# YALE LAW JOURNAL

*Subscription price, $4.50 a year* *Single copy, 80 cents*
*Canadian subscription price is $5.00 a year; foreign $5.25 a year.*



*YALE LAW JOURNAL COMPANY, INC., Box 401A, Yale Station, New Haven, Conn.*
*Publication Office, P. O. Box 1844, New Haven, Conn.*

## REVIEW BY THE SUPREME COURT OF CASES ARISING UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

THE Federal Employers' Liability Act [1] was designed to provide railroad workers with a possibility of obtaining compensation for injuries sustained in interstate commerce free from the incubus of the defenses allowed employers by the common law.[2] It abolished the historic fellow servant rule; it established the doctrine of "comparative negligence" [3] in place of the defense of contributory negligence; and it eliminated from the risks

1. 35 STAT. 65 (1908), 45 U. S. C. § 51 (1926).

2. SEN. REP. 432, 61st Cong. 2d Sess., March 22, 1910, p. 2. See Brandeis, J., dissenting in New York Central Ry. Co. v. Winfield, 244 U. S. 147, 164 (1916): "The common law liability for fault was to be restored by removing the abuses which prevented its full and just operation. The liability of the employer under the federal act as at common law, is merely a penalty for wrong doing."

3. The doctrine that each litigant shall be penalized to the extent of his own negligence was early adopted in Illinois (Galens and Chicago Union Ry. Co. v. Jacobs, 20 Ill. 478 (1858)) and Georgia (Macon and Western Ry. Co. v. Davis, 18 Ga. 679 (1855)).

a worker might assume those dangers arising from the use of machinery disapproved by the Safety Appliance Act.[4] In addition, both the state and federal courts were made available for suits under the statute and railroad workers were apparently assured the opportunity to sue in state courts without fear of removal, by provision that a case could not be removed from state to federal court for diversity of citizenship. The state courts were to administer the act as interpreted by the United States Supreme Court. "One uniform rule of liability in all the states" was to result.[5]

The present study is based upon the relevant decisions of the Supreme Court from October Term 1925 through October Term 1931, and upon those decisions of the state courts in which application for certiorari was denied during the same period. The Supreme Court of the United States during this period reviewed forty-two decisions of state courts on certiorari proceedings.[6] Of these, thirty-seven were reversed and five affirmed. Eleven cases, of which ten were reversed, were appealed on the basis of the minor defenses allowed under the statute.[7] In thirty-one of the cases the defense was based upon assumed risk or insufficiency of evidence of negligence on the part of the railroad company, and of this group, four judgments for the plaintiff were affirmed.[8] The remainder were reversed on the ground that evidence of assumed risk was so strong,[9] or proof of the

4. 27 STAT. 531 (1893), 45 U. S. C. § 1 (1926).

5. ROBERTS, INJURIES TO INTERSTATE EMPLOYEES (1915) 38.

6. Over the same period, opinions were written in only two cases in which jurisdiction was taken on certiorari to the lower federal courts. The case of Chicago and Eastern Illinois Rr. Co. v. Industrial Commission, 284 U. S. 296 (1932), is not considered in this study. In that case the Supreme Court affirmed a judgment for plaintiff under the Illinois' Workmen's Compensation Act, deciding that the plaintiff was engaged in intrastate commerce and therefore the state and not the federal act was applicable.

7. Statute of limitations: Reading Ry. Co. v. Koons, 271 U. S. 58 (1926); Baltimore, Ohio and Southwestern Ry. v. Carroll, 280 U. S. 491 (1930); Flynn v. New York, New Haven and Hartford Ry. Co., 283 U. S. 53 (1931) (state court judgment for plaintiff affirmed). Interstate commerce: Chicago and Northwestern Ry. v. Bolle, 284 U. S. 74 (1931); New York, New Haven and Hartford v. Bezue, 284 U. S. 415 (1932). Survival of cause of action: Chicago, Baltimore and Quincey Ry. Co. v. Wells-Dickey Trust Co., 275 U. S. 161 (1927). Computation of damages: Gulf, Colorado and San Francisco Ry. Co. v. Moser, 275 U. S. 133 (1927). Petition for writ of prohibition to prevent state court from taking jurisdiction of Employers' Liability case: Denver and Rio Grande Ry. v. Terte, 284 U. S. 284 (1932). Validity of release signed by employee: Mellen v. Goodyear, 277 U. S. 335 (1928). Misconduct of counsel in trial of case: Minneapolis, St. Paul Ry. Co. v. Moquin, 283 U. S. 520 (1931). Fraud in procurement of position: Minneapolis, St. Paul Ry. Co. v. Rock, 279 U. S. 410 (1929).

8. Minnesota, St. Paul Ry. Co. v. Goneau, 269 U. S. 406 (1926); Western and Atlantic Ry. Co. v. Hughes, 278 U. S. 496 (1929); New York Central Ry. Co. v. Marconi, 281 U. S. 345 (1930); Texas and Pacific Ry. Co. v. Guidry, 280 U. S. 531 (1930).

9. Assumed risk was recognized as a complete defense in eight cases: Chesapeake and Ohio Ry. Co. v. Nixon, 271 U. S. 218 (1926); Toledo, St. Louis

company's negligence so weak[10] that a verdict should have been directed for the railroad company. The cases were taken from the highest courts of appeal of nineteen states.

I. CASES IN WHICH CERTIORARI WAS GRANTED

| State | Judgment for Plaintiff in Trial Court | Affirmed by State Court of Appeal | Affirmed by United States Supreme Court | Reversed by United States Supreme Court | Judgment for Defendant in State Courts | Affirmed by United States Supreme Court |
|---|---|---|---|---|---|---|
| Arkansas | 1 | 1 | | 1 | | |
| Connecticut | | | | | 1 | 1 |
| Georgia | 1 | 1 | 1 | | | |
| Illinois | 2 | 2 | | 2 | | |
| Indiana | 1 | 1 | | 1 | | |
| Kansas | 2 | 2 | | 2 | | |
| Kentucky | 1 | 1 | | 1 | | |
| Minnesota | 5 | 5 | 1 | 4 | | |
| Missouri | 5 | 5 | | 5 | | |
| Mississippi | 1 | 1 | | 1 | | |
| New Jersey | 3 | 3 | 1 | 2 | | |
| New York | 2 | 2 | | 2 | | |
| North Carolina | 2 | 2 | | 2 | | |
| Ohio | 1 | 1 | | 1 | | |
| Pennsylvania | 1 | 1 | | 1 | | |
| South Carolina | 8 | 8 | | 8 | | |
| Texas | 3 | 3 | 1 | 2 | | |
| Virginia | 1 | 1 | | 1 | | |
| West Virginia | 1 | 1 | | 1 | | |
| Totals | 41 | 41 | 4 | 37 | 1 | 1 |

Ry. v. Allen, 276 U. S. 165 (1928); Chesapeake and Ohio Ry. Co. v. Leitch, 276 U. S. 429 (1928); Delaware and Lackawanna Ry. Co. v. Koske, 279 U. S. 7 (1929); New York Central Ry. Co. v. Ambrose, 280 U. S. 486 (1930); Chesapeake and Ohio Ry. Co. v. Kuhn, 284 U. S. 44 (1931); Missouri Pacific Ry. Co. v. David, 284 U. S. 460 (1932); Tyner v. Atlantic Coastline Ry. Co., 278 U. S. 565 (1929). The last case was reversed in a memorandum opinion on the authority of Chesapeake and Ohio Ry. Co. v. Leitch, *supra*, and Chicago, Milwaukee and St. Paul Ry. v. Coogan, 271 U. S. 472 (1926). A dissent was filed in the lower court on the ground that the plaintiff should be held to have assumed the risk and that the evidence of negligence was insufficient. In citing the Leitch case and the Coogan case as its authority for the reversal, the court apparently relied upon both grounds.

10. Twenty cases were reversed because of failure of proof of negligence or of proximate cause: Chicago, Milwaukee and St. Paul Ry. Co. v. Coogan, 271 U. S. 472 (1926); Atlantic Coastline Ry. Co. v. Southwell, 275 U. S. 64 (1927); Missouri Pacific Ry. Co. v. Alby, 275 U. S. 426 (1928); Gulf, Mobile and Northern Ry. v. Wells, 275 U. S. 455 (1928); Unadilla Valley Ry. Co. v. Caldine, 278 U. S. 139 (1929); Atlantic Coastline Ry. Co. v. Davis, 279 U. S. 34 (1929); Chesapeake and Ohio Ry. Co. v. Stapleton, 279 U. S. 587 (1929); Atlantic Coastline Ry. Co. v. Driggers, 279 U. S. 787 (1929); Atlanta and Charlotte Ry. Co. v. Green, 279 U. S. 821 (1929) (memorandum opinion citing

It will be seen that seven cases were taken from the so-called northeastern states. Of this number two were affirmed, one for plaintiff[11] and one for defendant.[12] The latter was the only decision of the entire group of 42 cases in which judgment was entered for the defendant in the state courts. The remaining thirty-five were brought up from states where juries and courts are reputedly hostile to railroad companies. In this group only three judgments were allowed to stand.[13]

The Supreme Court dealt with these cases summarily. Each case was considered in the light of its own facts. Conventional concepts were the basis of decision; no dissents were filed. The purpose of a number of these decisions is evident. Some were cases where the railroads were clearly treated unfairly.[14] A few were cases where the state courts had set precedents which might have proved harmful had they been allowed to stand.[15] But the opinions in the remainder showed no such reasons for the Court's action in granting certiorari or in reversing and remanding to the state court. The decisions generally, therefore, do not indicate whether the Supreme Court is using its power of review to accomplish a uniform administration of the statute, or merely to defeat injustice in particular cases.

It would be natural to expect a high degree of similarity in the administration of the Act by the state courts, and in its administration by the Supreme Court. Identical substantive rules of law operate and the same precedents apply. The construction of the Act by the Supreme

---

Chicago, Milwaukee and St. Paul Ry. Co. v. Coogan); Chesapeake and Ohio Ry. Co. v. Mihas, 280 U. S. 102 (1929); Santa Fe Ry. Co. v. Toops, 281 U. S. 351 (1930); Atlantic Coastline Ry. Co. v. Powe, 283 U. S. 401 (1931); Denver and Rio Grande Ry. v. Terte, 284 U. S. 284 (1932); Atchison, Topeka and Santa Fe Ry. Co. v. Saxon, 284 U. S. 458 (1932); Southern Ry. Co. v. Moore, 284 U. S. 581 (1932); Atlantic Coastline Ry. Co. Temple, 285 U. S. 143 (1932); Southern Ry. v. Youngblood, 286 U. S. 313 (1932); Baltimore, Ohio and Southwestern Ry. Co. v. Berry, 286 U. S. 272 (1932); Southern Ry. Co. v. Dantzler, 286 U. S. 318 (1932); St. Louis and Southwestern Ry. Co. v. Simpson, 286 U. S. 346 (1932); *cf.* Toledo, St. Louis Ry. v. Allen, 276 U. S. 165 (1928) (reversed also for lack of evidence of negligence, *supra* note 9).

11. New York Central Ry. Co. v. Marcone, 281 U. S. 345 (1930).

12. Flynn v. New York, New Haven and Hartford Ry. Co., 283 U. S. 53 (1931).

13. Minnesota, St. Paul Ry. Co. v. Goneau, 269 U. S. 406 (1926); Western and Atlantic Ry. Co. v. Hughes, 278 U. S. 496 (1929); Texas and Pacific Ry. Co. v. Guidry, 280 U. S. 531 (1930).

14. As in Atlantic Coastline Ry. Co. v. Southwell, 275 U. S. 64 (1927) where a workman was killed in a fight which occurred on company property. See also Mellon v. Goodyear, 277 U. S. 335 (1928); Minneapolis, St. Paul and Sault Ste. Ry. Co. v. Rock, 279 U. S. 410 (1929).

15. See Gulf, Colorado and San Francisco Ry. Co. v. Moser, 275 U. S. 133 (1927) where the state court had departed materially from the prescribed method of computing the damages. In Reading Co. v. Koons, 271 U. S. 58 (1926) the action was brought over seven years after the employee's death. The state court allowed a recovery on the ground that the statute of limitations did not begin to run until after the appointment of the administrator.

Court was supposed to avoid the possibility that the liability of interstate carriers would become a matter of "geography of the states and not of one supreme law applying uniformly within its exclusive domain." [16] But the state courts in the decisions included in this study: *i.e.*, those in which application for certiorari was granted (Figure I) or denied (Figure II), display an attitude antithetic to that of the United States Supreme Court.

