

## PROPERTY—ACCORDING TO LOCKE

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IN the history of ideas the names of John Locke and George Sutherland stand somewhat apart. The one was the author of a celebrated "chapter on property";<sup>1</sup> the other was the voice of the United States Supreme Court in the declaration of the invalidity of the minimum wage law;<sup>2</sup> and nearly a quarter of a millenium separates the two intellectual events. The passing of the crowded years belies a causal connection between them; a likeness in thought, and even an occasional turn of expression, betokens more than a coincidence. A comparison of the documents indicates that had it not been for the philosopher, the jurist would not have written as he did. Yet the bond—unless it be through the imperfect medium of Blackstone—is not personal influence. For Locke was only more plausible than other writers of his outlook and generation in setting down what they in common believed, and Sutherland spoke much as other justices might have done on that historic occasion—and had spoken before. The connection lies rather in a continuing stream of thought, comprehending both utterances, in which the principles of Locke and the dicta of Mr. Justice Sutherland are alike symbols.

It has become axiomatic that an understanding of the office of the judiciary as overlord of the legislature invites an ideological journey far into the past. Some will say that Sutherland did no more than invoke "the great tradition" of the freedom of the individual in person and in property which was venerable long before Locke ever put quill to paper. Others will insist that the Justice, a firm believer in the article of faith which makes business immune from public control, expressed his own judgment and in justification set down the most respectable arguments he could muster. An intermediate group of students, discounting both explanations, will be disposed to contend that jurists are moved by ideas in their heads, as well as by rules of law in the books, loyalties to social groups, and prevailing states of the judicial digestion. They are inclined to inquire how practical notions which emerged in England as an intellectual by-product of a struggle against an irresponsible monarchy help to fix the current limits of the province of government. To them Locke and Suth-

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<sup>1</sup> A chapter in *An Essay Concerning the True Original Extent and End of Civil Government* (1690), which is the SECOND of TWO TREATISES of GOVERNMENT.

<sup>2</sup> *Adkins v. Children's Hospital*, 261 U. S. 525 (1923).

erland are convenient pegs whereon to hang an explanation—or perhaps only a speculation—about the place of seventeenth century ideas in a twentieth century judicial process.

The literature of law, of politics, and of constitutional history holds many fragments of this still half-told tale. The appearance of a book about property in the eighteenth century<sup>3</sup> is to be hailed as an installment of that dramatic story rather than as the God-sent narrative. The author is a student of social ethics and of public affairs rather than a political theorist or a lawyer. He takes little interest in the erudition built around “real property” and the subtleties which make up “personalty”; the pleasing perplexities of “covenants which run with the land” and of “the rule in Shelley’s case” lie beyond the orbit of his thought. He gives almost no account of the changes in form and the transformation of functions which the coming of industrialism brought to ownership. His pages are barren of a Hohfeldian analysis of the wousin called property into the conglomerate mass of rights, duties, privileges, and immunities which make it up. Instead, the subject of his essay is the property of public law; it is the imponderable in whose name the affairs—especially the pecuniary affairs—of men are put beyond the reach of the government. In spite of the limitation in the title to the eighteenth century, the account begins with the Middle Ages and comes down to the present day. And, although it has “special reference to England and to Locke,” a procession of philosophers and statesmen is passed in review, a digression upon France serves for contrast, and a chapter upon America allows the heritage of ideas to pass into our constitutional law. In these pages abstraction does not beget abstraction in apostolic succession; on the contrary the emerging philosophy of property is consistently related to the stirring march of events and the circumstances of industrial life. Some notice, even, is taken of the changing fortunes of political systems and of the common sense of the various periods through which the narrative runs.

In the Middle Ages the stage was not set for the obtrusion of individualistic notions into the social theory of property. The ways of thought, rather than the activities of the folk, were against it. Then, as now, men were disposed to use a strong arm, cunning mind, or strategic position to help themselves and to do as they pleased with their own; and doubtless a multitude of facts could be assembled in support of a doctrine of privacy of ownership. But, as in other periods, the actualities were not in strict accord with the idealized picture of the prevailing system

<sup>3</sup> *Property in the Eighteenth Century*. By Paschal Larkin. Dublin and Cork: Cork University Press, Educational Company of Ireland, Ltd. 1930. pp. xi, 252.

which contemporary writers set down in manuscript.<sup>4</sup> To the people of the age, salvation was a necessity of life, and the church's control of the keys of heaven enabled it within limits to impose its will upon temporal affairs. Moreover, the church enjoyed a monopoly of learning and lorded it over the realm of mind. The needed explanation of office and order in society could be furnished only by priests and monks; it could be contrived only out of the stuff of Christian doctrines.

