1920

Industrial Courts with Special Reference to the Kansas Experiment

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INDUSTRIAL COURTS:

WITH SPECIAL REFERENCE TO THE KANSAS EXPERIMENT[1]

By J. S. YOUNG*

THE act creating the court of industrial relations fairly bristles with constitutional questions and will have to run the gauntlet of the courts from the district and supreme courts of Kansas to the Supreme Court of the United States.

V. THE ACT CREATING THE COURT OF INDUSTRIAL RELATIONS AND THE KANSAS CONSTITUTION.

1. *The Power of the Governor to Call a Special Session of the Legislature.* Counsel for defendants in *Kansas v. Howat*[2] attacked the validity of the act on the ground that it was passed at a special session of the legislature which Governor Allen had no authority to call for the reason that no extraordinary occasion existed in the state at the time. This contention the court denied following an earlier decision by the same court. In that case, *Farrelly v. Cole*,[3] Governor Leedy of Kansas called a special session of the legislature nineteen days before the time for the regular session. Article 1, sec. 3 of the constitution reads as follows: "The supreme executive power of the state shall be vested in the governor who shall see that the laws are faithfully executed," and sec. 5 of the same article states: "He may on extraordinary occasions convene the legislature by proclamation." Governor Leedy's proclamation convening the legislature reads as follows:

"*Whereas* assurances have reached me to the effect that if the legislature be convened, suitable legislation for the regulation of railway charges can be enacted and deeming such matter of sufficient importance to justify the convening of the legislature in special session, now therefore, I, by virtue of authority in me vested by the constitution of the state, do convene."

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[1]Continued from Vol. 4, MINNESOTA LAW REVIEW 483.

[2]Briefs were submitted by Messrs. P. H. Callery of Pittsburg, Kansas and Redmond S. Brennan, Kansas City, Missouri, (1920) 107 Kan. 423, 191 Pac. 585.

[3](1899) 60 Kan. 356, 56 Pac. 492, 44 L. R. A. 464.

The legislature assembled and Governor Leedy delivered a message setting forth his reasons for calling the special session. The legislature passed an act regulating railway charges, which was contested by the railroads on the ground that no extraordinary occasion existed within the meaning of the constitution to justify the calling of the special session that had enacted the offending law.

It will be noticed that the Governor's proclamation does not recite that an extraordinary occasion existed, but it does state:

"I, . . . by virtue of the authority vested in me by the constitution of the state, do hereby convene the legislature of the state of Kansas."

The court pointed out that the governor had no power to call a special session except on extraordinary occasions and that the language of the proclamation by its reference to the constitution made it certain that an extraordinary occasion was meant. Governor Leedy's proclamation is less defective than the form used by the early presidents of the United States.[4]

The railway companies contended that the reasons assigned by Governor Leedy in his messages to the special session clearly showed that no extraordinary occasion existed, in short, they attacked the discretion of the governor. The court followed the decisions of other courts in a few leading cases. In *Marbury v. Madison*[5] the Supreme Court by Marshall said:

"He, the president, is to use his own discretion and is accountable only to his country in his political character and to his own conscience, and whatever opinion may be entertained of the manner in which the executive discretion may be used, still there exists no power to control that discretion. The subject is political."

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[4]The clause in the Kansas constitution providing for the calling an extra session of the legislature was adopted from a similar provision in the constitution of the United States (Art. 2, Sec. 3) which reads: "He, (the president) may, on extraordinary occasions, convene both houses (of Congress) or either of them." The first proclamation of President Washington calling an extra session of the Senate is dated March 1, 1791 and does not mention an extraordinary occasion. It reads: "Certain matters touching the public good requiring that the Senate shall be convened." 1 Mess. & Papers of Pres. 587.

This form was followed until Tyler introduced the following: "Objects interesting to the United States requiring that the Senate should be in session," etc. Beginning with Fillmore, all presidents have recited an extraordinary occasion in the proclamation calling a special session of either the Senate or the Congress.

[5](1803) 1 Cranch 137, 2 L. Ed. 60.

In *United States v. Arredondo*[6] the Supreme Court discussing discretion said:

"It is a universal principle that when power or jurisdiction is delegated any public officer or tribunal over a subject-matter and its exercise is confined to his or their discretion, the acts so done are binding and valid as to the subject-matter."

The highest court in New York in the case of *Judges, etc., v. People*[7] *ex rel. Savage* defined discretion to be:

"A power of right conferred upon them by law of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others."

Touching the uncontrolled power of the governor to call a special session of the legislature, the supreme court of Delaware in the case of *Whiteman's executors v. Wilmington, etc., R. Co.*[8] said:

"The governor is authorized to convene the general assembly on extraordinary occasions. The framers of the constitution have not defined what should be deemed an extraordinary occasion for this purpose nor referred the settlement of the question to any other department or branch of the gorvernment. The governor must necessarily be the judge or he cannot exercise the power. He may err but this court has no jurisdiction to review his decision or to correct his error. If he act corruptly, he is liable to impeachment."

In passing on the same point the supreme court of Colorado in *Veto Power*[9] said:

"Whether or not an occasion exists of such extraordinary character as demands a convention of the general assembly in special session . . . is a matter resting entirely in the judgment of the executive."

The same conclusion was reached by the New York supreme court in *People ex rel Catter v. Rice.*[10] The Kansas supreme court after citing with approval the cases listed above, concluded that there can be no fixed or uniform definition of an extraordinary occasion. The court concluded:[11]

"The sole power is thus deposited in the governor to convene the legislature on extraordinary occasions and it has been uniformly held that he cannot be compelled by mandamus to act,

[6](1832) 6 Pet. 729, 8 L. Ed. 547.
[7](1837) 18 Wend. 99.
[8](1839) 2 Harr. (Del.) 514, 33 Am. Dec. 411.
[9](1886) 9 Colo. 642, 21 Pac. 477.
[10](1892) 65 Hun 236, 20 N. Y. S. 293, 47 N. Y. St. Rep. 685.
[11]Farrelly v. Cole, 60 Kan. 356, 56 Pac. 492, 44 L. R. A. 464.

should he refuse for any reason to exercise the power, nor be restrained by injunction in an attempt to exercise it."

