" THE RIGHT OF PRIVATE PROPERTY "

BY

Judge William Howard Taft

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FOREWORD

BY

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In 1887, at age twenty-nine, William Howard Taft was appointed to the Cincinnati Superior Court; the next year he was elected to a full term; but he resigned in 1890 when appointed Solicitor General of the United States by President Benjamin Harrison, a post he held until 1892, when he was nominated and confirmed Judge of the United States Circuit Court Judge for the Sixth Circuit, where he served eight years. About this trajectory his biographer Henry F. Pringle observed, "The fates were, as always, pushing Taft higher and higher. Perhaps he was the only man in American Political history who can, with complete accuracy, be described as a creature of destiny." [1]

[1] Henry F. Pringle, 1 *The Life and Times of William Howard Taft* 107 (Farrar & Rinehart, 1939).

On June 27, 1894, Judge Taft delivered a commencement address on "The Right of Private Property" at the University of Michigan Law Department.[2] Off the bench, he did not hesitate to speak openly about divisive political issues of the day.[3] Constructing his speech like a lawyer's brief,[4] he drew upon history, economics, politics and law to explain the recent rise of threats to private property, warning that "if the present movement against corporate capital is not met and fought, it will become a danger to our whole social fabric."

He began with a history of protections of property rights in the common law and constitutions of the states and the nation. But, he warned, these rights were being challenged by, most notably, "those who do manual labor for a living." Unless these threats were subdued, "our boasted constitutional guaranties of property rights will not be worth the parchment upon which they were originally written." One way to combat them was to explain why "the institution of private property is a good thing," and "to point out why the laborer of all members of modern society is most interested in maintaining its absolute security." [5] In other words, laborers' ignorance of how they

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[2] Uncomfortable at speechifying, he read "verbatim from prepared texts." Judith Icke Anderson, *William Howard Taft: An Intimate History* 64 (W. W. Norton & Co., 1981).

[3] *Contra* Jonathan Lurie, *William Howard Taft: The Travails of a Progressive Conservative* 37 (Cambridge Univ. Press, 2012) ("As a federal judge, Taft refused to comment publicly on issues of contemporary political concern.").

[4] To Pringle, Taft wrote in "an involved manner" and "the complexity of his phraseology was partly caused by his desire to be exact." Struck by the complexity of a paragraph in one of Taft's judicial opinions, Pringle, "with reluctant apologies to the legal mind," translated it into simple English. Pringle, note 1, at 131.

[5] In his history of property in this country, Professor Stuart Banner recounts the story of one laborer who did not benefit from Judge Taft's expansive views of property rights:

> In 1887, for example, a Cincinnati trial court heard the case of John Dodds, the former foreman for the Blymyer Manufacturing Company, a producer of copper and tin bells. When the company was sold, Dodds left and went into business for himself, using the bell-making knowledge he had acquired over the years. His contract with Blymyer had

benefit from the existing system of unfettered private property rights — what became known as laissez faire capitalism — could be corrected by education.

Private property, he contended, led to the accumulation of capital, which lowers production costs, resulting in greater comforts and higher incomes for everyone:

> **[T]he institution of private property is what has led to the accumulation of capital in the world. Capital represents and measures the difference between the present condition of society and that which prevailed when men lived by what their hands would produce without implements or other means of increasing the result of their labor, that is, between the utter barbarism of prehistoric ages and modern civilization. . . . Capital increases the amount of production and reduces the cost in labor units of each unit of production. The cheaper the cost of production the less each one had to work to earn the absolute necessities of life and the more time he had to earn its comforts.**

He was not alarmed by "the rapid accumulation of wealth among the comparatively few in the last twenty years in this

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> **said nothing about trade secrets, and no one had ever told him not to use his knowledge or communicate it to others. Did that mean Dodds could make his own bells? The case came before a brand new thirty year-old trial judge named William Howard Taft, who held that it made no difference what Dodds had been told. "I am inclined to think that his obligation to preserve such secret as the property of his employer must be implied, even though nothing was said to him on the subject," Taft reasoned. Property was property, regardless of the form it took.**

Stuart Banner, *American Property: A History of How, Why, and What We Own* 42-43 (Harvard Univ. Press, 2011) The case is *Cincinnati Bell Foundry Co. v. Dodds*, 10 Ohio Dec. Reprints 154 (1887).

country." Inventors, entrepreneurs and "men of wealth" deserved "princely profits" for the "general good they have done." But occasionally, "real evil" resulted when corporations and "unscrupulous managers" used their wealth to corrupt the political system to secure monopolies and block legislation. This corruption fueled the hostility of organized labor toward corporate wealth. Yet he recognized the need for unions:

> **On a rising market, early advantage in the increase of the demand for labor may be taken by the laborers if they act together, and a prompt raising of wages secured, when otherwise it would be grudgingly and slowly granted; while, by the same united action, they may retard their too eager employer in reducing wages on a falling market. Such organizations, when they are intelligently and conservatively conducted, do much I have no doubt to aid their members in the hard struggle for existence, and have materially increased the share of the workingman in the joint product of capital and labor.**

He cited the Brotherhood of Locomotive Engineers as an example of well-run union ("It exercises a wholesome effect upon all the members by enforcing temperance, fidelity and strict attention in the discharge of their important duties."). He was familiar with this union because only a year earlier it was a party to one of his most controversial rulings. In March 1893, the Toledo, Ann Arbor & North Michigan Railway refused a demand for a wage increase by the Locomotive Engineers union, prompting it to strike. According to a clause in the bylaws of the union, engineers on other railroads could not handle property of one with which the Brotherhood had an

unsettled grievance. This precipitated a secondary boycott of the freight of the Toledo & Ann Arbor by other roads. [6] In a suit by the Toledo & Ann Arbor, Judge Taft held that the boycott violated the Interstate Commerce Act, and enjoined the Brotherhood, individual engineers and the other railroads from ceasing to carry the freight of the Toledo & Ann Arbor. [7]

Nevertheless, "seeds of sedition and discontent" have been planted in many unions, whose leaders support the political candidate who denounces "the greed of capital [and] the slavery of the workingman." Planks of the platforms of the populist parties in South, Midwest and Western states resembled socialism. There was, he saw, a growing movement against property rights that must be stayed:

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[6] A "secondary boycott" is a combination of individuals or organizations such as unions that act to coerce suppliers or customers from doing business with the employer being targeted.

[7] *Toledo, Ann Arbor & Northern Michigan Railway Co. v. Pennsylvania Co., et al*, 54 Fed. 730 (N. D. Ohio, 1893), earlier proceeding, 54 Fed. 746 (N. D. Ohio, 1893). For commentary, see Felix Frankfurter & Nathan Greene, *The Labor Injunction* 6-7 (MacMillan Co., 1930), and Pringle, note 1, at 130-132.

Several years earlier, Superior Court Judge Taft affirmed a lower court ruling that a secondary boycott by the Bricklayers Union was illegal. *Moores & Co. v. Bricklayers Union*, 10 Ohio Dec. Reprint 48 (1889). Here Professor Burton saw that Taft "displayed not only an unyielding position in favor of capital over labor, but he also chose to embrace a double standard of social morality":

> But he went beyond the rule of law in handing down his opinion, arguing that malice was the motivation of the bricklayers. He could have arrived at that judgment only based on his private attitude toward the labor movement, relative to which he had deep suspicions that privately tended to demonize union leaders.

David H. Burton, *William Howard Taft: Confident Peacemaker* 16-7 (Saint Joseph's University Press & Fordham University Press, 2004). Professor Lurie does not share this view of Taft's ruling. See Lurie, note 3, at 22-23.

Taft did not foresee that his decisions in the *Toledo, Ann Arbor & Northern Michigan* case, the *Moores* case, and others where he ruled against unions would, to use a hackneyed phrase, which nevertheless seems appropriate, come back to haunt him. Fourteen years, later, when running for President, Taft was portrayed by the opposition as anti-union; to combat these charges he was forced to defend each of these rulings. (See Appendix, at 42-54 below.)

> **How then can we stay the movement I have described against property rights? It is by telling and enforcing the truth that every laborer, and every man of moderate means has as much interest to preserve the inviolability of corporate property as he has that of his own. It is by defending modern civilization and the existing order against the assaults of raving fanatics, emotional and misdirected philanthropists, and blatant demagogues. It is by purifying politics from corruption. It is by calling to strict account our public men for utterances or conduct likely to encourage resentment against the guaranties of law, order and property and by insisting that equal and exact justice shall be done as well to a corporation as to an individual in legislative and executive action.**

Because these educational efforts take time, the judiciary must become the front line of defense of the right of private property. Echoing Justice David Brewer's commencement address at the Yale Law School in 1891, [8] Taft exhorted the men sitting before him to resist assaults on the property rights of the minority — the wealthy:

> **To-day it is the rich who seek the protection of the courts for the enforcement of those guaranties. The judges of federal and other courts are sworn to**

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[8] David Brewer, "Protection to Private Property from Public Attack" 19 (MLHP, 2014)(published first, 1891) ("In this coming era, great social changes will take place. A more equal distribution of the wealth of the world, and the elimination of the pauper from our midst will be secured. Many and various will be the means suggested for accomplishing these desired and glorious changes. To the lawyer will come the sifting and final judgment on the righteousness and justice of these various schemes. Into that profession, and into this era, I welcome you,—and welcoming, I bid you remember that not he who bends the docile ear to every temporary shout of the people; but he only who measures every step,—even in defiance of angry passions, by the unchanging scale of immutable justice, will win the crown of immorality, and wear the unfailing laurels.").