Institutions might go astray,—but the church dominated speculation, and its scheme of values found expression in apologetic literature. All good Christians were severally members one of another; the community was a single organic whole. The denial of “the world, the flesh, and the devil” robbed wealth of any inherent goodness; “exterior goods” were to be justified only from their “character of things useful to an end.” Temporal things were “subject to man” that he might “use them for his necessity”; but he was not to “set up his rest in them or be idly solicitous about them.” He might have and hold as much of “external riches” as was essential “to his life according to his rank and condition.” But, even though “goods of fortune” served as “instruments to acts of virtue,” the fortunate man ought not to keep “beyond the due amount,” for “one cannot have superabundance without another being in want.”<sup>5</sup> Thus, in doctrine, the well-to-do were stewards of the possessions with which they had been blessed by Providence. By reason of God's favor the fortunate man might easily discharge his obligation as his brother's keeper.

In the explanations set down in books, the idea of trusteeship permeated all the institutions of secular ownership. The fief gave support to the warrior in return for his service of protection; feudal tenure was conditional and contingent; in its terms “liberties” were always associated with responsibilities. The village commons and the open-field system were as much the genuine property of the village folk as the common altar and common prayer; they remained as an expression of neighborhood solidarity until well into modern times. Even after obligations began to wane and men of property began to talk glibly of their individual own, the communal idea lingered on. The most reputable of religious and political writers defended the right of the in-

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<sup>4</sup> It would be interesting, and probably not very difficult, to superimpose an individualistic theory upon the mediaeval social order. The exercise, like all of its kind, would involve a careful selection of materials, their neat articulation into an account, and real artistry in the use of light and shade. A comparison of a consciously formulated synthesis with the unconsciously idealized picture of contemporaries would throw light alike upon the culture described and the intellectual process of description.

<sup>5</sup> AQUINAS, *SUMMA THEOLOGICA*, *ETHICUS*, II, II, questions CXVIII, and CXXIX, Ricaby translation (2d ed. 1896) Vol. II, 233-4, 261-2, 265-7.

digent to help themselves to the necessities of life. When eventually there came to be a state, there was set down as among the first of its functions provision for "the peace, riches, and public conveniences of the whole people."

It is the background which gives meaning to the writer. One Locke is to be seen across the eventful doings and the disturbing winds of doctrine of the eighteenth and nineteenth centuries; quite another Locke stands out against passing feudal usage and declining canonist doctrine. The great philosopher was of his day; he took for granted what men about him knew to be true; what he does not set down is as important as what he says. An attempt of the House of Stuart, under rather unfavorable conditions, to set up an absolute monarchy touched off the course of events which eventually provoked him into writing. As the glorious revolution of sixteen hundred and eighty-eight was the synthesis of the constitutional innovations of the century, so was Locke's essay on civil government—which served no purpose more cosmic than "to establish the throne of our great Restorer" and "to make good his title in the consent of the people"—a summary of the accompanying innovations in political thought. His utterance,—with its excuse in the political crisis,—is a curious blend of vested and newly prevailing ideas.

The fragment on property is not a detached essay, but a chapter in a purposive disquisition upon civil government. It is a skillful bit of dialectic aimed, not at the analysis of an institution, but to help along an argument against the divine pretensions of kings. Locke's initial premises are that natural resources exist in super-abundance and that "every man has a property right in his own person." Since things which exist with an overplus are without intrinsic worth, the sole source of value lies in man's labor. It follows that whatsoever a person "hath mixed his labor with and joined it to something that is his own," he thereby "makes his property." But it is not to be inferred that "anyone may engross as much as he will"; for the same Nature which grants him the opportunity of possession "doth bound the property, too." For "as much as anyone can make use of to any advantage of life, so much may he by his labor fix a property in," and "whatever is beyond this is more than his share." Everyone "hath a right to as much as he can use" of "the good things which Nature hath provided in common"; but, in view of the magnanimity of a bountiful Creator, individual possession involves no "prejudice to other men"; there is "still enough and as good left." A government,—rightfully established only by a compact of the governed,—can have "no other end or measure" than "to preserve the members of that society in their lives, liberties, and possessions." Every man, when he "incorporates himself into a commonwealth" submits "to the community those possessions

which he has" and agrees to be governed by the "majority." But he cannot give up what he does not by nature possess; accordingly the power of government can "never be supposed to extend further than the peace, safety, and public good of the people." Its authority cannot be used to the injury of its citizens in "their lives, liberties, and estates."<sup>6</sup> Above all, the acts of rulers must not be "arbitrary" or "at their pleasure," but in strict accord with "standard," "established and promulgated laws."<sup>7</sup> Here Locke does not cease to be a good mediaevalist; an office is established by contract and is a public trust; not even the monarchy can escape its reciprocal obligations.

