YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS

Published monthly during the Academic year, by students of the Yale Law School.
P. O. Address, Box 893, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise it is assumed that a continuation of the subscription is desired.

THE POLICE POWER AND THE TEN-HOUR BAKERY LAW.

Much antagonism, grading all the way from the philosophic dissent of Mr. Justice Holmes to the bitter comment of the more socialistic press, which hint a vague analogy to the Dred Scott decision, has been aroused by the final disposition of the case of *People v. Lochner,* 25 Sup. Ct. 539, five judges there held that a law, forbidding proprietors of bakeries to "require or permit" an employee to work more than ten hours a day, or sixty hours a week, is merely an illegal interference with liberty of contract, void under the fourteenth amendment, and is not a regulation so proximately concerned with public health as to come within the protection of the police power. Justices Harlan, White, Day and Holmes dissented. A further illustration of the divergence of opinion which the question has raised is found in the decision of the New York Court of Appeals, which upheld the law, four judges approving, as against three dissenting. *Same case,* 69 N. E. 374.

Ever since the now classic Slaughter-House Cases, where the term "police power" perhaps first received a well-defined expression, it has meant much or little, according to the individual conception of the judges before whom each case, in which it was involved, was tried. The personal equation is of no small weight in fixing its boundaries. Punitive damages laws, game laws, even laws prohibiting the possession of stamped soda-water bottles (*People v. Cannon,* 139 N. Y. 32), have been admitted to be proper police regulations, while, on the other hand, a legislature may not prescribe the number of hours beyond which women must not be employed in

dry-goods stores—at least, according to the Illinois court. *People v. Ritchie,* 155 Ill. 98.

In the present case the broad field, which has been open to legislatures in the exercise of the power, has been given narrower limits than formerly. To be sure, the statute here declared unconstitutional went a step further than most laws of the same nature hitherto declared valid. The ordinary so-called "labor" statutes, which merely declare how long a legal day shall be, do not prevent agreements for a longer day. *United States v. Martin,* 94 U. S. 400. And where the occupation for which the day's work is prescribed is undeniably dangerous and unhealthy, as for instance working under ground, such laws must be recognized as valid. *Holden v. Hardy,* 169 U. S. 366. But until the present case it has been recognized and asserted many times that the courts, while they would adjudge whether the legislature had used a fair discretion in exercising the power, nevertheless would refuse to declare a law void "until they had indulged every possible presumption in favor of the validity of the statute, and had been wholly unable to find that it could be sustained as a constitutional exercise of legislative power." See the opinion in *Taylor v. Place,* 4 R. I. 324; also, *Mugler v. Kansas,* 123 U. S. 661. Now it appears from the main opinion in the present case that there existed but a very weak presumption in favor of the integrity of the New York legislature in passing the act; in fact the presumption seems to have been on the other side. *That* is not entirely in accord with former expressions on the particular point. But when it proceeds to declare the statute void because of the court's belief concerning the sanitary status of bakers,—a belief which is certainly not in accordance with the popular conception, nor even with that expressed in medical and other technical works on the subject, (as Justice Harlan in the Supreme Court, and Judges Parker and Vann in the New York Court of Appeals, forcibly indicated in their respective opinions),—it seems that the judiciary is approaching a little nearer the legislative border line that it has hitherto. The old writers on the Constitution dreaded such an approach, and the Convention, though of course with no thought of the fourteenth amendment and its accompanying police power, rather heartily rejected the proposal to vest in the judiciary a qualified negative on all legislation, 3 *Madison Papers* 1332. All this discussion, it cannot be denied, is in the face of Mr. Justice Peckham's affirmance that "this is not a question of substituting the judgment of the court for that of the legislature."

The decision obviously avoids a question of great difficulty which might arise in future—where, if not here, and with what class of labor, if not with this, could this infringement on liberty of contract be held invalid? Many kinds of employment have more or less of that which is unhealthy in them, and there is undoubtedly a tendency toward legislative restriction of liberty of contract. So that the practical results of the case will probably be salutary. Nevertheless, the chiasmus between the opinions of Justice Peckham and Judge Bartlett, disapproving the constitutionality of the

law, and of Justice Holmes and Judge Parker, upholding it, presents an interesting comparison of different lines of logic. For this reason, as well as for the importance of the case, they are worthy of much study.

REASONABLENESS IN LEGISLATIVE REGULATION OF FARES.

