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INDUSTRIAL COURTS

With Special Reference to the Kansas Experiment[1]

By J. S. Young*

THE Kansas act creating a court of industrial relations has been challenged as violating constitutional rights by (1) affecting with a public interest the business of manufacturing clothing and food, and the mining or production of fuel; (2) socializing these three industries by providing for state operation in certain circumstances; (3) interfering with liberty of contract by denying to both employer and employee due process and equal protection of the law; (4) reëstablishing involuntary servitude; (5) impairing the obligation of the contract; (6) unnecessarily burdening interstate commerce. These are sweeping condemnations and call for an examination of the state police power and the constitutional limitations that apply to it.

VI. The Kansas Act and the Police Power.

1. *Nature and Methods of the Police Power.* What is the police power? The courts and writers on the subject frankly acknowledge that the police power has never been more than partially defined. Its nature prevents a concise definition. The supreme court of Iowa has said that this power cannot be embalmed in any fixed or rigid formula and the Supreme Court of the United States in the *Slaughter House cases*[2] said:

"The police power is and must be, from its very nature incapable of any very exact definition and limitation." Justice Shaw in *Commonwealth v. Alger*[3] pointed out that "it is much easier to prescribe and realize the existence and sources of the police power than to mark its boundaries or prescribe the limitations of its existence." Various writers have made general statements touching the nature of the police power. John Stuart Mill discussing the powers of the government said:[4] "As soon as any part of a person's conduct affects prejudicially the interests of

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[1] Continued from 5 Minnesota Law Review 39.

[2] (1872) 16 Wall. 36. 21 L. Ed. 394.

[3] (1851) 7 Cush. (Mass.) 53, 58.

[4] Essay on Liberty. Ch. 4, p. 283, Harvard Classics.

others, society has jurisdiction over it." Professor Ernst Freund, the most recent and undoubtedly the ablest writer on the police power, after stating that the object of the police power is the general welfare said:[5]

"It [the state] exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of the abuse of these rights on the part of those who are unskillful, careless or unscrupulous."

The doctrine of the police power originated with and has been developed by the courts until this power has come to have a recognized place along with such powers of the state as the constituent, the international, the administrative, the proprietary, the criminal, the taxing and eminent domain; but the courts do not attempt formal definitions. Each case is allowed to rest upon its own individual merits. In *Gibbons v. Ogden*,[6] Chief Justice Marshall referred to the state police power, without using the term, as the state's power to regulate its "internal affairs" whether of "trading or police," and in *Brown v. Maryland*,[7] he used the term "police power" for the first time in any adjudicated case. In *Lakeview v. Rose Hill Cemetery Company*[8] the supreme court of Illinois, by Justice Scott, said:

"It [the police power] is a power coextensive with self-preservation and is not inaptly termed the law of overruling necessity. It may be said to be that inherent or plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society."

While the supreme court in the case of *Thorpe v. Rutland, etc., R. R. Co.*[9] described the police power as follows:

"It extends to the protection of the lives, limbs, health, comfort and quiet of all property within the state . . . and persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state."

The courts have developed the police power until it now extends to the protection of public health, safety and morals; the

[5] Freund, Ernst, Police Power, p. 6.
[6] (1824) 9 Wheat. (U.S.) 1, 6 L. Ed. 23.
[7] (1827) 12 Wheat. (U.S.) 419, 6 L. Ed. 678.
[8] (1873) 70 Ill. 191, 22 Am. Rep. 71.
[9] (1854) 27 Vt. 140, 149, 62 Am. Dec. 625.

prevention of fraud; safeguarding against incapacity and incompetence; conservation of natural resources; securing public peace, good order and comfort; promotion of public convenience, general welfare and all the great public needs. The state cannot divest itself of the police power.[10] In other words it is inalienable and is founded on the maxim, salus populi suprema lex est. The general method of the police power is sic utere tuo ut alienum non laedas. The state enforces this maxim by restraining and regulating persons in the use they make of their liberty and property. The police power is a general inherent power of the American states; but it must be exercised in such manner as not to conflict with the state or federal constitution. The municipal corporations of a state may exercise the police power, only, when it is properly delegated to them by the law-making power of the state. The federal government has no general police power but it may and does perform a similar function in the exercise of its delegated powers over interstate commerce, postal powers and taxation.

The state may exercise the police power when there is an emergency, danger or need of such magnitude as amounts to public rather than merely private welfare and the emergency danger or need cannot be met more effectively by the exercise of some other power. The police power legislation should be in some proportion to the danger or need, should tend to remove the danger or meet the need, and at the same time not impair essential rights.

The police power is anticipatory and deals with incipient tendencies and conditions that unchecked may lead to the violation of rights and the commission of crime. The exercise of this salutary legislative power is closing the garage before the auto is stolen. If used wisely it may promote the general welfare better than a resort to other coercive measures such as taxing, eminent domain and the criminal power. The general spirit of the times favors prevention rather than allowing matters to drift until crime is committed and punishment must be inflicted; the prevention of typhoid, smallpox, diphtheria and numerous other contagious and infectious diseases by abolition of the slums and the substitution of sanitary hygiene, drainage and sewage; the prevention of accidents in the hazardous occupations rather than

[10] See Boston Beer Co. v. Mass., (1877) 97 U. S. 25, 24 L. Ed. 989; Stone v. Mississippi, (1879) 101 U. S. 814, 25 L. Ed. 1079.

maiming workers and then providing compensation; the prevention of vice by wholesome amusements, settlement houses and proper home conditions; the prevention of food adulteration instead of curing nation-wide poisoning and disease; the prevention of fraud by proper licensing, inspection and publicity; the prevention of social and economic injustice by wholesome legislation. In short, the idea back of police power legislation is that an ounce of prevention is worth a pound of cure; restraint and regulation of persons in the use of their liberty and property are better than reformation and punishment.

Has the Kansas legislature made a proper use of its reserve police power in creating a court of industrial relations for the settlement of industrial disputes, or has it, in seeking to serve the public, exceeded constitutional limitations? In attempting answers to this question the first subject that claims attention is involved in affecting an industry or business with a public interest; in the second is one of constitutional infringement.

2. *Business Affected With a Public Interest.* The Kansas statute affects with a public interest the *operation* of (1) all public utilities as defined in section 8329; (2) all common carriers as defined in section 8330 of the General Statutes of Kansas, 1915; (3) the manufacture of clothing in common use by the people of the state; (4) the manufacture of food products for human beings; (5) the mining or production of fuel in common use either for domestic, manufacturing or transportation purposes; (6) "the transportation of all food products and articles or substances entering into wearing apparel or fuel as aforesaid, from the place where produced to the place of manufacture or consumption." This is one of the widest exercises of the police power ever attempted by a state legislature. What is meant by affecting a business with a public interest? A review of legislation and the resulting adjudications will afford the best answer, and such a review will furnish an approximate standard for testing the Kansas statute.

The doctrine of property or business affected with a public interest was first definitely announced in this country by the Supreme Court in the case of *Munn v. Illinois*[11] and has since been reaffirmed in numerous statutes and adjudications. The issue in the *Munn case* grew out of a provision in the constitution of Illinois, adopted in 1870, and legislation passed in pur-

[11] (1876) 94 U. S. 113, 24 L. Ed. 77.

suance thereof, that declared all elevators or storehouses where grain or other property was stored for the public and a charge made for such service, to be public warehouses and subject to legislative control including the fixing of charges. The Supreme Court upheld the validity of these constitutional and statutory provisions as a proper exercise of the police power, the opinion being written by Chief Justice Waite. The doctrine of the opinion is founded on a statement made by Lord Chief Justice Hale more than two hundred years ago in his treatise, De Portibus Maris:[12]

"If the king[13] or subject have a public wharf unto which all persons that come to that port must come and unlade or lade their goods . . . because they are the wharfs only licensed by the king . . . or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary or excessive duties for cranage, wharfage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate. . . . For now the wharf and crane and other conveniences are affected with a public interest and they cease to be juris privati only. . . ."

