JUDGE MAYER SULZBERGER

II*

CASES ON POLITICS AND GOVERNMENT

Although Judge Sulzberger in his political views was regarded by many as a conservative, even a reactionary by some, an examination of his judicial decisions indicates a complete understanding of the history and theory of government, a real desire to safeguard the sanctity of the ballot, and almost a reformer's zeal to prevent corruption by office-holders. Traces of the originality and research which characterize his studies dealing with the government and polity of the ancient Hebrews [40] can be found in a few of the reported decisions relating to the status of American political parties, the qualifications and obligations of public officials, and the right of suffrage.

(*a*) *Political Parties*

In a leading case decided in 1912,[41] the Judge reviewed the historical development of national and state political parties in this country, and discussed the right of the legislature to recognize national rather than state parties in selecting majority and minority representation among election officers.

It was argued that state political parties by such legislation were denied the equal protection of the laws accorded to national parties, in violation of the Fourteenth Amendment to the Constitution of the United States.

The Judge, at the conclusion of a very learned opinion, declared that the Fourteenth Amendment has no bearing on the question at issue; that the object of the Amendment is to secure equality of rights to *"any person"* within the jurisdiction of the state and to enforce the doctrine that all *persons* are equal before the law; and that political parties, though composed of persons, are not themselves persons, either in fact or in law. He said:

---

*The first part of this article appeared in the UNIVERSITY OF PENNSYLVANIA LAW REVIEW for December, 1926.

[40] See THE AM HA'ARETZ and THE POLITY OF THE ANCIENT HEBREWS.

[41] Kille v. Woodruff, 21 Pa. D. R. 207 (1912).

> "While under the Fourteenth Amendment one natural person is to have the same rights as all other natural persons, this is not true of political parties. The essence of party government is that the majority party has the right to enforce its policies and to annul the policies of the minority party. In other words, while persons have the right of equality, parties have the right of inequality."

(*b*) *The Public Office-Holder*

A municipal employee, who had been discharged for pernicious political activity, petitioned Judge Sulzberger for a writ to compel the Director of Public Works to reinstate him.[42] An act of the legislature, commonly known as the "Shern Law,"[43] provided that a city office-holder should be discharged if he should take any active part in political management or in political campaigns, or use his office to influence political movements, or interfere with elections, etc. Another act of the legislature, adopted at the same session and a short time after the Shern Law, forbade the discharge of an employee for a cause "religious or political." [44] It was argued by the petitioner that the two acts were repugnant, that the former was by implication repealed by the latter, and that the Shern Law was unconstitutional.

The Judge in his opinion pointed out that there is no repugnancy between the two acts of the legislature, and that there could be no possible implied repeal of the Shern Law. When an employee is discharged for political activity, the cause for discharge is not "political," within the meaning of the legislature, because it is not the political sentiments of the employee that bring about his removal. "If he perform the prohibited acts," said the Judge, "he is guilty to whichever party he may belong. He is not, however, guilty of a 'political' offence, but of devoting himself to an activity which the legislature has declared to be incompatible with the proper performance of his duties."

The Judge's hatred of official corruption, or even unintended favoritism, is well illustrated by a case in which he defined the

---

[42] Duffy v. Cooke, 21 Pa. D. R. 613 (1912).

[43] Act of 1906, P. L. 19, § 2.

[44] Act of 1906, P. L. 83.

duties of a city official with respect to bids on public work,[45] saying:

> "A municipal officer, after he has opened and computed the bids, must sedulously avoid saying or doing anything that ordinary ingenuity may interpret as a hint to a bidder that he has lost the contract unless he lowers his bid, whether by abatement of price or addition of new items. If a man of ordinary intelligence will understand his word or act as such a hint, even the absence of intent in the utterer or doer will not make it lawful. . . ."

(c) *Suffrage and Taxation*

The relationship of taxation to the right of suffrage is treated by Judge Sulzberger with characteristic insight and erudition, in a case which involved the question whether an applicant for registration at the polls must himself pay the poll tax, or whether it is permissible to have another person pay the poll tax for the voter.[46] The applicant contended that he was qualified if the tax had been paid, whether he had or had not paid it himself. The basis of this argument was that, as taxes yield revenue, the only concern of the state regarding any tax is that the revenue shall be collected.