In all of this the philosopher is applying the tricks of his trade to the immediate occasion. It is the manner of a craft, in which Locke was a master, to invoke a march of absolutes to the condemnation of particular abuses. In his day it was beginning to be the fashion to defend an institution rather by proclaiming its rightful origin than by justifying its social function. Locke never disassociates property from the personality of which it is an expression; because it is the creation of man it has the sacredness which he attaches to human life itself. But the subjects of ownership in Locke's pages are consumption goods, land used by its owner, and the tools of handicraft. Corporate wealth and the apparatus of large-scale production and business enterprise are absent from his discussion. In spite of instances drawn almost exclusively from primitive societies,—still unknown to anthropologists,—his argument is not unsuited to an England in which the owner or craftsman managed his own estate or labored in his own shop. It was most useful in defense of ownership in the trades and commerce, which had felt most severely monarchical exactions, and about which he says never a word. But he is too close to mediaeval thought, and too much imbued with the notion

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<sup>6</sup> The wording of the phrase which occurs again and again in the *Civil Government* varies somewhat. The forms "lives, liberties, and fortunes," "lives, liberties, and estates," and "lives, liberties, and possessions" are the most common. In the *Petition of Rights*, 1628, the expression is "rights and liberties"; in the *Bill of Rights*, 1689, it is "the true ancient, and indubitable" "religion, rights, and liberties" which are to be preserved. In its one appearance, the word "estates," significantly enough, is to be found, not among the liberties but among the obligations of the King's subjects. "The Lord's Spiritual and Temporal, and Commons" agree to "defend their said Majesties . . . with their lives and estates." STUBBS, *SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH HISTORY* (1874) 515, 523.

<sup>7</sup> The quotations in this paragraph are taken not only from Chapter V., "Of Property," but also from Chapters VII, VIII, IX, XI, and XV, "Of Political or Civil Society," "Of the Beginnings of Civil Societies," "Of the Ends of Political Society and Government," "Of the Extent of the Legislative Power," "Of Paternal, Political, and Despotical Power Considered Together," and "Of the Dissolution of Government." The edition of the *Civil Government* used is that in the Everyman's Library (1924).

of purpose, to let property escape its instrumental character; and with the bounds he sets about ownership any follower of Aquinas would agree. Nor would a champion of authority set up other than "the common good" as the standard for the abridgment of individual rights. To Locke "property" is a useful counter in an intellectual game,<sup>8</sup> intended to justify the suppression of a royal racket; as a value that stands on its own, it falls far short of an absolute right. It is difficult to make of the Locke who pleads for security of person and fortune against acts of state prompted by "ambition, fear, folly, or corruption"—except by benefit of the thought of posterity,—"the prophet of property."

Importance, however, attaches not to what Locke meant, but to what was made of his words. A stream of influences from near and far endowed the classic lines with enhanced significance. The society of church and commune, of feudal tenure and monastic explanation, declined; with it passed towards oblivion other-world values, religious sanctions, ecclesiastical discipline, and the ceremonial support of social responsibility. The growth of commerce and of over-seas trade enlarged the market, brought a division of labor into the workshop, and permitted industrial processes to be transformed by the machine. An unplanned—and even unexpected—empire of commerce came with a rush; the course of business proved to be too strange and too turbulent to fall into the leisurely ways of petty trade. The older aristocracy, like the established order, fell back before the shock; and merchant adventurers and men of affairs,—with notions in their heads not alien to their economic interests,—came to be masters of the state. The older scheme of regulation, which aimed to make the trafficking in wares serve the common-wealth, was not formally abandoned; its increasing irrelevance to the conditions and problems of an emerging industrial society merely caused it to fall into disrespect and disuse. Even men keenly sensitive to the instrumental character of industrial activities were disposed to let matters take their own course; amid the whirl of change there seemed to be no sound alternative. After all, it was impossible to tell in advance what would prove wise and what foolish. It was easiest to rationalize doing nothing as if it were a deliberate public policy.

Things were in the saddle; and the thinkers, as is their wont, set out to explain the inevitableness of it all. The ideas in the

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<sup>8</sup> The assumptions underlying the argument are hardly consistent with those used elsewhere by the writer. In the *Essay Concerning the Human Understanding* Locke refutes the contention that "there are in the Understanding certain Innate Principles" and insists that the mind, like "white paper, void of all characters, without any ideas," receives the materials of the intellectual process from experience. Although it had its beginning as early as 1671, the *Human Understanding* was published in the same year as the *Civil Government*, 1690.

heads of the best of men lag behind the facts, and it is of the nature of theory to hold itself aloof from the sordid touch of reality. So an institution that was—or was presently to be—was given the defenses of one that had passed or had only an ideal being. If God, by reason of being the Great Artificer, had become the Supreme Proprietor, so man in his lesser capacity and smaller sphere was a creator, and entitled to the fruits of his own production. To Adam Smith the right of every man “in his own labor” was “the original foundation of all other property” and a proprietary estate represented the accumulated labor of many generations.<sup>9</sup> To Hume “the convention” existed “to bestow stability of possessions” and to insure “the peaceful enjoyment” of what one “may acquire by his fortune and industry.”<sup>10</sup> By Blackstone,—to whom nothing “so generally strikes the imagination and engages the affections of mankind, as the right of property,”—“bodily labor bestowed upon any subject” was “universally allowed to give the fairest and most reasonable title to an exclusive property therein.”<sup>11</sup> Thus for a time even mercantile capital, innocent of such an origin, was explained in terms of land and by reason of labor. When its distinctive character was no longer to be overlooked, the labor theory was made over and capital came to be justified by the pain of the abstinence involved in saving. The effect of this resort to origins was to identify ownership with creation and to give to possessions the sentimental values attached to personality. The “productivity theory”<sup>12</sup> became a mighty prop to laissez-faire; the functions of government, shorn of the powers of regulation, came to be the protection of ownership and the enforcement of contract. It was small wonder that by men of substance and standing society came to be regarded as a “kind of joint-stock company established in the interests of property-owners.”<sup>13</sup>

<sup>9</sup> ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776) bk. i, ch. x; bk. iv, ch. v; bk. v, ch. 1.