> **administer justice fairly between the rich and poor. When the oath was formulated it was doubtless feared that the temptation would be to favor the rich. To-day, if a judge would yield to the easy course, he would lean against the wealthy and favor the many. While this seems to be a change, it is not really so. The sovereign to-day is the people, or the majority of the people. The poor are the majority. The appeal of the rich to the constitution and courts for protection is still an appeal by the weak against the unjust aggressions of the strong.**

And like all commencement speakers, he concluded with advice for the new graduates. He urged them to become "supporters and protectors" of the right of private property":

> **Many of you will become foremost in the communities where you live as leaders of public sentiment. Many of you, I hope, will take part in politics. You will go to the legislature and to congress. As public teachers, as public men, as politicians, you will not cease to be lawyers, or lose your allegiance to the fundamental compacts you have sworn to uphold and defend. It has seemed to me fitting, at such a time, to remind you that in those compacts there is secured as sacred the right of private property, and that unless you do everything that in you lies to maintain that security and guaranty, you will be false to the oath you take.[9]**

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[9] **Taft's hope that the graduates would enter politics was noted by the editors of the Michigan Law Journal, where his address was reprinted:**

> **LAW AND POLITICS.—Possibly every young lawyer as he enters into the active practice of his profession, has received more or less sage advice as to the advisability of**

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Taft and Social Darwinism.

After the publication of Charles Darwin's *Origin of Species* in 1859, the theory of biological evolution influenced every corner of intellectual life in America. Some applied the theory of natural selection to society and the economy — what became known as Social Darwinism. Its adherents believed that life was a struggle for existence; those who survived were superior, "the fittest," identified many times by the extent of their material wealth; and the inevitable result of this fierce competition was social and economic progress.[10] Outside interference, especially through legislation, must be resisted because it impedes the natural selection process.[11] Robert McCloskey writes:

> **Even more important in helping to shape the argument for conservatism in the post-Appomattox world were the social and political analogies drawn from the biological insights of Charles Darwin. In large part, of course, the findings of Darwin seemed**

> **"dabbling in politics." Students at the law schools may almost invariably be heard to comment upon the wide differences of opinion entertained by their instructors. As they gather for their farewell lecture or annual address, how they will be advised upon this subject is always matter of conjecture. The utterances of two well known men made at the same time before the two law schools of this state would make an interesting parallel column. In his address delivered before the law students and alumni of the University of Michigan, published in this number, Judge Taft urged his hearers to take part in politics. At the same time in delivering a similar address before the Detroit College of Law, Hon. Don M. Dickinson emphatically advised young lawyers to keep out of politics.**

3 Michigan Law Journal 236 (1894).

[10] See generally, *Richard Hofstadter, Social Darwinism in American Thought* (George Braziller, 1959).

[11] Sidney Fine*, Laissez Faire and the General-Welfare State: A Study of Conflict in American Thought, 1865-1901* 43-46 (Univ. of Michigan Press, 1956)

to complement and confirm the hypotheses of the classical economists. Political economy taught that the maximum utility for society as a whole would be achieved if economic forces were allowed to work without restriction. Social Darwinism gave the ideal of noninterference enormously enhanced prestige by making it the sine qua non of all human progress. An unfettered industrial order would insure not only an optimum product in the world of today, but a perfect race and a perfect social order in the world of tomorrow It was an engaging, even sometimes an inspiring, conception.

Even better, it was a conception made to the order of an industrial age its character, its terminology, its symbols were completely secular, purporting to rest on empirical truth, on concrete, scientific findings. No appeal need be taken to an abstract moral law for verification of the rules that govern a just society. One need only look to nature herself to trace the inexorable workings of those rules in the geologic record. Facts were what the postwar age understood best, and facts were what the Social Darwinists pretended to give it. Abstract ethics had lost much of its charm; very well, here was the basis for an ethic empirically derived. "This was a vast stride," said Henry Adams. "Unbroken evolution under uniform conditions pleased everyone — except curates and bishops; it was the very best substitute for religion; a safe, conservative, practical, thoroughly Common-Law deity." And . . . what most men understood of Social Darwinism was its promise of constantly increasing material well-being. A

system whose moral imperatives were dependent upon materialist proof, however, was doomed from the outset. The teleology of Fiske and the optimism of Spencer withered away in time from the main stalk leaving only a cold determinism, a set of precepts devoid of moral content and glorifying selfishness in the name of science.

As the conservatives employed it, the Darwinian revelation supported all their traditional premises. In nature, the fittest rise to positions of dominance; the less fit are eliminated. Thus the species slowly improves through natural selection, so long as no extraneous influence interferes. At a blow then, the timeworn presumptions of American conservatism were given new confirmation. "Fitness" was defined in terms of material success, because nature is incapable of recognizing another standard. The elite, the saints of the new religion, therefore, were those who had proved their native superiority by their survival value. This will be recognized as the Puritan idea of "election" in modern dress; the supporting rationale was different, but the implications were almost indistinguishable. Inequality was no longer a dismal necessity as the economists had argued; it was a disguised blessing that helped move society onward and upward. The claim of the great body of the people to control the social order they live in was manifestly unwarranted. The inferiority of the masses was attested by their economic position, and the great social decisions must be left to those who had won the right to make them.

On similar grounds, the property right earned nature's sanction. Those most qualified to control property were those who had demonstrated their capacity in the competitive struggle. Movements to deprive them of control were ill advised in a double sense: first, because such action might disturb the cosmic plan and inhibit progress; but, second, because in some way not always clear, the acquisition of property somehow invested the owner with al right to hold his prize. This curious blending of an empirically derived moralism with deductions from the facts themselves was characteristic of the new commercial apologia. Pretending to reject abstract moral concepts, its exponents introduced one by the back door. The illusion of right and wrong is persistent and not dissipated by formal repudiation, and the, prophets of the new faith owed more to the despised Enlightenment than they liked to acknowledge.[12]

Merle Curti refined the picture:

Of the far-reaching implications of this image of man none was more important than the conviction that the functions of government must be limited to the protection of life and property against possible excesses of an unrestrained individualism. The need for education was conceded if people were to understand their true interests and responsibilities. Thus enlightened, men could rightly claim a large

[12] Robert Green McCloskey, *American Conservatism in the Age of Enterprise* 26-28 (Harvard Univ. Press, 1951) (citation omitted).

> **field for individual liberty. It followed that everyone must be allowed to accumulate and use his capital as he saw fit. . . .**
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> **According to this frame of thought, individual endowment explained success and failure. Poverty had nothing to do with the prevailing order of laissez faire. It resulted rather from the deficient native talents and character of those who experienced such degradation. Moreover, poverty served as a beneficial stimulus to effort. It warned everyone of the penalty for sloth, failure of will, inebriation, and other violations of the middle-class Christian code. On the other hand, the successful man owed everything to his superior endowment, including character, to his superior effort, or to both. This message reenforced by biblical authority, was the dominant note in the literature of the self-made man, even though some exponents conceded the contributing role of chance or even of the unwholesome environment of wayward city urchins.** [13]

Taft's biographers agree that he was, to an extent, a Social Darwinist. Alpheus Thomas Mason is blunt: "Taft was a thoroughgoing Social Darwinist, an outspoken critic of governmental regulations." [14] **More circumspect is historian Professor David H. Burton, who has spent most of his professional life studying Taft and his times. Burton writes that as an undergraduate at Yale University, 1878-1882, Taft was**

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[13] Merle Curti, *Human Nature in American Thought: A History* 218-19 (Univ. of Wis. Press, 1980).

