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THE LAW OF LABOR AND TRADE.*

"The right to labor is a necessary consequence of the right to live" and "the freedom of contract is inviolable."

I construe the law, gentlemen, requiring your President to address you "with particular reference to any statutory changes in the state of public interest and any needed changes suggested by judicial decisions during the year" as meaning in its broadest interpretation that it is your wish to have submitted for your consideration, the most important and farthest reaching changes, or proposed changes in jurisprudence not necessarily local in their origin or progress, if so it be that we need the benefits of, or should be protected against the dangers in legislation of other states, springing from a great tendency or movement affecting or likely to affect us.

Without, therefore, attempting by preliminary remarks to persuade you of the aptness of a discussion of the law of labor and trade at this particular time, it is my purpose to touch upon the history of legislation relating to these subjects, but more especially to bring to your attention some specimens of recent enactments affecting them, that they may be examined

* Address by P. C. Knox, Esq., President, to the members of the Pennsylvania Bar Association.

in the light of the underlying principles of our government, and the economic laws they are designed to control.

Now that the defense of life and individual freedom is no longer the chief care of civilized men, it may be said that among the main purposes of all existing social compacts are the production, preservation and distribution of wealth. This is true whether the organization be a commune or the more common form of social agreement where the individual is permitted to work out his own ends according to his own capacity and fancy.

The right to labor for the production of property is unquestioned. It has been well said to be "a necessary consequence of the right to live." This right is the same whether the purpose be to produce or acquire only sufficient for maintenance or to accumulate a surplus beyond the individual's needs.

The right to the property thus acquired is protected in all governments to the acquisitor and to those to whom he may convey or transmit it by sale, gift or devise. This right was the first concession by tyranny to progressing humanity and was only yielded after a struggle of centuries. The right to acquire property and to possess it are, therefore, the same in their nature, and are both included by economists under the general term "Right of property." It is thus expressed by Say in his work on Political Economy, Sec. 133: "The right of property is equally invaded by obstructing the free employment of the means of production as by violently depriving the proprietor of the product."

A means of acquiring property or wealth besides labor is by exchange or sale. These rights are equally fundamental, and are included in the right of property as above defined. Such transactions in property are effected through contracts between individuals, and contracts, which are the expression of the terms upon which individuals deal with property or the means of producing it, have, in all forms of government, been the subjects of the greatest consideration. "The liberty of contract is one of the inalienable rights of the citizen."

These regulative social and economic principles find ex-

pression in one form or another, or are recognized in all constitutional governments. They are all included in the Declaration of Rights in the words, "All men are born equal, free and independent and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

The rights to acquire, possess and protect property are inherent and indefeasible. As there is no difference between the nature of the right to acquire and the right to possess property, so there is no degree of preference expressed for the one right above the other in this great declaration of their nature and legal status. Neither is there any distinction or preference shown as between the means of acquisition, whether by physical, mental or commercial activities.

We approach, therefore, the legislation affecting the rights to acquire, possess and protect property, with the certainty that by the fundamental law they are inherent and indefeasible in all men. "This equality of right," said Mr. Justice Field, "with exemption of all disparaging and partial enactments, in the lawful pursuits of life throughout the whole country, is the distinguishing privilege of the citizens of the United States." The Constitution of the United States provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and further that "no person shall be deprived of life, liberty or property without due process of law."

Legislation affecting the right to acquire property began early in the English speaking world. It was at some periods aimed at and undertook to regulate its acquisition by labor, through statutes affecting labor; at other times at its acquisition through trade, by statutes regulating trade and commerce. At times these laws bore harshly and unjustly upon the one, again upon the other.

The world has seen four great epochs in labor.

First, the struggle for individual emancipation from serfdom and slavery.

Next, the period of the guilds or monopolies of labor, whose unique and far reaching oppressions made the demand of the masses of Europe for free labor a potent factor in the readjustment of governmental and social conditions during the past two centuries. Labor is entitled to the credit of its own original emancipation, and to the odium of its self-imposed tyranny existing in the two periods suggested.

Again, we have the period of statutory oppression, followed by the existing era of legislative favor.

From slavery labor became a tyrant; thence it sank into oppression, again to rise to its present status.