The Judge conceded that taxes yield revenue, but contended that there may, nevertheless, be certain forms of taxation which have other and more important purposes. In support of this contention, he cited the ancient Jewish Shekel-Tax, as follows:

> "The Bible (Numbers 1, 46: Exodus 38, 26) furnishes us an example of an ancient commonwealth which compiled its census of males liable to military duty by collecting from each a half-shekel tax, and the count of the half-shekels established the military contingent of the respective districts of the country. As such tax was accompanied by the imposition of arduous duty, there is small likelihood that any district would ordinarily strive to swell the list, though in modern times the 'padding' of muster-lists for purposes of profit is not totally unknown."

---

[45] Ryan v. Ashbridge, 10 Pa. D. R. 153 (1901).
[46] Flick v. Woodruff, 21 Pa. D. R. 137 (1912).

In the case before him, the Judge realized that the object is to make an accurate muster-list or census of all males qualified to vote. He said:

> "In this census are involved liberal privileges instead of onerous duties. It is conceivable that interests might arise which would favor the swelling of such a census list beyond the actual number of votes, since by such means civic power might be accessible. To attain such an end, persons of ample means might find it desirable and cheap to expend some thousands of half-dollars. By such means they might disturb the proper balance of power between various districts of a city or state, and give one faction an advantage over another. Viewed in that light, it is seen that, though the revenue derived from the poll tax is a necessary incident of the taxation, yet it is not its purpose. On the contrary, its purpose is defeated unless we prevent revenue in excess of that produced by the actual number of qualified voters, and hence unauthorized persons are debarred from paying the tax. . . ."

Judge Sulzberger then reviewed the whole course of legislation in Pennsylvania with reference to personal registration, and concluded as follows:

> "The right of suffrage is derived from our constitution and laws, and no man has ever been qualified to exercise it at any time in our history unless he was a taxpayer. . . .
>
> "The intimate association of the tax with elections forbids any other conclusion than that the payment of it by any other person than the taxpayer himself is an illegal payment of an election expense. . . ."

In the few typical cases that have been cited in which political problems were involved, Judge Sulzberger displayed a thorough familiarity with the constitutional and political history of the State of Pennsylvania and of our federal government. He also evinced a relentless hostility toward the politically active and the corrupt office-holder, and toward the questionable practice of politicians paying the poll-tax of voters and thus indirectly buying their support.

Cases on Industrial and Economic Problems

It is not at all surprising that Judge Sulzberger, presiding over a court in a large industrial center, should have had before him for adjudication numerous cases involving fundamental questions of economics and business. The extension of the limits of Philadelphia, the growth of its population, and the development of its industries, gave rise to controversies in which the Judge could not rely on authorities expressly in point, but, in approaching the questions involved, was guided chiefly by his own views as to how the general welfare of the community might best be promoted.

(a) *The City and its Growth*

A case, decided in 1910,[47] presented the conflict, occasioned by the extension of the territorial limits of the city, between industry and agriculture, between urban and rural interests. The plaintiff sought an injunction to restrain the defendant from conducting a bone-boiling plant located on a plot of ground situated miles south of the regularly settled portions of the city, on the Schuylkill River, in a district which originally had been a farm-trucking region, but which for some years had been invaded by business enterprises not adapted to be carried on in the heart of a city. The plaintiff's house was about a thousand feet away from the defendant's building. The Judge said:

> "This conflict between trucking and manufacturing is not a battle begun and ended in a day, but a continuous process by which the greater values of land used for mercantile and manufacturing purposes slowly compel the agriculturalist to remove his farm from the city to the country.
>
> "Instead of being detrimental to the value of plaintiff's property, the introduction of such plants as have been mentioned, including the defendant's, greatly enhances the pecuniary value of the land in the whole district. In short, the plaintiffs really complain of the substantial advances of their neighborhood from farming to manufacturing.
>
> "That this change from country to city has its disadvantages is true. For instance, streets will be laid out and

[47] Shetzline v. Layer, 19 Pa. D. R. 1025 (1910).

the farmhouses standing in the way of their opening will be razed; noises, great and unaccustomed, will be brought in; smoke, cinders and other disagreeable incidents of advancing civilization will darken the air; and, as in this case, new noisome smells will mingle with the ancient ones which have been familiarized, if not endeared, by long suffering.