[14] Alpheus Thomas Mason, *William Howard Taft: Chief Justice* 16 (Simon and Schuster, 1964). Curiously Mason spends three pages analyzing Taft's commencement address to the Michigan Law Department, but does not once mention the influence of Social Darwinism. Id. at 44-47.

influenced by William Graham Sumner, a popular teacher of economics and sociology. "Sumner's modus operandi in the lecture hall was to dogmatize the teachings of Herbert Spencer, who, in turn, had given social applications to the findings of Charles Darwin. Sumner's aim was to overpower the undergraduate mind as he preached . . . the gospel of laissez-faire capitalism."[15] As a result, "Taft became at best a partially wrought Social Darwinist but there would be found traces and more than traces in certain of his diplomatic tactics in dealing with small Central American countries." [16] Burton added:

> **The importance of property and successive alterations in society growing out of the Darwinian struggle for survival were familiar enough as a result of Taft's encounters with Professor Sumner at Yale. There were aspects of Sumner's philosophy that encouraged him to embrace notions of the extreme of property rights, but there were equally strong reasons why, ultimately, he would reject a system of ethics based on force. [17]**

Viewing Taft's public life as a whole, Burton explained why he did not always act during his decades in office under the influence of Social Darwinism:

> **The question may well be asked about why there was no strong evidence of the influence of Sumner's preachments of Social Darwinism on Taft's public positions and policies. If anything, he was pragmatic**

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[15] Burton, note 7, at 9-10.

[16] Id.

[17] Id. at 12.

> **in his approach to seeking resolution of the problems that faced the nation. He was not a pragmatist, however, and not given to abstractions or faithful to this or that school of thought. There was, rather, a practicality in his way of thinking and doing. Sub-consciously perhaps he believed in the workability of congressional law and court reform, provided they conformed to the Constitution. As an American he could only wonder in admiration at the success of a federal government that, despite the Civil War breakdown, demonstrated its ultimate workability with the reconstruction of the union. It would not be natural, however, to associate him in theory with either Charles S. S. Pierce or William James, just as it would be wrongheaded to treat Herbert Spencer or William Graham Sumner as a presence in the mind or in action. And despite his lack of Christian orthodoxy, William Howard Taft was a traditionalist in keeping with the historic values of the American people to which he was altogether faithful. He was alert to the place and uses of these values well before he went out to the Philippines where he first came to appreciate the dynamics of mind over matter in world affairs. Similarly, in domestic politics his mind and spirit were sympathetic to reform.[18]**

Whether this retrospective summing up accurately describes the man who delivered the following commencement address is debatable. Comparing Taft's text with the studies of Professors McCloskey and Curti, it is hard not to conclude that on June 27, 1894, he held Social Darwinist convictions.

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[18] **Id. at 62.**

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A judge may speak more personally and frankly off the bench than on it. In his address, Taft urged the courts to become active defenders of private property rights. "The immediate burden of this conflict for the security of private property will, I suppose, fall upon the courts," he predicted. But times change.

Fourteen years later, while running for president, he was required to defend several of his judicial rulings favoring business against charges that he was "anti-union." Never comfortable as a political campaigner, he quipped to an audience in Topeka, Kansas, "I didn't think I was going to be foolish enough to run for the Presidency when I was on the Bench." He did not portray himself as an activist judge, a zealous guardian of laissez faire capitalism. Instead, he explained in numbing detail the facts of the cases to justify his rulings and rebut the charges as untrue. In the APPENDIX on pages 42-54 below, are excerpts from two campaign speeches in which he justifies issuing injunctions against labor. After the election, they were reprinted in *Political Issues and Outlooks: Speeches Delivered Between August, 1908, and February, 1909* (Doubleday, Page & Co., 1909).

Taft's commencement address was reprinted in volume 3 of the Michigan Law Journal, August 8, 1894, pages 215-233. It has been reformatted, a few cites inserted in brackets; footnotes, spelling and punctuation have not been changed. ◊

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THE RIGHT OF PRIVATE PROPERTY *

BY

WILLIAM H. TAFT

As far back as we can go in the history of the common law of England, the right of property of the freeman was theoretically inviolate. Of course the serf or slave, owned by another enjoyed no such right. But freedom, and the security of private property were linked together as the ancient liberties of the free English subject. The Norman kings were not as regardful of these liberties as they should have been, and the barons of the realm forced from King John in 1215 the written promise to preserve that which we all of us know as the Magna Charta. The important words of John's promise were: "No freeman shall be taken or imprisoned, or be disseised of his freehold or liberties, or free customs or be outlawed or exiled, or any otherwise damaged, nor will we pass upon him, nor send upon him but by lawful judgment of his peers or by the law of the land."

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*** An address delivered before the graduating class and alumni of the law department of the University of Michigan at the last Commencement. Judge Taft prefaced his address with the following remarks:**

> **Gentlemen of the Graduating Class: Since your Dean and Faculty honored me with an invitation to speak to you on this occasion, I have not found it easy to select an appropriate subject of present interest Last year, the class which preceded you, had the good fortune to hear an able and instructive address on the uses of the science of jurisprudence from one who, though still a young man, is a leading lawyer of the country and is now doing honor to your and his Alma Mater as the Solicitor General of the United States. A careful study of what Mr. Maxwell said in this place a year ago, and the adoption of his suggestions to your methods of professional work, will make you better lawyers. I cannot hope to confer such a benefit upon you, but I have thought it might not be without public benefit, if I could say something to you, as future members of the legal profession, to awaken or increase your interest in the social conflict now at hand, in which is at stake the security of private property. I am the more encouraged to do so when I observe that among your professors and instructors is that great judge, jurist and law writer, Mr. Justice Cooley (who honors us all by presiding here to-day), than whom no one has done more in this generation on the Bench and in his treatises to maintain inviolable the rights I am about to discuss.**

It is needless to say that this guarantee under John's sign manual was often broken by him and his successors, but just in proportion as England became more civilized, the ancient charter and pledge of rights became more sacred.

When our ancestors settled in this country their purpose was to establish here a government and society in which the liberty of the individual and the right of property should be strictly protected. The constitutions of the states which were adopted after the Declaration of Independence and before the federal constitutional convention, contained guaranties, the language of which was borrowed from the foregoing clause of Magna Charta. The Massachusetts constitution of 1780, was especially full in this respect.

When the war of the revolution closed, the territory which lay northwest of the Ohio river and east of the Mississippi, was claimed, under royal grants, by Virginia, New York, Connecticut and Massachusetts. After much controversy these states ceded it all to the old Confederation, making it subject to the government of the Continental Congress, and that body, after several years of intermittent effort, finally passed the ordinance of 1787 establishing over it a territorial government. Its passage was secured largely through the persistent efforts of the Ohio Company, an unincorporated association of revolutionary officers of Massachusetts, organized for the purpose of buying and settling a million and a half acres of land in the new territory. The ordinance is in many respects as remarkable a charter of constitutional liberty as that under which we now live. All the guaranties contained in the Massachusetts constitution of 1780 were embodied in the ordinance, and it also contained a clause forever forbidding

slavery in the territory. It was this which so endeared the ordinance to the opponents of slavery in the heated discussion of that institution in the forty years before the war. But the part of the ordinance with which we have most to do, in this discussion, is as follows:

> **Section 14. It is hereby ordained and declared by the authority aforesaid, that the following articles shall be considered as article of compact, between the original states and the people and states in said territory and forever remain unalterable unless by common consent, to-wit: * * ***
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> **Article II.**
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> *** * * * No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land, and should the public exigencies make it necessary, for the common preservation to take any person's property or to demand his particular services, full compensation shall be made for the same. *And in the just preservation of rights and property it is understood and declared that no law ought ever to he made or have force in said territory that shall in any manner whatever interfere with or affect private contracts or engagements bona fide and without fraud previously formed*.**

The authority and origin of the clause with reference to contracts is in dispute. Nathan Dane of Massachusetts many years afterwards, claimed that it was original with him, while Richard Henry Lee of Virginia maintained that he was its author, stating that he intended it as a regulation of the abuse

of paper money. Whoever drafted the clause it is probable that it was prompted by Dr. Manasseh Cutler, the agent of the Ohio Company, who was deeply interested for his principal in establishing in the new territory, all the possible guaranties of property and contract rights, because upon such security depended the value and success of his company's proposed purchase. The clause forbidding the impairment of the obligation of contracts by legislative authority was the first restriction of the kind ever contained in a charter of constitutional rights. It suggested the adoption of a similar restriction in the constitution of the United States a few months later, and in some form or other is now found in the constitutions of nearly all the states.

In 1791, a bill of rights was added to the federal constitution and by its fifth article congress and the general government were forbidden to deprive any person of life, liberty or property without due process of law. Following Sir Edward Coke's statement in his Institutes, the supreme court of the United States has held that the words "due process of law" are the equivalent of the words of Magna Charta "except by the lawful judgment of his peers or by the law of the land." In 1866, after the late civil war, and for the purpose of establishing the security of life and property, so much in peril in the states which had been devastated by war and which were being subjected to radical changes in their social conditions, the fourteenth amendment to the federal constitution was adopted, providing among other things, that no state shall pass laws depriving any person of life, liberty or property without due process of law. Similar restrictions upon the power of state legislatures may be found in all the state constitutions.

There is not time and it is not necessary for me to review the judicial treatment and construction of these guaranties. Suffice it to say that the supreme court of the United States, the ultimate tribunal for the enforcement of them, has lacked neither in a high appreciation of their sacred character, nor in courage to declare void the intermittent attempts of state legislatures and of congress to override them.