2. *The Title of the Act and Revival of a Law by Amendment.* The Kansas constitution provides:[12]

"No bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be revived or amended unless the new act contain the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed."

The title of the act is as follows:[13]

"An act creating the court of industrial relations, defining its powers and duties, and relating thereto, abolishing the public utilities commission, repealing all acts and parts of acts in conflict therewith, and providing penalties for the violation of this act."

The constitutionality of the act has been challenged because of defective title by counsel for defendants in two important cases[14] that have been before the Kansas courts recently. In the *Jerry Scott* case (district court), which involved the criminal provisions of the act (Laws of 1920, Chap. 29, Sec. 17) counsel for the defendant contended that the title does not define the subjects embodied in the act; that the title does not clearly express all that is included in the act; that it violates the constitutional requirement of unity by embodying a multiplicity of subjects. Among these numerous subjects may be mentioned: (1) transferring the power and duties formerly controlled by the public utilities commission; (2) affecting with a public interest certain employments, industries and public utilities and common carriers; (3) giving power to the court of industrial relations to make rules and regulations to govern its own procedure; (4) giving power to the court of industrial relations to make rules controlling the acts and conduct of employees; (5) authorizing investigation of conditions, surroundings and housing of employees; (6) establishing of a minimum wage; (7) determination of law as to misdemeanors and felonies.

The district court of Wyandotte County, by Justice McCamish, reviewed several cases in which the supreme court of Kansas had the titles of the acts under consideration. In *Swayze*

[12]Art. 2, Sec. 16.

[13]Kansas Laws, 1920, C. 29.

[14](1920) Kansas v. Jerry Scott, District Court of Wyandotte County, printed transcript of decision and brief by Messrs. James A. Smith, Harry Sullivan & Henry Dean. Kansas v. Alexander Howat et al., (Kan. 1920) 191 Pac. 585.

v. Britton[15] the court held that the title, "An act concerning notaries public" does not include a section providing for the service of protest on a negotiable instrument by a notary public because this was not part of his duty under the law merchant; in *M. K. & T. Ry. Co. v. Long,*[16] the title, "An act to require railroad companies to make cattle guards and to pay damages that individuals may sustain," does not cover a provision for making crossings; in *State v. Barrett,*[17] the title, "An act to prohibit the manufacture and sale of intoxicating liquors" is not broad enough to cover a section punishing intoxication of persons; in *Wilkerson v. Belknap Savings Bank,*[18] the title, "An act to regulate the sale of real estate under execution . . . and repealing certain sections of General Statutes, 1889," does not admit a section "In any case where the property is bid in by or for the prior creditor the sheriff shall receive the fees for the sale, but shall not be entitled to charge any commission on said sale" as not germane to the title; in *Topeka v. Wood,*[19] the title, "An act relating to cities of the first class and providing for appeals from the police court of such cities in certain cases," does not sustain a provision for further appeal from the district court to the supreme court; in *Winfield v. Hackney,*[20] the title, "An ordinance in relation to the registration of dogs in the city of Winfield and providing a penalty," does not cover a section providing that "at the time of registration the owner shall pay a sum of money to the city clerk or dog tax collector" because it is not expressed in the title; in *Clark v. Wallace County Commissioners,*[21] the title, "An act to protect fruit trees, hedge plants and fences," does not embrace a section providing for the payment of a bounty on gopher scalps.

The information charged Jerry Scott with an offense under the proviso contained in sec. 17, chap. 29, Laws of 1920.[22] It

[15](1879) 17 Kan. 625, Brewer, J., dissenting.
[16](1882) 27 Kan. 684.
[17](1882) 27 Kan. 213.
[18](1894) 52 Kan. 718, 35 Pac. 792.
[19](1901) 62 Kan. 809, 64 Pac. 630.
[20](1912) 87 Kan. 858, 126 Pac. 1088.
[21](1895) 54 Kan. 634, 39 Pac. 225.
[22]"*Provided,* That nothing in this act shall be construed as restricting the right of any individual employee engaged in the operation of any such industry, employment, public utility, or common carrier to quit his employment at any time, but it shall be unlawful for an such individual employee or other person to conspire with other persons to quit their employment or to induce other persons to quit their employment for the purpose of hindering, delaying, interfering with, or

was claimed that the proviso violates sec. 16, art. 2 of the Kansas constitution in that the subject of the section is neither clearly expressed in the title to the act, nor germane to what is expressed. Touching this point the court said:[23]

"The real subject of the act was to abolish the old public utilities commission and to confer the powers of the old on a new board which the statute creates and to enlarge the powers heretofore exercised in the matter of settling industrial disputes."

"It is difficult to see," remarked the court, "how the subject as expressed in the title will support an act to define and punish certain misdemeanors not relating to the subject. Reading the title to the effect that a court is to be established, does not warn the reader that new statutory offenses in no way affecting the powers and duties of the court, are to be defined and punished; or that the law of conspiracy to prevent the continuous operation of railroads is to be annulled or amended."

The court, therefore, ruled that the proviso of sec. 17 violates sec. 16 of art. 2 of the state constitution.