"But for these conditions no one man is responsible. People who have farms near a city, in getting the advantage of enhanced money values, must also expect to suffer the concomitant disadvantages. The balance, after all, is greatly in their favor.

"We think that the district in question has now established itself as a district of disagreeable trades, and that whoever goes there or is there cannot ignore the fact."

Ever mindful of the progressive character of the law, and loath to have this decision of his used as a precedent in the future when an advancing population might again change the character of the district, the Judge warned:

"The time may come in the future when population, advancing in that direction, shall have the right to make these disagreeable plants move on; but that time has not yet arrived."

The growth and shift of population frequently bring into conflict the peace and comfort of private residents with the business interests of neighboring landowners. In a leading case,[48] Judge Sulzberger considered the rights of residents on North Broad Street, Philadelphia, to restrain the owners of a lot on the corner of Broad and Thompson Streets from erecting or maintaining thereon a moving-picture theatre. The defendants' title to the lot was subject to a restriction which was dated 1858, and which inured to the plaintiff's benefit, "that no building for any offensive occupation shall at any time be erected upon said lot."

The Judge declared that the only ground on which the plaintiff could maintain his bill is that the maintenance of a moving-picture theatre is an offensive occupation within the meaning of

[48] Burk v. Kahn & Greenberg, 22 Pa. D. R. 691 (1913).

the restriction in the defendants' deed. He proceeded as follows:

> "At the date of the covenant (1858) and for more than a century before, there had been theatres in Philadelphia. Their existence was known to all and their activity prized by many. It is true that a respectable section of the community have always looked upon them as incitements to frivolity and perhaps worse. The great majority, however, decline to accept this opinion. It is certain that the general sentiment was and is that giving theatrical representations is not an offensive occupation. . . .
>
> "The genuine business progress of a street, steadily continued for many years, along many squares or blocks, cannot be stayed. There is no sound reason in public policy for gratifying the plaintiff's love of privacy, and the inadequacy of the restriction under which he claims is such as to give no warrant for equitable interference in his behalf. We may not unduly stretch the meaning of plain words. The defendants' property is their own, with the full right to use, just as the plaintiff's property is his. This right, however, does not confer on either the power of dictating to his neighbor."

In both of the cases reviewed, Judge Sulzberger adopted the attitude that the growth of the city and of its business dare not be retarded by an overscrupulous regard for the rights of individuals adversely affected thereby.

(*b*) *The Corporation and the Law*

Recent industrial and economic progress in America is closely related to the development of the corporation, and it was as chancellor in equity deciding cases involving corporate affairs that Judge Sulzberger particularly showed his modern juristic outlook.

In corporation law, those who may be called "legal fundamentalists" conceive of a corporation as a legal entity, an artificial person entirely distinct from its members and its officers, whereas the "modernists" have attempted to look through the fiction to the fact and, so far as possible, to regard corporations, partnerships and other groups as similar in legal effect.

In 1898, when the "legal entity" theory was in its full glory, and long before the modernist conception of the law of corporations had received definite judicial recognition, Judge Sulzberger espoused the cause of the factualists as against the fictionists. In a leading case, decided in that year,[49] the plaintiff, in his bill of complaint in equity, charged that the Pennsylvania Railroad Company, one of the defendants, being the majority stockholder of the Philadelphia and Erie Railway Company, so managed the affairs and so interpreted the contracts of the latter company as to destroy the rights of the minority stockholders in the Philadelphia and Erie Railroad. The plaintiff, a minority stockholder in the said company, prayed the court to order the Pennsylvania Railroad Company to render an accounting of certain matters of business transacted during the period from 1870 to 1896.

