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RECENT LEGISLATION FOR THE RELIEF OF MORTGAGE DEBTORS

AN abnormal demand for the liquidation of debts is one of the most serious consequences of a period of depression. Its effects are visited upon the mortgagor with double-barreled severity. A scarcity of available funds brings widespread default, both of interest and principal, and so leads to an increasing number of foreclosures. These forced sales, in combination with other factors, reduce the value of real estate to such an extent that the defaulting mortgagor not only loses his land but also remains liable upon a large deficiency judgment. This is the situation, aggravated by the increase in the relative value of the dollar since 1929, in which the mortgagor has found himself in recent months.[1] And so long as this process

1. The total value of urban and rural mortgages outstanding at the close of 1932 is estimated at $45,000,000,000, or $3,000,000,000 less than in 1929. Total

of liquidation continues uncontrolled and unregulated, the more depressed the market for real estate must become, followed in turn by still more foreclosures and still further depressed prices. Both courts and legislatures have, in these circumstances, been alert to discover means of relieving mortgage debtors.

Court relief, apart from legislative action, encounters difficulty in the contractual agreement of the mortgagor that upon default the mortgagee may force a sale of the property and may have a deficiency judgment for the amount by which the debt exceeds the proceeds of sale. Generally, a lack of competitive bidding has not been regarded as sufficient to justify a court in setting a minimum price before sale, nor mere inadequacy of price sufficient for refusing confirmation after sale.[2] In past depressions, the fact that "times were hard," or "money scarce," or "the market unpropitious," has afforded no basis for disturbing normal procedure.[3] But in the already famous case of *Suring State Bank v. Giese*,[4] the Supreme Court of Wisconsin recently declared that, "in the light of the present emergency, and because of the present inadequacy of a judicial sale to establish a fair value for the security," a court of equity has power without the aid of statute to relieve mortgage debtors of liability upon deficiency decrees. The court indicated three methods by which this might be ac-

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national income, on the other hand, has fallen from $85,000,000,000 to $36,000,000,000 during the same period. The great bulk of farm mortgages was contracted when the general price level was about twice, and the farm price level nearly four times, as high as in 1932. Today's dollar is worth 57½ cents more than the dollar of 1929, which means that 6 per cent interest agreed upon then is worth 9.45 per cent now. Cash income of farmers, after deducting production expenses, declined 72 per cent in three years. In ten years land values have dropped 66 per cent. For statistics and discussion, see Holden, *The Menace of Mortgage Debts* (1933) 166 HARPERS 575, 576; Johnson, *Debt and the Devil* (1933) 22 YALE REVIEW 450; Stein, *Home Owners, Unite!* (1933) 74 NEW REPUBLIC 35; Jennings and Sullivan, *Legal Planning for Agriculture* (1933) 42 YALE L. J. 878, 887, n. 21; Duffus, *Our Burden of Internal Debt; An Analysis of the Problem*, N. Y. Times, May 2, 1933, § 1, at 6; Department of Agriculture's Annual Estimate of Farm Income, N. Y. Herald Tribune, May 9, 1933, at 12.

Estimates of the number of foreclosures during the last three years reach as high as half a million. Holden, *supra*. In Cook County, Illinois, the number of foreclosures commenced increased from 3,852 in 1929 to 15,332 in 1932. Carey, *Mortgage Foreclosures in Cook County* (1933) 19 A. B. A. J. 275. Foreclosure and bankruptcy sales of farm property for the country as a whole increased from 27 per cent of the total number of transfers in 1928 to 37 per cent in 1932. N. Y. Herald Tribune, May 8, 1933, at 5. In relation to the number of defaults, however, the number of foreclosures has not been large. *Ibid.*

2. 3 JONES, MORTGAGES (8th ed. 1928) § 2140; Note (1933) 42 YALE L. J. 960.

3. Nebraska Loan and Trust Co. v. Hamer, 40 Neb. 281, 58 N. W. 695 (1894) (sale confirmed); McGowan v. Sandford, 9 Paige 290 (N. Y. 1841) (postponement of date of sale refused); Muller v. Bayly, 62 Va. 521 (1871) (injunction against proposed sale denied).

4. 246 N. W. 556 (Wis. 1933); noted in (1933) 42 YALE L. J. 960.

complished. The trial court might fix an upset price before the foreclosure sale, or failing this, either it might decline to confirm a sale where the bid is "substantially inadequate," or upon application for confirmation it might conduct a hearing to establish the value of the property and as a condition to confirmation require that such value be credited upon the foreclosure judgment. Trial courts in various parts of the country have indicated their willingness to follow the lead of the Wisconsin court in the *Giese* case,[5] but the traditional view that such questions of policy should be left to the determination of the legislatures will probably lead many courts of appellate jurisdiction to a contrary conclusion.[6]

Recent legislation, both pending and enacted, reveals a wide variety of attack upon the mortgage problem. Most of the measures considered are designed either to give the debtor more time, or to relieve him of liability upon deficiency judgments, or to extend the period after sale within which he may redeem his property. Laws granting mortgagors outright moratoria have been proposed in a few states,[7] but measures accomplishing virtually the same result through various procedural devices are more general. Considerable relief may be afforded the mortgagor by allowing him several months within which to file his answer in foreclosure proceedings.[8] Thereafter, additional delay may be provided by statutes authorizing prolonged continuances,[9] or directing that no sale of the debtor's property shall be had until a reasonable time has elapsed after judgment,[10] or even until such

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5. See First Union Trust and Savings Bank v. Division State Bank, Circuit Court of Cook County, Illinois, decision by Fisher, J., April 1, 1933; Berry, Vice Chancellor of New Jersey Court of Chancery, as quoted in N. Y. Times, May 25, 1933, at 7; Schmuck, Judge of New York Supreme Court, as quoted in N. Y. Times, April 7, 1933, at 21.

6. Several courts have already so held. First National Bank v. Cahill, 160 Atl. 649 (N. J. Eq. 1932); Roberson v. Matthews, 200 N. C. 241, 156 S. E. 496 (1931); Commonwealth Bank and Trust Co. v. MacDonell, 49 S. W. (2d) 525 (Tex. Civ. App. 1932).

7. Mass. H. B. no. 1254 (1933) (all foreclosure suits to be stayed until the executive shall declare that "the emergency creating the necessity for this legislation no longer exists"); N. H. H. B. no. 401 (moratorium for one year).

8. Ark. Acts (1933) no. 21, approved February 9, 1933 ("An act for the relief of the congested dockets of the chancery courts" providing, among other things, that answers in foreclosure proceedings shall not be due for three months); Okla. S. B. no. 76 (1933), approved March 7, 1933 (answers not to be due for nine months).

9. Ariz. H. B. no. 167 (1933), approved March 4, 1933; Iowa H. F. no. 193, effective Feb. 9, 1933; Okla. H. Roll no. 600 (1933), approved March 2, 1933. Similar provisions have been suggested in other states. Ill. H. B. no. 420 (1933); Mich. H. B. no. 267 (1933); R. I. S. B. no. 92 (1933).

10. A bill introduced in the Wisconsin legislature this year allows a reasonable time, but in no event beyond March 1, 1938; time would be granted upon such terms as the court might determine; and defaults in payments of taxes, interest or insurance would not of themselves be cause for appointment of a receiver.

time as "will insure, if possible, a fair price" being received.[11] Statutes which seek to cut down deficiency decrees are equally diverse in their methods. The Idaho legislature has prohibited altogether the taking or enforcement of such judgments in the case of purchase money mortgages.[12] For the most part, however, legislators have resorted to procedure such as that suggested in the *Giese* case. A Kansas statute enacts the procedure there adopted, virtually without change.[13] A New Jersey bill, providing that foreclosure sales shall not be confirmed "unless the bid shall equal the value of the mortgaged premises," declares that the amount of the debt shall be *prima facie* evidence of that value; [14] while an Arkansas statute makes the amount of the debt conclusive evidence of the property's value, and requires the plaintiff to bid a sum equal to the debt, interest and costs before the sale will be confirmed.[15] And a statute in Arizona provides that a mortgagee may have a deficiency judgment only if he proves that "at the time the note and mortgage, or deed of trust, were executed, the real property was not of a value in excess of the amount remaining due upon the note." [16]

The foregoing statutes, together with those extending the period of redemption,[17] are open to the serious constitutional objection that they impair the obligations of the mortgage contracts. The contract clause [18] was included in the federal Constitution for the very purpose of protecting creditors from debtor-relief legislation.[19] Recognizing this, courts in earlier periods of economic depression frequently refused to sustain statutes similar to the present mortgage relief measures. An early statute allowing debtors to satisfy their obligations by instalment payments was held to be invalid; [20] and laws forbidding foreclosure sales unless the amount bid should equal an appraised valuation of the property or some specified percentage thereof,[21] or directly restricting the mortgagee's right to a de-

11. Ariz. Session Laws (1933) no. 21, approved February 9, 1933.

12. An act so providing was approved Feb. 9, 1933.

13. See KANS. JUD. COUNCIL BULL. for April, 1933, at 6-10.

14. N. J. S. B. no. 135 (1933).

15. Ark. Acts (1933) no. 57, effective Feb. 25, 1933.

16. Ariz. H. B. no. 115 (1933), approved March 18, 1933.

17. In Wisconsin the usual one-year period has been extended to two years, but in no event beyond January 1, 1936, provided the person entitled to redeem "shall pay all insurance premiums as provided in the mortgage and all taxes on the mortgaged property accruing after such judgment (of foreclosure), before they become delinquent, and shall also pay on or before the expiration of one year from the date of such judgment, one year's interest thereon." Wis. Laws (Special Session, 1931-32) c. 29, § 7.

18. Art. 1, § 10.

19. Feller, *Moratory Legislation: A Comparative Study* (1933) 46 HARV. L. REV. 1061, 1068.

20. Jacobs v. Smallwood, 63 N. C. 112 (1869) (debts made payable in four annual instalments).

21. Bronson v. Kinzie, 1 How. 311 (U. S. 1843) (law prohibiting sale for less than two thirds of appraised value held unconstitutional); McCracken v. Hayward, 2 How. 608 (U. S. 1844) (same).

ficiency judgment,[22] or extending the period of redemption,[23] all met a similar fate when applied to prior mortgage contracts. But when courts desired to reach a contrary conclusion, an escape from the Constitution's prohibition was readily found in Chief Justice Marshall's distinction between laws which impair the "obligations" of contracts and those which merely modify the "remedies" given to enforce the obligations.[24] In spite of the contract clause, therefore, a considerable body of moratory legislation has been sustained by the state courts. For example, a Georgia statute of 1807 suspending the issuance of civil process [25] for a limited period and intended "to alleviate the condition of debtors" was sustained,[26] as was also a Wisconsin statute providing that defendants in actions to foreclose mortgages should have six months within which to file answers and that property should not be sold after judgment except upon six months notice.[27] And several state courts upheld laws giving debtors additional time by changing or delaying court terms.[28] But the obscurity of the distinction between "obligation" and "remedy" is indicated by the conclusion of the courts that laws suspending the issuance of execution on civil judgments are such drastic alterations of remedial rights as to diminish substantive rights and so to be unconstitutional.[29] Clearly, the theory that statutory modifications

22. The statute need not completely abolish the recovery of such a judgment in order to be open to attack as unconstitutional; it may provide only that such a judgment cannot be recovered in proceedings to foreclose, leaving open the right of the mortgagee to proceed in a subsequent action at law for the balance, or to sue on the note or other evidence of debt in the first instance without regard to his security. *Cf.* Burrows v. Vanderbergh, 69 Neb. 43, 95 N. W. 57 (1903). A law construed to limit the right to enforce judgments on debts for which mortgage security has been given to the property mortgaged has been held invalid even as to contracts made after its passage, as an undue restraint upon freedom of contract. Dennis v. Moses, 18 Wash. 537, 52 Pac. 333 (1898). Of course, the parties may contract voluntarily with reference to the property alone. Weikel v. Davis, 109 Wash. 97, 186 Pac. 823 (1919).