<sup>10</sup> DAVID HUME, *A TREATISE OF HUMAN NATURE* (1738), Everyman's Library edition, vol. ii, p. 195.

<sup>11</sup> WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1765), bk. ii, ch. i.

<sup>12</sup> In the late nineteenth century “a theory of specific productivity,” in whose terms the incomes of labor and capital were explained, came into economic doctrine. Its most skillful presentation is to be found in CLARK, *THE DISTRIBUTION OF WEALTH* (1899). The cruder notions, of which the professional accounts are refinements, were matters of faith to business men at the end of the century. The “productivity theory” has not yet disappeared from the manuals prepared for the use of college classes in economics; but it would be invidious to set down citations.

<sup>13</sup> There was, of course, a vigorous dissent; but the writings of the protestants never became quite respectable. “‘The Creator of the earth’ did not ‘open a land office from which the first title-deeds were issued.’”—LARKIN, *op. cit. supra* note 3, at 129, quoting Thomas Paine.

In the meantime the cause of property received help from another quarter. Locke had found it expedient to appeal from the government of his day to a higher power; and the laws of nature had stood him in good stead. His natural state is a curious affair, peopled with the Indians of North America and run by the scientific principles of his friend Sir Isaac Newton. But in time the savages were banished and the Newtonian norms grew and possessed social inquiry. Scholars, bent upon being objective, seized with delight the analogue to physics,<sup>14</sup> sought out "the laws" by which trade was governed, and applied mechanical formulas to human activities. The cruder state of nature, which had existed in the beginning or lay without the fringes of civilization, was converted into a prevailing and comprehensive Natural Order. Its contemporary existence enabled the focus of inquiry to be shifted from how things might be made to fulfill their purposes to how they automatically worked. But, if science was invoked, religion was not to be lost; and a very comfortable assumption enabled the venerable concept of "the common wealth" to be retained. "The Creator," as the Great Commentator phrased it, "has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to enquire after and pursue the rule of right but only our self love." It was rooted in the foundation of things;<sup>15</sup> so it was easily demonstrated that "the common good,"—no longer a subject of conscious bother,<sup>16</sup>—was best promoted by leaving each free to exercise his individual right to liberty and to property. Thus two intellectual worlds were bridged, and an erstwhile objective of public policy remained to crown an apology.<sup>17</sup>

All of this was not without its effect upon the appreciating lines of Locke's treatise. The events of the decades which passed stirred men's souls; the rising economic interests were supremely

<sup>14</sup> In the later eighteenth and the nineteenth century the analogue to physics is evident in writings in politics, economics, law, ethics, and theology. A dominant thread in the thought of the age might well be set down in an essay with the text, "Tell me a man's analogy and I will expound his system."

<sup>15</sup> BLACKSTONE, *op. cit. supra* note 11, introduction, sec. 2.

<sup>16</sup> An inquiry into the various intellectual devices by which a conscious concern with public policy was elbowed out of the picture of the social order would throw much light upon the concept of property in public affairs. It is, however, too much in the nature of an excursion to have a place in these pages.

<sup>17</sup> "Thus the idea of purposiveness or teleology disappears also from social theory; and an atomistic view of society alone remains."—LARKIN, *op. cit. supra* note 3, at 109. This is hardly exact; the truth is rather that men needed no longer to take conscious thought to make industrial activities serve social ends. The idea of purpose was much too valuable to be lost; it was because "self love" and "social" were made the same that the mechanistic explanation became "the great apology."

important to those whom they concerned. As yet there was little place in political speculation for tentative hypotheses; men of strong faith demanded verities and were content with nothing less than absolutes; they clung to their dogma as to a religious creed. The background of Locke's thought was forgotten; his silences were overlooked; the conditions and peradventures in his argument were brushed aside. His propositions, no longer limited in meaning by his reasons, became general truths; his expediences, freed from the exigencies of cause and occasion, blossomed out as cardinal principles of government. The motley thing called property became a simple, autonomous entity, the basis of a natural, an inalienable, an indefeasible right. It was,—thanks to the Great Absolute who had replaced a more capricious deity,<sup>18</sup>—alike an element in the Providential Plan and an aspect of the Order of Nature itself. The men of "the enlightenment" and of a developing industrial culture,—who always thought of cause as individual and never as social,—looked into Locke's essay, found it good, and read therein their own sense and reason.