The Judge, in the course of a thorough discusssion of the law and the facts of the case, showed that he had no respect for any technical theory by which the rights of minority stockholders might be destroyed. He said:

> "The thought at the bottom of the bill is that the acquisition of a majority of the stock by the Pennsylvania Railroad Company in itself operated to give to the minority stockholders, when dissatisfied, a right to come into court, and, averring with as much precision as practicable why and how their reasonable expectations of profits have not been realized, demand an account upon general equity principles and not upon the basis of contract.
>
> "In the course of the discussion we have not been referred to any authority expressly in point, and it becomes necessary, therefore, to approach the discussion of the question on principle.
>
> "The view of the law is that a corporation is an organization of persons with common interests. Just as a partnership is based upon the mutual faith and confidence of the parties in each other, so is a corporation organized upon the theory that the parties thereto are devoted to the attainment of the objects of the corporation. In order that a corporation may act efficiently, the natural and inevitable diversity of opinion which obtains among men forbids the require-

[49] Wolf v. Shortridge, 8 Pa. D. R. 1 (1898).

ment of unanimity among the stockholders as the prerequisite to corporate action. For the purposes of the business or a corporation, the vote of the majority is the vote of the whole. If, however, the majority should be a rival corporation, whose interest it is to increase its own profits, at the expense of the corporation into which it has bought, a new question is presented. Externally and formally, the conditions do not appear to be changed. If a rival railroad corporation has a right to own stock, it has the right to vote upon it. By voting, it may elect any officers and directors it chooses. In short, it may do any act that any other majority could do.

"The powers of a corporation are, however, like the powers of an individual, limited by the consideration that the rights of others may not be unlawfully invaded. A corporation for profit, owning a majority of the stock of another corporation for profit, cannot so manage the affairs of the latter as deliberately to turn it into a corporation for loss, itself appropriating the profit. If such an object were avowed, it would be the duty of the chancellor to enjoin.

"If the accounting partner in a private partnership should be found to have acquired a much larger interest in a rival firm, and should be charged with so using his power as to deprive his first firm of its legitimate profit and throw it into the new firm into which he had entered, would it be considered a sufficient answer in equity if he were to set up an article of the partnership contract, by which it was stipulated that he should be the managing partner? The answer would be immediate, that management excludes interested mismanagement.

"The principles of right do not differ essentially, whether men act as individuals or as corporations. We must not allow the mere legal entity to disguise the fact that behind it are men subject to ordinary motives and temptations to deviate from the proper course."

While it is true that the Supreme Court of Pennsylvania on appeal reversed Judge Sulzberger in this case,[50] the reversal being based on the technical ground that the pleadings of the complainants were not sufficiently specific, there can be no doubt that the opinion of the lower court is expressive of what would today be

[50] 195 Pa. 91, 45 Atl. 936 (1900).

generally regarded as the proper judicial attitude toward a corporation owning the majority of the stock of a competing company. Many of the recent decisions of the Supreme Court, in which fraud perpetrated by the manipulation of corporate stock has been severely scored, will be found to have their inspiration in the opinion of Judge Sulzberger, an opinion that was set aside because the Supreme Court was not ready, in 1897, to uphold it.

In another important case,[51] the rights and obligations of public utility corporations are fully treated. The 13th and 15th Street Passenger Railway Company of Philadelphia filed a bill of complaint in equity against the Broad Street Transit Company, praying for an injunction to restrain the defendant from laying and operating a double-track passenger railway on Broad Street. It appeared that the plaintiff corporation had leased away its entire property for 999 years. The Judge held that although technically the plaintiff company had the right of reversion at the expiration of the term of the lease, it had no real tangible interest in the matter in controversy. He said:

> "The object of a railway franchise is to operate a railway for the accommodation of the public, and the duty so to operate it is imposed on the corporators. Failing such duty, forfeiture results.
>
> "In the development of the business of railroading, it soon became apparent that the public interests would be subserved by converting fragmentary bits of railroad into larger systems. Hence, the statutes authorizing connections, mergers and leases, all of which pursue one and the same policy. So soon, however, as a railroad is merged, or leased, the public duty of the prior owners of the merged or leased road is practically imposed on another, and reciprocally the direct interest of the public in the merging or leasing corporation is virtually at an end.
>
> "The function of a leasing road then becomes a private matter, the business of its corporators being merely to collect (under the inexact name of rents) stipulated dividends on their shares, not as a return for public service rendered by them, but by another. The public interest is obviously transferred from those who yield their trust to those who assume it, and the former ought not to become active for the mere purpose of hindering their substitutes from performing their public duty."