23. Bronson v. Kinzie, 1 How. 311 (U. S. 1843); Howard v. Bugbee, 24 How. 461 (U. S. 1860); Barnitz v. Beverly, 163 U. S. 118, 129 (1895); Malone v. Roy, 134 Cal. 344, 66 Pac. 313 (1901); State v. Hurlburt, 93 Ore. 34, 182 Pac. 169 (1919).

24. Sturges v. Crowinshield, 4 Wheat. 122, 200 (U. S. 1819).

25. Except for trial of the right to property.

26. Grimball v. Ross, T. U. P. Charlt. 175 (Ga. 1808).

27. Von Baumbach v. Bade, 9 Wis. 559 (1859).

28. *Ex parte* Pollard, 40 Ala. 77 (1866) (first term after commencement of action to be return term only, second term to be appearance and pleading term, and third term to be trial term; in city courts of civil jurisdiction six months to elapse between terms); Johnson v. Higgins, 3 Metc. 566 (Ky. 1861) (repealing all laws requiring courts to hold terms, except for trial of criminal and penal causes, for seven months); Stevens v. Andrews, 31 Mo. 205 (1860) (statute similar to that considered in *Ex parte* Pollard, *supra*).

29. Hudspeth and Co. v. Davis, 41 Ala. 389 (1869) (no execution to issue until one year after treaty of peace in Civil War); Jones v. Crittenden, 4

of "remedies" do not also deprive creditors of substantive rights is untenable. Any relief measure which does not substantially modify the debtors' obligations fails of its purpose. Chief Justice Marshall's distinction is therefore wholly inadequate as a test of constitutionality.[30]

Unless, therefore, courts in the present depression are more influenced by social and economic conditions than they have been in the past, it seems clear that much of the recent legislation for the relief of mortgagors will be declared unconstitutional.[31] The decision of the Michigan court this spring in *Thompson v. Stack*[32] indicates something of the courts' present uncertainty upon the question. The Michigan legislature, for the express purpose of relieving tax delinquents of the sale of their property, forbade the auditor general to publish descriptions of land scheduled so to be sold.[33] A newspaper publisher, claiming a contract with the auditor general for the publication of such descriptions, sought a writ of mandamus to require the auditor general to perform his contract, alleging that the statute was unconstitutional because it impaired the contracts of governmental units with persons who had loaned them money and who held their notes. The court, holding that the petitioner had a contract entitling him to seek the

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N. C. 50 (1812) (executions stayed for a limited period); Barnes v. Barnes, 8 Jones 366 (N. C. 1861) (no execution to issue until otherwise provided by law); Sequestration Cases, 30 Tex. 688, 712, 713 (1868) (statute similar to that considered in Hudspeth and Co. v. Davis, *supra*). *Contra:* Chadwick v. Moore, 8 Watts & Serg. 49 (Pa. 1844) ("emergency measure" suspending execution for three weeks sustained, the court denying "that a State Legislature is incompetent to relieve the public from the pressure of sudden distress by arresting a general sacrifice of property by the machinery of the law"). Statutes staying for a reasonable time all actions against persons engaged in military or naval service have generally been sustained. Note (1930) 9 A. L. R. 6, 11.

In Cutts and Johnson v. Hardee, 38 Ga. 350 (1868), a Georgia statute which provided that juries should have the power to "reduce the amount of the debt according to the equities of each case," and which made the amount of the debtor's property upon the faith of which credit was extended him competent evidence, was sustained on the ground that it acted only on the creditor's remedy.

30. It is worthy of note that the constitutional prohibition is against "*any* law impairing the obligation of contracts." It can make no difference under what name the injury is done. See Warner, J., dissenting in Cutts and Johnson v. Hardee, *supra* note 29, at 381, 387. Chief Justice Marshall himself, even while making his distinction, was careful to recognize that a change in remedy might impair the obligation of a contract. Sturges v. Crowinshield, 4 Wheat. 122, 207 (U. S. 1819).

31. A district court in Texas has recently held unconstitutional a moratorium law by which the legislature of that state proposed to give the district courts discretionary power to postpone foreclosures for six months on a showing by the land owner that he was unable to pay and that the property would bring less than its actual value if sold. N. Y. Herald Tribune, May 20, 1933, at 6.

32. 247 N. W. 360 (Mich. 1933), decided March 1.

33. Mich. Pub. Acts (1933) no. 2.

mandamus order,[34] concluded that the governmental units had borrowed "on the faith of the collection of delinquent taxes, and the sale of lands to realize such taxes, under laws existing at the time the notes were issued and sold. A law which impairs the means of realizing upon the contracts of the governmental units as agreed impairs the obligation of such contracts." [35] The writ was accordingly granted. Curiously enough, however, the reporter adds a footnote that "Under subsequent order of court, writ of mandamus was not issued, in view of existing emergency, and it being a discretionary writ."

In the existence of the emergency which induced the Michigan court to act contrary to its own decision lies the strongest argument for the constitutionality of the mortgage legislation under consideration. The titles of these various measures proclaim the existence of a period of "extreme financial depression," and the necessity for affording temporary relief to mortgage debtors. Reliance is thus invited upon the doctrine of the *"Emergency Rent Cases,"* [36] in which an emergency was held by the Supreme Court to lend validity to legislation which otherwise could not have been sustained.[37] A crisis sufficiently serious to necessitate resort to martial law for the preservation of order should certainly warrant the application of this doctrine to statutes for the relief of mortgagors. At least where such statutes are expressly limited in operation to a reasonable and definite time,[38] therefore, their constitutionality should be affirmed.

Of the various forms of mortgage relief legislation that have been proposed, a general moratorium on all foreclosures, applying to defaults in the payment of principal and interest alike and prescribing an iron rule for all cases without regard to the circumstances of the parties, seems least

34. The court in laboring to demonstrate that petitioner had a contract giving him standing in court appears to have gone out of its way to indicate its views upon the constitutional question presented.

35. 247 N. W. at 371.

36. Block v. Hirsch, 256 U. S. 135 (1920); Marcus Brown Holding Co. v. Felderman, 256 U. S. 170 (1921); Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242 (1922). These cases involved the validity of legislation enacted by Congress and by the legislature of New York declaring an emergency housing situation in the District of Columbia and in New York. For discussion, see Boyd, *Rent Regulation under the Police Power* (1921) 19 MICH. L. REV. 599; Wickersham, *The Police Power and the New York Emergency Rent Laws* (1921) 69 U. OF PA. L. REV. 301; Notes (1921) 5 CAL. L. REV. 337; (1921) 19 MICH. L. REV. 869; (1921) 5 MINN. L. REV. 472.

37. The Court indicated in Chastelton Corp. v. Sinclair, 264 U. S. 543 (1924), that the rent laws would cease to operate when the emergency ceased to exist.

38. Such a time limitation was stressed in the Rent Cases. See Block v. Hirsch, 256 U. S. 135, 157 (1920). In earlier times courts have sometimes held that mortgage relief legislation was void for indefiniteness if a time limitation was not expressed; *e.g.*, Breitenbach v. Bush, 44 Pa. 313, 318 (1863). But whether expressed or not, a time limitation upon the operation of such statutes must almost necessarily be intended; such restrictive legislation as a permanent policy would drive capital from the mortgage field altogether.

likely to effect a socially and economically desirable solution of the problem. There are many mortgage debtors who can afford to pay something; there are creditors who cannot afford to remain unpaid.[39] In determining whether final settlement is to be left in abeyance in any case, the needs of the mortgagee as well as those of the mortgagor should be considered, and some protection of the mortgagee's interests should be afforded in the interim. From this standpoint, a measure of the type recently enacted by the Arizona legislature[40] offers the most satisfactory form of relief. The statute provides in substance that in all pending foreclosure actions and in actions subsequently instituted the court may, upon application of either party and unless good cause is shown to the contrary, order a continuance for a period of not more than two years[41] from the effective date of the act. If a continuance is ordered,[42] the court shall make an order for the possession of the land at fair rental terms, giving preference to the present owners; furthermore, the court is required to determine the application of the rents, income and proceeds from the land,[43] and to make such provisions for the preservation of the property during the period of the continuance

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39. It has been estimated that about 15 per cent of all farm mortgages are held by farmers themselves, while other individuals hold an additional 15 per cent, the remaining 70 per cent being held by federal land banks, joint stock land banks, commercial banks, mortgage companies, and insurance companies. For discussion of the effect upon these mortgagees of general relief laws, see (1933) 136 NATION 193. Farm mortgages represent only 9 per cent of the total investments of insurance companies at present; urban mortgages form another 20 per cent of their investments. Commercial and savings banks hold 35 per cent of all urban mortgages, and building and loan associations hold an additional 25 per cent. These investments constitute more than half the earning assets of savings banks and building and loan associations. N. Y. Herald Tribune, May 8, 1933, at 5.

40. The Arizona act, and also the similar ones enacted in Iowa and Oklahoma and proposed in Illinois, Michigan and Rhode Island, are cited *supra* note 9.

41. The Iowa law provides that proceedings may be stayed until March 1, 1935, or so long as the act is in effect. The Nebraska law is similar, as are also the bills in Michigan and Rhode Island.

42. The Oklahoma law authorizes a court to grant continuances in all foreclosure proceedings, and requires the court to make such an order if the mortgagor will agree to pay or secure the interest and taxes due, plus a reasonable rental, and if the land is of sufficient value to satisfy the lien with costs. The court may appoint a receiver (except when the land is a homestead) to preserve, rent and operate, or to prevent waste upon the property. The bill proposed in Illinois provides for the appointment of a receiver during the continuance, and directs him to enter into a written lease with the owner for one year requiring the latter to pay taxes and a reasonable rental. The lease may be extended in the discretion of the court, but not beyond July 1, 1935. A bill (H. B. 473) similar to the Iowa and Nebraska legislation has also been presented in Illinois.

43. In distributing the rents and proceeds of the property, taxes, insurance, cost of maintenance and upkeep are to be paid in the order of priority named, and the balance as the court may direct.

as may seem proper. In effect the statute contemplates a fair temporary arrangement between the parties when circumstances make relief for one or both of them necessary. It is possible, however, that the individual treatment which would be necessary for each case under such a statute would impose an unduly heavy volume of litigation upon the trial courts.

D. E. C.

APPOINTMENT OF RECEIVERS FOR LABOR UNIONS

RACKETEER control of labor unions, inflicting many abuses upon the rank and file of union members, invites an enlarged scope of judicial interference in the unions' internal organizations which would in many circumstances prove incompatible with the unions' legitimate functions. The recent action of a New York court in appointing receivers to manage the affairs of Local 306 of the moving picture operators' union [1] is a warning of the drastic form which such interference may take. While the New York court's appointments were vacated upon appeal,[2] they had meanwhile been followed by a New Jersey court's decision placing several local building-trades unions in the hands of receivers.[3]

The factual background of the New York decision is probably representative. In 1926, one Sam Kaplan was elected president of Local 306. Internal disputes arose quickly and furiously. Charges were made by minority members at the meeting of the union and filed with the officers and General Executive Board of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, from which Local 306 held its charter. It was alleged that Kaplan had discriminated in wage scale contracts in favor of exhibitors who purchased supplies from Kaplan's own concern, the Sam Kaplan Manufacturing Company, and that he had in other ways used his position as president of the local for the personal benefit of himself and the other officers, to the detriment of the local and its members. Kaplan was also accused of mismanagement and illegality in the handling of the funds of the union, it being claimed that approximately $800,000 was collected annually and spent without proper bookkeeping records, and that vast sums of this money were unaccounted for. Further, Kaplan was said to have discriminated among union members in the assignment of positions, and to have threatened violence to some of them and incited assaults by others. It appears that between October, 1929, and October, 1931, at least twelve members of Local 306 were expelled or suspended and fined [4] for opposition to Kaplan's leader-

1. Kaplan v. Elliot, 145 Misc. 863, 261 N. Y. Supp. 112 (Sup. Ct. 1932).

2. Kaplan v. Elliot, N. Y. L. J., Jan. 24, 1933, at 456, 464 (mem. App. Div. 1st Dep't 1933), N. Y. Times, Jan. 24, 1933, at 17; noted in (1933) 46 HARV L. REV. 1037.