The first Act of Parliament known as the Statute of Laborers is the Statute of 23 Edward III. By its terms every man and woman under threescore having no occupation was required to serve in a suitable station for the wages and upon the terms usual in the preceding five or six years. Severe penalties were provided for non-compliance. Later, prices were fixed by Parliament for a day's work for agricultural labor and certain artifices. The penalty for abstention from service under this Act was to be branded with a hot iron upon the forehead with a letter "F" to denote falsity.

This statutory enslavement of the skilled and unskilled labor of England in the fourteenth century was followed down to the present century by penal acts preventing agreements for advancing wages or lessening the usual hours of work. It was also highly penal to endeavor by any means to try to prevent any unemployed person from taking service, or to try to induce any person to leave his work or to refuse to work with any other workmen or to assist men upon a strike or to collect money or attend meetings having any such purpose in view.

Thus, with slight modifications, the law stood until 1824 and 1825, when the Statutes of England were purged of these harsh and unjust provisions and the course of judicial decision upon the law of conspiracy was changed by enactments that in effect legalized all that had theretofore been prohibited except when accomplished by violence, threats or intimidation, molestation or obstruction.

The different States of this Union have met and in many

instances further extended the liberty and privileges of associated labor. In Pennsylvania, trades unions may be chartered to do substantially all that was inhibited by the English Statutes and by common law as it was expounded in this Commonwealth, and Congress has provided for the incorporation of trades unions for many purposes criminal at common law.

In Pennsylvania, the Act of June 14, 1872, provides that it shall be lawful for any laborer or laborers, acting either as individuals or as the member of any association, to refuse to work for any person whenever in his, her or their opinion the wages paid are insufficient or the treatment of such laborer or laborers is brutal or offensive, or the continued labor by such laborer or laborers would be contrary to the rules of any organization to which he or they might belong, without subjecting any person or persons so refusing to work to prosecution for conspiracy. To this act there is a provision reserving liability to prosecution to those who shall in any way hinder persons who desire to labor or who shall hinder other persons from being employed as laborers. The Legislature, however, in 1876, construed this proviso by enacting that the use of force, threat or menace of harm to persons or property shall alone be regarded as in any way hindering persons who desire to labor, or other persons being employed as laborers.

So that as the law now stands in this great industrial State, and it is by no means an extreme illustration of American legislative attitude towards labor, a man may work when he pleases, for whom he pleases and for what he pleases. He may lawfully refuse for any reason to continue his labor, whether the reason be one based upon his own grievance or be predicated upon some rule of an association. He may do anything he chooses by himself or in conjunction with his associates to advance the price of labor, to restrict its hours, to prevent others from working for his employer or to prevent others from being employed, provided he does not use force, threat or menace of harm to persons or property, without being subject to prosecution or indictment for conspiracy under the criminal laws.

Thus we see the right to acquire property by labor is free,

absolutely free. Indeed, more than free, as in addition to the freedom of the individual the law provides for the association of numbers and legalizes their co-operation for purposes formerly illegal. Nay more, in Pennsylvania, in respect to corporations, which are the great employers of labor, by the Act of June 4, 1897, it is made a misdemeanor punishable by fine and imprisonment to coerce by discharging a workman from service because of his connection with any lawful labor organization, or to exact from any applicant for employment any promise not to form, join or belong to such lawful labor organization, or to attempt by any means whatsoever to interfere with the laborer's free and untrammeled connection therewith.

The right to trade means the right to contract. The simplest as well as the most complicated engagements between men are contractual. The liberty which enables a man to dispose of his own services upon his own terms is but the liberty of contract. The right to dispose of one's own surplus to acquire the surplus of another, or to supply the necessities or requirements of others, is but the right of contract. Any restriction placed upon this right is a restriction upon the liberty of contract, which is an inalienable right, being included in the right to acquire and possess property.

The right to trade has been at times more or less trammeled for the good or supposed good of the public. As in the case of labor, it was in England subject to many Parliamentary regulations and restrictions.

The attempt to regulate the trade and commerce of England by artificial rules contained in Acts of Parliament led to many curious and ridiculous consequences before it was abandoned. The spirit of commerce could not thus be confined. The desperate attempts of Parliament to keep the business of the kingdom within the lines and subject to the regulations imposed by that authority led from one encroachment to another upon the freedom of the people and culminated in the sumptuary regulations enacted in the reign of Edward III, which prescribed even the dress and diet of his subjects.