Justice Waite stated Lord Hale's principle to be applicable to this country as follows:[14]

"Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use he must submit to the control."

Justice Waite then reviewed the general character of the business of warehouse men in Chicago and emphasized the monopolistic nature of the business in the following words:[15]

"They stand . . . in the very 'gateway of commerce' and take toll from all who pass. Their business most certainly 'tends to a common charge and is become a thing of public interest and use.' . . . Certainly if any business can be clothed 'with a public interest and cease to be juris privati only,' this has been." Continuing, the court said:[16] "It is difficult to see why, if the

[12] 1 Harg. Law Tracts, 78.

[13] The King is placed on the same basis as a subject.

[14] The Munn case, (1876) 94 U. S. 113, 126, 24 L. Ed. 77.

[15] (1876) 94 U. S. 113, 131-2, 24 L. Ed. 77.

[16] (1876) 94 U. S. 113, 131, 24 L. Ed. 77.

common carrier, or the miller, or the ferry-man, or the inn-keeper, or the wharfinger, or the baker, or the cartman or the hackney-coach man, pursues a public employment and exercises 'a sort of public office,' these warehouse men do not."

Having established the business of warehousing to be clothed with a public interest the court justified the fixing of maximum charges for the service as follows:[17]

"In fact, the common law, which requires the charge to be reasonable, is itself, a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms or forego the use."

Justice Field, with Justice Strong concurring, filed a dissenting opinion and raised the question whether it is within the competency of the state to fix the compensation which an individual may receive for the use of his own property in his private business and for a service in connection with it, and remarked:[18] "There is no magic in the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of a building in which the business is transacted. A tailor's or shoemaker's shop would still retain its private character even though the assembled wisdom of the state should declare by organic act or legislative ordinance that such a place was a public workshop and that the workmen were public tailors or public shoemakers. One might as well attempt to change the nature of colors by giving them a new designation."

Justice Field pointed out that by the doctrine of the majority of the court all business and property in the state would be held at the mercy of a majority in the legislature; that doing this under the guise of public good or the police power would be the same as doing it by a special act providing for the confiscation of private property; that the legislature might fix the rent of all tenements used as residences without reference to the cost of their erection. He declared that when Lord Hale spoke of property affected with a public interest and ceasing to be private he meant property, the use of which had been granted by the government or had been granted with special privileges. He then stated that the power to regulate charges under the police power in this country rested on some right or privilege granted by the government which renders the property more valuable to the owner; that submission to the power of regulation grows out of the

[17] (1876) 94 U. S. 113, 134, 24 L. Ed. 77.
[18] (1876) 94 U. S. 113, 138, 24 L. Ed. 77.

grant; that the moment the privilege or advantage is withdrawn the power of regulation ceases.

The principles announced in the *Munn case* and other so-called *Granger cases* came up again for a decision in two famous cases, *People v. Budd*[19] and *Budd v. New York*.[20] In 1888 the legislature of New York passed an act fixing the maximum charge for receiving, elevating, weighing and discharging grain between elevators and lake vessels or propellers, ocean vessels, steamships, and canal boats. The constitutionality of the statute was contested in the state court the following year. Judge Andrews wrote the opinion of the court, and emphasized the fact that the business of elevating grain is an incident to the business of transportation, or that elevating is an instrumentality of transportation; also that warehousing at Buffalo, New York City and Brooklyn is a virtual monopoly which may be regulated under the police power. In other words the doctrine of a business affected with a public interest announced in the *Munn case* was adopted by the state court. There were two vigorous dissents. Justice Gray when discussing the question of virtual monopoly said:[21]

"Has the government any concern or interest in the price which one individual may demand of another, who resorts to him because of his superior business skill or facilities? How does the magnitude or the publicity of an individual's business furnish a valid reason for legislative interference? Every business is, in a measure, public, and is dependent upon the public patronage for its maintenance and success. It is not compulsory upon the public to resort to these elevators nor is the business exclusive or beyond competition. . . . If the door is opened to this species of legislation what protection have we against socialistic laws? The police power is incapable of being stretched to reach such a case as this if we have any respect for the provisions of the constitution. Its justification for interference with a private, legitimate business is admissible only when that business may be said to be affected by a public use or interest by reason of some grant or privilege conferred by the state."

A second dissenting opinion was filed by Justice Peckham who said:[22]

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[19] (1889) 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 A. S. R. 460.

[20] (1891) 143 U. S. 517, 36 L. Ed. 247, 12 S. C. R. 468.

[21] People v. Budd, (1889) 117 N. Y. 1, 32, 22 N. E. 670, 682, 5 L. R. A. 559, 15 A. S. R. 460.

[22] (1889) 117 N. Y. 1, 40, 22 N. E. 670, 682, 5 L. R. A. 559, 15 A. S. R. 460.

"I also deny that any person has a virtual or any monopoly in the business, without a grant thereof from the sovereign power merely because the property is conveniently situated for the business and it would cost a large amount of money to duplicate it. So long as everybody is free to go into the same business and invest his capital therein with the same rights and privileges as those who are already engaged in it, there can be no monopoly in the legal acceptation of the term, virtual or otherwise."

Justice Peckham then protested against adopting the view of Lord Hale which, he said, undoubtedly was colored by the atmosphere of his times with their paternalistic conceptions of government, and then enlarging and extending this view to other cases and by so doing ignoring the later and truer conceptions which an advancing civilization and fuller knowledge of political economy marks out as the proper functions of government. The case was appealed to the Supreme Court.[23] Justice Blatchford wrote the opinion and followed the same line of reasoning adopted by Justice Waite in the *Munn case* and by Justice Andrews in the *Budd case*. Again there was a vigorous dissent written by Justice Brewer with Justices Field and Brown concurring. Justice Brewer said[24] the vice of the doctrine announced in the opinion of the court is "that it places a *public interest* in the use of property upon the same basis as a *public use* of property." Continuing he said:

"Property is devoted to a public use, when, and only when the use is one which the public in its organized capacity, to-wit, the state, has a right to create and maintain it, and, therefore, one which all the public have a right to demand and share in. The use is public, because the public may create it, and that individual creating it is doing thereby and pro tanto the work of the state. The creation of all highways is a public duty. Railroads are highways. The state may build them. If an individual does that work he is pro tanto doing the work of the state. He devotes his property to a public use. The state doing the work fixes the price for the use. . . . But this public use is very different from a public interest in the use. There is scarcely any property in whose use the public has no interest. No man liveth unto himself alone, and no man's property is beyond the touch of another's welfare. Everything, the manner and extent of whose use affects the well-being of others, is property in whose use the public has an interest. . . . Take for instance the only store in a little village, all the public of that village are

[23] Budd v. New York, (1891) 143 U. S. 517, 36 L. Ed. 247, 12 S. C. R. 468.

[24] (1891) 143 U. S. 517, 549-550, 36 L. Ed. 247, 12 S. C. R. 468.

interested in its use. . . . That which is true of the small village store is also true of the largest mercantile establishment in the great city. The magnitude of business does not change the principle. Surely the matters in which the public has the most interest are the supplies of food and clothing; yet can it be that by reason of this interest the state may fix the price at which the butcher must sell his meat or the vendor of boots and shoes his goods?"