It was easy enough for America to accept Locke; or, at least, to employ his phrases as sanctions for their own borrowed—*or native*—political thought. If, in his scribbling, the philosopher had one eye upon the reformed English throne, his other was fixed upon the new continent and the possibilities which it offered for a better ordered society. The great open spaces and the bountiful gifts of the Creator appear constantly in the essay on civil government. There labor was of much and land of little importance; and there, if anywhere, man made things valuable by mixing his sweat and toil with them. Long after Locke had passed on,—and the problems with which he was concerned were forgotten by all except students,—the exploitation of a continent and the establishment of an industrial system gave breadth to personal opportunity. Along a continuing frontier, where industry was blazing new paths as well as where pioneers were settling new lands, the ideas of individualism flourished. In a country in which there was not over-much of "feudal nonsense" and public opinion was little tainted by canonist doctrine, it was certain to possess vitality. In time the masses of men were destined to end their days as wage-earners; yet the hope in every man's breast of becoming a property-owner lived on. Opinion, long after the machine and the corporation had transformed society,

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<sup>18</sup> In the history of ideas, it is interesting to note the changing character of the deity. He is recreated by each age, a little belatedly, in its own likeness. As the god of the Middle Ages was a royal personage, whose favor was to be won by prayers, so the deistic god of the later eighteenth century was the God of Nature whose will was expressed in universal laws.

still professed allegiance to the creed of individualism;—and opinion is mightier than fact.

In this country Locke became the gospel of liberty and property. It is true that in its early days the staid authorities at Yale, —probably because they were already possessed of “light and truth,”—warned their students against the corrupting doctrines of the Oxford philosopher; but the books got about. Men who were later to shape “the course of human events” knew “their Locke” and with him viewed the overthrow of the last of the Stuarts “as an act of reasonable men defending their natural rights against the usurping king who had broken his compact.”<sup>19</sup> Friction with the mother country grew,—and out of Locke’s arguments<sup>20</sup> a case was contrived against acts of Parliament<sup>21</sup> which threatened the purses of Colonial merchants. The political ties with the crown had to be broken,—and Mr. Jefferson found in the Civil Government the raw material for his organ-like prelude to the Declaration of Independence.<sup>22</sup> A number of erstwhile colonies had to be welded into a union,—and from the same storehouse ideas were drawn for incorporation into a Constitution which was to be “the supreme law of the land.” In it “the forces of democracy” were “set over against the forces of property” and a “fundamental division of powers” was effected “between voters on the one hand and property-owners on the other.”<sup>23</sup> If, in the

<sup>19</sup> BECKER, *THE SPIRIT OF '76* (1926) 14.

<sup>20</sup> It is not safe to dogmatize about the native and the borrowed elements in the case of the Colonies against the Mother Country. There was, to be sure, quite an importation of intellectual thunder and no small reliance upon Locke. But the occasion was a novel one, the parties to the struggle had their own distinctive positions, and the events of intellectual combat took their own course. When the smoke of battle and the clouds of dialectic were lifted, our Revolution was discovered to have been a rather different one from the show the English had put on in the preceding century.

<sup>21</sup> A curious twist was given to the dialectic of the great philosopher by the course of events. Locke’s argument is a justification of revolution against an irresponsible monarchy; the occasion demanded a protest of humble subjects of His Majesty against acts of Parliament. Locke elevates the rights to life, liberty, and estate above “the legislature”; but he does not distinguish the legislature from the executive. At the time of the break with England, nearly a century later, the supremacy of Parliament had come to be incorporated into the British constitution, and in America the new-fangled theory of the separation of powers was beginning to be in the air. The dialectical attack upon parliament did much to inculcate the idea of the invalidity of legislative acts, and hence played its ideological role in the rise of the doctrine of unconstitutionality.

<sup>22</sup> The turn of events which led to the separation from the crown simplified the argumentative problem, and brought Locke once more to the rescue. For a critical account of the use of borrowed intellectual wares see BECKER, *THE DECLARATION OF INDEPENDENCE* (1922).

<sup>23</sup> HADLEY, *THE CONSTITUTIONAL POSITION OF PROPERTY IN AMERICA*, in *The Independent*, for April 16, 1908, reprinted in HAMILTON, *CURRENT ECONOMIC PROBLEMS* (3d ed. 1925) 764.

provisions engrossed on parchment, the influence of Locke is not explicit, it is manifest in "the bill of rights" which was presently appended to the document.<sup>24</sup>

The Civil War brought its new burst of freedom,—and through the Fourteenth Amendment an injunction against arbitrary interference with "life, liberty, and property," was laid upon the states. The modern industrial system came into being—and the most Lockian phrases in the Constitution were employed to guard its integrity. The property which Locke knew,—or perhaps only wrote about,—receded; and business enterprise won for itself certain immunities from its former over-lord the state. The United States Supreme Court, with the help of the phrase "freedom of contract," declared invalid state statutes which did such things as regulate the weight of loaves of bread,<sup>25</sup> prohibit the use of shoddy in manufacture,<sup>26</sup> and fix the fees to be charged by employment agencies;<sup>27</sup> and invoked the word "property" to establish a judicial review of the findings of administrative committees in matters relating to the rates,<sup>28</sup> valuation,<sup>29</sup> and even the charges for depreciation,<sup>30</sup> of public utilities. Locke assailed the divine right of kings,—and penned words which have been used to enthrone ownership. Thus was an intellectual heritage passed on from a decaying feudal to a rising industrial society.