3. The New York World-Telegram, Jan. 19, 1933, at 16.

4. Polin v. Kaplan, 257 N. Y. 277, 177 N. E. 833 (1931); Rubin and Lanzotto v. Kaplan, Smith v. Kaplan, and Wood v. Kaplan, all in Supreme Court, Kings County (all of these expulsions and fines have been held void and set aside).

ship. Expulsion of several members followed their cooperation in bringing, or in seeking the members' support for, an action in which the officers of the union were accused of wrong-doing and in which an accounting of union funds was requested; similar treatment was accorded several members for forcing some of the union's officers to answer assault charges in proceedings which were subsequently dismissed.[5] Kaplan is said to have refused to reinstate these members even when their reinstatement was ordered by the courts.[6]

Despite the gravity of these charges, the International Alliance declined to interpose in the affairs of Local 306, preferring to respect local autonomy. The American Federation of Labor also refused to interfere. Thereafter, however, a series of scathing articles and editorials in a New York newspaper[7] gave considerable publicity to the state of internal affairs in Local 306; and in December, 1931, Kaplan and twenty-one officers of the local were indicted for criminal coercion and conspiracy in connection with their union activities.[8] Spurred on by these events, and by the American Federation of Labor's threatened revocation of its charter, the International Alliance in September, 1932, directed its Executive Board to conduct an investigation into conditions in Local 306.

After extended hearings, the Executive Board on November 28, 1932, notified Kaplan and his associate officers of their ouster, and directed them to turn over the assets and books of the local to a committee appointed by the Board.[9] Within a few days Kaplan brought suit to prevent the International from improperly ousting him, seeking a temporary injunction against any immediate interference in the affairs of the local. The court, denying the temporary injunction, set down the trial of the action for an early date and ordered an immediate election of new officers. Representatives of the International Alliance, submitting further affidavits showing the turbulent condition of the local, urged the court to postpone the election until after the trial.[10] Thereupon the court, on its own motion, entered a second order substituting for

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Ruddoch (later replaced by Polin, later replaced by Thide) v. Kaplan, pending in Supreme Court, Queens County.

5. See Latelton v. Kaplan, pending in Supreme Court, New York County; Tyborowski v. Kaplan, pending in Supreme Court, Kings County.

6. Other charges filed against Kaplan included discrimination in dues charged to out-of-town card men, in direct violation of the constitution and by-laws of the International Alliance, and employment of non-union labor in the Sam Kaplan Manufacturing Company.

7. The New York World-Telegram published a series of articles commencing in May, 1931, and continuing through 1932.

8. Matter of public record. On March 9, 1933, Kaplan and several of the officers were convicted. People v. Kaplan (unreported). See N. Y. Times, March 10, 1933, at 18.

9. As to the power of the International Alliance to order such transfer, see note 30, *infra*.

10. Kaplan v. Elliot, N. Y. L. J., Jan. 5, 1933, at 57 (Sup. Ct. 1933).

an immediate election the appointment of three receivers "of the property, real and personal, things in action and effects of every kind and nature" of Local 306, and directing the receivers "to take possession of said property, to collect and receive, hold and preserve, and protect the same and the proceeds thereof, and maintain and conduct the affairs of Local 306 . . . " This order was modified by the court to provide that a committee of two persons, one a member of the local and the other a representative of the International, should actually conduct the operating affairs of the local, but the committee was made subject to the supervision of the receivers, and the latter retained full control over the funds of the union. In vacating the appointment of these receivers, the Appellate Division[11] required the International Alliance to post a $500,000 bond securing the funds of the local, and ordered an immediate trial of the action.[12]

Sweeping injunctions in connection with strikes, restrictions on picketing and boycotts, and judicial protection of "yellow dog" contracts, have caused labor unions to be wary of judicial interference in their affairs. Consequently, it has become a common rule among labor unions that, in the settlement of internal disputes, all available remedies within the union be exhausted before recourse is had to the courts. Provisions in the by-laws of labor associations designed to bring disputes to arbitration before internal tribunals have, in general, been enforced by the courts.[13] Numerous judicial exceptions, however, have lessened the efficacy of such requirements. For example, prior appeal within the association is not necessary if the internal appellate body meets very infrequently,[14] or if the matter is not within the association's power,[15] or if, in the most common type of suit, a wrongfully expelled member seeks only damages and not reinstatement.[16] Many unions have gone so far as to provide in their by-laws that the decisions of their own tribunals shall be final in any dispute. Some courts have respected such provisions and have per-

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11. Kaplan v. Elliot, *supra* note 2.

12. At the trial subsequently held, Justice Miller ruled that Kaplan had been properly ousted. Kaplan v. Elliot, N. Y. L. J., Jan. 31, 1933, at 612 (Sup. Ct. 1933). Question might be raised whether the court had the right to entertain the suit until Kaplan had exhausted his remedies within the union. See notes 13 *et seq.*, *infra*. After such trial, an election of officers was held and associates of Kaplan were overwhelmingly defeated.

13. Supreme Council of Chosen Friends v. Forsinger, 125 Ind. 52, 25 N. E. 129 (1890); Harris v. Detroit Typographical Union, 144 Mich. 422, 108 N. W. 362 (1906); Powell v. United Association of Plumbers & Steamfitters, 240 N. Y. 616, 148 N. E. 728 (1925).

14. Kaplan v. Elliot, *supra* note 12; Broun v. Supreme Court I. O. F., 34 Misc. 556, 70 N. Y. Supp. 397 (Sup. Ct. 1901), *aff'd*, 66 App. Div. 259, 72 N. Y. Supp. 806 (4th Dep't 1901), *aff'd*, 176 N. Y. 132, 68 N. E. 145 (1903).

15. People v. Order of Foresters, 162 Ill. 78, 44 N. E. 401 (1896); Knights of Pythias v. Eshholme, 59 N. J. L. 255, 35 Atl. 1055 (1896).

16. Grand International Brotherhood of Locomotive Engineers v. Green, 210 Ala. 496, 98 So. 569 (1923).

mitted further appeal only in cases of fraud or duress,[17] although in several early decisions by-laws completely ousting the courts of jurisdiction were declared illegal.[18]

The courts themselves, moreover, usually express a definite reluctance to interfere in the internal affairs of trade unions.[19] But whether they will take jurisdiction or not is entirely within their own discretion, for there exists a corollary rule that relief should be afforded where property rights, contracts or similar legal questions are involved.[20] Thus, in the usual case of alleged improper ouster of individual members, the courts have generally consented to hear the complaint, and have sought to ascertain whether or not the expulsion was wrongful. Three criteria are employed: the expulsion must have been in accordance with the rules of the union and the offense of the expelled member must be covered by them; [21] the rules and proceedings must not have been contrary to natural justice; [22] and the determinations must have been free from malice (bad faith).[23]

The rapid spread of racketeering in labor unions has caused the number of expulsions and suspensions to increase greatly. And with the development in the strength of union organizations expulsion from an association

17. Brotherhood of Railroad Trainmen v. Barnhill, 214 Ala. 565, 108 So. 456 (1926); Long v. Baltimore & Ohio Rr. Co., 155 Md. 265, 141 Atl. 504 (1908); International Hod Carriers' Union, Local 426 v. International Hod Carriers' Union, Local 502, 101 N. J. Eq. 474, 138 Atl. 532 (1927); Stevers v. Blethen, 124 Wash. 473, 215 Pac. 7 (1923). See Rubens v. Weber, N. Y. L. J., Feb. 3, 1933 (wherein court refused to interfere with operation of internal machinery).

18. Supreme Council of Order of Chosen Friends v. Forsinger, *supra* note 13; Reed v. Washington Insurance Co., 138 Mass. 572 (1885). These early cases would probably be overruled in the light of the recent definitely favorable reception of arbitration statutes. See Baum and Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts* (1930) 8 N. Y. U. L. Q. REV. 238.

19. Chafee, *The Internal Affairs of Associations Not for Profit* (1930) 43 HARV. L. REV. 993.

20. *Id.* at 999.

21. Polin v. Kaplan, *supra* note 4; Lewis v. Wilson, 121 N. Y. 284, 24 N. E. 474 (1890); Matter of Koch, 257 N. Y. 318, 178 N. E. 545 (1931); See Mintz, *Trade Union Abuses* (1932) 6 ST. JOHN'S L. REV. 272; Note (1930) 30 COL. L. REV. 853.

22. Spayd v. Ringing Rock, 270 Pa. 67, 113 Atl. 70 (1931) (law of trade union providing that member using his influence against legislative policies of the union should be expelled, held void as violating member's constitutional right of petition). Other rights which have been protected are: right to testify in court against the interests of the union, Thompson v. Grand International Brotherhood of Locomotive Engineers, 41 Tex. Civ. App. 176, 91 S. W. 834 (1905); right to sue the union, Burke v. Monumental Division, 273 Fed. 707 (D. C. Md. 1919); Sweetman v. Barrows, 263 Mass. 349, 161 N. E. 272 (1918).

23. See POUND, CASES ON EQUITABLE RELIEF AGAINST DEFAMATION AND INJURIES TO PERSONALITY (Chafee ed. 1930) 96 n.

has come to mean for the worker loss of livelihood and inability to obtain other employment. Recognizing the seriousness of the situation, the courts have been granting relief to ousted members with increasing frequency. However, since the relief sought in these cases is only reinstatement or damages, the result has not been to enlarge the scope of judicial interference with the unions' internal affairs. Such limited exercise of power by the courts is clearly desirable under present circumstances. The danger that it might exceed those limits could be overcome by statute, as in England,[24] or by provisions in union by-laws limiting the right of judicial relief to actions brought by individual members seeking reinstatement. If even such safeguards were considered insufficient, resort to the courts might generally be made available, as in some unions today, only after all internal remedies have been exhausted, and then, possibly, merely in cases where fraud or duress or other circumstances obviously have invalidated the determinations of the unions' own tribunals.

Any extension of judicial interference, however, whereby the funds and activities of labor organizations would be brought within the complete supervision of the courts, should be vigorously opposed. In the instant case, the appointment of receivers with the wide and discretionary powers indicated above would have had this result. Precedents for placing labor unions under any such sweeping control of receivers are very meagre and the few cases which have raised the problem directly are clearly dis-

24. 34 & 35 VICT. c. 31 (1871). This Trade Union Act of 1871 provided that: "Sec. 4. Nothing in this Act shall enable any court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of the following agreements, namely, . . .

"3. Any agreement for the application of the funds of a trade union,

"a. To provide benefits to members;

"b. To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or

"c. To discharge any fine imposed upon any person by sentence of a court of justice."

This statute was deliberately enacted to meet the apprehension of the English labor unions that they might be exposed to constant and harassing litigation by disaffected members acting at the instance of employers and unfriendly interests. WEBB, HISTORY OF TRADE UNIONISM (rev. ed. 1920) 255. At first, any suits to interfere with the internal affairs even though merely for reinstatement or damages, were rejected under the above statute, but later cases have whittled away the full protection. See Johnston v. Aberdeen Master Plumbers Association, [1921] A. C. 62; Osborne v. Amalgamated Society of Railway Servants, [1911] 1 Ch. 540. However, the English courts still refuse to take any jurisdiction over union funds. Yorkshire Miners' Association v. Howden, [1905] A. C. 256 (denied injunction to restrain purported misapplication of union funds); Gozney v. Bristol, [1909] 1 K. B. 901; Burke v. Amalgamated Society of Dyers, [1906] 2 K. B. 583 (latter two cases held court would not interfere with use of union funds).

tinguishable. An English court's refusal[25] to appoint a receiver at the request of a single member of a union who had instituted an accounting action, was based upon the provisions of the Trade Disputes Act.[26] In the only other closely analagous cases, property rights alone were involved and the effect of the decisions would not have been to place the activities of a going labor organization under external supervision. Thus, in one case, receivers were appointed to take charge of the funds of a labor union ordered to be dissolved,[27] and in another, a judgment creditor sought a receiver to take possession of the assets of a union.[28] It is true that the remedy of receivership is available to minority members of business associations in the event of fraud or mismanagement,[29] but such cases do not raise the peculiar problems inherent in similar control over labor organizations.