The judge then made an analysis of warehousing and concluded that the business is private, not public, therefore, the state cannot regulate it under the police power. He then set forth the following rule:

"That property which a man has honestly acquired, he retains full control of subject to the following limitations: First that he shall not use it to his neighbor's injury, and that does not mean that he must use it for his neighbor's benefit; second, that if he devotes it to a public use he gives to the public a right to control that use; and third, that whenever the public need requires, the public may take it upon payment of due compensation."

In 1891 the state of North Dakota regulated grain elevators, declaring them to be public warehouses, fixed charges, and required their managers to carry insurance to protect the owners of grain stored in such elevators. This act was contested before the Supreme Court in the case of *Brass v. North Dakota.*[25] The opinion of the court was written by Justice Shiras, who pointed out that the monopoly feature of the warehouse business upon which the *Munn* and *Budd cases* rested is not conclusive in the matter of regulation, nor does the power of regulation rest exclusively upon special privileges granted. In other words, Justice Shiras stripped the principle of its monopolistic and special privilege features and said:

"When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances. We do not understand this law to require the owner of a warehouse built and used by him only to store his own grain to receive and store the grain of others. Such a duty only arises when he chooses to enter upon the business of elevating and storing the grain of others for profit."

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[25] (1894) 153 U. S. 391, 38 L. Ed. 757, 14 S. C. R. 857.

Again Justice Brewer, Justices Field, Jackson and White concurring, dissented. Justice Brewer offered three objections against the opinion:[26] (1) the warehouse man by the decision is compelled to engage in the business of maintaining a public warehouse when his chief interest is private, or buying, storing and selling grain for himself, the storing for the public being only incidental; (2) there is no practical monopoly in the prairie state of North Dakota by means of which tribute can be exacted from the community, as was involved in the *Munn* and *Budd cases;* (3) the warehouse man is compelled to insure grain for the benefit of those storing it no matter what the cost.

The above review shows that the business of warehousing has been established as one affected with a public interest, and hence subject to the exercise of the police power, in spite of the powerful arguments advanced in able dissenting opinions bottomed on the private nature of the business. In other words, such a public interest was discovered by the legislatures as justified state control.

A development somewhat similar to that of warehousing, has taken place with regard to banking. There was little regulation of banking in English law. There was some statutory regulation of dealing in coins, bills of exchange and fixing the rate of interest. In the United States, banking was originally regarded as a common right and open to all citizens until after the financial crisis of 1837 when some states passed statutes changing the common law right in order to insure financial security.[27] These general regulations culminated in limiting the right of banking to corporations in some states and compelling the creation of a depositors' guaranty fund in other states. In 1890 the state of North Dakota passed an act prohibiting private banking and required all banking to be carried on by corporations. In upholding this act as a proper exercise of the police power the supreme court of North Dakota in the case of *State ex rel. Goodsil v. Woodmansee,*[28] by Justice Wallin, said:

"It is clear . . . that the matter of regulating and prohibiting private banking, and all banking not expressly authorized by law, is strictly within the legislative discretion, under

[26] (1894) 153 U. S. 291, 308, 38 L. Ed. 757, 14 S. C. R. 857.

[27] Freund, Police Power 417.

[28] (1890) 1 N. D. 246, 46 N. W. 970; accord Weed v. Bergh, (1910) 141 Wis. 569, 124 N. W. 664; Contra, State v. Scougral, (1892) 3 S. D. 55, 51 N. W. 858, and Marymont v. Nevada State Banking Board, (1910) 33 Nev. 333, 111 Pac. 295.

that branch of the police power relating to the public safety and that the courts will not interfere and declare such legislation unconstitutional as an invasion of natural rights."

Closely connected with the requirement that all banking be done by corporations is one adopted by the Kansas legislature in 1911, authorizing a state charter board to decide whether public business necessity in a community justifies the establishment of a bank or of additional banking facilities, and if no public necessity is found, to withhold a charter from the would-be-incorporators. In upholding the constitutionality of the act, the supreme court of Kansas in the case of *Schaake v. Dolley,*[29] by Justice Burch said:

"What the common law rights of the plaintiff may have been is not very material. . . . Numerous subjects which formerly were chiefly private with only an incidental public aspect, have become social subjects demanding regulation of a kind and to an extent which former conditions did not warrant. The business of banking is now clearly discriminated as belonging to that class."

In 1907 and 1909 the state of Oklahoma passed acts subjecting state banks to assessments for a depositors' guaranty fund. In upholding the constitutionality of the act the Supreme Court in *Noble State Bank v. Haskell*[30] said:

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

On a motion for a re-hearing of this case, counsel for the Nobel State Bank vainly pointed out that the doctrine of the decision substitutes public opinion for the constitution.[31]

Insurance has been regulated for practically the same reasons as justify regulation of banking. The first general regulation was in the state of New York in 1849. Now most states have elaborate regulations.[32] In 1870 the state of Pennsylvania passed an act which restricted fire insurance to corporations. In upholding the constitutionality of the act the supreme court of

[29] (1911) 85 Kan. 598, 118 Pac. 80.

[30] (1911) 219 U. S. 104, 55 L. Ed. 112, 31 S. C. R. 186. Accord Assaria State Bank v. Dolley, (1911) 219 U. S. 121, 55 L. Ed. 112, 31 S. C. R. 186; Shallenburger v. First State Bank, (1911) 219 U. S. 114, 55 L. Ed. 112, 31 S. C. R. 186.

[31] Noble State Bank v. Haskell, (1911) 219 U. S. 575, 55 L. Ed. 341, 31 S. C. R. 299.

[32] Freund, Police Power, 418.

Pennsylvania in the case of *Commonwealth v. Vrooman*,[33] by Justice Williams, said:

"The business of insurance against loss by fire is, by reason of its magnitude, its importance to property owners, and the nature of the business, a proper subject for the exercise of the police power of the state. The act of 1870 . . . does not prohibit but regulates the subject. . . . The qualification is reasonable."

Justice Dean, Chief Justice Sterrett and Justice Green concurring, dissented and among other things said:[34]

"It is paternalism to assume that citizens are incapable of prudently contracting with reference to their property without an express grant of the state in the shape of a corporate franchise, to one of the contracting parties. It is an assumption that the citizen is a child, needing the tutelage and protection of the legislature in the ordinary affairs of business life. Or else it is a species of tyranny in government, like that of Turkey where the right to produce, manufacture and trade are all the subject of grant from the Sultan."

A further step in regulating fire insurance was taken by Kansas in 1909 by regulation of rates under the supervision of the superintendent of insurance with the right of review by the district court. In upholding the constitutionality of this act Justice McKenna in the case of *German Alliance Insurance Co. v. Lewis*[35] said:

"The basic contention is that the business of insurance is a natural right receiving no privilege from the state, is voluntarily entered into, cannot be compelled nor can any of its exercises be compelled; that it concerns personal contracts of indemnity against certain contingencies. Whether such contracts shall be made at all it is contended is a matter of private regulation and agreement, and necessarily there must be freedom in fixing the terms. And 'where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist.' "[36]

This the Justice put aside as adventitious and inquired:

"Is the business of insurance so far affected with public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is involved in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite con-

[33] (1894) 164 Pa. 306, 30 Atl. 217, 25 L. R. A. 250.
[34] (1894) 164 Pa. 306, 325, 30 Atl. 217, 25 L. R. A. 250.
[35] (1913) 233 U. S. 389, 58 L. Ed. 1011, 34 S. C. R. 612.
[36] (1913) 233 U. S. 389, 405, 58 L. Ed. 1011, 34 S. C. R. 612.

sequence, which makes the public interest that justifies regulatory legislation."