I have thus reviewed the guaranties of private property contained in our fundamental law, familiar to us all, for the purpose of showing what a conservative government we live under and how strongly buttressed by written law is our American Society against the attacks of anarchy, socialism and communism. While we inherited from our English ancestors the deep seated conviction that security of property and contract and liberty of the individual are indissolubly linked, as the main props of higher and progressive civilization, we have by our complicated form of government, with its many checks and balances, been able to give substantial guaranties of those rights, much further removed from the gusty and unthinking passions of temporary majorities, than has our mother country. The difficulties attending an amendment of the national constitution are so great as to make it practically impossible unless there is an overwhelming and long maintained feeling among the people in its favor. And this, in a less degree, is also true of amendments to state constitutions. Such limitations upon the power of the legislature were unknown when American political history began. The guaranties of English liberty and rights were against the aggressions of the monarch, not those of the legislature. The English parliament had always been omnipotent, and might by arbitrary act deprive the king

of his throne, the subject of his property or the creditor of his debt. As Mr. Justice Matthews said in *Hurtado v. California*: *

> **"The actual and practical security for English liberty rights of contract infringed by act of parliament. The Irish against legislative tyranny was the power of a free public opinion represented by the Commons."**

The history of England even down to modern times affords many instances where property has been confiscated and vested land laws of the last fifteen years, if subject to the restrictions of the federal constitution, would certainly have been held to be in direct conflict with all the guaranties of property and contract given in that instrument. The trend of recent English politics indicates that the power of public opinion is not now being strongly exerted in behalf of vested rights. The steps toward state socialism by both the great political parties are quite rapid.

The assaults of socialism upon the existing order in continental countries of Europe are more formidable even than in England, and of necessity therefore property rights are there more seriously threatened. The power of the socialist party in politics is in those countries fast increasing, and we need not be surprised if we shortly see in some one of them the experiment of socialism actually attempted, with the disastrous results and not altogether useless lessons which are sure to follow.

In this country until recent years not only have we had broad constitutional guaranties of property and contract rights, but

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*** 110 U. S. 531 [1884].**

there has been present in the breasts of our whole people a firm conviction of their sacred character. The fundamental compacts of state and nation have been merely declaratory of that which has been recognize as right and necessary by every individual, no matter how humble, and the immense advantage to our country growing out of the inviolability of property and contract rights has until recently been fully appreciated by all American citizens.

But while there has been no change in our constitutional guaranties, it cannot be denied that there has lately come a change of sentiment in certain of our people, by whom the right of private property is not now as highly regarded as formerly. Constitutional restrictions are generally not self executing but appropriate legislation must be passed for the purpose. Statute laws do not execute themselves, but, to be effective, must be administered by the firm hand of executive power. Events are happening each day which make a thoughtful man fear that if the tendency, indicated by them, is to grow in popular weight and intensity, our boasted constitutional guaranties of property rights will not be worth the parchment upon which they were originally written.

Impatience with the existing social order and contempt for the security of private property have found strongest expression among those who do manual labor for a living. By some of the more radical the wisdom of private property has been already challenged, while others manifest a resentment toward the system without formulating a purpose to destroy it. Then there are others, not confined to the ranks of labor, who would not admit an intention to undermine the constitutional guaranties we have just been considering and yet publicly express so

strong a hatred for aggregated capital, and show so marked a disposition to obstruct in every way its lawful accretions, that much comfort and strength is given to the avowed enemies of private property. Now the institution of private property is a good thing or it is not. We who believe in it must be able to give reasons for the faith that is in us. A full discussion of the subject would be too much extended for an address like this, but it may not be out of place briefly to refer to the origin of private property, and its incalculable advantage to our race, and to point out why the laborer of all members of modern society is most interested in maintaining its absolute security.

As soon as man raised himself above the level of the beasts, and began to live in a social state with his fellows, he recognized as a principle of natural justice that one should enjoy what his labor produced. As man's industry and self-restraint grew he produced by his labor not only enough for his immediate necessities but also a surplus which he saved to be used in aid of future labor. By this means the amount which each man's labor would produce was thereafter increased. As social justice requires that the laborer should enjoy his product, so it came to be equally well recognized that he whose savings from his own labor increased the product of another's labor was entitled to enjoy a share in the joint result, and in the fixing of their respective shares was the first agreement between labor and capital. What a man has the full right to enjoy he has the right to give to another to enjoy, and so it happened that when a man was about to die he assumed and was accorded the right to give, to those whom he wished to enjoy it, that which was his. As the natural parental instinct dictated provision for those whom he had brought into the world, it first became custom and then law that if he made no

express disposition of what he had the right to enjoy, it should become the property of those for whose existence he was responsible. In this way the capital saved in one generation was received by succeeding generations, and its accumulation for producing purposes was made much more probable. The certainty that a man could enjoy as his own that which he produced, furnished the strongest motive for industry beyond what was merely necessary to obtain the bare necessities of life. The knowledge that what he saved would enable him to increase and share the result of another's labor was the chief inducement to economy and self control, and this was greatly strengthened as a motive when he came to know that what he saved during his life could be enjoyed after his death by those to whom he was bound by natural affection. In other words, the institution of private property is what has led to the accumulation of capital in the world. Capital represents and measures the difference between the present condition of society and that which prevailed when men lived by what their hands would produce without implements or other means of increasing the result of their labor, that is, between the utter barbarism of prehistoric ages and modern civilization. Without it the whole world would still be groping in the darkness of the tribe or commune stage of civilization with alternating periods of starvation and plenty, and no happiness but of gorging unrestrained appetite. Capital increases the amount of production and reduces the cost in labor units of each unit of production. The cheaper the cost of production the less each one had to work to earn the absolute necessities of life and the more time he had to earn its comforts. As the material comforts increase the more possible becomes happiness and the greater the opportunity for the cultivation of the higher instincts of the human mind and soul.

Capital was first accumulated in implements, in arms and personal belongings, the value of which depended wholly on the labor necessary in their manufacture. The rewards of the chase were divided, the flesh being distributed to the tribe and the skin going to the hunter as his own. When the land began to be cultivated the crop belonged to the husbandman but the land was still common. Gradually, however, as more land was needed for the support of all, those in possession of the land asserted a right to permanently occupy it, and maintained it by force or were succeeded in permanent occupation by the stronger. After cycles of progress the ownership of land came to be recognized, and in course of time it was exchanged for what was purely the product of labor on the land. While, therefore, it may be conceded with reference to the land of England and the continent of Europe that private property in land in its rough uncultivated and unimproved state depended originally on mere force and conquest, nevertheless, in the possession of the present owners of it, its value is the accumulated result of the labor of previous generations. The improvements and the increased value due to cultivation are manifestly nothing but the result of labor. This is still more clearly the case in our country, where land was originally given to those who would settle it, and where it only had value after the labor of clearing and cultivating it had been performed. All capital then is nothing but the accumulated savings from labor available for use in making labor more productive, and thus reducing the cost in labor units of producing everything conducive to human happiness. It would seem, therefore, to be plainly for the benefit of every one to increase the amount of capital in use in the world. This can only be done by maintaining the motive for its increase, which we have found to be in the institution of private property.

Labor needs capital to secure the best production, while capital needs labor in producing anything. The share of each laborer in the joint product is necessarily determined by the amount of capital in use as compared with the number of laborers. The more capital in use the higher is the reward of each laborer, while the less the capital in use, the number of laborers remaining the same, the lower the reward of each laborer. To state it in another way, the more capital in use the more work there is to do, and the more work there is to do the more laborers are needed. The greater the need for laborers the better their pay per man. Manifestly then it is to the interest of the laborer that capital should increase faster than the number of those who work. Everything which tends to legitimately increase the accumulation of wealth and its use for production will give each laborer a larger share of the joint result of capital and his labor. It will be observed that the laborer derives little or no benefit at all from wealth which is not used for production. Nothing is so likely to make wealth idle as insecurity of capital and property. It follows as a necessary conclusion that to destroy the guaranties of property is a direct blow at the interests of the working man.

The cry of the critic of our present civilization is that the poor are getting poorer and the rich richer, from which premise it is said to follow that the wealth of the rich is unjustly wrested from the poor. The proposition that the poor are getting poorer is unfounded and with that the conclusion falls. It is not true that the laborer of this country, skilled or unskilled in times of ordinary prosperity, receives less than formerly. On the contrary statistics show that the purchasing power of his wages is decidedly greater than in former years. Doubtless there is much misery in the world but there always has been. There is a

greater spirit of charity and benevolence to-day than ever before, and society is therefore more conscious of the misery of its unfortunates. But before it can be established that the present system of civilization resting on free labor, free right of contract and security of private property is a failure, it must at least be shown that the average condition of those who depend on manual labor for their existence is growing worse instead of better. This cannot be proved at all, and certainly is not shown by an array of statistics to prove that the rich men are growing richer.