Counsel for Howat et al. in the supreme court challenged the constitutionality of the act among other reasons because (1) it contains more than one subject and the subjects are not clearly expressed in the title. It was contended that the title of the act is, a court of industrial relations, but the body of the act clearly shows that the legislature intended to create an agency of the legislature and not a court as a part of the judiciary; therefore, the real subject of the act is not only not clearly expressed in the title, but is not expressed at all; the term "court" should be used in its ordinary and legal meaning to be a "judicial assembly" or "a place where justice is judicially administered." (2) The act expressly abolishes the public utilities commission, confers its former powers upon the new court of industrial relations and seeks to reënact all the statutes dealing with the former commission.[24] This, it was argued, clearly conflicts with sec. 16,

suspending the operation of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act, or for any person to engage in what is known as 'picketing,' or to intimidate by threats, abuse, or in any other manner, any person or persons with intent to induce such person or persons to quit such employment, or for the purpose of deterring or preventing any other person or persons from accepting employment or from remaining in the employ of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act." Laws 1920, c. 29, Sec. 17.

[23]State v. Jerry Scott, see note 14.

[24]Laws 1920, c. 29, Sec. 2 confers upon the court of industrial relations the jurisdiction formerly exercised by the public utilities commission; the court is given jurisdiction to supervise and control all public

art. 2 of the constitution which requires the sections so amended to be reënacted in full, which constitutional provision is mandatory and not merely directory.[25] (3) The title is too restrictive for the body of the act. Section 11 of the act provides:

"In case any person shall fail or refuse to obey any summons or subpoena issued by said court after due service then, and in that event said court is hereby authorized and empowered to take proper proceedings in any court of competent jurisdiction to compel obedience to such summons or subpoena."

This section which greatly enlarges the jurisdiction of the courts does not appear in the title of the act creating a court of industrial relations, defining its powers and *relating thereto.* Various cases have been decided by the supreme court of Kansas holding acts of the legislature void because the titles are too restricted for the subjects included in the body of the acts.[26] (4) The new crime of hindering or delaying the continuity of production of certain industries, employments, public utilities and the operation of common carriers is created with no reference to the criminal code of procedure and is not germane to the title.[27] (5) The body of the act attempts to change the power, authority and jurisdiction[28] of the supreme court with no indication in the

utilities and common carriers as defined by the Kansas statutes; all laws relating to the powers, authority, jurisdiction and duties of the public utilities commission are adopted and made applicable to the court, and the commission is abolished. The court is required to prosecute or defend all pending actions brought by or against the commission, and any investigations, examinations or proceedings pending before the commission are to be continued and heard by the court.

[25]Commissioners of Sedgwick County v. Bailey, (1874) 13 Kan. 600.

[26]See Allen County Agr. Soc. v. County Commissioners, (1915) 93 Kan. 772, 145 Pac. 902; State ex rel. Kellogg v. Commissioners of Wabaunsee County, (1891) 45 Kan. 731, 26 Pac. 483.

[27]State v. Lewin, (1894) 53 Kan. 679, 37 Pac. 168.

[28]Laws 1920, c. 29, Sec. 12: "In case of the failure or refusal of either party to said controversy to obey and be governed by the order of said court of industrial relations, then and in that even said court is hereby authorized to bring proper proceedings in the supreme court of the state of Kansas to compel compliance with said order; and in case either party to said controversy should feel aggrieved at any order made and entered by said court of industrial relations, such party is hereby authorized and empowered within ten days after service of such order upon it to bring proper proceedings in the supreme court of the state of Kansas to compel said court of industrial relations to make and enter a just, reasonable and lawful order in the premises. In case of such proceedings in the supreme court by either party, the evidence produced before said court of industrial relations may be considered by said supreme court, but said supreme court, if it deem further evidence necessary to enable it to render a just and proper judgment, may admit such additional evidence in open court or order it taken and transcribed by a master or commissioner. . . ."

title of the act, even granting that the legislature has the power to make the changes.

The supreme court adverted to most of the points raised in the brief of counsel for Howat and held that the court of industrial relations is not a court in the strict judicial sense and pointed out that the act creates an administrative board to carry out the will of the legislature and cited cases to show that the word "court" is frequently applied to bodies not strictly judicial in character.[29] Touching the objections that the act undertakes to confer all the power of the public utilities commission upon the new court without reënacting in full the sections of the old law, the court decided that the act is not amendatory and that art. 2, sec. 16 does not prohibit legislation by reference, citing with approval *State v. Shawnee County,*[30] wherein the court announced that it is constitutional to extend the provisions of an existing statute to a new subject by an appropriate reference to such statute in the new act; that the legislature has power to declare the meaning of an earlier act and such interpretation is binding in all cases arising after it has been made manifest; and that reference and interpretative statutes are not amendatory within the meaning of the constitution. Discussing the power of courts of competent jurisdiction to compel the attendance of witnesses before the court of industrial relations as being foreign to the title, the court remarked that the title includes the words "An act creating a court of industrial relations . . . and *relating thereto;*" that sec. 11 certainly has relation to the new tribunal and is therefore, pertinent to the subject expressed in the title. The objections that the title is too restrictive, the court dismissed with the curt statement: "We think them not well taken."

Since one of the chief objections to the act has been directed against the title, revival, etc., a brief statement on the general constitutional position of these matters may be introduced at this place. Legislative procedure in this country was adopted from England. Certain forms for bills in parliament developed, but inaccuracy in form never rendered a statute invalid. Custom and law in England have been the chief regulators, but custom

[29]See "Words and Phrases," "Courts;" Aldrich v. Aldrich, (1844) 8 Metc. 102. The legislature of Massachusetts is styled "The General Court of Massachusetts," Const. c. I, Art. I.