II. CASES IN WHICH CERTIORARI WAS DENIED

| *State* | *Total Number of Cases* | *Found for Plaintiff in Trial Court* | *Affirmed by State Supreme Court* | *Reversed by State Supreme Court* | *Found for Defendant in Trial Court* | *Affirmed by State Supreme Court* |
|---|---|---|---|---|---|---|
| Alabama | 9 | 9 | 9 | | | |
| Arkansas | 9 | 9 | 9 | | | |
| California | 3 | 3 | 3 | | | |
| Colorado | 1 | 1 | 1 | | | |
| Connecticut | 2 | 2 | 2 | | | |
| Georgia | 3 | 2 | 2 | | 1 | 1 |
| Illinois | 6 | 6 | 4 | 2 | | |
| Indiana | 5 | 5 | 5 | | | |
| Kansas | 4 | 4 | 4 | | | |
| Kentucky | 2 | 2 | 2 | | | |
| Michigan | 2 | 2 | | 2 | | |
| Minnesota | 4 | 4 | 2 | 2 | | |
| Mississippi | 5 | 4 | 3 | 1 | 1 | 1 |
| Missouri | 24 | 24 | 21 | 3 | | |
| Nebraska | 1 | 1 | 1 | | | |
| New Hampshire | 1 | 1 | 1 | | | |
| New Jersey | 6 | 5 | 4 | 1 | 1 | 1 |
| New York | 5 | 5 | 5 | | | |
| North Carolina | 6 | 6 | 6 | | | |
| Ohio | 1 | 1 | 1 | | | |
| Oklahoma | 5 | 5 | 5 | | | |
| Oregon | 1 | 1 | 1 | | | |
| Pennsylvania | 7 | 4 | 1 | 3 | 3 | 3 |
| South Carolina | 6 | 6 | 5 | 1 | | |
| Texas | 15 | 15 | 15 | | | |
| Virginia | 1 | 1 | | 1 | | |
| Washington | 1 | 1 | 1 | | | |
| West Virginia | 3 | 3 | 3 | | | |
| Wisconsin | 1 | 1 | 1 | | | |
| Wyoming | 1 | 1 | 1 | | | |
| Totals | 140 | 134 | 118 | 16 | 6 | 6 |

In the 182 cases studied (Figures I and II), twenty-three plaintiffs applied for certiorari. Only one, however, was granted a review by the Supreme Court.[17] Applications for writs were filed by the railroad in 159 cases over the same period, 41 of which were granted. It must be

16. ROBERTS, *op. cit. supra* note 5, at 38.

17. Flynn v. New York, New Haven and Hartford Ry. Co., *supra* note 12.

assumed that the 159 cases which the railroad appealed from the state courts were those in which the railroad believed it had the best chance for a reversal. But regardless of the possible merit of the railroad's case, the fact remains that of the cases in which the Supreme Court took jurisdiction, the state courts decided for the railroad in only 2%, while the Supreme Court decided for the railroad in 90%.[18]

The abolition of the fellow servant rule has had a negligible effect upon the decisions of the Supreme Court. The Court has merely invoked the defense of assumed risk to serve the same purpose for which the fellow servant rule formerly was used.[19] Indeed, it is difficult to discern a justification for abolishing the one defense and retaining the other. Before the passage of the statute, they were so completely interdependent that to throw aside the one and keep the other was almost self-contradictory.[20] The servant undertook the performance of his contract on the assumption that the master would not be responsible for the negligent acts of certain of his fellow servants. He was said to have assumed the risk of such negligence as well as other risks of his employment. Today in the Supreme Court, he is held to have assumed all of the ordinary and many of the extraordinary risks of his employment.[21] The facts of the cases indicate that these include acts of his fellow servants, although no exact delimitation can be made of the extent to which the abolition of the fellow servant rule decreased the list of risks which an employee assumes. Eight

18. If it be assumed that denial of certiorari should be treated as affirmance of the state decision for this purpose, it nevertheless appears that the Supreme Court decided for the railroad in 33% of the cases, while the state courts decided for the railroads in 13%.

19. HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY ON H. R. 239 (1906). A representative of the railway employees urged the injustice of a hypothetical case where "A" an injured passenger was allowed to recover for injuries caused by the negligence of the engineer where "B" a conductor on the same train would be precluded from recovery by the fellow servant rule. The Supreme Court in Chicago and Milwaukee Ry. Co. v. Ross, 112 U. S. 377 (1884) refused to apply the fellow servant rule to a kindred situation where the engineer brought suit to recover for the negligence of the conductor. In a later case, Baltimore and Ohio Ry. Co. v. Baugh, 149 U. S. 368 (1893) the Court applied the fellow servant rule and held that a fireman could not recover for the negligence of the engineer. Since the passage of the Employers' Liability Act numerous decisions have held that employees assume the risks of the negligence of the engineer. Chesapeake and Ohio Ry. Co. v. Nixon, 271 U. S. 218 (1926); Atlantic Coastline Ry. Co. v. Driggers, 279 U. S. 787 (1929).

20. "Both fellow servants" stated Baron Alderson in Priestly v. Fowler, 3 M. & W. 1 (1837) "have engaged in a common service the duties of which impose a certain risk on each of them, and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow servant and not of his master. . . . The servant knew when he accepted his position that there might be a want of due care on the part of his fellow, and he must be supposed to have contracted on the terms that, as between himself and his master, he would run the risk, a risk which he must be taken to have agreed to run when he entered into the defendant's services."

21. Delaware, Lackawana and Western Ry. Co. v. Koske, 279 U. S. 7 (1929).

of the thirty-seven cases reversed by the Supreme Court were based upon error of the trial court in failing to direct a verdict for the defendant on the basis of the evidence that the plaintiff had assumed the particular risk of his employment.

In the state courts there is no dissension from the Supreme Court on premises. All agree that the employee assumes the ordinary risks of his employment,[22] the "simple tool doctrine" [23] is recognized, and homage is paid in dicta to the necessity of a directed verdict where the evidence shows conclusively that the plaintiff assumed the risks.[24] These doctrines, however, were used by state courts to reverse a trial court judgment in favor of the plaintiff in only 6 of the 182 cases included in this study.

The Act allows recovery only where the negligence of the company is proved as the proximate cause of the injury.[25] Thus it is clear that where the negligence of the plaintiff is the whole cause of the accident,[26] or where the plaintiff fails to prove the existence of the company's negligence[27] and the direct causal connection of such negligence with the injury,[28] no recovery can be had. In the Supreme Court, in twenty of the thirty-seven cases reversed, the reversal was based in whole or in part upon the trial court's error in failing to direct a verdict for the defendant on the ground that proof of negligence or of proximate cause was insufficient. But it would seem that in some of these cases, to say that there was a failure to prove proximate cause was merely another way of stating that plaintiff was contributorily negligent.[29] In the state courts the question was raised in a great majority of the cases, but in only eight instances were reversals grounded upon such error.

---

22. The validity of the defense of assumed risk is, of course, not open to question. The courts simply hold that it is a question for the jury, and upon such a basis the judgments are usually affirmed. Chesapeake and Ohio Ry. Co. v. Russo, 163 N. E. 283 (Ind. App. 1928); Berry v. St. Louis and San Francisco Ry. Co., 324 Mo. 775, 26 S. W. (2d) 988 (1930). In Denver and St. Louis Ry. v. Lombardi, 87 Colo. 311, 287 Pac. 648 (1930) it was held that plaintiff assumed the risk of dangers incident to his employment in the vicinity of a mass of stones, but that he did not assume the risk of negligence of the fellow servant who caused the stones to fall upon him.

23. None of the cases reversed was so decided because of the applicability of this doctrine. Consult Crouch v. Missouri Pacific Ry. Co., 128 Kan. 26, 276 Pac. 81 (1929); Jackson v. Chicago Great Western Ry. Co., 165 Minn. 58, 205 N. W. 689 (1925).

24. McGary v. Central Ry. Co., 105 N. J. Law 590, 147 Atl. 472 (1929).

25. Atlantic Coastline Ry. Co. v. Driggers, *supra* note 14.

26. As in Baltimore and Ohio Ry. Co. v. Berry, 286 U. S. 272 (1932); *cf.* Southern Ry. v. Youngblood, 286 U. S. 313 (1932).

27. Chicago, Milwaukee and St. Paul Ry. Co. v. Coogan, 271 U. S. 472 (1926).

28. Chesapeake and Ohio Ry. Co. v. Mihas, 280 U. S. 102 (1929).

29. Thus, in Southern Ry. Co. v. Youngblood, *supra* note 26, a conductor's disobedience of orders was held to be the proximate cause of the injury, and his administratrix was not allowed to recover for his death. The Supreme Court of South Carolina (164 S. E. 431) held the company liable for negligence

These divergences between the Supreme Court and the state courts have induced the railroads to consider the Supreme Court as the ultimate court of appeal in all cases arising under the Act. The fact that applications for writs of certiorari in 159 out of 182 cases were made by the railroads is graphic evidence that so far as the companies are concerned, jurisdiction of employers' liability litigation is still vested in a federal court. One of the most practical benefits intended by the Act is thus impaired. By the anti-removal clause the employee was to have untroubled access to the state courts which were reputed to be more sympathetic to his cause of action, and in which he could bring his suit with less expense than in the federal courts.[30] But the attitude of the Supreme Court toward these cases and the consequent possibility of securing reversals of the large verdicts for plaintiffs make it profitable for the railroads to make a practice of applying for a writ. The road to final adjudication is thus made longer and more expensive than it was before the Act, with the added probability that should the employee's case reach the Supreme Court, he will lose. These facts have furnished the railroads a powerful weapon by which they may force disadvantageous settlements from their employees.[31]

## BITUMINOUS COAL AND THE SHERMAN ACT—UNITED STATES v. APPALACHIAN COALS, INC.

THE first case decided under the Sherman Act involved the dissolution of an association of bituminous coal dealers who were fixing prices through the medium of a selling agency.[1] The year 1899 witnessed the issuance

---

of its servants in failing to deliver certain orders of departure to the plaintiff's intestate. The Supreme Court of the United States admitted the existence of the negligence, but refused to recognize its casual connection with the injury. *Cf.* Baltimore and Ohio Ry. Co. v. Berry, *supra* note 26; Great Northern Ry. Co. v. Wiles, 240 U. S. 444 (1916).

30. See Hulac v. Chicago and Northwestern Ry. Co., 194 Fed. 747 (D. Neb. 1912): "It is a well recognized fact in judicial history that plaintiffs, in actions brought by employees against railway companies for damages resulting from personal injuries, have quite generally and for many years sought to bring and retain their actions in the state courts, and the fact is well attested by the multitude of applications to remand such cases which have been constantly presented to the federal courts. The expense of trials and appeals in the federal courts have been deterrents, and the variance in the rules of law in such cases has also been well understood."

31. No attempt has been made in this paper to discuss the theoretical merits or practical disadvantages of a Federal Employers' Liability Act. However, one conclusion seems to follow from the facts and figures adduced. Whether substantive definition of the employer's liability is entrusted to State or to Federal legislative bodies, administration should be vested finally and exclusively in state agencies.

1. United States v. Jellico Mountain Coal and Coke Co., 46 Fed. 432 (C. C. M. D. Tenn. 1891).

of an injunction against a similar combination of coal operators,[2] and four years later a group of independent individuals and corporations engaged in mining coal in Kentucky and West Virginia, who had agreed to sell their combined product at not less than a minimum price to be fixed by an executive committee appointed by the producers, was held likewise to be a combination in restraint of interstate commerce.[3] These early decisions were prophetic not only of the fate of future attempts to organize the bituminous field,[4] but also of the rock on which they were to founder. Through the blurring of concepts and issues that accompanies the "judicial process of inclusion and exclusion" there has persisted consistently the principle that the ultimate essence of the competition required by the Sherman Act is the establishment of prices by the free interplay of supply and demand.[5] Whatever judgment be made of the success of the Sherman Act, certain it is that judicial interpretation of the anti-trust law has had the effect of legalizing almost any degree of corporate concentration of economic power where certain formalities are observed.[6] The programs of loose-knit combinations have been scanned more vigilantly, but recent cases reveal increasing latitude in permitting exchange of vital information among members and more charity in interpreting coincidence of prices.[7] Clearly the courts, posed with the problem of maintaining a régime

2. United States v. Coal Dealers' Ass'n of California, 85 Fed. 252 (N. D. Cal. 1898).

3. Chesapeake & Ohio Fuel Co. v. United States, 115 Fed. 610 (C. C. A. 6th, 1902).

4. Chicago, W. & V. Co. v. People, 214 Ill. 421, 73 N. E. 770 (1905) (combination between independent producers of coal held common law conspiracy). Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173 (1871) (five coal companies in Virginia agreed to divide two coal regions of which they had control and to market exclusively through a common selling agent). Pocohontas Coke Co. v. Powhatan Coal and Coke Co., 60 W. Va. 508, 56 S. E. 264 (1906).

5. The decision in United States v. Trenton Potteries, 273 U. S. 392 (1926) brings the law of United States v. Trans-Missouri Freight Association, 166 U. S. 290 (1896) down to the present. For exhaustive analysis of this question, see Note (1932) 32 COL. L. REV. 291; Oliphant, *Trade Associations and the Law* (1926) 26 COL. L. REV. 381; remarks of Sharfman on The Anti-Trust Act of 1890 and Trade Associations in HANDLER, THE FEDERAL ANTI-TRUST LAWS——A SYMPOSIUM (1932) 93.

6. *Cf.* United States v. U. S. Steel Corporation, 251 U. S. 417 (1920) (50% control); United States v. United Shoe Machinery Co., 247 U. S. 32 (1918) 95% control); FETTER, MASQUERADE OF MONOPOLY (1931) 362; KEEZER AND MAY, PUBLIC CONTROL OF BUSINESS (1930) 55; Bell, *Rule of Unreason in Restraint of Trade Cases* (1926) 12 VA. LAW REG. 129. See WATKINS, INDUSTRIAL COMBINATIONS AND PUBLIC POLICY (1927) 258.