[51] Railway Co. v. Transit Co., 13 Pa. D. R. 808 (1904).

Judge Sulzberger declared that the argument of the plaintiff corporation that its right to "reversion," which was to accrue nearly a thousand years hence, amounted to a substantial interest which the court ought to safeguard, should not be taken seriously. He said:

> "It rests on a false analogy with the English land law and its elaborate fictions, devised for great political ends, but having no basis in the nature of things or in sound logic or reason."

It is interesting in this connection to compare the language of Mr. Justice Oliver Wendell Holmes of the United States Supreme Court, who in a recent case declared: "But the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke." [52]

Perhaps the explanation for the Judge's repudiation in this case of a well-established principle of English land law may be found in this concluding sentence of his opinion:

> "This is not the case of a public-service corporation that fears the impairment of its activities, but of individual stockholders who see an opportunity to increase the value of their shares on the Bourse."

Sitting in the Court of Common Pleas, Judge Sulzberger frequently considered applications for charters for corporations organized not for profit. He always imposed such conditions and limitations as would protect the interests of the public, and frequently scented dangers that would ordinarily have escaped the attention of less communally-minded jurists.

In one case decided in 1909,[53] he prevented the incorporation of what he conceived to be an association of merchants tending to restrict trade and commerce. The by-laws of the proposed corporation provided "that the membership shall consist of an individual member of any firm or copartnership, an individual officer of any corporation, or any individual engaged in the busi-

[52] Gardiner v. Butler & Co., 245 U. S. 603 (1918).

[53] *In re* The Decorative Trades Association of Philadelphia, 18 Pa. D. R. 503 (1909).

ness of supplying commodities for use in the decorative trades, provided, however, that but one individual member of any firm or corporation and one individual officer of any corporation (which shall include the credit man of such corporation) shall be entitled to membership."

Judge Sulzberger had previously ruled that membership of such a corporation had to be limited to natural persons and could not include firms and corporations as such. He said:

> "That this corporation, if established, would be a trade-guild, whose real unit of membership is a business establishment and not natural persons, is obvious. Were this not so, the limitation set forth would not have been adopted or thought of.
>
> "That the association of capable persons skilled in a particular trade may make for its improvement and for the advantage of the community is obvious. Better methods and processes may from time to time be suggested, and the quickening influence of personal intercourse will tend to multiply and perfect such suggestions. The law favors such educational endeavor.
>
> "The law, however, does not favor any association of merchants tending to restrict trade and commerce, nor does the act of assembly contemplate the incorporation of a union of trading establishments as such. In carrying out public policies it will not allow mere verbal conformity to be an efficient substitute for full and whole-hearted compliance with the spirit of the act of assembly. If we were frankly to incorporate firms and corporations by name, we would be doing no more than if, avoiding the use of their names, we incorporated one individual representative of each. The effect would be the same. The moral, intellectual and educational qualifications of members would not be the main factor of usefulness in the new association. There might be two, three or more proper men in any one of the constituent corporations, yet all but one would be ineligible. The purpose which inspires this rejection of valuable material for membership is clear enough. No one firm or corporation is to be more powerful than another. If, however, the object of the incorporation were the increase of useful knowledge, there could not be too much of that sort of influence. The inference is irresistible that in some way the proposed corporation wishes to regulate trade and commerce

in the articles made, bought and sold by the constituent firms and corporations.

"There is no law authorizing incorporation for such a purpose, and perhaps it is not going too far to say that the purpose is either in restraint of trade or in favor of a tendency to monopoly, which would make it unlawful."