[30](1910) 83 Kan. 199, 110 Pac. 92.

and statutory laws are not binding on parliament. Originally, all the acts of a parliamentary session had one caption or title, but a distinct title for each chapter was introduced by Henry VIII.[31] Originally, the parliament petitioned the king to legislate and the title served to notify him of the desired legislation. When parliament ceased petitioning for legislation and drafted bills in complete form in order to hold the king to the exact wishes of parliament, titles assumed a slightly increased importance but were still relatively unimportant because the attention of the legislator was directed to the content of the bill, not by its title, but by the rule that required three readings; besides, many of the members were illiterate and could read neither the title nor the bill. With the increase in the number and complexity of bills the title assumed more importance because members paid slight attention to the perfunctory reading of the bills and read for themselves the bills whose titles aroused their interest. A body of skilled bill drafters now see that all important government bills have a correct form, for a defective or misleading title might mean the defeat of the cabinet.

There were many grave abuses in legislation in the United States before the adoption of constitutional restrictions in regard to title, unity, revival by amendments, reference, etc. One of the strong arguments for placing such matters in the constitution is that by so doing, they become enforceable by the courts; therefore, if the titles do not fit the requirements of the constitution, the act, or at least parts of it, may be declared unconstitutional and void. Before titles of acts were regulated by constitutional provisions, a notorious abuse occurred in the state of Georgia in the Yazoo act of Jan. 17, 1795. The legislature passed an act with the following title: "An act for the payment of the late state troops." When the act was finally passed, it was found that large areas of land had been conferred in fee simple, upon a few individuals. This brazen act aroused such a storm of protest that the next legislature annulled the grant, and as a direct result of popular indignation, a clause was inserted in the constitution of Georgia in 1798 which reads as follows: "Nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof."[32] This provision

[31]See Jones, Chester Lloyd, Statute Law Making, p. 62; Ex parte John Lidell, (1892) 93 Cal. 633, 29 Pac. 251.

[32]Const. of Georgia, Art. I, Sec. 17; Savannah v. State, (1843) 4 Ga. 26.

looked toward preventing the passage of poor bills under good titles.

Another requirement soon found its way into the state constitutions, viz. unity, or that one subject only should be treated in each bill. This is to prevent "log rolling" and "riders" and to make each measure stand on its own merits. The provision requiring unity appeared in the constitution of New Jersey in 1844 and the object is "to avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other."

Title rules have met with general approval. In Congress the rule is statutory and applies to bills making appropriations. An act of August 26, 1842, provides;[33] "The style and title of all acts making appropriation for the support of the government shall be as follows: 'An act making appropriations (insert object) for the year ending June 30 (insert year)'." Practically all the states have regulated the matter in their constitutions.[34]

There is no general agreement among the state courts on the interpretation of title requirements in the constitution touching construction, limits as to broadness or narrowness, sufficiency, mandatory or directory and partial invalidity of the act. A sound list of guiding principles was announced by Justice Valentine of the Kansas supreme court in *State v. Barrett*.[35] Discussing the matter of the title of a bill in relation to the body of the act he said:

"Its object must be taken into consideration; and the provision must not be construed or enforced in any narrow or technical spirit, but must be construed liberally on the one side, so as to guard against the abuse intended to be prevented by it, and liberally on the other side, so as not to embarrass or obstruct needed legislation. . . . The title of an act may be so broad and comprehensive as to include innumerable minor subjects, provided all these minor subjects are capable of being so combined and united as to form only one grand and comprehensive subject; or it may be so narrow and restricted as to include only the smallest and minutest subject. . . . In construing the title to an act, as well as the act itself, reference must be had to the object of the act, and to the evil sought to be remedied by it. . . . It is not necessary that the title to an act should

[33]5 Stat. at L., C. 207, Sec. 2, p. 537.

[34]For a good discussion of the advantages of such rules see Somerset County Com'rs. v. Pocomoke Bridge Co., (1908) 109 Md. 1, 71 Atl. 462; Smith v. Commonwealth, (1871) 71 Ky. 100.

[35](1882) 27 Kan. 213.

be a synopsis or abstract of the entire act in all its details; it is sufficient if the title indicates clearly, though in general terms, the scope of the act. . . . It is sufficient if it is germane to the single subject expressed in the title, and included therein, provided the act itself does not contain more than this single subject."

The reason for incorporating in the state constitution such a provision as "No law shall be revived or amended unless the new act contain the entire act revived, or the section or sections amended and the section or sections so amended shall be repealed" is to give complete publicity to the law. Discussing a similar provision of the New York constitution, the court of appeals in New York said:[36]

"The evil in view in adopting this provision of the constitution was the incorporating into acts of the legislature by reference to other statutes, of clauses and provisions of which the legislature might be ignorant and which affecting public and private interest in a manner and to be extent not disclosed upon the face of the act, a bill might become a law, which would not receive the sanction of the legislature if fully understood. . . . There is no evil . . . to be apprehended by the mere reference to other acts and statutes for the forms of process and procedure for giving effect to a statute otherwise perfect and complete."

The courts usually construe these provisions liberally, not always carrying them out in literal strictness, but generally enforcing the original intention of the framers of the constitutions.[37]

Reverting to the two recent cases decided by the Kansas courts, one or two observations may be made. The supreme court upheld the act creating a court of industrial relations as complying with the formal constitutional requirements so far as it was necessary to decide whether the Crawford County court could compel Howat to testify before the court of industrial relations or be adjudged in contempt and committed to jail until he should testify. It put the stamp of approval upon legislation by reference. Little can be said in favor of this form of legislation save that it prevents padding the statute books. It does not make for publicity of the law, either for the legislator or the

[36]People ex rel. Board of Comrs. of Washington Park v. Banks, (1876) 67 N. Y. 568. See State v. McNeal, (1886) 48 N. J. L. 407, 5 Atl. 805.

