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Contributors to the May Issue/Notes

Thomas Broden

Richard H. Keen

John M. Anderton

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CONTRIBUTORS TO THE MAY ISSUE

Anton-Hermann Chroust, Associate Professor of Law, University of Notre Dame. J.U.D. from the University of Erlangen 1929. Ph.D. from the University of Munich 1931. S.J.D. from the Harvard Law School 1933.

Sister Mary Barbara McCarthy, S.S.J., B.A., Western Michigan College of Education; M.A., Ph.D., Catholic University of America; legal research, University of Michigan, 1934-1938. Listed in the International Blue Book of the world's notable living men and women, as the author of several works, including textual commentaries on the Constitution of the United States and on the American state constitutions. Professor of history and political science, Nazareth College, Michigan.

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NOTES

CO-OPERATIVE MARKETING—STATUTES PROVIDING PENALTY AGAINST THIRD PERSONS WHO INDUCE BREACH OF MARKETING CONTRACTS.—Capitalism is most prudent in accepting into its legal system measures of governmental regulation which apply to economic relations generally and contract relations particularly. Efforts of the executive, legislative or judicial branches of either British or American governments to directly control phases of contractual relationships have generally met staunch and rigid opposition. The spirit of the sacredness and inviolability of the contract relation was a logical outgrowth of the

capitalistic system in its inception. At that time freedom was a passion, self-sufficiency a goal. From an era thus shrouded and bedecked with individualism, it is little wonder that measures affecting, even protecting, freedom of contractual relations were slow to evolve. In 1853 in England malicious interference with a contract by a third person was definitely recognized as a tort.¹ At this time, however, this form of judicial protection of the contract relation appeared to most businessmen in the United States as an interference with economic freedom; yet slowly and certainly the tort of malicious interference with contractual relations has developed in this country.²

Once the judicial branch of the government was able to affect contracts and to protect contractual relations from malicious third-party influence, public policy determined the boundaries of legal and illegal interference. Thus we see privileged invasions of contractual relations growing out of the demands of the public and national welfare. The most outstanding examples of privileged invasions of contractual relations are the activities in the business world of the labor unions. Likewise stemming from public policy is the privileged invasion of contract relations by co-operative marketing associations. The government, in answer to public demands, has protected the sale of goods under co-operative marketing agreements. Some states have made manifest this spirit of protection by making it a misdemeanor on the part of a third person to induce or cause the breach of a co-operative marketing agreement. The plight of the agricultural group in the United States during the period of rampant industrial progress gave rise to the present interest of government in the protection of farmers. It became increasingly apparent that a sound economy demanded a thriving agricultural group. It was also just as apparent that positive action was the only effective cure for the utterly dissipated farm element.

Such governmental aid to the farmers was opposed as an infringement upon the rights of all citizens to equality under the law. Cries of loss of freedom rose from the buyers who at the time had practically reduced the unfortunate farmer to the position of a bargaining slave. Fundamental rights were being violated when classes such as the farmer were to be afforded privileges and protection. However the concept of freedom in society and under government must inevitably be tempered with a consideration of all other members of the society or government. Thus the right to buy or sell at will in agricultural circles is tempered by regulations designed to secure economic stability

¹ In *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853), defendant was held liable by reason of his inducing an opera singer to break her contract with the plaintiff.

² Today the great majority of jurisdictions in the United States uphold the doctrine of liability on the part of a third person for maliciously interfering with a contract between two other parties. Prosser on Torts, 978-79 (1941).

for the farming class.³ Numerous judicial opinions have held that discrimination in favor of agriculture does not amount to a denial of the equal protection of the laws to non-agricultural groups of society. It is understood that the general welfare of these non-agricultural groups is dependent upon the well-being of the agriculturists.⁴

In the very nature of things agriculture was at the mercy of purchasers who readily ascertained the advantages of organized buying. Combinations of purchasing capital virtually regulated the return which farmers realized on their crops. The wretched condition of the

³ A Colorado court held certain actions of the defendant constituted criminal inducement to breach a contract whereas other actions of the defendant against the co-operative were not of such a nature as to fall within the purview of the statute. In this case the court stated that it was a misdemeanor for a third person to induce a breach of a co-operative marketing agreement. *Fort v. People ex rel. Co-operative Farmers' Exchange, Inc.*, 81 Col. 420, 256 P. 325 (1927). In the case of *Fort et al. v. Co-operative Farmers' Exchange, Inc.*, 81 Col. 448, 256 P. 329 (1927) the defendant, Fort, was enjoined from inducing the members of a marketing association to break their contracts of sale to the co-operative marketing association or from interfering in any way with the business of the co-operative. The Supreme Court of Colorado held defendant guilty of contempt of the injunction when he continued to induce members to breach their marketing agreements. However at this time and while this same injunction was in effect, Fort was responsible for articles appearing in a local newspaper accusing the co-operative of "cutting" cabbage prices to the detriment of farmer members. The Colorado Supreme Court held that these acts were not such an interference with the business of the co-operative as to be considered unlawful. The court harmonized the constitutional right of every citizen to the liberty "to speak, write or publish whatever he will on any subject" with the public interest of the issue and decided that the publication would not lawfully interfere with property rights. However in its opinion the court went on record asserting that under Colorado statutes "knowingly to induce or to attempt to induce a member of a co-operative marketing association to break his marketing contract with the association is a misdemeanor." *Fort v. People ex rel. Co-operative Farmers' Exchange, Inc.*, *supra*.