Such is the story as it is told; or rather the story which one reader discovers in these pages. Verbal coinage always passes somewhat uncertainly, and a pondering over fascinating chapters confers no ability to pass along their meaning with precision and fulness. The manner of the book makes none too easy access to its thought. The essay was written as a doctor's thesis and does not escape the blight of that institution. The author never allows a passion for his subject to make him unmindful of academic standards. His style is heavy with the fruits of scholarship; the inescapable bundle of notes of the researcher is all but omnipresent; and at points one must dig deep beneath erudition to recover the thread of argument. And, for all the mass of ma-

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<sup>24</sup> "Indeed the remarkable thing about the Constitution is the absence of any declaration of individual rights such as is contained in the Declaration of Independence."—LARKIN, *op. cit. supra* note 3, at 161. The author overlooks the fact that the addition of a "bill of rights,"—the first ten amendments,—was the price paid by the supporters of the document to secure its ratification by the states.

<sup>25</sup> Burns Baking Co. v. Bryan, 264 U. S. 504 (1924).

<sup>26</sup> Weaver v. Palmer Brothers Co., 270 U. S. 402 (1926).

<sup>27</sup> Ribnik v. McBride, 277 U. S. 350 (1928).

<sup>28</sup> Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287 (1920); Southern Bell Telephone Co. v. Public Service Commission of Missouri, 262 U. S. 276 (1923).

<sup>29</sup> Saint Louis and O'Fallon Ry. v. United States, 279 U. S. 461 (1920).

<sup>30</sup> West v. United Railway and Electric Co., 278 U. S. 567 (1920).

terial, chapters in the story seem to be strangely incomplete. Accordingly, in an attempt at summary, a resort has had to be made to other writings to fill in blanks and to clear up obscurities in the narrative. An even greater hazard attends the necessity of setting it all down in terms somewhat alien to the intellectual system in which it was written. In spite of its concern with law, there is mention in the book neither of Maitland nor of Holmes. Though this is just the theme to invite it, the essay bears little mark of the ways of thought of Veblen. The account is historical, rather than genetic; and doctrinal, rather than ideological. The color is to be found in the indignation of the preacher, not in the irony of the artist. In the background is to be discerned the influence of the minds and spirits of Figgis and Gore and R. H. Tawney. The conversion of the prophetic narrative of a neo-canonist into a chronicle of the emergence of a legal institution is no automatic task.

The great bother about the book is that it is weakest where the unfolding drama demands that it be strongest. The emergence of parliamentary supremacy in England denied to the property of Locke a place above the legislature. But his ideas took their way westward, and the author's search fails to discover their growth in the New World. His initial difficulty is a lack of acquaintance with things American. His sources are good of their kind; but many of them are secondary, and as a whole they are not adequate to his requirements. He overlooks the changes in the status of persons and the rights of ownership which attended the American Revolution.<sup>31</sup> He leans too heavily upon Beard in presenting the conspiracy theory of the passage of the Fourteenth Amendment; he endows the captains of a rising industry with a capacity for forward plan and deep plot which they are not usually understood to possess. His account of the constitutional sacredness of property is made up, not from the U. S. Reports,—more than one set of which is to be found in London,—but out of Beard.<sup>32</sup> A picture of a picture of the first Minnesota

<sup>31</sup> It is probably captious to quarrel with a British scholar because of his lack of acquaintance with general American history, and a single example must be made to suffice. The author writes that "during the War of Independence . . . little time was left to" the various States "to consider their particular interests as individual entities." Larkin *op. cit. supra* note 3, at 151. This sentence would not have been written had the author been acquainted with the delightful Princeton lectures to be found in JAMESON, *THE AMERICAN REVOLUTION CONSIDERED AS A SOCIAL MOVEMENT* (1926).

<sup>32</sup> BEARD, *Contemporary American History* (1920), 73, 86-87.

The American writer is not to blame. Against a charge of overstatement, it needs to be set down that Beard wrote, "the Supreme Court has declared very little social legislation invalid." *Op. cit.* at 87. Against a charge of understatement, it is to be noted that Beard wrote in 1913.

rate case,<sup>33</sup> by persons not unversed in the art of selection, is not a substitute for the original holding. Nor does a trio of cases at second-hand furnish quite enough evidence to support a generalization about the attitude of the United States Supreme Court towards social legislation,—especially when two of them happen to be decisions of other tribunals.<sup>34</sup> And his reference to “the cast iron character of the Constitution”<sup>35</sup> must look strange to the eyes of even the most conservative jurists. But in general the fault is not so much that details are wrong or irrelevant as that they are not properly evaluated and used. The reality of a cluster of usages is never to be captured in a series of items thumbed out of books; words and events are dependent for their rightful places in a narrative upon the maturity and understanding of the historian. An even greater source of weakness is the author’s lack of intimate acquaintance with the changing human arrangements which make up the judiciary. The complimentary institutions of “the higher law”<sup>36</sup> and “judicial review,”—without which property could never have come into its constitutional own,—receive scant attention in these pages. The idea-of-the-book finds its most distinctive expression in the protection accorded to property by the courts; it is embodied most completely in the usages which make up judicial review; its tangled and colorful actuality is most evident in the decisions under the Fifth and the Fourteenth Amendments. Here is the climax of the history;—it makes its dull appearance and is gone.

