation rather than by carefully worked out reformatory measures.

Bills for an account may be compared to advantage with statutory procedures providing for compulsory references and for the taking of accounts in actions at law. It seems probable that legislative reforms of common law procedure will before many years make it unnecessary to study bills for an account at all in the equity courses, just as legislation as to taking testimony by deposition and as to examination before trial has rendered obsolete the learning as to the auxiliary jurisdiction of equity.

The statutory materials of importance in the study of specific relief against torts relate, for the most part, to the enforcement of injunctions. Legislation as to jury trial in contempt proceedings raises serious questions of constitutionality and policy, and illustrates the inherent difficulties of combining efficiency of administration with indubitable impartiality in cases raising contentious issues. Legislation permitting a court of equity to award damages in addition to, or in lieu of, an injunction, is increasingly important, and these materials must be presented if the student is to learn the equity of today and not merely the equity of Lord Eldon's time.

The vexed problem of equitable relief against defamation is illuminated by the unsuccessful attempt of the legislature of Minnesota to use the equity courts as censors

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of the press;" this may well be compared with the revival of "criminal equity" in connection with the enforcement of statutes of California and Kansas directed at the advocacy of so-called "criminal syndicalism." Equitable relief against threatened injuries to interests of personality other than reputation is affected on the substantive side by legislation creating or extending rights of privacy, and cannot be studied without some consideration of statutory materials.

Interpleader, particularly in the Federal courts, has been largely affected by legislation, as a reading of Cha-fee's recent articles in the *Yale Law Journal* will show. State statutes in some jurisdictions have eliminated at least part of the unnecessary technicalities which many of the courts of this country, blindly following Pomeroy, set up as bars to relief in meritorious cases; in other words, the legislatures have done what the courts might better have done themselves. The relevancy of these materials to any law school study of interpleader is obvious.

The technical requirements of bills *quia timet* have in some states been modified by statute in such a way as to make this remedy more useful. But by far the most important statutory materials which should be considered in studying the *quia timet* jurisdiction of equity are the Declaratory Judgment Acts. These statutes are really a legislative extension of the power of the courts of equity to give relief against "peril and insecurity," as Borchard puts it; and they can, I think, be most fruitfully studied in connection with the classical *quia timet* jurisdiction.

Any attempt to teach equity pleading and practice would
necessarily involve a considerable use of statutory materials, including rules of court promulgated under statutory authority. Perhaps some acquaintance with the Federal Equity Rules should be acquired by the students in an introductory equity course, as well as enough knowledge of classical equity procedure to make possible an understanding of the classical substantive precedents; but I doubt whether it would be worth while to go further, unless it be in those law schools which are training for the practice of law in a particular jurisdiction. If anything more than the essential minimum of equity procedure is to be taught, it must be taught largely on the basis of statutory and analogous materials.

This review of the more important statutory materials relevant in the teaching of equity clearly brings out, I think, the large importance of those materials, and indicates something as to how far they should be made use of in the equity courses.

There are several distinct objects, I suppose, in presenting statutory materials in any law school course. In the first place, it is obviously important that the students of any subject shall have some idea as to the more important changes in the common law which have been brought about by legislation. In this respect, the purpose of presenting statutory materials is no different from the purpose of presenting case materials. Second, the teaching of statutory materials impresses on the student that there are such things as statutes, and that statutes are part of the law—an essential factor in the growth of the law—and are not to be disregarded as alien interlopers, nor "construed" out of effective existence. Third, the use of such materials throughout the law school curriculum affords an excellent opportunity to teach the interpretation of corrective or amendatory statutes as, in my judgment, it should be taught—not as a process of applying formal rules of construction to the words of the legislature in order to ascertain an often mythical "legislative intent," 53 but rather as the art of fitting statutory and com-

53 Gray, Nature and Sources of the Law, (2nd ed. 1921) 172-173; Radin, Statutory Interpretation, (1930) 43 Harv. L. Rev. 863; cf. Landis, A Note on "Statutory Interpretation," (1930) 43 id. 886;
mon law principles and rules into a coherent, and, so far as may be, consistent scheme for the ordering of human affairs by law. This method of interpretation can, I believe, be taught more effectively when the statutory materials are presented in appropriate relation to their common law background than in a separate undergraduate course on legislation. Finally, consistent emphasis on statutory materials in the law school should stimulate ultimate activity by law school graduates in the important field of reformatory legislation, and should tend to develop the ability competently to draft such legislation.

To achieve these objects so far as the equity courses are concerned, it would seem to be desirable: First, that enough such materials be presented to give the student facility in dealing with them and to impress him with their importance; second, that the text of the more important statutes be given in the case book used with sufficient fullness to afford a basis for detailed study; third, that enough cases involving interpretation of statutes be read and discussed in the classroom to give the student some concrete idea as to how courts deal with problems of statutory construction; and fourth, that a considerable amount of classroom time be devoted to statutory materials—probably more in proportion to their substantive importance than is devoted to common law materials. Statutes, as Llewellyn has well pointed out in the preface to his Cases on Sales, require a very different technique of study and teaching than do cases. By the time the student comes to the equity courses, he has considerable acquaintance with case-study methods, but very little with the technique of studying statutory material of the corrective or amendatory type. If he is to develop the latter technique, time and attention must be devoted to problems of statutory interpretation as well as to the substantive changes which legislation has made in the common law. In other words, the course in equity must become in part a course on legislation, and the statutory materials must be taught in a double aspect. The

Horack, In the Name of Legislative Intention, (1932) 38 W. Va. L. Q. 119.

use of legislative materials in this way should have the desirable effect of rendering the students' thinking about equity problems more flexible and less bound by conceptualistic dogmas.

What I have said about the use of statutes in the teaching of equity is for the most part, I suspect, in point as to the use of statutes in teaching other law school subjects. I am impressed with the idea that most statutory materials can be best taught in the regular law school courses rather than in special undergraduate courses on legislation, provided that the teachers of the regular courses will devote adequate time and thought to teaching those materials; and I am firmly convinced that this is true as to the statutory materials relevant to the equity courses. It is quite clear, in any event, that no course on equity can be adequately taught today without an increasingly large emphasis on legislation as the most important present method of growth on the equitable side of the law.
Questions involving anti-trust laws, Federal and State taxation, bank deposits, contempt of court and railroad regulation were included by the Court in the decisions announced on March 13th.

Heralded as the most important decision economically, to be rendered in the past few years and which purports to relieve the depressed bituminous coal industry, the Court in the so-called Appalachian Coals case\(^1\) declared that the cooperative endeavor of independent dealers in the bituminous coal industry to stabilize business through the formation of exclusive regional sales agencies does not necessarily constitute an unreasonable restraint of trade nor result in violation of the Sherman Anti-trust Act. In the government's brief it was urged that the

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\(^1\) Appalachian Coals, Inc. v. United States, No. 504, Oct. Term, 1932.
evidence presented in the case supported the findings of the District Court that the appellant's plan eliminated competition among themselves and fixed uniform prices at which their products would be offered for sale, also that it gave the selling agency power substantially to affect and control the price of bituminous coal in many interstate markets. The government also contended that the Sherman Act must be interpreted so as to effectuate its policy and purpose; that Congress, in prohibiting restraints of trade and monopolies, adopted the view that the public interest was best served by the maintenance of free competition, and the courts, in construing the Act, may not adopt other criteria of the public interest; that furthermore the sales agency plan will not remedy the basic problems of the bituminous coal industry. In rejecting these arguments the Court announced the rule that: "a cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, when the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competition." The Court further pointed out that the question of the application of the statute is one of interest and effect, and is not to be determined by arbitrary assumption. That it is therefore necessary to consider the economic conditions peculiar to the coal industry and the probable consequence of the carrying out of the plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal. Since the case was tried in advance of the operation of the sales agency plan the court limited its decision by declaring that if in actual operation the plan should prove to be an undue restraint upon interstate commerce—if it should impair fair competition, the present decision would not preclude the government from seeking the remedy which would be suited to the facts.

Injunction proceedings by a transfer company against several interstate railroads was held to be precluded by section 16 of the Clayton Anti-trust Act, which provides that the Government only may sue a common carrier subject to the Interstate Commerce Act for alleged violations of the Sherman Act. The railroads had employed several transfer companies, among them the petitioners, to transfer freight between "off-track" and "on-track" stations. Later the carriers, in the interest of economy and efficiency agreed that another transfer company was to have the exclusive right to haul the freight. The petitioner contended that this second contract created a forbidden monopoly in restraint of interstate commerce. The court pointed out that there was no way by which the contract itself could be assailed by injunction except by restraining acts done in performance of it. That, in the present case, is precluded by the statute, not because the agreement is within the jurisdiction of the Interstate Commerce Commission, but because the acts done in performance of it, which must necessarily be enjoined if any relief is given, are matters subject to the jurisdiction of the I. C. C.

In another railroad case the court ruled that, when the plaintiff had elected to seek relief by proceedings before the Interstate Commerce Commission to recover reparations from a railroad for unjust discrimination in the supply of coal cars, in a suit based on the same claim in the Federal court, to enforce the reparations award, the claimant may not recover an amount greater than the award made by the Commission.

A positive misstatement by a prospective juror on her voir dire examination, in declaring that her mind was free

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from bias and a concealment of her prior employment with a company of which the defendants in a criminal case were officers, was held sufficient cause for her to be adjudged in contempt of court. In rendering the decision, Justice Cardoza quoted White, C. J., in *Ex parte Huddings*: "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is . . . the characteristic upon which the power to punish for contempt must rest." The court, reasoning along, stated that the petitioner is not condemned for concealment, though concealment had been proved. She is not condemned for false swearing, though false swearing had been proved. She is condemned for making use of false swearing and concealment to accomplish her acceptance as a juror and under cover of that relation to obstruct the course of justice.

Invoking section 3466 of the Revised Statutes, the guardian of a mentally incompetent veteran who had deposited war risk insurance and disability compensation funds in a bank contended that priority should be awarded his claim when the bank became insolvent in that the money deposited constituted money of the United States to which the bank was indebted under the statute. In rejecting the contention that the claim was a preferred one against the bank's assets the court opined that the guardian, appointed by the county court was by the laws of the State given the custody and control of the personal estate of his ward and was authorized to collect and receive the money in question; that unquestionably payment to the guardian vested title in the ward and operated to discharge the obligation of the United States in respect of such instalments.

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7 Clark *v.* United States, No. 531, Oct. Term, 1932.
8 249 U. S. 378, 383, 63 L. Ed. 656 (1919).
12 Taylor *v.* Bemiss, 110 U. S. 42, 45, 28 L. Ed. 64 (1884); Lamar *v.* Micou, 112 U. S. 452, 472, 28 L. Ed. 751 (1884); Maclay *v.* Equitable Life Assurance Society, 152 U. S. 499, 503, 38 L. Ed. 528 (1894).
In a suit brought by the cities of Baltimore and Annapolis which challenged the validity of a statute of Maryland whereby the property of a particular railroad was made exempt from taxation for two years, the Court upheld the constitutionality of the statute on grounds of public policy. The contention of the cities that the exemption was a denial to them of the equal protection of the laws in violation of the Fourteenth Amendment was disposed of by the Court stating that new conditions must be cared for by new laws. Sometimes the new conditions affect the members of a class. If so, the correcting statute must apply to all alike. Sometimes the new conditions affect one or only a few. If so, the correcting statute may be as narrow as the mischief. The Constitution does not always prohibit special laws but permits them when there are special evils with which existing general laws are incompetent to cope and the special public purpose will then sustain the special form. The Court added that the whole question was one of legislative policy with a wide margin of discretion conceded to the lawmakers and only in cases of plain abuse will there be a revision by the court.

A beneficiary of a trust cannot deduct in his income tax return the loss on the sale of a building which was part of a trust estate. Such a loss, the Court held, falls upon the trust estate since the ownership of the building was at the time of the sale in the hands of the executors of the testamentary trust.

Gasoline, which is "used or sold" by an air transport company and is imported from outside the state and stored in tanks at airports for use in filling interstate airplanes, is subject to a license tax levied by a Wyoming

14 Md. Acts 1931, c. 497: "An Act to exempt the railroad property of the Washington, Baltimore and Annapolis Electric Railroad Company, or so much thereof as may be used for railroad purposes by said company, its receiver, successors and assigns, from all State Taxes and charges, including contributions to the cost of construction of railroad crossings made or to be made under the authority of the State Roads Commission, and from all county and city taxes and charges in the nature of a tax for the years during which the property is so used, but not exceeding two years beginning January 1, 1931."

15 Anderson, etc. v. Wilson, Nos. 460-1, Oct. Term, 1932.
statute, declared the Court in denying the contention of the respondents that it imposed an unconstitutional burden on interstate commerce. The Court fortified its opinion in saying that the tax was not levied upon the consumption of gasoline in furnishing motive power for the interstate planes. The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. For the purposes of the tax it is at the time of withdrawal alone that "use" is measured.

W. T. C., JR.

16 Wyo. Laws, 1929, c. 14, amending Laws of 1929, c. 139; Laws of 1927, c. 70; Laws of 1925, c. 89; Laws of 1923, c. 73.


THE NATIONAL BANKING HOLIDAY PROCLAMATION

ON March 6, 1933, the President of the United States issued a proclamation which, by its terms, suspended all "banking transactions" throughout the United States during the four days immediately following its issuance. Such an exercise of power by the Executive stands without parallel or precedent in the history of this Nation, and to students of the law, it presents many interesting questions.

The foremost of these questions is: Was there any power vested in the President which would sustain his action? That no such power is granted to the President by the Constitution is beyond question. An examination of the proclamation discloses the recital that it is issued by virtue of the authority vested in the President by the Act of Congress of October 6, 1917 as amended. Subdivision (b) of Section 5 of that act as amended by the Act of Congress of September 24, 1918 provides:

"That the President may investigate, regulate or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange and the export, hoarding, melting, or earmarkings of gold or silver coin or bullion or currency, transfer of credit in any form (other than credits relating solely to transactions to be executed wholly within the United States), and transfers of evidences of indebtedness or of the ownership of property between the United States and any foreign country, whether enemy, ally of enemy or otherwise, or between residents of one or more foreign countries, by any person within the United States; . . ."

A consideration of the constitutionality and present effect of that statute necessarily follows.