⁴ *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 45 L. Ed. 102, 21 S. Ct. 43 (1900); *Cox v. Texas*, 202 U. S. 446, 50 L. Ed. 1099, 26 S. Ct. 671 (1906); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 66 L. Ed. 239, 42 S. Ct. 106 (1921); *Rifle Potato Growers' Co-op. Assn. v. Dexter Smith*, 78 Col. 171, 240 P. 937 (1925); *Burley Tobacco Co. v. Gillaspay*, 51 Ind. App. 593, 100 N. E. 89 (1912); *Potter v. Burley Tobacco Growers' Co-op. Assn.*, 201 Ky. 441, 257 S. W. 33 (1923); *Brown v. Staple Cotton Co-op. Assn.*, 132 Miss. 859, 96 So. 849 (1923); *State ex inf. Crow v. Continental Tobacco Co.*, 177 Mo. 1, 755 N. W. 737 (1903); *Nebraska Wheat Growers' Co-op. Assn. v. Norquest*, 113 Neb. 731, 204 N. W. 798 (1925); *List v. Burley Growers' Co-op. Assn.*, 114 Ohio 361, 151 N. E. 471 (1926); *Dark Tobacco Growers' Co-op. Assn. v. Dunn*, 150 Tenn. 614, 266 S. W. 308 (1924); *State of Tennessee, ex rel. Atty. Gen. v. Burley Tobacco Growers' Co-op. Assn.*, 2 Tenn. App. 674 (1926); *Northern Wisconsin Co-op. Tobacco Pool v. Bekkedal*, 182 Wis. 571, 197 N. W. 936 (1924). Other examples of legislative discrimination in favor of agriculture are the Clayton Act; the Capper-Volstead Act (February 18, 1922, chap. 57) 42 Stat. at L. 388, U. S. C. title 7, sec. 291; and the Co-operative Marketing Act of July 2, 1926, chap. 725) 44 Stat. at L. 802, U. S. C. title 7, sec. 414-1.

rural populace gained widespread recognition but its needs only increased its helplessness. Efforts to attain the farmer's obvious avenue of escape — that of combining with other farmers — had not gained widespread success. It was only through unity that the farmer would realize equality in bargaining for the sale of his crops. But many factors hindered successful combination; farms and their occupants were physically dispersed; the farmer was characteristically an individualistic person and methods of combined selling had never been effectively presented to him. Also the rest of the country was in no way prompted to assist the farmer in his predicament because low food prices through competitive selling were assured by the agricultural element remaining unorganized.

To relieve this unhealthy national economic situation both the state and federal governments effected statutes providing for co-operative marketing agreements — one phase of which is special protection in contract relations between the co-operative and its members. The over-all purpose of these statutes is usually set out in the introduction to the co-operative marketing act of each jurisdiction.⁵

It is well settled that the very existence of the co-operative depends upon the enforcement of its mutual contracts of purchase and resale — exclusive purchase from the members and exclusive resale to the buyer through the co-operative. If this "exclusiveness" in co-operative activity were not insisted upon, the effectiveness of the organization would be seriously hampered if not totally destroyed. There would be no easier method of destroying the co-operative than to interfere with the exclusiveness of flow of products from the member producer through the co-operative to the final purchaser. The co-operative can only insure a just return to the farmer for his products when it is the exclusive or, at least, the predominating bargaining

⁵ Indiana Statutes Annotated (Burns, 1933) § 15-1601, "Declaration of Policy. (a) In order to promote, foster and encourage the intelligent and orderly production and marketing of agricultural products through cooperation; and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; to stabilize the marketing of agricultural products, and to provide for the organization and incorporation of agricultural cooperative associations and societies, this act is passed.

(b) It is here recognized that agriculture is characterized by individual production in contrast to the group or factory system that characterized other forms of industrial production, and that the ordinary form of corporate organization permits industrial groups to combine for the purpose of group production and the ensuing group marketing and that the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the marketing industries; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops. (Acts 1925, ch. 20, sec. 1 p. 42; 1931, ch. 34, sec. 1, p. 79)."

agent in the area for the products. Extensive competition would cause the complete dissolution of the co-operative and a return to the former open market competition where a single farmer sold to the organized purchaser. For this reason co-operative marketing statutes have provided penalties for members who breach their co-operative marketing agreements. But more important are the stringent penalties which are provided for those third persons who induce the member to breach his co-operative marketing contract. Recognizing the serious danger of possible destruction of the co-operative by third party interference in the co-operative marketing contract, legislatures have, in some cases, made it a misdemeanor on the part of the third person who induces the member to breach his marketing contract.⁶ Many other states provide for heavy penalties to be assessed in a civil suit in favor of the co-operative against the third persons who bring about a breach of marketing agreement.⁷

The basic defense of a third person guilty of inducing a breach of a co-operative marketing contract has been the plea of the unconstitutionality of the statute which classifies such a breach as blameworthy. It is claimed that a statute condemning a third person for buying products impairs the freedom of contractual relations. Also equal protection under the law guaranteed by the Fourteenth Amendment to the Constitution is pointed to as being violated by such penalty statutes. This same Constitutional Amendment affords to those guilty of inducing a breach the possible argument that the statute takes property from them without due process of law. Overshadowing all these defenses is the plea that the legislature has no power to make the influencing of a member to breach a co-operative marketing contract a crime.

⁶ The following states have statutes which render a third person guilty of a misdemeanor if he knowingly induces a member to breach a co-operative marketing agreement; Colorado, Minnesota, Oregon, Pennsylvania, South Carolina and Vermont. A typical co-operative marketing agreement penalty statute is that of Kentucky which also makes it a crime to induce a member to breach his marketing contract. Kentucky Statutes Annotated (Baldwin, 1943) § 272.990 "Penalties:

(2) Any individual or any corporation whose officers or employees knowingly induce or attempt to induce any member to break his marketing contract with an association or who maliciously and knowingly spreads false reports about the finances or management of any association shall be fined not less than one hundred dollars nor more than one thousand dollars for each offense, and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars for each offense."