This more special interest he found, in such matters as the business of common carriers, the transmission of intelligence, the furnishing of water, light, gas and electricity, and then said:

"We do not hesitate at their regulation nor at the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest.[37]

He dismissed as artificial the contention that the service which the state cannot demand is not subject to state regulation; also the contention that regulation applies to personal property, only, and not to personal contracts. Touching the latter point he said: "It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest."

Referring to Justice Brewer's dissent in the *Budd case*, he said:

"Every consideration was adduced based on the private character of the business regulated, and for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was a master. The considerations did not prevail. Against them the court opposed the ever-existing police power in government and its necessary exercise for the public good. . . ."

He chided the timid and halting in the following words:

"Against that conservatism of mind which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare. . . . The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guarantees impaired."[38]

The Justice examined the business of fire insurance in the light of the *Munn, Budd* and *Brass cases* and said:

"Business, by circumstances and its nature, may rise from private to be of public concern and be subject in consequence to governmental regulations. Contracts of insurance have greater public consequence than contracts between individuals to do or not to do a particular thing whose effects stop with the individuals. . . . When the effect goes beyond that there are many examples of regulation."[39]

Justice Lamar, Chief Justice White, and Justice Van Devanter concurring, wrote a vigorous dissent that compares favor-

[37] (1913) 233 U. S. 389, 407, 58 L. Ed. 1011, 34 S. C. R. 612.
[38] (1913) 233 U. S. 389, 409, 58 L. Ed. 1011, 34 S. C. R. 612.
[39] (1913) 233 U. S. 389, 413, 58 L. Ed. 1011, 34 S. C. R. 612.

ably with the dissents set out above. Among other things he said: "For if the power to regulate, in the interest of the public, comprehends what is intended in the power to take property for a public use, it must inevitably follow that the price to be paid for any service or the use of any property can be regulated by the general assembly."[40]

He then examined laws regulating such business as canals, waterways and booms; bridges and ferries; wharves, docks, elevators and stockyards; telegraph, telephone, electric, gas and oil lines; turnpikes, railroads and the various forms of common carriers including express and cabs; inn-keeping, irrigation ditches and toll mills, and called attention to the fact that in each instance the power to regulate rates is applied to a business that uses tangible property devoted to a public use, not intangible such as an insurance contract.[41] He finally pointed out that public interest and public use are not synonymous; if they are synonymous, then the sum of the units involved in farming and labor clothe these occupations with a public interest and the price of farm products and wages of the day laborer can be minutely regulated as they were during England's paternalistic regime between the fourteenth and eighteenth centuries.[42]

The police power in its narrow sense of restraining and regulating in the interest of peace, safety, health and morals applies to all business; but a special kind of control applies to a public business or one affected with a public interest. At common law these businesses are the ones conducted by an inn-keeper, ferryman, wharfinger, miller, and common carrier; in addition, by statute, the business of railroads, telegraphs, telephones, turnpikes, canals, warehouses, stockyards; the supplying of water, gas, light, heat, oils, and power through pipes and wires; banking and insurance, and the distribution of news and market quotations. These have to do with transportation, finance and the necessaries of life.[43] In other words, their justification for restraint and regulation is that business has (1) a government grant or special privilege; (2) is a virtual monopoly although not conclusive now; (3) such a business has standardized its methods so that the public must use it for success; (4) where the business is that of caring for another's property or money.[44]

[40] (1913) 233 U. S. 389, 419, 58 L. Ed. 1011, 34 S. C. R. 612.
[41] (1913) 233 U. S. 389, 426, 58 L. Ed. 1011, 34 S. C. R. 612.
[42] (1913) 233 U. S. 389, 430, 58 L. Ed. 1011, 34 S. C. R. 612.
[43] Freund, Police Power 381.
[44] 6 R. C. L. 227.

Was the Kansas legislature justified in affecting with a public interest the occupations mentioned above? An affirmative answer can be given with assurance touching the public utilities and common carriers. The manufacture of food and clothing and the mining and preparation of fuel present a more difficult question. The leading cases reviewed above were presented to show the progressive advance made in this country by law-makers and courts in spite of powerful dissents based upon the private nature of the business. No more cogent reasoning or vigorous language can be used against affecting with a public interest the manufacture of three great necessities of life—food, clothing and fuel and the transportation of the same—than were used by Justices Field, Brewer, Gray, Peckham, Dean and Lamar; but the police power legislation was upheld in each case. Every great advance, both in common and statutory law, arose out of some public necessity. There are always persons, especially those who fear their interests are adversely affected, who think nothing is constitutional until some court of last resort says so. Courageous spirits in the Kansas legislature have adventured a little farther than preceding legislatures and applied the police power to new economic areas by affecting three fundamental necessaries of life with a public interest and applying government regulations. Will the courts of last resort uphold this new legislation as a proper exercise of the police power? The judicial answer to this question depends on whether the Kansas act has gone so far as to infringe the constitutional limitations. Justice Holmes stated the method of fixing the scope of the police power and how it is determined as follows:

"With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides."[45]

VII. The Kansas Act and Constitutional Limitations.

In order to run the gauntlet of constitutional limitations, the Kansas statute must have been enacted in the face of a great emergency or danger, or to promote some great public need and tend to overcome the emergency or danger and conserve the public interest in a reasonably effective manner. If under judicial test the act is found to be capricious, unreasonable or arbitrary,

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[45] Noble State Bank v. Haskell, (1911) 219 U .S. 104, 112, 55 L. Ed. 112, 31 S. C. R. 186.

it will be declared unconstitutional. The act must have some relation of means to a legitimate public end.

I. *Liberty of Contract.* The chief constitutional provisions used to restrain the legislative exercise of the police power are found in the bill of rights, in state constitutions, and the fourteenth amendment to the federal constitution. The pertinent parts of the Kansas bill of rights read:[46] "All men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness;" also, "all persons for injuries suffered in person, reputation or property, shall have remedy by due course of law and justice administered without delay." The pertinent part of the fourteenth amendment reads:[47] "Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Kansas act has been attacked as infringing these provisions. What is meant by "liberty," "property," "due process," and "equal protection" as used in the constitutions? The meaning of these words when employed by the courts indicate a fusing or overlapping. The Supreme Court in *Allgeyer v. Louisiana,*[48] by Justice Peckham, said:

"The liberty mentioned in the fourteenth amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the engagement of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

Property as defined by the supreme court of Illinois in *Braceville Coal Co. v. People,*[49] by Justice Shope,

"Is the right, not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which one has in his own labor is the common heritage, and, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial,

[46] Kansas constitution, bill of rights, secs. 1 and 18.
[47] Constitution of U. S., fourteenth amendment, sec. 1.
[48] (1897) 165 U. S. 578, 17 S. C. R. 427, 41 L. Ed. 832.
[49] (1893) 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 A. S. R. 206.

and of others to employ such labor, is necessarily included in the constitutional guarantee."

These definitions indicate that the "due process" clause includes contractual rights as a species of liberty and property. Furthermore, "equal protection" usually accompanies or is included in "due process." In support of this statement the Supreme Court in *Smyth v. Ames*,[50] by Justice Harlan, said:

"A state law establishing rates for transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under the circumstances, is just to it and to the public, would deprive such carrier of its property without 'due process' of law and deny to it the equal protection of the law."