It is well established that where a railroad is deprived by a legislature of the power to charge reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, the company is deprived of the lawful use of its property, and thus, in effect, of the property itself, without due process of law. *Chicago & St. P. R. Co. v. Minn.,* 134 U. S. 418, 458. But as to what constitutes reasonableness in rate regulations, the courts are not wholly clear. In the recent Massachusetts case of *Comm. v. Interstate St. R. Co.,* 73 N. E. 530, a statute requiring that street railroads shall carry public school children at half rates is held valid. The company in this case offered to show that the average cost of transportation per passenger was more than one-half its regular rates. But the court argues that the company can make good any loss, by simply raising the regular rate of fare. This assumes as an economic truth that railroad profits are proportional to rates charged. And it is hard to reconcile this argument with the court's further statement that if the law were one which "would cause expense to street railway corporations, which they must bear themselves or put upon other classes of passengers in the form of increased fares to make good the loss," it would be unconstitutional. At all events, the court bases its judgment as to "reasonableness" on the fact that the company's business *as a whole* is not shown to be rendered unprofitable.

This holding finds some support in *Missouri R. Co. v. Smith,* 60 Ark. 221, where it was held that rates imposed are not necessarily unreasonable because they are unrenumerative on a certain portion of the line. This is true even though the unrenumerative subdivision was once a separate road. *St. Louis & S. F. R. Co. v. Gill,* 156 U. S. 649. On the other hand, a state cannot justify unreasonably low rates for domestic transportation, considered alone, on the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. *Smyth v. Ames,* 169 U. S. 541. And it is said that a state's regulation of charges is not to be measured by the aggregate profits, determined by the volume of its business, but by the question whether any particular charge to an individual is, considering the service rendered, an unreasonable exaction. The question is not how much one makes out of his volume of business, but whether in each transaction the charge is an unreasonable exaction for the service rendered. Having a right to do business, one has a right to charge for each separate service that which is a reasonable compensation therefor, and the legislature may not deny him such reasonable compensation. *Per* Mr. Justice Brewer, in *Cotting v. Godard,* 183 U. S. 95.

Since the Massachusetts justices reject the average cost per passenger as a criterion of reasonableness in charges, it would seem incumbent upon them to present some rule of mathematics whereby the points they suggest could be applied in estimating the reasonableness of rates. Their reasoning is liable to the criticism made by another court, where an effort to show that a probable increase in passengers would make up for a reduction in rate was held to furnish no reliable basis for decision, being "too speculative an argument for acceptance." *Milwaukee Electric R. Co. v. Milwaukee,* 87 Fed. 577, 578.

THE MEASURE OF DAMAGES IN CONVERSIONS BY STOCK BROKERS.

The ease with which the English system of common law can be molded to meet the exigencies of modern business is aptly illustrated in the evolution of the rule of damages in conversion, where the subject of the conversion is liable to rapid fluctuation in value, as is the case with stocks or bonds in the hands of a broker. Out of a conflict which seemed for the time utterly hopeless, the courts have gradually produced a rule which is now being rapidly seized upon as affording a just and safe criterion. This is stated with extreme lucidity in the twin cases of *Federal Stock & Grain Co. v. Wiggins,* 77 Conn. 507, and *Ling v. Malcom,* 77 Conn. 517. Both cases arose out of an unauthorized conversion of stocks in the hands of a broker, and the rule was there given as follows: "The correct measure of the plaintiff's damage was, therefore, the excess, if any, over the price realized (at the sale on June 10th) of the lowest sum for which he could have placed the stocks after notice of the sale, had he given an order to that effect with reasonable promptness; or, in case of fluctuations of market price between the wrongful sale and the latest day to which it would have been reasonable to defer a repurchase, the difference, if any, between the price obtained when the shares were converted and the highest market price, in excess thereof, attained during that period."

Three rules for the computation of damages in cases of this character have been adopted by the various courts. In a few states it is held that the value of the stock at the time of the conversion should furnish the standard of measurement. *Freeman v. Harwood,* 49 Me. 195; *Baltimore Ins. Co. v. Dalrymple,* 25 Md. 269; *Brylan v. Huguet,* 8 Nev. 345. It is obvious, however, that this rule leaves the customer at the mercy of his broker, and the rule has received but limited indorsement.