The several opinions involving corporations that have been reviewed portray their author as a man bent upon throwing aside the technical quibbles and fictions that have encumbered the law of corporations, upon preventing the manipulation of corporate stock, upon frustrating the attempt to use the corporate entity for the purpose of restraining trade and establishing monopoly, and upon protecting the public interest at all times.

(c) *Employer and Employee*

A judge can most readily, if not most accurately, be identified as reactionary or progressive by a study of his decisions dealing with the rights and obligations of wage-earners in relation to their employers particularly, and to society generally. Judge Sulzberger, in his most significant contribution to Hebraic scholarship, his lectures on "The Status of Labor in Ancient Israel," proudly declared that "a great movement for the protection and improvement of the laboring mass was initiated in Israel more than three thousand years ago, and continued to promote its life and literature, becoming indeed a part of the mental constitution of the people."

The sanctity of human labor and the interest of society in the free exercise thereof were emphasized by Judge Sulzberger in a case decided in 1900,[54] in which the plaintiff, who owned a laundry, tried to restrain the defendant, a former employee, from securing for another employer, customers whom he had served while in the plaintiff's employment.

It appeared that the plaintiff had engaged the defendant under a written contract which provided: (a) that the defendant was to drive the plaintiff's wagon, serve the customers and make

[54] Seward v. Shields, 9 Pa. D. R. 583 (1900).

returns of the money collected; (b) that he should increase the number of plaintiff's customers, it being understood and agreed that "such increase of custom shall be forever the custom" of the plaintiff; (c) that he would give the plaintiff not less than one week's notice before leaving his employ, and, after leaving, he would not serve any customer whom he served while in plaintiff's employment; (d) if he should serve any customer within one year after leaving his employment, the defendant authorized the plaintiff to restrain him by injunction issued out of any court of equity.

Judge Sulzberger, in a very significant opinion, said the following:

> "An examination of the contract shows that the defendant was employed for no specified time or fixed wages. The utmost duration of the employment which the defendant can claim by interpretation of the contract is one week. The wages, not mentioned in the contract, were actually $10 per week. The defendant had continued in the plaintiff's employment for about twenty months.
>
> "The evidence did not show that the plaintiff had any customers whose names and addresses he confided to the defendant, but rather that the defendant's business was to procure work for the plaintiff from anybody who could be induced to give it to him, and that he had himself procured the customers respecting whom the plaintiff makes his complaint."

Judge Sulzberger declared the question involved to be of great importance. He said:

> "The defendant is a workingman, hired for ordinary wages for one week to drive a horse and wagon and secure customers for the plaintiff."

And he asked:

> "Is this, even when coupled with the nominal one dollar, sufficient consideration to warrant a court of equity in restraining the defendant, by preliminary injunction, from the exercise of his working powers for one year?

"Contracts of this kind are not favored by law and still less by equity. Man's duty to society requires him to exert all his activities for his own and, incidentally, for the common good. Contracts to hamper or destroy this activity must, therefore, have a strong basis if they are to be supported. In the case before us this basis is lacking. What has the plaintiff given the defendant as a consideration for abandoning his natural right to unhampered activity? The plaintiff says (a) he has employed him, (b) he has given him a dollar, (c) he has paid him wages of $10 a week. These, separately or together, do not, in our opinion, constitute sufficient consideration for so important a sacrifice. *The mere employment of one man by another constitutes no consideration whatever.* At that point the values on both sides are equivalent. The man wants to be employed, the employer wants the man. The consideration of one dollar being merely nominal, can have no effect where substantial consideration is indispensable. The wages of $10 a week are not shown to be anything but ordinary wages for so much work, and hence are not consideration for the abandonment of a valuable right in addition."

The courts of Pennsylvania, however, have consistently adopted a position diametrically opposed to that of Judge Sulzberger in this case, and have uniformly held that mere employment is sufficient consideration to warrant a restraining order.[55] The decision of Judge Sulzberger was affirmed by the Superior Court,[56] but on purely technical grounds. The real issue in the case was evaded by the appellate tribunal.