While this particular section of the Act has never been subjected to judicial consideration, many others have and without exception, they have been held to be constitu-

2 40 Stat. 964 (1918).
tional,\(^3\) and since similar delegations of power in the same as well as other acts have been sustained, it is probable that the Supreme Court would hold it to be constitutional.\(^4\)

While it has been held that the Act is strictly a war measure and finds its sanction in Article I, Section 8, clause 11 of the Constitution,\(^5\) it has also been held that the Act was not repealed or otherwise affected by the Armistice, the Joint Resolution of Congress of March 3, 1921,\(^6\) the Peace Resolution of Congress of July 2, 1921,\(^7\) or the Proclamation of Peace by the President on August 25, 1921.\(^8\) It was expressly provided in the Joint Resolution of March 3, 1921\(^9\) that the Act of October 6, 1917\(^10\) and all amendments thereto should be excepted from the operation and effect of that resolution, and the Peace Resolution of July 2, 1921\(^11\) provided that nothing therein contained should be construed as repealing, modifying or amending that exception. In sustaining this exception the Supreme Court of the United States in its opinion delivered by Mr. Justice McKenna, said:\(^12\) "A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of the conflicts in the field. The power which declared the emergency is the power to declare its cessation, and what the cessation requires. The power is legislative." But if this proposition is sound,


\(^4\) Hampton \textit{v.} United States, 276 U. S. 394, 72 L. Ed. 624 (1928).

\(^5\) Stoehr \textit{v.} Wallace, \textit{supra} note 3.

\(^6\) 41 \textit{Stat.} 1359 (1921).

\(^7\) 42 \textit{Stat.} 105 (1921), 12 U. S. C. 991 (1926).

\(^8\) Commercial Trust Co. of N. J. \textit{v.} Miller, \textit{supra} note 3.

\(^9\) \textit{Supra} note 6.

\(^10\) \textit{Supra} note 1.

\(^11\) \textit{Supra} note 7.

\(^12\) \textit{Supra} note 8.
does it not follow that Congress, by failing to declare the cessation of a war ended in fact, and failing to repeal measures which were valid only because of the existence of a state of war at the time of their enactment, could continue its exercise of the war power without limit or restraint? Is it not possible that the States of the Confederacy might still be governed by the military under the "Reconstruction Act"\(^\text{13}\) of post Civil War times, or that Congress might have continued its War Time Prohibition Act\(^\text{14}\) without benefit of the Eighteenth Amendment, or still control and regulate the distribution and prices of food and fuel, and seize and operate railroads, mines, ships, the telephone and telegraph and practically all industry as was actually done during the World War? That such a condition would not be tolerated by the courts seems manifest. On this point Willoughby in his work "Constitutional Law of the United States"\(^\text{15}\) says that "undoubtedly the courts would refuse to recognize the validity of a flagrant abuse of this authority." In this statement he has some support in a later opinion\(^\text{16}\) by Mr. Justice Holmes of the same Court, to the effect that "a law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."

But it is possible that the cases in which these apparently conflicting opinions were expressed may be distinguished. The former opinion was rendered in a case involving the act under discussion here which as a war measure, depends upon a political situation, while the latter opinion was delivered in a case involving the Emergency Rent Law for the District of Columbia\(^\text{17}\) which was passed in exercise of the power of Congress over the District of Columbia by virtue of Article I Section 8 of the Constitution; and since that is in the nature of police power, the validity of laws made in its exercise.

\(^{13}\) 14 Stat. 428 (1867).

\(^{14}\) 40 Stat. 1046 (1918).

\(^{15}\) (2d ed. 1929) 1573.

\(^{16}\) Chastleton Corporation v. Sinclair, 264 U. S. 543, 68 L. Ed. 841 (1924).
depends upon facts as distinguished from political matters. But if a distinction is taken on this ground, will it not result in the subjection of Constitutional guarantees and substantive rights to a rule of evidence which requires the courts to take judicial notice of legislative *faits* as true even though they are known to be false in fact? But in any event, it is well settled that the exercise of the war power by Congress is not confined to times when a state of war exists, but the constitutional restraints and limitations on the exercise of this power have not been determined judicially but remain matters of conjecture.

But conceding that this Act of Congress and its amendments are constitutional and still in full force and effect, was the proclamation of the President restricted to an exercise of the authority granted to him?

It is true that the Supreme Court of the United States has held that "the law should be liberally construed to give effect to the purpose it was enacted to subserve" but can any reasonable construction of this statute authorize the President to proclaim an enforced suspension of all banking transactions? The Act expressly excepts from its operation and effect transfers of "credits relating solely to transactions within the United States." In this connection it is interesting to note that this exception was not reenacted in the Act of Congress of March 9, 1933, which "approves and confirms" the acts of the President "heretofore or hereafter taken" since March 4, 1933, but on the contrary, that statute expressly authorizes "the investigation, regulation or prohibition of transfers of credit between or payments by banking institutions as defined by the President." It may be conceded that the terms of the proclamation were effectual in accomplishing its purpose, wise, or even necessary to the welfare of the Country, but unless the power to employ such measures was granted, the Proclamation, in part at least, was an unconstitutional usurpation of power, for the proclamation not only incidentally interfered with transactions

17 41 Stat. 298 (1919).
19 *Supra* note 1.
of the excepted class, but one of its primary purposes was to prevent transactions of that nature.

Neither the Proclamation nor actual existence of an emergency can create in the President a power which he did not possess before. "An emergency may not call into life a power which has never lived though emergency may afford a reason for the exertion of a living power already enjoyed. But the doing of one thing which is authorized cannot be made the source of an authority to do another thing which there is no power to do."

That an executive order made without power vested in the President by the Constitution or granted by Congress is wholly invalid and without effect was settled as early as 1804 by the Supreme Court of the United States in Little et al. v. Barreme et al. That case arose out of an Act of Congress and presidential order very closely analogous to those under discussion here. In 1799, just ten years after the conclusion of the treaty of peace between the Colonies and England, a state of open hostility existed between the United States and France but there was no formal declaration of war. By an Act of Congress of February 9 of that year the President was authorized "to give instructions to the commanders of the public armed ships of the United States to stop and examine any ship or vessel of the United States on the high seas... and if upon examination it shall appear that such ship or vessel is bound or sailing to any port of the French Republic... it shall be the duty of the commander of such public armed vessel... to seize every such ship or vessel...." Under this Act of Congress, President Jefferson ordered the seizure of vessels bound to or from ports of the French Republic. Captain Little, an officer of the United States Navy, obeyed the order of his commander-in-chief and seized a ship outward bound from a French port. For this seizure he was sued for damages and he pleaded the order of President Jefferson in defense. In characterizing the order of President Jefferson, Mr. Chief Justice Marshall in delivering the opinion of the Supreme

22 2 Cranch 170, 2 L. Ed. 243 (1804).
23 4 Stat. 244 (1799).
Court, said: "It was so obvious, that if only vessels sailing to a French port could be seized on the high seas, that the law would be very often evaded, that this Act of Congress appears to have received a different construction from the Executive of the United States; a construction much better calculated to give it effect." Nevertheless the Court held that the good purpose and the wisdom of the President in issuing the order could not justify the exercise of power not granted or the acts of Captain Little done in pursuance of the unlawful order.

Since the issuance of the "Bank Holiday Proclamation" Congress has passed an Act (March 9, 1933) which purports to "approve and confirm" it. This raises two new questions: First, has Congress the power to enact legislation of this nature; second, can it be made retroactive so as to validate a prior unauthorized act?

In *McCulloch v. Maryland* the Supreme Court held that Congress had the power to create a bank and that this power was to be implied from the express powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. That power was held to be great enough to permit the protection of the bank from interference by the State through the exercise of the sovereign power of taxation. Can such a power be insufficient to permit the preservation of a complex and universally interdependent State and Federal banking system from destruction by public hysteria and fear?

The power of Congress to "approve and confirm" an Act done without authority is the only point remaining for consideration. That power has been exercised and recognized by the courts since 1832. It is settled beyond doubt that such power exists subject to the single qualification that it may not be exercised to disturb vested rights.

It is unfortunate that students of the law probably will

24 4 Wheat, 316, 4 L. Ed. 579 (1819).
26 The Prize Cases, 2 Black 635, 17 L. Ed. 459 (1863); Mitchell v. Clark, 110 U. S. 663, 28 L. Ed. 279 (1884); Tlaco v. Forbes, 228 U. S. 549, 57 L. Ed. 960 (1913).
be denied the satisfaction of a judicial determination of the questions discussed here but their misfortune is overbalanced by the fact that it is the very salutary effect of the Proclamation which makes that judicial determination improbable.

R. S. B.

RELIEF WITHOUT ADJUDICATION—THE NEW BANKRUPTCY LAW

On March 3, 1933, the President approved a Bill amending the Act of July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," and Acts amendatory thereof and supplementary thereto. This latest amendment was designated Chapter 8 and entitled "Provision for the Relief of Debtors." It consists of four sections from 73 to 77, inclusive. The additional chapter was intended, as the title indicates, for the relief of debtors and under its provisions such relief can be granted without an adjudication in bankruptcy and without the debtor ever being declared a bankrupt. Obviously, it was the intention of Congress to afford the opportunity to embarrassed debtors to liquidate their assets and arrange for a pro rata disposition of their creditors without attaching to their reputation the stigma of "bankruptcy."

The Amendment is quite detailed and specific and consists, as has been stated, of four sections. It is intended here to enumerate the more interesting and important provisions of each section. Section 73 confers upon the courts of bankruptcy original jurisdiction in proceedings for the relief of debtors, as provided in Sections 74, 75, and 77 of the Act. Section 74 applies to any person except a corporation. Under its provisions any debtor, with the exception mentioned, may file a petition in the bankruptcy

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1 Public, No. 420, 72d Cong. 2d Sess.
3 32 Stat. 797 (1903); 34 Stat. 267 (1906); 36 Stat. 838 (1910); 39 Stat. 999 (1917); 42 Stat. 354 (1922); 44 Stat. 662 (1926).
court stating that he is insolvent or unable to pay his debts as they mature and that he desires to affect a composition or an extension of time to pay his debts. In the case of an involuntary petition, the debtor may in his answer, admit the allegations and state that he desires to effect a composition or an extension. Upon the filing of such petition or answer the judge shall enter an order either approving it as properly filed under this section, or dismissing it. If the petition or answer is approved, there shall be no order of adjudication as in ordinary cases. The matter, however, is immediately in the hands of the court and it may impose such terms in staying the action as it deems necessary. Any person by or against whom a petition is filed shall be referred to in the proceedings under this section as "debtor" instead of "bankrupt." Provision is made for the appointment of a custodian or receiver, the giving of notice to creditors, the filing of schedules, the nomination of a trustee by the creditors, and the fixing of a reasonable time by the Court within which application for confirmation shall be made. Paragraph (e) provides that an application for the confirmation of a composition or an extension proposal may not be filed unless it has been accepted in writing by a majority in number and a majority in amount of the claims against the debtor. The court is authorized to confirm the extension proposal if satisfied that (1) it includes an equitable and feasible method of liquidation for secured creditors whose claims are affected and of financial rehabilitation for the debtor; (2) it is for the best interests of all creditors; (3) that the debtor has not been guilty of any acts or omissions which would be a ground for denying his discharge; and (4) the offer and its acceptance are in good faith. Upon its confirmation, an extension proposal shall be binding upon the debtor and his secured and unsecured creditors affected thereby, with the provision, however, that such extension or composition shall not reduce the amount of or impair the lien of any secured creditor, but shall affect only the time and method of its liquidation. Upon the confirmation of a composition the consideration shall be distributed as the court shall direct, and the case dismissed. Upon the confirmation of
an extension proposal the court may dismiss the proceeding or retain jurisdiction of the debtor and his property during the period of the extension in order to protect and preserve the estate and enforce the terms of the extension proposal. The judges of the courts of bankruptcy are authorized to appoint sufficient referees to sit in convenient places to expedite the proceedings under this section. It is obvious from an analysis of the provisions of this section that it was the aim of the framers of the measure to provide safe relief for the debtor and at the same time to protect as far as possible, both the secured and unsecured creditors. It is to be hoped that a careful administration of the law will prevent it from working any great hardship upon the creditor and will at the same time enable many distressed debtors to recover somewhat from the shocking conditions which confront them.

Section 75, entitled "Agricultural Compositions and Extensions," is intended to apply only to the farmer. It gives the bankruptcy courts authority upon petition of at least fifteen farmers within any county, who certify that they intend to file petitions under this section, to appoint for such county one or more referees to be known as conciliation commissioners. Persons engaged in dealing with farmers are not qualified to act as conciliation commissioners. The duties of the commissioner under the section are to call meetings of the creditors, to fix the time within which application for confirmation shall be made, and to assist the farmer, if so requested by him, in preparing and filing a petition under this section and "in all matters subsequent thereto arising under this section." The provisions of this section are, in the main, similar to those enumerated in the preceding section relative to individual debtors.

The Bankruptcy Act of July 1, 1898, as amended by the

5 Paragraph (r) is as follows: "For the purpose of this section and section 74, the term 'farmer' means any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such farming operations occur."