As in the case of labor, so in respect to the price of com-

modities, it was fixed in utter defiance of the law of supply and demand or the cost of production. Contracts for the sale or exchange of goods were forbidden, except at the staples or market places fixed by law, and there only under imposed conditions. The system of special privileges soon came into existence. The more powerful merchants and manufacturers were enabled to purchase or otherwise secure exemption from the general rules, and in the end exclusive rights were granted. Thus monopolies came into existence. The sale of grants of monopoly was a speedy and certain method of raising revenue for the crown. Traffic therein soon overleaped the limits of the necessity for revenue, and was maintained to feed the avarice of the soverign and his court. The most odious form of commercial or industrial enterprise is a monopoly. A monopoly is defined by Lord Coke to be "an institution or allowance by the King by his grant, commission, or otherwise, to person or persons, bodies political or corporate, of or for the sole buying, selling, making, working or using of anything whereby any person or persons, bodies politic or corporate are sought to be restrained of any freedom of liberty they had before, or hindered in their lawful trade:" 7 Bacon's Abridgment, 22.

And by the Supreme Court of the United States as, "the withdrawing of that which is a common right from the community and vesting it in one or more individuals, to the exclusion of all others:" *Charles River Bridge Case*, 11 Peters, 567.

Monopolies can only exist by grant from the sovereign. They cannot be created by contract between individuals. During the period that the labor guilds and corporations so effectually destroyed the freedom of labor, monopolies flourished to the destruction of all competing trade. The validity of monopolistic grants during and prior to the reign of Elizabeth was successfully contested in *Darcy* v. *Allen*, in 1601, and in 1624, Parliament declared them null and void.

Sir John Culpepper said of the monopolies of England, "Like the frogs of Egypt they have gotten possession of our dwellings, and we have scarce a room free from them.

They sup in our cup; they dip in our dish; they sit by our fires. We find them in the dye fat, wash bowl and powdering tub. They share with the butler in his box. They will not bait us a pin. We may not buy our clothes without their brokerage. These are the leeches that have sucked the commonwealth so hard that it is almost hectical."

Detestation of a monopoly is ingrained in the Anglo-Saxon. "They have always been harlots in the courts, going in at one door to be cast out at another." They are contrary to the spirit of free governments, and have been held to infringe the rights of the people under the Constitutions of many States. To this sentiment must be attributed the hostility now so pronounced against many of the great commercial and industrial enterprises of the country which possess or are alleged to possess the features of a monopoly, that has found expression in the legislation of Congress and of many of the States. The general features of this legislation are substantially the same. In the main they are acts having in view two purposes:

1. To make void as against public policy, contracts establishing monopolies or which may tend to establish them.

2. To make void all contracts which do or may restrain trade or prevent competition.

Fines and imprisonments are provided for those offending by being parties to such contracts, and in portions of the land of the setting sun other features are embodied expressive of a hostility to thrift that takes a form not worthy of serious consideration. As for illustration, the proposed anti-department-store laws designed to prevent merchants from offering for sale more than a limited number of kinds of articles, to the utter extinction of the useful and convenient shopkeepers who have succeeded their pilgrim prototype who supplied his customers, according to his alliterative sign-board, with

"TESTAMENTS, TAR AND TREACLE,
GODLY BOOKS AND GIMLETS."

The New York statute may be taken as a type. It contains all of the features of the Act of Congress recently construed by the Supreme Court of the United States, with such

additions as bring it fully up to the most radical and advanced thought upon the subject evidenced in the acts passed or introduced in nearly all the States, including our own. Its title and first two sections are as follows:

"AN ACT

"*To prevent monopolies in articles or commodities of common use, and to prohibit restraints of trade and commerce, providing penalties for violations of the provisions of this act, and procedure to enable the attorney-general to secure testimony in relation thereto.*

"The People of the State of New York, represented in Senate and Assembly, do enact as follows:—

"Section 1. Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production, or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby trade or commerce in this state in any such article or commodity is or may be restricted, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit of any lawful business, trade or occupation is, or may be, restricted or prevented, is hereby declared to be against public policy, illegal and void.

"Sec. 2. Every person or corporation, or any officer or agent thereof, who shall make or attempt to make or enter into any such contract, agreement, arrangement or combination, or who within this state shall do any act pursuant thereto, or in, towards or for the consummation thereof, wherever the same may have been made, is guilty of a misdemeanor, and on conviction thereof shall, if a natural person be punished by a fine not exceeding five thousand dollars, or by imprisonment for not longer than one year, or by both such fine and imprisonment; and if a corporation, by a fine not exceeding five thousand dollars."