Here, again, we have an illustration of the Judge's disposition to slight or to overrule legal precedents which had been founded on principles regarded by him as no longer applicable to the present state of society. He was, however, motivated by a desire to give the particular wage-earner the right to earn a livelihood and not by any yearning for abstract social reform.

His anxiety to break through legal fiction and his concern for the wage-earner were also illustrated in a case decided in

[55] Opinion of Martin, *P. J.*, in American Ice Co. v. Luff, 12 Pa. D. R. 381 (1903), citing numerous Pennsylvania and English authorities.

[56] 18 Pa. Super. 384 (1901).

1896,[57] where a mechanics' lien, filed by a builder, was attacked by the owner because the mechanic was alleged to have waived his right to file the lien. The written contract contained a *printed* provision under which the mechanic might properly file his mechanics' lien claim, and also contained a *written* provision under which, standing alone, the mechanic could not file a lien. It was argued that the rule of evidence that a written clause is paramount to a printed one governed the case and that, therefore, the mechanic could not file his lien. Judge Sulzberger says the following with respect to this phase of the case:

> "Where there are two clauses absolutely contradictory and repugnant, the natural reason cannot give effect to either. They neutralize each other. It is urged, however, that there is a legal rule of construction which removes the difficulty, namely, the rule that where the written and printed portions are repugnant to each other, the printed form must yield to the deliberate written expression. But this rule of interpretation is merely a technical device, whereby the harmonizing of contraries, which to the natural reason is impossible, becomes possible by a legal fiction. Legal fictions, however, are invented for the sake of justice, and will not be raised so as to operate to the detriment of any person, or in destruction of a lawful vested estate. . . ."

This extreme decision in which an established rule of evidence was set aside because in the opinion of the Judge, an injustice might be done to the mechanic, was of course reversed by the Supreme Court.[58]

Judge Sulzberger's concern for the rights of labor was pointedly demonstrated in two cases,[59] in which he declared unconstitutional the Acts of the Legislature of 1909 and 1913, providing for the assignment of wages as security for loans made by workmen. Speaking of the Act of 1909, he said:

---

[57] The Commonwealth Title Insurance & Trust Co. v. Ellis, 5 Pa. D. R. 33 (1896).

[58] 192 Pa. 321, 43 Atl. 1034 (1899).

[59] Application of Jefferson Credit Company for License, 18 Pa. D. R. 634 (1909), and Foster's Application, 23 Pa. D. R. 558 (1914).

"In the act before us, the borrower is, as a wage-earner, segregated from the rest of the community. A new law is made for him. The source of his future earnings is known. He is employed for wages by a particular man, who, when the anticipated service has been rendered, will become his debtor. It is these future services which are irrevocably pledged.

"The effect of the act, therefore, is to evade the operation of the exemption law, so far as wage-earning borrowers are concerned, and, moreover, to extend this waiver from things that he has in possession to things that he expects to get from his labor in the future.

"The main defect of the act, however, is that it classifies men and not transactions, and in so classifying them it enacts a law against wage-earners only, which does not effect the rest of our citizens. That this law operates to bind the heads of families to future service by creditors is an odious incident of such classifications.

"The assent of husband and wife which the law demands does not relieve the statute from the charge of hostility to the constitution. The fundamental law places first of all the freedom of the citizen as an end more important and more sacred than even the freedom of contract.

"We entertain no doubt that the placing of wage-earners as a separate class upon whom this act of assembly is to operate is unjustified, and that the act is special legislation, offensive to the letter and the spirit of the constitution, and therefore of no validity.[60] . . ."

When the legislature in 1913 repealed the Act of 1909 and adopted another statute aiming to effectuate the same result, namely, the pledge of wages of the future labor of workmen for an indebtedness previously incurred, the Judge said:

"The first section of the Bill of Rights is still a living force in this Commonwealth. One of the inherent and indefeasible rights thereby guaranteed is the enjoyment and defence of liberty. It is a declaration against slavery in any form, however modified or disguised. The distinction between a man's acquired estate (that is, his property) and his

[60] In Comm. v. Lynch, 22 Pa. D. R. 454 (1913), Judge Baldridge disagrees with Judge Sulzberger as to the unconstitutionality of the Act of 1909. The Act was repealed by the Act of 1913.