The rapid accumulation of wealth among the comparatively few in the last twenty years in this country has frightened many people beside the laborer, but a careful consideration of the facts fails to disclose any good reason why it should, if the wealth is to be employed only for the lawful accretions of itself. In the last three decades we have witnessed an enormous decrease in the cost of producing nearly all the necessities and many of the comforts of life. This has been brought about in two ways, one by the invention of labor-saving machinery and processes, and the other by the combination and economic organization of capital. The inventors on the one hand, and the men of judgment, courage and executive ability who have conceived and executed the great enterprises on the other, have reaped princely profits, which the world may well accord them for the general good they have done. The profits which they received were the price the world paid for the gain in the purchasing power of labor. But for the pledge of society that the profits might be securely enjoyed the enterprises never would have been undertaken, and the machines never would have been invented. The wealth thus accumulated is not wrested from labor but it is only a part of that which has been

added to the general stock by the ingenuity, industry, judgment and ability of those who enjoy it. The other part has been enjoyed by every member of society whose labor has been given greater purchasing power. Moreover it is a mistake to suppose, because enormous profits have enured to the leaders of industrial enterprises, that their accumulation of it as private property will not benefit others. On the contrary, if the owner of such wealth would increase it, he must use it with labor, and so increase the dividend of labor and wages per man. If with the growth in the laboring population the condition of man is to improve, new plans for the use of capital to better advantage must be devised which shall at the same time increase capital more rapidly than the population and reduce the cost of living. The aggregation and organization of capital in corporations is therefore for the general good.

It is said that this has now gone on in some industrial enterprises called trusts to such an extent as to entirely destroy competition by absorbing all the small producing agencies. That this is one of the objects of the founders of such associations is doubtless true. Whether the intent and its accomplishment are unlawful by statute I do not stop to discuss. Certain it is that even a few years' experience with such unwieldy enterprises shows that those only are successful whose managers are gradually reducing the prices of the commodities they manufacture, and this they cannot do and live save by reducing the cost of production. The competition of smaller establish-ments is only effectively avoided by continuously doing that which smaller establishments cannot do, that is, by producing and selling cheaper goods. The possibility that rival enterprises will spring up furnishes the same motive for reducing prices that actual competition would. The ultimate result of such

aggregations of wealth is for the benefit of the man who buys what is produced, that is, of every member of society.

What has been said should not be misunderstood. The men who have by economic organization of capital at the same time increased the amount of the country's capital increased the demand and price for labor and reduced the cost of necessities, are not philanthropists in the sense that they have done this from any motive of unselfish and disinterested love for human kind. Their sole motive has been one of gain, and with the destruction of private property that motive would disappear and so would the progress of society. The very advantage to be derived from the security of private property in our civilization is that it turns the natural selfishness and desire for gain into the strongest motive for doing that without which the upward development of mankind would cease and retrogression would begin.

We are told in sounding rhetoric that some one by the present system of private property and contract is worth $50,000,000. Well, what of it? If he is using it in such a way that thousands of workmen are employed at good wages, and the cost of living necessities is being gradually reduced, what good ground of complaint has any one to make, that for the mere sake of seeing his fortune grow, he is willing to give hard mental labor and untiring industry to the economic advancement of society? The men of wealth do not oppress anybody by extending, in every legitimate way, the scope of their great industrial enterprises and thereby increasing their wealth. The working man rarely has cause to complain, and his strikes are very few when production is profitably carried on. It is when the capitalist has not used good judgment in his investment when

there are no profits to divide, that the real pinch between capital and labor comes, and then follows the usual result, after a weary conflict against the inevitable, that the investment is abandoned and the laborer is discharged.

But if it is so clearly for the benefit of the workingman that capital should be combined and organized to increase wealth and reduce the price of production, why is it that he and others are so hostile to aggregated capital? There are several reasons for this, one of which at least is founded on a real evil in part traceable to the increase of wealth. Unscrupulous managers of great corporate enterprises, with large amounts of money at command, have not hesitated to use it in corrupting legislative and other depositories of political power for the purpose of securing unjust advantages over the community at large. Unfortunately, men of good reputation who would not stoop so low in their private business, are, when interested in great corporations prone to wink at the dishonesty of such expenditures, and to regard them as necessary under the circumstances, stilling their consciences by carefully avoiding embarrassing inquiry into details. The monopolies secured by legislation are much more dangerous to the public weal than any which may be for a short time maintained by the mere combination and organization of capital. The latter carry in themselves the germ which must shortly either render them beneficial to the community or cause their destruction, while the former supported by positive law are much more difficult for the natural operation of the principle of supply and demand is overcome. It is unfortunate for the public that there have been action and reaction in the matter of political corruption by corporations, which has only increased the sum of it all. While much money has doubtless been spent to secure undue

advantages for corporate enterprises, it is also true that sums quite as large have been spent to prevent legislative or executive action unjustly obstructive to legitimate corporate purposes and instigated solely for blackmail. It is the corrupting influence of large corporations which has caused a righteous resentment among the people against the abuses of corporate wealth, and often without any discriminating recognition of the immense amount of real good they have done for the community. Is it a good reason for destroying capital and the corporate agencies for legitimately increasing it, and the resulting addition to the sum of human happiness, that in the flush of rapidly acquired wealth men have been able to corrupt legislatures and other branches of the government? This would be a waste of benefits acquired equal to that described by Charles Lamb in his story of the Chinese method of preparing roast pig. Manifestly the remedy for the evil or corruption is to put men in political control not susceptible to corrupt influences, rather than to take away from everybody that, which, while it is a means of corruption, is also the means of securing every material good. The difficulties of eradicating corruption from politics are immense, but with our confidence still firm in a government of people we should be the last to admit that they are not to be overcome.

A second reason for the hostility of the laborer to the security of corporate wealth is in the want of clear-sighted leadership in many of those unions organized by workingmen for the purpose of securing their common production and benefit.

It is often stated that such organizations are a threat to modern society and civilization, but it seems to me that this is as far from the truth as the opinion that the aggregation and

organization of capital are necessarily bad. We live in an age of marked progress in which organization of labor and organization of capital are necessary steps. They both of them make strongly for the public good but they also bring with them the evils that experience and time will cure. They are permanent and necessary features of our civilization and must be recognized and treated as such.

I have said that the increase of capital is for the benefit of the laborer, because it increases the demand for his labor and therefore his wages. As the fruits of production are to be divided between labor and capital, their common interest to increase the fruits is manifest. But in the division of their joint product their interests are plainly opposed. Clearly in such a conflict of interest the laborers united are stronger than when acting singly. Ultimately the division of the fruits is inexorably determined by the law of supply and demand, but during the gradual adjustment, according to that law, the capitalists will gain the advantage unless labor acts as a body. On a rising market, early advantage in the increase of the demand for labor may be taken by the laborers if they act together, and a prompt raising of wages secured, when otherwise it would be grudgingly and slowly granted; while, by the same united action, they may retard their too eager employer in reducing wages on a falling market. Such organizations, when they are intelligently and conservatively conducted, do much I have no doubt to aid their members in the hard struggle for existence, and have materially increased the share of the workingman in the joint product of capital and labor. Take the Brotherhood of Locomotive Engineers in this country. It exercises a wholesome effect upon all the members by enforcing temperance, fidelity and strict attention in the discharge of their important duties.

They have a prudently managed life insurance system. They take united action on the subject of wages. They call in experienced chief officers to assist them in a controversy. The result has been that their strikes have been few and their financial and moral condition excellent. There are many others like it and they conclusively demonstrate that the more conservative and reasonable such organizations are in their dealings with employers, the more useful they are to their members.

But unfortunately for capital and labor, many unions as now conducted are very different from that just described. In them, the turbulent are either in the majority or by mere violence of demonstration overawe the conservative element. The leaders are selected, not because of their clear judgment and intelligence, but because they are glib of tongue and intemperate of expression. The influx of foreign workmen bringing with them the socialistic ideas which prevail among the laboring classes of Europe, has planted in many unions the seeds of sedition and discontent with the existing order. Hence it is, that whenever a controversy arises between labor and capital resulting in a strike, lawlessness too often follows any attempt of the employer lawfully to continue his business. If this lawlessness is not repressed promptly and firmly, as often it is not, the sympathies of members of the union are awakened in behalf of lawless methods, their former law-abiding disposition is blunted and they manifest an alarming indifference to the necessity for peace and order.