The practical dangers to labor union activities and purposes which the appointment of receivers with extensive supervisory powers would involve, are many and formidable. The strength of a labor union depends essentially upon the willingness of its members implicitly to obey the decisions of the governing body. External control, and particularly control by the courts, is naturally objectionable to the members. The effect of placing the direction of union activities in the hands of receivers, therefore, would be to demoralize the organization and to emasculate its power. Moreover, since all the funds and all the current activities of the union would be subject to the supervision and control of the court, collective agreements could be authorized or abrogated by the court during the receivership proceeding; and the effects of such action would extend beyond the period of the receivership. Strikes might easily be broken by receivership actions instituted by disaffected factions and fostered by employers involved therein. Finally, during a vital strike, the activities of a union when organized by court-appointed receivers, would not be of the same militant character as when organized under the supervision of labor leaders.

The alternative to drastic judicial interference in the internal affairs of labor unions is not chaos. Relief from the strangle-hold of racketeers is quite possible from within. While local unions are permitted considerable autonomy, the by-laws and constitutions of both the locals and the national organizations grant wide and discretionary powers to the national body. The International Alliance, for example, could, under its powers, investigate the affairs of Local 306, remove the officers if the charges against them were proven, and take jurisdiction and control over the

25. Sansom v. London & Provincial Union of Licensed Vehicle Workers, 36 T. L. R. 666 (K. B. 1920).

26. See note 24, *supra*.

27. Kealey v. Faulkner, 18 Ohio Dec. 498 (Cuyahoga C. P. 1907).

28. District No. 21, United Mine Workers of America v. Bourland, 169 Ark. 796, 277 S. W. 546 (1925).

29. Dudley v. Platt, 70 Misc. 322, 127 N. Y. Supp. 154 (Sup. Ct. 1911) (joint stock association).

assets and books of the local union pending the election of new officers.[30] Theoretically, the American Federation of Labor, in which only the national organizations have memberships, may not interfere in the affairs of any particular national or local union unless first requested to do so. But through publicity or its threat of ousting the national union, it could easily cause investigations to be made and ultimately compel the elimination of racketeering. Unfortunately, the strength and prestige of the national unions and of the American Federation of Labor have only recently been brought to bear upon the outrageous conditions which have been exposed in many locals.[31] Regardless of any individual injury in the interim, however, it seems clear that the ultimate form of reorganization of union affairs must come from within the unions and probably be fostered by the rank and file of labor organizations.

LEE PRESSMAN †

CONSTITUTIONALITY OF THE NEW YORK MINIMUM WAGE LAW

SINCE the decision in *Adkins v. Children's Hospital* [1] the facts of the case for a minimum wage law have undergone a compelling change, and the

30. The constitution and by-laws of the International Alliance bestowed the customary wide and discretionary powers upon the international president and governing board. Sec. 10 of Art. 7 of the constitution provided: "The International President shall have the power to authorize any members of the Executive Board or International Representative to examine all books, papers, etc. of any affiliated local whenever he may deem it necessary . . . " Section 11 of the same article provides: "Emergency cases. In case of any emergency the International President shall have the power to suspend any law or laws of the Alliance, or of any local union, provided he obtains the unanimous consent of the members of the General Executive Board."

In several cases, by-laws of unions permitting, under specified conditions, the national body to take control over the assets and books of the local, have been held contrary to public policy and invalid. Austin v. Searing, 16 N. Y. 112 (1857); Wicks v. Monihan, 130 N. Y. 232 (1891). *Cf.* State Council, United American Mechanics v. Hotaling, 184 App. Div. 750, 171 N. Y. Supp. (3d Dep't 1918). However, a contrary attitude seems to have been adopted in Brotherhood of Railroad Trainmen v. William, 211 Ky. 638, 277 S. W. 500 (1925). The New York court's affirmance of Kaplan's ouster and the taking over of the local's funds and books indicates an adoption of the latter view.

31. Recent newspaper accounts report that the American Federation of Labor is investigating racketeering in unions in New York City.

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1. 261 U. S. 525 (1923). For a chronological discussion of state court decisions treating of minimum wage legislation, see BAKER, PROTECTIVE LABOR LEGISLATION (1925) 79-99; and for the development of minimum wage laws in the United States, see ARMSTRONG, INSURING THE ESSENTIALS (1932) 58-79; BURNS, WAGES AND THE STATE (1926); *Development of Minimum Wage Laws in the United States, 1912 to 1927*, U. S. Dep't of Labor, Bulletin of the Women's Bureau, No. 61 (1928); Crow, *History of Legislative Control of Wages in*

effective demands[2] for such legislation have assumed imperative proportions. According to a settled rule of constitutional law, therefore, that case is no longer binding precedent.[3] In 1923 a minimum wage law was regarded as a humanitarian measure designed to prevent inordinate exploitation of labor.[4] The issue was merely whether the state could compel employers to pay a fair living wage.[5] Recent economic trends, however, have revealed a necessity for wage-fixing not appreciated at the time of the *Adkins* decision.[6] It is now generally recognized that wage-cutting[7] threatens the stability of industry.[8] Reduced wages mean decreased pur-

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Wisconsin (1932) 16 MARQ. L. REV. 188; U. S. Daily, April 8-15, 1933, at 75, 86; *id.* May 20-27, 1933, at 29.

2. See telegram sent by President Roosevelt on April 12, 1933, to the Governors of the thirteen principal industrial states urging the enactment of minimum wage legislation comparable to the Eberhard-Wald Bill discussed below. For comments by industrial and labor leaders on the necessity of minimum wage legislation, see U. S. Daily, April 8-15, 1933, at 75; *id.* April 22-29, 1933, at 109; N. Y. Times, May 6, 1933; *cf.* also *Symposium, Do We Need Minimum Wage Laws?* (1933) 89 FORUM 282.

3. "Underlying conditions of fact condition the constitutionality" of legislation. O'Gorman & Young v. Hartford Fire Insurance Co., 282 U. S. 251 (1931); *cf.* Abie State Bank v. Weaver, 282 U. S. 765 (1931); Atchison, Topeka and Santa Fe Ry. v. United States, 52 Sup. Ct. 146 (1932); People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639 (1915) (see especially pp. 410, 411, 412). See Missouri Pacific Railroad Co. v. Norwood, 283 U. S. 249, 255 (1931), where a unanimous Court ruled that the burden of proving the unconstitutionality of a statute rested upon the plaintiff, who must "set forth in its complaint facts sufficient plainly to show the asserted invalidity." *Cf.* also Note (1931) 40 YALE L. J. 657; Note (1931) 40 YALE L. J. 1101; Comment (1931) 41 YALE L. J. 262.

4. See the dissenting opinion of Mr. Chief Justice Taft in Adkins v. Children's Hospital, 261 U. S. 525, 562 (1923). *Cf.* Broda, *Minimum Wage Legislation in Various Countries*, U. S. Dep't of Labor, Bulletin of Bureau of Labor Statistics, No. 467 (1928) 4.

5. § 23 of the District of Columbia Act stated that the purpose of the Act was "to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living; and the Act in each of its provisions and in its entirety shall be interpreted to effectuate these purposes."

6. THE NEW REPUBLIC, May 17, 1933, at 16, 17; *cf.* note 2, *supra.*

7. The extent to which wage-cutting has prevailed during the four years of the depression is revealed by a recent study made by the National Industrial Conference Board. Of 1,718 concerns which were studied in the leading fields of business, 75.4% have reduced wage rates. SALARIES AND WAGE POLICY IN THE DEPRESSION (1932) 13. For the extent of wage cuts among "white collar" women workers in New York City, see 10 INDUSTRIAL BULLETIN, New York (State) Dep't of Labor (1930-31) 191-193; and for women factory workers, see Flynn, *Starvation Wages* (1933) 89 FORUM 327. *Cf.* note 8, *infra.*

8. The stabilizing effect on industry of a fair minimum wage standard has persuaded the union operators of the Ohio and Western Pennsylvania bituminous fields to urge the federal government to fix a minimum wage scale for

chasing power,[9] and decreased purchasing power paralyzes trade. Moreover, unlimited ability to slash labor costs constitutes a vicious weapon for unscrupulous competition.[10] These factors make minimum wage legislation essential to any program for economic recovery.[11] And since the

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the industry in order to offset the ruinous competition of the southern nonunion fields, enjoying cheaper labor costs and advantageous freight differentials. N. Y. Times, May 3, 1933, at 19. *Cf.* also the plan proposed by Senator Hayden of the Committee on Mines and Mining, providing for the allotment of production for domestic consumption and the establishment of a minimum wage level below which operators would be prevented from cutting. *Ibid.* That the administration of a minimum fair wage exerts a salutary effect on business through the elimination of "cut throat competition" between employers, reduces labor turnover, creates goodwill between employers and employees, increases efficiency of management and workers, and decreases industrial waste, has been amply demonstrated by the operation of the California Minimum Wage statute. See ARMSTRONG, *supra* note 1. For statements by business leaders and statistical data on the sound effects of its operation, see brief in Gainer v. Industrial Welfare Commission of California (withdrawn from litigation), prepared by Felix Frankfurter and Miss Mary Dawson, and reprinted by the National Consumers' League (1926). See *id.* at 109-172 for an analysis of the beneficial effects of the Wisconsin and Massachusetts minimum wage laws; *cf.* Broda, *supra* note 4, at 6, 51. See in general, U. S. Daily, May 20-27, 1933, at 29.

9. From 1929 to 1931 the money incomes of employees in the major occupations had fallen between 35% and 40%. In 1930 the decline amounted to 13% and in 1931 to about 20% more. In the first quarter of 1932 the incomes derived from salaries and wages were still further reduced. "At the same time the annual money earnings of American employees have been reduced by about 35%, the cost of living has declined by no more than 15%." II RECENT SOCIAL TRENDS (1933) 822, 823, 824. *Cf.* statement of Miss Frances Perkins: "the fixing of minimum fair wages in industries where earnings have fallen below a 'fair value for services rendered' would result in increased purchasing power." U. S. Daily, April 22-29, 1933, at 3.

10. See (1933) 23 THE AMERICAN ECONOMIC REVIEW, *Stabilizing Industry* No. 1 Supp. 55-81; SOULE, WAGE ARBITRATION (1928); HAMILTON AND WRIGHT, THE CASE OF BITUMINOUS COAL (1925); Marshall and Meyers, *Legal Planning for Petroleum Production* (1932) 41 YALE L. J. 33; Jennings and Sullivan, *Legal Planning for Agriculture* (1933) 42 YALE L. J. 878; DUNN AND HARDY, LABOR AND TEXTILES (1931); TODES, LABOR AND LUMBER (1931). *Cf.* note 8, *supra.*

11. *Cf.* provision of proposed Industrial Recovery Bill (H. R. 5755) whereby employers must apply the minimum wages "approved or prescribed by the President" which are to be worked out by the collective agreement of labor and employers if possible. See THE NEW REPUBLIC, May 31, 1933, at 57-58; U. S. Daily, May 20-27, 1933, at 12, 13. At this time there are additional compulsions for the enactment of a minimum wage law. While many of the larger enterprises have reduced the wages of each employee, they have, until recently, under a policy of spreading work, retained the greater number of their employees, with the result that the total payroll average has not been decreased proportionately to the average cut per worker. On the other hand, the smaller firms have both decreased the wage per worker and the number

wages paid women and children are subject to the most excessive reductions,[12] a law similar to that declared unconstitutional in the *Adkins* case is particularly vital.

The New York legislature has recently enacted such a law.[13] It provides that on the petition of fifty or more residents of the State, or upon the basis of information in the Department of Labor, the Industrial Commissioner or the Director of the Minimum Wage Division shall appoint a wage board to recommend minimum fair wage rates for women and minors in any industry concerning which complaint is made that "oppressive" [14] and "unreasonable" wages are being paid. A wage board is

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of workers. Under the pressure of a deepening crisis and intensified competition, the larger enterprises are now confronted with the necessity of adopting the policy of their smaller competitors, and abandoning the spreading of work in order to reduce wages. Slichter, *Should Labor Be Deflated?*, THE NEW REPUBLIC, May 3, 1933, at 329, 330. Moreover, since the federal government is now attempting to stimulate buying through inflation of prices, an outbreak of widespread and still more drastic wage cutting at this time would seriously undermine the success of its program. A minimum wage statute would serve to bridge the gap between real wages and inflationary commodity prices.