⁷ The following states have statutes which provide for the recovery of a penalty in favor of the co-operative from a third person who induces a member to breach his co-operative marketing contract. These states do not make this action a misdemeanor, however. They are: California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Tennessee and Virginia. Texas provides for treble damages to go to the co-operative.

These contentions are rebutted in the majority of the courts by reference to the police power of the legislature to secure the general welfare of the community. The courts point out the dilemma in which the farm element existed prior to governmental aid. The legislative intent obviously was to remove the obstacles which stood in the path of clarification of this agricultural dilemma. It has been shown that penalty statutes prohibiting third persons from inducing members to breach their co-operative marketing contracts are essential to the potency of the acts as corrective measures. Thus the co-operative marketing acts are established as necessary tools to the maintenance of the general welfare, and the penalty statutes are considered as essential to the effective existence of the acts.

In an outstanding federal case involving this controversy the Supreme Court of the United States upheld the constitutionality of a typical marketing agreement penalty statute by a unanimous decision in 1928.⁸ The defendant warehouse company purchased tobacco from a producer, who, as a member of the plaintiff co-operative, had pledged the sale of his full crop to the co-operative. The warehouse, at the time of the purchase, was fully aware of the producer's co-operative marketing agreement with the plaintiff. Mr. Justice McReynolds delivered the opinion of the undivided court in finding the warehouse guilty of inducing a breach of a co-operative marketing contract.

The defendants challenged the validity of the criminal penalty statute as offending the Fourteenth Amendment to the Constitution and thus depriving them of equal protection of the laws. The court rebutted this contention by stating:

"The statute penalizes *all* who wittingly solicit, persuade, or induce an association member to break his marketing contract. It

⁸ *Liberty Warehouse Company v. Burley Tobacco Growers' Co-operative Marketing Association*, 276 U. S. 71, 72 L. Ed. 473, 48 S. Ct. 291 (1928). *Tigner v. Texas*, 310 U. S. 141, 84 L. Ed. 1124, 60 S. Ct. 881 (1940) pointed out that the principal case was an outstanding example of the attitude of the judiciary toward the legislative policy of aid to agriculture. In further support of the principal case is *In re Wisconsin Co-operative Milk Pool*, 35 F. S. 787 (1940) in which the court held that co-operative associations for the marketing of agricultural products have a favored status under federal laws and the laws of Wisconsin, and that, therefore, a co-operative thus organized was not to be amenable to adjudication as an involuntary bankrupt under the Bankruptcy Act. Compare with *Shuster et al. v. Ohio Farmers' Co-operative Milk Association*, 61 F. (2d) 339 (1932) which affirmed the validity of the *Liberty Warehouse* case but found co-operative marketing associations amenable to the Bankruptcy Act. The court stated that the *Liberty Warehouse* case served to illuminate brilliantly the active existence of co-operative marketing in economic fields and that with their existence thus apparent to Congress, it was the place of the legislative body to specifically exclude the co-operatives from the Bankruptcy Act. For a discussion of the principal case see (1929) *Tenn. L. Rev.* 7:123-7F and (1929) *Texas L. Rev.* 7:306-7F. Also the same problem is discussed in Note (1928) *Harvard L. Rev.* 41:668-9.

does not prescribe more rigorous penalties for warehousemen than for other offenders. Nobody is permitted to do what is denied to warehousemen. There is no substantial basis upon which to invoke the equal protection clause." (Italics ours)

The defendants placed much reliance on the *Connolly* case of 1902, in which the United States Supreme Court decided that particular exemption of agricultural interests was a denial of the equal protection of the law. The *Connolly* case had little value in the solution of the present case, the Court held, as it distinguished the *Connolly* case from the instant proceedings on factual grounds.⁹

The Supreme Court concluded its statement in support of validity of the statute by expressing the now generally accepted policy regarding co-operative marketing statutes:

"Co-operative marketing statutes promote the common interest. The provisions for protecting the fundamental contracts against interference by outsiders are essential to the plan. This court has recognized as permissible some discrimination intended to encourage agriculture. And in many cases it has affirmed the general power of the states so to legislate as to meet a definitely threatened evil. Viewing all the circumstances, it is impossible for us to say that the legislature of Kentucky could not treat marketing contracts between association and its members as of a separate class, provide against probable interference therewith, and to that extent limit the sometime action of warehousemen.

*"The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint — not immunity from reasonable regulation to safeguard the public interest. The question is whether the restrictions of a statute have reasonable relation to a proper purpose."*¹⁰ (Italics ours)

⁹ Later, also the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, 22 S. Ct. 431 (1902) was overruled in *Tigner v. Texas*, 310 U. S. 141, 84 L. Ed. 1124, 60 S. Ct. 881 (1940) cited *supra* note 8. There Mr. Justice Frankfurter delivered the eight to one majority opinion and in part stated: "And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature. *Connolly's* case has been worn away by the erosion of time, and we are of opinion that it is no longer controlling." The Court pointed out that an impressive legislative movement during the forty years following the *Connolly* case was witness to the general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy.