Then many labor organizations appear in politics and their influence is thrown, regardless of party lines, for the candidate who loudly proclaims himself the friend of labor and proves it

by denouncing the greed of capital, the slavery of the workingman and his purpose to change all this by legislation. While their members are not in a majority, the united action of such labor organizations, together with the inert partisanship which gives to each of the great parties a certain vote whatever the issue, enables them to exercise an influence in elections far beyond their mere numbers. As there is still much human nature in man, the impulse of most persons in public life is to say and do nothing which will displease them. Thus it is that the workingman is rarely told the exact truth about his relations to capital and is too often encouraged by public men to believe that he suffers from society wrongs which should not be borne. Is it much cause for wonder, that he is skeptical about the wisdom of private property, when he is told in the halls of our national legislature that he should have the right to compel another to employ him at his own price, and that, in a bloody battle waged for him, for this purpose, against private property and its defenders, he is entitled to sympathy? Is his illogical hostility to aggregate capital very strange when in the same place he frequently hears men attacked with virulence and a torrent of epithet, simply because by industry, thrift, executive ability and sound business judgment, they have succeeded in accumulating wealth? Shall we wonder that the labor unions regard themselves as privileged when it is deemed proper by a house of congress to investigate the action of an able and conscientious federal judge in making an order claimed to prejudice the interests of organized labor, on the ground that the order was illegal, and unwarranted? Whether the order was proper or within the jurisdiction of the court were questions of law upon which lawyers and judges might differ, and which would be probably settled by a court of appeals. There was not the slightest evidence that the learned judge's conclusion was

influenced by other than a wish to do exact justice. He simply gave to the performance of a disagreeable duty his best judgment. May not labor unions reasonably conclude that such a disregard of the independence of a co-ordinate branch of the federal government is justified only because, in the cause of labor against capital, constitutional restrictions are not to be observed?

When we turn to the state governments, we find even more encouragement to the workingman to think that property has few rights which, in his organized union he is bound to respect. In several states the open sympathy of peace officers with law-breaking strikers has been most demoralizing to the cause of order. The failure to visit the many breaches of the law with adequate penalties accustoms the less conservative labor unions to the use of lawless methods to accomplish their purposes, and the actual security of private property is seriously shaken.

I do not by any means intend to say that hostility to private property will continue to be the tendency of labor organizations for I am sure that, as their members become educated by hard economic experience to the truth that they have a deep interest in sustaining the security of property rights, their action will become more intelligent and more conservative. The trouble has been that many of their members are at present blinded by the new sense of social and political power which combination and organization have given them, and they fail to perceive the limitations of that power, which are fixed, not only by the inexorable law of economics, but also by the mighty force of American public opinion, which, after a long suffering patience, sometimes manifests itself with terrible emphasis.

The power which labor organizations have, if directed in proper channels, could exert an influence for good which can hardly be overstated and all lovers of our county will say God speed the day. But it will not be by bringing about legislative or executive action or nonaction, which shall weaken the power of society to protect property and capital. Of the many good things labor organizations could do in politics, let me mention but one. The use of wealth which injures labor is for the corruption of legislatures, national, state and municipal. This is most expeditiously and safely accomplished through the political boss. He lives by virtue of the spoils system and the machine. A concerted movement to abolish the use of public office to perpetuate political power would do much to deprive unscrupulous rich men of the means of manipulating legislatures, councils and city governments. It would bring about the payment of the same wages by the public as a private employer, and would relieve enterprises in whose success the workingman has every interest, of the heavy weight of taxation which so much interferes with their prosperity. It would give him cheap gas, cheap water, and cheap intramural transportation.

As it is, however, anything which injures corporate interests is thought in some mysterious way to work good for the laborer. The same spirit pervades many of the rural communities of this country, and so it is popular openly to favor legislation hostile to corporate interests. The regulation of corporations, particularly railroad corporations, has been so severe and unjust in many instances that insolvency has followed and thereafter has come a poor or indifferent service to the public, because the purchaser will not expend further capital within a jurisdiction so inimical to enterprise. Many state legislatures are now

engaged in devising plans of taxation which shall affect only corporate property and remove the necessity of increasing the rate of general taxation in order to pay the increased expenditures of government. Thus they are discouraging the large investment of capital within their jurisdiction and directly injuring those of their constituents who earn their daily bread by the sweat of their brows. When the populist party came into control of the state government of Kansas with its threatenings against capital and corporations, all capital in movable form fled the state as if from a pestilence and it became apparent how little civilization could improve without capital.

The populist party has grown enormously among the farming communities of the south and far west because of the discontent produced by the present industrial depression. There were in times of prosperity on the one hand an extension of areas of agriculture beyond the limit of profitable cultivation, and on the other the planting of new territory enormously fertile, which made living competition with it by older farms impossible. The hardships and consequent discontent have led to the approval by the populists of those quack remedies for hard times that are so fascinating to the human imagination and so pernicious in their effects. They are based principally on the proposition that the government is all powerful to give every one a living because it has an inexhaustible supply of wealth to draw from, that it can create wealth by stamping as money what was before worthless, and that it is its duty to distribute it when so created, among the people. They forget that the state is nothing but an aggregation of many men, and that it cannot use a cent which it does not take from the men who compose it. They seek to avoid the simple truth that there is nothing good to be enjoyed for which

labor has not been expended. From one fallacy they have drifted to others, until the difference between what is advocated in populist platforms and socialism is hard to state. Suffice it to say that many of the planks are directed against accumulated capital and the rights of private property.

In the large cities where foreign labor is congested, we find bodies of avowed socialists. The socialist objects to the ownership by an individual of any means of production, that is, of capital. That, he contends, should be wholly vested in the state, while the results of production should be distributed among all members of society for consumption only, in proportion to their labor, the comparative value of the labor of each to be fixed by a governing committee. It is hardly necessary to point out the immense loss in production which such a plan would entail in depriving the community of the benefit it now derives from the motive for accumulation given by the security of private ownership, or the entirely impracticable plan of governing committees to determine the comparative rewards of different kinds of labor, or the waste and corruption necessarily incident to state managed enterprises.

In addition to those already named who are engaged in a movement against the security of private property, there are others who look on with complacency at the popular resentment at large corporate interests, but would be much alarmed at any disposition to infringe upon the property rights of individuals of moderate means. They would be willing to see a man's power of accumulation limited by law to a substantial size. What shall the sum be? Shall it be a million or a hundred thousand or fifty thousand or less? In either case such a limitation would be a fatal blow at the institution of private

property and its beneficent effect. The right of property and the inviolability of contracts carry with them, by necessary implication, the right to use property as capital for the lawful accretion of the same, and if the right to limit lawful accretions be once conceded and inequalities of wealth are to be remedied by legislation, there is no logical stopping place between that and practical socialism.

It seems to me that enough has been stated to show that, while we have the strongest guaranties of the rights of property in our fundamental laws, there is a growing tendency to weaken the firm maintenance of those guaranties, so far at least as they relate to corporate capital; that everything which weakens this security of corporate capital cannot but affect that of individual private property; and that if the present movement against corporate capital is not met and fought, it will become a danger to our whole social fabric. I do not think the present state of social unrest is any ground for a pessimistic view of modern civilization. We are passing through an era of tremendous economic changes and the apparently alarming phenomena in the social horizon are only the necessary results of an adjustment to new conditions. But this view does not, in the slightest degree, diminish the necessity for reducing the friction of the adjustment, so that it may not be retarded, or for preventing a temporary impairment or destruction of the chief agent in the material progress of the human race, the security of private property and free contract.

How then can we stay the movement I have described against property rights? It is by telling and enforcing the truth that every laborer, and every man of moderate means has as much interest to preserve the inviolability of corporate property as he has that of his own. It is by defending modern civilization

and the existing order against the assaults of raving fanatics, emotional and misdirected philanthropists, and blatant demagogues. It is by purifying politics from corruption. It is by calling to strict account our public men for utterances or conduct likely to encourage resentment against the guaranties of law, order and property and by insisting that equal and exact justice shall be done as well to a corporation as to an individual in legislative and executive action. The friends and believers in our modern civilization with its security for private property, as the best mode of a gradual elevation of the race, must make their views and voices heard above the resounding din of anarchy, socialism, populism and the general demagogy which is so wide spread to-day.

In the days of old, the charter guarantees were given it was supposed, for the benefit of the poor and lowly against the oppressions of the rich and powerful. To-day it is the rich who seek the protection of the courts for the enforcement of those guaranties. The judges of federal and other courts are sworn to administer justice fairly between the rich and poor. When the oath was formulated it was doubtless feared that the temptation would be to favor the rich. To-day, if a judge would yield to the easy course, he would lean against the wealthy and favor the many. While this seems to be a change, it is not really so. The sovereign to-day is the people, or the majority of the people. The poor are the majority. The appeal of the rich to the constitution and courts for protection is still an appeal by the weak against the unjust aggressions of the strong. Mr. Justice Miller, speaking for the supreme court in *Loan Association v. Topeka*,* a case where the majority of the voters of a city were seeking to impose upon its property holders

*** 20 Wall 656 [87 U. S. 655 (1875)].**

against their consent, a tax to build a private factory for the use and ownership of a private individual, uses this language in reference to the right of the property owner to object to the taxing of his property for the personal advancement of another. "It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, liberty and property of its citizens, subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power is, after all, a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism."