12. See, in general, *The Employment of Women in the Sewing Trades of Connecticut*, Preliminary Report, U. S. Dep't of Labor, Bulletin of the Women's Bureau, No. 97 (1932); HUTCHINS, YOUTH IN INDUSTRY (1930). For the increase in child labor and home work in New York State since the depression, see ANNUAL REPORT OF THE INDUSTRIAL COMMISSIONER, 1931, New York State Dep't of Labor, Leg. Doc. (1932) No. 21, at 10, 18, 19. In the clothing industry of Connecticut and Rhode Island the number of workers between 16 and 17 years of age has increased by 123% and 283% respectively; in New Jersey the increase was 81%; in Pennsylvania 62%; and in Massachusetts 52%. *Monthly Labor Review*, U. S. Dep't of Labor, March, 1933, at 500. The availability of a plentiful supply of cheap labor by women and children has led to the establishment of "runaway shops" working on a contract system and attended by all the evils of sweating, low pay and long hours. An investigation made by the Massachusetts Minimum Wage Commission has disclosed that rates as low as 10 cents, and in one case, 5 cents an hour were paid to girl workers in Fall River. Of 1,616 employees in 13 plants making women's apparel, 71% earned less than $15 a week. *Monthly Labor Review*, *supra*, at 501. Wage-cutting, moreover, affects women workers more directly than men workers. A comparison of cuts in New York City, for example, reveals that in the women's clothing industry the wages of men have been cut 34%, the wages of women 40%. In the shoe industry, men factory workers have been cut 40%, women workers 45%. In the candy industry men workers have suffered wage reductions of 23%, women 30%. The same percentages apply to the canning and preserving industries. In industries outside New York City wage cuts have forced women workers to the bare subsistence level. Flynn, *supra* note 7; *cf.* Bilevitz, *The Connecticut Needle Trades* (1932) 135 NATION 475.

13. Eberhard-Wald Bill, approved by Governor Lehman May 1, 1933. N. Y. Laws 1933, c. 584.

14. The word is taken from the Wisconsin Oppressive Wage Act, Wis. Stat. 1931, c. 104. See ARMSTRONG, *supra* note 1.

to consist of three representatives of the employers in the industry under investigation, three representatives of the employees, and three persons representing the public. In determining a fair minimum wage the board is required to differentiate and classify employments in any industry according to the nature of the services rendered; it may also vary the wage rates according to the different localities. Within sixty days of its inception the board is to submit its report and recommendations. If the Commissioner accepts this report, he is to publish it with such additional administrative regulations as he deems advisable, and thereafter hearings are to be held at which all interested persons may present their objections. The Commissioner will then enter a "directory" order, defining the minimum fair wage for the industry investigated. Failure to comply with the "directory" order will cause an employer's name to be published in the newspapers, and continued disregard of the order will cause the previous "directory" order to be made mandatory. Violation of the mandatory order is punishable by fine or imprisonment. Moreover, at the request of any woman or minor worker paid less than the minimum fair wage rate under a mandatory order, the Commissioner may take an assignment of the complaining employee's wage claim and bring action against the employer for the amount due. After a minimum wage order has been in effect for one year or more, it may be modified on the Commissioner's motion, or upon the petition of fifty or more residents of the State. No appeal from the Commissioner's ruling on questions of fact is permitted. However, review by the Industrial Board and the courts is provided on questions of law included or embodied in a decision or order of the Commissioner.[15]

Even if the Supreme Court declines to disregard the *Adkins* case on the basis of the change in conditions since 1923, the conclusions reached in that case need not determine its decision as to the validity of this law; for the grounds upon which the District of Columbia law was declared unconstitutional are irrelevant to the present Act. The opinion of Mr. Justice Sutherland in the *Adkins* case constitutes a syllogism, the major premise of which is: "Freedom of contract . . . is the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." The question before the Court, therefore, was whether such circumstances existed in the case at hand. And a review of a few of the decisions which had permitted exceptions to "the rule" convinced the majority of the Court that the District of Columbia law resembled those which had been refused judicial sanction more than those the constitutionality of which had been upheld.[16] But the reason which "perhaps more than any other" impelled the Court to this conclusion was that, according to the terms

15. On administration of wage laws in general, see MINIMUM WAGE-FIXING MACHINERY, International Labour Office, Geneva (1927).

16. Thus, Mr. Justice Sutherland did not directly answer the question whether in this case "exceptional circumstances" justified the interference with "freedom of contract." For a criticism of the opinion's method of determining

of the District of Columbia Act, it "extracts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or work the employee engages to do." The basis for the computation of the minimum wage was "not the value of the services rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals . . . The necessities of the employee are alone considered and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another." Moreover, the cost of living standard which the Act provided was considered "so vague as to be impossible of practical application with any reasonable degree of accuracy." An analysis of the provisions of the New York law reveals that one of these objections are applicable to it. The terms of the Act are that "a 'fair wage' shall mean a wage fairly and reasonably commensurate with the value of the service or class of service rendered." [17] In establishing a fair minimum wage the Commissioner and the wage board may be guided "by like considerations as would guide a court in a suit for the reasonable value of services rendered" [18] in *quantum meruit* proceedings, and may consider "the wages paid in the state for work of a like or comparable character by employers who voluntarily maintain minimum fair wage standards." [19] Thus, the New York law does not "extract" an "arbitrary payment." On the contrary, the method of determining a reasonable wage is one long familiar to the courts.[20] The "purpose" and "basis" of payment by the employer has a direct "causal connection with his business" and is founded not upon any "extraneous circumstances" but upon a test which Mr. Justice Sutherland himself suggested,[21] "the value of the services rendered" and the ability of the employer to pay. Finally, the standard is not "vague" but entirely capable of "practical application" with a very "reasonable degree of accuracy." [22] For since the time of the enactment of the District

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the minor premise of the syllogism, see Powell, *The Judiciality of Minimum Wage Legislation* (1924) 37 HARV. L. REV. 545.

17. Eberhard-Wald Bill, *supra* note 13, § 551.

18. *Ibid.*

19. *Ibid.*

20. Heublein v. Wright, 227 Fed. 667 (D. C. Md. 1915); Shira v. Carbon Steel Co., 245 Fed. 589 (S. D. W. Va. 1917); Lillard v. Oil Paint and Drug Co., 70 N. J. Eq. 197, 56 Atl. 254 (1905); Cotter v. Coatsville Boiler Works, 257 Pa. 411, 101 Atl. 744 (1917). *Cf.* Nichols v. Olympia Veneer Co., 139 Wash. 305, 246 Pac. 941 (1926) (in determining the reasonable wage for stockholding employees the test was a comparison with wages paid in similar plants for similar work). See Note (1933) 42 YALE L. J. 419.

21. "A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable." Adkins v. Children's Hospital, 261 U. S. 525, 559 (1923).

22. The time which Mr. Justice Sutherland recommended for testing the economic value of a minimum wage law has now arrived. "No real test of

of Columbia statute, comprehensive analyses of the industrial and economic arts have yielded techniques and devices for appraising the reasonableness of a wage. Research has disclosed the ability of business to pay wages, taking into consideration profits in the separate industries, the effects of efficient management and industrial waste, and the general influence of the business cycle upon purchasing power.[23] The New York Department of Labor has accumulated an adequate fund of statistical data by which to evaluate the capacity of industry to pay wages and it has also recorded the progress of wages actually paid.[24]

It was admitted in the *Adkins* case that "There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints." And as examples of decisions in which such restraint has been allowed the Court cited[25] four classes of cases: those dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest; statutes relating to contracts for the performance of public work; statutes prescribing the character, methods and time for payment of wages; and statutes fixing hours of labor. The underlying principle of all these cases is that the state may interfere in the terms of a contract between private parties when there is such inequality of bargaining power between them that "it is illusory to speak of liberty of contract."[26] When the question is one of price fixing, "Regulation is within a state's power whenever any combination of circumstances seriously curtails the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole."[27] But the only businesses to which this principle has been applied are those which the Court has been able to label as "affected with a public interest."[28] When the question is one of stipulating terms in a labor contract, a field wherein it is generally recognized that "freedom

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the economic value of the law can be had during periods of maximum employment, when general causes keep wages up or above the minimum; that will come in periods of depression and struggle for employment." *Id.* at 560.

23. For an outline of the literature on the technology of wages, see HAMILTON AND MAY, THE CONTROL OF WAGES (1927) 175-180.

24. See the *Annual Reports of the Industrial Commissioner* and special bulletins of the Department.

25. Adkins v. Children's Hospital, 261 U. S. 525, 545-563 (1923).

26. German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 417 (1914).

27. Stone, J., dissenting in Ribnik v. McBride, 277 U. S. 350, 360 (1928). *Cf.* Schmidinger v. Chicago, 226 U. S. 578 (1913); German Alliance Insurance Co. v. Lewis, 233 U. S. 389 (1914); Tagg Bros. & Moorehead v. United States, 280 U. S. 420 (1930); O'Gorman & Young v. Hartford Fire Insurance Co., 282 U. S. 251 (1931); Advance Rumely Thresher Co. v. Jackson, 53 Sup. Ct. 133 (1932) (upholding a North Dakota statute providing that threshing and harvesting machines may be returned by farmers if unsatisfactory).

28. For a criticism of this doctrine see Hamilton, *Affectation With Public Interest* (1930) 39 YALE L. J. 1089.

of contract is a misnomer," [29] the courts have allowed legislatures to impose upon the dominant party a variety of restraints. Thus, commission merchants may be held liable for the just return on the sale of milk; [30] payment of wages in advance may be prohibited by the state; [31] mechanics liens universally afford protection to the claims of materialmen; the National Bankruptcy Act gives to the worker a priority on wages due; [32] a statutory requirement prescribing payment in money instead of store checks has been upheld; [33] usury laws for the protection of workers are valid; [34] a requirement for the payment of employees at stated intervals is permitted; [35] prohibition of the assignment of unearned wages has received judicial sanction; [36] a legislative act requiring coal to be measured for payment of miners' wages before screening is not an unreasonable regulation; [37] and, finally, hours of labor may be regulated.[38]

Except for the decision in the *Adkins* case these cases would seem to offer compelling precedent for upholding the constitutionality of minimum wage legislation. Particularly when the principle of a minimum wage law is compared with laws regulating hours of labor, there appears, as pointed out by Mr. Justice Holmes, "no difference in the kind or degree of interference with liberty . . . The bargain is equally affected whichever half you regulate." [39] But an analysis of the majority opinion reveals that even Mr. Justice Sutherland did not rest his decision upon the distinction between hours of labor laws and *any* minimum wage law, but specifically upon the objections he raised to the particular law under consideration.[40] The conclusion, therefore, that the above cases were not binding precedent in the *Adkins* case cannot fairly be said to apply to a law which is not open to any of those objections. Furthermore, the process of collective bargaining incorporated in the New York law is a method of wage-fixing which has received, since the *Adkins* case, extraordinary

29. Holmes, J., dissenting in Adkins v. Children's Hospital, 261 U. S. 525, 571 (1923). The quotation is from Higgins, *A New Province for Law and Order* (1915) 29 HARV. L. REV. 13.

30. People v. Perretta, 253 N. Y. 305, 171 N. E. 72 (1930).

31. Patterson v. Bark Eudora, 190 U. S. 169 (1903); Strathearn Steamship Co. v. Dillon, 252 U. S. 348 (1920).

32. 30 STAT. 563 (1898), 11 U. S. C. § 104(4) (1926).

33. Knoxville v. Harbison, 183 U. S. 13 (1901), and *cf.* appellants' brief in Adkins v. Children's Hospital, 261 U. S. 525, 534 (1923).