[37]See In re Buffalo Traction Co., (1898) 25 App. Div. 447, 49 N. Y. S. 1052; People v. McKay, (1902) 72 App. Div. 527, 76 N. Y. S. 600; Kennedy v. Borough of Belmar, (1897) 61 N. J. L. 20, 38 Atl. 756.

public, and is very undesirable when combining civil and criminal matters. The Wyandotte County court, by Justice McCamish, had a more difficult point to decide in the *Jerry Scott* case. The decision followed the rather technical decisions of the Kansas supreme court's former adjudications. Justice McCamish kept within the strict letter of the law but he neither took account of the general legal principles stated by Justice Valentine in *State v. Barrett,* nor the whole purpose and spirit of the act creating the court of industrial relations as gathered from the context. The decision of the supreme court in the Howat case surely indicates that Justice McCamish's decision will be reversed, but in doing so, the supreme court must overrule a long line of its own former decisions or distinguish them upon very narrow and technical grounds.

3. *Commingling the Functions of the Three Great Departments of the Government.* The framers of American constitutions both federal and state have been influenced by the doctrine[38] of Montesquieu who said: "There can be no liberty . . . if the power of judging be not separated from the legislative and executive powers." This theory amounts almost to a fetish. No person in this country is regarded as qualified to be a member of a constitutional convention who does not believe that the essential powers of government should be distributed among three separate bodies of magistrates, viz: legislative, executive and judicial. There is no express provision in the Kansas constitution[39] separating the powers or stating that persons charged with the exercise of powers properly belonging to the one shall not exercise any functions properly belonging to either of the others; yet the supreme court of Kansas in the case of *In re Sims Petitioner,*[40] said:

"We think, however, that under our constitution these powers are as clearly separated as though the framers of the constitution had said so in terms;" and in *"Auditor of State v. Atchison, Topeka & Santa Fe Railroad Company,*[41] that attempting to confer both executive and judicial power upon a court is "as dangerous to good government as it is subversive of the constitu-

[38]See James Madison in No. 47 of The Federalist; constitution of Massachusetts, Part The First, Art. XXX.

[39]The three great powers are vested in the Kansas constitution in art. 1, sec. 1; art. 2, sec. 1; art. 3, sec. 1.

[40](1894) 54 Kan. 1, 37 Pac. 135.

[41](1870) 6 Kan. 500, 7 Am. Rep. 575.

tion which has carefully kept separate the executive, legislative and judicial departments of the government."

Does the act creating a court of industrial relations violate the Kansas constitution by commingling the functions of the three great departments of government? In approaching an answer to the question it is well to keep in mind that the framers of the bill must have studiously attempted to avoid the mistakes made by the legislature that enacted the "Visitation Act" which was declared unconstitutional by the Kansas supreme court in the case of *State v. Johnson.*[42] This act set up a real court endowed with complete law and equity powers; with a full set of administrative machinery of a regular court; with power to summon juries, issue writs of mandamus and injunction; with power to punish for contempt and to carry its decrees into effect. In addition to these judicial powers the court had the power to establish freight rates and switching charges, to apportion charges between connecting carriers, and to require the construction and maintenance of depots. The court in declaring an act with these provisions unconstitutional said:

"Despotism begins when the executive, legislative and judicial departments of government cease to be independent of one another and the tyrant exercises without check the powers of the three united."

What kind of a body is created with the title, "Court of Industrial Relations"? The act uses such words as "tribunal," "judges," "jurisdiction," "actions," "record," "rules," "evidence," "testimony," "seal," "summons," "subpoena," "attendance of witnesses," etc. These expressions fall within the nomenclature of the judiciary; but is a court in the judicial sense created by the act? The debate[43] in the legislature at the time the bill was under consideration indicates that the lawmakers wished to create an agency that would consider controversies between capital and labor in such manner as to guarantee to capital a fair return; to labor fair wages, reasonable hours and wholesome working conditions; and to the public continuous and efficient service; that the subjects coming within the powers of the body are so far-reaching that something more than an arbitration board or a commission in the ordinary sense of the term should be provided; that the agency created should act in a quasi judicial capacity,

[42](1900) 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662.
[43]See Young, J. S. in 4 MINNESOTA LAW REVIEW, 483.

or approach its work in a judicial frame of mind, take evidence, make findings of fact and enter an order—in short, a court in a broad and general but not in a technical sense. The Kansas supreme court in the *Howat* case held that the agency created is not a court in the judicial sense but is an administrative board to carry out the will of the legislature.[44]

The next question that arises is this: Has the legislature made an unconstitutional delegation of its own legislative power to an administrative board called the court of industrial relations? As early as 1871 the Kansas supreme court in the case of *Coleman v. Newby,*[45] by Justice Valentine said:

"While the legislature possesses all the legislative power of the state, and while it is true that they cannot delegate any portion of that power to any other body, tribunal or person, yet it is generally found impracticable for them to exercise this power in detail. They may do so if they chose, or they may enact general provisions, and leave those who are to act under these general provisions to use their discretion in filling up the details. They may mark out the great outlines, and leave those who are to act within these outlines to use their discretion in carrying out the minor regulations."

The supreme court of the United States in *Reagan v. Farmers' Loan and Trust Co.*[46] said:

"Such a commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislature."

In *State v. Missouri-Pacific Railroad*[47] the Kansas supreme court by Mr. Justice Porter said:

"In a majority of the states of the Union the legislatures have created commissions and conferred upon them the power to regulate and control the operation of common carriers, to fix rates and schedules for the transportation of passengers and freight, to hear and determine complaints of the people against the carrier and to act thereon, and the power to create such agencies and to confer upon them these powers, has been repeatedly recognized and upheld by the Supreme Court of the United States."