7. *Cf.* United States v. American Linseed Oil Co., 262 U. S. 371 (1928); American Column and Lumber Co. v. United States, 257 U. S. 377 (1921) and Cement Manufacturers Protective Association v. U. S., 268 U. S. 588 (1925); Maple Flooring Mfrs. Ass's v. U. S., 268 U. S. 563 (1925). These are discussed in Oliphant, *op. cit. supra* note 5. For an account of how these plans may be used to fix prices see Probst, *Failure of the Sherman Anti-Trust Law* (1926) 75 U. OF PA. L. REV. 122. In the later cases, the Court held that the government had

of competition while at the same time permitting to members of combinations those advantages of expert research facilities and long time schedules, which in the case of mergers have secured productive efficiency, technical progress and lower prices, are now ready to forgive much in the way of close cooperation [8] if they are not asked to surrender overtly the ultimate pearl of competitive price-fixing.[9] Returning good for good, business men have lately permitted to fall into disuse the formerly popular method of limiting production, fixing prices and eliminating competition by the device of a common selling agency,[10] and those desiring to achieve the same result have preferred to rely upon informal understandings or gentlemen's agreements.[11]

It is therefore surprising to find the employment of the hoary selling agency plan in the most recent attempt to bring order into the sorely chaotic field of bituminous coal. Appalachian Coals, Inc., a corporation organized by 137 producers of the Virginia, West Virginia, Tennessee and Kentucky fields to market exclusively and to fix the price at which all their coal should be sold, was part of a contemplated scheme of regional coal-selling agencies, each of which was to handle in the same manner the coal produced in a field characterized by common competitive conditions. A three

---

not proved that price fixing disguised by ostensible dissemination of trade information was being practiced.

8. It is categorically declared in the cases that not exercise of the power, but merely potential control of prices, constitutes the illegal element in restrictive agreements. Trans-Missouri Freight Association v. United States, *supra* note 5; Addyston Pipe & Steel Co. v. U. S., 85 Fed. 271 (C. C. A. 6th, 1898), *affd*, 175 U. S. 211 (1899); Thomsen v. Cayser, 243 U. S. 66 (1916); Swift v. United States, 196 U. S. 375 (1905); American Column & Lumber Co. v. United States, *supra* note 7; United States v. American Linseed Oil Co., *supra* note 7. See Board of Trade of City of Chicago v. U. S., 246 U. S. 231, 238 (1918). The trend may be seen further in United States v. National Association of Window Glass Manufacturers, 263 U. S. 403 (1923) and in Standard Oil Co. (Indiana) v. U. S., 283 U. S. 163 (1930), both discussed in Jones, *Historical Development of Law of Business Competition* (1926) 36 YALE L. J. 207; Notes (1932) 45 HARV. L. REV. 566; (1931) 31 COL. L. REV. 1049; (1931) 40 YALE L. J. 1297.

9. This position is taken definitively by the court, in Trenton Potteries Co. v. United States, *supra* note 5, by Mr. Justice Stone, who also wrote the opinions in Maple Flooring Manufacturing Association v. United States, and Cement Manufacturers Protective Association v. United States, both *supra* note 7.

10. The illegal status of the selling agency device was established as early as 1909 in Continental Wall Paper Manufacturing Co. v. Voight & Sons, 212 U. S. 227 (1909).

11. MCLAUGHLIN, CASES ON THE FEDERAL ANTI-TRUST LAWS (1930) 310; Probst, *op. cit. supra* note 7. See 1 F. T. C. Report on Home Furnishing Industry (1923). The success of this policy is illustrated in the field of bituminous by the case of Commonwealth v. Hatfield Coal Co., 193 Ky. 229, 235 S. W. 722 (1921), in which a corporation engaged in mining, shipping and selling coal, which sent out from time to time to other dealers in coal printed circulars containing price lists of various qualities of coal sold by it, and such other information as would indicate changes in price of the coal handled by it, was absolved of the charge of fixing prices.

judge district court held the proposed combination illegal as restraining interstate commerce in violation of the Sherman Act.[12] The only novelty in this combination was its unprecedented magnitude; the chastened spirit in which the decision was handed down, however, marks the passing of an epoch.

To a court ruling upon the validity of similar combinations of the bituminous industry in the first decade after the enactment of the Sherman law,[13] it was axiomatic that the self-regulating mechanism of the competitive system could be depended upon to assure to the public an adequate supply of high-quality products at a reasonable price with the interests of all involved in the industry efficiently cared for.[14] The policy of relying upon competition has been attempted to an unprecedented degree in the field of bituminous. In no basic industry except agriculture has the 20th century movement towards concentration made so little headway.[15] Though thirty producers mine one-third of the total and own more than one-third of the coal reserves,[16] their holdings are scattered, and the largest individual operating company produces less than 5% of the annual output of the country.[17] A similar situation exists in the individual producing fields.[18] A survey of the field after the epidemic of bankruptcies attendant upon the current depression has dispelled the hope that deflation of the industry [19] would solve the problem of overdevelopment of mine capacity inherited from War conditions.[20] Drastic reduction in productive capacity, however, has not kept pace with shrinkage in demand. Oil, gas, hydro-

12. United States v. Appalachian Coals, Inc., U. S. Daily, October 6, 1932, at 4 (W. D. Va.). Appeal has been filed with the Supreme Court.

13. See notes 1, 2 and 3, *supra*.

14. For an admirable statement of the theory of the Sherman Act and the manner of its actual operation in the bituminous field see HAMILTON AND WRIGHT, THE CASE OF BITUMINOUS COAL (1925).

15. Several small local combinations have been effected since 1923, but in none of the principal soft coal fields is there yet any single corporation or group of related companies which so dominates the market as to restrict competition and regulate prices. *Supra* note 14, c.l.

16. LAIDLER, CONCENTRATION IN AMERICAN INDUSTRY (1931) 67.

17. Gandy, *Some Trends in the Bituminous Coal Industry*, (1930) 147 ANNALS 84. In 1928 a total of 6,450 mines produced about 525 million tons: less than 100 of these companies providing as much as a million tons apiece and 2,752 producing less than 10,000 tons annually.

18. *Ibid.*

19. Production dropped 73 million tons comparing 1930 with 1929; another 89 million tons contrasting 1931 with 1930; and, to judge by the figures to date, perhaps another 55 million tons for the current year below the 1931 figure. Address of C. E. Bockus, of New York City, President of Clinchfield Coal Corporation and National Coal Association, The Institute of Public Affairs, University of Virginia, Charlottesville, Virginia, July 4, 1932.

20. In the five years prior to 1916 average output was about 440 million tons per year. Under the stimulus of high prices thousands of new mines were opened during and immediately after the war and the old mines were equipped with modern machinery with the result that there was an increase to 502 million tons in 1916, to 552 million in 1917 and to 579 million in 1918. Thus

generated electricity, and improved methods of coal consumption[21] have made serious inroads on the market for bituminous. Consumption of coal in all of the industries which are its largest users has shown not only a marked actual decline but also a substantial decline in its relative position as a source of energy.[22]

The reaction in the bituminous field to the present universal dislocation of business has only served to throw into more lurid relief the lack of coordination which under the present system inevitably pervades the industry. Owing to the seasonal character of the demand for coal,[23] and the virtual impossibility of storing coal at the mine mouth,[24] the industry is forced habitually to operate with an excess capacity of about 730 million tons a year. Though this condition accounts in large measure for prices below cost, further cutting down of equipped and manned mine capacity cannot continue if the industry is to remain in readiness to satisfy legitimate demands.[25] The disastrous effect of imposing competition under these conditions is enhanced by the fact that owing to the inelasticity of the annual demand for coal, sales are not stimulated by a reduction in price and a small excess of coal in the market tends further to depress prices.[26]

---

in three years production increased over 30%. In 1927, 1928, and 1929 there was a capacity to produce 800 million tons and a market for something over 500 million. Improvements in the technique of mining have been an additional factor tending toward overproduction. See LAIDLER, *op. cit. supra* note 16.

21. More efficient use of coal has reduced the fuel consumption of railroads by 32 million tons per annum from 1916 to 1929, and by the electric industries by approximately 47 million tons per annum. Address of Van A. Bittner at a Conference on the Bituminous at Swarthmore College, November 7, 1930.

22. In 1916 the coal industry furnished 72% of the total supply of energy derived from mineral fuels and water power; in 1931 this had dropped to approximately 48%. From 1916 to 1931 the use of natural gas, in supplying such energy had increased from 4% to 9%; oil had increased in use from 10.2% to 26% and water power from 4% to 8.5%. The total displacement of coal by other fuels has amounted to more than 200 million tons of coal per annum. Brief of Defendant, p. 5.

23. It has been estimated by the Bureau of Mines that the rate of consumption of bituminous coal in January is more than 50% greater than the rate of consumption in July. Over this fluctuating consumer's demand, practically no control can be established. Gandy, *op. cit. supra* note 15, at 85.

24. Physical conditions surrounding the mines particularly in the mountainous Appalachian region of the East preclude the offsetting of lack of orders in slack seasons by producing and adding to stocks on hand. Other prohibiting elements are the bulkiness of the commodity which would entail the use of a large storage area if an appreciable effect in equalizing production were to be obtained, the necessity of breaking down sizes and rehandling the coal stored, and the added cost of rehandling, which would make lower grade coal more expensive than newly mined coal. *Ibid.*

25. Production at the rate of 730 million tons a year was required in 1926. In virtue of its position as the basic industrial fuel, capacity to meet such maximum emergency demand must be maintained in the bituminous field. *Ibid.*

26. Another factor tending to disorganize the market is the demand at different seasons for diverse sizes of coal. Since this cannot be satisfied without

Even closing down in off season provides the unhappy operator no avenue of escape from the rigors of competition. Since overhead costs continue, and substantial sums must still be spent in preserving the physical condition of the property, production at a loss persists.[27] Price demoralization is also considerably advanced by the prevalence of the practice of authorizing several different agencies to dispose of the same coal in the same markets, with the result that an artificial pyramiding of supply is obtained in which a given quantity of coal actually competes with itself.[28]

But it is not only the plight of operators, investors [29] and labor [30] which is a matter of concern. Through the effect of this disorganization has been to return immediate dividends to the public in the form of fuel below cost of production, coal is a wasting resource, and the policy which prolongs the distressed condition of the industry places a premium upon its depletion.[31] At present prices only the richest veins can be reached, and it has been estimated that approximately 30% of the coal is thus left in the ground, where it is lost to future use.[32] Prolonging a competitive race in thus denuding a natural resource is obviously an indefensible policy, and no effort is made in the opinion in *Appalachian Coals v. United States* to minimize the fact that the present status of the law is unsuited to every interest involved in the bituminous industry.[33] However, in view of the cooperative practices already established as legal, and the unequivocal character of the scheme employed, a contrary decision would have given full

---

the production of other sizes, those unordered must be sold for what they will bring as distress coal or be lost as demurrage.

27. As a result the operator may be constrained to accept not cost price but cost less the loss involved in closing down.

28. This situation may account for the predeliction of the operators for the selling agency scheme of organization. Choice of this plan is, however, based upon the doubtful assumption that the uneconomic aspects of the industry are exclusively connected with the marketing of coal.

29. In 1925, according to the Income Tax Unit, 2,585 companies reported an aggregate loss of $62,826,452. This was on the basis of a price of $2.06 a ton. By 1928, the price per ton had dropped to $1.80. This was before the recent depression set in. See LAIDLER, *op. cit. supra* note 16, at 66.

30. Because of the excess capacity and irregularity of operation, the bituminous industry ordinarily requires 600,000 men to produce an amount of coal which could readily be produced each year by 300,000 without increasing the average daily output per man. ROCHESTER, LABOR AND COAL (1930) 50. Since 1920 working days have been reduced from 30% to over 50%, the trade union control of the soft coal field has declined from some 70% to 20% of the field and the wage-scale and annual earnings of the miners have become completely unstable. LAIDLER, *op. cit. supra* note 16, at 67.

31. Hervey, *Anti-Trust Laws and Conservation of Minerals* (1930) 147 ANNALS 67.

32. Address by Professor Willits, at A Conference on the Bituminous Coal Industry held at Swarthmore College, Nov. 7, 1930.

33. The Court said, "We sympathize with the plight of those engaged in the coal industry whether as operators or as miners; but we have no option but to declare the law as we find it. . . ."

legal sanction to the combination to set prices and limit output.[34] The well known rule of reason, which absolves of illegality any combination not operating "to the prejudice of the public interests by unduly restricting competition or unduly obstructing the true course of trade" might readily have been pressed into service to justify this result.[35] It is believed that the court, in referring the defendants to the legislature for relief, took the sounder course. To proceed with the emasculation of the Sherman Act would be to deliver once more the full guidance of industry into the hands of private individuals to be run exclusively for private profit. The difficulty with such a course is not only that if price fixing agreements are permitted, the element of control in the interest of the public and of labor is removed, but that there is lacking the assurance that more than a temporary and superficial alleviation of distress within industry would ensue. Nor would the stipulation that the court retain power to pass upon the reasonableness of the prices fixed operate to cure these defects.

