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LEGAL ASPECTS OF CONVICT LABOR*

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[The following reprint will be interesting in view of the recent article by Mr. Mohler on Convict Labor in this JOURNAL.—Ed.]

Little doubt exists that the effect of a convict's engaging in useful occupation is beneficial so far as the convict himself is concerned.[1] Moreover, from an eonomic viewpoint, the failure to utilize convict labor is sheer waste, the cost of which is cast upon the taxpayers.[2] However, when we approach the effects of this labor upon industry, we tread upon more controversial ground. Though when compared with the total amount of labor engaged in industry, the importance of convict labor seems insignificant,[3] its concentration in a few industries[4] makes it a vital factor in those industries.

In the utilization of convict labor, the states have employed one or more of six systems.[5] Under the lease system[6] the state gives the care and custody of the convict to a lessee who obtains the benefit of the convict's labor, the state reserving to itself the power to make rules for the proper care and inspection of the quarters. Under the contract system,[7] as under the lease system, the contractor supplies the raw

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[1]See F. H. Wines, "Punishment and Reformation" (1919), pp. 209-212.

[2]See E. S. Whitin, "Self-Supporting Prisons," Annals of the American Academy of Political Science, May, 1924, p. 1. For judicial recognition of this fact, see *Ward* v. *City of Little Rock* (1883), 41 Ark. 526, 531.

[3]In 1923, the number of convicts engaged in productive labor was 51,799 (61 per cent of the total number of convicts). "Convict Labor in 1923" Bulletin of the U. S. Bureau of Labor Statistics No. 372, p. 2. The value of the goods aggregated $76,096,960. Ibid., p. 3.

[4]In 1923, the outstanding industries affected were:

Boots and Shoes	$ 5,686,619
Chairs, Tables, etc	2,913,793
Clothing	22,507,523
Farming	5,895,894
Coal Mining	4,105,424
Binding Twine	5,588,372

"Convict Labor in 1923," op. cit., footnote 3, pp. 5-10.

[5]For historical studies of convict labor and a description of the various systems see H. C. Mohler, "Convict Labor Policies" (1925), 15 Journ. of Crim. Law and Criminology 522, 548-597; E. T. Hiller, "Labor Unions and Convict Labor" (1915), 5 Journ. of Crim. Law and Criminology 851. For the various statutes relating to prison labor see "Convict Labor in 1923," op. cit., footnote 3, pp. 169-265.

[6]This system appears to have disappeared as far as Federal and State institutions are concerned. "Convict Labor in 1923," op. cit., footnote 3, p. 18.

[7]At present employed in Delaware, Kentucky, Maine, Maryland, New Hampshire, Virginia, West Virginia and Wisconsin. "Convict Labor in 1923," op. cit., footnote 3, pp. 19-23.

material, carries the risk of profit and loss, and superintends the work. But under this system, the responsibility for the care and custody of the convict is on the state, which usually maintains the convict in a state-kept institution. The authority over the convict is necessarily divided. The piece-price system[8] differs from the contract system only in that the state, in addition to caring for the convict, actually superintends the work. Where the public account system[9] is employed, the state enters the field of manufacturing on its own account and sells in the market as a producer. Under the state-use system,[10] articles produced by convict labor may be used only by the producing institution or by other public institutions of the state. Finally, the public works and ways system[11] permits the utilization of convict labor only in connection with the construction and repair of the public works and ways.

No matter which one of these systems is employed, free labor has to meet the competition of convict labor.[12] Likewise manufacturers employing free labor must necessarily face the competition of manufacturers employing convict labor.[13] As long as the wage paid to the convict remains, as it now is, materially less than that paid to the free

[8]At present employed in Connecticut, Indiana, Iowa, Nebraska, Oklahoma, Rhode Island, Tennessee, Vermont, Wisconsin and Wyoming. "Convict Labor in 1923," loc. cit.

[9]At present employed by all except New Hampshire, New Jersey, New York, Ohio and Wyoming. Ibid.

[10]At present employed by all the states except New Mexico and Wyoming. It is used exclusively in New Jersey, New York, Ohio and the Federal Government. Ibid.

[11]Adopted in all the states except Arkansas, Connecticut, Delaware, Idaho, Kentucky, Massachusetts, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee and Wyoming. Ibid.