The supreme court of Indiana in the case of *Blue v. Beach,*[48] said:

"The test and distinction whether a power is strictly legislative, or whether it is administrative, and merely relates to the

[44]Supra p. 46 and footnote 29.
[45](1871) 7 Kan. 82.
[46](1894) 154 U. S. 362, 38 L. Ed. 1014, 14 S. C. R. 1047.
[47](1907) 76 Kan. 467, 92 Pac. 606.
[48](1900) 155 Ind. 121, 56 N. E. 89.

execution of the statute law is between the delegation of power to make the law, which necessarily involves a discretion of what it shall be, and conferring authority and discretion as to its execution to be exercised under and in pursuance of law. The first cannot be done. To the latter, no valid objection can be made."

The supreme court of Oregon having under consideration the constitutionality of an act creating a railroad commission, in the case of *State v. Corvalis*[49] by Justice Moore said:

"The rule is universal that a legislative assembly exercising an authority conferred by the constitution cannot delegate the power to enact laws. It can, however, direct that the application of a statute to a designated district or to a specific state of facts, shall depend upon the existence of certain conditions, to be ascertained and determined in a particular manner."

The supreme court of Minnesota in *State v. Chicago, Milwaukee & St. Paul Ry. Co.*,[50] has said:

"The principle is repeatedly recognized by all courts that the legislature may authorize others to do things which it might properly do itself. . . . The statute books are full of legislation granting to officers large discretionary powers in the execution of laws the validity of which has never been successfully assailed."

The supreme court of Pennsylvania in the case of *Moers v. Reading*[51] has said:

"Half the statutes on our books are in the alternative form, depending upon the discretion of some person or persons to whom is confided the duty of determining whether the occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of law."

The supreme court of Pennsylvania in *Locke's Appeal*[52] said:

"To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is found relating to a state of affairs not yet developed, or to things future and impossible to fully know. The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would stop the wheels of government."

The Supreme Court of the United States has upheld the constitutionality of congressional acts delegating to the secretary[53]

[49](1911) 59 Oregon 450, 117 Pac. 980.
[50](1888) 38 Minn. 295, 37 N. W. 782.
[51](1853) 21 Pa. St. 188.
[52](1873) 72 Pa. St. 491, 13 Am. Rep. 716.
[53]Dunlap v. U. S. (1899) 173 U. S. 65, 43 L. Ed. 616, 19 S. C. R. 319.

of the treasury and to the president[54] the power to ascertain facts, and prescribe regulations under which its acts shall operate.

The legal principle established by these decisions is that the legislature cannot delegate the power to make laws, but can create an agency to carry out the legislative will as expressed in the acts of the legislature. Social and economic conditions are so complex and the demand for legislation so great, the state legislatures meet so infrequently and for so short a time that legislation is passed in general terms and the full operation of the law is made to depend upon future contingencies and the determination of certain sets of facts. This determination of facts is placed in the hands of so-called experts—either a single officer or a board. The legislative act sets the standard and all that these officers do is apply the standard to certain determined facts. The legislature in the act creating a court of industrial relations sets the standard in the oft-recurring phrase "fair, reasonable and just." When the court of industrial relations determines what is "fair, reasonable and just" it is not exercising legislative power—it is merely applying the legislative standard of fairness, reasonableness and justness to a given state of facts, which it, on investigation, finds to exist and when it enters an order the legislative will already declared in the act becomes operative; the court of industrial relations therefore, does not exercise delegated legislative power and is a constitutional agency.

Counsel for defendant in the Howat case contended[55] that the act (sec. 3) sets out the different employments, industries, etc., in such a vague general way that the court of industrial relations in contrast with the railroad commissions, which have their jurisdiction specifically designated, must and does exercise a judicial function in deciding its own jurisdiction; (2) that since the court of industrial relations may not modify a contract that is fair, just and reasonable, it must and does exercise a judicial function in determining this matter.

In reply to the first objection made by counsel for Howat it may be said that the act is as definite as the circumstances warrant, because the court of industrial relations has to do with *controversies* over the *operation* of several things, viz: (1) manufacture or preparation of food products; (2) manufacture of clothing; (3) mining or production of fuel; (4) transportation;

[54]Field v. Clark, (1892) 143 U. S. 649, 36 L. Ed. 294, 12 S. C. R. 495.
[55]Brief of Mr. R. S. Brennan, p. 17.

(5) public utilities and common carriers. The act is more inclusive than one dealing with a subject such as railroads. The second objection made by counsel may be answered by saying that the court of industrial relations is not exercising a judicial function when it decides that a subject coming within its jurisdiction is or is not fair, just and reasonable, because this is the standard set by the legislatures, and the court of industrial relations is simply exercising its executive discretion in the matter. The supreme court of Kansas in *State v. Railway Co.*[56] by Justice Porter has said:

"It is not every act which requires the exercise of judgment and discretion which can be said to be judicial. Where judgment or discretion is exercised as a mere incident to a ministerial power it has never been held to be the exercise of judicial power within the meaning of constitutions, which, like ours, provide for the separation of the three departments of government."

As additional evidence that the court of industrial relations is not a part of the judiciary the act (sec. 11) empowers the court to issue summons and subpoenas and can compel the attendance of witnesses and the production of books, correspondence, files and accounts, but on refusal of any person to comply, the court of industrial relations has no power to adjudge him in contempt of court and punish him but must invoke the aid of a court of competent jurisdiction. Furthermore, when the court of industrial relations enters an order, it has no authority to enforce obedience but must resort to the supreme court of the state for assistance (sec. 12). Therefore, it is safe to conclude that the court of industrial relations does not exercise judicial power in the constitutional sense.