The first rule to be adopted by influential courts was that damages for the conversion of stock should be computed upon the basis of the highest price intermediate the conversion and the time of trial. This rule originated in, and is still followed by, the English courts. *Cud v. Rutts,* 1 P. Wms. 572; *Harrison v. Harrison,* 1 C. & P. 412, 11 E. C. L. 436; *Owen v. Routh,* 14 C. B. 372. When cases involving the point arose in the United States the tendency was to follow the English cases. *Romaine v. Allen,* 26 N. Y. 309; *West v. Pritchard,* 19 Conn. 212; but the rule was found to be inequitable in many cases, as it practically allowed the

party bringing suit to delay his action, and thus increase in many instances the amount of his damages. The rule continues, however, to be followed in a few states. *Sturgis v. Keith,* 57 Ill. 451; *Parsons v. Martin,* 11 Gray (Mass.) 111; *Neiler v. Kelley,* 69 Pa. St. 403, 408. In the latter state it has been limited to those cases where a relation of trust exists between the parties, and, where a transfer of stock was permitted by a bank on a forged power of attorney, there being no breach of trust, the value at the time of the conversion was accepted as a criterion. *In re Jamison & Co.'s Est.,* 163 Pa. St. 143; *Ins Co. v. Phila., etc., R. R. Co.,* 153 Pa. St. 160. In some states the English rule has been adopted by statute, but the courts have required the complainant to proceed without unreasonable delay, and where this was not done, have estimated upon the basis of the value at the time of conversion. *Fargo First Nat. Bk. v. Minn. Elevator Co.,* 8 N. Dak. 430.

The case of *Romaine v. Allen, supra,* opened the eyes of the New York courts to the dangers of the English rule. In that case the trial was a protracted one before a referee, and the stock, which was worth $3,937.50 at the time of conversion, rose to $8,175 during the course of the trial. This was allowed by the referee as damages. When the subject came again before the Court of Appeals in *Baker v. Drake,* 53 N. Y. 211, 217, the decision in *Romaine v. Allen* was reversed, and the now prevailing rule adopted. This was subsequently reaffirmed in *Wright v. Bank of Metropolis,* 110 N. Y. 237, and by the Federal Supreme Court in *Galigher v. Jones,* 129 U. S. 193. The rule in these cases, and as it is more clearly stated by the Connecticut court, is now adopted by the majority of the states. *Citizens' St. Ry. Co. v. Robbins,* 144 Ind. 671; *Dimock v. U. S. Nat. Bk.,* 55 N. J. L. 296; *Ralston v.Bk.,* 112 Cal. 208. Although severely criticized by Mr. Sedgwick in his work on Damages, it has the advantage of affording the complainant a just and equitable relief without either giving him the opportunity to speculate upon his damages upon one hand, or on the other, of imposing a harsh and excessive punishment upon the debtor. *Sedgwick, Damages,* sec. 508, *et seq.* Where the stock has not advanced, under the prevailing rule, the complainant can obtain only nominal damages. *Taussig v. Hart,* 58 N. Y. 425.

It is interesting to note that the Connecticut court held it necessary to plead as special damage the fact that the stock had risen in value between the time of conversion and the time when it might have been replaced, and would not allow proof of that fact to be admitted under the general claim for damages.

DISCRIMINATION IN THE TAXATION OF STATE AND NATIONAL BANKS.

The question has several times arisen of what constitutes discrimination in the taxation of state and national banks, under *U. S. Rev. St.,* Sec. 5219, which exempts all the property of national banks, not including real estate within the taxing state; but provides for the taxation of the stock of such banking corporations, further providing that the stock shall not be taxed at a greater rate

than other moneyed capital in the hands of the individual citizens of the state.

It may be laid down as an established rule that the mere fact that different systems of taxation are applied to state and to national banks does not of itself constitute discrimination under the statute, *Nevada Nat. Bank v. Dodge,* 119 Fed. 57; *Davenport Nat. Bank v. Board of Equalization,* 123 U. S. 83. All that the statute requires is that the national banks be not unjustly discriminated against; they need not be taxed in the same manner. *Davenport Nat. Bank v. Board of Equalization, supra.* It has also been held that a statute imposing taxes on bank shares and requiring the assessment of such shares to be made at their market value, without making any deduction on account of the real estate owned by the bank, is not discriminative. *Peo. Nat. Bank v. Marye,* 107 Fed. 570. This case further holds that the statutes of a state permitting a taxpayer to deduct the amount of his indebtedness from the amount of all bonds, notes and other evidences of debt which he is required to return for taxation does not render the assessment of national bank shares at their market value, without allowing the holder to deduct his indebtedness, an unlawful discrimination against such shares, and in favor of other moneyed capital.