[12]For judicial recognition of this fact, see *Ward* v. *City of Little Rock*, supra, footnote 2, pp. 531-2. Under the lease, contract, and piece-price systems, free labor has to compete directly with convict labor. Even where the state-use or public works and ways system is employed, free labor is affected since the total demand for free labor is decreased. "Convict Labor in 1923," supra, footnote 3, p. 1. Under the public account system, free labor does not meet any direct competition. But the necessity of the private manufacturers meeting the competition of the state must tend toward the decrease of the wages paid free labor. For labor's viewpoint, see "Proceedings of the 44th Annual Convention, American Federation of Labor (1924), pp. 43-44; E. T. Hiller, op. cit., footnote 5, p. 851.

[13]The competition is most direct where the state itself engages in industry. Where a private manufacturer buys the labor of convicts he, in effect, enjoys a subsidy and is able to quote prices which the ordinary manufacturer is usually in no position to meet. Even under the state-use and public works and ways systems, private enterprise is affected since the total demand for its products is decreased. For the manufacturer's viewpoint, see "Prison Labor Competition v. Free Industry" (2nd ed.), issued by the International Ass'n of Garment Mfrs., pp. 9-10; "Convict Labor in 1923," op. cit., footnote 3, pp. 107-166. For judicial recognition of this fact, see *Pollock v. Mabey* (1924), 63 Utah 377, 383-4, 226 Pac. 186.

laborer,[14] both free labor and the employer of free labor must inevitably be under a disadvantage.

It is therefore not surprising to find considerable opposition to the utilization of convict labor. Attempts to check convict labor as such, on constitutional grounds, have proved unsuccessful. It is well settled that the state may compel the convicts to work.[15] It is not a violation of the constitutional prohibition against "cruel and unusual punishments."[16] As to one convicted after the passage of a statute providing for convict labor, the sentence includes such labor.[17] But as to one convicted before the statute, there is a possibility that it may be considered *ex post facto* and therefore ineffective.[18]

The opposition therefore has been evidenced mostly by attempts to curb convict labor indirectly. Statutes have been passed requiring the labeling and branding of convict-made goods and the licensing of dealers in such goods. Such statutes have not been passed upon by the United States Supreme Court. Where it was sought to apply these statutes to goods manufactured in other states, state courts held them to be unconstitutional on the ground that they unduly interfered with interstate commerce.[19] A statute is, *a fortiori,* invalid if it discriminates against goods produced by convicts in other states.[20] The fact that the goods are convict-made does not prevent them from being

[14]Of 104 institutions canvassed, 53 reported that the convicts received no compensation; 31 institutions paid $0.10 or less per day; 7 institutions paid between $0.10 and $0.20 per day; 11 institutions paid between $0.20 and $1.50 per day. Extra compensation was given for overtask work. "Convict Labor in 1923," op. cit., footnote 3, p. 15. It may be noted that the growing tendency to throw the loss caused by personal injuries sustained in the course of employment upon the industry in which they occur by means of compensation laws has not yet touched the prison industries. The injured convict may prosecute his claim against the state only after permission is granted him by the state. See Rept. of Prison Survey Committee (N. Y. 1920), chap. 9, "Wages and Other Incentives and Compensation," pp. 119-132. A bill has been introduced in the New York Legislature which would provide workmen's compensation to prisoners sustaining injury while engaged in prison work. Assembly (1925), No. 1939, Int. 1691.

[15]*Shenandoah Lime Co.* v. *Governor* (1914), 115 Va. 865, 80 S. E. 753.

[16]*State* v. *McCauley* (1860), 15 Cal. 430; *Mason & Foard* v. *Main Jellico Mountain Coal Co.* (1888) 87 Ky. 467, 9 S. W. 391.

[17]*State* v. *Yandle* (1896), 119 N. C. 874, 25 S. E. 796; *Holland* v. *State ex rel. Duval Co.* (1887), 23 Fla. 123.

[18]See *Ex Parte Hunt* (1890), 28 Tex. App. 361, 363-4.