The emphatic reluctance of the Supreme Court to go into the reasonableness of prices in anti-trust cases, and its uncompromising aversion to legislation establishing any such standard,[36] may be attributed not merely to a determination to cling to the fundamental competitive scheme, but also to the realization of the inadequacy of the judicial machinery to the task of formulating the details of a workable economic policy and the

---

34. P. H. Rhoads, *Proposed Changes in the Sherman Anti-Trust Act: Their Necessity and Validity* (1931) 79 U. OF PA. L. REV. 602.

35. Bell, *op. cit. supra* note 6.

36. Addyston Pipe & Steel Co. v. U. S., *supra* note 8; International Harvest Co. v. Kentucky, 234 U. S. 216 (1914) (Kentucky Criminal Statute making "depreciation below market value under normal competitive conditions" the standard of legality held violation of the 14th Amendment); United States v. Cohen Grocery Co., 255 U. S. 81 (1921) (standard of legality "any unjust or unreasonable rate of charge" in criminal provisions of the Lever Act held violation of 5th and 6th Amendments); Small Co. v. American Sugar Refining Company, 267 U. S. 233 (1925) (civil provisions of the Lever Act in which standard of legality was "any unjust or unreasonable rate of charge" held invalid); Connally v. General Construction Co., 269 U. S. 385 (1926) (Oklahoma Criminal Statute in which standard of legality depended upon "current rate of per diem wages in the locality where the work is performed" held invalid); U. S. v. Trenton Potteries Co., *supra*, note 5 (reasonableness of prices fixed held no defence from the prohibition of the Sherman Act); Tyson & Brother v. Banton, 273 U. S. 418 (1927) (New York Statute fixing charges of theatre ticket brokers held violation of the 14th amendment); Fairmont Creamery Co. v. Minnesota, 274 U. S. 1 (1927) (criminal provision of a Minnesota statute in which standard of legality depended upon "discriminatory buying in one locality at higher prices than in another" held violation of the 14th amendment); Cline v. Frink Dairy Co., 274 U. S. 445 (1927) (criminal provision of a Colorado statute in which the standard of legality depended upon whether a combination in restraint of trade was or was not "necessary to obtain a reasonable profit" held in violation of the 14th amendment). See Montague, *Proposals for Revision of Anti-Trust Laws*, in HANDLER, *op. cit. supra* note 5.

futility of the device of litigation to put them into effect.[37] It has been pointed out that the Court is unfitted to determine in an industry of any complexity whether price or quantity of production is reasonable. The problem of ascertaining from day to day whether price has become unreasonable through the variation of conditions could not be undertaken by a body schooled in and acting through an alien technique. Judges are not trained to undertake "a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies." [38] Finally, the court could not single out price fixing in the bituminous field alone for judicial sanction; a decision validating this practice would apply equally to all businesses. Unhappy experience in requiring competition in all industries regardless of their inherent differences should effectively deter any attempt to lay down another economic rule of universal application. It has been pointed out in another connection that "The conditions developed in an industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature." [39]

The withering barrage which has recently been turned upon the anti-trust law [40] has included many suggestions for repeal or modification which are relevant to the bituminous industry. On one hand, it is urged that the law by banning important cooperative action among producers stands in the way of the recovery of business and should be repealed either *in toto* or in its application to particular fields.[41] Repeal or unqualified exemption of chosen industries from the operation of the act is also urged by those who believe this to be the only course by which the government, in assuming drastic regulatory powers over the basic industries will alleviate the maladjustment fostered by a purely negative policy of regulation.[42] In attempting to take a median path between these alternatives, the vast majority of proposals evade fundamental issues.[43] Solution of the pressing problems presented by the present

37. See Hamilton, *Anti-Trust Laws and Social Control of Business* in HANDLER, *op. cit. supra* note 5, and Hamilton, *The Problem of Trust Reform* (1932) 32 COL. L. REV. 173.

38. Trenton Potteries Co. v. United States, *supra* note 5.

39. Brandeis, dissenting in Duplex v. Deering, 278 U. S. 1 (1918).

40. For an interesting symposium of current theory, see collection of essays, The Anti-Trust Laws of the United States (1930) 147 ANNALS.

41. Gandy, *op. cit. supra,* note 17; Bockus, *op. cit. supra* note 19; Hervey, *op. cit. supra,* note 31; Butler, *Needed Changes in the Anti-Trust Laws* (1930) 147 ANNALS 189, 191.

42. See Watkins, *The Federal Trade Commission* (1932) 32 COL. L. REV. 286; Oliphant, *supra* note 5; Dickinson, *Administrative Law and the Fear of Bureaucracy* (1928) 14 A. B. A. J. 513.

43. Note (1931) 45 HARV. L. REV. 566, citing bills and resolutions introduced during the 71st Congress, all of which died in Committee.

state of the law is hardly advanced by assurances that merely minor modification or clarification of the law will resolve all difficulties, and that no more is required than to confer certainty of immunity from prosecution upon arrangements for the innocent circulation of information or upon understandings on purely nominal matters among rivals.[44] The difficulty is not the uncertainty of the law, but the certainty that it now obstructs a particularly vital class of trade arrangements.[45] Variations of the proposal that the Sherman Act be amended to read "reasonable restraints of interstate commerce" [46] also leave the problem severely untouched, because of the Court's inveterate habit of assimilating ambiguous changes in the anti-trust law to previous standards of legality,[47] and the complete conceptual emptiness of the suggested modification itself. Production and price must become the objects of rational control if the disorder which attends undirected competition in the bituminous field is to be remedied. The industry must therefore be relieved of the operation of the Sherman Act. But the vesting of business interests with arbitrary power is not the only alternative. A substitute scheme specifically adapted to the problems of bituminous mining must be devised through the medium of a federal regulatory commission or a system of control within the industry, which will insure an adequate return to investors, operators and labor, without withdrawing protection from consumers.[48] The holding in *Appalachian Coals, Inc. v. United States* amounts to a withdrawal of the court as an influential factor in the determination of the future organization of the field of bituminous coal. It is believed that this decision will hasten the rehabilitation of the industry, since the problem must now be raised before the proper tribunal and in a form in which it can be satisfactorily solved.

## MUNICIPAL RESPONSIBILITY FOR THE TORTS OF POLICEMEN

A RECENT New York case [1] awakens renewed surprise at the frequent failure of the courts to keep pace with modern thought, and at their refusal to permit the legislatures to change the common law, notwithstanding the

44. Podell, *Our Anti-Trust Laws and the Economic Situation* (1931) 17 A. B. A. J. 254, 256; Donovan, *The Need for a Commerce Court* (1930) 147 ANNALS 138.

45. MONTAGUE, *op. cit. supra* note 36, at 29. HAMILTON, *op. cit. supra* note 37, at 178.

46. See Jaffe and Torbriner, *The Legality of Price-Fixing Agreements* (1932) 45 HARV. L. REV. 1164; MONTAGUE, *op. cit. supra* note 10, at 45 *et seq.*, citing several changes on this theme.

47. MONTAGUE, *op. cit. supra* note 36, at 43, citing cases and statutes.

48. For an analysis and criticism of the possible modes of organizing the bituminous industry with a suggested system of internal order, see HAMILTON, A WAY OF ORDER FOR BITUMINOUS COAL (1928).

1. Inez Evans v. Charles W. Berry, Comptroller of the City of New York, New York Law Journal, v. 88, No. 29, Aug. 4, 1932.

demands of public opinion. Realizing the growing injustice of the ancient rule that the innocent bystander, shot by stray bullets from policemen pursuing criminals or making arrests, must, in practical effect, alone bear his loss, the Municipal Assembly of New York City enacted in 1927 an ordinance [2] providing that the Board of Estimate is authorized to make an award of damages to such innocent bystanders when injured by policemen. Inez Evans was standing near the scene of a holdup in February, 1927, and was shot by a stray bullet from the gun of a policeman engaged in pursuing the highwaymen. She was incapacitated for about four years, and, in the light of her lost earnings and expenses, received from the Board of Estimate an award of $6,740. The Comptroller of New York declined to pay the award without a judicial declaration of its legality; whereupon Miss Evans sued out a writ of mandamus. Granted by Justice McGeehan in the Special Term, the order was reversed by the Appellate Division, First Department, on the ground that the assumption of liability for the injury inflicted by the police officer represented no moral or equitable obligation of the City, but, on the contrary, constituted a pure gift to a private person, prohibited by the Constitution of the State of New York.[3]

The issue is clear-cut. Is there any moral or equitable element in the assumption by the community of such liability? And is the legislature or the court the proper judge of that question? Accepting the guide of experience, perhaps our only criterion in determining whether a legislative admission of liability has any equitable or moral foundation, the answer seems hardly doubtful, especially so in the State of New York, where great advances have been made in recognizing community liability for the torts of officers.

The courts have wisely come to the conclusion that if the legislature *might* reasonably have considered an obligation to constitute an obligation of honor or justice or equity, a court should not undertake to overrule the legislative determination by holding an appropriation of money to be an unfounded gift.[4] In other words, the court would have to con-

---

2. LOCAL LAW 13 (1927). "Section 1. The Board of Estimate and Apportionment is hereby authorized and empowered, in its discretion, to make an award to a person who has been or hereafter shall be injured by a police officer while such officer is engaged in arresting any person or in retaking any person who has escaped from legal custody or in executing any legal process. Such award shall be of such amount as the Board of Estimate and Apportionment shall deem just and equitable."

3. Article 8, § 10. "No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes . . ."

4. "It would seem to be pretty unreasonable to assume that the legislature conferred upon the courts power to pass upon and give judgment for claims unless it itself had considered and approved their equitable nature." Williamsburgh Savings Bank v. State, 243 N. Y. 231, 242, 153 N. E. 58, 61 (1926). See also Farrington v. State, 248 N. Y. 112, 115, 161 N. E. 438, 440 (1928).

clude that a legislature in assuming a certain obligation acted without precedent, policy, experience, or reasonable judgment, before they would be justified in holding the assumption of liability an unfounded and unsustainable gift.

There has been a progressive development in New York State recognizing the liability of the state to private citizens for injuries arising out of the torts or misfeasance of state officers. The courts were slow to espouse this development. For even after the enactment in 1919 of the section of the Court of Claims Act waiving the state's immunity before the Court of Claims in tort cases,[5] the Court of Appeals held in *Smith v. State*[6] that the state had waived its immunity from suit but not from liability for the torts of its employees, a decision which rendered the statute nugatory and which was adversely commented upon by several law journals.[7] But Judge McLaughlin for the Court of Appeals clearly indicated that, of course, the legislature could waive its immunity from liability. This was done in the broadest form by chapter 467 of the Laws of 1929,[8] admitting for all types of official wrongdoing causing private injury the liability which in particular instances had theretofore been assumed by other special statutes.[9] The Laws of 1929 made "every city, town, and village . . . . liable for the negligence" of one of its officers or employees operating "a municipally owned vehicle upon the public streets and highways of the municipality" if operated "within the scope of his employment."[10] Two cases have already been decided under this law holding the city liable for the negligence of officers acting in what is usually called a governmental function.[11] It seems reasonable to assume that an obliga-

---

5. COURT OF CLAIMS ACT (1919) § 12, N. Y. CODE CIV. PROC. § 264. "The Court of Claims . . . has jurisdiction to hear and determine a private claim against the state. . . . In no case shall any liability be implied against the state and no award shall be made on any claim against the state except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity."

6. 227 N. Y. 405, 125 N. E. 841 (1920).

7. (1919) 5 CORN. L. Q. 78 and 340; (1931) 16 CORN. L. Q. 359, at 361; (1924) 34 YALE L. J. 10-11.

8. 'The state hereby waives its immunity from liability for the torts of its officers and employees and consents to have its liability for such torts determined in accordance with the same rules of law and equity as apply to an action in the supreme court against an individual or a corporation, and the state hereby assumes liability for such acts . . . caused by the misfeasance or negligence of the officers or employees of the state while acting as such officer or employee."

9. See *e.g.*, CANAL LAW, § 47; HIGHWAY LAW, § 176.

10. N. Y. LAWS (1929) c. 466, § 282-g. The section proceeds: "Every such appointee shall, for the purpose of this section, be deemed an employee of the municipality, notwithstanding the vehicle was being operated in the discharge of a public duty for the benefit of all citizens of the community and the municipality derived no special benefit in its corporate capacity."

11. Miller v. City of New York, 257 N. Y. Supp. 33 (2d Dep't 1932); Snyder v. City of Binghamton, 138 Misc. 259, 261, 245 N. Y. Supp. 497, 500 (1930).

tion recognized as moral and equitable by the state legislature has a like moral and equitable character when recognized by a municipal legislature.

The Court of Appeals of New York has also recognized that community liability for such injuries represents a moral and equitable obligation.[12] Both in *People v. Westchester County National Bank* and in *Farrington v. State* the Court of Appeals has held that a moral obligation upon the state arises not only out of benefits which the state has received, but out of "injuries which have been suffered in its service or because of its acts or acts done under its authority or because of the acts of its servants;" [13] that is, in respect of "claims involving injuries and damages wrongfully inflicted upon individuals by those in the state service or others for whose acts the state might justly be regarded as responsible." [14]

New York in fact has gone beyond the assumption of liability for negligence merely, but has assumed liability where the operation of a public service regardless of fault resulted in injury to an innocent individual.[15] In the *Evans* case it cannot be doubted that, had the policeman been employed by a private corporation or individual, the employer would have been held liable. All that the City of New York did by the ordinance of 1927 was to waive its immunity from suit and liability and place itself in the position of a private employer. The refusal of the legislature to indemnify officers defending themselves against criminal or other charges [16] has no relevancy to the question under examination.