Does the fact that the court of industrial relations must invoke the assistance of real courts render the act or this part of it unconstitutional by violating the principle of the separation of powers? Section 11 of the act creating the court of industrial relations is as follows:

"In case any person shall fail or refuse to obey any summons or subpoena issued by said court after due service, then and in that event said court is hereby authorized and empowered to take proper proceedings in any court of competent jurisdiction to compel obedience to such summons or subpoena."

The constitutionality of a similar provision in the act of Congress creating the Interstate Commerce Commission was chal-

[56] (1907) 76 Kan. 467, 92 Pac. 606.

lenged by counsel for defendant in *Interstate Commerce Commission v. Brimson*[57] on the ground that the action of the court in requiring a witness to appear before an administrative body is a non-judicial action. The court by Justice Harlan in overruling the contention said:

"The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative tribunal for final determination. . . . The performance of the duty . . . which rests upon the defendants cannot be directly enforced except by judicial process. . . . It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the constitution."

Counsel for defendants in the *Howat case* argued that sec. 12 of the act[58] is invalid because it authorizes proceedings in the supreme court; (1) to enforce compliance with the orders of the court of industrial relations; (2) to compel the court of industrial relations under certain circumstances to render "just, reasonable and lawful orders." In both instances new evidence may be admitted by the supreme court. It was claimed that the first is an attempt to enlarge the original jurisdiction of the supreme court; the second to confer legislative power on the supreme court. To support the contention that the act authorizing the supreme court to consider new evidence to enable it to render a just and proper judgment is unconstitutional, counsel cites the case of *In re Burnette*[59] which defines a case de novo as being in essence original. In this case the court said:

"The manner in which the case reaches the higher court is not the test; jurisdiction being the power to hear and determine, the nature of the functions to be exercised controls, whether they are to be brought into activity by primary processes or by removal from an inferior tribunal. Upon a trial de novo the power of an appellate court in dealing with the pleadings and the evidence in the application of the law, and in the rendition of judgment according to the rights of the case, all independent of the action of the lower court, is no different from what it would be if the case were begun there originally, and hence is not appellate

[57](1894) 154 U. S. 447, 39 L. Ed. 49.
[58]For the provisions of Sec. 12 see footnote 28. Supra.
[59](1906) 73 Kan. 609, 85 Pac. 575.

within the meaning of laws creating jurisdiction . . . it is beyond the power of the legislature to enlarge the scope of the original jurisdiction to which this court is confined, either directly or by authorizing the primary consideration of causes other than those specified in the constitution or indirectly, by including such cases within its review power on appeal."

In the opinion of the writer, the "proper proceeding" of sec. 12 comes within the supreme court's original jurisdiction in mandamus, and if so, it is constitutional and does not attempt to enlarge the original jurisdiction of the court by means of a trial de novo. Of course, any attempt of the legislature to enlarge the original jurisdiction of the supreme court would be clearly unconstitutional.[60]

The second contention that the supreme court has legislative power conferred upon it by section 12 which authorizes either aggrieved party because of an order of the court of industrial relations to bring proper proceedings in the supreme court to compel the court of industrial relations to make and enter a "just, reasonable and lawful order" in the premises, presents a difficult question, especially, in view of the fact that new evidence may be admitted by the supreme court to enable it to render a just and proper judgment. The language of section 12 is capable of at least three constructions. If the supreme court is not satisfied with the original order: (1) the supreme court may determine that the order of the court of industrial relations is not "just, reasonable and lawful" and order it to try again and enter another order which will conform to the legislative standard; (2) it may determine what is a "just, reasonable and lawful" order by revision and order the court of industrial relations to enforce what in effect, is not the order of the court of industrial relations but is the order of the supreme court; (3) it may determine what is a "just, reasonable and lawful" order on the basis of the new evidence and thus practically oust or supersede the court of industrial relations. In the brief (p. 20) for the defendant in the *Howat case,* Mr. Redmond S. Brennan said:

"We assume that the section intends that the supreme court shall set out in detail the specific orders which the court of industrial relations is required to make. The controversy which has thus been brought to the supreme court is the same as that which was before the court of industrial relations. It will come

[60]See Auditor of State v. Atchison, etc., R. Co., (1870) 6 Kan. 500; State ex rel. v. Wilson, (1883) 30 Kan. 661, 2 Pac. 828; Marbury v. Madison, (1803) 1 Cranch 137, 2 L. Ed. 60.

to the supreme court with the same issues framed. The same relief will be prayed and the nature of the order which the supreme court will make is the same as that which was entered by the court of industrial relations. If, therefore, the order of the court of industrial relations is a legislative order, then the order of the supreme court is likewise legislative. The mere fact that in the last analysis it is the court of industrial relations that finally enters the order does not in any way change the situation. If the supreme court has no power to enter the order directly, then the law will not permit it to enter such an order indirectly."

The brief cites two leading federal cases to support the contention that the supreme court of Kansas cannot revise the orders of the court of industrial relations, also, that the legislature in section 12 attempted to confer legislative power on the supreme court. In the case of *Interstate Commerce Commission v. Lakeshore and Michigan Southern Railway Co.*[61] the federal circuit court for the northern district of Ohio by Justice Wing said:

"It has been urged in behalf of the commission that the court has general equity powers in this cause to make such mandatory injunction, other than the enforcement of the order of the commission, as will satisfy justice. The act itself confines the action of this court to the enforcement of the lawful orders or requirements of the interstate commerce commission. It has been frequently decided in the federal courts that, under the act, the function of the court is to enforce or refuse to enforce the order of the commission as made; that the court cannot amend or modify an order, or make another order; that the federal court has no revisory power over the orders of the commission; and that it cannot undertake to decide whether the requirements have violated an order which the commission might have lawfully made."