6 Supra, note 2.
Act of June 25, 1910,7 provided: "Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt." Thus prior to the adoption of this Amendment, financially distressed railroad corporations could not resort to the bankruptcy laws for relief. Section 77, while not providing for the adjudication of a railroad corporation as a bankrupt, provides that any railroad corporation8 may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition must be filed with the court in whose territorial jurisdiction the railroad corporation, during the preceding six months or the greater part thereof, has had its principal executive or operating office, and a copy of the petition shall, at the same time, be filed with the Interstate Commerce Commission. The operation of this section is by its very title restricted to railroads engaged in interstate commerce. In the case of a railroad, which, although lying wholly within one State, is engaged in interstate commerce, the proceedings shall be brought in the Federal district court within the State in which the railroad is located. Provision is also made that in the absence of the filing of a petition for reorganization by railroad corporations, the creditors of any such corporation having claims or interests aggregating no less than 5 per cent of all the indebtedness of such corporation, as shown in the latest annual report which it has filed with the Interstate Commerce Commission at the time when the petition is filed, may, subject to first having obtained the approval of the Commission, after hearing, upon notice to such railroad corporation, file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is in-

8 Paragraph (r) defines the term "railroad corporation" as used in this Act as "any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment."
solvent or unable to pay its debts as they mature and that such creditors propose that it shall effect a reorganization. It is then incumbent upon the railroad corporation, within 10 days after such service to answer the petition. A plan of reorganization must, under this section, modify or alter the rights of creditors generally, or any class of them, secured or unsecured, and may in addition modify the rights of stockholders generally, or any class of them; it may also provide for the transfer of the assets to a new corporation, and the issuance of securities for cash, or for existing securities, or in satisfaction of claims or rights. Upon approving the petition as properly filed the judge may, under subdivision (c) of this section, appoint a temporary trustee or trustees, recommended by the Interstate Commerce Commission, which trustee or trustees shall have the power, subject to the judge’s control and the jurisdiction of the Interstate Commerce Commission, to operate the business of the railroad corporation. Permission for creditors to be heard is also provided in this section. If a plan for reorganization is not proposed within such reasonable time as the court may, upon cause shown and after considering any recommendation which has been filed by the Interstate Commerce Commission, allow, the Court may dismiss the proceeding. Before creditors and stockholders of the debtor are asked finally to accept any plan of reorganization, the Interstate Commerce Commission shall hold a public hearing, hear the proposed plans and shall render a report in which it shall recommend a plan (which may be different from any proposed) that will, in its opinion be equitable, non-discriminatory and which will be compatible with the public interest. The plan thus recommended by the Commission is to be submitted to the creditors and stockholders of the debtor for acceptance or rejection. The plan must be accepted in writing by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims or interests would be affected by the plan. This acceptance is also required of two-thirds of the stockholders, unless the corporation has been found to be insolvent, or that the interests of the stockholders will not be adversely affected by the plan, or that the corporation has pursuant
to authorized corporate action accepted the plan, and its stockholders are bound by such acceptance. After acceptance by the necessary creditors and final approval by the Interstate Commerce Commission, the plan is to be submitted to the court for confirmation. It is evident from the general context of this section that Congress intended to make use of the expert knowledge of the Interstate Commerce Commission in working out the reorganization of the railroad corporations which may be in financial distress so as to protect both debtor and creditor and to reduce the expense and delay of administration.9

Probably the most interesting point raised by the Act is whether Congress has power under the Constitution to provide for adjustments of the affairs of debtors and creditors without adjudging the debtors "bankrupts." The authorities seem to sustain the power.10 The broad powers of Congress over the relations between debtors and their creditors was defined by Chief Justice Fuller in Hanover National Bank v. Moyses.11 The Court quotes from Mr. Justice Story as to "what laws are to be deemed bankrupt laws within the meaning of the Constitution:" 12

"Attempts have been made to distinguish between bankrupt laws and insolvent laws. For example, it has been said, that laws which merely liberate the person of the debtor are insolvent laws, and those which discharge the contract are bankrupt laws. But it would be very difficult to sustain this distinction by any uniformity of laws at home or abroad. . . . It is believed that no laws ever were passed in America by the Colonies or States, which had the technical denomination of 'bankrupt laws.' But insolvent laws quite coextensive with the English bankrupt system in their operations and objects have not been infrequent in Colonial and State legislation. No distinction was ever practically or even theoretically attempted to be made between bankruptcies and insolvencies. And an historical review of the Colonial and State legislation will abundantly show, that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to bankrupt laws."

10 In re Klein, 1 How. 277, 11 L. Ed. 130 (1843).
11 186 U. S. 181, 46 L. Ed. 1113 (1901).
12 Story, Commentaries on the Constitution, Chap. XVI, sec. 1111.
Thus it is quite clear that the subject of bankruptcies in the Constitutional sense is equivalent to the whole subject of insolvencies, and that distinctions of terminology are beside the point. In *In re Reiman*, the exact question presented by the new Amendment was raised and disposed of. In that case, an Amendment of 1874 to the Bankruptcy Act of 1867 made provision for compositions whether or not an adjudication in bankruptcy had been had. The debtor in such proceedings was referred to as a “debtor,” although the word “bankrupt” was used in the other sections of the Act. This is that precise distinction made in the present Amendment between debtors on one hand and bankrupts on the other. The constitutionality of the provision was attacked and upheld. The Court defined the “subject of bankruptcies” as follows:

“It is not, properly, anything less than the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief.”

Thus it is concluded that since the Amendment provides for the distribution of the property of insolvent debtors, and for their discharge, it has to do with the “subject of bankruptcies;” that the particular forms of the proceedings and the terminology employed have no constitutional significance; and that, specifically, the distinction drawn between “debtors” and “bankrupts” is within the power of Congress and has already been considered and upheld by the courts.

G. A. C., JR.

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14 18 Stat. 178 (1874).
15 14 Stat. 517 (1867).
16 Under section 12 of the present Bankruptcy Act there is a similar provision authorizing compositions without adjudication in bankruptcy. It would seem that this section is superseded by the new Amendment.
17 Memo. Solic. Gen. for the use of the Committee on the Judiciary.
THE COMMERCE POWER AND HOURS OF LABOR

As the profusion of emergency laws with their novel legislative features continue to appear during the present session of Congress one is prompted to put this question: Does a period of economic stress provide occasion for the strained constitutional interpretation? Perhaps the answer is that it does not. But certainly economic stress mothers the inventiveness of our legislators. With each new need the constitutional powers give evidence of expanding under the guidance of Congressional interpretation, if such an unorthodox descriptive term may be employed.

The proposed law to prohibit from interstate commerce, for a period of two years, commodities of industrial manufacture produced by labor employed for more than five days a week or six hours a day provides an example of such Congressional interpretation of its own powers in relation to the power to regulate commerce among the States. In its present form the Bill is a penal measure which affects articles or commodities of any "mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment in the United States" and contains a clause making possible exemption for industries which can satisfactorily prove the existence of special work conditions. Specific exceptions are made in the case of canneries handling perishable food stuffs and in the case of the commodity, milk. Executive and clerical employment are expressly excluded from the operation of the suggested law. It is intended by the drafters of the law that agricultural and railroad labor are not to be included among the workers whose hours will be affected.

The political implications of the law are not matters for comment in these pages. The economic importance of the Bill, should it become law, need not be enlarged upon. The broad economic aspects of the Bill are obvious. It is a matter of conjecture whether the Bill will ever become law or whether it may become law after modification. But the question of the constitutionality of the measure is open for discussion. The arguments upholding the constitu-

1 S. 158, 73d Cong. 1st Sess.
tionality of the measure as put forth on the floor of the Senate will be set down in brief form.²

The Bill in its introductory paragraphs declares that the unemployment situation of the country constitutes an emergency and relates that the Bill is intended as emergency legislation. For this reason the operation of the law would be limited to two years. From this fact of the existence of an emergency the proponents of the Bill conclude that the measure would not be declared unconstitutional by the Supreme Court. Without stopping to point out any emergency power given to Congress in the Constitution, the proponents of the Bill look to the attitude of the Supreme Court in the past in sustaining legislation enacted by Congress under the pressure of time and circumstance. Temporary legislation suspending the provisions of rental contracts during a war-time inflation of rents has been sustained although the law apparently impaired the obligations of the contracts.³ The Adamson eight-hour law for railway labor which required the maintenance of the payment of wages without reduction was sustained in spite of the fact that it is understood that Congress does not have the constitutional power to provide minimum wage legislation.⁴ Certain pronouncements of the Court in its decisions sustaining such emergency measures have been very strong. Thus it was stated that, "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."⁵ Reasoning by analogy and from language of the Court the present Bill, limited as it is to a two-year period of duration, seeks to alleviate the condition of twelve million men whose continuance in a state of poverty is a source of social, economic and, if one considers recent European upheavals, governmental stability. For such a purpose it may well be adjudged an exercise of Congressional power under the stress of pressing national need.

² 77 Cong. Rec. 1105-1121 (1933).
⁵ Block v. Hirsh, supra, p. 156.
But emergency or no emergency, the sponsors of the Bill believe it to be constitutional as an exercise of the power to regulate commerce among the States. Looking at the constitutional power of the Congress over commerce from an historical point of view it is recalled to mind that one of the chief reasons for the meeting of the Constitutional Convention and the framing of the document was the purpose to confer upon a strong central government a plenary control over commerce and thus to overcome the chaotic condition of trade which resulted from the petty conflicts among the States and from the harsh competitive practices of their uncontrolled citizens. Today we face a stagnation of commerce which finds its roots in a technological advance which has displaced men of earning capacity from their place in the economic world. The number of these men approximates one-fourth of all wage earners. As a consequence there is a loss of purchasing power in the Nation as a whole which is progressively pushing commerce to the verge of collapse. While it is obvious that the restoration of purchasing power requires a restoration of men into the productive field and although a limitation of the number of hours of employment of each man will necessitate the employment of greater numbers of men, no action has been taken to that end by private initiative of industrialists, although former President Hoover urged them to do so as a rational measure of self-preservation, or by the States who together with the industrialist are fearful of the possible competition from industry employing labor without hour restrictions. The situation is an historical counterpart of that which troubled the Colonies. It is such a national problem that the commerce power was intended to meet. Under its plenary and exclusive power "to foster, protect, control and restrain" commerce among the States it is a problem which Congress is alone equipped to meet. If Congress has not the power, where does it rest? If one focuses the attention upon the intended effect of the legislation upon the course of commerce and realizes that the regulation of hours is only an incidental method of assisting to

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6 See Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23 (1824).
the end desired, the argument of the supporters of the Bill under discussion appears in its best light.

Substantiation for this position is, of course, sought from the decided cases. In the past, Congressional regulative methods have reached into the States themselves and controlled the compensation of brokers in live-stock, even where the transactions were intrastate in character.\(^8\) Congress has prohibited the transportation of coal in inter-state commerce by a railroad interested in a coal mine. Lottery tickets and liquors have been barred from commerce.\(^9\) In the words of the Court, "Congress, in exercising its constitutional power over interstate commerce, may adopt police regulations, as well as the States, and it has power to adopt not only means necessary but convenient to its exercise."\(^{10}\)

As for the Child Labor decision the contention is that the facts of that case make it inapplicable to a determination of the constitutionality of the proposed statute. It is true that the Child Labor Law sought to prohibit commodities from interstate commerce and to regulate hours of labor of persons employed in producing these commodities. But it is pointed out that the decision turned upon the fact that the law in effect had to do with such a special group of persons, a group whose total output of commodities had so little relation to the commerce as a whole, that the law must reasonably have been found to be purely local in its intent. It was thought to be an attempt by Congress to regulate the hours of labor rather than a regulation of commerce among the States. However, this aspect of the Child Labor Case is not found in the proposed legislation which touches the productive effort of no class, but of all producers whose great proportion of commodities enter into interstate commerce in fact. Further, the direction of the Bill is different from that of the Child Labor Law. Its prime purpose is undeniably to better


\(^{10}\) Champion \textit{v.} Ames, \textit{supra}. 
commerce as a whole; it regulates hours of labor as a matter of necessity and incidentally to the purpose with which Congress is accomplishing, that is, regulating interstate commerce.\footnote{\textit{Hammer v. Dagenhart}, 247 U. S. 251, 62 L. Ed. 1101 (1918).}

Even though one foregoes the argument in favor of the Bill based on the emergency nature of the Bill, the idea behind the argument arising from the commerce power is compelling in its force. Broadly, the idea is that the Congress should be more than a mere referee in the matter of the commerce between the States. Acting under the commerce power Congress should take positive action to foster commerce. J. T. M.
TORTS—Right to Privacy Reviewed.

When the Supreme Court of Georgia, speaking through Mr. Justice Cobb, indorsed, some twenty-eight years ago, the existence of the so-called right of privacy as an absolute right, it also prophesied its future universal recognition and approval. This prediction, ventured so emphatically when the principle had not, up to that time, been accorded the dignity of any formal acknowledgment by the courts of this country, certainly savorcd of temerity, if not of radicalism. It will be interesting, therefore, to note the progress, if any, made in that direction.

The new tort owes its expression under the present label entirely to an article appearing in the Harvard Law Review, written by the now Associate Justice of the Supreme Court, Brandeis, and Samuel D. Warren. Disregarding the fact that the cases considered by them had been interpreted by the various courts as reflecting either an infringement of some property interest or breach of an implied contract or trust, the contention was made that the real principle involved was that of an inviolable personality. Thus, the right to privacy is said to be founded upon the right to be let alone; the right of a person to be free from unwarranted publicity. It is significant, however, that to date nothing more adequate has been suggested by way of definition.

Some fourteen jurisdictions can now be enumerated as having considered the question. A very definite conflict of authority has resulted evidencing, however, a tendency toward denying its recognition as a legal right for the violation of which there is a legal remedy.

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1 "So thoroughly satisfied are we that the law recognizes, within proper limits, as an absolute right, the right of privacy . . . that we venture to predict the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability." Pavesich v. New England Mut. L. Ins. Co., 122 Ga. 190, 50 S. E. 68 (1905).

2 (1890) 4 Harv. L. Rev. 193, 220.


4 Supra note 2. "This process of implying a contract, or trust, is nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule, and that the publication under similar circumstances, would be considered an intolerable abuse."

5 21 R. C. L. 1196.

6 For further comments see 54 C. J. 816.


8 Op. cit. supra note 5, at 1197; 38 Cyc. 496.
So far as the unauthorized use of photographs violates the right of privacy, it has been said that: "The weight of authority seems clearly to recognize the existence of the right of privacy—the division of opinion being as to the existence of a remedy." 8a

In Roberson v. Rochester Folding Box Company, 9 the complainant was denied a decree which sought to restrain the unauthorized publication of her picture as accompanying advertisements of the defendant's brand of flour. The court after a complete and exhaustive examination of the authorities 10 concluded that "the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided." 11 This decision invoked considerable discussion and criticism inasmuch as lack of precedent and fear that recognition of the right might open the floodgates of litigation were construed as the grounds for the court's conclusion. 12 The following year, however, the legislature enacted a statute expressly designed to meet such situations. 13

8a Fitzpatrick, The Unauthorized Use of Photographs (1932), 20 GEORGETOWN LAW JOURNAL, 134, 158: "From the cases cited, and they appear to be all the citations available, the majority and the better reasoning incline toward the recognition of the right and the existence of a remedy. It would appear that the right 'to be let alone'—the right of privacy—is an inherent natural right, and that what we have in these photograph cases is—not an attempt to establish a new right—but rather a new method of invading an old right. And in this connection, it will be recalled that photography, and, particularly, commercial advertising, are modern inventions and methods."

9 171 N. Y. 538, 64 N. E. 442 (1902).


12 "... a case seldom cited but to be disapproved, the force of which was subsequently removed by statute ..." Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 Atl. 97 (1907). Yet, it cannot be denied that Chief Justice Parker's thorough survey of the law justified the statement that no common law right of the complainant had been infringed. See comments in (1902) 36 AMER. L. REV. 634.