Another phrase of the question has lately been passed upon in *San Francisco Nat. Bank v. Dodge,* 25 Sup. Ct. 384, where the discrimination grew out of the method of assessing the property. The statutes of California require that all taxable property shall be assessed "at its full cash value" and that the terms "value" and "full cash value" shall be construed to mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor. This, it was maintained, required the assessment of stock at its market value. It was also claimed that market value was made up of all the property of the banks including franchises, the prospective earning capacity, and the skill of the officers in the management of the company; that an arbitrary reduction in valuation by the assessor constituted a discrimination, as in *Bank of Cal. v. San Francisco,* 142 Cal. 276, where under statutory provisions the franchise was to be valued by deducting the value of the tangible property from the market value of the shares of stock. The discrimination, it was urged, lay in a resulting failure to include prospective earning capacity and the skill of the officers. The court in the principal case was of the opinion that such reduction was discrimination within the meaning of the federal statute, as the taxing of the shares of stock of the national banks at market value included the entire difference between the value of the tangible property and the selling price of the stock, as well as the actual value of all tangible property.

The strong dissenting opinion rendered by Justice Brewer and concurred in by three other justices seems to be more in harmony with the liberal construction shown by the cases first cited. It maintains that the value of the stock depends upon that of the property, that if a fair valuation were placed upon the latter—which was not denied in this case—there was no violation of the federal

statute, and that the court could not inquire into the method of reasoning by which the assessor had reached the value of the franchise, it being admitted to have been done in good faith. *Pol. Code of Cal.*, Sec. 3608, it may be remarked, declares that shares of stock have no intrinsic value over and above the actual value of the property of the corporation, which they represent.

THE RIGHT OF PRIVACY.

A question of law comparatively new in the American courts, and one wholly unsettled, is that involving what has been termed the right of privacy, the right to be let alone. The sentiment in favor of this right had its first substantial expression in 1890, during which year there appeared in Scribner's Magazine for July an article entitled "The Rights of the Citizen to his Reputation", by E. L. Godkin, Esq., an extended discussion on the "Right to Privacy" in IV *Harv. L. R.* 193, and the case of *Manola v. Stevens* (not reported) in which the Supreme Court of New York enjoined the defendant from making and issuing photographs surreptitiously taken of the plaintiff. In *Schuyler v. Curtis,* 15 N. Y. Supp. 787 (1891), the relatives of Mrs. George Schuyler, the deceased, secured an injunction restraining the defendant from proceeding with a project to make and exhibit a statue of the deceased, the court holding that the granting of an injunction is not limited to a case where damages could be recovered at law. In 1895 this case came before the New York Court of Appeals and the judgment was reversed on the ground no right of privacy survives so that it can be enforced by relatives. 147 N. Y. 434. In a case arising in Michigan where a widow brought an action to restrain the defendant manufacturer from using the name and picture of her deceased husband on cigar labels, the court held that this was an injury which the law could not redress. *Atkinson v. Doherty,* 121 Mich. 373. So in the United States Circuit Court in a suit brought by the widow and children of George H. Corliss to enjoin the defendant publishers from printing and selling the picture of Mr. Corliss, it was held that the jurisdiction of equity to grant injunctions, being founded on rights of property, did not extend to a matter affecting an exclusively personal right. *Corliss v. Walker,* 64 Fed. 280.

It may be noted that in none of these cases was the action brought by the person whose right of privacy had been invaded, but in the case of *Roberson v. Folding Box Co.,* 71 N. Y. Supp. 876 (1901) the action was brought by the person injured and the question was squarely presented to the court for decision. In this case it appeared that lithographed likenesses of a young woman, bearing the words "Flour of the Family," were, without her consent, printed and used by a flour milling company to advertise its goods. The court gave judgment for the plaintiff, holding that if a property right was necessary to entitle the plaintiff to maintain the action, the case might stand upon the right of property which every one has in his own body. This case was carried to the Court of Appeals in 1902 and the judgment was reversed. 171 N. Y. 540. The decision was rendered by a divided court, Judge Gray, with

whom two associate judges concurred, filing a dissenting opinion. This decision, finally establishing, as the rule in New York, that the right of privacy does not exist, called forth considerable comment in legal publications throughout the country, many of which approved the conclusions reached in the minority opinion. 36 *Am. Law* 634; 12 *Yale L. J.* 35.

In view of the doubtful existence and final defeat of the right of privacy in New York, and the denial of the right in other jurisdictions, much interest attaches to the recent case of *Pavesich v. The New England Life Insurance Co.*, 50 S. E. 68, in which the Supreme Court of Georgia clearly recognizes that right and grants relief against the defendant company, which was, without his consent, using the plaintiff's name and picture, to advertise its business. The court proceeded on the theory that "a right of privacy is derived from natural law, recognized by municipal law, and its existence can be inferred from expressions used by commentators and writers on the law, as well as judges in decided cases," and that "the right of privacy is embraced within the absolute rights of personal security and personal liberty."