The immediate burden of this conflict for the security of private property will, I suppose, fall upon the courts until by discussion and longer experience, light shall come to its opponents. The bench must rest for its strength upon the bar. As Judge Dillon said in his address as president of the American Bar Association: "The prominent present duty of the American bar and judiciary is to maintain the ascendency of our constitutions and to see that their guaranties are made effectual in favor of all persons, all rights and all interests which they were devised and designed to protect."

And for this reason I have addressed you. As you enter upon your professional life you will be required to swear that you will support and defend the constitution of the United States and of the state of Michigan. Many of you will become foremost in the communities where you live as leaders of public sentiment. Many of you, I hope, will take part in politics.

You will go to the legislature and to congress. As public teachers, as public men, as politicians, you will not cease to be lawyers, or lose your allegiance to the fundamental compacts you have sworn to uphold and defend. It has seemed to me fitting, at such a time, to remind you that in those compacts there is secured as sacred the right of private property, and that unless you do everything that in you lies to maintain that security and guaranty, you will be false to the oath you take. You are about to enter a profession which a great French chancellor said was "as old as the magistrate, as noble as virtue, as necessary as justice." In ancient times the members of that profession were the bulwark of freedom and of the vested rights of property. I do not doubt that they will continue to be so in the future. The freedom of the citizen is secure. It is the right of private property that now needs supporters and protectors. ◊

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APPENDIX

Speech **Pages**

A. Speech delivered at Orchestra Hall, Chicago, September 23, 1908.

My Fellow-citizens:

I am glad to meet so many members of organized railroad labor. I think it is generally conceded that railroad orders, or "brotherhoods" as they are called, have been conducted with marked ability and with the greatest usefulness, not only to their members but to the community at large, including their employers, the railroads; and I have accepted this opportunity to address an audience of members of the brotherhoods in order that I may take up a question which has been given great prominence in this campaign, and in which I must say that every effort has been made unjustly to arouse the prejudice of organized labor against the Republican party and its candidate.

In the first place, I wish to affirm, without fear of contradiction, that the Republican party has done vastly more than the Democratic party, both in State and National legislation, for the protection and in the interest of labour.

. . . . .

An issue, however, has arisen as to the attitude of the two parties on the subject of injunctions in labor disputes.

I propose now to take up first my personal relation to this question. It fell to my lot to be a Judge of the Superior Court of Cincinnati for three years and a Judge of the United States Circuit Court for the Sixth District, including Michigan, Ohio, Kentucky and Tennessee, for eight years, and during that time I had to consider a number of important cases involving the rights of labor and the rights of the employer, as well as the

practice in equity with reference to the issuing of injunctions in such cases. The first case was not an injunction suit at all. A boss bricklayer quarreled with the union, and their members who were in his employ struck. In order to embarrass him the union notified all the local dealers in materials that they would boycott any firm which furnished him with material. Moores & Co. had a contract to deliver to this boss bricklayer a lot of lime. In order to avoid trouble they secured from him a release from the contract; but he sent his wagon to the freight station and bought lime out of the car where Moores & Co. sold lime to any one who applied. The walking delegate of the union discovered it, and a boycott was begun.

Moores & Co. were prevented from selling to their usual customers any lime or other material for a great number of months, and suffered a severe financial loss to their business. They sued for damages and the case was tried before a jury. The jury returned a verdict for $2,500. Now, gentlemen, in that case I held and decided with two colleagues that a secondary boycott was an unlawful injury, and that whether it was perpetrated by laboring men or otherwise. That is the law today and, my friends, it ought to be the law. I understand that the railway orders, generally, acquiesce in the proposition that it is not wise to use such a secondary boycott as an instrument in industrial disputes. I know that this is not the view of Mr. Gompers, but I am glad to know that there is a difference in organized labor upon this question. Certainly no more cruel instrument of tyranny was ever adopted than this secondary boycott.

Now, what was the second case in 1893? In that case the Toledo & Ann Arbor Railroad was in a dispute with its employees, who were members of the Brotherhood of

Locomotive Engineers, and a strike by the engineers followed. It was understood by the Toledo & Ann Arbor road that the brotherhood engineers on the Lake Shore road were going to refuse to haul their cars, and that the Lake Shore road for that reason would acquiesce in this action. Accordingly the Toledo & Ann Arbor road applied to Judge Ricks to enjoin the Lake Shore Railroad Company, its officers and employees, from refusing to haul Toledo & Ann Arbor cars. He did so in accordance with the [federal] interstate commerce law, which requires one railroad engaged in interstate commerce to haul the cars of another railroad delivered to it, and imposes this duty not only on the railroad itself but upon the officers and employees. There was no order issued which required engineers to stay in the employ of the Lake Shore road. The order only required them, so long as they remained on their engines and in the employ of the Lake Shore road, to comply with the law and haul Toledo & Ann Arbor cars. After this, Mr. Arthur, the head of the Brotherhood of Locomotive Engineers, complying with a secret rule, No. 12, then in force in the order, which forbade the engineers on one road, members of the order, to haul the cars of another road when the order had a strike on the latter road, issued a notice to the engineers of the Lake Shore that the strike on the Toledo & Ann Arbor was approved as required by the rules of the order, and that they should proceed to enforce rule No. 12, which meant that they should refuse to haul the cars of the Toledo & Ann Arbor road. In other words, this order which he issued by telegram was a direct order to them to violate the Federal statute and to compel the Lake Shore road as a third person not interested in the controversy between the Toledo & Ann Arbor road and its former employees to assist their employees in their fight with that road. It was a secondary boycott, and it was a direct violation of the Federal statute

which imposed a punishment by fine and imprisonment for its violation. I required Mr. Arthur to withdraw the telegram which he had issued to his men in respect to rule No. 12, and within a very short period I gave him a hearing. Mr. Arthur had promptly complied with my order and never did disobey it. My own impression always was that Mr. Arthur was glad to have it decided that such a rule as rule 12 was illegal. At all events, the Brotherhood of Locomotive Engineers then repealed the rule and it has never been enforced so far as I know.

I submit that the Brotherhood of Locomotive Engineers, in repealing rule No. 12 and condemning the use of the secondary boycott in such cases, justifies and vindicates fully the conclusion that I reached in that case, on the action that I took. The repeal of rule 12 brought the Brotherhood completely within the law and instead of being law-breakers they became its conservators.

The third case was the Phelan case. It grew out of the attempt of the American Railway Union and Eugene Debs to starve the country by stopping all the railroads and thus compel the Pullman Company to pay higher wages to its employees. Neither the starving country nor the railroads had control over Mr. Pullman. They had no power to control him in any way or to compel him to change the terms upon which he employed his labor. Some railroads had contracts with him for carrying his cars. They were not justified in breaking those contracts. In other words, the action against the railroad companies by Debs and his lieutenant, Phelan, was a secondary boycott. At this time the Cincinnati Southern Railroad, 336 miles from Cincinnati to Chattanooga, was being operated by a receiver under my orders as United States Circuit Judge. Phelan knew this and was warned of it. He held meetings of the Cincinnati

Southern Railroad employees, and advised them to strike and tie up the road, and by hints and winks and side remarks, he instigated them to violence, and to attack the men who stayed upon the engines and who worked the trains, and who refused to obey his call to leave the railway. You may remember that in that strike the regular Brotherhood did not join, because they did not believe in a sympathetic and aimless strike of that character. Nevertheless the strikers, acting under the instigation of Phelan, broke the heads of members of the Brotherhood locomotive engineers and firemen who stuck to their engines and attempted to carry on the business of the railroad. The chief residence of the employees was Ludlow, Kentucky, and it became entirely unsafe for the Brotherhood engineers and firemen of the receivers to go from the railway to their houses in Ludlow. On an affidavit charging him with contempt in attempting by such methods to defeat the order of court directing the receiver to run the road, he was brought into court. At the same time he was enjoined from continuing his obstruction and the time for hearing of the contempt proceedings was set in accordance with his desire. He employed counsel and for ten or twelve days I tried the case. Meantime, during the trial he continued his course. The evidence clearly established his guilt. His defiance of the court's order during the trial was flagrant and deliberate and tended to destroy the court's authority. I, therefore, sentenced him to jail for six months. It was necessary that this man who was inflicting loss not only upon the stockholders of the road but also upon the public, who was subjecting to lawless violence the Brotherhood engineers and firemen of the road, and who was holding the administration of justice up to contempt, should be punished in an orderly way.

I can understand how a man like [Eugene] Debs, [the Socialist Party candidate] a socialist tending to anarchy, who believes that modern society is established on a thoroughly wrong basis, that property ought to be divided equally, that everything ought to be run by the Government, should be in favor of such a disturbance as that which he created by bringing about the strikes and tying up the railroads as he did; but I cannot understand how intelligent and law-abiding members of the railroad orders entertaining the views which I am told they do entertain with reference to the boycott and with reference to violations of law in industrial disputes, can object to the course which was taken by me in these cases in employing all the lawful authority I had to prevent the injuries which were threatened and to bring about a lawful state of affairs.