13 NEW YORK LAWS, (1903) p. 308 ch. 132, forbids the unauthorized use of the name or picture of any living person for the purpose of

14 *Supra* note 1.


17 *Munden v. Harris*, *supra* note 15; *Corliss v. Walker*, *supra* note 10;
remarked by Chief Justice Dubois in *Henry v. Cherry & Webb*, "the right cannot be one of person and of property at one and the same time. The conclusion would seem to be that, if the right of privacy exists and has been recognized by the law, it must be as a personal tort right. It cannot be a right of property. The gravamen of the offense in a violation of the right of privacy is the interference with the seclusion of the individual, and not of the publication."

The force of some of the cases has been dissipated by the existence of other matters, rendering the infringement of privacy more or less incidental. Furthermore, it is subject to various recognized limitations.

In the recent case of *Melvin v. Reid*, the court summarized the law relative to the right of privacy as follows:

1. The right of privacy was unknown to the ancient common law;
2. It is an incident of the person and not of property;
3. It is purely a personal action, and does not survive, but dies with the person;
4. It does not exist where the person has published the matter complained of, or consented thereto;
5. It does not exist where a person has become so prominent that by his very prominence he has dedicated his life to the public, and thereby waived his right to privacy. There can be no privacy in that which is already public;
6. It does not exist in the dissemination of news events, nor in the discussion of events of the life in whom the public has a rightful interest, nor where the information would be of public benefit, as in the case of a candidate for public office;
7. The right of privacy can only be violated by printings, writings, pictures, or other permanent publication or reproduction, and not by word of mouth.

In the light of such conclusions the suggestion offered by Chief Justice Parker to the effect that, "the legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or name of another for advertising purposes without his consent. In such event no embarrassment would result to the general body of the law, for the rule would be applicable only to cases provided for by the statute . . ." is certainly not unreasonable. 

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BANKS AND BANKING—Statutory Construction.

To an action against a state bank for breach of contract in refusing to purchase stock in an investment trust company, the defense was that the contract was *ultra vires*. The plaintiff contended that a Pennsylvania statute (P. L. 603, 1901) (15 P. S. 661) authorizing any corporation "to purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the stock, and other securities or evidence of indebtedness of any corporation" included a state bank. *Held,* that the statute did not apply to state banks, and the contract was void. *Dillon, Read & Co. v. Commercial State Bank,* 62 F. (2d) 606 (C. C. A. 3rd, 1933).

It is a fundamental rule of statutory construction that not only should the intention of the lawmaker be deduced from a view of the whole statute, but statutes *in pari materia* should be construed together. *Richardson v. Harman,* 222 U. S. 96, 56 L. Ed. 110 (1911). The object of the rule is to ascertain and carry into effect the intention of the legislature, and it proceeds upon the supposition that the several statutes relating to one subject were intended to be consistent and harmonious in their several parts and provisions. *Neil v. Keese,* 5 Tex. 23, 51 Am. Dec. 746 (1849). The rule that statutes *in pari materia* should be construed together applies with particular force to statutes that are contemporaneous or nearly contemporaneous; for, in such case, we have the same minds acting upon the one subject, and it is not to be presumed that the same body of men would pass conflicting and incongruous acts. The presumption is that they had in mind the whole subject under consideration; that while the one general subject it touched in several separate acts, yet the legislative intent was that of a harmonious whole. Hence, statutes passed at or at nearly the same time should be construed together in determining their effect. *Bishop v. Boyle,* 9 Ind. 169, 68 Am. Dec. 615 (1857). A statute authorizing any "corporation" to purchase, hold, and sell stock of any other corporation is not applicable to banks. *Moore v. Fremont State Bank,* 103 Wash. 249, 173 Pac. 1089 (1918).

CONSTITUTIONAL LAW—Commerce—Constitutionality of Tax.

The plaintiffs, an interstate carrier of passengers and property by airplane, brought action to enjoin the defendants, as officers of the State of Idaho, from collecting a tax of five cents per gallon on all gasoline purchased outside of the State and thereafter imported by it into the State for use in its airplanes. The tax was imposed by Chapter 172 of Laws 1923 of Idaho as amended, which requires each dealer "engaged in the sale of motor fuels" to pay the tax on all motor fuels sold and/or used by such dealer, and provides: "That in addition to the taxes now provided for by law, each and every dealer... who is now engaged or who may hereafter engage... in this State, in
the sale of motor fuels . . . shall . . . render a statement to the Commissioner of Law Enforcement of the State of Idaho of all motor fuels sold and/or used by him or them in the State of Idaho during the preceding calendar month, and pay a license tax of five cents per gallon on all motor fuels as shown by such statement." Held, that since the plaintiff sold none of the gas it was not within the taxing terms of the said statute which are limited to that class of dealers who engage "in the sale of motor fuels," and consequently a perpetual injunction was granted enjoining the defendants from further collection from plaintiff of the tax involved. Varney Air Lines, Inc. v. Babcock, 1 F. Supp. 687 (S. D. Idaho, 1932).

Apart from the question of the interpretation of the statute this case raises an interesting point. The plaintiffs attacked the validity of the act upon the ground that it is in contravention of clause 3, section 8, Article 1, of the Federal Constitution, "The Congress shall have power to regulate commerce with foreign Nations, and among the several States, and with the Indian tribes."

The principle deduced from the above clause is that all restraints by exaction in the form of taxes upon the use of the means and acts necessary to the completion of transportation between the States are invasions of the exclusive power of Congress to regulate commerce between the States. A State may not impose a tax upon the privilege of engaging in interstate commerce within its borders, in view of the United States Constitution. Eureka Pipe Line Co. v. Hallanan, 87 W. Va. 396, 105 S. E. 506 (1921). The inquiry then arises: Does the tax here imposed with respect to gasoline used by the plaintiff to propel its airplanes in interstate commerce come within this principle?

It has been held that a State statute imposing a tax upon the use of gasoline, insofar as it affects gasoline purchased outside the State for use as a fuel upon a ferry engaged in interstate commerce, is in effect a tax upon an instrumentality of commerce, in contravention of the commerce clause of the Constitution, notwithstanding that the tax is confined to such only of the gasoline as is used within the limits of the State. Helson v. Kentucky, 279 U. S. 245, 73 L. Ed. 683 (1929). As regards the mere instrumentalities of interstate commerce an airplane is not to be distinguished from a ferry.

The power vested in Congress to regulate commerce embraces within its control all the instrumentalities by which that commerce may be carried on. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. Ed. 158 (1885).

A State statute levying excise tax on gasoline is invalid as interference with interstate commerce as applied to air transportation companies engaged in interstate transportation business. United States Airways, Inc. v. Shaw, 43 F. (2d) 148 (W. D. Okla., 1930). In this case the proceeds of the tax are apportioned between the State and counties for the maintenance of the highways and bridges.

An excise tax upon all gasoline used by air transport corporations engaged in interstate commerce and in intrastate commerce incidental thereto is invalid as a direct burden on interstate commerce. Mid-
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Continent Air Express Corp. v. Lujan, 47 F. (2d) 266 (D. C. N. M. 1931).

But the defendant contended that the general rules as laid down by the above cases are not entirely applicable here; that the facts of this case constitute it an exception. Here the plaintiffs are using certain air navigation facilities furnished at the expense of the State.

A State which, at its own expense, furnishes special facilities for the use of those engaged in interstate and intrastate commerce may exact compensation therefor; and if the charges are reasonable and uniform they constitute no burden on interstate commerce. Hendrick v. Maryland, 235 U. S. 610, 59 L. Ed. 385 (1915). The amount of the charges and the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce. Transportation Company v. Parkersburg, 107 U. S. 691, 27 L. Ed. 584 (1882); Monongahela Navigation Co. v. United States, 148 U. S. 312, 37 L. Ed. 463 (1893).

In the case of St. Louis v. Western Union Telegraph Co., 148 U. S. 92, 37 L. Ed. 380 (1893), the court said, "Even interstate business must pay its way—in this case for its right of way and the expenses to others incident to the use of it."

An analogy may be drawn between this case and the exaction of a gasoline tax as a compensation for the use of highways by busses and trucks engaged in interstate traffic.

While a State may not lay a tax on the privilege of engaging in interstate commerce it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. Kane v. New Jersey, 242 U. S. 160, 61 L. Ed. 222 (1916); Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199 (1927). But such a tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways in the State or to defray the expense of regulating motor traffic. Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, 75 L. Ed. 953 (1931).

The tax here is allocated to the purpose of furnishing and maintaining airports and air navigation facilities which the plaintiff uses. Therefore, under the principles as stated, the tax imposed by the act and required to be paid by the plaintiff does not burden interstate commerce.

CONSTITUTIONAL LAW—Due Process—Rate Making—Power and Policy.

The appellant was one of seven affiliated companies which owned and operated an interconnected system of public utilities that sold and distributed electricity to thirteen counties, in which counties service was rendered to some fifty cities and towns and to numerous industrial establishments and customers within the confines of such cities and towns. The company had abandoned the local electric plant and obtained all current necessary from plants located elsewhere. In
setting the rate the lower court determined the value of the property to which it added that proportionate value of system property which is found to be fairly attributable to local service. This was in accordance with a statute. The company appeals from this view and contends that the entire operating property should be taken as a unit in fixing the rate and that to fail to do so is to deprive of due process of law. Held, that to treat the city as a unit and to disregard the interconnected system is not to deprive of due process and that the appellant has no right to question the policy of the legislature. Wabash Valley Electrical Co. v. Young, 53 S. Ct. 234, — L. Ed. — (1932).

In City of Eau Claire v. Railroad Commission, 178 Wis. 207, 189 N. W. 476 (1922), the court held that under a similar statute that contemplated the serving of only one city by a utility, an order by the Commission to treat the group rather than the individual municipality was erroneous. This precise question involved is not often contested.

It is not the policy of the judiciary to inquire into the motives or wisdom of the legislature. Thus it is that Justice Owen of the Supreme Court of Wisconsin in City of Eau Claire v. Railroad Commission, supra, says: "If the legislature shall conclude that the policy adopted by the Railroad Commission is a wise one, it will be for those administering the law to follow it. As to the wisdom of the policy we intrude no opinion." This, of course, assumes that the legislature has the power. This point was alluded to by Chief Justice Marshall in Fletcher v. Peck, 6 Cranch 87, 3 L. Ed. 162 (1810). Vide, Angle v. Chicago, etc., R. Co., 151 U. S. 1, 38 L. Ed. 55 (1893); McRay v. United States, 195 U. S. 27, 49 L. Ed. 78 (1904); Calder v. Michigan, 218 U. S. 591, 54 L. Ed. 1163 (1910).

CRIMINAL LAW—Former Jeopardy—Withdrawal of Counts.

Defendants were prosecuted under an indictment in nine counts for violations of the Harrison Narcotic Act, 38 Stat. 785 (1914), 26 U. S. C. § 211, 691, et seq. (1926). After the jury disagreed in the first trial, the trial judge in the second trial withdrew eight counts so as to simplify issues, but the jury disagreed on the count submitted. At the third trial, former jeopardy was pleaded to counts withdrawn at second trial and upon denial thereof, defendants were convicted under five counts including four which had been withdrawn. Upon motion to reargue the motion to dismiss the counts withdrawn from the jury, made at the beginning of the third trial, on the ground of former jeopardy. Held, motion granted, defendants were placed in double jeopardy as to counts not submitted at second trial, warranting dismissal of such counts. United States v. Kraut et al., 2 F. Supp. 16 (S. D. N. Y. 1932).

The decision in the instant case finds support first in the doctrine favored by a preponderance of judicial opinion and well considered cases that jeopardy attaches when a person is placed on trial on a valid indictment or information before a court of competent jurisdiction, has been arraigned, and a jury has been empanelled and sworn.
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16 C. J. 236, CLARK, CRIMINAL LAW (2d ed.) 432. But in some jurisdictions it is held that jeopardy does not attach until a valid verdict, either of acquittal or conviction, has been rendered. However, the states which follow the minority rule, do so because their constitutions contain an express provision to that effect. State v. Kennedy, 96 Miss. 624, 50 So. 978 (1910). And secondly, on the principle that withdrawal of counts from the consideration of the jury, precludes subsequent prosecution thereon, where a plea of former jeopardy is interposed timely. Roland v. People, 23 Colo. 283, 47 Pac. 269 (1896). And the withdrawal of such counts amounts to an acquittal of the charges contained therein. 16 C. J. 260; State v. Hess, 240 Mo. 147, 144 S. W. 489 (1912); State v. Casey, 207 Mo. 1, 105 S. W. 645 (1907); State v. Hous, 31 Utah 168, 87 Pac. 163 (1906); State v. Martin, 30 Wis. 216, 11 Am. Rep. 567 (1872); Barnett v. People, 54 Ill. 331 (1870); WHARTON, CRIMINAL LAW, § 540a.

It seems difficult to distinguish this case from those holding likewise, wherein the entire indictment is dismissed after the introduction of all the evidence. State v. Hous, supra; Harlan v. State, 190 Ind. 322, 130 N. E. 413 (1921), United States v. Ratagczak, 275 Fed. 558 (D. C. Ohio, 1921). Nor from cases also in accord with the instant one, wherein the counts are nolle prosequi or certain ones elected by the prosecution. Johnson v. State, 97 Tex. Cr. R. 658, 263 S. W. 924 (1924); Mizell v. State, 85 Tex. Cr. R. 305, 203 S. W. 49 (1918); Murphy v. State, 25 Neb. 807, 41 N. W. 792 (1889); Campbell v. State, 17 Tenn. (9 Yerg.) 333, 30 Am. Dec. 417 (1836); Commonwealth v. Dunster, 145 Mass. 101, 13 N. E. 350 (1887); State v. McNaught, 36 Kan. 624, 14 Pac. 277 (1887); State v. Servenson, 79 Iowa 750, 45 N. W. 305 (1890); Contra: Linden v. United States, 2 F. (2d) 817 (C. C. A. 3rd, 1924).


HABEAS CORPUS—Statute of Limitations.