The state does not violate the "equal protection" clause if its laws operate on all alike without imposing any arbitrary power of government on the individual. Of course, all persons do not have to be treated alike. The legislature may make classifications on the basis of necessity or convenience; but the laws must operate uniformly within the classification. Justice Field gave a good general statement on the nature of "equal protection" in the case of *Barbier v. Connolly*[51] in the following words:

"The fourteenth amendment in declaring that no state shall deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law, undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be imposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. . . . But neither the amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its 'police power,' to prescribe regulations, to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity."

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[50] (1898) 169 U. S. 466, 18 S. C. R. 418, 42 L. Ed. 819.
[51] (1885) 113 U. S. 27, 5 S. C. R. 357, 28 L. Ed. 923.

The chief assault on the Kansas act has been directed against its contract provisions by counsel for defense in the *Howat case* before the Crawford County district court[52] and the Kansas supreme court.[53] In these cases the issue was whether the coal-mining business is one that can be affected with a public interest and consequently be regulated under the police power. The most obnoxious provisions of the Kansas act, according to Howat's counsel are section 9 which provides that if in any of the industries affected with a public interest, the contract entered into in the future for their operation be found to be unfair, unjust or unreasonable, the court of industrial relations has the power to modify the contract so it will be fair, just and reasonable; section 15, which makes it unlawful to discharge or discriminate against an employee for any testimony before, or any complaint made to the court of industrial relations, touching a controversy between employers and employees; section 17 which makes it unlawful for any employee or other person willfully to strike, or picket any of the specified industries, etc., for the purpose of hindering, delaying, interfering with, or suspending their operation.

Mr. J. T. Clarkson, one of the counsel for Howat in the case before the Crawford County district court presented a brief which traces the history of labor in England, beginning with the Statute of Labourers of 1349 which required all able-bodied men to work, fixed wages, etc., cited cases[54] both English and American which upheld the common law right to indict and convict laborers for a conspiracy to raise wages; asserted that to protect liberty, and prevent interference with the freedom of contract the fourteenth amendment was adopted; developed the modern doctrine of the right of workmen to combine or form labor unions;[55] set out the rights of individual members of a labor union;[56] developed the theory that the best method of making a labor union

[52] Kansas v. Howat, et al., (1920) Crawford County Dist. Court, printed transcript; Typewritten brief of John T. Clarkson, Albia, Iowa.

[53] Kansas v. Howat et al., (1920) 107 Kan. 423, 191 Pac. 585.

[54] Rex v. Journeyman Tailors, (1721) 8 Mod. 10; People v. Melvin, (1810) 2 Wheeler's C. C. (N.Y.) 202; Yates Ill. Cas. 112; People v. Trequier, (1823) 1 Wheeler's C. C. (N.Y.) 142.

[55] See Martin, Modern Law of Labor Unions 9. See Commonwealth v. Hurt, (1842) 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Pickett v. Walsh, (1905) 192 Mass. 572, 78 N. E. 753; Jacobs v. Cohen, (1905) 183 N. Y. 207, 76 N. E. 5, 111 A. S. R. 730, 2 L. R. A. (N.S.) 292.

[56] See State v. Glidden, (1887) 55 Conn. 46, 2 A. S. R. 231; Karges Furniture Co. v. Amalgamated Woodworkers Local Union, (1905) 165 Ind. 42, 75 N. E. 877, 2 L. R. A. (N.S.) 607; My Maryland Lodge v. Adt. (1905) 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752.

effective is by the use of strikes which he declared permissible as a part of the liberty of contract, regardless of the motives for which the strike is called and said:

"Thus it is clear that one in the employ of another, under a contract terminable at will, or where the contract will terminate at a given time, has an absolute right to determine for himself, or agree with others at the termination of that contract, or at any time if terminable at will, to quit the employment and his motive for so doing is beyond inquiry."[57]

In support of this position counsel for Howat relied on certain decisions[58] of the Kansas supreme court, but chiefly on a few leading decisions of the Supreme Court of the United States, upholding the freedom of contract. In *Brick Company v. Perry,*[59] where the Kansas supreme court had under consideration a statute making it unlawful to discharge an employee because he belongs to a labor organization the industry not being affected with a public interest; Judge Greene pronounced the act unconstitutional and among other things said:

"The right to follow any lawful vocation and to make contracts is as completely within the protection of the constitution as the right to hold property free from unwarranted seizure or the liberty to go when and where one will. One of the ways of obtaining property is by contract. The right, therefore, to contract cannot be infringed by the legislature as it would be violating the letter and spirit of the constitution. Every person is protected in his right to work where and for whom he will. He may select not only his employer but also his associates. Any act of the legislature that would undertake to impose on any employer the obligation of keeping in his service one whom, for any reason, he should not desire, would be a denial of his constitutional rights to make and terminate contracts and to acquire and hold property. . . ."

In the case of *Adair v. United States*[60] the Supreme Court had under consideration an act of Congress regulating interstate commerce, one section of which made it a crime for an agent of an interstate carrier, with full authority on the premises, to dis-

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[57] Hichman Coal and Coke Co. v. Mitchell, (1917) 229 U. S. 245. 259; Purvis v. U. B. of Carpenters and Joiners, (1906) 214 Pa. 348, 63 Atl. 585, 112 A. S. R. 272. 12 L. R. A. 642; Beechley v. Melville, (1897) 102 Iowa 602, 70 N. W. 107; Kimball v. Harrison, (1871) 34 Md. 407.

[58] See State v. Haun, (1899) 61 Kan. 146, 59 Pac. 340; State v. Wilson, (1899) 61 Kan. 32, 58 Pac. 981, especially Judge Smith's dissent; Coffeyville Vitrified Brick and Tile Co. v. Perry, (1904) 69 Kan. 297, 76 Pac. 848.

[59] Coffeyville Vitrified Brick and Tile Co. v. Perry, (1904) 69 Kan. 297, 76 Pac. 848.

[60] (1908) 208 U. S. 161, 52 L. Ed. 436, 28 S. C. R. 277.

charge an employee simply because of belonging to a labor union. Justice Harlan in declaring the act unconstitutional, said:

"In our opinion that section, in the particular mentioned, is an invasion of personal liberty, as well as the right of property guaranteed by that amendment[61] [the fifth]. . . . Such liberty and right embraces the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor. . . . It is not within the functions of government—at least in the absence of contract between the parties—to compel anyone in the course of his business and against his will to accept or retain the personal service of another or to compel any person against their will to perform personal services for another. The rights of persons to sell their labor upon such terms as they deem proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer for whatever reason is the same as the right of the employer for whatever reason to dispense with the services of such employee."[62]

Another leading case is *Coppage v. Kansas*[63] in which the Supreme Court had under consideration an act of Kansas which made it a crime for anyone to coerce another to make any agreement not to join, become or remain a member of a labor organization. The court, by Justice Pitney, held the statute contrary to the 'due process' clause of the fourteenth amendment and referring to the *Adair case* said:

"Unless it be overruled, this decision is controlling upon the present controversy; for if Congress is prevented from arbitrary interference with the liberty of contract because of the 'due process' provision of the fifth amendment, it is too clear for argument that the states are prevented from the like interference by virtue of the corresponding clause of the fourteenth amendment; and hence if it be unconstitutional for Congress to deprive an employer of liberty or property for threatening an employee with loss of employment or discriminating against him because of his membership in a labor organization, it is unconstitutional for a state to similarly punish an employer for requiring his employee as a condition for securing and retaining employment to agree not to become or remain a member of such an organization while so employed."