[19]*People* v. *Hawkins* (1897), 20 App. Div. 494, 47 N. Y. Supp. 56 aff'd (1898), 157 N. Y. 1, 51 N. E. 257; *Arnold* v. *Yanders* (1897) 56 Ohio St. 417, 47 N. E. 50. A bill has been introduced in Congress, which if passed will enable the states to regulate, by means of labelling, marking, branding, and licensing, the importation of goods made by convicts in other states. H. R. No. 10241, 67th Congr., 2d Sess. The constitutionality of this proposed law is doubtful since it is based on the nature of the laborer and not on the nature of the goods. *Hammer* v. *Dagenhart* (1918), 247 U. S. 251, 38 Sup. Ct. 529.

[20]*People* v. *Hawkins* (1895), 85 Hun. 43, 32 N. Y. Supp. 524.

proper articles of commerce.[21] When applied to goods already in existence, these statutes also seem to violate the state constitutional provisions against the deprivation of liberty and property without due process of law.[22] Though a law will not be declared unconstitutional under either the due process or discrimination clauses where the state's police power is properly exercised, the protection of free labor from the competition of convict labor has been held not to be a proper exercise of the police power.[23] Where an attempt was made to evade the above holdings by a statute based on the taxing power, it was held that convict-made articles were not a proper classification for the purposes of taxation.[24] Where, however, the law applies to articles to be made within the state and concerning which no private individual has any contract rights, it would seem to be constitutional, at least as far as the first sale is concerned. Since the state may prevent its convicts from working at all, it may impose the conditions under which the labor of convicts may be employed or the goods produced by the convicts acquired. Inasmuch as such laws would not restrict the total sales of convict-made goods to an extent great enough to compensate for the substantial decrease in the value of the labor of the state's own convicts, they will probably not prove of much importance. Though the labeling and licensing laws have not met with much success, the amount of convict labor has been substantially restricted in a few states by statutory or constitutional prohibitions against trade instruction to convicts or the use of machinery by convicts.[25]

It is fairly obvious that some systems for the utilization of convict labor are better than others and attempts have been made to abolish the poorer ones. The lease system early proved a failure from a humanitarian and criminological viewpoint.[26] The desire of the contractors to get as much out of the convict as they possibly could often worked to the detriment of the convict's well-being.[27] The contract

[21]See *People* v. *Hawkins,* supra, footnote 19, pp. 16-17; *Arnold* v. *Yanders,* supra, footnote 19, p. 420.

[22]*People* v. *Hawkins,* supra, footnote 19.

[23]See *People* v. *Hawkins,* supra, footnote 19, p. 9.

[24]*People ex rel. Phillips* v. *Raynes* (1910), 136 App. Div. 417, 120 N. Y. Supp. 1053 aff'd (1910), 198 N. Y. 539, 92 N. E. 1097. Motion for reargument denied. 198 N. Y. 622, 92 N. E. 1097.

[25]*Manthey* v. *Vincent* (1906), 145 Mich. 327, 108 N. W. 667, involved a constitutional prohibition against the teaching of mechanical trades to convicts except the manufacture of articles of which the chief supply for home consumption is imported. *Kempf v Francies* (1913), 288 Pa. 320, 86 Atl. 190, involved a statute prohibiting the use of machines operated other than by hand or foot power.

[26]See Mohler, op. cit., footnote 5, pp. 562-568.

[27]See K. R. O'Hare, "Human Ostriches," The Nation, April 8, 1925, p. 377; see supra, footnote 6.

system is open to similar objections.[28] Moreover, these systems are the ones which cause convict labor to come most directly into competition with free labor.[29]

Many states have attempted to abolish the leasing or contracting of convict labor.[30] The question has therefore arisen whether a contract calls for the furnishing of convict labor or the furnishing of goods to be produced by convict labor. The problem may be approached from either of two angles. It is possible to regard these constitutional provisions as attempts to restrict direct competition with free labor.[31] If the state supplies the capital, exercises control, bears the risk of profit and loss, and is regarded in the contract as the enterpriser, or if a majority of these elements are present, the state is the true enterpriser and is the one who actually engages the convict labor. If, however, a majority of the enumerated factors are found on the side of the private individual, he is the one for whom the convicts are working. This "enterpriser" approach has been followed by some cases.[32] including the recent one of *Rice* v. *State ex rel. Short* (Okla. 1925), 232 Pac. 807. On the other hand, it is possible to regard these constitutional provisions as attempts to abolish the inhumanities attendant upon the lease and contract systems and to hold valid any contract so long as the state has control and supervision of the undertaking.[33]

The performance of contracts involving convict labor or products of convict labor is affected by the fact that the state is one of the

[28]Supplement to the Senate Journal, 39th Legis. (Tex.), "Report of the Penitentiary Investigating Committee, March 19, 1925.