Petitioner applied for a writ of habeas corpus contending that his sentence was void, since the indictment revealed that the offenses were barred by the statute of limitations. On the trial of this indictment, charging an attempt to evade an income tax, no fact was claimed to exist which would have prevented the running of the statute, but the defense moved for a directed verdict on the ground that the indictment was barred. The court overruled the motion. In this application for a writ of habeas corpus the petitioner contended that his
motion for a directed verdict was equivalent to a plea in bar, and that the court lost jurisdiction at the moment the motion was made. Held, that the limitations statute must be pleaded, and cannot be raised by demurrer, or a motion of that nature; that the trial court had jurisdiction to decide the motion, and an incorrect judgment would not be void but an error which could have been corrected on appeal. Capone v. Aderhold, 2 F. Supp. 280 (D. C. Ga., 1933).


The United States Supreme Court has consistently held that, on habeas corpus, only the jurisdiction of the court whose judgment is challenged can be called in question. Knewel v. Egan, 268 U. S. 442, 69 L. Ed. 1036 (1925). The writ of habeas corpus is not a proceeding in the original criminal prosecution, but an independent civil writ, in which the record of the trial court is not open to collateral attack, but imports an unimpeachable verity. Riddle v. Dyche, 262 U. S. 333, 67 L. Ed. 1009 (1923). The whole inquiry is confined to an examination of fundamental and jurisdictional questions and a writ of habeas corpus cannot be employed as a substitute for a writ of error. Knewel v. Egan, supra.

INSURANCE—Representations in Marine Insurance.

While plaintiff's barges were proceeding on a voyage, a storm arose which necessitated their withdrawal to the Delaware breakwater. Upon receiving information that they were lying there, plaintiffs directed their broker to place insurance on the barges, stating to him that the crafts were "safe in port." The risk was offered to defendant's agent who inquired as to the whereabouts of the boats, to which inquiry the broker answered, "They are in port." The insurer's representative thereupon issued a binder covering the barges, and within an hour after, one of them was totally demolished as a result of the storm. Held, that it was a misrepresentation of a material fact to answer that the barge was in "port" when she was in a temporary asylum behind a breakwater, and that such a misrepresentation avoided the policy. Wathen et al. v. Public Fire Ins. Co., 61 F. (2d) 962 (C. C. A. 2d, 1932).

In marine insurance, the underwriter, from the very necessities of his undertaking, is obliged to rely upon the insured, and has therefore
the right to exact a full disclosure of all the facts known to him which may in any way affect the risk to be assumed. *Aetna Life Ins. Co. v. Conway*, 11 Ga. App. 557, 75 S. E. 915 (1912). The English codification of the law of marine insurance provides that a contract of marine insurance is based upon the utmost good faith; that the insured must disclose every material circumstance which is known to him and he is deemed to know every circumstance which in the ordinary course of business ought to be known to him, and if he fails to make such disclosure, the insurer may avoid the contract. *Marine Insurance Act* (6 Edw. VII) c. 41 (1906); *Merchants' & Shippers' Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 219 App. Div. 636, 220 N. Y. Supp. 514 (1927).

"Material circumstances" are only such facts as are likely to influence the mind of a prudent and intelligent underwriter in determining whether he would accept the risk, or what his premium would be if he decided to accept it, and the question of materiality is one of fact to be decided upon consideration of all the circumstances and conditions affecting the transaction. *Northwestern S. S. Co. v. Maritime Ins. Co.*, 161 Fed. 166 (C. C. Wash. 1908).

Whether the suppression of facts as to the marine risk arises from fraud, or merely from mistake, negligence or accident, the policy may be avoided on the ground that the insurer has been deceived, and not that the insured has intended to deceive. *Cox v. C. G. Blake Co.*, 166 N. Y. Supp. 294, 100 Misc. Rep. 135 (1917); *Niagara Fire Ins. Co. v. Layne*, 162 Ky. 665, 172 S. W. 1090 (1915).

The rules as to misrepresentation and concealment are more rigid in marine than in fire insurance. This distinction is based upon the difference in the character of the property, and the greater facilities the insurers possess of obtaining information as to its condition and surrounding circumstances in cases of insurance on buildings, etc., than on vessels, which are often insured when absent or afloat. *Armour v. Transatlantic Fire Ins. Co.*, 90 N. Y. 450 (1882). As was indicated in *Aetna Life Ins. Co. v. Conway*, supra, if the underwriter of fire insurance assumes the risk without taking the trouble to either examine or inquire, he cannot very well, in absence of all fraud, complain that it turns out to be greater than he anticipated. This distinction finds application, ordinarily, in cases where the insurer relies on the omission of the applicant to state material facts. However, the stringency of the rule with respect to marine insurance is likewise applied in cases of fire insurance, where the applicant has made a *material affirmative* misrepresentation as to matter which was presumably within his knowledge and as to which the insurer had not the same means of knowledge. *Armour v. Transatlantic Fire Ins. Co.*, supra.

Many decisions also lean to the conclusion that the effect of a material misrepresentation by an applicant for life insurance is, as in marine insurance, fatal to the existence of the policy, irrespective as to whether the mis-statement was made intentionally, or through a mistake and in good faith. *Bankers' Life Ins. Co. v. Miller*, 100 Md. 6, 59 Atl. 117 (1904); *State Bank & Trust Co. v. Conn. Gen. Life Ins. Co.*, 109 Conn. 67, 145 Atl. 567 (1929).

Defendant was the proprietor of a department store in which an escalator was operated to convey customers from one floor to another. At the bottom of this conveyance, in the floor, there was a set of teeth into which the teeth on the conveyor meshed, the purpose being to remove the feet of passengers from the conveyor as the bottom was reached. The operator was stationed on the upper floor at the switch. It was unusual, but not unknown, for teeth at the bottom to break off, thereby greatly endangering the passengers. The plaintiff, four years old, in the company of his grandmother, was a passenger on this escalator when, as the result of a broken tooth, his foot caught in the apparatus. The case was submitted to the jury under the doctrine of res ipsa loquitur, and found in favor of plaintiff. Upon appeal the issue of liability was found to have been properly submitted and decided, the judgment being reversed on other grounds. Held, that the mere facts of the accident were sufficient to take the case to the jury, and that plaintiff's plea was not such as would preclude him relying upon the doctrine. May Department Stores Co. v. Bell, 61 F. (2d) 830 (C. C. A. 8th, 1932).


This case was properly presented to the jury under the doctrine of res ipsa loquitur. Petrie v. Kaufman & Baer Co., supra; Heseman v. May Dept. Store Co., 225 Mo. App. 584, 39 S. W. (2d) 797 (1931). In two other cases, namely, Fuller v. Wurzburg Dry Goods Co., 192 Mich. 447, 158 N. W. 1026 (1916); and Conway v. Boston Elevated R. Co., 255 Mass. 571, 152 N. E. 94 (1926), both of which involved injuries growing out of escalator accidents, the court refused to apply the doctrine. The case under discussion, however, can be distinguished from these last two cases in that the present case clearly sets out a defect in the defendant's machinery, whereas both of the other complaints were based upon an unexplained method of operation. A like distinction is pointed out by the Supreme Judicial Court of Massachusetts in Fitzgerald v. Boston Elevated Ry. Co., 274 Mass. 287, 174 N. E. 490, (1931). And see also Martin v. Interurban Transp. Co., Inc., 15 La. App. 131 So. 514, 256 (1930).

The Missouri decisions are divided on the question of allegations of specific and general negligence and their relation to the doctrine of res ipsa loquitur. One line of cases holds that a plaintiff may point
out a specific defect and, so long as he charges the existence of this defect to be due to the negligence of the defendant generally, he may still rely upon the doctrine of *res ipsa loquitur*. Malloy *v.* St. L. & Suburban R. Co., 173 Mo. 75, 73 S. W. 159 (1903); Estes *v.* Mo. Pac. R. Co., 110 Mo. App. 725, 85 S. W. 627 (1905); Chlanda *v.* St. L. Transit Co. *et al.*, 213 Mo. 244, 112 S. W. 249 (1908). The other line of cases has construed similar declarations to contain allegations of specific negligence, and consequently refused to apply the doctrine. Feary *v.* Metropolitan St. Ry. Co., 162 Mo. 75, 62 S. W. 452 (1901); McGrath *v.* St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872 (1906); Van Horn *v.* St. Louis Transit Co., 198 Mo. 481, 95 S. W. 326 (1906). The Circuit Court of Appeals of the Eighth Circuit is in accord with this first series of cases. Kaemmerling *v.* Athletic Mining & Smelting Co., 2 F. (2d) 574 (C. C. A. 8th, 1924); Dierks Lumber & Coal Co. *v.* Brown, 19 F. (2d) 732 (C. C. A. 8th, 1927). Consequently this court approved the action of the court below in applying the doctrine in the case under discussion where the plaintiff pointed out a specific defect in machinery of defendant, and charged same to be due to the negligence of the defendant generally.

**TAXATION—Customs Court—Taxation Upon Imported Competitive Goods.**

The Dutchess Hat Works, an American manufacturing company, sued the United States to compel the collector of customs at New York to assess a higher rate of tax upon the Feltex Corporation, an importer of foreign goods, alleging that the method of assessment was improper and the tax assessed insufficient. Held, that under section 516 of the Tariff Act of 1930 (46 Stat. 763) the United States had consented to be sued to determine judicially the rate of taxation upon imported competitive goods; and that the plaintiff should prevail in this action for there was a substantial compliance with the requisite formalities. Dutchess Hat Works *v.* United States *(Feltex Corporation, Appearing as a Party in Interest)*. Treasury Decisions, U. S. Customs Court, 46124 (1933).

Much interest has arisen over this case as it presents a very unusual legal problem. The only case mentioned in the decision of this case which bears any close relationship with it is the case of *State of Louisiana v. McAdoo, Secretary of the Treasury*, 234 U. S. 627, 58 L. Ed. 1506 (1914). There the State of Louisiana operated sugar plantations with convict labor. In order that such sugar might be marketed it was necessary to compete with the Republic of Cuba and other sugar exporting countries. In that suit the State of Louisiana sued the Secretary of the Treasury to compel him to assess a higher tax against foreign companies. The court dismissed the suit, for it was in fact a suit against the United States and it had not consented to be sued.

In the decision of the *Dutchess Hat Works v. United States*, *supra*, Judge Brown stated that the rule in *Louisiana v. McAdoo, supra*, held *obiter* that such a suit might have been maintained had the United
States consented to be sued. He further stated that section 516 of the Tariff Act of 1930 was intended to give that consent. He was undoubtedly correct in his statement concerning the Tariff Act, but we are unable to agree with him in the inferences that he has drawn from that case.

After holding that mandamus would not lie in the *Louisiana* case, *supra*, because the act was not merely ministerial but one involving discretionary power, Mr. Justice Lurton said, "We can discover no precedent where an importer may invoke the aid of the courts to clog the wheels of government by attempting to review the action of the Secretary of the Treasury in determining the rate of duty to be collected upon imported goods," and further, "What definite and distinct interest has the State of Louisiana whether the tax to be collected is too high or not? . . . If Louisiana, as a mere producer of sugar, may review the action of the Secretary of the Treasury why cannot any consumer make the same complaint?" This leaves us with considerable doubt as to the correctness of the implication that has been drawn from this case.

If *Louisiana v. McAdoo*, *supra*, does not form a basis for the decision of the *Dutchess Hat Works* case, *supra*, it must find its support entirely in section 516 of the Tariff Act of 1930.

This section provides, in effect, that an American manufacturer, producer or wholesaler may be authorized in certain circumstances to compel the collector to change his construction of the law and to assess a higher rate of tax upon a foreign article competing with the plaintiff's domestic goods than previously assessed.

There is no longer any doubt as to the constitutionality of the flexible tariff. *Hampton v. United States*, 276 U. S. 394, 72 L. Ed. 624 (1928). Since this case was decided, the rule of law forbidding the delegation of discretionary executive power to fix the amount of the future rate of tax has ceased to exist. That rule had existed since the action of the Parliament in 1641 denying the kingly prerogative to levy ship money and negativing the effect of the decision in *Rex v. Hampden*, 3 State Trials 825 (Vide 20 Encyclopedia Britannica, 540, 1931).

Section 516 of the Act of 1930 is a step in advance of the flexible tariff. It allows a most unusual suit to be brought to determine the amount of taxation upon imported competitive goods. Such action finds its origin entirely within this section of the Tariff Act, and this case is, as yet, the outstanding case on the point. F. B. Q.-W. B. S.

TAXATION—Internal Revenue—Deductions from Federal Estate Tax.

The testator entered into a written contract with his daughter whereby, in consideration of the daughter's agreement to make no claim against him during his life or against his estate after his death, and not to contest any will he might leave, the testator agreed to pay to her $2,500 yearly and to create a $50,000 trust for her in his will. The testator died without making any provision by will for the creation of such trust, so the executrix paid the daughter $53,381 in com-

By Section 303 of the above act it is provided that "for the purpose of the tax the value of the estate shall be determined: (a) In the case of a resident, by deducting from the value of the gross estate: (1) such amounts for funeral expenses, claims against the estate, unpaid mortgages upon, or any indebtedness in respect to, property ... to the extent that such claims, mortgages, or indebtedness were incurred or contracted bona fide and for a fair consideration in money or money's worth ... as are allowed by the law of the jurisdiction ... under which the estate is being administered."

In the Latty case, supra, it was expressly held that even though this contract was concededly valid, the consideration moving to the testator could not be regarded as "in money or money's worth," since those words "must be construed to evidence an intent on the part of Congress to permit the deduction of claims only to the extent that such claims were contracted for a consideration which at the time either augmented the estate of the decedent, granted to him some right or privilege he did not possess before, or operated to discharge a then existing claim, as for a breach of contract or personal injury."

Such claims incurred for "fair consideration in money or money's worth" do not include all contracts for a consideration, and are not limited to cases where the consideration passes to the testator. Thus, in Porter v. Commissioner of Internal Revenue, 60 F. (2d) 673 (C. C. A. 2nd, 1932), it was held that the executors were not entitled to deduct a payment which was made in order to fulfill a promise of the testator to pay a hospital for building an x-ray room as a memorial to his deceased son, in computing the estate tax. But in In Re Atkins Estate, 30 F. (2d) 761 (C. C. A. 5th, 1929), it was held that the value of notes which the decedent gave to his sons to equalize certain gifts to other children were supported by a sufficient consideration and therefore deductible from the tax.

If property is devised or bequeathed in lieu of dower, the value of the widow's dower right cannot be deducted in computing the tax. Title Guarantee & Trust Co. v. Edwards, 290 Fed. 617 (D. C. N. Y. 1922). But if the widow allows all the property left by the deceased to pass as a part of his estate, then the entire property is taxable, regardless of the fact that an adverse dower interest might have been asserted. Briscoe v. Craig, 32 F. (2d) 40 (C. C. A. 6th, 1929).