34. Griffith v. Connecticut, 218 U. S. 563 (1910).

35. Erie Rr. v. Williams, 233 U. S. 685 (1914).

36. Mutual Loan Co. v. Martell, 222 U. S. 225 (1911).

37. McLean v. Arkansas, 211 U. S. 539 (1909), and *cf.* appellants' brief, *supra* note 33.

38. Muller v. Oregon, 208 U. S. 412 (1908); Bunting v. Oregon, 243 U. S. 426 (1917).

39. Adkins v. Children's Hospital, 261 U. S. 525, 569 (1923).

40. See *id.* at 553, where the Court emphasizes that its basic reasons for distinguishing the cases "will be made to appear" when the particular act is analyzed. See also, *id.* at 558, and see quotation from opinion, *supra* note 21.

judicial sanction. For it assures to the interested parties equality of bargaining power and thus establishes rather than restricts freedom of contract between them. Similar methods were adopted in the Railway Labor Act of 1926[41] wherein it is stipulated that labor disputes are to be settled by arbitration between an equal number of representatives of the employers and employees. In *Texas & New Orleans Railroad Co. v. Railway Clerks*,[42] a preservation of this system was considered so essential to the maintenance of actual freedom of contract that the Court approved an injunction against an attempted interference therewith. By making collective bargaining between employer, consumer and employee mandatory, the New York minimum wage law is merely attempting another means of reifying the same principle.[43]

The Court, therefore, has more than adequate grounds for upholding the New York law either by distinguishing the *Adkins* case or by refusing to recognize its decision in 1923 as binding under present day conditions. It is to be hoped, however, that, in accordance with its more recent attitude toward social legislation,[44] the Court will repudiate the very premises of its former opinion. The theory that freedom of contract is the rule against which a specific statute must be proved a proper exception should now be accorded a "deserved repose." As a statement of the problem of economic well-being it has been displaced by the premises of the opinion in the *O'Gorman* case,[45] where it was declared that a statute must be presumed to be valid and that the presumption will be conclusive unless there is a recitation of facts showing that the evil did not exist or that the legislative remedy was inappropriate.[46] The propriety of such a change in the method of approach to constitutional questions, even though it may involve overruling previously decided cases,[47] has been recognized since the days of Taney.[48] It is necessary today if "judicial authority" is to

41. 44 STAT. 579 (1926), 45 U. S. C. SUPP. VI § 154 (1932). See STOCKETT, THE ARBITRAL DETERMINATION OF RAILWAY WAGES (1928).

42. 281 U. S. 548 (1930).

43. See Hamilton, *Collective Bargaining* (1930) 3 ENCYC. SOC. SCI. 628.

44. See cases. articles and notes cited *supra* note 3.

45. O'Gorman & Young v. Hartford Fire Insurance Co., 282 U. S. 251 (1931).

46. See Hamilton, *Freedom of Contract* (1931) 6 ENCYC. SOC. SCI. 450, 454.

47. See Brandeis, J., dissenting in Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 405, 406, 407, and cases cited therein, n. 1 and 2. See also Fox Film Co. v. Doyle, 286 U. S. 123 (1932); Note (1932) 41 YALE L. J. 1237.

48. See The Passenger Cases, 7 How. 283, 470 (U. S. 1849); Washington University v. Rouse, 8 Wall. 439, 444 (U. S. 1869) (where Miller, J., speaks of "questions touching the power of legislative bodies, which can never be finally closed by the decision of a court"); Barden v. Northern Pacific Rr. Co., 154 U. S. 288, 322 (1893) (where Field, J., says: "It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience"); Brandeis, J., *supra* note 47, at 407, 408 ("The Court bows to lessons

continue to "depend altogether on the force of the reasoning by which it is supported." [49]

LEGISLATIVE REGULATION OF THE NEW YORK DAIRY INDUSTRY

IT seems paradoxical that governmental price fixing should be adopted to meet the ills of the dairy industry in New York state. One would hardly look to urban industrial New York for this direct legislation on agricultural maladjustments.[1] Nor would one expect such measures to be necessary in dairy farming which has heretofore been regarded as the most lucrative and stable source of farm income.[2] It is equally surprising that in the midst of an intense concern for those agricultural problems of a national and international scope,[3] the last resort of governmental action in the market, price fixing, should come to the aid of the purely local dairy industry of New York. Yet the very features which suggest these paradoxes may be shown in reality to resolve them. In the first place, the action of a single state could be effectively exerted over the major part of the market.[4] The fluid milk industry in New York is dominated by the needs of New York city and the metropolitan area.[5] Because of the perishability of milk and high transportation costs, the supply must

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of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function").

49. Taney, C. J., in The Passenger Cases, 7 How. 283, 470 (U. S. 1849); Brandeis, J., *supra* note 47, at 412-413.

1. Emergency Milk Control Act, N. Y. Laws 1933, c. 158, art. 25.

2. Consumers in this country annually pay approximately four billion dollars for dairy products. The income to the farmer is normally greater than his income from any other branch of farming. BARTLETT, COOPERATION IN MARKETING DAIRY PRODUCTS (1931) 1, 2. Since the war, and until very recently, milk prices have been more favorable than prices of other farm products. N. Y. Agr. Bull. (1932) No. 267, 9, 10. See Report of Legislative Committee to Investigate the Milk Industry, Part II (hereinafter cited as "Report") 23, 24a, 86, for the New York situation. The paging given is from the mimeographed advance copy. The printed version may differ.

3. See Jennings and Sullivan, *Legal Planning for Agriculture* (1933) 42 YALE L. J. 878. For an intensive description of a typical milk market, see J. T. HORNER, THE DETROIT MILK MARKET (1928) Mich. Agr. Exp. Station Special Bul. No. 170.

4. The territory supplying the metropolitan market, known as the New York "milk shed," embraces the state of New York and parts of Pennsylvania, New Jersey, Vermont, Connecticut and Massachusetts, but New York farmers supplied in 1930 83% of the milk and cream consumed within the state. Report, 13-18.

5. The metropolitan area consumes more than three-fourths of the total quantity of milk and cream sold in all cities of 10,000 or more within the New York milk shed. *Id.* at 12 *et seq.*

be drawn from a nearby region. By increasing the costs of producing a standard quality of milk,[6] and discriminating against out of state production,[7] the urban milk regulations have tended further to confine the supply to producers in New York state, who, in 1931, supplied 76% of the milk and 80% of the cream for the metropolitan area.[8] Such a restricted milk shed furnishing the tremendous urban demand of industrial centers has brought forth a substantial industry, with a total value of one billion dollars.[9] The investments and interests involved would in a crisis shape a problem attracting legislative action.

The greatest pressure for price fixing legislation came from the producers.[10] Although the industry as a whole was affected by the general fall in price levels and the reduced purchasing power of the consumer, the

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6. *Id.* at 64 *et seq.*

7. This discrimination is made through the health inspection provisions. *Id.* at 15, 17; AMERICAN COOPERATION (1932) 242, 246.

8. N. Y. Agr. Bull. (1932) No. 267, 139. The percentages were about the same in former years, see N. Y. Agr. Bull. (1930) No. 241, (1931) No. 253, but fell to 69% for milk and 77% for cream in 1932, Report, 15.

9. New York ranks third among the states in the production of milk and second in the value of dairy products. Returns to the dairyman for milk and its products averaged in 1927-1930 nearly 190 million dollars, which represented one-half the total agricultural income of the state. More than $160,000,000 is invested in equipment for the handling and delivery of milk. Another $116,000,000 is expended each year for labor, supplies, transportation and taxes. It is estimated that in 1931 total net sales by milk dealers amounted to $275,000,000. About half the dairy farms within the state were mortgaged in 1931, and the indebtedness of $130,000,000 thus represented constituted about 40% of the value of the property mortgaged. In addition, dairy farmers were in that year carrying a short-term indebtedness of $30,000,000. The state and local bodies levy more than half their farm property taxes on dairy farms. The shipping of milk and cream brings an annual income of about $10,000,000 to the railroads of the state. The metropolitan market consumes nearly 100,000 40-quart cans of milk daily, plus half as much again in the form of cream. N. Y. Agr. Bull. (1932) No. 267, 125; Report, 7 *et seq.*

10. Commercial production of milk is carried on by about 84,000 individual farmers with average herds of less than 20 cows. The independent unorganized producers, numbering some 15,000, strenuously advocated the measure. The Dairymen's League Co-operative (see *infra* note 17) opposed such legislation, probably because it felt co-operation was the real way out for the producers, and because it feared that the creation of a board would consolidate the position of the distributors. See N. Y. Times, May 28, 1933, IV, p. 2. Distribution is in the hands of efficient large-scale corporations which can meet the high capitalization and overhead required by modern market conditions. About 50% of the metropolitan retail market is controlled by Borden's Farm Products Company and the Sheffield Farms Company. These are owned respectively by holding companies, the first by The Borden Company and the second by National Dairy Products Company. These form the two largest dairy distributing systems in the country. Report, 213 *et seq.*, 240; see note 32, *infra.*

chief incidence thereof fell upon the producers because of their weakness in the market.[11] Three factors have combined to prevent the farmer from overcoming this weakness: his failure to achieve comprehensive collective action, the opposition of well-organized distributors, and the effects of an ever-present surplus.

The existence of a surplus of milk above the amount required for fluid consumption creates, as between the selling producer and the buying distributor, a buyers' market. The inelastic demand for fluid milk, which must be satisfied, necessitates a minimum daily production, but from the number of cows required to yield an adequate supply during the months of least production there comes with the spring freshening an extremely large seasonal excess. In recent years seasonal variations have consistently ranged as high as 90% over the month of least production.[12] This surplus must go into manufactured products such as cheese, butter and condensed milk where the milk has a much lower value than that going into fluid uses.[13] However, the individual farmer does not send his milk to two different markets, but rather delivers his whole production to a country plant and the distributor makes a subsequent allocation according to the relative needs of the two markets.[14] The actual price which the farmer receives is therefore a composite of the value of both uses to the distributor.[15] The primary advantage which the distributor derived from the existence of the surplus lay in his power to drive down the price he

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11. The average price paid to producers for milk compared with a pre-war base of 100 was 175 in March, 1929 and 77 in March, 1933. *Id.* at 86. The farm price of milk, which since 1925 had been substantially above the general price level, was in 1932 more unfavorable in comparison to that level than in any previous recorded year. Milk prices had been since 1919 above the level of prices for other farm products but in January, 1933 the difference vanished. The 1932 farm value of dairy products was about one-half that of 1929 and the return did not meet the cost of production. *Id.* at 23-38. For the much milder effects of the depression upon the distributor, see note 29, *infra*.

12. Variations in consumption of fluid milk from the highest to the lowest month in the New York market are less than 7% compared with average consumption throughout the year. On the other hand, in 1927-1931 milk deliveries to receiving stations by farmers have averaged 92% greater in June than in November. See Barns v. Dairymen's League Cooperative Association, Inc., 220 App. Div. 624, 627, 222 N. Y. Supp. 294, 296 (4th Dep't 1927); BARTLETT, *op. cit. supra* note 2, at 166 *et seq.*; N. Y. Agr. Bull. (1932) No. 267, 67, 68, 108, 109; Report, 18 *et seq.*, 35, 82-85.

13. BARTLETT, *op. cit. supra* note 2, at 188; Report, 82, 84. The low prices set by national competition for milk in surplus uses are particularly harsh from the point of view of New York farmers, whose cost of production is above that of areas in the Middle West. N. Y. Agr. Bull. (1932) No. 267, 10; Corn. Univ. Agr. Exp. Sta. Bull. (1927) No. 459, 3.

14. Barns v. Dairymen's League Co-operative Association, Inc., *supra* note 12, at 628, 222 N. Y. Supp. at 297.

15. See Barns v. Dairymen's League Co-operative Association, Inc., *supra* note 12; BARTLETT, *op. cit. supra* note 2, at 190.

had to pay for milk used in the fluid market.[16] The necessity of meeting the advantage enjoyed by the distributor was the motive force and object of early collective action on the part of New York farmers.[17] By 1921 the Dairymen's League Co-operative Association had attained a membership of 50,000 farmers supplying 50% of the metropolitan market.[18] In that year, in an effort to deal with the problem of marketing an apparently unavoidable surplus, the League adopted the so-called classified-use price plan, which is still in effect. Under this arrangement the distributors with whom it deals are required to make payments to the League on the basis of an accurate record of the allocation of milk to its various uses; the proceeds are pooled and each producer is paid for the quantity he delivers on the basis of the average price for all milk sold by the associ-

16. See Barns v. Dairyman's League Co-operative Association, Inc., *supra* note 12; BARTLETT, *op. cit. supra* note 2, at 19; AMERICAN COOPERATION (1932) 186; Report, 135.

