

# YALE LAW JOURNAL

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VOL. XL

FEBRUARY, 1931

No. 4

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## A STRIKE AND ITS LEGAL CONSEQUENCES— AN EXAMINATION OF THE RECEIVERSHIP PRECEDENT FOR THE LABOR INJUNCTION

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THE study from which this paper proceeds is an attempt to understand the labor injunction in the light of its comparatively brief history.

The questions of labor law are indissociable from the question of what Madison called "the most difficult of all political arrangements"—that of so adjusting the conflicting claims of those with and those without property "as to give security to each and to promote the welfare of all."<sup>1</sup> To deal with them on the basis only of what is contained in law books is to miss many factors which have influenced the judgments both of courts and of their critics. Those factors include conditions and events, personalities, faiths cherished with uncritical devotion, and a vast complex of forces of interest and desire among which genuine desire for social harmony, though it tends always to abdicate its vague power as mediator and to trust in the benevolence after victory of one or the other of the major protagonists in social conflict, may not be so negligible as contemporary disillusion inclines to assume.

In the case of the American labor injunction the insufficiency of the law's own explanations of itself is singularly evident. The first reported instance of a labor injunction—in England

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<sup>1</sup> 5 ELLIOTT'S DEBATES (ed. of 1866) 580. Madison thought (in 1787) that when, "through the connections between the great capitalists in manufactures and commerce, and the numbers employed by them," the conflicting feelings of the two classes should attain "the operation natural to them in countries fully peopled," the chief danger of oppression would lie, not, as in monarchies, in want of sympathy in the government towards the people, but in the irresponsible power of the unpropertied majority. He hoped that a balance might be maintained through confining the representation of the unpropertied to the lower houses of legislative bodies. He seemed also to hope that opportunities for the accumulation of great wealth might be diminished, and the permanency of accumulations defeated, "by the equalizing tendency of our laws." *Ibid.* 580-583.

in 1868<sup>2</sup>—was of minor and deferred importance. The cases examined in this paper<sup>3</sup>—summary punishments of strike sympathizers for contempt of court in obstructing the operation of railways in the hands of receivers—were of greater consequence. And such reported cases as might have been resorted to by lawyers on the question of the legality of those summary punishments seem appropriately relegated to an appendix. The punishments were responsive less to legal principles than to emotions inspired by the great railway strike of 1877. And that strike was responsive to conditions concerning which it will be the first task of this paper to refresh recollection.

## I

The economic expansion of the United State after the Civil War was disorderly.<sup>4</sup> It involved enormous waste, both material

<sup>2</sup> Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551 (1868). Discussion of this case belongs in a later article. The case was not followed in the United States until Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307 (1888). It had meanwhile been but slightly noted—and then with reprobation: Prudential Assurance Co. v. Knott, L. R. 10 Ch. 142 (1875); Boston Diatite Co. v. Florence Manufacturing Co., 114 Mass. 69 (1873).

<sup>3</sup> *Infra* note 61.

<sup>4</sup> The following are among the works consulted in regard to the phenomena of the period: 8 RHODES, HISTORY OF THE UNITED STATES (1919); 5 WILSON, HISTORY OF THE AMERICAN PEOPLE (1903); 2 BEARD, THE RISE OF AMERICAN CIVILIZATION (1927) 105-343; SHIPPEE, RECENT AMERICAN HISTORY (1927) c. 1-8; 3 PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT (1930) 1-287; BUCK, THE GRANGER MOVEMENT (1913) and THE AGRARIAN CRUSADE (1920); THE EDUCATION OF HENRY ADAMS (1918) c. 14-20; SEITZ, THE DREADFUL DECADE (1926); LYNCH, "BOSS" TWEED (1927); WOODWARD, MEET GENERAL GRANT (1928); DAVIS, THE UNION PACIFIC RAILWAY (1894); DUNNING, A HISTORY OF POLITICAL THEORIES FROM ROUSSEAU TO SPENCER (1920); GIDE AND RIST, A HISTORY OF ECONOMIC DOCTRINES (1925); MITCHELL, BUSINESS CYCLES (1927); LIPPINCOTT, ECONOMIC DEVELOPMENT OF THE UNITED STATES (1921) pt. 4; BOGART, ECONOMIC HISTORY OF THE UNITED STATES (1923).

The following statistics are condensed from BOGART (B.) and LIPPINCOTT (L.), *op. cit. supra*:

	1860	1870	1880
Coal (B. 319) . . . . .	14 mil. tons		71 mil. tons
Pig iron (L. 443) . . . . .	821,000 "	3,385,000 "	
Cotton goods (L. 451) . . . .	\$115,000,000		\$192,000,000
Woolens (L. 451) . . . . .	73,000,000		238,000,000
Farm Machinery (L. 449) . .	21,000,000	\$52,000,000	68,000,000
Population (L. 311) . . . . .	31,000,000	40,000,000	50,000,000
Wage earners in factories .	1,300,000 (L. 312)		2,700,000 (B. 382)
Railway mileage (B. 332) .	30,000	52,000	93,000

Except temporarily in the beginning of new industries, increase in the volume and value of manufactures concurred with a steady diminution in the number of establishments (B. 386-7).