Justices Holmes, Day and Hughes dissented.

[61] It will be observed that the due process clauses of the fifth and fourteenth amendments are identical—the fifth applies to acts of Congress; while the fourteenth applies to the lawmaking power of each state.

[62] Justices McKenna and Holmes filed separate dissenting opinions. Infra.

[63] (1914) 236 U. S. 1, 59 L. Ed. 441, 35 S. C. R. 240.

The proponents of the parts of the Kansas act that deal with contracts rest their case on a somewhat different conception of contracts and the "due process" clauses of the constitutions. They rely on such statements of the supreme court, " . . . freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community;"[64] also, "it is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts."[65]

The courts of last resort have recognized that liberty to contract is limited and not absolute, by upholding statutes fixing a reasonable maximum charge for a public service;[66] prohibiting the manufacture and sale of intoxicating liquors;[67] limiting the hours of employment in mines and smelters;[68] prescribing the hours of labor for those employed by the state or its municipalities;[69] prohibiting the sale of cigarettes without a license;[70] abolishing the 'truck system' and requiring payment of wages in cash;[71] prohibiting option contracts to sell or buy grain;[72] restricting the hours that women may be employed in laundries to not more than ten hours a day;[73] permitting a person to condemn property for the purpose of obtaining water for his land;[74] mak-

[64] Chicago, etc., R. Co. v. McGuire, (1911) 219 U. S. 549, 55 L. Ed. 328, 31 S. C. R. 259. See Crowley v. Christensen, (1890) 137 U. S. 86, 34 L. Ed. 605, 11 S. C. R. 13, and Jacobson v. Massachusetts, (1901) 197 U. S. 11, 49 L. Ed. 643, 25 S. C. R. 358.

[65] Frisbie v. United States, (1895) 157 U. S. 160, 39 L. Ed. 657, 15 S. C. R. 586.

[66] Munn v. Illinois, supra; Chicago, etc., R. Co. v. Iowa, (1876) 94 U. S. 155, 24 L. Ed. 94; Railroad Commission cases. (1886) 116 U. S. 307, 29 L. Ed. 636; Wilson v. Consolidated Gas Co., (1908) 212 U. S. 19, 53 L. Ed. 382, 29 S. C. R. 192.

[67] Mugler v. Kansas, (1903) 123 U. S. 623, 31 L. Ed. 205, 8 S. C. R. 273.

[68] Holden v. Hardy, (1897) 169 U. S. 366, 42 L. Ed. 780, 18 S. C. R. 383.

[69] Atkin v. Kansas, (1903) 191 U. S. 207, 48 L. Ed. 148, 24 S. C. R. 124.

[70] Gundling v. Chicago, (1900) 177 U. S. 183, 44 L. Ed. 725, 20 S. C. R. 633.

[71] Knoxville Iron Co. v. Harbison, (1901) 183 U. S. 13, 46 L. Ed. 55, 22 S. C. R. 1.

[72] Booth v. Illinois, (1902) 184 U. S. 425, 46 L. Ed. 623, 22 S. C. R. 425.

[73] Muller v. Oregon, (1908) 208 U. S. 412, 52 L. Ed. 551, 28 S. C. R. 324.

[74] Clark v. Nash, (1905) 198 U. S. 361, 49 L. Ed. 1085, 25 S. C. R. 676.

ing it unlawful to contract to pay miners employed in quantity rates on the basis of screened coal instead of the weight of coal as originally produced at the mine;[75] prohibiting contracts limiting liability for injuries made in advance of injuries received;[76] regulating the rates to be charged for fire insurance;[77] requiring certain industries including railroads to pay employees semi-monthly in cash;[78] fixing a minimum wage for women and minors;[79] and prohibiting the sale of stocks without a license granted by a "blue sky commission."[80] In all these cases there was a limitation of contract in the interest of the general welfare and, therefore, not an infringement of the fourteenth amendment. Upholding the power of the legislature to enact such legislation Justice Hughes said:[81]

"But where there is reasonable relation to an object within the governmental authority the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative consideration dealing with the matter of *policy*."

The same principle is thus stated by Justice Day in *McLean v. Arkansas*:[82] "The legislature, being familiar with local conditions is primarily the judge of the necessity of such enactments."

Again, those upholding the constitutionality of the present Kansas act rely to a considerable extent on the dissenting opinions in the *Adair* and *Coppage cases*. In the *Adair case* Justice McKenna pointed out that labor unions sustain a very important relation to common carriers, a matter of public concern; therefore, their power should be recognized in legislation. Justice Holmes emphasized the same point and said:

"Their very existence is directed specifically to the business, and their connection with it is, at least, as intimate and important

[75] McLean v. Arkansas, (1919) 211 U. S. 539, 53 L. Ed. 315, 29 S. C. R. 206.

[76] Chicago, etc., R. Co. v. McGuire, (1916) 219 U. S. 549, 55 L. Ed. 328.

[77] German Alliance Ins. Co. v. Kansas, (1913) 233 U. S. 389, 58 L. Ed. 1011, 34 S. C. R. 612.

[78] Erie R. R. Co. v. Williams, (1914) 233 U. S. 685, 58 L. Ed. 1155, 34 S. C. R. 761.

[79] Stettler v. O'Hara, (1914) 69 Ore. 519, 139 Pac. 743; Williams v. Evans, (1917) 139 Minn. 32, 165 N. W. 495.

[80] Hall v. Giegner-Jones Co., (1917) 242 U. S. 539, 61 L. Ed. 480, 37 S. C. R. 217.

[81] Chicago, etc., R. R. Co. v. McGuire, (1916) 219 U. S. 549. 55 L. Ed. 328.

[82] McLean v. Arkansas, (1919) 211 U. S. 539, 53 L. Ed. 315, 29 S. C. R. 206.

[83] Adair v. United States, (1908) 208 U. S. 161, 52 L. Ed. 436, 28 S. C. R. 277, 13 Ann. Cas. 764.

as that of safety couplers, and, I should think, as the liability of master and servant, matters which, it is admitted, Congress might regulate so far as they concern commerce among the states."

Justice Holmes dissented in the *Coppage case* reiterating his former attitude and urging that the *Adair* decision be overruled. Justice Day with Justice Hughes concurring, argued strongly in favor of upholding the Kansas act as a proper limitation of the contract under the reserved police power of the state.[84]

The chief reliance of the proponents of the Kansas act is the so-called Adamson law, passed by Congress in 1916 to prevent a nation-wide strike by the railway labor unions. This law did three things: (1) It established eight hours as the standard work day for employees of interstate commerce carriers; (2) provided for a commission of three to observe the operation of the law for a period of not less than six nor more than nine months and then report to the president and Congress; (3) provided that until a report of the commission should be made and for thirty days, thereafter, the wages of railway employees should be the present standard day's wage and for extra time the employees should be paid not less than the pro rata rate for the standard eight-hour day. In other words, Congress compulsorily arbitrated a dispute between railway employers and their employees and fixed a temporary minimum wage pending an agreement between the employers and their employees. The constitutionality of this act was upheld by a divided court in the case of *Wilson v. New*,[85] Chief Justice White delivering the opinion. The Chief Justice in the course of the opinion, surveyed the situation in the fall of 1916 when the imminent interruption of interstate commerce was threatened by a general strike of railway employees. The strike, if called just at the approach of winter, would have been a national calamity. The threatened strike was the outcome of a dispute over a standard work day and an adequate wage scale. The Chief Justice then inquired as to the power of Congress over interstate and foreign commerce in the face of an emergency, which in his opinion, did not create a power in Congress, but furnished a reason for the exercise of a power already enjoyed,[86] and said:

"That the business of common carriers by railroads is in a sense a public business because of the interest of society in the

[84] Coppage v. Kansas, (1914) 236 U. S. 1, 59 L. Ed. 441, 35 S. C. R. 240.