17. Barns v. Dairymen's League Co-operative Association, Inc., *supra* note 12. The first cooperative action in the milk industry was taken by distributors of New York City who in 1882 organized in the Milk Exchange, Ltd., which openly fixed prices to be paid to producers. After some legal difficulties, about 75 of the largest distributors formed the Milk Conference Board which today effectuates a uniform policy towards producers by means of "gentlemen's agreements." Meanwhile, in 1907, the producers formed the Dairymen's League, Inc., and in 1916 when the distributors refused to grant an increase in price the League ordered a milk strike which lasted a fortnight, until finally the distributors agreed to the price increase. The same events were again repeated in 1919; a strike of even greater proportions took place, which ended in the same way. But no sooner had the League succeeded in gaining its price than it was faced with a problem of much more serious import. The exaggerated wartime demand for condensed and evaporated milk suddenly collapsed, and an immense supply of milk now pressed upon the fluid market and began to nullify the price advances which the League had made. The latter found that a mere bargaining association was insufficient to prevent its members from competitively forcing their milk upon the fluid market and thereby threatening the very existence of the League. A new organization was formed, the Dairymen's League Co-operative Association, Inc., which in a year or two succeeded the old Dairymen's League, and is in operation today. The new League is a "processing" as well as a collective bargaining association, for it owns and operates over 300 country plants where it receives and ships its members' milk. By means of the classification plan and its ownership of country plants, it is able to market its members' surplus without the danger of complete disorganization of the fluid market. See, for full account, Report, 101-123. Shorter treatments may be found in Barns v. Dairymen's League Co-operative Association, Inc., *supra* note 12; and in BOOTH, FARMERS CO-OPERATIVE BUSINESS ORGANIZATIONS IN NEW YORK (1926) 19-24. Legislation has been enacted aiding and encouraging co-operatives. N. Y. CO-OPERATIVE CORP. LAW (1930) §§ 105-128.

18. Barns v. Dairymen's League Co-operative Association, Inc., *supra* note 12, at 634, 222 N. Y. Supp. at 301. The League handled in April, 1922, 40% of the milk produced in the state of New York.

ation.[19] The League thus succeeded in putting into effect an accurate price plan, but it has failed to overcome the primary advantage of the distributor.[20] For since the adoption of the plan, the League has been unable to attract those producers who are unwilling to share collectively the burden of the surplus and who hope individually to sell a greater proportion of their milk for fluid use.[21] Clearly, the Dairymen's League could not effectively bargain for higher prices when the distributors still had an alternative source of supply from unorganized producers. The traditional resistance of the farmer to collective action[22] and the difficulties presented by the surplus combined with the pressure exerted by distributors in the form of counter propaganda and direct economic coercion[23] to prevent complete co-operative organization.

Prior to 1929, the inherent weaknesses of the farmers' position were obscured by a steadily rising demand. But with the decline in the purchasing power of the consumer, the demand for fluid milk fell off and the retail price was forced down.[24] The consequent increased competition between distributors reacted unfavorably upon producers' prices.[25] Furthermore, at the same time that the demand decreased, the supply available for the fluid milk market underwent a twofold increase. The greater

19. See BARTLETT, *op. cit. supra* note 2, at 197-205; Report, 114-123, 135-138. The pooling contract was upheld as within the powers of agricultural co-operatives but deductions for co-operative expenses were strictly limited by statutory powers of such associations. Dairymen's League Co-operative Association, Inc., v. Holmes, 239 N. Y. 503, 147 N. E. 171 (1924).

20. The president of the League expressly states that under the classified-use plan "the dealer does not have to bear the burden of surplus. The producers, through their association, bear the burden . . ." Report, 119, 173. And see Barns v. Dairymen's League Co-operative Association, Inc., *supra* note 12, at 632, 222 N. Y. Supp. at 300.

21. Prices paid to independent or company-union producers are consistently higher than those paid to League members. It is suggestive to note that the membership of 50,000 which the League had in 1922 is almost exactly identical with that of today. See Report, 124, 204-211.

22. Report 199, 200, 202.

23. During the year preceding the enactment of the Milk Control Statute about 1,000 farmers who engaged in efforts to form a "single, strong organization" were denied a market by the distributors to whom they had theretofore delivered their milk. Distributors served notice through advertisements in newspapers that producers who joined the new organization would lose their market. Besides this method of intimidation, certain distributors spread propaganda to the effect that the League was a price-cutting organization, that it was heavily in debt and anxious to enlist new members to help pay off the debt, etc. Report, 190, 192-199. Other practices of distributors are cited in BARTLETT, *op. cit. supra* note 2, at 19. See Report, 199-211, for the factors which explain the failure of dairymen to organize more completely.

24. Report, 79, 80. See also AMERICAN COOPERATION, *op. cit. supra* note 7, at 227-231.

25. All parties protected themselves from the fall in net sales by lowering the price paid to the farmer. The inevitable effect of the price cutting was to pull the price of fluid milk down towards the price of surplus. Report, 98, 99.

number of productive cows in the state caused an absolute increase in the total supply of milk,[26] and, since the producers' price for milk going into manufactured products plunged downward even more rapidly than did the farm price for fluid milk, an unusual pressure was exerted which forced upon the fluid market the milk normally going into surplus uses, thereby making for a relative increase in the available supply.[27] The comparative effect of these trends upon producers and distributors provides the background for the picture of milk strikes and rioting farmers.[28] Between 1929 and 1932 the retail price of milk declined from sixteen to twelve cents. The distributor passed on to the farmer all of this four cent decrease except six-tenths of a cent. While distributors earned profits of 9.9% in 1931, producers were receiving less than the cost of production, and by 1933 only half that cost.[29]

Within two years after the break in prices began the condition of the New York dairymen induced the legislature to create a joint committee to investigate the situation[30] and stirred the farmers to form an "Emergency Committee of the New York Milkshed" looking to the establishment of an all-inclusive co-operative association. After a very thorough investigation the legislative committee made findings and recommendations on the basis of which the present statute was drafted. The "Emergency Committee" in the course of a year held 3,100 meetings attended by 151,000 farmers and their families; secured from 10,000 farmers signed agreements to join a "single, strong organization"; and exerted a steady and at times violent pressure for relief measures.[31]

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26. Report, 73-75, 89-93; 1 AMERICAN COOPERATION (1931) 269 *et seq.*; N. Y. Agr. Bull. (1932) No. 267, 14, 56; *id.* (1931) No. 253, 13, 56.

27. N. Y. Agr. Bull. (1931) No. 253, 110; Report, 84.

28. Sporadic outbreaks of picketing and dumping milk from trucks took place in the few weeks prior to the passage of the statute. See the newspapers of March and April, 1933.

29. See Report, 95-97, 244b; *cf.* note 10, *supra.* Distributors' losses were actually smaller than the table below indicates, since wages and other operating costs were drastically reduced.

Table of Relative Losses by Farmers and Distributors.

Year	*Price Paid by Dealers for Fluid Milk 201-210 mile zone*	*Retail Price New York City (Grade B)*	*Distributors' Margin Incl. Country Handling and Transportation*
1929	7.4	16.0	8.6
1930	6.9	15.7	8.8
1931	5.9	14.7	8.8
1932	3.9	12.0	8.1
March 1933	2.8	10.0	7.2
Percentage Decline	61.6%	37.5%	17.2%

30. Joint Resolution of the Senate and Assembly, March 10, 1932, reprinted in Advance Report, Part I, ii.

31. Report, 180-192.

Meanwhile, the same factors which had made for chaos in the producers' market had created a disturbance in the retail market. Although three distributors controlled 67% of the metropolitan retail business, there always existed a considerable degree of competition.[32] To the distributor as well as the producer the milk going into surplus products yielded a smaller return than that sold as fluid milk. Accordingly, the total cost of his milk was a composite of the two values. The small distributor, however, who carried no surplus could purchase milk from producers at the same price as that paid by the larger dealers, and selling exclusively in the fluid market, he could afford to cut prices. This advantage increased as the size of the surplus drove down the "blended" price. When the decline in purchasing power induced even keener competition among distributors for the restricted demand, the extraordinary surplus of the last two years offered a ready supply of cheap milk which encouraged further price-cutting.[33] In this situation the prospective milk bill afforded the larger distributors an opportunity for the stabilization of the retail market. What was originally designed to provide immediate relief to the farmer became as well a vehicle for the protection of the distributor.[34]

The Milk Control Statute recites the breakdown in the dairy markets and declares that the milk industry is "a business affecting the public health and interest."[35] It establishes a Milk Control Board with general supervisory powers over the dairy industry throughout the state and requires all distributors to secure licenses, which may be revoked for an

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32. *Id.* at 214, 216, 240.

33. Normally, price-cutting flourishes in the spring and early summer, when the large surplus creates a wide difference between the fluid price and the blended price received by League and Sheffield member producers. In the fall months, usually, since the slender surplus results in only a narrow margin between fluid and blended price, price-cutting does not thrive. In sales to stores price-cutting was indulged in chiefly on Grade B and "loose" (bulk) milk. Report, 98-100, 125, 275, 308, 311, 318-320, 323.

34. The original draft declared that the board might fix minimum prices to producers and maximum prices to consumers. N. Y. Times, April 6, 1933, p. 16. "The milk distributors have maintained a powerful lobby at Albany whenever their interests have been threatened. And it has been invariably effective. On one occasion they fought a law which would have made it a misdemeanor to pass off cocoanut oil as butter fat in cream or butter." N. Y. Herald Tribune, May 10, 1933, p. 4.

35. Laws 1933, c. 158, art. 25, § 300. The milk industry has been strictly regulated as to standard quality, and a licensing system has been the device used to secure enforcement. Supervisory power has heretofore been vested in the Department of Agriculture and Markets, N. Y. AGRICULTURE & MARKETS LAW (1930) §§ 22-58; and in local health bodies, N. Y. PUBLIC HEALTH LAW (1930) §§ 6-b, 21. These regulations have been upheld as an exercise of the police power to protect the public health. People *ex rel.* Liebermann v. Van De Carr, 199 U. S. 552 (1905); People *ex rel.* Lodes v. New York, 189 N. Y. 187, 82 N. E. 187 (1907); Herkimer v. Potter, 124 Misc. 57, 207 N. Y. Supp. 35 (Sup. Ct. 1924).

infraction of the provisions of the law or the orders of the Board.[36] It empowers the Board to fix the retail price of milk and, in case any increase in price thereby effected is not passed along to the farmer, to fix the producers' price.[37] Finally, it makes unlawful the sale of milk purchased from an out-of-state producer at a price less than that required to be paid to farmers within the state.[38]

This attempt by a state to fix prices and protect particular interests is according to the provisions of the statute to remain in force for the emergency period of twelve months.[39] The statute may therefore be upheld on the sole ground that it is a necessary exercise of the police power in an emergency,[40] but otherwise the validity of the law is open to question. There are two tests for the determination of the constitutionality of a price-fixing measure. The first is by a comparison of the given instance with past decisions in which price-fixing has been allowed or disallowed.[41] According to such a test this direct regulation of the market in the milk industry may well be unconstitutional. The dairy industry is not a public utility,[42] and the dicta of Mr. Justice Sutherland that it is not affected with

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36. Laws 1933, c. 158, art. 25, §§ 302-311. The board may issue subpoenas for information (§ 303), and secure injunctions to enforce its orders, while violations are made a misdemeanor (§ 307). The license shall be granted to anyone complying with the several provisions (§ 308). It would seem that the licensing does not represent any attempt to control production, and so does not raise the issue of New State Ice Co. v. Liebmann, 285 U. S. 262 (1932). Apart from the fact that the licensee must maintain the prices set, he is now subject to substantially the same regulations as before, which have been upheld, *supra* note 35. Even those provisions in the present statute holding a dealer to a proper course of conduct and prohibiting fraud restate in stronger terms former regulations of the dairy industry (AGRICULTURE AND MARKETS LAW (1930) § 55) which have been sustained as valid. People v. Beakes Dairy Co., 222 N. Y. 416, 119 N. E. 115 (1918); People v. Perretta, 253 N. Y. 305, 171 N. E. 72 (1930).