"Wage earners in factories" in the above table include only a limited

and human. If "men of vision" built for the future, it was not for the sake of the future. Railways were built to be "milked" by their promoters of subsidies obtained through legislative corruption. Many railroads, to finance which middle western pioneers mortgaged their farms<sup>5</sup> or issued municipal bonds,<sup>6</sup> were not built at all. In boom times nothing but expansion seemed important. Before production exceeded the buying power of old markets, new markets were planted by new railways on the prairies. Alternate links of transportation and industry composed an ever-lengthening endless chain which, primed with immigrants,<sup>7</sup> pumped wealth—enriching life in some respects, impoverishing it in others.<sup>8</sup> The boom was prolonged by abnormal European demand for American food stuffs due to wars and crop shortages.<sup>9</sup> While this accident obscured the hard

class of industrial wage earners; miners, for example, are excluded. Nor do they include dependents. In 1880, however, 70% of the population was still rural (L. 313).

<sup>5</sup> See *e. g.*, *Sawyer v. Prickett*, 19 Wall. 146 (U. S. 1873). It seems to have been part of the technique of promotion to pass bonds or mortgages issued for railway stock through the hands of someone who could qualify as a *bona fide* purchaser for value.

<sup>6</sup> A vivid impression of the extent and results of this practice may be had by an examination, almost at random, of the cases in Wallace's *United States Reports* indexed under "Municipal Bonds."

<sup>7</sup> In 1873 immigration was 460,000; in 1879, 789,000. From 1861 to 1870 the total was 2,300,000; from 1871 to 1880, 2,800,000. About nine tenths were from northern Europe. Immigration was accelerated by the act of 1864 "to encourage immigration," which authorized the importation of contract labor—a practice which the repeal of that act in 1868 did not end. LIPPENCOTT, *op. cit. supra* note 4, at 314-318.

<sup>8</sup> There was loss, in particular, in values served by homogeneity of population—which include morality, obligations of mutual service (MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926)), the security of a settled order, and, perhaps, a greater generality of warmth in personal relations—at least a comparative absence of friction—than exists when individual conduct is less under the eye of the community and "success" less dependent upon esteem. American life before the Civil War was undoubtedly narrow and provincial—often sordid. See, *e. g.*, DICKENS, *MARTIN CHUZZLEWIT*; WERNER, *BARNUM* (1923). Its self-satisfaction seemed absurd to observers with larger horizons; it was, however, satisfaction. And there was much of the justification for self-satisfaction that there is in primitive society. If an homogeneous folk does not tolerate even fruitful variations from its norms, neither does it tolerate large criminal and predatory classes. Compare in this respect contemporary England, which is comparatively homogeneous, with the United States. Compare also the earlier New England with the New England of abandoned farms surrounding tuberculous mill-towns. And note the extent to which the agricultural Middle West, which approaches homogeneity, has become the seat of political morality.

<sup>9</sup> In 1870 and 1871 exports of flour to Europe were more than a third greater than in the years immediately preceding. In 1872 they fell sharply back again. See table in the Introduction to the translation by De Courcy Thom of JUGLAR, *BRIEF HISTORY OF PANICS* (1893).

truth that new farmers along the lines of new railways were producing more wheat, corn, hogs and cattle than normal markets could buy, it seemed that the middle west could not be developed too fast for its own good, that no railway building was overbuilding. But peace and comparative plenty returned to Europe, and after the resultant Panic of 1873<sup>10</sup> people at large paid heavily for the creation and concentration of great wealth. The depression lasted until 1879. Prices fell to unprecedented depths. Farm and railway mortgages were foreclosed. Small independent business men and manufacturers closed their establishments forever and took salaried jobs—if they could get them.<sup>11</sup> The tramp, in thousands, appeared for the first time in America.

"It is with a sort of angry surprise," wrote Charles F. Dunbar in the Centennial volume of the *North American Review*, "that our people note their increasing sensitiveness to the penalties with which economic error is visited."<sup>12</sup> Men who, according to Woodrow Wilson, "did not know how to reason upon such matters" attributed calamity to the demonitization of silver, and advocated unlimited fiat money as a remedy.<sup>13</sup> Undoubtedly they reasoned badly. But were there many who reasoned much better? Theirs were not the only special interests that warped judgment. And fixed prepossessions clouded or blocked the thinking of even the most disinterested.

<sup>10</sup> "In September, 1873, financial panic once more came upon the country with a rush, amidst abundant trade, amidst every sign of prosperity, when wages were good, employment readily found, factories busy, prices normal, money easy. Railways had been built too fast in the West. . . . Such roads could not reasonably look to make a profit for twenty years to come. . . . Their construction was for the present purely speculative, and the processes of growth upon which they depended to keep them from bankruptcy could not be sufficiently hurried to save their credit. Early in September, 1873, the break began to come. One by one banking and brokerage firms in New York which had advanced money to western and Canadian railways began to announce their inability to meet their obligations. . . . A long, slow winter of panic ensued whose effects the business of the country was to feel for years to come." WILSON, *op. cit. supra* note 4, at 92, 93.