Contracts creating monopolies and all contracts in restraint of trade are the targets. Between these there are many points of resemblance and some of striking and radical difference. While a valid monopoly always restrains trade, in fact, annihilates competition, a contract between individuals can never create a monoply.

Legislation against monopolies, except in so far as it may be to repeal existing grants, amounts to nothing, as there can be no pretense of exclusive right to pursue any trade or calling without legislative grant. The sovereign power need not forbid, it need only refrain from creating to prevent any claim of monopoly arising. Two or more persons, whether natural or artificial, combining their labor, skill or capital in the prosecution of any work or trade, cannot create a monopoly no matter what the terms of their combination may be. It is only in their power to place limitations upon their own acts. They can neither contract nor expand the rights of others in respect to a similar business. Statutes, in so far as they make it a penal offence to make contracts creating monopolies, undertake to punish an impossible act. The statute quoted declares illegal and void every contract whereby a monopoly in the production, manufacture or sale of any article in common use is or may be created and provides for the punishment, by fine and imprisonment, of the parties thereto. By what process any two or more persons in the State of New York, by contract or combination could create a monopoly, is hard to understand, if it be true that a monopoly can only be created by a grant from the sovereign, and "it is the withdrawing of that which is a common right from the community and vesting it in one or more individuals to the exclusion of all others," as above defined. Such legislation, so far as it voids contracts creating monopolies, is meaningless, confusing and unnecessary.

The interesting, important and serious question raised by this legislation and the one after all that underlies all such acts is this, can the legislature forbid and invalidate all contracts which are or may be in restraint of trade, or restrictive of competition?

The liberty of contract which is said to be an inalienable right and guaranteed to the citizens by authority beyond legislative control is nevertheless subject to certain limitations. Contracts to do an unlawful act, or to do a lawful act in an unlawful way, are criminal and void. Contracts that are against public policy are prohibited in this sense, that they cannot be enforced. It is interesting to note that this is the only sense in which they are prohibited. It was never supposed that A. and B. could not make any commercial or business agreement they saw fit and carry it out according to its terms, even though the public would be benefited by their not doing so. If A. voluntarily, with or without consideration, agrees with B. not to carry on a competitive trade, the courts could not compel him to do so or prevent B., by any process, from conducting his business under the more favorable conditions thereby secured. If such a contract were unreasonable, without consideration, or injuriously affected the public, the courts would refuse to enforce its provisions against one of the non-complying parties upon the ground of public policy. This would not strictly be an interference with the liberty of contract between persons *sui juris* and dealing with their own, but a refusal by the public to lend the machinery of the law maintained at the public expense, to enforce an agreement that affected injuriously the public interests. This is a sound public policy and it is the utmost extent to which the liberty of contract has heretofore been adversely affected. It will be observed the legislation under discussion is not upon these lines. It is not an attempt to establish a new public policy for the guidance of the courts broad enough to deny a remedy to a different class of cases from that now excluded. It makes the contracts themselves illegal and void, vests the courts with jurisdiction to restrain their operation, and punishes the parties. It is the legislators saying, inasmuch as, in our opinion, it would be better for the public at large that both A. and B. should continue to prosecute their callings or trades in competition with each other, although perhaps to their disadvantage, we will force them to continue to do so by denying them the power to

negotiate a sale, combination or consolidation upon the only terms such an arrangement could be made, to wit, by the vending or absorbed party covenanting to refrain from engaging in a similar employment, and we enforce our will not by denying them a forum for the enforcement of such a contract, but by furnishing a prison for the fact of its existence. This is certainly radical and new.

Is there not a distinction between the power of the legislature, assuming it to have such power, to declare a contract void as against public policy, thereby barring the courts from its enforcement, and legislative power to make the execution of such a contract a crime?

But does the legislature have power to declare illegal *all* contracts in restraint of trade, even to the extent of closing the courts against them?

No one has yet defined, so far as I have been able to discover, the term "in restraint of trade" in such a way as to give to it that certainty essential to a clear understanding of a written law. There has been little concern heretofore about a precise definition, as in administrative justice the validity of the contract has usually turned upon its consideration, its reasonableness, the situation of the parties and the interests of the public. Now, however, in view of these acts declaring *all* contracts in restraint of trade criminal and void and the decision of the highest court in the land that neither reasonableness, consideration nor the necessities of the parties are elements to remove any contract from that classification, it becomes vital to know exactly what the words, in restraint of trade, import.