¹⁰ The view of the principal case finds virtually universal judicial support. *Warren v. Alabama Farm Bureau Cotton Assn.*, 213 Ala. 61, 104 So. 264 (1925), where the court was of the opinion that co-operatives were in no way injurious to the public interest or in any way violative of public policy. In *Arkansas Cotton Growers' Co-op. Assn. v. Brown*, 128 Ark. 504, 270 S. W. 946, 1119 (1925) the court sustained a Co-operative Marketing Act: "The statute seems to be in a form which has become standard and has been enacted in many of the states, the

Kentucky was one of the earliest states whose supreme court was called upon to uphold the constitutionality of a co-operative marketing statute which made it a misdemeanor to induce a member to breach a marketing contract. In 1910 the court decided that, unless such a statute were expressly or impliedly forbidden by the terms of the state or federal constitutions, it is valid. Since co-operative marketing pools are lawful, the passage of statutes necessary for the protection of those pools is within the police power of the legislature, the court said. Likewise co-operative marketing penalty statutes are not an interference with one's right to acquire property because a person has no right to acquire property from those who have no right to sell that property. The Kentucky Supreme Court also announced that the legislature, for purposes of public welfare, may set out the farm element as a group to be protected, and that as long as all persons who violate the terms of a protection statute are guilty, there is no denial of equal protection of law as guaranteed by the Fourteenth Amendment.¹¹

enactment of such legislation being manifestly prompted by the universal urge to promote prosperity in agricultural pursuits." The court in *Manchester Dairy System v. Hayward*, 82 N. H. 193, 132 Atl. 12 (1926) held a co-operative marketing contract in accord with public policy. "Co-operative marketing agreements, containing the essential features of the contract here considered, have been recognized in many of our states as a legitimate means of protecting its members against oppression, of avoiding the waste incident to the dumping of produce upon the market with the consequent wide fluctuations in prices and of securing to the producer a larger share of the price paid by the consumer for his products." In accord are *Tobacco Growers' Co-op. Assn. v. Jones*, 185 N. C. 265, 117 S. E. 174 (1923); *Northern Wisconsin Co-op. Tobacco Pool v. Bekkedal*, 182 Wis. 571, 197 N. W. 936 (1924); *Dark Tobacco Growers' Co-op. Assn. v. Dunn*, 150 Tenn. 614, 266 S. W. 308 (1924); *Tobacco Growers' Co-operative Assn. v. Danville Warehouse Co., Inc.*, 144 Va. 456, 132 S. E. 482 (1926); *Burley Tobacco Society v. Gillaspay*, 51 Ind. App. 583, 100 N. E. 89 (1912); *Bullville Milk Producers' Assn., Inc. v. Armstrong*, 178 N. Y. S. 612 (1919); *Anaheim Citrus Fruit Assn. v. Yoeman*, 51 Cal. App. 759, 197 P. 959 (1921); *Washington Cranberry Growers' Assn. v. Moore*, 117 Wash. 430, 201 P. 773, 204 P. 811 (1922). *Contra*, *Minnesota Wheat Growers' Co-op. Marketing Assn. v. Rahke*, 163 Minn. 403, 204 N. W. 314 (1925), where the court held that a statute prohibiting third parties from buying or handling products merely because they were under contract to be sold to a co-operative marketing association is an infringement of the liberty of contract guaranteed by the state and federal constitutions. This court held the statute to be unconstitutional. This view apparently stands alone in American judicial decisions.

¹¹ *Commonwealth v. Hodges et al.*, 137 Ky. 233, 125 S. W. 689 (1910). Other decisions which recognize the principal case as valid authority are: *Burley Tobacco Society v. Gillaspay*, 51 Ind. App. 583, 100 N. E. 89 (1912); *Louisville & N. R. Co. v. Burley Tobacco Society et al.*, 147 Ky. 22, 143 S. W. 1040 (1912); *Liberty Warehouse Company v. Burley Tobacco Growers' Co-operative Marketing Association*, 276 U. S. 71, 72 L. Ed. 473, 48 S. Ct. 291 (1928); *Potter v. Dark Tobacco Growers' Co-op. Assn.*, 201 Ky. 441, 257 S. W. 33 (1923); *Lee et al. v. Clearwater Growers Assn. et al.*, 93 Fla. 214, 111 So. 722 (1927); *Tobacco Growers' Co-op. Assn. v. Jones*, 185 N. C. 265, 117 S. E. 174 (1923) and *Elephant Butte Alfalfa Assn. v. Rouault*, 33 N. M. 136, 262 P. 185 (1928).

Co-operative marketing statutes have been enacted in virtually every state of the Union, and an examination of the cases shows that universal judicial acceptance has greeted legislative efforts to aid the plight of the farmer by these co-operative marketing agreements.¹² Likewise virtually universal judicial acceptance has greeted those penalty statutes which safeguard the existence of co-operative marketing contracts. The strongest of these penalty statutes are those which make it a misdemeanor for a third person to induce a breach of such a contract. These are forcefully indicative of the genuine wholehearted assistance government is bringing to agricultural groups in this country.

A most controversial economic question of the present day — how much personal freedom must be forfeited to the government to establish an economic system which affords security to all — finds one answer in the principles of co-operative organizations.

In a democratic system of government where the majority of the citizens exercise control of the policies of the government, it is inevitable that this majority be constantly pressing for governmental reforms aimed at the minority which possesses the means of production. Thus we see economists offering solutions to the problem of economic security for the political majority.

Since the collectivist state, placing the means of production in the hands of the government, is comparatively easy to attain, this method of attaining majority economic security seems to receive the most active and effective support.

However it has been said that a form of economy based on the principle of the co-operative organization also would bring economic security to the majority of the citizens. This system is known as the distributive state wherein the mass of citizens own the means of production. Such a system, however, is not so easily attained. It places on each citizen the burden of control and decision in relation to his private property — his share in the means of production. Property, of course, is private and for this reason alone many advocates have been found to support the distributive modification of capitalistic government. For this reason, also, an expanding future has been predicted for the co-operative marketing association.