<sup>11</sup> The smaller and more old-fashioned the business, the less its chance of weathering the depression. Both the speed and the hardships of the process of industrial concentration were augmented.

<sup>12</sup> (1876) 122 N. AM. REV. 124, 152.

<sup>13</sup> WILSON, *op. cit. supra* note 4, at 93, 154; BUCK, *op. cit. supra* note 4. Most of the votes for the Greenback ticket in 1876 and 1878 were cast by farmers who objected to re-paying loans made to them in depreciated Civil War greenbacks with more valuable gold. Any satisfaction obtained from the final result of the Legal Tender cases was mitigated by the success of the fiscal policy designed to bring greenbacks to par. The demand was mainly for abundant cheap currency. The political movement showed only traces of the theory of its first prophet—that the government should become the universal banker, so that those unable to get credit at private banks might compete on equal terms with the more fortunate. KELLOGG, *LABOR AND OTHER CAPITAL* (1849).

These prepossessions were of the rightness and inexorability of certain economic and political dogmas which had permeated society by way of Adam Smith and Thomas Jefferson. Individual liberty is an inalienable right, "natural" and therefore sacred. The welfare of all is served by the freedom of each to do his utmost to better his own condition. The "natural" correctives of hardship in the anarchic scramble of a free society are the equilibrium of supply and demand, competition, and the moral sentiments which arise from mutual "sympathy." Government, though its necessity was inconsistently conceded, is an evil, and therefore to be kept at a minimum; governmental interference diminishes rather the blessings than the cruelties of natural anarchy. Hamiltonian practicality was not, to be sure, deterred by such principles from obtaining from government special benefits and privileges. But after Jacksonian democracy had made Hamiltonian candor impossible in public, practicality became adept in drawing defensive arguments from the reservoir of the "natural rights" of individuals and the "natural laws" of economics, shifting when occasion required to the Benthamite arguments of social utility which are impartially available to all comers.<sup>14</sup> Certain awkward truths had indeed been noted by Sismondi in 1819: that under the "natural laws" upon which, without pretending that they are adequate for protection against crime, we inconsistently rely for economic welfare, the equilibrium of supply and demand, though always a tendency, is never a fact; that "natural" adjustments of supply to demand do not precede or prevent crises of over-production, and are devastating in their subsequent operation; that the doctrine of the beneficence of free competition is premised upon the approximate equality of competitors; the premise being false, the equal freedom of all to promote competitively their respective interests results in fact in the enforced acceptance by most people of evils preferable only to the evil of extinction.<sup>15</sup> But Sismondi, in this country, was only a name, if that. The place for Utopian dreamers was at Brook Farm or Walden Woods.<sup>16</sup> With "prac-

<sup>14</sup> For Adam Smith see GIDE AND RIST, *op. cit. supra* note 4, bk. 1, c. 2, and STEPHEN, *ENGLISH THOUGHT IN THE EIGHTEENTH CENTURY* (1876) c. 9 and 11; for Jefferson and Hamilton, 1 PARRINGTON, *op. cit. supra* note 4, at 267-356; for Bentham, DICEY, *LAW AND OPINION IN ENGLAND* (1905) Lect. 6, and DUNNING, *op. cit. supra* note 4, at c. 6.

<sup>15</sup> For Sismondi, see GIDE and RIST, *op. cit. supra* note 4, at bk. 2, c. 1, and MAO-LAN TUAN, *SIMONDE DE SISMONDI AS AN ECONOMIST* (1927); his economic writings seem still to be represented in English only by a collection of extracts—*POLITICAL ECONOMY AND THE PHILOSOPHY OF GOVERNMENT* (1847). That Adam Smith held, though he did not emphasize, views similar to Sismondi's is suggested by passages in the *WEALTH OF NATIONS* (1776) bk. 2, c. 2; bk. 5, c. 1, pt. 3, art. 1; (ed. Dent 1910) i, 289, ii, 228 *et seq.*

<sup>16</sup> For early Utopianism in the United States see 1 COMMONS, *HISTORY*



tical" men demonstration of the impracticality of Utopian proposals passed as equivalent to vindication of their faith that the equal liberty of unequal individuals is ordained by God or nature, and that for the hardships which inevitably result from the equal freedom of the strong and weak no relief is possible save such as proceeds spontaneously from the "sympathy" of man with man. And in the middle of the century, when John Stuart Mill was himself struggling to escape from the inexorability of the "natural laws" for which he stood popularly as a prophet,<sup>17</sup> the phrase "survival of the fittest" contributed a new ethical prop to individualist dogma.