We know of that endless list of contracts that have been the subjects of contention in the cases in which the principles of the application of the rules of public policy to contracts in restraint of trade have been settled. In most, if not all of these the fact that the agreements were in restraint of trade was conceded and the validity of the contract contended for, nevertheless, upon one or another of the above grounds. The Supreme Court of the United States states the rule of guidance to be this,—when it is claimed that a

contract in restraint of trade is void,—"Public welfare is first considered, and if it be not involved and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is or is not reasonable:" *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 397. This case does not define a contract in restraint of trade; it merely tells us when such a contract is lawful.

Nester v. *Brewing Co.*, 161 Pa. 473, decides that a contract designed solely to prevent all competition among the parties in restraint of trade, is against public policy, and will not be enforced, but this throws no light upon what constitutes restraint or what is the meaning of trade.

Assuming the word "restraint" is to be taken in its usual meaning, what is this trade that is the ward of public policy, and is to be subjected to no restraint? Is it a fitful hand to mouth course of dealing subject to no law but sentiment, in which profits are to be reaped under the protection of artificial laws of local application? Or is it a great system of production, sale, and exchange growing out of the wants and necessities of humanity and governed by laws as inexorable as those of nature, and equally incapable of being restrained or diverted from affecting any country or state? Will it be a defence to an indictment for being a party to a contract in restraint of trade that in fact the contract does not restrain trade, although it restricts competition, but upon the contrary promotes trade by preserving it where it would otherwise perish? And is this a question of law or fact, and upon what kind of evidence is it to be determined? If American manufacturers are undersold in the markets of the world by their foreign competitors, does it restrain trade for them to combine to effect economies beyond their individual means and to confirm their agreement to act in unison by covenants in partial restraint of trade, when not to do so means bankruptcy, idleness, and loss to the community? If a number of workmen combine to raise their

wages, secure more reasonable hours, or to correct a real or fancied abuse, and agree to attain their ends by refusing to work until they are conceded, are they shielded by the statutes declaring these purposes to be legal and exempting them from prosecution in view of a subsequent law making all combinations in restraint of trade criminal? These are all material questions, as lawyers well know, and laymen are soon to discover.

Without undertaking to define restraint of trade, I think it safe to say all those contracts are included in this legislation as crimes and void which have been treated as in restraint of trade in the adjudicated cases and have only been saved in the courts because of the character and extent of the consideration, the necessities of the parties, their reasonableness, under the particular circumstances or some previous statutory exemption that may now fall by repeal.

It would require the space of a volume to enumerate the business contracts that have, though concededly in restraint of trade, been sustained by the courts. Illustrations at once occur to the professional mind. The case of a sale of a business and its good will is a common one. Here a covenant upon the part of the vendor not to engage in competition with his vendee in a similar business is often the main consideration for the transaction. This is, of course, in restraint of trade, and interferes with competition. But to make a contract such as this illegal is not only restrictive of the liberty of contract, but it is depriving one of his property without due process of law. Good-will is property capable of being appraised, bought and sold. In many cases and especially in the lines of business intended to be most affected by this new legislation, it is the main ingredient of value. It represents all the struggle, industry, tact and judgment that makes success. In estimating the worth of a business it is not infrequently reckoned more valuable than the buildings and machinery that make up the physical plant.

In the Store Order Cases, the Supreme Court of Pennsylvania says-:

"The legislature cannot prevent persons who are *sui juris*

from making their own contracts:" *Godcharles & Co.* v. *Weigman*, 113 Pa., 431.

In Commonwealth v. *Perry*, the Supreme Court of Massachusetts says:

"The right to acquire, possess and protect property includes the right to make reasonable contracts, which shall be 'under the protection of the law.'"

That is just what this legislation attempts to prevent. All contracts, reasonable or unreasonable, upon good consideration or upon none, necessary or unnecessary for the real interests of the parties, all are alike forbidden if they in any way or to any extent restrain trade or have that tendency. The Supreme Court of the United States so construed the Anti-Trust Act of 1890. The language of the opinion is this:—"When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the Act that which has been omitted by Congress:" *United States* v. *Trans-Missouri Frt. Assn.*, 17 Supreme Ct. Rep. 540 (Mar. 22, 1897). This, of course, includes combinations among workmen as well, if they in any way restrain trade. No matter how peaceable, orderly, just and reasonable the combination may be; no matter what oppressive injustice or harshness it may be designed to correct. If it restrains trade (and all such combinations do restrain trade for without that effect they would be impotent) it is a crime. This was specifically determined in *United States* v. *Debs*.