Thomas Broden.

¹² *Liberty Warehouse Company v. Burley Tobacco Growers' Co-operative Marketing Association*, 276 U. S. 71, 72 L. Ed. 473, 48 S. Ct. 291 (1928).

CONSTITUTIONAL LAW — EVOLUTION OF CONGRESSIONAL TAXING POWERS INCIDENT TO CHILD LABOR REFORMS.—A system of economic and social regulation by various governmental agencies has become as commonplace in our daily lives as putting on our shoes in the morning. We are becoming accustomed to the striking reform measures instituted under economic stress in the early thirties of the Roosevelt Era, and carried through the forties to expedite the war program. Many of these reforms, regulatory in nature, are based on the powers of Congress under the Constitution to tax, to regulate commerce, and to establish and operate the post offices and post roads. Each of these presents a vast source of material for review, but the discussion here will be restricted to a brief consideration of the regulatory taxing power and will deal more specifically with the Child Labor Tax Case, its history, applications to later legislation, and prospective results in the present period of social reform.

From earliest colonial times, to the present day, our individualism has rebelled against strict regulation, and this attitude is closely related to our concept of a free pursuit of happiness. It was firmly imprinted in the minds of our patriot forefathers by the heavy hand of the Royal Tax Collector, who taxed the trade of the colonies to suit the needs of Parliament and the British merchant class. It is, therefore, significant that the first Congressional power mentioned in our Federal Constitution refers to taxation and its limitations.¹

An early outgrowth of the bitter struggle between a strong centralized government and state superiority was climaxed in the now legendary decision of *McCulloch v. Maryland*,² which, in a sense, was a bit of historical irony in that it was a state's attempt to impose a regulatory and prohibitive tax on a federally instituted National Bank. Chief Justice Marshall made a bold stand against state superiority in writing for a unanimous Court that "the power to tax involves the power to destroy," and that "the power to destroy may defeat and render useless the power to create." Following this line of reasoning the Maryland law was declared unconstitutional without testing the question as to whether it was really a revenue measure or not.

In 1869 the Supreme Court decided the case of *Veazie Bank v. Fenno*,³ in which it passed upon the power of Congress to levy an excessive tax on state bank notes. By an act Congress raised a tax on the circulating notes of persons and state banks from one per cent to

¹ U. S. CONST. Art I, § 8: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

² 4 Wheat. 316, 4 L. Ed. 579 (1819); *accord*, U. S. v. Fisher, 2 Cranch 358, 2 L. Ed. 304 (1804); *Osborn v. Bank of the United States*, 9 Wheat. 738, 6 L. Ed. 204 (1824).

³ 8 Wall. 533, 19 L. Ed. 482 (1869).

a prohibitive ten per cent, thus giving the national currency virtual ironclad protection. Chief Justice Chase, former Secretary of the Treasury during Lincoln's first administration, had advocated at that time a plan for a uniform currency of national bank notes. Chase, in speaking for the majority of the Court, said:

"Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation . . . Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile."

The Court warned that the judicial branch could not prescribe limitations upon acknowledged powers of the legislative department, even though such taxes might be oppressive upon a class of persons. The relief sought should come through the medium of the ballot on election day.

At the beginning of the twentieth century the dairy interests felt the need of protection from a highly competitive oleomargarine industry. By an act of Congress, which the dairymen instituted, a prohibitory tax of ten cents a pound was placed on all colored oleomargarine. The statute was designed ostensibly to raise revenue, but by restricting competition it defeated this purpose by eliminating any and all revenue. The act could not be justified as a health measure, as later acts were, because oleomargarine is not an unhealthful product. Once again in a case paralleling the *Veazie Bank* case the Supreme Court upheld the taxing measure, as an exercise by Congress of its constitutional power which, although oppressive to one group, could not be limited by judicial review.⁴

The Supreme Court wisely upheld taxing measures regulating the sale of narcotics over which the individual states were unable to exercise proper control. By a five to four decision, the Harrison Narcotic Drug Act was sustained⁵ even though it was known that its aim was regulative and lacked the purpose of revenue through taxation. Justice Day, speaking for the majority, clearly stated that the Court would not inquire into the motives that might impel the use of the taxing power. The fact that similar regulatory legislation might be passed under the police power in the various states did not invalidate the taxing power of Congress in this situation.

If closely examined, many tax measures have underlying motives other than raising revenue, and exercise some regulating or equalizing function relating to social welfare. Our graduated income and inheritance taxes, while just, in many respects are an outgrowth of the

⁴ *McCray v. United States*, 195 U. S. 27, 49 L. Ed. 78 (1904).

⁵ *United States v. Doremus*, 249 U. S. 86, 63 L. Ed. 493 (1919).

desire of our people to bring about a greater measure of equality of wealth. The upholding of excise taxes placed on some commodities, and not on others, show that a consideration of social values has been taken into account by the courts. But the Supreme Court was presently to state, in the grain-futures and child labor cases, that a worthy social objective would not of itself validate an act.

The *Child Labor Tax Case*⁶ had an interesting history and sheds light on the social reform movement which paralleled the years of World War I. Cheap labor meant, as it always does, a lower standard of living, and the reformers of the late nineteenth century found receptive minds eager to carry out their ideas. Women were beginning to demand an equal position in life, not only for themselves but for their children. Educational standards were developing more and more each year. The sweat shop conditions in the factories across the country were exposed, and this turned the people's attention toward more adequate child labor legislation that might eventually allow all children educational and recreational benefits. Competing industrialists were confronted by changes in economic as well as social standards. Many of the northern states, in spite of opposition by employers, had adopted varying forms of legislation limiting child labor, while the southern industrial operators, unaffected by such restrictions, were producing goods equal in quality at lower wage scales. The northern employers had visions of declining markets for their goods under this unbalanced competition from the South. To remedy this situation, they urged their Congressmen to find some means by which this labor competition could be equalized. In other words, to indirectly impose uniform child labor legislation on all employers. The southerners countered this attack with the "states rights" theory as protection for their industries.