In this state of the currency of common thought, any recognition of economic anarchy as the economic error for which the depression of the seventies was a visitation was usually neutralized by the presumption that anarchy (the word used, of course, was "liberty") is ideal. The intellectual cloture of a superficially libertarian orthodoxy conditioned the expression and to an extent limited the thinking of even the most acute social diagnosticians—of whom the members of the third generation from John Adams were surely not far from foremost. In "A Chapter of Erie" Charles Francis Adams not only condemned financial "buccaneers" in terms of the morality upon which individualism relied for social control, but undertook also to disclose the roots of "the deep decay which has eaten into our social edifice."<sup>18</sup> He was, however, diffident as to remedy. His chief hope, not very confident, was in the "moral vigor" of the American people. He agreed with E. Lawrence Godkin, the first editor of the Nation, that government interference with private enterprise<sup>19</sup> is justified only when "one branch of business is so monopolized that citizens can no longer share in or control it, and so mismanaged that they can no longer

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OF LABOUR (1918) 14, 493 *et seq.*; 2 PARRINGTON, *op. cit. supra* note 4, at 242, 251-253, 342-50, 400 *et seq.*

<sup>17</sup> See GIDE and RIST, *op. cit. supra* note 4, at bk. 3, c. 2.

<sup>18</sup> "Modern society," he said, "has created a class of artificial beings who bid fair soon to be the masters of their creator." Indications seemed to him to point to an ultimate combination in one vigorous hand of corporate economic power with political power obtained through corruption of popular government—which, when accomplished, will "bring our vaunted institutions within the rule of all historic precedent." This essay was first published in (1869) 109 N. AM. REV. 30; reprinted in HICKS, *HIGH FINANCE IN THE SIXTIES* (1930) *q. v.* at 114-119.

<sup>19</sup> Historically the conception of corporate enterprise as private enterprise is anomalous. See *The Dartmouth College Case* (1874) 8 AM. L. REV. 189, 212, 216-221, 226. This unsigned article was perhaps written by Moorfield Storey, who was an editor of the magazine. It was not until after the Dartmouth College Case that the paradoxical phrase "private corporation" became commonplace.

endure it.”<sup>20</sup> Nearly everyone who mattered shrank from any approach to government interference with business,<sup>21</sup> either on grounds of dogmatic individualism or because he had no answer to the hard-headed Hamiltonianism of such as Mr. W. M. Grosvenor:

“Does any man seriously believe that 4,000 millions of property, with revenues of 500 million yearly, in the hands of men who already make and unmake Senators and Representatives in many states, can be controlled by a free government? It would be simpler to elect Colonel Scott perpetual President of the United States with powers of dictator. If ever the United States makes it necessary for railway property and railway managers either to control the government or be controlled by it, the end is sure. . . . We shall escape Communism . . . because we shall surely take Despotism as better.”<sup>22</sup>

Nevertheless, confronted with actualities of anarchic oppression—notably arbitrary charges on the “all the traffic will bear” principle in territory where cut-throat competition did not force charges preposterously low—*laissez-faire* individualism, in spite of itself and without quite knowing what it was about, yielded ground. The Granger legislation was passed and sustained.<sup>23</sup> It could be said in an opinion of the Supreme Court that, “A railroad is authorized to be constructed more for the public good to be subserved, than for private gain. . . . its construction and management belong primarily to the Commonwealth, and are

<sup>20</sup> In a report as Railroad Commissioner of Massachusetts, Feb. 14, 1873, urging “the regulation of all railroads through state ownership of one.” Pamphlet, N. Y. Public Library, TPG pv 68 No. 9. Adams agreed that at the foundation of republican institutions is “the great principle of not unnecessarily meddling.” ADAMS, RAILROADS, THEIR ORIGIN AND PROBLEMS (1878) 212-213. Adams, however, was comparatively free from the dogmatic individualism of Godkin and almost all other leaders of opinion. His position was based as much on a realization that government interference was unobtainable as that it was undesirable. “The statesman, no matter how sagacious he may be, can but build with the materials he finds ready for his hand. . . . If he is to succeed, he must have the conditions necessary to success.” *Ibid.* 146.

<sup>21</sup> Goldwin Smith, then a professor at Cornell, was a conspicuous exception. See his article, *The Labour War in the United States*, 30 CONTEMPORARY REVIEW (London, 1877) 529, 538. The Greenbackers fulminated vaguely against corporations in terms later taken over by the major parties. SHIPPEE, *op. cit. supra* note 4, at 86. European Socialism, though there were immigrants who preached it, was as yet scarcely audible. 2 COMMONS, HISTORY OF LABOUR IN THE UNITED STATES (1918) 203-234.

<sup>22</sup> *The Communist and the Railway* (Sept. 1877) INTERNATIONAL REV. 585, 598-9. To the same effect is Richard S. Spofford’s reply to Charles Francis Adams’ proposal in the Massachusetts legislature. Pamphlet, N. Y. Public Library, TPG pv 105.