[85] (1917) 243 U. S. 332, 61 L. Ed. 755, 37 S. C. R. 298.

[86] See Ex parte Milligan, (1866) 4 Wall. 2, 18 L. Ed. 387.

continued operation and rightful conduct of such business, and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, state and federal, and is illustrated by such a continuous exertion of state and federal legislative power, as to require no room for question on this subject."

Touching the private nature of the right of the parties concerned to fix wages and the superior public right vested in Congress in case of failure to exercise what he called an essentially private right he said:

"It is also equally true that as the right to fix, by agreement between the carrier and its employees, a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standards is not subject to be controlled or prevented by public authority. By taking all these propositions as undoubted, if the situation which we have described and with which the act of Congress dealt be taken into view, that is, the dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened, and the infinite injury to the public interest, which was imminent, it would seem inevitably to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation, which included a power to deal with a dispute, to provide by appropriate action for a standard of wages, to fill the want of one caused by the failure to exert the private right on the subject, and to give effect by appropriate legislation to the regulations thus adopted."

The court upheld the constitutionality of the Adamson act because (1) a great emergency confronted the country, an emergency occasioned by a dispute between employers and employees in interstate commerce; (2) interstate commerce is a business affected with a public interest; (3) therefore, Congress, having full power over interstate commerce, has the right to regulate it for the preservation of a superior public right to the extent of fixing a standard work day and a temporary minimum wage. It is claimed that the Kansas act is "on all fours" with the Adamson act in that each provides compulsory arbitration and each fixes a temporary minimum wage pending the settlement of a dispute between employers and employees in a business affected with a public interest; but it should be noted that the *Wilson case* had to do with a common carrier and no prohibition of strikes; the *Howat case,* with a coal-mining industry and a prohibition of strikes.

Justice Curran of the Crawford County district court rendering the decision in the *Howat case*[87] showed that the coal mining industry is subject to the supervision of a state official, namely, the state mining inspector, which makes the industry a matter of public interest; that the act of the Kansas legislature, in the circumstances, specifically affecting the coal mining industry with a public interest is conclusive upon the court. Justice Curran followed the example of Chief Justice White in the *Wilson case* and took judicial notice of the emergency that induced the Kansas legislature to pass the act creating the Kansas court of industrial relations to settle industrial disputes, and said:

"If I am at liberty to do that, what were the conditions that confronted the people of our state during the time referred to by counsel, that is, of December, 1919? We find the state, by reason of being deprived of fuel, in a paralyzed condition in practically all of its industries. The streets of cities were dark; the schools were closed and the education of children was interfered with; the unfortunates confined in the hospitals for the insane threatened with the hazard of freezing. We find the school for the feeble-minded in the same condition. The hospitals that dot the state of Kansas, where the sick, the weak, the crippled, the maimed and helpless were confined, threatened with the hazard of freezing for want of fuel; the school for the deaf and dumb, the school for the blind and helpless, and every institution in the state threatened and doubly threatened; transportation paralyzed; the means of distribution of food and other necessaries of life did not properly function as a result of not having fuel; and whenever you paralyze transportation you make a strong bid for starvation and suffering."[88]

Continuing, the court pointed out that the act does not provide for a general but only a temporary regulation of the coal business as the court of industrial relations does not begin to function until there is a controversy that threatens the public safety; and when the dispute is settled the regulation by the court ceases. The act, in the opinion of the court, is a reasonable police power regulation and therefore, constitutional.

The contention of Justice Curran to the effect that the court of industrial relations does not begin to function until there is a controversy between employers and employees in the industries affected with a public interest and consequently there is no general

[87] See note 52; see also Titus v. Sherwood, (1910) 81 Kan. 780, 106 Pac. 1071; In re Williams, (1908) 79 Kan. 212, 98 Pac. 777; State v. Reasor, (1915) 93 Kan. 628; Pac.; State v. Booth, (1913) 179 Ind. 405, 100 N. E. 563.

[88] See note 52.

but merely a temporary regulation, seems to be well taken. An examination of this act confirms Justice Curran's position. Section 3 declares the "operation" of the specified industries to be affected with a public interest. It is "operation" and not property that is affected. Section 7 states the circumstances under which the court of industrial relations may take jurisdiction over a "controversy" between employers and employees in the specified industries. It is clear that no jurisdiction is conferred unless

"It shall appear to said court of industrial relations that said controversy may endanger the continuity or efficiency of service . . . or affect the production or transportation of the necessaries of life . . . or produce industrial strife, disorder or waste, or endanger the orderly operation of such industries . . . and thereby endanger the public peace or threaten the public health."

Section 8 defines the kind of order the court may make and provides:

"Such terms, conditions, rules, practices, wages or standard of wages . . . shall continue for such reasonable time as may be fixed by the court, or until changed by the agreement of the parties with the approval of the court."

It is not reasonable to assume that the court would refuse to revoke its order when the disputants agree, unless such agreement would impair a public right. Section 9 provides:

"The right of every person to make his own choice of employment and to make and carry out fair, just and reasonable contracts and agreements of employments is hereby recognized."

Section 17 permits an individual to quit his employment at any time; but prohibits him from quitting by the strike method for the purpose of "hindering, delaying, interfering with, or suspending the operation of" any of the specified industries. Again, "operation" is the keyword.

Is it not clear that these sections provide no general regulation of the specified industries? The court can act, only, in case of a dispute or controversy which creates a danger to the public peace or public health, or the general welfare. After the court acts to prevent a breach of the peace, or danger to the public health, the law provides that the emergency having passed, in other words, the disputing employers and employees having agreed and the agreement being reasonable, it must set aside the order and the industry returns to its normal conditions. When the industrial ship approaches dangerous breakers or stormy seas in the form of unsettled controversies, and, the owners, the crew and the passengers — the employer, employees and the public — are

threatened with a wreck, an impartial expert pilot, the court of industrial relations, takes the wheel temporarily; and when the danger is passed the regular pilot resumes the wheel and the ship continues on its regular course. No attempt is made to impose upon the manufacture of food and clothing and the production of fuel the fixing of charges and the regulation of service similar to the general regulation of public utilities and common carriers. In these three industries such temporary regulation, only, is imposed as is absolutely necessary to preserve the peace, protect the health and promote the general welfare.

No case involving the manufacture of food or clothing has come before any of the regular courts of Kansas, but a hearing of a milling case[89] has just been concluded by the court of industrial relations. This was an investigation coming under the provisions of the Kansas act touching the manufacture of food products to determine whether the flour mills are reducing production to "affect prices," or to obstruct the reasonable continuity and efficiency of production of flour and thus endanger the public peace, health and general welfare. The milling industry is one that by section 16 of the act cannot reduce production without the consent of the court of industrial relations. The decision, written by Judge Huggins, stated that the evidence showed a condition exactly opposite from that occupied by the coal mining industry a year ago as the flour storage capacity of the mills at the present time is full to the limit. Elevators are full of wheat, no shortage of flour anywhere in the state, prices falling and foreign orders for flour diminishing because of foreign market and exchange conditions. The court found that the milling industry is one of the essential industries in the sense of the Kansas statute and, therefore, subject to the court's regulations to protect the public interest. The court did not issue a regulating order but appointed Mr. G. A. Engh, the chief accountant of the court; Professor L. A. Fitz, head of the milling department of the Kansas Agricultural College, and C. V. Topping, Secretary of the Southwest Millers Association, a committee to recommend to the court rules for the operation of the industry and keep the court informed as to continuity and efficiency of operation.