An overwhelming opinion throughout the world in favor of the assumption of community liability for the torts of public officers may be regarded as representing a growing moral conviction [17] to which the courts should

12. "Fortunately, and creditably to them, our courts have firmly established the proposition that the state as well as an individual may be honorable and may voluntarily recognize just obligations which it fairly and honestly ought to pay even though they do not constitute purely legal claims such as in the case of an individual could be enforced under the compulsion of judgment and execution." Williamsburgh Savings Bank v. State, *supra* note 4, at 240, 153 N. E. at 61.

13. People v. Westchester County National Bank, 231 N. Y. 465, 478, 132 N. E. 241, 246 (1921).

14. Farrington v. State, *supra* note 4, at 116, 161 N. E. at 440. Similar explanations for the reasonableness of the assumption of state responsibility are given by Judge Crane in Munro v. State, 223 N. Y. 208, 215, 119 N. E. 444, 445 (1918). See also Babcock v. State, 190 App. Div. 147, 180 N. Y. Supp. 3 (3d Dep't 1919), *aff'd*, 231 N. Y. 560, 132 N. E. 888 (1921).

15. See Judge Cardozo in People v. Westchester County National Bank, *supra* note 13, at 486, 132 N. E. at 248, citing Munro v. State and Babcock v. State, both *supra* note 14; and 16 CORN. L. Q. 359, at 361.

16. Matter of Chapman v. City of New York, 168 N. Y. 80, 61 N. E. 108 (1901); Cuvillier v. State, 250 N. Y. 285, 165 N. E. 284 (1929); Rosalsky v. State, 254 N. Y. 117, 172 N. E. 261 (1930); Matter of Jensen, 44 App. Div. 509, 60 N. Y. Supp. 933 (2d Dep't 1899); Matter of Kilroe v. Craig, 238 N. Y. 628, 144 N. E. 920 (1924), *aff'g* 208 App. Div. 93, 203 N. Y. Supp. 71 (1st Dep't 1924).

17. Aks, *Municipal Corporations—Tort Liability* (1929) 14 CORN. L. Q. 355; Albertsworth, *New Interests in the Law of Torts* (1922) 10 CALIF. L. REV.

not remain impervious. At least when the legislative body takes account of that conviction and assumes such liability, a court is hardly justified in saying that it had no moral or equitable support. The New York Court of Appeals has recognized that "the modern tendency is against the rule of nonliability," [18] a tendency which has been translated into statute by an increasing number of states.[19] Prussia in 1909 and Germany in 1910 enacted statutes assuming such liability, even in the exercise of so-called governmental functions.[20] France long ago espoused and helped to develop the modern tendency, transcending the strict requirement of tort or negligence, and demanding only evidence of a defective operation of the public

---

461, at 480; Angell, *Sovereign Immunity—The Modern Trend* (1925) 35 YALE L. J. 150; Barnett, *The Distinction between Public and Private Functions in Tort Liability of Municipal Corporations in Oregon* (1932) 11 ORE. L. REV. 123; Barry, *The King Can Do No Wrong* (1925) 11 VA. L. REV. 349; Borchard, *Government Liability in Tort* (1924-1925) 34 YALE L. J. 1, 129, 229, (1926-1927) 36 YALE L. J. 1, 757, 1039, (1928) 28 COL. L. REV. 577, 734; Carraway, *Actions against the Commonwealth for Torts* (1904) 1 COM. L. REV. 241; Davie, *Suing the State* (1884) 18 AM. L. REV. 814; 4 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) c. 32; Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations* (1925) 23 MICH. L. REV. 325; Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases* (1930) 78 U. of PA. L. REV. 815; Fleischmann, *The Dishonesty of Sovereignties* (1910) 33 Report of the N. Y. Bar Ass'n 229; Freund, *Private Claims against the State* (1893) 8 POL. SCI. Q. 625; Glushein and Katzin, *Administrative Law*, etc. (1931) 16 CORN. L. Q. 359; GOODNOW, MUNICIPAL HOME RULE (1895) c. 7; Gordon, *The Crown as Litigant* (1929) 45 L. Q. REV. 186; Harno, *Tort Immunity of Municipal Corporations* (1921) 4 ILL. L. Q. 28; JONES, NEGLIGENCE OF MUNICIPAL CORPORATIONS (1892); Laski, *The Responsibility of the State in England* (1919) 32 HARV. L. REV. 447; MacDonald, *Substantive Liability of the State of New York* (1929) 1 N. Y. State Bar Ass'n Bull. 235, 238; Maguire, *State Liability for Tort* (1916) 30 HARV. L. REV. 20; Maitland, *The Crown as a Corporation* (1901) 17 L. Q. REV. 131, at 142; Martindale, *The State and Its Creditors* (1887) 7 So. L. REV. (N. S.) 544; 6 MCQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1928) c. 53; Moore, *Liability for Acts of Public Servants* (1907) 23 L. Q. REV. 23; Rockel, *Governmental Function of Municipality-Liability for Tort* (1919) 89 CENT. L. J. 27; 2 SHEARMAN AND REDFIELD, NEGLIGENCE (6th ed. 1913) c. 12; Tennant, *Servants of the Crown* (1932) 10 CAN. BAR REV. 155; Tooke, *Public Authorities and Legal Liability* (1926) 20 AM. POL. SCI. REV. 898; Ward, *Municipal Liability* (1930) 2 N. Y. State Bar Ass'n Bull. 402; WHITE, NEGLIGENCE OF MUNICIPAL CORPORATIONS (1920); WILLIAMS, MUNICIPAL LIABILITY FOR TORT (1901).

18. Augustine v. The Town of Brant, 249 N. Y. 198, 163 N. E. 732 (1928).

19. CAL. CIV. CODE (Deering, 1931) § 1714 1/2, at 661, STAT. (1931) at 168; CONN. GEN. STAT. (1930) c. 319, §§ 5988, 5989, at 1869; MICH. PUB. ACTS (1929) No. 259, at 621; MINN. STAT. (Mason, 1931) c. 9, §§ 1920-1, 1920-2, at 110; WIS. STAT. (1931) 66.095, at 792.

20. Dehne, Ernst. Die Haftung des Staates für seine Beamten (Freienwalde, 1912); Holtz, Carl F. Die Haftung des Staates für seine Beamten (Greifswald, 1914); Pillmann, Carl. Die Haftung des Staates für seine Beamten (Erlangen, 1928).

service inflicting injury.[21] In a recent French case, the state was held liable for injuries inflicted on innocent bystanders by an insane person who by negligent police supervision had been permitted to escape from a state asylum.[22] South Africa exhibits numerous instances of liability for injuries inflicted by policemen in the discharge of public duties.[23] The pending English Crown Proceedings bill assumes liability of the Crown "for any wrongful act done, or any neglect or default commited, by an officer of the Crown in the same manner and to the same extent as that in and to which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed, by his agent." [24] And in the pending Federal Tort Claims bill the United States assumes liability for any injuries caused by the "negligence or wrongful act or omission of any officer or employee of the government within the scope of his office or employment." [25] It is a fact that the British Treasury now frequently defends officers against whom suits in tort may have been brought and pays the judgment found, if it is believed that the officer acted with reasonable prudence. It has not been suggested that there is anything immoral or inequitable or unjust in such assumption of liability.

The late Attorney General of New York, Mr. Hamilton Ward, in 1930 caused a bill to be introduced in the legislature providing that "no municipal corporation shall hereafter be exempted from liability for damage because the activity in which it or its officers or employees are engaged is of a public or governmental nature." He made a strong argument in its support before the New York State Bar Association.[26]

It is not without interest in this connection to observe that international tribunals have taken it for granted, as a general principle of law, applied in appropriate cases in international courts, that a state is liable for the uncorrected injuries inflicted upon aliens through the mistaken, negligent, or maladroit action of soldiers and policemen in shooting people who were privileged from assault.[27] Very recently the International Congress of Comparative Law adopted a resolution in support of such liability.

---

21. Tomaso Greco, Council of State, Feb. 10, 1905, Dalloz Pér. 1906, 3. 81; Auxerre, Council of State, Feb. 17, 1905, Dalloz Pér. 1906, 3. 81; Pluchard, Council of State, Dec. 24, 1909, Le Bon, 1029; DUGUIT, LAW IN THE MODERN STATE (1919) 225 *et seq.*; WATKINS, THE STATE AS A PARTY LITIGANT (1927) 149 *et seq.*

22. Garcin v. France, Council of State, Jan. 23, 1931, Revue du Droit Public, vol. 48, p. 571.

23. See the article signed C. J. G., *The State and Its Liability for the Torts of Policemen* (1932) 49 SOUTH AFRICAN L. J .4.

24. Gordon, J. W. *The Crown as Litigant* (1929) 45 L. Q. REV. 186; Inskip, Sir Thomas. *Proceedings By and Against the Crown* (1931) 4 CAMB. L. J. 1; Keith, Berriedale. *Claims By and Against the Crown* (1928) 10 J. SOC. COMP. LEG. 186.

25. See Borchard, *Tort Liability of the State* (1930) 12 J. SOC. COMP. LEG. 1.

26. *Municipal Liability*, address published in (1930) 2 N. Y. State Bar Ass'n Bull. 402.

27. Portuondo (U. S.) v. Spain, Feb. 12, 1871, Moore's Arb. III. 3007; Youmans (U. S.) v. Mexico, Sept. 8, 1923, Opinions of the Commission, 1927,

There is thus a widespread conviction that such liability is almost elementary to civilized government. The climate of opinion has changed since the lower New York courts decided *Mollnow v. Rafter*[28] and *Brown v. State*,[29] denying municipal liability for the torts of officers. This is evidenced by the numerous statutes which have been enacted in several states, notably in New York, and by the approval of community liability by the New York and other courts. In several states such assumption of liability has been expressly held not to constitute a gift, inhibited by the state constitution.[30] And whatever the legal theory on which such assumption of liability may be based,[31] the fact is inescapable that it represents a growing conviction of civilized people. That conviction the people of New York have evidently shared. This evidence should be sufficient to satisfy any court, if a court assumes the power to express its own opinion on the subject, that the legislative assumption of liability had a decided moral and equitable foundation. That which is regarded by much of the rest of the world as a legal obligation may surely be accepted by an American legislature as at least a moral obligation. If an independent New York theory is desired, it may be found in the course of the opinion delivered by Judge Cardozo in *People v. Westchester County National Bank*:[32]

"The legislature might readjust the incidence of the burden, might establish a more equitable distribution between the individual and the public, through the voluntary acceptance of liability for a loss which was without a remedy when suffered. . . . The readjustment of these burdens along the lines of equality and equity is a legitimate function of the state as long as justice to its citizens remains its chief concern *(Oswego & Syracuse R. R. Co. v. State of N. Y.*, 226 N. Y. 351)." E. M. B.

---

p. 150; Falcon (Mexico) v. U. S., *id.* at 140; Garcia and Garza (Mexico) v. U. S., *id.* at 163; Kling (U. S.) v. Mexico, Sept. 8, 1923, Opinions of the Commission, Oct. 1930 to July, 1931, at 36, and the many cases there discussed at 41 *et seq.*

28. 89 Misc. 495, 152 N. Y. Supp. 110 (1915).

29. 206 App. Div. 634 (3d Dep't 1923).

30. Heron v. Riley, 284 Pac. 209 (Cal. 1930); *id.* 209 Cal. 507, 289 Pac. 160 (1930); Pennington's Adm'r v. Commonwealth, 242 Ky 527, 46 S. W. (2d) 1079 (1932); State ex rel. Crowe v. City of St. Louis, 174 Mo. 125, 73 S. W. 623 (1903); Mills v. Stewart, Sec. of State, 76 Mont. 429, 247 Pac. 332 (1926); Ouzts v. State Highway Dept., 161 S. C. 21, 159 S. E. 457 (1931). See also City of Anniston v. Hillman, 220 Ala. 505, 126 So. 169 (1930); see Note (1930) 4 CIN. L. REV. 491; The State, Bradley, Prosecutor, v. The Council of the Town of Hammonton, 38 N. J. Law 430 (1876); *cf.* Candill v. Pinsion, 24 S. W. (2d) 938 (Ky. 1930).

31. See discussion of the theories in Borchard, *Theories of Governmental Responsibility in Tort* (1928) 28 COL. L. REV. 577, 734.

32. *Supra* note 13, at 489, 132 N. E. at 249. It is immaterial that this theory was expressed in a dissenting opinion on the constitutionality of the soldiers' bonus.