Another leading case touching the same point is *St. Louis S. W. Railway Co. v. United States,*[62] wherein the federal district court for the western district of Kentucky said:

"At the threshold it may be said that the scope of our inquiry is exceedingly limited and involves only the ultimate question as to whether the commission, in the order complained of, acted within its power. Whatever view the court might entertain upon it, or upon the expediency or wisdom of the order, is not material. The court cannot interfere with the rates fixed, or practice established by the commission, unless it is made plainly to appear that the orders are violative of the constitution or wanting in conformity to statutory authority, or have been arbitrarily exercised; and the duty of the court is to determine the sole question whether

[61] (1905) 134 Fed. 942.
[62] (1916) 234 Fed. 668.

or not the order of the particular case is based upon substantial evidence, heard and considered by the commission."

Mr. Brennan comes to the conclusion that the court of industrial relations is not a board similar to the railway commissions or the interstate commerce commission and cannot invoke the supreme court in the same way as these commissions can; he also concludes that section 12 of the act undoubtedly vests the supreme court with legislative power which makes the act unconstitutional. The contention of Mr. Brennan on the last point seems sound if one accepts his construction of section 12, but there are other possible interpretations of section 12 as indicated above. It is a wellknown rule of statutory construction that if a statute be capable of two or more constructions under one of which it would be constitutional and under the other unconstitutional, the courts will adopt the meaning consonant with constitutionality. The supreme court of Kansas in the *Howat case* did not consider the controverted points in regard to the jurisdiction of the supreme court because it was not, in the opinion of the court, involved in the issue but it did decide the court of industrial relations is an administrative agency to carry out the express will of the legislature. This point being judicially determined, may the supreme court in the exercise of its judicial power be invoked as indicated in section 12? In answering this question it is necessary to distinguish between a legislative and a judicial act. A clear statement on this point was made in the *Sinking Fund Cases*[63] by Justice Field as follows:

"The distinction between a judicial and a legislative act is well defined. The one determines what the law is and the other what the rights of the parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it."

If the court of industrial relations is similar to the railway commissions and interstate commerce commission, some guiding principles have already been established by both federal and state adjudications. In *Reagan v. Farmers' Loan and Trust Co.*[64] the court by Justice Brewer said:

"It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or an administrative rather than a judicial function. . . . The courts are not author-

[63](1878) 99 U. S. 700, 25 L. Ed. 516.
[64](1894) 154 U. S. 362, 14 S. C. R. 1047, 38 L. Ed. 1014.

ized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

In *Interstate Commerce Commission v. N. O. & T. P. R. Co.*[65] the court said:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable . . . that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the state, that is a legislative act."

Again, in the case of *Norwalk Railway Company's Appeal*[66] the court said:

"The regulation of such charges is held to be distinctively a legislative function which may be delegated by the legislature to a subordinate legislative or administrative body, but if this subordinate body, or the legislature, exceeds its powers, and a person is thereby injured in his rights of property, he may invoke the judicial power to determine that question of legal injury; and the reasonableness of the charges, although a question legislative in its nature, must be reviewed by the court as necessarily incident to the exercise of its judicial power. But if the court should attempt to establish for the future a schedule of charges, it would exceed the limits of judicial power; it would act as legislator in respect to a matter as to which it must also act as judge."

The supreme court of Kansas in the case of *State v. M. P. R. Co.*[67] by Justice Porter said;

"The doctrine of the decided cases is that the inquiry by the courts as to the reasonableness of the schedules of rates or other regulations, either made by the legislature or through a commission, is purely a judicial inquiry, and the legislature may expressly confer the power upon the courts."

The doctrine of these cases is that an agency such as the court of industrial relations can carry on investigations, make findings of facts and enter an order which must be reasonable, and that the courts may review the order as to its reasonableness as an incident of judicial power, but cannot revise the order as this would be an exercise of legislative power. Section 12 is very

[65](1897) 167 U. S. 479, 42 L. Ed. 253.
[66](1897) 69 Conn. 576, 37 Atl. 1087.
[67](1907) 76 Kan. 467, 92 Pac. 606.

baffling. It is the opinion of the writer that the Kansas legislature did not intend to confer power on the supreme court to revise an order of the court of industrial relations as this would be clearly unconstitutional. The supreme court can neither fix a rate nor make an order and require the court of industrial relations to enter the same as its own order; but the supreme court can find that the order made by the court of industrial relations is not "just, reasonable or lawful" and issue an order requiring the court of industrial relations to proceed to hear and determine the matter and issue an order that is "just, reasonable and lawful." The final order is to be entered by the court of industrial relations, not by the supreme court. Suppose, by way of illustration, the court of industrial relations should make an order dismissing an application and the applicant should apply to the supreme court for a mandatory order requiring the court of industrial relations to reinstate the proceeding and hear it, can there be any doubt that the supreme court would be clearly within its original jurisdiction? On the other hand, suppose the court of industrial relations should make an unjust, unreasonable and unlawful order and the party against whom it is made should invoke the aid of the supreme court and ask it to issue an order upon the court of industrial relations requiring it to make and enter a proper order. In this case the supreme court would make its finding that the order of the court of industrial relations was unjust, unreasonable and unlawful, and as a consequence would enter its order requiring the court of industrial relations to hear the matter and render a "just, reasonable and lawful" order.

The writer is of the opinion that section 12 does not confer legislative power on the supreme court; also that the functions of the three great departments of government are not commingled in the act creating a court of industrial relations.

Space limitation precludes a discussion of a few other minor constitutional questions raised in the *Howat case*. The general conclusion of the writer is that the act creating a court of industrial relations does not conflict with the Kansas constitution. In the next article the constitutionality of the police power provisions of the statute will be examined.

(To be continued)