<sup>23</sup> WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1928) c. 33.

only put in private hands to subserve the public convenience and economy."<sup>24</sup> Railroads continued, however, to be dealt with as private property, no matter how conspicuous the failure of private operation to subserve public convenience and economy;<sup>25</sup> and only "men who did not know how to reason" advocated a reversal of this policy.

Baffled by his own convictions as well as by practical difficulties in his approach to the problems of economic anarchy, the individualist tended to focus attention upon its incident of political corruption. Callousness to corruption was considerable. "When you have proved to the busy wealth seeker," said Samuel Bowles in the *Springfield Republican*, "that the President has shown an indecent fondness for gifts, that he has appointed rascally or incapable kinsmen to office, that he has cracked, if not broken, the laws, what have you accomplished by your denunciation? They [*sic*] will reply to you, 'General Grant is a safe man.'"<sup>26</sup> Callousness in boom times was not, however, more dense than since. And economic depression revealed that at bottom we were a moral people, who went to church on Sundays and to lectures during the week. The moralist looked at corruption less as a result of conditions than as wanton sin. And sinners, if they could not be saved, could at least be condemned and cast out into darkness. This attitude permeated the advocacies of the most intelligent "reformers" of the time—Adams, Godkin, Carl Schurz, George William Curtis. It is hard indeed to collect from Godkin's writings—always powerful, often penetrating—any principle more profound than that the Goulds, Fiskes, Grants, Blaines and Tweeds should be superseded in high places by great gentlemen like his friends Charles Eliot Norton and James Russell Lowell.<sup>27</sup> Men of such feelings were offended a decade later by what seemed to them the cynicism of Henry George: " 'Let us elect good men to office,' say the quacks. Yes;

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<sup>24</sup> Woods, J., in *Barton v. Barbour*, 104 U. S. 126, 135 (1881).

<sup>25</sup> There was no public interest which a court could recognize in preventing or redressing the spoliation of the Union Pacific by its directors. *United States v. Union Pacific Ry.*, 98 U. S. 569 (1878). The spoliation was, however, clearly unlawful as against a private interest. *Wardell v. Union Pacific Ry.*, 103 U. S. 651 (1880). Was the spoliative character of the Credit Mobilier adventure affected by the fact, if it was a fact, that the adventurers failed to profit? See LAUT, *THE ROMANCE OF THE RAILS* (1929) 318-336.

<sup>26</sup> 2 MERRIAM, *LIFE AND TIMES OF SAMUEL BOWLES* (1885) 195-6. Cf. *THE EDUCATION OF HENRY ADAMS* (1918) c. 17 and 18; Senator Hoar's speech on the Belknap impeachment (1876), quoted in PECK, *TWENTY YEARS OF THE REPUBLIC* (1905) 316.

<sup>27</sup> See OGDEN, *LIFE AND LETTERS OF E. LAWRENCE GODKIN* (1907). Godkin is well described as "the founder of adult journalism in America." He was not, however, an American. And he was not a realist, See PARRINGTON, *op. cit. supra* note 4, at 154-168.



let us catch little birds by sprinkling salt on their tails!"<sup>28</sup> In the depression of the seventies, as often since, their prescription of public virtue was the only reform on which any appreciable constituency could agree. The nomination and dubious election of Hayes, the goodest man who ever became President, was its victory.

## II

It was during the administration of Hayes that the unregulated private operation of railways, the effects of its anarchy intensified by the depression, produced the strike which a good many contemporary binoculars magnified, for the moment, to the proportions of a social revolution.

During the depression the primary object of every owner of a business was to survive. Present profit, if possible at all,<sup>29</sup> was secondary. The immediate aims were to keep one's apparatus for future profit in working order, and not to part with its ownership or control. The owners of many Middle Western railways, unable to meet fixed charges, had to call on the courts to take care of their properties through receivers; some were, others were not, able to profit by the receivership and reorganization proceedings and find themselves still in the drivers' seats at their conclusion. Of the lines between New York and Chicago, already combined into four great competing systems, only the pilfered Erie had recourse to receivership. But in the struggle to survive even the New York Central and the Pennsylvania cut viciously at one another's throats. In 1876 Mr. James Ford Rhodes bought a ticket from Cleveland to Boston for \$6.80. Cattle were carried from Chicago to New York at a dollar a carload.<sup>30</sup>

Losses on competitive through traffic were in part recouped by exorbitant rates from way stations such as Pittsburgh. Railway employees also were naturally required to contribute to the costs of cutthroat competition. Reductions of wages were not

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<sup>28</sup> GEORGE, *SOCIAL PROBLEMS* (1883) 16.

<sup>29</sup> In many businesses approach to monopoly was a condition not alone of profit but survival. HADLEY, *RAILROAD TRANSPORTATION* (1885) c. 4 and 5. The most practical remedy for cutthroat competition was through pooling agreements—potentially a means towards comparative economic order, but often in practice a means of extortion. See *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173 (1871). Pools were often short-lived for the reason that parties could not be brought to see that honest observance of their terms was the best policy. RHODES, *op. cit. supra* note 4, at 16. "Lawlessness and violence among themselves . . . bred . . . distrust, bad faith and cunning, until railroad officials have become hardly better than a race of horse jockeys on a large scale." ADAMS, *op. cit. supra* note 20, at 193.