The argument passes on to other matters;<sup>37</sup> and yet the impact of established idea upon emerging institution is the proper theme of the story. In Locke’s discourse “property” follows directly after “slavery”; in his pages a man’s estate is the means of life; in his thought “liberty” and “property” are almost a single word; he seems even to disclaim the relevancy of his philosophy to a money economy. A concept of property-inseparable-from-personality served well the social policy of a pre-industrial era. As an abstraction it fits neatly enough the game taken from the wild herd, the homestead carved out of the wilderness, or even the shop of the petty tradesman. It served well the

<sup>33</sup> *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418 (1890).

<sup>34</sup> One is the first Minnesota rate case, *supra* note 32. Although no citations are given, the other two are undoubtedly *In re Jacobs*, 98 N. Y. 98 (1885), and *Godcharles v. Wigeman*, 113 Pa. 431 (1886).

<sup>35</sup> Larkin, *op. cit. supra* note 3, at 166.

<sup>36</sup> See especially Corwin, *The “Higher Law” Background of American Constitutional Law* (1928-1929) 42 HARV. L. REV. 149, 365; and Grant, *The Natural Background of Due Process* (1931) 31 COL. L. REV. 56.

<sup>37</sup> The chapter on France, which serves the purpose of comparison, seems hard to justify. If the technique of printing permitted it to be hauled up alongside, it might not be out of place. At the end of the volume it is an anti-climax.

common-sense of an America which was "on the make." The phrases of the Fourteenth Amendment were initially invoked in behalf of the right of the working man to his trade;<sup>38</sup> they were first used by the United States Supreme Court as a sanction for safeguarding personal opportunity.<sup>39</sup> As late as the turn of the last century justices were not yet distinguishing between liberty and property; in the universes beneath their hats liberty was still the opportunity to acquire property.<sup>40</sup>

The coming of industrialism left its impact upon the words of Locke. It separated the laborer from the instruments of production, articulated establishments into an industrial system, and enabled a capitalistic ownership to come into the repute of a personalized property. The parallel growth of judicial review made the judiciary the overlord of the legislature, assigned to it a role in the control of the economic order, and gave to the ownership of corporate wealth the protection of the Constitution. In this recent chapter—which goes no further back than the eighteen hundred and nineties—the property of the Reports is not a proprietary thing; it is rather a shibboleth in whose name the domain of business enterprise has enjoyed a limited immunity<sup>41</sup> from the supervision of the state.<sup>42</sup> Even now it is not the taking

<sup>38</sup> The brief of the former Mr. Justice Campbell in the Slaughter House Cases, 16 Wall. 36 (U. S. 1873), is path-breaking. His argument, which leans heavily upon Adam Smith and Mr. Jefferson, is not Locke; but it is made out of the stuff and in the manner of Locke. The right to life, liberty, and the pursuit of happiness includes the right of the working man to his trade and is entitled to the protection of the higher law against an act of a state establishing a monopoly. It is set down in terms of the privileges and immunities of citizenship; but later was with revisions translated into the terms of the due process clause by Bradley and Field, JJ. Its mutations cannot be followed here; eventually it ceased to be an expression of Jeffersonian democracy.

<sup>39</sup> Yick Wo. v. Hopkins, 118 U. S. 356 (1886).

<sup>40</sup> Here there is probably a difference between the imported ideas of Locke and the indigenous American intellectual product. Locke made property a means to liberty; a late nineteenth century jurist, Mr. Justice Field, for example, probably made liberty a means to property.

<sup>41</sup> The statement of Judge Van Orsdel, of the Court of Appeals of the District of Columbia, in declaring unconstitutional a statute providing for a minimum wage for women workers in industry, goes quite beyond the most advanced position taken by the United States Supreme Court: "It should be remembered that of the three fundamental principles which underlie government, and for which government exists, the protection of life, liberty, and property, the chief of these is property." *Children's Hospital v. Adkins*, 284 Fed. 613, 622 (1922).

<sup>42</sup> If there is such a thing as substantive law, the formula used by the courts for the determination of constitutionality is Lockian. The philosopher would suffer persons to be impaired in "their lives, liberties, or estates" only for "the common good." The rights of life, liberty, and property currently have to take their chance against the claims of "the police power."

of physical things or,—except in public utilities,—the diminution of financial assets which prompts the intervention of the courts. If, in cases involving the regulation of business, a pecuniary detriment substantial enough to show up in the balance-sheet had to be demonstrated,<sup>43</sup> federal jurisdiction would have been much restricted. In the annals of the law property is still a vestigial expression of personality and owes its current constitutional position to its former association with liberty. If that place is not its by intellectual succession,<sup>44</sup> the fault lies with the march of events which has taken from Locke's principles the support of his own reasons and their relevancy to the world of affairs.