[29]See supra, footnote 12.

[30]There are constitutional prohibitions against the lease and contract systems in California, Louisiana, Mississippi, Montana, New York, Ohio, Oklahoma, Utah, and Washington. The contract system is either regulated or abolished in Alabama Arkansas, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Texas and Wyoming.

[31]*Green* v. *Jones* (1924), 261 S. W. 43.

[32]*Price* v. *Mabey* (1924), 62 Utah 196, 218 Pac. 725. In this case, the company was under a duty to furnish raw materials and machinery and to supervise the work. The court therefore held the contract invalid. But see *Henry* v. *State* (1905), 87 Miss. 1, 53, 39 So. 856, where the individual supplied the capital, the state had control, and both were in a position to gain or lose. In addition the contract spoke of the individual's paying for the "labor of the convicts." It would therefore seem that the enterprise was that of the individual. Nevertheless, the court held that the contract did not call for the sale of convict labor. The same contract again came before the court and was given the same interpretation in *Henry* v. *State* (1905), 87 Miss. 125, 151-2, 40 So. 152. In *Bromwell Brush & W. G. Co.* v. *State Board of Charities* (D. C. Ky., 1922), 286 Fed. 737, an attempt to circumvent the provisions against leasing and contracting under the guise of providing manual training was unsuccessful.

[33]*Utah Mfrs. Ass'n* v. *Mabey* (1924) 63 Utah 374, 226 Pac. 189. In *Green* v. *Jones*, supra, footnote 31, this view was expressly repudiated.

parties to such contracts. Since it is considered contrary to public policy to prevent the state from altering the nature of the penal system, if, acting in a governmental capacity, it does make a change in the penal system, the private contractor has no remedy if it involves a breach of contract.[34] If, however, the state attempts to breach the contract otherwise than by a change in the penal system, the private contractor may obtain specific performance.[35] It has been urged that state expenditures for facilities to enable convicts to labor when such labor results in products which are sold to private individuals is a diversion of public funds for private purposes. They have, however, been held proper on the ground that the primary purpose was a public one, namely, to provide employment for the convicts and that the sale to private individuals was only incidental.[36] It has been held in a recent decision[37] that contracts for the sale of the products of convict labor are not "in restraint of trade" nor the granting of a "special privilege."

Opponents of convict labor are looking with favor upon a plan[38] which would provide a variation of the state-use system. Under it, by agreement between states, certain industries which have a ready and stable market among public institutions would be allocated to the various states and the sale of products of convict labor would be limited to such institutions.[39] The possible objection that such statutes would be in violation of the constitutional prohibition of agreements and compacts between states[40] may be obviated by procuring the consent of Congress.

[34]*Jones Hollow Ware Co.* v. *Crane* (1919), 134 Md. 103, 106 Atl. 274 (specific performance); *Roach & Co.* v. *Ewing* (1874), 55 Mo. 101 (specific performance); see *Porter* v. *Haight* (1873) 45 Cal. 631, 638 et seq. Of course such a contract does not interfere with the Governor's pardoning power. See *State* v. *Bank* (1889), 66 Miss. 431, 437, 6 So. 184.

[35]*Georgia Penitentiary Cos. Nos. 2 and 3* v. *Nelms* (1883), 71 Ga. 301.

[36]*Shenandoah Lime Co.* v. *Governor,* supra, footnote 15; *Rice* v. *State ex rel. Short* (Okla., 1925), 232 Pac. 807.

[37]*Rice* v. *State ex rel. Short,* supra, footnote 36.

[38]See Initial Conference, Committee on the Allocation of Prison Industries, National Committee on Prisons and Prison Labor, p. 12; Frayne, "Prison Labor and Society," Address at the Biennial Convention, General Federation of Women's Clubs, June, 1922.

[39]This market is supposed to have a potential buying power of $700,000,000. See Frayne, op. cit., footnote 38, p. 4.

[40]See *Virginia* v. *Tennessee* (1893), 148 U. S. 503, 520-1.