> personal earning power by labor (that is, his freedom) is carefully preserved and sedulously safeguarded. A man may pledge his property, but not his person. However great may be the volume of police power entrusted to the legislature, it cannot extend to the impairment of the mere right of a man, even though he be a debtor, to earn a living by labor and to apply his earnings to the support of himself and his family. This right is so fundamental and so necessary, not only for himself and his family, but also for the Commonwealth, that it cannot be waived by the man himself. It is true that the freedom of contract is a great and necessary right, but it has its limit. And this limit is reached and passed when a man's future labor is pledged to pay his past debts, with the consequence that he and his family are rendered liable to fall from the status of free citizenship into the degradation of pauperism.
>
> "After mature consideration, we cannot resist the conclusion that there is no power of contract in the individual and no power of legislation in the general assembly to authorize a man to pledge or assign the wages of his future labor, and that the attempt of the legislature to exercise such power is a futile assault upon the very basis of our frame of government."

Judge Sulzberger feared that whole communities of wage-earners would practically become peons, slaves of their employers, if such statutes were declared valid. He regarded any legislation that debased labor as contrary to the fundamental law of the land, and it was due to his strong stand that workmen's wages are today non-pledgeable in the State of Pennsylvania, for his decision was later affirmed by the Superior Court,[61] and was still later followed by the Supreme Court.[62]

It will be seen from an examination of the cases reviewed that Judge Sulzberger, in dealing with social, political or economic problems, never aimed at the reorganization of society. He was not a reformer, unless, perhaps, he may be spoken of as "one of God's passionless reformers." He never sought to put an entirely new principle in the place of the existing state of things. On

[61] 60 Pa. Super. 8 (1915).
[62] Comm. v. Young, 248 Pa. 458, 94 Atl. 141 (1915).

the contrary, he endeavored to maintain the *status quo,* and aimed simply to arrive at just conclusions in the particular cases coming before him.

In framing his opinions he appears to have been anxious, wherever possible, to bring the case within the scope of some broad general principle. Occasionally, in order to accomplish this result, and at the same time do real justice as between the litigants, he resorted to forced interpretations, fanciful analogies, and even legal homiletics. He was frequently ingenious in the selection and application of precedents to support a theory, but he was always above the pedantry and affectation of profuse citations of decisions. He did not hesitate to ignore precedents where their application might lead to bizarre and unsocial conclusions.

He always kept in mind the distinction between "law" and "right" and he used law as a means to achieve right as an end. In one case,[63] this distinction is especially marked. The Supreme Court of Pennsylvania had reversed the Court of Common Pleas No. 2, which had entered a judgment for the defendant despite the verdict of the jury in favor of the plaintiff. The order of the Supreme Court in reversing the lower tribunal directed it "to enter such judgment as law and right required." Judge Sulzberger, in a dissenting opinion, said:

> "If the word 'judgment' is to be understood in its proper legal sense, it means here a judgment on the verdict. The entry of such a judgment would comply with the direction of the Supreme Court, in so far as it would be in accordance with 'law.' The order, however, is 'to enter such judgment as law and right require.' We are all of opinion that the verdict is unjust, and 'right' would require us to set it aside. Where law and right (equity) are thus in conflict, a judgment in accordance with both is impossible. . . ."

Above all, Judge Sulzberger shows himself a sterling humanist. He considered law not the master, but the servant of man. He regarded law not as something fixed and immutable, but as a living, growing organism, having its origin in human

[63] Sloan v. Phila. & Reading R. R., 20 Pa. D. R. 987 (1911).

nature, in the habits, practices, beliefs and convictions of men and women, in the *mores* of the day. He was a student of human nature in all its manifestations, and he humanized jurisprudence wherever he touched it.

Louis E. Levinthal.

Philadelphia, Pa.