Congress decided that it might use its commerce power to impose uniform restrictions on the states, but shortly after the act by which it attempted to do this became effective, a case testing its constitutionality was brought to the Supreme Court.⁷ By a five to four decision the act was declared unconstitutional.⁸ The Court reasoned that the subjects of previous regulatory legislation, passed under the commerce power — lottery tickets, "white slavery," narcotics, and impure food, all considered immoral or harmful — differed in nature from goods manufactured by children.

While the Court was being criticized from all quarters for its decision, Congress was busy searching for another power upon which child labor regulation might be constitutionally upheld. Congress also hoped that the public indignation might stir the thinking of the judges,

⁶ *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 66 L. Ed. 817 (1922).

⁷ *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. Ed. 1101 (1918).

⁸ See Mr. Justice Holmes, dissenting in *Hammer v. Dagenhart*, 247 U. S. 251, 277, 62 L. Ed. 1101, 1108 (1918).

so that at least one would change his opinion if another similar test case should come before the court. It was decided that by the use of a prohibitive tax, as a revenue measure, sufficient validity would be given new legislation.⁹ Briefly, the tax decided upon imposed an excise of ten per cent of the entire net profits earned during the year by factories or other establishments for knowingly employing any child under sixteen in a mine or quarry, or under fourteen in a mill, workshop, cannery or factory, or allowing children between the ages of fourteen and sixteen to work longer than eight hours a day during a six day week, or allowing them to work after seven o'clock in the evening or before six o'clock in the morning. In 1922 this revenue act came before the Court to be tested.¹⁰ Chief Justice Taft wrote the opinion in this case, and clearly pointed out that it was not within the authority of Congress to pass by its tax powers an act that, for similar reasons had been rejected under the commerce power. The tax subterfuge was so excessive that it was clearly a penalty, and the amount was not proportioned to the number of violations. Knowledge of an unlawful violation is associated with a penalty, but a tax should not discriminate as this one did. Since the states have the power under the Tenth Amendment to regulate their own child labor as they desire, the act was declared unconstitutional. Chief Justice Taft sounded this warning which might be remembered in judging all regulatory legislation:

"Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which is reserved to them by the Tenth Amendment, would be to enact a detailed measure to complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."¹¹

The only course that now seemed open to Congress was the passage of a Child Labor Amendment. On June 2, 1924 this Amendment was proposed to the legislatures of the several states for their ratification or rejection. Public opinion which had formerly been in accord with Congress, voiced its dissatisfaction almost immediately, when it was found to what extent this innocent appearing Amendment could be interpreted. It reads as follows:

⁹ Revenue Act of 1918 §1200-1208; 40 STAT. 1138, Chap. 18 Comp. Stat. § 6336½a (1919).

¹⁰ *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 66 L. Ed. 817 (1922).

¹¹ *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 38, 66 L. Ed. 817, 820 (1922).

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

Section 2. The power of the several states is unimpaired by this article except that the operation of state laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

Not one of the individual states had gone as far as Congress now desired to go in controlling the labor of persons under eighteen years of age. Many men saw the eventual dissolution of the sovereign state's rights in this proposal, and were determined not to allow such a menace to infiltrate into the Constitution under the guise of social betterment for our children. In his Farewell Address, Washington warned us that we should "resist the spirit of innovation upon its principles, however specious the pretexts" and that alterations might "impair the energy of the system and thus undermine what cannot be directly overthrown."¹²

Upon examination, it is seen that the Amendment does not only refer to regulating child labor, but abolishes it entirely, a far greater step than was attempted by previous acts under Congressional commerce and taxing powers. The framers were advised against using the term "child" which usually means a person under fourteen years of age, so "persons" was substituted to accompany the eighteen-year age limit. The term "labor" was substituted for the phrase "employed or permitted to work" which had been used in previous child labor statutes. By the use of such a term many types of work, outside employment for wages, could be included. The labor of the farmers' children would become unlawful and a mother would be breaking the law by telling her daughter to help wash the dishes or make the beds. It was pointed out that many families were dependent on the earning power of children whose maturity and strength at sixteen and seventeen was equal to their parents. Many, at these ages, became dissatisfied with the requirements of schools, and were eager to start earning and learning their future occupation or trade. It was also shown that by acts pursuant to Section 2 of the proposed Amendment, an unlimited army of federal investigators would result and be responsible only to the Secretary of Labor. Congress could thus directly or indirectly affect the lives of nearly two-fifths of our population.¹³

With these objections to retard its ratification the Child Labor Amendment seemed destined to remain before the state legislatures as a dead issue doomed to ultimate failure. During the decade that fol-

¹² See *McCulloch v. Maryland*, 4 Wheat. 316, 403, 4 L. Ed. 579, 601 (1819); *Hammer v. Dagenhart*, 247 U. S. 251, 275, 62 L. Ed. 1101, 1107 (1918); *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 37, 66 L. Ed. 817, 819 (1922).

¹³ Warren, *The Proposed Child Labor Amendment; Its Implications and Consequences*. 11 Va. L. Rev. 1 (1924).

lowed, the states passed child labor measures of their own, suitable to their individual needs. Mining state laws might be more restrictive than neighboring agricultural state laws, and in between lay the mill, factory, and canning states, but each law was more effective than a general prohibitive federal amendment.

