

Further Developments in Due Process

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NOTES AND COMMENT

FURTHER DEVELOPMENTS IN DUE PROCESS.—There appeared in the Harvard Law Review of three years ago an article of Laski's entitled *Judicial Review of Social Policy in England*.¹ To one who had carelessly assumed that the finality of Parliamentary action precluded the English counterpart of the judicial veto, it was indeed a pleasurable surprise. To be sure, in England the problem arises differently and is mainly encountered in the courts' disposition to read into Parliament's grants of authority private conceptions of policy.² Nevertheless, Laski's critique is of distinct value to us; it is refreshing, it is perspicuous, and, more, its complete applicability may no longer be doubted.

A Pennsylvania statute,³ enacted in 1927, required that every pharmacy thereafter established be owned by a registered pharmacist and forbade such establishment by firms or corporations of which all the members were not registered pharmacists. Those dealing exclusively in proprietary medicines were expressly excepted. The enactment, it should be noted, was but a further step in a chain of statutory progression.⁴ The Louis K. Liggett Company sought permission to conduct two additional stores in Pennsylvania. This was denied, the applicant not having complied with the ownership requirement of the statute. Thereupon the Company unsuccessfully applied

¹ 39 Harv. L. Rev. 832 (1926).

² The immediate occasion of the article was the *Poplar* case—*Roberts v. Hopwood et al.*, [1925] A. C. 578, in which the House of Lords unanimously held that borough councillors who had continued in force a schedule of wages for their employees after the official index showed a decrease in the cost of living, were subject to surcharge. The Metropolis Local Management Act of 1855, 18 & 19 Vict. c. 120, Sec. 62, is specific that the borough council "may allow to such Clerks, Treasurers, Surveyors, Officers and Servants respectively such Salaries and Wages as the Board * * * may think fit." Nevertheless, it was deemed the function of the District Auditor, an administrative official, not "to leave the ratepayers unprotected from the effects on their pockets of honest stupidity or unpractical idealism." A number of other judicial and administrative restraints upon policy are enumerated by the author.

³ Pa. Stat. Supp. 1928, Secs. 9377a-1, 9377a-2.

⁴ Specific reference is had in the Court's opinion, *infra* Note 5, to the successive enactments erecting ever-increasing safeguards about the prescribing and compounding of medicines. The majority find the previously existing requirements sufficient, 73 L. ed. 45, 47. Note the approach of Justice Holmes, *ibid.* 48:

"Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil. The selling of drugs and poisons calls for knowledge in a high degree, and Pennsylvania after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed. * * * The Constitution does not make it a condition of preventive legislation that it should work a perfect cure."

for relief to a federal statutory court. It did, however, find the Supreme Court more kindly disposed, and willing, not only to grant relief, but to ignore definitely a method of approach ostensibly recognized since that tribunal in *Mugler v. Kansas*, proclaimed the due process clause a restraint upon social legislation of the states.⁵ We are told by the majority that "unless *justified* as a valid exercise of the police power, the act assailed must be declared unconstitutional."⁶ Justification, it will be seen, is required of the statute and not of the position that would strike it down. If the operation of chain drug stores has resulted in detriment to the public health, "some evidence of it (*i. e.*, the detriment) ought to be forthcoming. None has been produced, and, so far as *we* are informed, either by the record or outside of it, none exists. The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough";⁷—not enough to sustain a statute that "plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees."⁸ It is not difficult to say that this decision, and its immediate predecessors, the *Ribnik*, *Tyson* and *Fairmont* cases,⁹ like "the series of decisions which centre about the policy of *Poplar*, are all examples of an outlook which seeks to insist that views not cherished by the Court shall not, for reasons which it is difficult to term judicial, find the avenue of legality open to them."¹⁰

A Tennessee statute of 1927 authorized an agency of the state, after having complied with requirements of preliminary investigation, to fix the prices at which gasoline might be sold.¹¹ Two companies

⁵ *Louis K. Liggett Company v. Baldrige*, 73 L. ed. 45 (1928). Note Justice Harlan's declaration in the *Mugler* case, 123 U. S. 623, 661 (1887):

"There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (citing *Sinking Fund* cases), the courts must obey the Constitution rather than the law-making department of government, * * *"

This presumption of constitutionality will be found discussed at some length in the opinion of Stone, *J.*, in *Ribnik v. McBride*, 277 U. S. —, 48 Sup. Ct. 545, 548 (1928).

⁶ 73 L. ed. 45, 47. Italics ours.

⁷ *Ibid.* 48. Italics ours.

⁸ *Ibid.* 47. The majority, it will be noticed, declares the conduct of a pharmacy to be the exercise of an *ordinary* property right. Justice Holmes in his dissent reminds us that corporations offering professional services may not escape regulation though all services be rendered by qualified members of the profession, and refers to passing to the better known examples of such regulation. Justice Brandeis joined in the dissent.

⁹ *Ribnik v. McBride*, 277 U. S. —, 48 Sup. Ct. 545 (1928); *Tyson v. Banton*, 273 U. S. 418 (1927); *Fairmont Creamery Co. v. Minnesota*, 274 U. S. 1 (1927).

¹⁰ Laski, *supra* Note 1, at 847.