It seems that the Latty case, supra, was properly decided, in view of the fact that consideration is always something of value. It did not appear that either fraud or duress were involved. There was no legal detriment to the daughter, and it did not appear that she rendered any valuable services. The statute, being a taxing measure, was properly given a strict construction.

W. F. P.
TRADE MARKS AND TRADE NAMES.

The plaintiff sold his business to the defendant through another purchaser. The contract of sale contained no provision regarding the trade name, which the defendant continued to use, without objection on the part of the plaintiff, during the seven years prior to this suit for an injunction to restrain such use. Held, that the vendor, by this silence and conduct, was estopped from preventing the further use of his name. Burns v. Navorska, 42 Ohio App. 313, 182 N. E. 282 (1932).

A person may restrain another in the use of his name even though not himself conducting the business. Scheer v. American Ice Co., 66 N. Y. Supp. 3, 32 Misc. Rep. 351 (1900). However, prior users of a firm or trade name, where there is a clear intention to abandon, may not restrain the subsequent user of the firm or trade name. Harris v. Brown, 202 Pa. 16, 51 Atl. 586 (1902); Fisk & Co. v. Fisk Teacher's Agency, 3 F. (2d) 7 (C. C. A. 8th, 1924); Bellows v. Bellows, 53 N. Y. Supp. 852 (1898); Bennett & Sons v. Farmer's Seed & Gin Co., 288 Fed. 365 (C. C. A. 5th, 1923); Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 45 L. Ed. 60 (1900). But no instance of the application of this theory of abandonment to the use of one's own name has been found. A person, it is recognized by the courts, must be well protected in the use of his own name. Carter v. Carter Electric Co., 156 Ga. 297, 119 S. E. 737 (1923). But the plaintiff in the instant case cannot claim protection upon any of the grounds upon which it is usually afforded. Booth v. Jarrett, 52 How. Pr. (N. Y.) 169 (1876) (use by right of contract); 48 A. L. R. 1257 (1927). The failure to act is evidence of the intention to abandon. J. T. M.

More stringent enforcement, in recent years, of the alien laws has focused attention upon the activity of the Department of Labor in respect to alien exclusion and deportation. Though national defense against the evils incident to the presence here of undesirable alien elements is generally recognized as necessary, yet hard cases, widely published, have stirred sympathy and have aroused some apprehension that oppression and injustice may characterize the work of federal officials in this department. Possibly our statutes are too drastic. If so, that is a matter of federal policy to be corrected by Congress. Possibly there is fault in administrative enforcement methods. Such fault may be inherent in the administrative process itself; or it may be that the administrative machinery set up for alien control needs general overhauling, or only modification here and there.

Neither maudlin sympathy for, nor undue harshness toward the alien should enter into an estimate of the situation. A proper appraisal calls for even-mindedness. And that is the temper in which Professor Van Vleck enters upon the task of critical analysis in his book here under review. He does not play the role of a crusader. He does not strive to "make a case" against the government. In this respect his work is a distinct improvement upon the Oppenheim report upon this subject which was made a part of the Wickersham Commission Reports. Dr. Van Vleck enters the field apparently without prejudice, with an open mind, and he maintains an even balance of judgment throughout. In consequence, he inspires confidence in the fairness of his treatment of illustrative cases and in the soundness of his conclusions.

In his discussion of the exclusion process, there is recognition of the practical necessities of speed in the disposition of applicants. Slow-moving governmental machinery would work severe hardship upon the aliens themselves. More or less summary procedure is essential. The statutes
so provide. Recent provision for consular preview of each case abroad, before embarkation, has helped to expedite decision at the ports of entry. Professor Van Vleck seems, on the whole, to approve what is being done in exclusion matters. Such criticism as he does offer suggests too broad a discretionary authority in the immigrant inspector. One cannot escape the thought, however, that if Congress states disqualifications for entry in broad terms, calling for a wide judicial discretion in their interpretation and application, inspection officials are compelled to apply such standards no less than standards more definite and specific. Thus a finding of fact that the applicant has tuberculosis is relatively simple, depending upon medical inspection. But Congress has also provided that the alien shall be excluded when it is found that he has committed a crime "involving moral turpitude." The immigration official is charged with the duty of passing upon both alike. His is the responsibility of decision, in the first instance. If the question involves matter of law, such as "moral turpitude," it is still a question of administrative determination which Congress has delegated to him. That courts of law have had some difficulty in defining crimes of moral turpitude does not relieve the inspection officials of their duty to make a finding. Shall we escape the possibility of error in decision by withholding the discretion? That would be a reflection upon the administrative process itself, and certainly the tendency of our times is not away from administrative action, but is rather distinctly in the direction of wider and ever wider administrative regulation, and of broader and broader powers of discretion. So it would seem that adverse criticism of the results attained in particular cases properly pertains to the lack of adequate training and preparation of the local inspection officials themselves necessary to the solutions of the problems presented to them. Higher salaries, high enough to attract well trained legal minds, seems to be the only answer to that criticism. As a matter of fact, such a criticism cannot fairly be made of the superior reviewing officers of the Department of Labor, for they are well trained men. And Dr. Van Vleck confines such criticism to the men in the lower brackets of
the service. If overzealousness is attributed to them, the same fault may be found in all departmental administration, for inherent in every governmental department is a natural tendency to resolve doubts in favor of the government whose laws the officials are sworn to enforce. Any other disposition on their part might well be expected to subject them to adverse criticism from superiors in office or from members of Congress or both. There is inevitably such difficulty in administrative action where the investigatory, prosecuting and judicial functions are combined in departmental officers. Beyond this, fair criticism looks rather to the integrity and fairmindedness of officers, to the adequacy of means of correction of errors or abuse of discretion through appellate review in the department or in the courts of law, and to the responsiveness of administrative officials to legal limitations exemplified in judicial opinions. There can be no doubt that the law officers of the Department of Labor are sensitive to the decisions of the courts which have overturned cases of improper procedure in the department or findings contrary to law. On the latter point, the author does not commit himself. Cases illustrative of hardship are recited (pp. 30 and 31). Of six cases stated, five were reviewed in the federal courts, and in three of the five, the department was sustained in its decision. Of the latter three, it may fairly be said that the facts "may evoke sympathy but cannot affect the legal question." In all of these cases, the question was one of finding the real intent of Congress in the enactment of the statutes. The alien had his day in court, and the criticism implied goes to the Acts of Congress rather than to the administrative process. As Dr. Van Vleck himself points out (p. 31), "These cases are illustrative of many. The most significant factor is the long time after entry within which the power to expel may be exercised, five years in most cases, an indefinite time in many. In many cases the power is exercised not as a punishment for wrongdoing but as a penalty for misfortune. Even when it is the former it is usually out of all proportion to the offense."

Discrepancy cases, so called, are cited (pp. 61 and 62). These illustrate the operation of the judicial check to
prevent arbitrary action through findings by the department, though the author cites them as the basis of his very excellent discussion of the administrative handling of this type of case. Ten cases are noted, all affecting Chinese. The author concludes that there is a tendency on the part of the immigration officers to exclude on suspicion aroused by some discrepancy in the testimony. In all ten cases, two District Court and eight Circuit Court of Appeals, the department was not sustained. However, it is suggested that Dr. Van Vleck's strictures may be softened by several mitigating circumstances, namely, that the officers have had much experience with wily Orientals whose tricks they know, that in five of the eight Appeals cases the District Courts had sustained the department, thus indicating that the cases were very close, and lastly, that the immigration officers may have been prompted by a will to do their fullest duty even to resolve doubtful cases in favor of the Government of the United States, their employer, as suggested heretofore. This danger lies in all administrative work.

In his description of procedural steps, both in exclusion and in deportation cases, the author is especially clear and very accurate. His work should be on the desk of every lawyer who seeks to become acquainted with this special field of practice.

Deportation is discussed under the heading “Expulsion Process.” “Expulsion” has a harsher sound than “deportation,” but its use in late amendments to the Federal Statutes probably prompted its use here. The description of the methods pursued in preliminary examinations of suspected aliens, indicates need of more formal and more substantial evidence of record for the issuances of warrants of arrest in many instances. Unfortunately the recital frequently does not disclose whether warrants were actually issued. Presumably they did issue, and if so, then there is need for more carefully drawn departmental rules or at least for more stringent adherence to existing rules. Though the investigatory work here involved does not require “probable cause,” as in criminal warrants, public policy is involved, and it is a serious question whether the ferreting out process would be hampered by a
more strict adherence to requirements of sworn testimony based upon actual knowledge. Apparently the government proceeds upon the theory that the end achieved justifies the less formal procedure. The same considerations enter into the question whether the alien should have benefit of counsel at the early stages of preliminary investigation.

There is criticism also of administrative stretching of the statutory provisions regarding "public charges within five years" and "likely to become a public charge at the time of entry." There is ample opportunity for judicial check upon such steps beyond statutory authority, and it is reasonable to believe that a few test cases in court would remove the possibility of evil in this direction in future cases. Better still, as suggested by Dr. Van Vleck, Congress should more clearly define the terms of the statute.

The concluding suggestions offered, among others, that the Board of Review should be by statute set up as a tribunal more independent of the administrative department and that a judicial process should be substituted for the administrative process in expulsion cases, imply that we have gone too far in our resort to administrative determinations and that the more formal and more certain safeguards of judicial procedure should not be lightly set aside. In this sense the treatise, on the whole, has a wholesomely conservative tone. While in no way denying the practical considerations which require resort to short-cut fact-finding procedure, yet it emphasizes the thought that where human rights are involved, government by the more strict formalities of law is to be preferred to bureaucratic methods.

Dr. Van Vleck has given us, in this work, a very interesting, a very suggestive, and a very scholarly study of a very vital type of Federal administrative action, particularly in respect to the delegation and exercise of administrative discretion, its virtues and its shortcomings.

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This manual on Church Law by Professor Zollman of Marquette University, will be welcomed by many lawyers, for its carefully digested material and analysis of leading decisions brings together information which permeates the entire field of law, public and private, of persons, things and remedies. It is remarkable that some such volume did not appear thirty years ago. The field of church law is a specialized one and very few lawyers in the United States have the requisite training to enable them to qualify as experts in it. The Courts suffer in not having the litigation well tried before them, unable to fall back upon any training of their own in the subject. In *Bonacum v. Harrington*, Pound, C. (later Dean Pound) observed: "The laws and decrees of the church presuppose a considerable knowledge of the canon law, and their interpretation by a court must necessarily be very unsatisfactory in the absence of more complete and explicit expert evidence than is before us in this case."

For a lawyer to qualify as a competent church lawyer he should have a good working knowledge of Roman Law, its history, theory and practice. This may be obtained by a study of Professor Hunter's volume on Roman Law, edited by Cross, Scott's edition entitled "The Civil Law," containing the translation, in English, of the *Corpus Juris Civilis*, and antecedent material, a knowledge of the English ecclesiastical precedents, of the *Corpus Juris Canonici*, an excellent commentary on it being by Dr. Woywood, and, of course, a thorough knowledge of common and statutory law, both public and private.

The clergyman who has taken a course in Church Law generally given twice or three times a week for two semesters cannot be regarded as an expert in such a field, and even with graduate study must thereafter have practiced before church tribunals extensively. Then he be-

1 65 Neb. 831, 91 N. W. 886 (1908).
2 Sweet and Maxwell, London (1923, 4th ed.).
3 (1932), Central Trust Company, Cincinnati.
comes an expert in what may be termed *internal* church law, the practice and substantive phases of ecclesiastical law. Such a one is at a loss when confronted with the relation of American courts to that body of law which he has studied without considering its relation to it. Now it is the peculiar value of Professor Zollman's book that it serves that need, that is, of translating the various bodies of church law in this country into terms of American case law.

In reviewing the action of ecclesiastical superiors and tribunals to determine whether it will be disturbed, the central question is upon the regularity of the action in accordance with the regulations of the church to which the clergyman has either expressly or impliedly agreed to be bound. A manual such as this should set forth the more important ordinances of the several churches in an appendix, for in trying such matters before state tribunals the greater familiarity with the internal *modi operandi* of ecclesiastical bodies the greater will be the help both to the court and the litigant. In addition such contrasts are of advantage to the student of comparative law, especially the provisions of the *Corpus Juris Canonici*, book 4, on the practice and procedure of civil and criminal trials. One of the canonical actions was the *actio ad implendum* to require the performance of an act by an officer of the court when the judgment is against the defendant, a type of specific performance. As Dean Pound reminds one, 5 "It is only when for some reason specific relief is impractical or inequitable, as in contracts of personal service, that money relief is resorted to." The doctrine of consideration, which the lawyer thinks of as grounded upon a detriment to the promise, might have been the making of a promise with the intention to be bound, the *causa* of the civil law, had not the influence of Canon Law been impaired in the sixteenth century. Whether such action would have been "not to its advantage" 6 (the common law), is not clear, for the tendency of courts to treat contracts as bilateral rather than unilateral leads in the di-

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5 An Introduction to the Philosophy of Law (1922), New Haven.
6 P. 252.
rection of looking upon a promise as being morally, therefore legally, binding.

It is interesting to observe the status of the Supreme Pontiff from the point of view of Canon Law. No court is regarded as having jurisdiction over the Pope, for he is empowered to exercise "the highest legislative, administrative and judicial power in the Church," and this was the case in the Roman Empire, "quid placet principi, lex est," in the former case, of course, founded upon the basis of sacred writ and the teaching of the fathers.

In dealing with the mortmain statutes, Section 167, Professor Zollman does not make it clear that the purpose of the statutes was not so much to prevent church monopolies, the church tenure being most benevolent towards the tenant, but the unwillingness of the crown to forego the incidents of feudal tenure, such as wardship, and its desire to limit the temporalities of the church for personal rather than altruistic motives.

Despite the persuasiveness of Professor White upon the enforceability of antenuptual promises, disparatus cultus, it is very doubtful whether such promises will ever be held to be enforceable, which is the opinion of Professor Zollman.