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[89] Printed transcript. Docket No. 3, 803. In the court of industrial relations, state of Kansas.

In the matter of the investigation concerning the continuity of production in the flour-milling industry at Topeka and other points in the state of Kansas.

Touching the interest of labor in this matter, the opinion contains two significant paragraphs as follows:

"Another very important question connected with the matter before us is its effect upon labor. As has already been stated, herein, the people of Kansas have solemnly declared by legislative act that workers engaged in this industry shall, at all times, receive a fair wage and have healthful and moral surroundings. In the reduction of hours of operation, therefore, the millers should be very careful and solicitous concerning the matter of labor. Skilled and faithful employees should be given such treatment as will enable them during the period of limited production to support themselves and families. The evidence before us shows that in the Topeka mills skilled men in the milling business are being paid a monthly wage and are, therefore, drawing pay whether the mill is running or not. So far as it is possible to do so this rule should be recognized in all the mills of the state, for it is necessary in the promotion of the general welfare that skilled and faithful workers should always be available for these essential industries which so vitally affect the living conditions of the people."

This is not an order, but if the suggestion is carried out or an order is finally made embodying this principle, may it not in time "take property without due process of law?"

There is one drastic provision in the Kansas act affecting the control of business which amounts to temporary state socialism. Section 20 provides that in case of suspension, limitation or cessation of the operation of the specified industries, etc., contrary to the provisions of the act or the orders of the court of industrial relations, and said court is satisfied, that the suspension, etc., affects the general welfare by endangering the public peace or threatening the public health, the court of industrial relations may take proper proceedings in any court of competent jurisdiction to take over and operate the said industry, etc., during such an emergency. There is a proviso that owners of the industry must have a *fair return* and the employees a *fair wage* during the time of such operation. This reads well. But it might happen that state operation would not yield a net return in the face of supply and demand and the inexorable conditions of world markets sufficient to pay a *fair return* to the owners and a *fair wage* to the workers. Would this not be a taking of property without "due process" of law? Would the state in the circumstances retreat from the cover of the police power and resort to taxation to make up the deficiency so that the owners might have a fair return and the workers a fair wage? Would the state insist on the discouraging police power principle for a business affected by a public

interest that Justice Holmes announced in the case of *Noble State Bank v. Haskell?*[90] The Justice replying to the charge that taking the funds of one bank to create a guaranty fund to pay depositors in a failed bank is taking property without "due process" of law, said:

"For in this case there is no out and out taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, for corporations created by the state."

Would the state rest its case on the principle of the North Dakota industrial program which was recently held constitutional by the Supreme Court in the case of *Green v. Frazier?*[91] Justice Day speaking for the court said:

"Under the peculiar conditions existing in North Dakota which are emphasized by the opinion of its highest court, if the state sees fit to enter upon such enterprises as are herein involved with the sanction of its constitution, its legislature and its people, we are not prepared to say that it is within the authority of this court in enforcing the observance of the fourteenth amendment, to set aside such action by judicial decision."

This case involved a question of state taxation and "due process" of law.

Briefly summarizing this article it may be said that the original principle of affecting an industry or business with a public interest rested on either special privileges granted by the state or on a monopoly, real or virtual. These still play an important role but are not conclusive at the present time. The common law has been augmented by statutes to include many industries that formerly were regarded as private. The justification for these additions is the changed social and economic conditions which call for a new interpretation of the public interest and the place of the individual in a complex social, political and economic organization. Despite the arguments of able judges who pleaded the

[90] (1911) 219 U. S. 575, 55 L. Ed. 341, 31 S. C. R. 299. The court of appeals for the District of Columbia recently held unconstitutional an act of Congress declaring rental property such as apartments and hotels affected with a public interest, and giving tenants the right to occupy the premises after the termination of the lease, the rental to be fixed by a rent commission. This act known as the Ball Rent Law, the court said, infringed the fifth amendment by taking property without "due process" of law. There was a vigorous dissent by Chief Justice Smyth who argued that renting apartments can be affected with a public interest and regulated under the police power, using the principles of the Munn, Budd, McGuire and the German Alliance Ins. Co. cases. See Hirsh v. Block, (1920) 267 Fed. 614.

[91] (1920) 40 S. C. R. 499.

private nature of the business and the principle of competition as a sufficient regulator, the legislatures have widened the horizon of the police power in the interest of the general welfare which has constantly waxed as the individual welfare, as formerly understood, has waned. The individual may conduct his business unmolested as long as he does not injure others, but the state decides when the individual activity threatens to impinge upon the public welfare.

The Kansas act was passed in the face of a great emergency. In order to get the strongest possible excuse for regulation the act affects several industries, etc., with a public interest, namely, public utilities, common carriers and three industries that deal with the necessaries of life—manufacture of food and clothing and the mining or production of fuel including the transportation of these three. The act has several interesting features in the difference of treatment accorded these three industries. The regulation of the manufacture of food products seems to be unrestricted but the regulation applied to the manufacture of clothing and the production of food applies only to these two articles in "common use." What is "common use?" Again instead of following the usual practice of classifying the industries on the basis of size and therefore the assumed probable danger the act makes no distinction between the small and the large industries within each class, that is, the aggregate units of the separate industries furnish the public interest or test which is but following the method whose constitutionality was upheld in the *German Alliance Insurance Company case*.[92] Finally the act is interesting in that the court of industrial relations, for the three special industries affected, exercises no general regulation of the business but only a temporary regulation restricted to the *"operation"* of the industry during the peroid of a controversy or public danger.

Sections 15 and 17 have been the storm centers of opposition to the act.[93] Section 15, which makes it unlawful for any person to discharge or discriminate against an employee because of his testifying before or complaining to the court of industrial relations touching a controversy between employers and employees as provided for in the law, seems to fall under the condemnation

[92] German Alliance Ins. Co. v. Kansas, (1913) 233 U. S. 389, 58 L. Ed. 1011, 34 S. C. R. 612.

[93] Section 17 will receive further treatment in the concluding article of this series.

of the Supreme Court's decision in the *Coppage case.*[94] Two views may be advanced in support of the constitutionality of this section: first, the general theory of the Supreme Court which pervades the decision of *Wilson v. New,* together with the strong dissents in the *Adair* and *Coppage cases,* may indicate that the highest court in the United States is ready to reverse its decisions in the last two cases and thus bring them into harmony with other decisions by the Supreme Court approving sweeping limitations of the right to contract; second, the industries to which the limitation applies, unlike the legislative act condemned in the *Coppage case,* have been affected with a public interest and section 15 is incorporated as necessary in the enforcement of a police power regulation. In other words, the section is introduced to prohibit employers from intimidating employees who might be necessary witnesses before the court or who might properly sign a complaint.

In view of the judicial attitude toward the evolving or dynamic police power, it would seem that this Kansas act, at least as far as the sections already discussed are involved, has more than an even chance of being held constitutional; but it would take the cube of Solomon's wisdom to predict what the Supreme Court of the United States will do with a police power statute and the "due process" and "equal protection" clauses of the federal constitution.

(*To be concluded.*)

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[94] Coppage v. Kansas, (1914) 236 U. S. 1, 59 L. Ed. 441, 35 S. C. R. 240.