<sup>30</sup> RHODES, *op. cit. supra* note 4, at 15-17.

negotiated in those days; they were announced.<sup>31</sup> There had been successive reductions since the Panic. Many of the men, moreover, were on part time and subject to onerous boarding house charges at the end of runs which left them far from home. And upon a truce in the rate war effective July 1, 1877, came announcement of a further ten per cent cut in wages.<sup>32</sup>

There was never a strike less organized and more spontaneous than that which followed. The British *chargé d'affaires* conjectured that but for some panicky firing into an unarmed crowd by frightened militiamen at Baltimore on July 20th, it would have remained local to the Baltimore and Ohio.<sup>33</sup> It spread "more by contagion than by organization."<sup>34</sup> Some Brotherhood officers may have been active, but not officially.<sup>35</sup> The Engineers, strongest of the Brotherhoods, had been a few months earlier, in Godkin's phrase, "collared and subdued."<sup>36</sup> An attempted secret "Trainmen's Union" had fizzled a few weeks earlier.<sup>37</sup> Casual local leaderships there inevitably were, but no policy or direction

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<sup>31</sup> Some testimony of A. J. Cassatt, then vice president of the Pennsylvania Railroad, illustrates the feeling of the period of individualism as to the "rights" of employers. One of the economies put into effect by the Pennsylvania was the running of "double-headers;" two freight trains were combined into one, halving the crew except on its two locomotives. Trainmen protested against resulting lay-offs and part time. Mr. Cassatt might have based his answer upon economics. But he said instead: "We looked upon the objection of the men as an interference with our own business." 5 PA. LEG. DOC. (Session of 1878), REPORT OF THE COMMITTEE APPOINTED TO INVESTIGATE THE RAILROAD RIOTS, 698.

<sup>32</sup> 2 COMMONS, *op. cit. supra* note 21, at 185.

<sup>33</sup> GREAT BRITAIN, FOREIGN OFFICE, COMMERCIAL REPORTS (1877) Vol. 84, No. 22, REPORTS RESPECTING THE LATE INDUSTRIAL CONFLICTS IN THE UNITED STATES, Report No. 1. Most of the reports in this collection are by Mr. F. R. Plunkett *chargé d'affaires*, to the Earl of Derby.

<sup>34</sup> Smith, *op. cit. supra* note 21.

<sup>35</sup> BRITISH REPORTS, *op. cit. supra* note 33, Report No. 5.

<sup>36</sup> NATION (Mar. 8, 1888). Cf. 2 COMMONS, *op. cit. supra* note 21, at 61-65, 186. The railway Brotherhoods were then little more than fraternal benefit societies. The Engineers had organized in 1863 to resist the substitution of the run for the time basis of pay; but they had almost at once, with occasional inconsistencies, limited their objectives to the development of an efficiency and a moral character which would win the grateful appreciation of employers. P. M. Arthur had been elected grand chief as an insurgent against this policy. In strikes on the Boston and Maine and the Grand Trunk in the winter of 1876-7 he had made the cruel and colossal blunder of directing the engineers to leave passenger trains between stations, without notice or warning, in a northern blizzard.

<sup>37</sup> 2 COMMONS, *op. cit. supra* note 21, at 186. The chief organizer of this disrupted union, a young brakeman named Ammon, assumed local direction of the strikers at Alleghany, Pennsylvania, efficiently preventing any disorder or destruction of property. Instead of tying up the lines radiating from Alleghany, Ammon and his men took them over and operated them—a phenomenon perhaps more terrifying than the Pittsburgh Riots. PA. LEG. REPORT, *op. cit. supra* note 31, at 21-22.

more definite than could spring from the concurring wills of an indignant mass.<sup>38</sup>

Colonel Thomas A. Scott, president of the Pennsylvania Railroad, wrote about the strike in the *North American Review* soon after it was over.<sup>39</sup> His analysis of causes and motives is interested and inadequate. But his outline of events is succinct and sufficient:

"On the 16th of July it became known that the firemen and freight brakemen of the Baltimore and Ohio Railroad were on a strike at Martinsburg, West Virginia, and that no freight trains were allowed to pass that point in either direction. This proved to be the beginning of a movement which spread with great rapidity from New York to Kansas and from Michigan to Texas, which placed an embargo on the entire freight traffic of more than twenty thousand miles of railway, put passenger travel and the movement of the United States mails at the mercy of a mob, subjected great commercial centers like Chicago and