# THE FEDERAL POWER COMMISSION'S OPINION UPON THE MITCHELL DAM CONSTRUCTION COSTS

## II

### *Power-site Valuation*

BY far the greater portion of the Federal Power Commission's opinion in the *Mitchell Dam* case [1] is devoted to a consideration of the proper valuation of lands and certain related intangibles which had been acquired by the Alabama Power Company prior to the passage of the Federal Water Power Act and the licensing of the Company thereunder. Several groups, each possessing one or more dam sites and holding easements for power purposes, were originally interested in developing the power possibilities of the Coosa River.[2] Of these groups the most important was the original Alabama Power Company which owned Lock 12 and Lock 14.[3] This situation prevailed until outside interests, organized under the name of Alabama Traction, Light & Power Company, Ltd., introduced a unified control. During the years 1912 and 1913 this corporation acquired the outstanding stock of four of the various groups along the River, together with that of another organization interested in developments on other streams, and purchased outright from the remaining group the dam-site lands which the latter held at Duncan's Riffle.[4] This last purchase was made in the name of the original Alabama Power Company and the lands were immediately transferred to that group.[5] Subsequently, the Traction Company caused its five controlled companies to become integrated into one corporation, known as the new Alabama Power Company.

This fusion was effected by an exchange of stock, the ratio of exchange in each case being determined by a valuation of the properties of the respective companies. In payment for those of the old Alabama Power Company, which included altogether Lock 12, Lock 14 and Duncan's Riffle with an aggregate valuation of $7,000,000, 70,000 shares of par value stock were issued.[6] As the plans for projects on the Coosa River were finally drawn, the Mitchell development was made to include the lands at both Lock 14 and Duncan's Riffle, the latter being the actual site of the dam proper. The value of these properties and those at Lock 12 being re-

---

1. A discussion of other factors involved in the recent determination by the Federal Power Commission in the Mitchell Dam case appeared in the November issue of the *Yale Law Journal.* (1932) 42 YALE L. J. 66.

2. Brief of Alabama Power Company, at 16-17, 37-38.

3. With the exception, to be noted more in detail hereafter, of one parcel of land at Lock 14, held by one of the other organizations.

4. Opinion, at 6.

5. Brief of Alabama Power Company, at 17. This appears to have been the method of financing purchases on the part of the Alabama Power Company in the first years after its acquisition by the Traction interests. Federal Trade Commission, *Utility Corporations* (1931) 70th Cong., 1st Sess., Ser. Doc. 92, Pt. 30, at 25.

6. Brief of Alabama Power Company, at 20.

garded as equal, the total of $7,000,000 was allocated equally between Lock-12 and Mitchell Dam; the present Alabama Power Company thus claims as the cost to it of properties utilized in the project now under consideration, the sum of $3,500,000.[7] In so calculating its claim, licensee appears to omit all consideration of the one parcel of land at Lock 14, known as parcel 214, which, alone of all the lands embraced in the scheme, the original Alabama Power Company did not hold at the time of the integration of the various groups in 1913.[8]

Implicit in this claim for $3,500,000 are three assertions. One is that 1913 denotes the date of acquisition by licensee of the assets above described. This view is based upon the contention that a new Alabama Power Company was formed on the fusion of the five development companies in that year. That fusion was effected under Alabama law[9] which appears to have made it optional whether there should be a continuance of the existence of one of the corporations involved or a totally new corporate entity initiated.[10] The Commission so interpreted the statute, and found in the articles of agreement adopted by the constituent companies a clear election not to create a new corporation but to perpetuate the old Alabama Power Company.[11] On the basis of these facts, in the exercise of its duty under the Power Act to determine costs as of the date of acquisition by a licensee, the Commission rejected this contention.

While the Commission's interpretation of the statute seems the logical one, the Alabama Supreme Court has apparently construed it as giving rise to a new corporation in every case of either merger or consolidation,[12] and the decision of a neighboring state supreme court has placed a like interpretation upon a statute couched in very similar terms.[13] But whether the law did or did not actually allow of an option of technical merger or consolidation, the situation serves to indicate the unsatisfactoriness of such a statutory test for determining the true date of acquisition, an inadequacy which is quite as apparent in the one case as in the other. For it would appear to be highly undesirable that important decisions in valuations under the Act should necessarily be governed by exercises of options motivated by totally irrelevant considerations.[14] Rather, it would

7. *Id.* at 21.

8. See Opinion, at 10.

9. 2 ALA. CODE (1907) §§ 3502-3508. The Alabama law is the same at the present time. ALA. CODE (Michie, 1928) §§ 7037-7044.

10. See, especially, § 3502.

11. The relevant portions of the agreement ratified by the directors of the five constituent companies are cited in the Opinion, p. 7.

12. Jackson v. Ariton Banking Co., 214 Ala. 483, 108 So. 359 (1926). From this case licensee argues that a new corporation was formed in 1913. Brief of Alabama Power Company, at 46. But *cf.*, as tending to support the position of the Commission, Alabama, T. & N. Ry. v. Tolman, 200 Ala. 449, 76 So. 381 (1917).

13. Carolina Coach Co. v. Hartness, 198 N. C. 524, 152 S. E. 489 (1930). The statute is now N. C. CODE ANN. (Michie, 1931) §§ 1224a-1224f.

14. There is some indication that the Commission senses this. See Opinion, at 9. The discussion here, as throughout the comment, is directed primarily

seem that inquiry should be directed in each case to the actual nature of the resulting change. Thus if the fusion marked changes in the managing interests, substitution of new policies, and the acquisition by the older organization of significant properties from the other groups involved, there would be strong evidence of the creation of a factually new corporation. Whereas, if there were no such variations in control and policies, if the assets acquired were largely those of the original company, and there was apparent a general continuity in factual existence, then the evidence would be persuasive that no new entity resulted. On the basis of such a test, the ruling of the Commission was clearly justified, for practically all the assets going into the Mitchell Dam project belonged to the old Alabama Power Company,[15] and the history of the enterprise reveals a high degree of continuity of interest and activity from the time that the power possibilities in Alabama first engaged the attention of the Traction interests.[16] It might have been better policy to have predicated that ruling upon such a basis rather than upon the one adopted.[17]

A second assertion arising from licensee's claim is that in the absence of any intimation of fraud,[18] the valuation on which was predicated the issue of $3,500,000 par value stock is conclusive upon the Commission in the present determination. This is urged from the fact that at the time of this valuation the constitution of the State of Alabama contained a provision [19] that no corporation should issue stock or bonds except for money, labor done or property actually received. The interpretation placed upon this provision by the highest state court had been that the judgment of a corporation's directors as to the value of services and property should be conclusive in the absence of fraud.[20] Similar construction [21] placed

toward a consideration of the problems raised by the necessity of pursuing valuations into the years prior to the adoption of the Act and the initiation of present policies thereunder. Note will be taken, on the other hand, of the bearing of the discussion on valuation problems likely to arise with respect to projects wholly conceived and constructed after the passage of the Act. Here it may be noted that advantage might easily be taken in the future of such a statutory test as that employed by the Commission with the result that every fusion would be executed as an outright consolidation resulting in the formation of a new corporation. Such fusions may not of course be as numerous in future project developments as in the earlier history of the hydro-electric industry.

15. See p. 248, *supra*.

16. See the testimony before the Federal Trade Commission during its investigation into the Alabama Power Company, to the effect that in the "merger" of 1913 "the continuity of the original Alabama Power Co. . . . was preserved." Federal Trade Commission, *supra* note 5, at 53.

17. On the basis of the method of valuation adopted by the Commission, which is discussed *infra*, this difference as to the correct date of acquisition involved a sum of approximately $190,000. See Reply Brief for the Commission, at 28-29.

18. See Brief of Alabama Power Company, at 18-20, 24.

19. ALA. CONST. (1901) § 234.

20. Elyton Land Co. v. Birmingham Warehouse & Elevator Co., 92 Ala. 407, 9 So. 129 (1891); Roman v. Dimmick, 115 Ala. 233, 22 So. 109 (1897);

upon provisions like that of Alabama, which are to be found in most of the states,[22] has given rise to the so-called good faith rule.[23] This doctrine clearly pertains, however, to the protection of creditors and stockholders against stock watering in businesses having limited liability. It appeared with the principle of limitation of liability [24] and the conclusive presumption of the good faith rule is in conformity with that principle. That these provisions and rules have this single application is generally recognized in the cases [25] and nowhere more emphatically than in the decision of the Alabama court most relied upon by licensee.[26] Indeed, but few attempts have been made to carry over the conclusive presumption of the correctness of directors' valuations into the domain of utility regulation. Where attempted, the result has been similar to that in the instant case where the Power Commission observed that such provisions "are intended for the protection of creditors and injured stockholders" and "are not binding upon the Government in the exercise of powers conferred by federal statute." [27]

The Commission's position is strengthened by further considerations. Thus the agreement for the exchange of stock and for the valuation of the properties was between companies under common control, and by a recent pronouncement of the Supreme Court [28] this fact of community of interest seems to entitle commissions to attach little significance to any kind of price agreement made under such circumstances. While relying upon this decision, the Commission might also have pointed out that even under the good faith rule courts are influenced by evidence of self-interest on the part of those making the appraisement.[29] But undoubtedly more significant is

---

Lea v. Iron Belt Mercantile Co., 119 Ala. 271, 24 So. 28 (1898); Lea v. Iron Belt Mercantile Co., 147 Ala. 421, 42 So. 415 (1906).

21. DODD, STOCK WATERING (1930) 57.

22. (1926) 26 COL. L. REV. 893.

23. *Cf.* Ballantine, *Stockholders' Liability in Minnesota* (1923) 7 MINN. L. REV. 79, 93; Bonbright, *The Dangers of Shares Without Par Value* (1924) 24 COL. L. REV. 449, 453. In some states the conclusiveness, in the absence of fraud, of the directors' valuation is fixed by statute. Bonbright, *Shareholders' Defenses Against Liability to Creditors on Watered Stock* (1925) 25 COL. L. REV. 408, 415.

24. DODD, *op. cit. supra* note 21, at 30.

25. See the cases cited in DODD, *op. cit. supra* note 21, at 15-17; DOUGLAS AND SHANKS, CASES AND MATERIALS ON BUSINESS UNITS—FINANCE (1931) 617-622, 633-637.

26. Elyton Land Co. v. Birmingham Warehouse & Elevator Co., *supra* note 20. The Commission notes this. Opinion, at 11.

27. Opinion, at 11. The only other recent attempt that has been found is one before the New York Public Service Commission, State Division, in a case involving a petition by a utility for permission to issue stock for certain property it desired to acquire. *Re* Niagara Hudson Power Corp., P. U. R. 1932C, 486, 492 (N. Y. P. S. C. 1932).

28. Western Distributing Co. v. Public Service Commission, 285 U. S. 119 (1932).

29. See DODD, *op. cit. supra* note 21, at 95-96, and cases there cited.

the fact that, where regulation of security issues is not present, excessive capitalization has been, and continues to be, common in the United States.[30] Especially is this true with respect to all types of fusion and combination in the utility field. Prior to the establishment in some of the states of governmental control over public utility securities, inflation of capitalization was often perpetrated under such circumstances [31] and the consensus of opinion is that there continue to exist many instances of uncontrolled excessive payments in stock purchases, mergers and consolidations, followed by overcapitalization.[32] The investigations of the Federal Trade Commission have revealed situations strikingly similar to that presented in the instant case, where mergers dictated by dominant parent companies have involved payments greatly in excess of the actual value of the assets acquired; [33] indeed, the fact appears that this was true of the 1913 corporate change under consideration by the Commission. It seems that upon the effecting of the so-called consolidation, the fixed capital of the resulting company was placed at approximately $13,475,000.[34] Of this sum $9,900,000 constituted assets unrecorded on the books of the constituent companies.[35] Approximately $7,000,000 of this write-up related to property acquired from the old Alabama Power Company,[36] $3,500,000 being credited directly to the Mitchell Dam development.[37] This amount was sought to be justified on the ground that it represented a proper reimbursement of those who, while organized under that name with only a nominal corporate capitalization, had as individuals incurred heavy expenditures in promoting the Mitchell Dam and other projects.[38] It was, in short, to cover "those expenditures made, services rendered, and other equities" not theretofore expressed upon the books or in the capital structure of the original Alabama Company.[39] But while there appears to be merit in some of this claim to unrecorded expenditures, the full amount, to the extent of which

30. BISHOP, THE FINANCING OF BUSINESS ENTERPRISES (1929) 153.

31. Heilman, *The Capitalization of Public Utility Consolidations* (1917) 7 AM. ECON. REV. 187; Waltersdorf, *State Control of Utility Capitalization* (1928) 37 YALE L. J. 337, 344.

32. Federal Trade Commission, *Utility Corporations* (1928—) 70th Cong., 1st Sess., Sen. Doc. 92; MASSACHUSETTS: REPORT OF THE SPECIAL COMMISSION ON CONTROL AND CONDUCT OF PUBLIC UTILITIES (1930) 33-34; Raushenbush, *The Concentration of Control in Power* (1927) 129 ANN. AM. ACAD. 118, 121-122; *Re* Midwest Telephone Co., P. U. R. 1930B, 284, 287 (Mo. P. S. C. 1930); *cf.* NEW YORK STATE COMMISSION ON REVISION OF THE PUBLIC SERVICE COMMISSIONS LAW (1930) VOL. III, *Hearings* 2445.