There was one more injunction suit to which I made reference but in which the operation of the injunction was not against laboring people but against a combination of iron pipe manufacturers who, residing in some eleven States, divided up the territory, and by their agreements maintained the prices of iron pipe at an exorbitant figure, monopolized the whole production within those States, and divided the profits of this arrangement between the members of the combination. A suit was brought in the Circuit Court, and an application made by the United States for an injunction to enjoin the combination from proceeding and to break it up. The Circuit Judge held that there was no power to issue such an injunction and no jurisdiction in the court to grant such a remedy. I sat in the Court of Appeals to entertain an appeal by the Government from the decision of the Circuit Court and rendered the opinion of the Circuit Court of Appeals. We there decided that an injunction would issue; the injunction did issue and the combination was broken up. The case was subsequently carried

to the Supreme Court of the United States, and the judgment was affirmed [*Addyston Pipe and Steel Co*. v. *United States*, 85 Fed. 271 (6th Cir. 1898), affirmed 175 U. S. 211 (1899)]. I merely instance this to show that the injunction works both ways, and that it is useful both in keeping lawless laboring men and lawless capitalists within the law.

The principles laid down in this case, known as the Addyston Pipe case, are the principles upon which the Antitrust Law is now being enforced under the present Administration.

The law laid down in each of the labor cases I have referred to is in accordance with the policy now pursued by the railroad orders. Mr. [William Jennings] Bryan [the Democratic candidate] says I am the father of injunctions in industrial causes. This is not true. The use of the injunction was in accordance with precedent in a number of cases which I cited, both in the Arthur case and in the Phelan case. I am not apologizing for what I did in these cases, for they were in accordance with my duty as a judge. I have merely gone into them to explain to you what they were in order to ask you whether they make a basis for the claim that I am hostile to labor organizations and opposed to the laboring men.

In these cases, I attempted to state with as great fullness as possible the rights and wrongs of employer and employee in these labor disputes; that men had the right to strike; that they had the right and duty to unite in order that they might present a solid front against their employer and deal with him on a level and not be subject to the disadvantage to which one laborer would be put in dealing with a powerful employer; that they had the right to select their officers and accept their advice with reference to what they should do; that they had

the right to accumulate funds in order to support those of their number who had withdrawn from the employ of the employer; that they could withdraw from the association with their employer and have all their colleagues do the same thing, but they might not injure the property of their employer, and they might not injure his business by the secondary boycott. . . . .◊

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B. Extract from an address delivered in Topeka, Kansas, October 8, 1908.

IT IS said that I have decided against labor; that I have issued injunctions in labor suits. I have. I was a judge on the Bench, and according to old-fashioned notions when I was on the Bench — of course, since I have been running for the Presidency those notions may have faded out some — I was required by my oath to decide the case as the law and the evidence required, and to furnish to the man who was injured or threatened to be injured, all the remedies that the law justified me in giving him and that the law justified him in having, and when I issued an order in his favor that he was entitled to have, I saw to it that it was enforced, and anybody that got in the way of it got hurt, and I am not apologizing for that at all. But what I want to tell you about is those cases. I want to show you what is a fact; that, while it happened that generally in those cases I had to decide against the lawless workingmen who were attempting to do something that the law did not permit, I laid down the principle of law defining the rights of the workingmen and the corresponding rights of the employers, and that those principles obtain to-day and that they are the principles upon which the trades unions and labor

organizations have built themselves up as lawful organizations within this community and have exercised the healthful and lawful influence that they do to-day.

Let us see what the first decision was: A boss bricklayer got into trouble with his men and they struck. They belonged to the Bricklayers' Union. The Bricklayers' Union notified every material man in Cincinnati that if he furnished any material to that boss bricklayer they would declare a boycott against him. Moores and Company were lime dealers. They went to the boss bricklayer, with whom they had a contract, and they said: "We don't want any trouble with the Bricklayers' Union. You have got a contract with us, but we would like to have you release it." He said: "All right, I will get my lime; you do what you please." The way he got his lime was to send a man down to the yard where there was a freight car from which Moores and Company sold lime to anybody that came for it. The walking delegate of the Bricklayers' Union saw this done. He reported it to the union and they declared a boycott against Moores and Company, the lime dealers, and broke up their business. Moores and Company brought suit against the Bricklayers' Union on the ground that this was an unlawful secondary boycott and they were entitled to recover damages. The case came before a jury. The jury rendered a verdict for $2,500 in favor of Moores and Company. The case came up to the general term where I sat with two other judges, and we decided, and I wrote the opinion, that a secondary boycott, by which a third person, not interested in the controversy, was drawn into it by one or the other and threatened by the boycott and thus made to come into the controversy by duress or to stay out under penalty of boycott, was tyrannous, un-American, un-Republican, was against common law and ought not to be the law and

was not the law, and that the person who instituted the boycott was liable in damages to the person who suffered on account of it. The jury, as I say, returned a verdict, and it shows how full of efficacy such a remedy was in that Moores and Company have still upon their books that judgment for $2,500 without a cent recovered on it.

The next case: I didn't think I was going to be foolish enough to run for the Presidency when I was on the Bench. I don't know whether I could have avoided getting into these cases or not, but nothing ever happened in the way of a labor controversy within a hundred miles of me that I did not flounder into it; so that when the Toledo & Ann Arbor road got into a strike with the Brotherhood of Locomotive Engineers and it began to be rumored that the engineers of the Lake Shore would not haul the cars of the Toledo & Ann Arbor road, which was its chief connection, the Toledo & Ann Arbor road brought an injunction suit against the Lake Shore, in which they averred the intention of the Lake Shore to refuse to haul their cars, and not only against the Lake Shore road but against the officers and employees, and they got an injunction, commanding the Lake Shore, its officers and employees to haul those cars, and the employees were notified, the officers were notified and the corporation was notified. P. M. Arthur was the leading labor leader of those days. He was at the head of the Brotherhood of Locomotive Engineers — of course, in my judicial experience I had to run up against the biggest of them — that was my luck. They came to me to tell me, and showed it by affidavits and otherwise that P. M. Arthur had notified the engineers of the Lake Shore road that they were not to haul the cars of the Toledo & Ann Arbor road; and that in spite of the injunction that had been laid upon them and in spite of a specific statute of the United States that made it an offense punishable by fine

and imprisonment for those employees, while on their engines and acting as employees, to refuse to haul those cars. I notified Mr. Arthur that he must withdraw his order to his engineers to obey that secret rule No. 12 not to haul those cars of the Toledo & Ann Arbor road. Mr. Arthur was a law-abiding citizen and he withdrew that order, the case was heard, the injunction against him was sustained and the engineers of the Lake Shore road continued to haul the cars. The Toledo & Ann Arbor strike went on and I do not know how it resulted.

Now, when that was done there was a tremendous outcry. I wrote the labor opinion. I don't think anybody read the opinion except possibly the reporters and some gentlemen who were seeking legal literature, but I do know that I was condemned by the railroad orders from one end of the country to the other for having done an act that was tyrannical and that was to revolutionize everything and enslave the railroad order men. I was talking the other day to a leader of one of the orders and he said just that to me, “but," he said, “we had this experience afterward. We got into a row with the Gould roads and Judge Adams of St. Louis issued an order of injunction preventing our chiefs from ordering us to strike or from negotiating on our behalf, on the ground that they had no right to interfere or advise, that sort of a thing." Well, that was a pretty broad injunction, one that could not be sustained, and they had the good sense to hire a good lawyer and to go into court and to ask Judge Adams to withdraw that injunction, and then the chiefs of the orders concluded that they would read my opinion, written some four or five years before, and to their surprise they found that I had there laid down the rights of railway and other labor organizations in such a way that the order of Judge Adams was entirely wrong, and that if he followed me as authority he must withdraw the injunction.

They submitted that opinion to him, he examined it, and he withdrew his injunction, and they went ahead with the strike and won it. The same thing occurred just six months ago in Judge Thompson's court with the Typographical Union. In those cases I laid down this principle: that laboring men not only had the right but that they ought to unite in their own interest, in order that they should meet on a level with the more powerful capitalist employers; that they had the right to elect officers who should represent them in these industrial pursuits; that they had the right by assessment to accumulate funds in order to support those of their members who were in a strike; that they had the right to withdraw from association with their employers and to withdraw all their friends from such association, but that they did not have the right to injure their employer's property or to initiate against him a secondary boycott. I also laid down the rule that no injunction should issue to prevent a man from striking if he would, or all the men striking if they would, because that would be slavery. Those are the principles I laid down, and I say that upon those principles has been guided every labor organization since that time, and they have kept within the law. If you will read my opinion you will find the principles there stated. ■

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