¹¹ Public Acts (Tenn.) 1927, p. 53, c. 22.

that transacted the bulk of the Tennessee business shortly sued (as the Supreme Court expresses it) to enjoin the state officers from carrying out their *intention* to enforce the act. Injunctions were granted by the District Court, and, of course, sustained on appeal.¹² The lack of legislative power to fix prices was declared to have been settled by the recent decisions of the Court, the *Wolff* case¹³ being the earliest cited for the proposition. The exception of business or property "affected with a public interest" was once more enunciated, and, quite appropriately, the words of this most illusive of tests were set off by quotation marks. Again that postulate was traced to *Munn v. Illinois*, but we are told, and this is rather more modern, that it may be considered both from an affirmative and a negative point of view. The affirmative view, it develops, is nothing more than the fictional test of devotion to a public use; the negative is but the insistence that a business is not affected with the requisite public interest merely because of its size, or because of a warranted feeling of public concern in respect of its maintenance. It will be remembered, however, that the Court in the *German Alliance Insurance* case,¹⁴ truly one of its epochal decisions, upheld rate regulation on just such a showing. The Court's present definite commitment to the raising of extra-constitutional barriers may well be said to induce a belief analogous to Laski's,—a belief that it, as well as "the House of Lords cannot be expected to approach an economic problem in a judicial spirit,"¹⁵ and a suggestion that it, too, "holds itself free to check economic solutions of which it happens to disapprove."¹⁶

In the last Congress an attempt was made to override the Supreme Court's decision in *Truax v. Corrigan*.¹⁷ This, Senator Shipstead proposed to accomplish by amending the Judicial Code so as to limit decidedly the jurisdiction of Federal Courts to issue restraining orders in labor disputes.¹⁸ The bill was referred to the

¹² *Williams, Commissioner of Finance v. Standard Oil Company of Louisiana, Same v. Texas Company*, 73 L. ed. 141 (1929). The position of the companies in the affected industry appears in the opinion of the Court, and is specifically dealt with at p. 143.

¹³ *Wolff Co. v. Industrial Court*, 262 U. S. 522 (1923).

¹⁴ 233 U. S. 389 (1914). This point has been well developed in, Finkelstein, *From Munn v. Illinois to Tyson v. Banton*, 27 Col. L. Rev. 769 (1927). In the instant case, the State's showing of the widespread need for, and use of, gasoline as a commercial fuel, and the practical monopoly of such business by two companies, was found insufficient.

¹⁵ *Supra* Note 1 at 847.

¹⁶ *Ibid.* 848.

¹⁷ 257 U. S. 312 (1921).

¹⁸ The bill, S. 1482, printed at 69 Cong. Rec. 10050 (1928), in the form submitted by the sub-committee headed by Senator Norris, provided for a preliminary declaration of public policy recognizing that under prevailing economic conditions "the individual unorganized worker is commonly helpless to exercise actual liberty of contract," and recognizing a necessity for freedom of association. The act would prohibit the issuance of orders restraining parties participating or interested in labor disputes from terminating any employment relationship, from becoming or remaining members of any labor organization, from paying strike or unemployment benefits, from giving publicity to the facts

Judiciary Committee and a sub-Committee appointed to consider it. The latter group suggested a substitute bill to the Committee and procured its publication with a view to attracting general attention. While the bill did not reach the floor of the Senate, it is not to be inferred from this that no progress was made.

The introduction of such a measure suggests the question of the attitude of the Court. Less than eight years ago, the Arizona statute considered in the *Truax* case was deemed to sanction a definite wrong in depriving an employer of "all real remedy" against a "wrongful and highly injurious invasion of property rights."¹⁹ In the Court's preliminary statement of the results of the ex-employees' picketing, could be read the decision. The whole tenor of the majority opinion was one of righteous indignation; in fact, as Justice Holmes pointed out, it was not even inquired whether the business affected had not been established subsequent to the enactment of the statute. From such decisions, "it is an easy step," as Laski phrases it, to the conclusion that the Court "is, in entire good faith, the unconscious servant of a single class in the community." Yet, as he reminds us, "more harm has been done in legal history by the prejudices of sincerity than was ever achieved by the receptivity of scepticism."²⁰

V. J. K.

RES IPSA LOQUITUR.*—The rapid growth of industry, with its consequent increase in the use of powerful machinery has given rise to a perplexing and vexatious problem. The question has come to be increasingly common whether the fact of an injury occasioned by the use of such machinery is to be regarded as raising a presumption of negligence upon the part of the owner of the apparatus. "Res ipsa loquitur is the phrase appealed to as symbolizing the argument for such a presumption."¹

of any such dispute, from assembling peaceably to act in the interests of any such dispute, from agreeing with others to do or not to do any of the above specified acts, and from inducing without fraud or violence any of those acts. Further, no injunction might be granted in a labor case except after the taking of testimony in open court and the Court's finding specifically a number of enumerated facts. An exception would permit the issuance of a temporary injunction good for five days only, without notice, where a complainant pleads an irreparable injury and files a bond sufficient to compensate for the improvident issuance of such injunction.

¹⁹ 257 U. S. 312, 328.

²⁰ *Supra* Note 1 at 848.

* "The transaction speaks for itself," 3 Bouvier's Law Dictionary 2908.

¹ 5 Wigmore, Evidence (1923), Sec. 2509.