In 1933, a new administration came into power to try to revive a depression-sick nation. As the "New Deal" progressed, a change of sentiment resurrected the almost forgotten Child Labor Amendment. When employment was at a low point, everyone advocated any measure to spread the work among men who had families to support. The curtailment of child labor was one of these. The National Industrial Recovery Act, an emergency measure, banned employment of children under sixteen years of age. Many of the states which had rejected the Child Labor Amendment in previous years, changed their ideas as to the so-called "evil and socialistic features," and looked to it as a means of returning the country to the prosperous "twenties." The American Bar Association opposed this sudden shift in popularity, advocating instead a uniform child labor act which had been drafted by the National Conference of Commissioners on Uniform State Laws.¹⁴ Although the original Amendment had no time limit within which it had to be ratified, many felt that it should be regarded as impotent and without effect, because of its slow progress toward ratification. Seven years had been the usual limit regarded by Congress as reasonable, and Justice Van Devanter speaking for a unanimous Court in 1921, voiced a similar contention.¹⁵ By 1936, twenty-five of the necessary thirty-six states had ratified the proposal, an increase of nineteen since its revival. Inspired by another sweeping victory in the November, 1936, election, President Roosevelt wrote a letter to the Governors of the nineteen states that had not ratified the Amendment, pointing out the increase of child labor in sub-standard work, and asked that they make ratification one of the important measures at the next meeting of their legislatures. Only three states added their strength to the others, and opposition to the Amendment seemed to have stemmed the tide of its popularity. The legality of many of the individual state ratifications was challenged before the Supreme Court because previously the Amendment had been rejected by them. The Court refused to decide the question stating that it was entirely political in nature.¹⁶

To appease the dissatisfied opposition, another Amendment was favorably reported to the Senate,¹⁷ eliminating many of the unpopular

¹⁴ Special Committee of the American Bar Association, *The Federal Child Labor Amendment*, 21 A. B. A. J. 11 (1935).

¹⁵ *Dillon v. Gloss*, 256 U. S. 368, 374, 65 L. Ed. 994, 996 (1921).

¹⁶ *Coleman v. Miller*, 307 U. S. 433, 83 L. Ed. 1385 (1939).

¹⁷ Senate Report No. 788, 75th Cong., 1st sess.

defects of the 1924 Amendment; it never, however, replaced the 1924 Amendment in the state legislatures. Finally, it was decided by the administration, that the latter Amendment should be allowed to die a natural death, and the problem would be solved through other channels. An all-inclusive Fair Labor Standards Act¹⁸ was proposed by the President and passed by Congress in 1938 under the commerce power. It cured many of the ills that had plagued the working man in general, and prohibited interstate commerce by those industries which indulged in oppressive child labor practices.

President Roosevelt's many opportunities to nominate justices to the Supreme Court during his administration made it likely that the Court would sustain legislation that was passed by the pro-Roosevelt Congresses. The occasion arose in 1941, when the Court was called upon to test the constitutionality of the interstate commerce provisions of the Fair Labor Standards Act.¹⁹ Justice Stone in delivering the opinion of the Court stated:

"The conclusion is inescapable that *Hammer v. Dagenhart* was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled."

Thus the Court dismissed by decision a controversy that had lasted for twenty-two years. The long debated need for a Child Labor Amendment had been circumvented without the fears of its opponents being realized. What might have been the consequences, had either the original *Child Labor* Cases, or the proposed Amendment been sustained by the Court at earlier hearings, is conjecture now, but the long effort served the purpose of educating the people and bringing about the enactment of acceptable legislation in this field of child welfare.

As has been shown by these varying attempts to enact child labor legislation, historical progress, from early concepts of "states rights" to federal exercise of governmental functions, has been the trend, as ideas and popular needs change with the growth and development of our nation.

Richard H. Keen.

¹⁸ 52 STAT., 1060, 29 U. S. C. A., §§ 201-219 (Supp. 1938).

¹⁹ *United States v. Darby*, 312 U. S. 100, 85 L. Ed. 395 (1941).

IMPLIED ASSIGNMENTS OF PATENTS RESULTING FROM EMPLOYER-EMPLOYEE RELATIONSHIP.—As a prerequisite to employment, many corporations require that in the case of employees whose work is of such a nature that patentable inventions are likely to be conceived or developed by the employee during his period of employment, such employees shall sign an agreement assigning all the patent rights of the invention to the employer. However, where this practice is not followed a conflict often arises as to the respective rights of the employer and employee to the invention. As was stated by a Wisconsin court, "The mere fact that in making an invention, an employee uses the materials of his employer, and is aided by the services and suggestions of his co-employees and his employer in perfecting and bringing the same into successful use is insufficient to preclude him from all rights thereto as an inventor."¹

In making clear the distinction between the circumstances necessary to give the employer the right to compel an assignment and those requisite to entitle him to shop rights only, a court held:

"Where there is no employment to invent and no agreement to assign, the employer's interests are fully protected by the privileges and benefits of shop rights. There are two items of property involved, that of the employer who owns the product in its improved form, and that of the inventor, to whom the novel idea belongs. These property rights remain distinct from each other unless and until the inventor has agreed to assign his idea to his employer. If the idea has become embodied in the product of the employer, and in a sense mingled with it because the materials of the employer and the services of his workman have been used in reducing it to practical form, the employer has a right to manufacture the improved product without paying royalties to the inventor."²

The earlier cases in this country laid down the rule that the employer was not entitled to an assignment of patent rights in the absence of an express agreement to assign.³ In 1882 the Supreme Court ruled: "But a manufacturing corporation, which has employed a skilled workman, for a stated compensation to take charge of its works, and to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents obtained for inventions made by him while so employed, *in the absence of express agreement to that effect.*"⁴ (Italics ours)

¹ Fuller and Johnson Mfg. Co. v. Bartlett, 68 Wis. 73, 31 N. W. 747 (1887).