33. Federal Trade Commission, *supra* note 32, Pt. 22, at 182-189 (1930); *id.*, Pts. 23 and 24, at 305-312 (1930).

34. Federal Trade Commission, *supra* note 5, at 28-30.

35. *Id.* at 36.

36. *Ibid.*

37. *Id.* at 30. It is significant to note that this amount exactly measures the licensee's claim in the present determination.

38. *Id.* at 106-110.

39. *Id.* at 36. These contentions were developed by the present Alabama Power Company in a document filed with the Alabama Public Service Com-

stock was issued in payment, cannot be defended as representing undiluted value to the acquiring corporation.

Yet another assertion is inherent in licensee's position on the claimed item of $3,500,000. It is that a valuation made for purposes of security issue and one made for the determination of the cost of property acquired are comparable. The determination of value has, however, long been recognized as varying with the purpose of valuation.[40] In the absence of security regulation, the standard of valuation for purposes of security issue is the economic value of the given property to its corporate owner; what is sought in cost valuation is a measurement of the financial sacrifice incurred by the owner in acquiring that property. Economic worth is determined from capitalization of expected earnings; [41] cost is found from known expenditures or imputed from market prices.[42] This distinction between discounted earning power and cost is generally appreciated [43] and was very distinctly drawn by licensee itself.[44] Yet it is clear that while the Act requires adherence to investment cost in determinations made thereunder,[45] the 1913 valuation was rested squarely upon a capitalization of estimated earnings [46] and licensee now specifically lays claim to this alleged economic value of the assets as assembled, in contradistinction to the prices paid for them as separate elements.[47]

The Commission, clearly cognizant of this fact,[48] was therefore correct in the position which it took. Nor is such a position inconsistent with that of the Interstate Commerce Commission, though licensee so urged. That commission, it is true, has in several valuations completed railroad investment accounts [49] through the use of par value of securities as a

---

mission and bearing the title "Memo in substantiation of $3,500,000 included as cost applicable to Mitchell Dam project."

40. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924) 211; Bonbright, *The Problem of Judicial Valuation* (1927) 27 COL. L. REV. 493, 494, 521.

41. BISHOP, *op. cit. supra* note 30, at 156-157.

42. See COMMONS, *op. cit. supra* note 40, at 202; DODD, *op. cit. supra* note 21, at 98.

43. DODD, *op. cit. supra* note 21, at 98-108, 111; HARTMAN, FAIR VALUE (1920) 81, 82; LOUGH, BUSINESS FINANCE (1917) 173-175; Bonbright, *supra* note 40, at 522, note; Craven, *Railroad Valuation: A Statement of the Problem* (1923) 9 A. B. A. J. 681, *passim; Re* United Fuel Gas Co., P. U. R. 1932B, 61, 79 (W. Va. P. S. C. 1931).

44. Supplemental Brief for Licensee, at 3, 5-6.

45. 41 STAT. 1064 (1920), 16 U. S. C. § 796 (1926).

46. Brief of Alabama Power Company, at 18-19, Reply Brief for Licensee, at 24.

47. Supplemental Brief for Licensee, at 3.

48. "It [licensee's valuation] related to the earnings expected from the development of these projects, not to the cost of assembling the lands, materials, and services necessary to their construction." Opinion, at 12.

49. "Actual legitimate original cost" is by the Power Act made equivalent to the investment in road and equipment account of the Interstate Commerce Commission. See 41 STAT. 1064 (1920), 16 U. S. C. § 796 (1926). In these accounts cost is measured by the cash outlay or, where the consideration given

measure of cost.[50] But it has done so only to a limited extent, to complete parts of accounts not otherwise ascertainable, and then only for lack of any other evidence.[51] In the *Mitchell Dam* case, however, the valuation was of the entire property and there existed other and more accurate evidence of cost.[52] Perhaps, on the other hand, the Power Commission in its opinion did not adequately emphasize the significance of its ruling on this matter. The essential point would seem to be that even though a valuation made for purposes of security issue were shown to be proper and not excessive, it could not be taken over in a cost determination under the Federal Water Power Act. Indeed, this would be generally true even if such valuation had been favorably tested in a stockholders' or creditors' suit, for in such suits it appears that courts have usually adopted as their standard of value " 'value to the corporation for its purposes' rather than value to anyone else, or market value in the strict sense of the price for which the property could then have been sold." [53] The contention that a directors' valuation for stock issue purposes is conclusive upon the Commission is thus met not only with the answer that such a valuation applies only to suits in instances of alleged stock watering and is factually destroyed by evidence of prevailing over-valuations in utility finance, but also with the fact that it is completely dissimilar from the cost valuation required by the Act.

The foregoing discussion assumes the nonexistence of governmental regulation of security issues, which was the situation in the present instance. The question therefore becomes pertinent as to cases where the opposite is true, for the Commission may well meet situations wherein there are urged upon it valuations for purposes of security issue which have been approved by some regulatory commission.[54] There is no unanim-

---

is other than cash, by the money value of that consideration. Thus where stock is the consideration, its market value is generally taken as the measure of cost. See *Re* Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., 24 I. C. C. (Val. Rep.) 1, 8 (1929).

50. The instances cited by the Power Company are *Re* Bangor & Aroostook Rr. Co., 97 I. C. C. 153, 155-156 (1925); *Re* Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., *supra* note 49, at 4; *Re* Chesapeake & Ohio Ry. Co., 24 I. C. C. (Val. Rep.) 451, 459-461 (1929).

51. The policy of the Interstate Commerce Commission is best revealed in *Re* Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., *supra* note 49, at 4, 6. There the Commission relied upon par value of securities to a rather great extent. But it did so "For lack of evidence, however, of the contemporary cash value of these securities . . . ," noting too that because of this inability to determine their cash value it could not be stated whether or not the amounts taken "represent accurately the money equivalent expended for the property covered by these investment accounts."

52. See the discussion at p. 256, *infra*.

53. DODD, *op. cit. supra* note 21, at 269. See Clinton Mining & Mineral Co. v. Jamison, 256 Fed. 577, 582 (C. C. A. 3d, 1919).

54. Not all state utility commissions possess regulatory power over security issues, however, even at the present time. Thus there are still many un-

ity or consistency among commissions regarding the proper basis of capitalization.[55] In general, however, since the aim of regulation is to have capitalization reflect the cost of the utility's assets, earning power is seldom employed, while actual cost is most favored.[56] In the construction of property, such cost is ascertained from the records of expenditure; where assets are purchased, evidence of cost is found in the value of those assets.[57] This value is determined from a consideration of the original cost of the property, its duplication cost, its earning power, and other relevant matters, with great weight given to exchange value.[58] A valuation for purposes of issuing stock predicated upon such a basis would be so close to a cost valuation under the Power Act as perhaps to warrant its use, but because of the lack of uniformity in this field of regulation the Commission would necessarily have to scrutinize closely any specific valuation that was advanced before adopting it. The fact that a valuation was under regulatory control would in itself have no significance.[59]

Finally, independent of the above considerations, it seems apparent that the position taken by the Power Company on the question of power-site valuation is untenable. The appraisal it advances was based upon prospective earning power, which was estimated from the then difference in cost of producing power by water and by steam. Such a method of calculating value, often urged upon state commissions with reference to the valuation of water rights, has been almost uniformly rejected by them.[60] Some of those commissions stress the fact that this method assumes a

---

regulated valuations to which the principles developed in the preceding discussion fully apply.

55. LAGERQUIST, PUBLIC UTILITY FINANCE (1927) 129-153; LOCKLIN, REGULATION OF SECURITY ISSUES BY THE INTERSTATE COMMERCE COMMISSION (1925) 54-63.

56. LAGERQUIST, *op. cit. supra* note 55, at 140, 142; LOCKLIN, *op. cit. supra* note 55, at 55.

57. Rosenbaum and Lilienthal, *Issuance of Securities by Public Service Corporations* (1928) 37 YALE L. J. 716, 734.

58. *Id.* at 734, 738-739.

59. The necessity for caution is strikingly revealed by the policy of the Interstate Commerce Commission and that of the regulatory body in Massachusetts. The former seeks to use its final rate-making values in passing upon proposed stock issues by the carriers; as a result, a valuation for security regulation may in one case approximate cost, in another reproduction cost, and in a third something somewhere between. LOCKLIN, *op. cit. supra* note 55, at 60. In Massachusetts, although the policy has supposedly been to control capitalization so that it will tend to reflect what has been invested in public utilities, it is said that there is no equivalence between the captalization of a local utility and the actual total cost of its property, the latter being greater. BARNES, PUBLIC UTILITY CONTROL IN MASSACHUSETTS (1930) 128.

60. The important commission decisions up to recent years are collected and fully discussed in 2 WHITTEN-WILCOX, VALUATION OF PUBLIC SERVICE CORPORATIONS (2d ed. 1928) 1214-1281. See also Tennessee Eastern Electric Co. v. Railroad & Public Utilities Commission, P. U. R. 1928D, 722, 732 (Tenn. Cir. Ct. 1928).

constant spread between the cost of the two alternatives of power production, whereas in reality there obtains a continuous change in the relative economy of the two, depending upon a number of variable factors.[61] But seemingly more significant, especially with respect to situations arising under the Federal Water Power Act, is the fact pointed out by other commissions that valuation by the comparative steam power method has the effect of equating consumer prices for electrical energy to the cost of the more expensive mode of production. Such a result denies the public the benefit to be derived from one of its great natural resources [62] and defeats the very purpose of the Federal Act and similar state laws.[63]

As an alternative to the method of valuation proposed by the licensee, the Commission adopted one predicated upon a combination of cost where known, and cost imputed from market value, where the actual cost could not be determined. Adhering to its conclusion that no new corporate enterprise resulted from the fusion of 1913, the Commission evaluated as of that date only the one parcel 214, which had previously been the property of the Alabama Power & Electric Company.[64] Its cost was imputed from its then market value as measured by the allocated price paid for it, along with other assets, in 1912 when the Traction Company acquired the various companies along the Coosa River.[65] Of the other lands at the Lock 14 site, the actual prices paid by the old Alabama Power Company were found from the deeds of conveyance in the majority of instances. Where the deeds did not give the real consideration, cost was based upon an assumed market value as calculated from prices paid for similar parcels. In the case of the lands at Duncan's Riffle, the actual considerations were known. There had also been calculated for the Commission the cost of Mitchell Dam lands based upon the assumption that a new and separate corporation had been formed in 1913. This cost, with respect to the Lock 14 lands, including parcel 214, was imputed from a market value estimated upon the basis of the apportioned price paid for these and other lands by the Traction interests the previous year.[66]

There can be no doubt of the correctness of the Commission's position in its adoption of such a valuation technique. A cost valuation is plainly

---

61. 2 WHITTEN-WILCOX, *loc. cit. supra* note 60; Tennessee Eastern Electric Co. v. Railroad & Public Utilities Commission, *supra* note 60. Chairman Smith and Commissioner McNinch consider this point in their respective concurring opinions. Opinion, at 31-32, and 47.

62. See the commission cases cited in 2 WHITTEN-WILCOX, *loc. cit. supra* note 60, especially at 1248-1249.

63. See Du Puy, *The Power Commission* (1930) 6 PUB. UTIL. FORTNIGHTLY 77, 81; *Re* Lockport & Newfane Power & Water Supply Co., P. U. R. 1928B, 183, 192 (N. Y. P. S. C. 1927). And see the well considered remarks of Chairman Smith in his concurring opinion. Opinion, at 33.

64. Opinion, at 10. And see page 248, *supra.*

65. See p. 252, *supra.* The ensuing outline of the Commission's cost calculations follows the general description of the properties there set out.

66. Reply Brief for the Commission, at 26. A detailed description of all these cost determinations is given in the same brief, at 22-29.

required by the provisions of the Power Act,[67] and the methods employed by the Commission in ascertaining the land costs are similar to those of other regulatory bodies, which resort to such evidences of cost as company vouchers, deeds, county and municipal records, tax assessments, court records, and contemporary sale prices of similar parcels.[68] But although the theory of valuation adopted by the Commission is sound, criticism may be made of the apparent failure, in two respects, to render the determination sufficiently inclusive of all proper cost elements. It has been before noted [69] that each of the original development companies on the Coosa River had, by complying with certain provisions of the laws of Alabama,[70] secured easements in the river for power purposes. It is assumed by the Commission that the costs incurred in the perfection of these rights were included in the price paid by the Traction Company for the various properties.[71] Such an assumption is correct as to the right at Duncan's Riffle, for the cost of that site to licensee is measured from the price paid for it by the Traction interests; it is difficult to perceive, on the other hand, how it can be true with respect to the easement at Lock 14, since the cost of that site to licensee is determined almost entirely from other considerations. By a narrow ruling, it could, of course, be held that the cost of obtaining the right at Lock 14 should not be included,[72] inasmuch as the Mitchell Dam was constructed at Duncan's Riffle and under a later right perfected in 1916,[73] but such a position would seem difficult of justification.[74]

67. See p. 253, and note 45, *supra*.

68. *Re* Texas Midland Railroad, 75 I. C. C. 1, 164, 166 (1918) (records of all types); 1 WHITTEN-WILCOX, *op. cit. supra* note 60, at 606 (records, tax assessments, and sale prices of similar land). The Federal Power Commission's use, as evidence of cost, of prices paid for the same properties in exchanges consummated within a short time previous to the transfers under consideration is very like the use of contemporary sale prices of comparable property. Where such data is available, it is held to be of significant weight. City of Loogootee v. Loogootee Water Co., P. U. R. 1932C, 494, 497 (Ind. P. S. C. 1932).