If it could be successfully contended in view of the legislation declaring trades unions lawful and exempting their members from criminal prosecution for combining in restraint of trade that they would thereby not be included within the terms of these new laws, then, when it is remembered that among the purposes for which labor organizations may exist, are the advancement of wages, the regulation of the service,

the shortening of hours, the maintenance of their own rules, the prevention of others from taking employment by means other than force, it requires but a moment's consideration to suggest the sharp contrast between such legislation and that which renders criminal and void similar co-operation between the traders and commercial classes of the country. The law would then be this: A combination that raises the price of goods is *void*, and the combiners are punished as criminals because of a public policy declared by statute. A combination to raise the cost of production of the goods by forcing an increase in wages or a diminution of service is *valid* because of a public policy declared by statute. As the effect upon the public is the same, to wit, an increase in the price, it is difficult to discover the underlying reason for the legislative pronouncement that one is contrary to public policy while the other is in accord.

Under general language of prohibition upon all contracts that do or may restrain trade or upon combinations that have for their purpose or may effect an increase or decrease in the price of commodities in general use, it will require a fine discrimination to fasten the inhibition upon employers and discover immunity for the employees because of previous favorable legislation. Four Justices of the Supreme Court of the United States concur in this statement. "The interpretation of the statute (The Anti-Trust Act of 1890) which holds that reasonable agreements are within its purview, makes it embrace every peaceable organization or combination of the laborer to benefit his condition, either by obtaining an increase of wages or diminution of the hours of labor."

A corporation employer in Pennsylvania engaged in interstate trade finds himself in this peculiar position: He goes to prison if he himself enters into a reasonable contract in restraint of trade. He goes to prison under the Act of 1897 if he induces his employee not to do so. The employee in turn is thus situated: He may prosecute his employer for interfering with his connection with a labor organization, and will himself be prosecuted if he joins one existing for either of the above laudable purposes. The situation as to domestic

trade will be the same should the pending Anti-Trust Act become a law.

There is a well defined policy of the law to omit to classify as crimes many agreements and combinations that it will not undertake to enforce. This is found in the decisions of the courts; also in statutes. While by statute agreements to raise or lower the price of wages and to regulate the hours of labor are no longer punishable, they are not enforcible at law. The courts will not undertake to compel contributions for the maintenance of a strike nor enforce penalties among combinations of employers who operate or refuse to operate their works against the terms of an agreement. Unless every act of our daily lives is to be regulated by the wisdom of our law makers, it must necessarily be that we may do or omit to do many things of which the courts will take no cognizance, yet for which we may not be punished.

The argument tending to uphold the constitutionality of an act making an agreement to restrain trade a crime is given by Lord Esher in his dissenting opinion in the case of the *Mogul Steamship Co.* v. *McGregor*, 23 Law Reports, Queen's Bench Division, page 605, and it is this: "Agreements held to be illegal because in restraint of trade must have been so held not because there was any wrong done to the traders who agreed—for they all agreed what was to be done—but because there was a wrong to the public. The restraining themselves from a free course of trade was held to be a wrong to the public . . . The cases do not determine whether an agreement which is void as between the parties to it because it is in restraint of trade is or is not an indictable offense. But if such an agreement is illegal because it is a wrong to the public, it seems to me impossible to say that it is not indictable. An illegal act which is a wrong against the public welfare seems to have the necessary elements of a crime."

It might be safely conceded that any act having the necessary elements of a crime is a crime at common law, and may be defined as such by statute. Also, that an illegal act which is a wrong against the public welfare has the necessary ele-

ments of a crime. This means when applied to the topic under discussion that the legislature might punish as a misdemeanor the making of that class of contracts in restraint of trade which the courts would not enforce. It means nothing more.

Many things are done and can be done under the protection of constitutional guarantees with impunity that affect specific public interests injuriously. Segregated competition in business is not a plank in our platform of rights, but the liberty of contract, included in the right to acquire and possess property is a main one. It is not nearly so important to foster a fanciful system of free trade in a state as to rear a race of free men. The contract obnoxious to a sound public policy is now invalid. The innocuous one cannot be made so without infringing the liberty of contract. Legislation that is anything more than declaratory of a public policy to which all contracts would otherwise be submissive is in itself in restraint of trade, against public policy, unconstitutional and void.