² Barlow and Seelig Mfg. Co. v. Patch, 232 Wis. 220, 286 N. W. 577 (1940).

³ Hapgood v. Hewitt, 119 U. S. 226, 7 S. Ct. 193, 30 L. Ed. 369 (1886); McWilliams Mfg. Co. v. Blundell, 11 F. 419 (1882); Pressed Steel Car Co. v. Hansen, 137 F. 403, 17 C. C. A. 207 (1905); American Stoker v. Underfeed Stoker, 182 F. 642, 110 C. C. A. 292 (1910); Johnson Furnace Co. v. Western Furnace Co., 178 F. 819, 102 C. C. A. 267 (1910).

⁴ Dalzell v. Dubilier Mfg. Co., 149 U. S. 315, 13 S. Ct. 886, 37 L. Ed. 749 (1893).

However, today the trend of the decisions appears to be in favor of the employer rather than the employee in that specific agreements to assign are no longer necessary in all cases in order to give the employer the entire interest on any invention developed by the employee during his term of employment. In 1924 in the frequently quoted case of *Standard Parts v. Peck*⁵ the Supreme Court abandoned the requirement that an express contract or agreement was essential and held that an agreement to assign might be implied from the terms of the employment or from other circumstances. In this case the defendant Peck had been employed to "devote his time to the development of a process and machinery" and received a stated compensation. He was ordered by the court to assign all his rights to the plaintiff, his employer.

The types of employment under which the invention may have arisen may be divided into two general classes:

1. General employment in which the employee made the invention outside the usual scope of his duties, but on his employer's time and with the aid of his employer's equipment and materials.
2. Employment in which the inventor has been hired for the specific purpose of working on the problem out of which the invention arose or was later assigned to the problem by his employer.

The general rule is that inventions arising under Class I type of employment belong to the inventor, with the employer merely retaining shop rights to the invention. The rule still stands which was laid down by the Supreme Court in 1890 in which the court held: "An employee performing all the duties assigned to him in his department of service, may exercise his inventive faculties in any direction he chooses with the assurance that whatever invention he may thus conceive and perfect is his individual property."⁶ In a case which is a typical example of this type of employment, the facts as stated by the court were as follows:

"Carey, the inventor, was a draughtsman employed by the Ingle Machine Company at a salary of \$35 a week. His work consisted in making drawings for machines built by that company. He was not employed to design any particular machine, or to use his inventive faculties in any way. He was under no contract to assign to his employer any inventions he might make. During his term of employment he did, in fact, make the invention subsequently embodied in the patent in suit."⁷

⁵ *Standard Parts v. Peck*, 264 U. S. 52, 44 S. Ct. 239, 68 L. Ed. 560 (1924).

⁶ *Solomons v. United States*, 137 U. S. 342, 11 S. Ct. 88, 34 L. Ed. 667 (1890).

⁷ *Ingle v. Landis Tool Co.*, 272 F. 464, cert. den. 257 U. S. 644, 42 S. Ct. 54, 66 L. Ed. 413 (1921).

In cases such as this where the initial employment is for routine work the burden is on the employer to show that the employment was later changed to inventive work.⁸

When the invention has been conceived by the employee who has been employed under circumstances similar to those described in Class 2 type of employment, then it is usually held that there has been an implied assignment of the patent rights to the employer. The *Peck* case cited above is an example of this class of employment. In cases of this nature the problem often arises as to whether the invention was within or outside the scope of the duties of the employee. This problem was discussed in a federal court in which the judge pointed out:

"The all important question is Dowse's relation to the tire manufacturing business. If he was only a hired man, taking orders as to his work from another officer or employee, the invention belonged to him, leaving only an implied license or shop right of the corporation, and this right was only personal to it, incapable of being assigned.

"It then becomes necessary to examine Dowse's relation to the corporation. He did not expressly contract as a part of his duties to design new tires; but if he did so agree in substance, and was more than a mere employee, having the main responsibility to make the business successful, then he should be compelled to assign the patent."⁹

It has been held to be immaterial whether the employee has been hired to devote part of his time to the problem out of which the invention arose, or whether he is putting all his time on the problem. In either case the employer has a right to the entire title to the improvements or patents resulting.¹⁰ Nor is it material whether the inventor was originally hired to work on the project out of which the invention arose or was assigned to it later. In this respect a court held: "We can see no distinction between a case where one is originally employed for the limited purpose of solving a specific mechanical problem and another case where he is employed generally to concern himself with such problems and during the course of the employment and within the scope thereof, is assigned to a specific one."¹¹ Another court supported this view in stating: "It matters not in what capacity the employee may originally have been hired, if he be set to experimenting with the view of making an invention, and accepts pay for such work, it is his duty to disclose to his employer what he discovers

⁸ Barlow and Seelig Mfg. Co. v. Patch, 232 Wis. 220, 286 N. W. 577 (1940).

⁹ Dowse v. Federal Rubber Co., 254 F. 308 (1910).

¹⁰ Magnetic Mfg. Co. v. Dings Magnetic Separator Co., 16 F. (2d) 739, cert. den. 274 U. S. 740, 47 S. Ct. 586, 71 L. Ed. 1320 (1927).

¹¹ Goodyear Tire and Rubber Co. v. Miller, 22 F. (2d) 353 (1927).