Against the background of a developing industrial culture the position of property in constitutional law is somewhat anomalous. In the world of here and now, justification-by-origin has gone the way of all doctrine. The individual is no longer thought of as a miniature god who has a title to his own creation. It is now impossible to place a mark of personal workmanship upon any chattel; a multitude of men have mixed their labor—and many another personal contribution beside—into such earthly possessions as a motor-car, a sky-scraper, a railroad, a going concern, and a handful of intangibles. In an economic order which comprehends all men the technical contribution of the individual to usable wealth cannot be isolated and measured. Nor can "the worth he has produced" be determined except in terms of the market value of his services or property,—and that is begging the question. Instead his relationship to a gigantic industrial order, into whose keeping he gives his services or his productive possessions and from whose store-house he fetches away his liv-

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<sup>43</sup> It has chanced, as often as not, that many reforms, against which there has been vigorous protest, have been shown by experience rather to promote than to injure business interests. The reduction of the hours of labor and compensation for industrial accidents may be mentioned as examples. The anomaly has not been unknown of a court declaring invalid the legislative prescription of industrial standards which enlightened business establishments were adopting in their own pecuniary interest.

<sup>44</sup> The office of the Supreme Court has not been unaffected by the clash between "human" and "material" values which has attended the coming of industrialism. It has brought uncertainty—and even some confusion—alike into political theory and into the judicial process. The author of *Property in the Eighteenth Century* rebels at putting property above the state, but seems willing to accord such a place to personal freedom. If in this matter his political theory gives him bother, he shares his perplexity with the majority of the United States Supreme Court at its last term. The court was then willing to create presumptions in order to deny to "freedom of contract" the protection of the Constitution; it was unwilling to indulge the same presumptions when they would have denied to "freedom of speech" the protection of that immortal document. *O'Gorman v. Hartford Insurance Co.*, 282 U. S. 251 (1931); *Near v. Minnesota*, 283 U. S. 697 (1931). See also Shulman, *The Supreme Court's Attitude Toward Liberty of Contract and Freedom of Speech* (1931), 41 YALE L. J. 262.

ing, depends upon a tangled scheme of social arrangements. The coming of industrialism has made of "liberty" and of "property" convenient names for changeable bundles of specific equities. Personal liberty as an abstraction has no worth; unless it is freedom to think and to express opinion, to seek and to do, it is empty of meaning; its substance lies in a right of access to the opportunities afforded by the prevailing society. Likewise the essence of property is the freedom of the owner in relation to his possession. Neither "liberty" nor "property" is antecedent to the state or beyond the domain of public control. Each is but a name for a cluster of prevailing usages,—certain to change and subject to amendment,—which binds the individual to the social order. The property which Locke justified by natural right was an isolated possession of personal origin; the property which is the concern of constitutional law is an aggregate of rights inseparable from the gigantic collectivism of business. It was not the fault of Locke that he had to write his immortal lines towards the close of the seventeenth century.

Nor is Locke to blame that he did not anticipate the perils which currently lie in wait for our possessions.<sup>45</sup> The nuisance of royal power had been abated before he wrote, and within a century his checks upon irresponsibility had found expression in constitutional government. But his thinking was not proof against paradox; and to the decree of fate that man contrives his formulas and time and chance rewrite them, he was granted no personal immunity. A supreme law is invented to guard the rights of the people against an unrepresentative government. Then the legislature becomes popular, the judiciary proclaims itself interpreter—and the divine right of kings is replaced by the oligarchy of the robe. An amendment is added to the Constitution to make the people secure in their persons and property against arbitrary acts of an untrusted officialdom. Then corporations become persons, established interests are accounted property, social legislation appears as deprivation—and a democratic

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<sup>45</sup> The United States Supreme Court has taken "judicial notice" of the depression, "the outstanding contemporary fact, dominating thought and action throughout the country."—Mr. Chief Justice Hughes, speaking for an undivided court, in *Atchison Topeka and Santa Fé Ry. v. United States* 52 Sup. Ct. 146, 149 (1932). A minority of the court has accorded recognition to some of the hazards which currently lie in wait for property. "There must be power in the States and the Nation to remould, through experience, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended the progress of the useful arts."—Mr. Justice Brandeis, dissenting, in *New State Ice Co. v. Liebmann*, 52 Sup. Ct. 371, 386 (1932).

provision in the supreme law of the land becomes aristocratic. An argument is contrived to justify the revolt of a people against their rulers—and a judicial institution decades away falls heir to the sanctions invented by the philosophers as a justification of revolution.

In government the technique of averting a threat which is gone is much better understood than the art of taking precautions against prevailing dangers. Today the unemployed walk our streets and securities belie their very name. The ups and downs of business confiscate more property in one month than all our state legislatures and administrative commissions in a decade. Against an unplanned and undirected industrialism, and its imminent hazards to life, liberty, and property, we have no constitutional rights. But thanks to John Locke,—or to the thinkers, statesmen, warriors, business men, and jurists who put the punch in his words,—we have adequate safeguards against the resort by any state to the kind of stuff the Stuart kings used to pull.