In Bonacum v. Harrington, which was brought by a clergyman to test the right of the bishop to remove him from a parish without cause on the contention that he had not been inducted into the diocese, Commissioner Pound said: "The remedy of the deprived clergyman is to be found within the organization itself. So long as the judgment or act of his superiors relates merely to its internal affairs and to church discipline, and he is not deprived or sought to be deprived of any property rights, he has no standing in court to procure a review of the proceedings dismissing him." The law could not be more cogently expressed. The author's comment in section 331 must be taken as a corollary: "The question whether the church tribunal had jurisdiction and whether it has violated the law which it professes to administer, may be investigated

7 Woywood, op. cit. ii, 199.
8 84 Ecclesiastical Review 496 (1932).
9 Supra note 1.
by the courts.” In an earlier Pennsylvania case,\(^{10}\) where a bishop removed a pastor without cause or trial the Supreme Court said: “We cannot assent to the doctrine that the pastor’s right of property may thus be stricken down, and he be prohibited from following his profession, without accusation and opportunity for a hearing and trial,” but in \(\text{Stack v. O’Hara,}^{11}\) where the clergyman sued to recover an amount which he alleged he would have received if assigned by the bishop to an office, the court commented: “May a man have an action at law against a minister for refusing to baptize. . . .” Judgment for the defendant was granted on demurrer.

The relation of the bishop holding the legal title to one of the churches in his diocese was discussed in \(\text{Krauczunas v. Hoban.}^{12}\) The court held that the bishop held the property in trust passively for the congregation, and not absolutely.

The matter of the taxing of churches and schools under religious control, the right of incorporated and unincorporated religious institutions to be beneficiaries of trusts, these and other important questions are presented fully and clearly in this treatise indispensible to churchmen generally. Even the nature of the interest of the pewholder is set forth \textit{in extenso}. Whether it be a mere license or a real right in the nature of an easement is, of course, a question of intention on which the case of \(\text{O’Hear v. De Goesbriand.}^{13}\) will throw much light. The aim of Dean Fox in seeking to introduce courses \(^{14}\) in church law generally is laudatory, and with such a volume for ready reference the teacher of such a course has much to rely upon, and much to stimulate him to further study and research.

\text{Lewis C. Cassidy.}\(^{*}\)

\(^{10}\) \(\text{O’Hara v. Stack, 90 Pa. 477 (1879).}\)
\(^{11}\) \(\text{Stack v. O’Hara, 2 Pa. Co. Ct. Rep. 348 (1887). A later case between the same parties on a different cause of action.}\)
\(^{12}\) \(233 \text{ Pa. 138, 81 Atl. 938 (1911).}\)
\(^{13}\) \(33 \text{ Vt. 593, 80 Am. Dec. 653 (1861).}\)
\(^{14}\) \(\text{Zollman, Forward, iii.}\)
\(*\) \(\text{Professor of Law, Georgetown University Law School.}\)

The author, a member of the Faculty of the Law School of the Catholic University of America, has furnished an able exposition of this vexatious question, with an exhaustive analysis of the English and American decisions holding the ante-nuptial agreements concerning the religious education of children to be unenforceable. These decisions were largely based upon the ideas of property rights and must be read also with a mind attuned to the times under which the rule, that such agreements are unenforceable, originated, as contrasted with the growing thought that rights of personality are involved in the question. As a matter of fact the authorities are traced back to the English cases of In re Browne,1 Hill v. Hill,2 Andrews v. Salt,3 and In re Agar-Ellis.4 The author has fairly demonstrated that these cases are not valid precedents because in some the court finds that there was no ante-nuptial agreement, in others that one of the parties has been guilty of misconduct or has waived rights acquired under the agreement while others were rested upon the now obsolete "king and ruler" right of the father over the control of the child.

After reviewing the American decisions at length the author presents the fact that this agreement should be viewed as a legal contract, and also reviews the nature of the rights acquired in this class of ante-nuptial agreements. The section dealing with the remedy of specific enforcement of the right of personality is ably discussed and there is a very complete list of the statutes of the states in substance directing that, in cases of commitment or adoption, children should be placed so far as possible with persons having the same religious belief.

In view of the fact that there seems to be an awakening to the idea that religious education is essential in the life of a child, if he is to become a useful citizen, it would seem

1 2 Ir. Ch. R. 151, 160.
2 40 L. J. (31 N. S.), 505 (1862).
3 L. R. 8 Ch. App. 622 (1873).
4 10 Ch. D. 49 (1878).
that in considering the best interest of the child it would certainly be consonant with public policy to have the child educated in the religious faith upon which the parents have agreed, to say nothing of enforcing a contract legal in effect and most assuredly binding in honor and conscience. How far the courts today will go in reversing the unenforceable rule is difficult to predict, but those who have occasion to present the question will find much help from reading this treatment of the subject.

CHARLES E. ROACH.*


The real character of this book is to be found in the subtitle, not the title. Professor Dunn disclaims in the beginning any intention to rival Borshard 1 or Eagleton 2 by adding another general treatise on diplomatic protection, but practical experience has given him ample opportunity—he was for a number of years an Assistant Solicitor of the Department of State and of counsel for the American Agent in the British-American and the Mexican Claims Commissions—to realize the shortcomings and inconsistencies of our present system of international law in application. He seeks here, therefore, to apply the new organon of juristic philosophy to that branch of the subject with which, presumably, he is most familiar in practice, in order to test its efficacy with respect to the whole body of international law.

But before reviewing this functional critique it will be necessary to examine the premises upon which it is founded and the movement in municipal law which called it forth.

Some ten years ago Dean Pound 3 analyzed the stagnant state of international law and suggested a realistic approach which would bring the theory of law more closely in accord with the facts of the political and economic

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1 DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915).

2 RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928).

3 Philosophical Theory and International Law, a lecture before the University of Leyden, in 1 BIBLIOTHECA VISSERIANA 71 (1923).
world. International law, he pointed out, came into being almost at a stroke on the publication of Grotius’s great book in 1625 and continued a vital system, inspired by a creative philosophical method, through its classical period which may be said to have ended toward the latter part of the 18th century. At a time when general acceptance of the doctrine of natural law implied identity between the moral and the legal order, and when individual men ruled states in fact as well as in name, international law acting upon the conscience of such personal sovereigns could and did exert a profound influence. Sovereigns were men and hence moral and rational entities responsive to conscience and reason. But the rise of the modern democratic state and the substitution of a sovereign people for a sovereign king reduced the moral order postulated by the theory of international law to a bare figure of speech. The divorce of theory from reality had begun. Nor did the renascence of juristic studies in the early 19th century, marked by such names as Savigny, Maine, Austin and Bentham, expose the fallacies which had sprung up in international law or impart to it any new creative impulse. The old classical natural law theory lingered on among Constitutional writers but met with only distrust in England and America since it was only too obvious in most cases the personal conscience of the writer, warped by national interest and prejudice, masquerading as the conscience of mankind. The historical school passively regarded law as an organic growth, its future verifiably determinable by its past. It was to be watched but not interfered with. The analytical jurists described and systematized what they found. They found international law in the 19th century in an immature state of development, and in giving it coherence as a system they did not go outside existing jural materials, themselves necessarily imperfect for building a new ideal system to fit new facts. So also with the positivists who confined themselves to what was, not caring for what ought to be. It will be seen, therefore, that international law, although profiting from research into its past and the analysis of its positive rules, gained no real impetus in the 19th century. It awaited a sociological jurisprudence which would envisage the social ends to be
subserved in the modern world and shape its system functionally to reach those ends.

The methods and aims of this school in municipal law are now so well known as to be almost commonplace, thanks to the efforts of such workers in the vineyard as Holmes⁴ and Pound, Cardozo and Brandeis. More recently there has arisen a group of writers who have emphasized not only the conscious and articulate ends of law but have sought to apply to the judicial function itself the critique of psychology, and by analysis to separate and distinguish those elements of a judgment attributable to instinctive reaction to class, racial, or economic prejudices, from those which are the result of a conscious choice of competing theories to subserve definite social ends. This focusing of attention on the nature of the judicial process, this attempt to show up the delusiveness of the logical form, has divided the schools: at one extreme, mere animal behaviorism reacting to subconscious social forces with law as its behavior-pattern; and at the other, each judgment drawing on certain Platonic Ideal Forms. It has created an astounding ferment in legal thinking. What is today certain, stable and predictable in law? Some writers, like Jerome Frank,⁵ would say, very little indeed. Professor Beale still believes in ascertainable “rules.” Holmes, Pound⁶ and Cardozo⁷ occupy a middle ground. For the logic of certainty, suggests Cardozo, we may safely substitute the logic of probabilities;⁸ for the rule of universal validity, we may employ the rule of what is best for here and now.⁹ A tentative certainty is thus established, which requires, of course, examination

⁴ "Still it is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." Holmes, The Path of the Law (1897), in COLL. LEGAL PAPERS, 167, 186.
⁵ LAW AND THE MODERN MIND (1930, reviewed by the present writer, Book Review (1932) 21 GEORGETOWN LAW JOURNAL, 100.
⁶ INTRODUCTION TO PHILOSOPHY OF LAW, 138-140.
⁸ OP. CIT. ULT., SUPRA NOTE 7, AT 68 ET SEQ.
⁹ OP. CIT. SUPRA NOTE 4, AT 126.
from time to time of the social premises on which it rests.

Professor Dunn pays his devoirs to this new school of "realists"\(^\text{10}\) (p. 10), and then posits his general problem, the interpretation, in the light of these ideas, of general concepts which have been systematized under the head of "diplomatic protection of citizens abroad," or (shifting the viewpoint) "international responsibility of states for damage done in their territory to the person or property of foreigners." The underlying conflicts of interest, engendered by some diversity in moral standards, by emotional attitude, but more especially by marked differences in economic needs, are given careful consideration. The author points out that the complexity of the factors involved, not the popular view that presents state officials as having only to choose between a policy of enlightened self-interest and a readily determinable international legal rule, offers the only adequate explanation of the uncertainty of their action in a given situation. The latter view, the "imperialistic hypothesis," "assumes a singleness of purpose and an unfailing ingenuity in working toward it, which to anyone familiar with the hesitant and uncertain actions of foreign officers at first hand, must seem in most cases a fantastic illusion" (p. 24). A chapter on "Historical Development" traces the growth of international legal ideas, the acceptance of arbitration as a method of settlement of differences, and the attempts at codification of the law of claims. Significantly it is pointed out that at the First Conference for the Codification of International Law which met at The Hague in 1930, "it was not possible to bring up the subject of social ends for discussion by the conference. Under the prevailing positivist tradition, it was not admitted that these ends had anything to do with the statement of the existing law on the subject" (p. 65).

The chapters on "The Nature of the Legal Process" and on "Unacknowledged Factors that Influence Legal Decis-

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\(^{10}\) Professor Llewellyn includes some twenty names in his list of "realists," with a carefully prepared bibliography of each, Some Realism about Realism—Responding to Dean Pound (1931) 44 Harv. L. Rev. 1222. Professor Dunn acknowledges most of these and adds a few more.
ions,” while of great interest, need not detain us, as they deal with questions already suggested in this notice, and exhaustively discussed in book and law review, in relation to municipal law, by writers of the “realist” group. With these—over half the book—we conclude the prolegomena and come to a detailed discussion of theories of Professor Eagleton and of the articles of the draft convention and comment prepared by the Harvard Law School Research in International Law in connection with The Hague Codification Conference of 1930. While the earlier chapters are doubtless necessary to develop the philosophic background of the study, it may be questioned, in view of all that has been recently written on the same general problem in municipal law, whether they might not well have been shortened and so have left space for a fuller consideration of these principles in application, considered in the chapter on “The Search for Workable Rules and Standards of Conduct.” Professor Dunn starts with the fundamental concept that “international responsibility” can only mean that internationally, certain acts have certain consequences; and adopts the Harvard Research definition of duty in terms of international predictability. The rule put forward by the Harvard draft that international, not national, law must determine state responsibility is then discussed, and from these premises, Professor Dunn proceeds to an examination of who may engage the responsibility of a state. But space does not permit our following him here. Suffice it to say that the discussion is lucid and pointed. The difficult questions of due diligence and denial of justice come in for consideration; the doctrines of the exhaustion of local remedies as pre-


12 Published by the Harvard Law School, Cambridge (1929).

13 Cf. Holmes, “For legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space.” Natural Law, Coll. Legal Papers, 310, 313.

14 Cf. again Holmes, “A legal duty so-called is nothing but a prediction that if a man does or omits certain things, he will be made to suffer in this or that way by judgment of the court.” Op. cit. supra notes 4 and 9, at 169.
liminary to establishing the basis of an international claim, and of revolutionary damages are treated. Passing from tort to contract, the conclusion that the use of governmental power to defeat recovery on contracts is prerequisite to creating an international claim is reached, and the effect of the Calvo clause as contravening public policy is considered. Finally, consideration of certain cases arising between the United States and Mexico results in the conclusion that the measure of damages is determined by no means wholly by the traditional test of reparation to the individual, but that their assessment is in many cases penal in nature, a preventative of such loose conduct by the state in future, or, to employ the cant of the new school, "prophylactic."

From this discussion emerge several general ideas which deserve mention. Much is made of the theory of "risk allocation," which it is suggested might well replace the old *culpa* theory. At several points recurs a statement, startling at first sight, concerning "the ancient doctrine of no liability without fault" (pp. 122, 133, 136). Certainly, so far at least as concerns English law, the "ancient doctrine" was quite otherwise. One reference (p. 133) indicates, however, that the author has in mind the theory of Grotius. The allocation of risk to a state as to all events likely to disturb the "minimum conditions which are regarded as necessary for the continuance of international trade and intercourse" is justifiable, one may agree with Professor Dunn, in theory and offers no doubt a better explanation of decided cases than the *culpa* theory, but the practical difficulty of fixing the norm or standard of such "minimum conditions" still remains. In his last


16 Apparently the reference is to De Jure Belli et Pacis (1625), Lib. II, c. xvii, Eng. transl. (Oxford, 1925), 430, 436.

17 For recent writings on the subject of risk allocation in municipal law, see Douglas, Vicarious Liability and Administration of Risk (1929) Yale L. J. 584, 720; and other articles cited by Llewellyn, op. cit. supra note 10, at 1255, note.
chapter (p. 201) he attempts an enumeration of these conditions. If the *culpa* theory involves a false assumption as to a readily ascertainable moral standard, the other presupposes a common standard of economic-social values, which may, however, and are likely to, vary as widely as economic-social conditions in different parts of the world. Professor Dunn would be the first to admit, for instance, and he in fact makes frequent reference to, the differences in our outlook and that of many Latin-American states. This profound divergence in viewpoint, as he often complains, accounts for the reluctance of Latin-American states to accept many principles of protection which we regard as fundamental. But who shall say what constitutes “progress?”