The constitution not only secures to the citizen freedom of contract, but it also guarantees him a remedy by due course of law. The remedy is denied him in respect to his contract only when it contravenes public policy. The courts have uniformly held the right to make reasonable contracts upon consideration in partial restraint of trade to be within the constitutional guarantees and have uniformly enforced them.

The declaration of what is and what is not public policy is not always or necessarily a legislative function. Congress has only such legislative power as the people have granted to it, and limitations are expressly imposed upon the lawmakers of all States. The rights of life, liberty and property; the rights of conscience; the right of suffrage; trial by jury; freedom of the press to examine the proceedings of any branch of the government; rights of accused; the right to a remedy in the courts—all these and many others declared in the Bill of Rights are removed from governmental interference and are declared to be excepted out of the general powers of government and to be forever inviolate. The interpretation of these written guarantees is a judicial power and duty. The extent to which a right once conceded to be within this classification

is or must be limited, for the public good is also necessarily a judicial function, and therefore it is for the courts alone in the end to declare the public policy effecting such limitation. The Legislature can make no rule of interpretation of the Constitution when it relates to rights declared to be excepted out of its powers.

The legislature may, upon the other hand, in the exercise of that general power of government known as the police power, define a public policy upon all matters falling within its scope. Nothing, however, comes under the police power that is excepted out of the general powers of government. The right of acquiring, possessing and protecting property is so excepted. This includes freedom to contract. This includes freedom to make reasonable contracts in partial restraint of trade, so the courts have said, and the question is closed.

The ultimate proposition, therefore, is this: Any privilege or right declared by the courts to be guaranteed by the Constitution cannot be taken away by the legislature, either by punishing its exercise as a crime or by denial of a remedy in respect thereto, or stated in another form, a judicial interpretation of a guarantee cannot be modified by a legislative act.

I have endeavored to show that the mischief created by contract cannot rise to the evil of a monopoly. At its worst it cannot go beyond temporary or partial restraint of trade and interference with competition. It cannot close the field, and any contract, agreement or combination for that purpose is void in the sense that it cannot be enforced as the law is now declared. Further limitation than this upon the freedom of contract is neither wise nor valid.

If it is true as alleged upon the one hand that there never was a time when the business of the country was so concentrated, it is claimed to be also true upon the other hand that the public has never been so well and cheaply served. As there is no hard and fast rule of public policy, it presents a nice question, either to the legislature which undertakes to declare a policy by statute, or the courts in the exercise of their power to determine one, in which direction the true interests of the public lie.

If we could lawfully adopt by statute the unbending rule

that if competition is or may be restrained or prevented, the contract is illegal, thus denying the right of combination among the weak, how is the great power of individual capital to be contended with? What would have been the condition of labor without the right to combine for lawful purposes? What is to become of trade if methods cannot be changed to meet its ever varying laws?

Combinations of capital are merely the co-operation idea applied to capital so much and justly extolled in the field of labor. Those halcyon days wherein the margins of profits were sufficiently broad to enable all degree of thrift, enterprise and talent to live in a given trade are gone, not to be restored by sentiment or legislation. The course of trade is influenced by the elements, modified by international agreement between and political and social conditions existing in, the most remote countries of the world. The value of a bushel of wheat may depend upon the construction of a railroad in Asia. That of a ton of iron or coal upon the existence of war or peace in Europe.

Self-preservation is the first law. It applies to governments as well as to individuals. In legislation this principle is known as the police power. In jurisprudence its integrity is preserved under the guidance of the rules of a sound public policy. So to use your own as not to injure another's is the essence of the whole matter, and it practically means to use your own so as not to prevent another from making a similar use of his if he cares to do so.

Existing conditions do not present a demand for legislation, but for the enforcement of well established laws and principles adequate to correct all infringements of private or public rights. Combinations, whether of employers or employees, are not essentially bad or essentially good. It is well nigh impossible to legislate in reference to them lawfully or wisely. Even the omnipotent and unrestrained Parliament of England gave up the task as a hopeless one, and whether it be a consequence or a coincidence it is nevertheless the fact that the greatest industrial progress of the world has been accomplished in the period following the repeal of the laws oppressing labor and antedating the laws oppressing trade.