<sup>38</sup> Professional exploiters of sensational episodes of the strike freely, but without specification or adduction of evidence, attributed leadership to Socialist immigrants. PINKERTON, STRIKERS, COMMUNISTS, TRAMPS AND DETECTIVES (1878); MCCABE (Edward W. Martin, pseud.), THE HISTORY OF THE GREAT RIOTS (1877). A British consular officer said that the formation of secret societies which blindly follow the edicts of one master mind "appears to be universal among all the working people of this country." BRITISH REPORTS, *op. cit. supra* note 33, No. 2. Such statements were based rather upon will to believe than information. The British chargé was more temperate: "There is no doubt," he said, "that a very considerable number of rioters were Europeans, and that for much of what has happened the lessons learnt from the Socialist leaders in the old world have to bear a large share of the blame." BRITISH REPORTS, *op. cit. supra* note 33, Final Report (Oct. 9). Even this may impute to Socialist immigrants more influence than they had. Unquestionably, doctrinaire radicals endeavored to make capital from the disorders and were doubtless often willing to take credit for them. See SO THE RAILROAD KINGS ITCH FOR AN EMPIRE, DO THEY?, BY A RED HOT STRIKER (Sidney H. Morse) OF SCRANTON (1877), pamph. N. Y. Public Library, TDG pv 9; HEYWOOD, THE GREAT STRIKE; "Its relations to labor, property and government; Suggested by the movements which, originating in the tyrannous extortion of railroad masters, and the execution of eleven labor reformers called "Mollie Maguires" June 21, 1877, culminated in burning the corporate property in Pittsburgh. . . . This essay carefully defines the relative claims of WORK and WEALTH involved in the IRREPRESSIBLE CONFLICT between Capital and Labor" (1878), pamph. N. Y. Public Library, TDB pv 29 No. 9.

Socialists were then usually Germans. Railway employees were for the most part either native born or Irish. The constitution of the mobs of course defies analysis. But Socialist meetings during the strike, though important to the newspapers, fizzled. See BRITISH REPORTS, *op. cit. supra* note 33. Irish immigrant labor had lately shown an aptitude for violence on undoctinaire principles in the Pennsylvania coal fields. RHODES, *op. cit. supra* note 4, at c. 2, *The Mollie Maguires*; 2 COMMONS, *op. cit. supra* note 21, at 181-5. And there is considerable historical evidence of capacity for mob violence in our native stock.

<sup>39</sup> Scott, *The Recent Strikes* (1877) 125 No. AM. REV. 351.

St. Louis to the violent disturbance of their business relations, and made the great manufacturing city of Pittsburgh for twenty-four hours such a scene of riot, arson, and bloodshed as can never be erased from the memory of its inhabitants."

The strike mobs were composed of the miscellaneous unemployed; the proportion of striking railway employees is unascertainable but was probably minor.<sup>40</sup> The incidents of riot, arson, and bloodshed, though appalling, were exceptional.<sup>41</sup> The usual mob procedure was to block tracks, yards and stations, and prevent the movement of trains. In general, the strikers "did everything they could to keep up the regular running of all trains carrying the United States mails" in proof that they were fighting the corporations only.<sup>42</sup> Troops, Federal and state (the civil authorities did little or nothing), soon broke up the mobs and "moved the trains." Within a fortnight the strike was over.

### III

It is striking, though not at all extraordinary, that there were few, if any, prosecutions in state courts<sup>43</sup> for participation in any of the thousands of crimes incident to that fortnight of disorder. The state of public opinion accounts for this suspension of the criminal law. "The system of corporate life and corporate power" was still in its infancy. The majority of the population was still dependent upon agriculture. The units of commerce and industry were still, for the most part, small. The local mine owner, the small shopkeeper, the contracting carpenter, had the dignity of independence. Their voices dominated public opinion. However crudely the ordinary citizen thought and talked about public affairs, he did think and talk about them, with a proud sense that his opinion was worth something. Democracy was operative.

The ordinary man hated and feared the railroads, not alone for their discriminations, extortions and frauds, but also because they symbolized for him the "Big Business" that was commenc-

<sup>40</sup> When after the strike the railway employees were back at their jobs and anxious to hold them, their orthodox explanation was that they had not struck at all but had been coerced by mobs to leave their trains. It seems clear, however, that most of them wanted to be coerced and adopted slight demonstrations as pretexts for quitting. PA. LEG. REPORT, *op. cit. supra* note 31, at 5-6, 439, 579.

<sup>41</sup> At Pittsburgh a regiment of militia was besieged in a houndhouse and burned out, with loss of life. 2 COMMONS, *op. cit. supra* note 21, at 185-191; RHODES, *op. cit. supra* note 4, at 17-51. There was also violence and destruction of railway property at Chicago and St. Louis.

<sup>42</sup> BRITISH REPORTS, *op. cit. supra* note 33, Report No. 3.