It is to be noted, however, that the imputing of cost from market value makes no allowance for the possibility that the utility was forced to pay more for land than the going market price. While not of any importance in the immediate case, owing to the manner here of ascertaining market value, this increased cost has been found to be a real factor in the purchase of land by railroads and of some magnitude in the case of other utilities. NASH, ECONOMICS OF PUBLIC UTILITIES (2d ed. 1931) 149. The Supreme Court, on the other hand, refuses to give weight to this possibility. Minnesota Rate Cases, 230 U. S. 352 (1913). The position of the Court has, however, been vigorously attacked. FLOY, VALUE FOR RATE-MAKING (1916) 76-77.

69. See p. 248, *supra*.

70. 2 ALA. CODE (1907) § 6148.

71. Opinion, at 18-19.

72. *Cf. Re* Union Electric Co., P. U. R. 1928E, 396, 403 (Mont. P. S. C. 1928) (no allowance made for expense of securing certificate unnecessary for the lawful operation of the utility).

73. Reply Brief for the Commission, at 34-35.

74. It is difficult to understand the extensive discussion between licensee and Commission regarding the proper legal designation of these rights, since

If a separate allowance were to be made for the cost to licensee of securing the easement at the old Lock 14 site, the amount would have to be estimated, since it is unknown. Indeed, there are no records extant of any of the early expenses of a promotional nature incurred either by the old Alabama Power Company or by the Traction Company.[75] But as against the licensee's contention that notwithstanding, there should be an allowance estimated for such expenditures because the cost to it of the land alone "represents only a small fraction of the total costs which must necessarily have been incurred," [76] the Commission took the position that it would not go beyond the expense records and vouchers which could be produced by the company.[77] In this it followed closely the position maintained by the Interstate Commerce Commission which has consistently refused, except within very narrow limits, to estimate the original cost of rail carriers where such cost cannot be determined from existing records.[78] But the interpretation placed by that commission upon the Railroad Valuation Act is of little relevance in determining the proper meaning of the Power Act. In the former case, omissions and deficiencies in original cost are corrected for by a consideration of other elements of value, primarily cost of reproduction which is so estimated as to include all necessary and legitimate costs. Where, on the other hand, actual reasonable cost is to be in itself the base, no such correcting factors are present, and it would seem therefore that deficiencies in cost would have to be supplied from estimates in order to obtain the total actual cost to the utility of its property.[79] This, indeed, has been the view uniformly taken by those state commissions [80] and writers [81] favoring the cost basis in

---

the Act requires that all water rights, interests in land, etc. are to be included only at cost. 41 STAT. 1072, 1074 (1920), 16 U. S. C. §§ 807, 813 (1926).

75. Opinion, at 17.

76. Reply Brief for Licensee, at 44.

77. Opinion, at 17. Such a position, while it is questioned with respect to a situation like that presented in the Mitchell Dam case where the investigation relates back to the era before governmental regulation of accounts, would without doubt be quite justified in instances in which a licensee had failed to maintain accurate records of costs incurred subsequent to the passage of the Federal Water Power Act and the prescription of a system of accounts thereunder.

78. *Re* Texas Midland Railroad, *supra* note 68, at 8; *Re* Chicago, Burlington & Quincy Rr. Co. 134 I. C. C. 1, 10 (1927); *Re* Chicago, Rock Island & Pacific Ry. Co., 24 I. C. C. (Val. Rep.) 709, 712 (1929).

79. *Cf.* FLOY, *op. cit. supra* note 68, at 65-66.

80. *Re* Los Angeles Gas & Electric Corp., P. U. R. 1931A, 132, 137 (Cal. R. C. 1930) (citing many previous California decisions to the same effect); *Re* Laporte Gas & Electric Co., P. U. R. 1921A, 824, 863-864 (Ind. P. S. C. 1920). The various Massachusetts commissions, popularly regarded as the greatest exponents of the investment cost rule, have also employed estimates for determining fair original cost where that could not be found from the outstanding securities because of the absence of regulatory supervision at the time of issuance of a part of those securities. BARNES, *op. cit. supra* note 59, at 117.

Moreover, many state commissions and writers, though adhering to the rule of Smyth v. Ames, hold that in calculating original cost resort to estimates is

utility valuation. And while allowances for promotion expenses should err on the side of conservativeness and not be made where there is no evidence that such costs were actually incurred,[82] yet there exists a general unanimity of opinion to the effect that where, as here, there is reasonable certainty that expenditures of this type were made,[83] an estimated amount should be included to cover them to the extent that they may properly be regarded as having been necessary and legitimate.[84] The inclusion of some allowance for them, however conservatively made, would also certainly be of strategical advantage to the Commission in case of appeals to the courts.

The contention that the Commission failed to correctly interpret the meaning of the phrase "actual legitimate original cost" did not constitute licensee's only criticism of the Commission's method of valuation. It also urged that a proper construction of the Act would dictate the inclusion of all property acquired prior to its passage at the fair value of that property as of the date of the license, not at its actual original cost.[85] This contention it founded upon Section 23 of the Act which provides in substance that in case of projects already constructed when application for a license is made, the fair value of the project shall be taken as the net

---

necessary where accounting records are unavailable or cannot be relied upon. See 1 WHITTEN-WILCOX, *op. cit. supra* note 60, c. 14 (citations and discussion); *Re* Boise Water Co., P. U. R. 1926D, 321, 353; *Re* Salmon River Power & Light Co., P. U. R. 1926E, 728, 734, both Idaho P. U. C. 1926; Wichita Gas Co. v. Public Service Commission, 126 Kan. 220, 221, 268 Pac. 111 (1928) (Kan. P. S. C. had estimated cost in the absence of records showing actual expenditures); Aluminum Goods Manufacturing Co. v. Laclede Gas Light Co., P. U. R. 1927B, 1, 5-7 (Mo. P. S. C. 1926); *Re* United Railways Co. of St. Louis, P. U. R. 1928E, 419, 452 (Mo. P. S. S. 1928), *aff'd*, State v. Public Service Commission, 326 Mo. 751, 771, 34 S. W. (2d) 507, 515 (1930).

81. BAUER, EFFECTIVE REGULATION OF PUBLIC UTILITIES (1925) 105-106; Goddard, *Public Utility Valuation* (1917) 15 MICH. L. REV. 205, 224.

82. West Palm Beach Water Co. v. City of West Palm Beach, P. U. R. 1930A, 177, 199 (U. S. Dist. Ct. S. D. Fla. 1929).

83. The Commission recognizes that some expenses were incurred in the way of preliminary investigation and promotion. Opinion, at 16-17. The testimony before the Federal Trade Commission of Mr. Thomas W. Martin, President of the Alabama Power Company, though undoubtedly presenting an estimate of those expenditures much in excess of any figure which could be allowed, indicates the actuality of such costs. Federal Trade Commission, *supra* note 5, at 105-110. The expenditures of the promotional period here under consideration should not be confused with the organization and preliminary investigation costs allowed by the Commission. The latter related to the period of active construction. PRELIMINARY ACCOUNTING REPORT, 15, 18-19, 23.

84. Bay State Rate Case, P. U. R. 1916F, 221, 245-248 (Mass. P. S. C. 1916); State v. Public Service Commission, *supra* note 80, at 771, 34 S. W. (2d) at 515, *aff'g Re* United Railways Co. of St. Louis, *supra* note 80 at 454; Dunn v. Rutland Railway, Light & Power Co., P. U. R. 1923C, 316, 329-330 (Vt. P. S. C. 1923); BAUER, *op. cit. supra* note 81, at 106, 216; FLOY, *op. cit. supra* note 68, at 65-66; 2 WHITTEN-WILCOX, *op. cit. supra* note 60, at 1091.

85. Brief of Alabama Power Company, at 38-40.

investment of the applicant as of the date of such license. Construed in its context, this provision seems to bear out the Company's position and to indicate on the part of Congress an attempt to circumvent any possible constitutional entanglements arising out of retroactive legislation which appears to take property without due process.[86] For it is clear from the decisions of the Supreme Court that it is the value of utility property which is protected by the Constitution [87] and that original cost is not the measure of this value.[88] Adherents of the investment rule and the more recent proponents of the fixed rate base recognize the possible constitutional invalidity of the application of their proposals to already existing utility properties.[89] The former seek to overcome this defect in their proposition by showing that the shift in the regulatory base would not be prejudicial to investors; [90] the latter, by somewhat similar observations reinforced with the explanation that existing properties are to be included in the frozen base at their fair value at the present time.[91] But the arguments are in the main addressed to the economic aspects of the problem and, while persuasive, it is questionable whether they could overcome in the minds of judges the force of the constitutional objection.[92]

---

86. See Ettor v. City of Tacoma, 228 U. S. 148 (1913).

87. Smyth v. Ames, 169 U. S. 466 (1898).

88. Southwestern Bell Telephone Co. v. Public Service Commission, 262 U. S. 276 (1923); St. Louis & O'Fallon Ry. Co. v. United States, 279 U. S. 461 (1929).

89. Bauer, *The Fixed Rate Base* (1930) 6 PUB. UTIL. FORTNIGHTLY 22, 25; Bickley, *Public Utility Valuation for Rate Purposes* (1926) 16 AM. ECON. REV. 28, 38-39; Bonbright, *The Economic Merits of Original Cost and Reproduction Cost* (1928) 41 HARV. L. REV. 593, 594-595; Ryan, *Let Congress Fix the Utility Rate Base* (1930) 5 PUB. UTIL. FORTNIGHTLY 756, 759. See also FLOY, *op. cit. supra* note 68, at 28-30.

90. Bonbright, *supra* note 89, at 614; Hale, *The "Physical Value" Fallacy in Rate Cases* (1921) 30 YALE L. J. 710, 718-720. But *cf.* FLOY, *op. cit. supra* note 68, at 63-64.

91. Bauer, *supra* note 89, at 25; Bauer, *What is Unconstitutional About a Fixed Rate Base?* (1930) 6 PUB. UTIL. FORTNIGHTLY 669, *passim.*

92. See Wherry, *Is a Fixed Rate Base Constitutional?* (1930) 6 PUB. UTIL. FORTNIGHTLY 611. If, by judicial construction of the Power Act, it did become necessary to find the fair value of the assets which licensee had acquired prior to 1920, an interesting valuation problem would arise from the fact that the law contemplates the use of the calculated base in both rate regulation and later government purchase. In valuation for rate making the capitalization of earnings is not considered in finding fair value, the base being determined from a consideration of past and contemporary costs. BAUER, *op. cit. supra* note 81, at 69-70; HARTMAN, *op. cit. supra* note 43, at 81, 93; Craven, *supra* note 43, *passim.* But with valuation for public purchase it is customary to give substantial weight to discounted earning power. 1 NICHOLS, EMINENT DOMAIN (2d ed. 1917) 664-665, 681-682; 1 WHITTEN-WILCOX, *op. cit. supra* note 60, at 64-67; Craven, *supra* note 43, at 686-687. The dissimilarity between these two types of valuation is discussed in HARTMAN, *op. cit. supra* note 43, at 57. The commission might thus be again met with the problem of determining upon the legitimacy of licensee's proposed method of valuation.

From the above discussion it appears that the Commission's position, like that of the Power Company, is perhaps open to attack. Yet there is no way whereby the licensee can immediately secure a judicial review. Determinations by the Commission like that here made have recently been held to be purely administrative in character, raising no judicial question on which resort to the courts may be had,[93] and this holding is without doubt in accord with the views of the Supreme Court which has ruled that final valuations by the Interstate Commerce Commission under the Railroad Valuation Act are but administrative determinations not open to attack by the carriers affected.[94] As was argued in the railroad cases,[95] this inability on the part of the utilities to secure a hearing until a judicial question is presented places them at a disadvantage, for the weight given at that later time to the administrative findings will be difficult to overcome. It is this situation which explains the licensee's unsuccessful effort to challenge the jurisdiction of the Power Commission to make a formal determination of costs in advance of any attempt at regulation of rates or ascertainment of purchase price.[96] And in view of the possibility that the Commission will have little occasion to exercise its powers over rates [97] this question as to the correctness of its present determination may well remain unanswered until the end of the license period, or at least until the period of amortization of excessive earnings has been reached after twenty years of operation.

---

93. Clarion River Power Co. v. Smith, 59 F. (2d) 861 (App. D. C. 1932).

94. United States v. Los Angeles & Salt Lake Rr. Co., 273 U. S. 299 (1927), *rev'g* 4 F. (2d) 736 and 8 F. (2d) 747; United States and Interstate Commerce Commission v. The Kansas City Southern Ry. Co., 275 U. S. 500 (1927), *rev'g* 19 F. (2d) 591. The lower federal courts had held that the carriers were sufficiently affected by these final valuations to warrant and necessitate the taking of jurisdiction.

95. See, especially, Kansas City Southern Ry. Co. v. United States, 19 F. (2d) 591 (W. D. Mo. 1926).

96. See Brief of Alabama Power Company, at 6-15.

97. See Du Puy, *supra* note 63, at 79.