37. Laws 1933, c. 158, art. 25, § 312.

38. *Id.* § 312 (f).

39. *Id.* § 319, which provides that on March 31, 1934 "the board shall be deemed abolished and [its] powers . . . shall terminate."

40. Wilson v. New, 243 U. S. 332 (1917); Block v. Hirsh, 256 U. S. 135 (1921); *cf.* Marcus Brown Holding Company, Inc. v. Feldman, 256 U. S. 170 (1921).

41. See Adkins v. Children's Hospital, 261 U. S. 525, 554 (1923); Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522 (1923); Tyson & Brother v. Banton, 273 U. S. 418, 451 (1927); Ribnik v. McBride, 277 U. S. 350 (1928); Williams v. Standard Oil Co., 278 U. S. 235 (1929); New State Ice Co. v. Liebmann, 285 U. S. 262 (1932). For an especially penetrating analysis, see Hamilton, *Affectation with Public Interest* (1930) 39 YALE L. J. 1089, 1101, 1103.

42. The milk industry has none of the customary features of a public utility: natural monopoly, grant of franchise, etc. See Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522 (1923). But see Manley, *infra* note 44.

a public interest[43] support the conclusion that the extension of price-fixing to the insurance business cannot serve as a precedent.[44] However, the statute may still be sustained on the ground that the elemental necessity of an adequate milk supply to the public health places the dairyman in a category with the insurer and distinguishes him from the grocer, the butcher and the baker.[45] The second test, proceeding pragmatically, looks to the necessity and efficacy of the measure with respect to the particular circumstances, and will uphold price-fixing if there exists a maladjustment "materially restricting the regulative forces of competition."[46] From the foregoing description of the dairy industry, it is clear that price regulation is essential. The existence of a producers' surplus gives rise to a continual maladjustment which reaches serious proportions with recurring depressions.[47] The magnitude of the dairy industry makes it of sufficient importance, and the handicaps of producers are of sufficient moment, to affect the public welfare and justify governmental intervention.[48] The New York courts have definitely said that the producer in his dealings with the distributor deserves special treatment from the legislature.[49] At the present moment, and until a comprehensive co-

43. New State Ice Co. v. Liebmann, 285 U. S. 262, 277 (1932); see also Ribnik v. McBride, 277 U. S. 350, 357 (1928); Tyson & Brother v. Banton, 273 U. S. 418, 440 (1927); *cf.* Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522 (1923).

44. German Alliance Insurance Co. v. Kansas, 233 U. S. 389 (1914); O'Gorman and Young v. Hartford Fire Insurance Co., 282 U. S. 251 (1931). See Hamilton, *supra* note 41, at 1098, 1099. But see the able argument that the milk industry has most of the elements of a public utility, in Manley, *The Constitutionality of Regulating Milk as a Public Utility* (1933) 18 CORN. L. Q. 410.

45. People v. Perretta, *supra* note 36, at 311, 171 N. E. at 74; see Cofman v. Osterhous, 40 N. D. 390, 400, 401, 168 N. W. 826, 828, 829 (1918), and Manley, *supra* note 44.

46. See dissenting opinions in Tyson & Brother v. Banton, 273 U. S. 418, 451 (1927); Ribnik v. McBride, 277 U. S. 350, 360 (1928); Hamilton, *supra* note 41, at 1110.

47. The prices fixed to meet a producers' disadvantage will of course be minimum prices to be paid by distributors. The fixing of minimum prices has been upheld in the case of railroads, TRANSPORTATION ACT of 1920, 41 STAT. 488 (1920), 49 U. S. C. 15a (1926); Anchor Coal Co. v. United States, 25 F. (2d) 462 (S. D. W. Va. 1928) [declared moot on other grounds, 279 U. S. 812 (1929)]; gas companies, Public Service Commission v. Great Northern Utilities Co., 53 Sup. Ct. 546 (1933); motor trucks, Stephenson v. Binford, 53 Sup. Ct. 181, 188 (1932).

48. Knoxville v. Harbison, 183 U. S. 13, 20 (1901); Patterson v. Bark Eudora, 190 U. S. 169, 175 (1903); McLean v. Arkansas, 211 U. S. 539, 550 (1909); Mutual Loan Co. v. Martell, 222 U. S. 225, 233 (1911). See People v. Beakes Dairy Co., 222 N. Y. 416, 119 N. E. 115 (1918), 179 App. Div. 942, 166 N. Y. Supp. 209 (1917); People v. Perretta, *supra* note 36.

49. People v. Perretta, *supra* note 36, at 310, 311, 171 N. E. at 73, 74; Barns v. Dairymen's League Co-operative Association, Inc., *supra* note 12, at 638, 222 N. Y. Supp. at 305.

operative organization is achieved, the Milk Board must set minimum prices to protect the producer and the milk supply. Should such an organization arise, and thus equalize the market strength of producers and distributors, the Board may still be necessary to protect the consumer from excessive prices.

Once the constitutionality of the price-fixing feature of the act is successfully established, then the fact that the statute involves no interference with interstate commerce completely assures its validity. By forbidding the sale of milk purchased from out-of-state producers at a price lower than that required to be paid to producers within the state, the statute does not discriminate against interstate commerce.[50] Since the provision applies only to milk sold within the state, the burden if any is indirect.[51] And in the absence of federal legislation the New York legislature can assuredly act to prevent wholesale evasion of the statute by recourse to unregulated markets.

The satisfactory operation of the statute depends upon whether the Board can make a happy adjustment of the interests involved in the dairy industry. As a result of the creation of the Board the consumer is now forced to pay approximately two cents a quart more for his milk.[52] Obviously, such would be the intended result of legislative relief for a dairy industry afflicted with low prices. Presumably permanent regulation will make for a relatively high price level but assure to the consumer a stable and sufficient supply of sanitary milk. The chief benefits of stabilization of the retail market, however, go to the distributor. The Board, aided by voluntary action on the part of large distributors, has already taken steps to prevent price cutting.[53] Restricted price variations, however, are permitted. The small distributor in New York City is still allowed the advantage of a lower price, for the statute expressly permits the sale of milk by "unadvertised" dealers at one cent per quart below the established price.[54] And prices may vary with the several localities and markets of

50. Packer Corporation v. State of Utah, 285 U. S. 105, 111 (1932); Sproles v. Binford, 286 U. S. 374, 390 (1932); Gregg Dyeing Co. v. Query, 286 U. S. 472 (1932).

51. See Hall v. Geiger-Jones Co., 242 U. S. 539, 559 (1917); International and Great Northern Railway Co. v. Anderson County, 246 U. S. 424, 434 (1918); Hump Hairpin Manufacturing Co. v. Emmerson, 258 U. S. 290, 294 (1922); Hygrade Provision Co. v. Sherman, 266 U. S. 497, 503 (1925).

52. See notes 59, 60, *infra*. Consumption varies with income groups, and save for depressions when purchasing power is drastically reduced, price changes have little effect upon consumption habits. See HORNER, *op. cit. supra* note 3; Waite and Howe, *Consumption of Dairy Products in Six New Jersey Townships* (1930) N. J. Agr. Exp. Station, Bull. 506; U. S. Dep't. of Agriculture, Prelim. Report, *Consumer Demand for Milk in Philadelphia* (1924).

53. N. Y. Times, May 19, 1933, p. 9; May 23, p. 9.

54. § 317 (c). After a protest by the small distributors the Board, supported by an opinion by the Attorney General of the state, allowed stores to sell such milk to consumers at the lower price. N. Y. Times, April 16, 1933, p. 16; April 19, p. 5; April 21, p. 9.

the state.[55] Since appeal may be had from any order of the Board, the distributor may seek from the courts protection for his investment against unreasonable prices.[56]

To the farmer substantial and immediate relief has come from the operation of the statute in the form of increased prices for his product. But as against this benefit it must be set down that the Board has thus far failed to deal adequately with the problems of the surplus and the distributor's spread. Were the Board to adopt the equalizing-value price plan in place of the present classified-use plan, the evils of seasonal variations could be largely eliminated.[57] It would seem that the Board has done nothing to diminish the distributor's spread. By the statute retail prices were to be fixed first; only in the event that the increases were not passed along to the farmers was the Board to set producers' prices.[58] In actual fact the Board's first act was to raise retail prices approximately one cent a quart.[59] Evidently the benefit derived from the increase was not passed on to the farmer, for after one month the Board, under the pressure of a threatened strike, fixed the producers' fluid milk price at four cents, and incidentally raised the retail price one cent more.[60] It would be a mistake to suppose that having gained a Milk Board the farmers thereby gained full equality of bargaining power with the distributors. The most reliable estimates indicate that the present established price is barely sufficient to cover the cost of production and presumably future minimum prices will do no more.[61] The policy of the Board, which has been and will be subject to pressure from distributors

55. § 312(a). The Board has responded by setting separate retail price schedules for the metropolitan area and for the upstate district. N. Y. Times, April 15, 1933, p. 3. The price schedule for payments to producers takes into account freight differentials based upon distance from the market. N. Y. Times, May 14, 1933, p. 1.

56. § 312(f). This raises the whole problem surrounding the concepts of fair return and valuation, which must be left to future developments.

57. The Board has in effect extended the classified-use plan to all producers in the milk shed and has taken steps to see that dealers make accurate payment. See N. Y. Times, May 6, 1933, p. 5. To the individual producer, this plan affords no incentive for uniform production. Under the equalizing-value price plan, types of which are in operation in Pittsburgh and Detroit, a total "basic" volume of production is fixed equal to the total fluid sales of the market, and individual quotas apportioned thereon among the farmers. By penalizing farmers for all production in excess of their quotas, seasonal variations could be levelled out and surplus production over the whole year to some extent discouraged. Such a plan would be most successful when used in connection with a fairly comprehensive producers' organization. For a discussion of price plans, see BARTLETT, *op. cit. supra* note 2, c. 13-19; HORNER, *op. cit. supra* note 3; Report, 127.

58. § 312 (b) (c) (d).

59. N. Y. Times, April 15, 1933, p. 3.

60. N. Y. Times, May 13, 1933, p. 15. See also N. Y. Times, May 14, 1933, p. 1, 20; May 6, p. 5; May 7, p. 3; May 11, p. 5.

61. N. Y. Times, May 14, 1933, p. 20.

as well as farmers, must be a compromise between the two interests and can substantially do no more than reflect their respective strength. The distributors on the whole are well organized, and the maintenance of uniform retail prices should completely stabilize the market. Ultimately, therefore, the dairyman if he wishes to make secure his interest must achieve comprehensive voluntary cooperative action. The Milk Control Board may well act as a focal point for the efforts of farmers to organize more successfully. More effective aid to cooperative action could, however, be secured by legislation compelling all producers to bear the burden of surplus prices.[62] In the final analysis, a group can extract no more benefits from governmental action in its behalf than it has power to compel.

62. Such a statute was passed in British Columbia (STAT. OF BRIT. COL. 1929, c. 20; see also 1930, c. 13, and 1931, c. 14). Farmers who had obtained the higher prices of the fluid market were required to contribute a share of their receipts to a committee which apportioned it equitably among the producers who had received only surplus prices. The statute was declared invalid by the Privy Council on the ground that by the British North America Act of 1867 an indirect tax by a Province was *ultra vires*. Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Limited, 148 L. T. R. 300 (P. C. 1933). At present, however, relief in this country relies upon price fixing. New Jersey has set up a Board to fix retail and producers' prices. N. Y. Times, May 30, 1933, p. 17; price fixing agreements are being negotiated in the Chicago market, *id.* p. 4; and producers in Wisconsin are demanding price fixing, *id.* May 28, 1933, IV, p. 2.