But to say that the problem has not been solved is not to say that it has not been very ably put before us. The appeal to deciding agencies in international law to make their decisions with the avowed object of achieving certain agreed desirable social ends, by keeping in mind the probable consequences of their decisions; the appeal to writers to make more articulate the aims of international law in terms not of its own 18th-century rules but of a general social and economic purpose, should not be without its response. Professor Dunn is to be congratulated on his achievement.

The book is of peculiar interest as being the first publication of the Walter Hines Page School of International Relations, of the Johns Hopkins University. Few misprints were discovered (pp. 74, 172). It has an index. Protest must be made, however, against the practice of saving the beauty of the page at the expense of the readers' patience by relegating to the back of the book all the notes. Practical considerations should certainly outweigh aesthetic ones here. There is nothing more

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18 We are now and then brought forcibly to consider the bases of some of our own institutions which ordinarily might be thought "progressive," and perhaps benevolent. What is good for one people at one time may not be at another; or for another people. On corporations and chain stores, for instance, see the dissenting opinion of Brandeis, J., in Liggett Co. v. Florida, U. S. Sup. Ct. March 13, 1933.
irritating to the present reviewer than to have to search for citations and comment in such a welter of notes. It falls little short of “Lord” Timothy Dexter’s famous trick of putting all his punctuation marks in an appendix with the facetious injunction to the reader “to sprinkle his pepper and salt to his own liking.”

MANGUM WEEKS.*

Washington.


A very real merit of this casebook lies in the fact that it contains quite recent opinions of the United States Supreme Court, and a number of state courts, concerning questions of vital importance from the point of view of constitutional law and dealing with problems bound to arise with increasing rapidity in times of almost inevitable economic experimentation. As one, but by no means exceptional, illustration of this up-to-dateness of the collection, the inclusion of the Oklahoma Ice Case,* may be properly cited. That the book contains all the well known classics of constitutional law goes, of course, without saying.

The book, however, is more than a mere collection of cases. The arrangement on the whole follows the usual classification of textbooks and casebooks on constitutional law, but the selection of later cases is quite critical, and, more, each chapter is preceded by an historical introduction, giving the student a general idea of the problem involved and thus eliminating some of the objections recently frequently made to the exclusive use of the case system. The author’s exposition, as well as his supplementary notes, brief as they are, invariably are scholarly and accurate.

Perhaps a criticism of the collection could be made on the score of its size (1500 pages). Obviously, in no course, in any law school, and of the usual duration, can all the cases presented be even superficially read and much less

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thoroughly studied. Evidently this is not the author's intention. No doubt, the instructor will be required to make his own selections from the material presented. This being so, even the large number of cases may be of advantage, for the teacher has the opportunity for the exercise of a certain amount of individual judgment without requiring too much reading outside of the casebook.

Professor Dodd's casebook is a useful collection.

CHARLES PERGLER.*

Washington, D. C.


Probably a lawyer having a general practice will find the title of this book far from informing him of its contents. While many general practitioners have some contact with the practice of patent law, it has become a specialty fairly wrapped up in itself. The practice of patent law in general is divided into two principal phases; first, that relating to the preparing and filing applications for patents and prosecuting the cases through the Patent Office to the actual granting of the patent; and second, that relating to conduct of litigation in the United States courts to prevent infringement of patents.

The first branch itself has two principal divisions. The practice, proceedings and rules relating to the preparation and filing of applications for patents and the negotiations with the examiner to procure the allowance of the patent including whatever appeals may be necessary, is generally referred to as patent soliciting. The other branch is generally referred to among the patent profession as interference practice, and the present book has to do with that phase of the matter.

The business of the Patent Office has grown to such an extent that there are about 80,000 applications for patents filed every year. In such a large number of applications it is not surprising to find that occasionally two inventors working along similar lines produce inventions which may be broadly or narrowly described by the same terms. When this happens two inventors are both asking for

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patents for the same invention. Obviously the exclusive right of the patent cannot be granted to both of these inventors. The law specifically provides for the patent to be granted only to the first inventor, and, based largely on the Revised Statutes, an interference is instituted in the Patent Office to determine who is the first inventor. Each year about 2,000 interferences are declared by the Patent Office involving upwards of 4,000 applications for patents. In some instances three or more applications are involved and sometimes granted patents are involved. Of this number less than 300 are actually litigated and go to final adjudication in the Patent Office. This means, however, that about one interference case each working day is decided by the Patent Office. The use, therefore, of the present book is fairly limited. At the same time it is to be observed that when interference cases are distributed among those specializing in patent practice most attorneys are involved in merely an occasional interference, so that it frequently is essential to live carefully with the books and decided cases while going through an interference.

The interference practice and procedure in the Patent Office has been built up by rulings and decisions to a very large extent of employees of the Patent Office, many of whom have never actually practiced law and many of whom have had no contact with inventors and no experience in actually taking testimony. For this reason or for some other reason the interference practice in the Patent Office is probably the most complicated procedure found anywhere in the law. It is easier to make a misstep in an interference case than in any other type of litigation. The importance of interference litigation may readily be seen, however, when it is remembered that such things as the patents for the high vacuum radio tube and cracking of petroleum have been the subject of interferences. Indeed the putative value of the invention involved in interference frequently runs into the millions and cannot be conveniently fixed in advance. The importance, therefore, and value of a book properly dealing with interference practice cannot be overestimated.

The present volume is an interesting attempt to cover the field of interference practice. It endeavors to point out who may be the parties to an interference and what pleading may be filed in an interference as well as what procedure may be adopted to definitely fix the issues and what testimony or proofs should be taken to establish the essential facts of conception, disclosure and reduction to practice of the invention involved. There is also a discussion of the substantive law as interpreted by the Patent Office and the courts so as to indicate what outcome may be expected in a case. The line of appeals is indicated. A chapter rather sketchily refers to the allied matter of protests against the issuance of patents and public use proceedings and another similar chapter relates to interfering patents. The book is well arranged and has an adequate index and cites over 700 cases. Substantially all of the matter in the book can be conveniently found in the ordinary patent index digest, although the author states the conclusion instead of quoting from the cases cited. The book entirely fails to provide forms acceptable to the Patent Office for the various steps in the procedure. Forms under the technical rules of the Patent Office are extremely important, frequently difficult to obtain and very much needed by the profession. The author makes a very inadequate apology for this omission by saying: “Forms have not been included as the forms given in the appendix of the Rules of Practice may readily be adapted or modified to meet any given set of circumstances.” It is to be observed, however, that the Rules of Practice of the Patent Office seem to include only three or four forms relating to interference procedure and no one who has not been through the mill several times will be able to adapt those forms successfully to the multitude of occasions arising in interference practice.

Karl Fenning.*

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Mr. Wallace's work is primarily of a political-economic, rather than of a traditionally legal nature, but the arresting title of the book, and the essentially legalistic character of the argument which the author uses to establish the groundwork of his thesis are facts which, together with the growing intimacy of the relation of law (at least public law) to the other social sciences, make it fitting to spread a discussion of the volume upon the pages of this Journal.

Our Obsolete Constitution is a plea for a new form of government and new ideal of public law in the United States. It calls for a recognition of the spirit of Scientific Industrialism, based upon the harmonious co-operation of the ideals of Scientific Capitalism and Scientific Socialism. ("Scientific," it may be hazarded, is the equivalent of the conventional "modified.") Between these two sets of ideals, it is said, there is no essential antithesis or clash, but, properly conceived, they mesh together so as to form a happy economic ideal.

The regime of Scientific Industrialism would have as its concrete objective a five-point program: 1. The guarantee of Economic Liberty, i.e., the rights to the fruits of one's labor, to economic security, to education and to leisure; 2. The guarantee of Social Security, i.e., assurance against ill health, unemployment and the like, proper working conditions and hours of labor, and general social welfare; 3. The guarantee of a More Efficient Government, to be brought about by the breakdown of the system of dual sovereignty, and the establishment in its place of a single State with nine regional sub-states whose elected representatives would direct the administration of the State; 4. The guarantee of Personal Liberty and Property by State ownership of all corporate enterprises "that serve a preponderantly social need," and a maintenance of other forms of private property in the status quo; 5. The guarantee of a Planned National Economy, by State supervision of the credit system and machinery.

This quintuple program is to be carried out under the direction of the State, which is to be, not the supreme
overload that it is today, but rather a corporation, co-equal with other corporations, whose function will be that of a liaison instrumentality. The concern of this State will be the social control of industrial corporations, considered as social units, rather than, as at present, of individuals. The latter would look for their protection and would subject the control of their conduct to the industrial corporations.

The entire plan is a remarkably ingenious combination of ideas selected from institutions of the Fascist Corporative State and the Soviet form of government, together with some original, or at least untested, devices of social control. In view of the tremendous and far-reaching changes of policy being made at the present time, not only in Washington but in nearly every capital in the world, it is impossible to say that some day the order of things described in Our Obsolete Constitution will not be a reality.

But of more immediate interest to the lawyer is the author's justification of the title of his work, and the basis of his allegation of the necessity of a change in our concept of the nature and function of the State.

The Constitution (so the argument runs) in its inception postulated a philosophy of rugged individualism, of recognizing and giving effect to claims of individuals in respect of the individuality of each, both as against other individuals and as against society. The purpose of the constitution was primarily to secure to the individual certain enumerated political rights. But this purpose no longer exists. The machinery for its effectuation was impaired by the gradual growth of the emphasis upon the national state and a corresponding diminishing of the importance of local state sovereignty. This growth paved the way for the Sixteenth Amendment, whose effect was to destroy the ideal of absolute ownership of property in favor of the general government. This recognition of the supreme importance of the general government, giving it the widest scope to act in the interest of social welfare, led to the Selective Draft Act of 1917, which broke down pre-existing ideals of the sanctity of the person, and the Espionage Act of 1917, destructive of the immunities of the old order of freedom of speech and liberty of the press.
The conclusion is drawn that in view of these facts, the individual political rights idealized by the Framers of the Constitution are now valueless. The Constitution itself has become a document of self-contradiction with such socializing appendages as the Sixteenth, Eighteenth and Nineteenth Amendments tacked on to its individualistic body. It follows, then, that individual rights and interests being dead or valueless, their place in the legal order must be filled; and by what more obviously than by a recognition and effectuation of a body of social interests? In order to bring about such an order of things, it is necessary to revise not only our ideas of social control, but also the instrument by which we express and give effect to those ideas.

Such a course of argument betrays a lack of understanding of what may be called the spirit of Anglo-American public law, especially that part of it which consists of expounding the American Constitution. It indicates a belief that our public law is fashioned from a set of rigorously formal ideals such as prevail in continental Europe. It fails to recognize that American public law is not a body of abstract concepts, cast as in a die and immobile from the day of their inception, but is a living, growing organism, always capable of adapting itself to conformity with changes in public ideals.

Mr. Wallace shows some appreciation of this spirit when he says (p. 112):

“In practice we in the United States believed that we had labored more diligently and successfully than any other people to abolish poverty. . . . In practice the struggle for economic freedom has in a large measure been won. It is in theory that we in America are so woefully laggards. We have been so busy with doing, that an examination of fundamentals has been wholly neglected.”

But on a later page it appears that the author did not fully appreciate the truth of which the passage quoted shows he had some glimmering. He says (p. 127):

“Natural rights . . . are no longer regarded as independent of the law, as superior to legislative enactment. In spite of the fact that the Constitution in its early amendments professes . . . guar-
antee them, later amendments have completely reversed this policy, so that today we have in the same document provisions that contradict each other. The Supreme Court itself no longer renders decisions in strict accordance with the fundamental principles of the Constitution. When on occasion it still does so, it becomes strikingly apparent how obsolete ideas of inherent, inalienable natural rights have become."

The innuendo, of course is that our public law, as expressed in the decisions of the Supreme Court, is derived from the "fundamental principles" of the Constitution. Nothing, as every lawyer familiar with the work of the Supreme Court knows, could be further from the truth. Verification of the innuendo may be found in some of the rhetorical flourishes of which Supreme Court justices were once fond, but a tracing of the path of actual decision which, after all, is the path of the law, will reveal that abstract ideals are the least of the elements which take part in its formation. However much the Framers were impressed with the importance of "natural rights," the Supreme Court does not, and has never felt itself bound thereby. Constitutional decisions are made, not by measuring abstract principles of law up against a body of equally abstract rights, but by analyzing and weighing tangible facts and determining whether they are the sort of thing referred to by the written words of the Constitution, and if so, what the reference is.

The nature of a constitutional decision, and hence of public law, is well illustrated by comparing the decisions of *Hammer v. Dagenhart*¹ and *Caminetti v. United States*.² If our public law were a body of conceptualism, these two decisions would be absolutely repugnant to each other. But an analysis of the facts of the two cases reveals certain psychological features found in the one and not in the other. The differences being ascertained, the reaching of the decisions is a comparatively simple matter of applying a traditional judicial technique.

Once our public law is viewed in the proper light, one is driven to the conclusion that Mr. Wallace's indictment, for the absence of legal recognition and effectuation of

¹ 247 U. S. 251, 62 L. Ed. 1101 (1918).
² 242 U. S. 470, 61 L. Ed. 442 (1917).
certain social interests, should be directed not at the Constitution, but at the administration thereof. The fault (and it cannot be denied that there is fault) lies with legislators, whether national or local, and their failure to utilize the devices provided in the Constitution to bring into the legal order various interests which experience has shown are but inadequately dealt with by other organs of social control. There are a host of such devices of which surprisingly little use has been made. The interstate compact, uniform state legislation, the giving of wide powers with appropriate checks to responsible executive departments, are all potential vehicles of social legislation whose usefulness has been scarcely investigated.

It cannot, then, be admitted that individual political rights are non-existent; much less that they are valueless. Rather let it be said that they were never absolute, but are qualified and tempered, accordingly as they are balanced with other interests of a public or social nature. Nor can it be admitted that effectuation of large social interests is impossible of attainment under our existing Constitution, if proper use is made of the machinery which is constitutionally provided. Finally it cannot be admitted that the Constitution is a temple of "natural rights," and is self-contradictory. It follows, then, that the author has failed to establish the premise upon which he argues the necessity of abandoning the Constitution.

Our Obsolete Constitution, then, resolves itself into an offer or proposal of a form of social control by which certain desirable results may be gained; and the question should be left as to whether such an order of things is more advantageous than the present. This is obviously quite different from the bald statement that the present order must inevitably go, and the proposed order is the alternative to chaos.

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