<sup>43</sup> There was a conviction in a federal court for obstructing the mails, on a theory which became important in the railway strike of 1894. *United States v. Clark*, 25 Fed. Cas. 443 (E. D. Pa. 1877).

ing to impinge on many sides. The newspapers were small and still his. Politicians and office holders, though they might secretly be for sale, had assiduously to cultivate the conviction that they also were his. Wage earners, unless they were unassimilated alien immigrants, seemed potential allies of the farmers and small business men in the coming struggle for independence. In 1876 Senator Carpenter of Wisconsin and Ben Butler of Massachusetts defended, without fee, coal miners prosecuted in Pennsylvania for conspiracy to prevent the employment of strike breakers.<sup>44</sup> Even violence in strikes, if it did not touch too nearly the ordinary man's own peace and property, was condoned. Major William McKinley of Canton, Ohio, won his first election to Congress by his eloquent defense, as volunteer counsel, of certain striking miners for riotous assault upon a member of Mark Hanna's firm of Rhodes Brothers <sup>45</sup> who was personally conducting to his mine a party of strike-breakers. "In his address to the jury he drew a picture of the scene of the riot which drew tears from eyes unused to weeping. He depicted the miners confronted with the sight of the men come to take away the work which fed their wives and little children. The miners, exclaimed the young attorney, became insane, and did not know what they were doing; they were not responsible for their acts, and he demanded an acquittal of the accused."<sup>46</sup>

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<sup>44</sup> *Commonwealth v. Siney and Parks*, ROY, HISTORY OF THE COAL MINERS (1906) 176. Siney was the first American labor leader to achieve for a large constituency anything like solidity of organization. The labor movement of the period otherwise consisted largely of groups of oratorical "reformers" speaking (sometimes with considerable effect upon legislation) for the virtually unorganized constituency of wage earners in general. WARE, THE LABOR MOVEMENT IN THE UNITED STATES, 1860-1895 (1929) 11; 2 COMMONS, *op. cit. supra* note 21, at 179-180. Siney was clear-headed, temperate and law-abiding. He had opposed as inexpedient the strike in Clearfield County, Pa., in 1876; it was whipped up notwithstanding by local agitators such as Parks—who threatened, for example, to send imported strike-breakers out of Clearfield "in wooden overcoats." Siney exerted himself to keep the strikers within bounds. The prosecution seems to have been a deliberate attempt on the part of the operators to catch in the loose net of "conspiracy" not only the abortive indiscretion of Parks but also the vastly more formidable moderation of Siney.

<sup>45</sup> Hanna was present at the trial, which may have been the occasion of his first meeting with McKinley. He was never again, as an employer, subjected to serious labor trouble. He maintained throughout his business career relations of personal friendliness with his thousands of employees, and in public life exerted himself on behalf of industrial peace. CROLY, MARCUS ALONZO HANNA (1912) 94, 386-410.

<sup>46</sup> ROY, *op. cit. supra* note 44, at 173.

The case is not mentioned in McKinley's official biography—which, however, quotes as follows from a panegyric by Justice William R. Day: "In the trial of a case Major McKinley gained the confidence of the jury by the fairness and courtesy of his conduct, and into all his arguments was thrown the silent but potent influence of a character beyond reproach. . . .



The ears to the ground of this rising young lawyer usually caught pretty accurately the ground's pulsations. They were strongly anti-capitalist in 1877 when the local militia at Pittsburgh fraternized with the strike mob.<sup>47</sup> In many parts of the country it would have been a foolhardy chief of police who interfered with the mobs and a still more foolhardy district attorney who asked a grand jury to indict their members.

Yet sober men in responsible positions could not rest quiescent in the face of anarchy manifest. Though Colonel Scott's impotency for soldiers seemed ridiculous to a respectable editor,<sup>48</sup> when governors applied for soldiers President Hayes of course proclaimed a constitutional occasion and furnished them.<sup>49</sup> The notion that the Federal government might file bills in equity and obtain injunctions against unlawful interference with railways, as was done in 1894, would, had anyone even thought of it, have seemed preposterous.<sup>50</sup> But it is possible to infer that Attorney General Devens may have instigated—he certainly supported—the extraordinary activities of Federal courts “in their administrative capacity” presently to be described.<sup>51</sup> Many railways in the Seventh Circuit (Illinois, Indiana and Wisconsin) were in the hands of receivers appointed to operate them pending suits to foreclose mortgages. Thomas Drummond was Circuit Judge.<sup>52</sup>

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He had the faculty of putting things so that the jury could readily comprehend and follow his arguments. He spoke to them as he has since spoken to the people, appealing to their judgment and understanding, rather than to passion or prejudice.” OLCOTT, WILLIAM MCKINLEY (1916) 61.

<sup>47</sup> It was a regiment from Philadelphia that was besieged in the Pittsburgh roundhouse. The city and county authorities at Pittsburgh as well as the militia were in sympathy with the strike. Newspapers described the “uncalled for blood-shed” as fruit of the governor's hasty step in calling out the militia. “Capital,” said the *Pittsburgh Critic*, “has raised itself on the ruins of labor.” The battle at the roundhouse, according to the *Pittsburgh Globe*, was the “Lexington of the labor conflict.” PA. LEG. REPORT, *op. cit. supra* note 31, at 14-15, 37, 184 *et seq.*, 256, 288, 388-392, 514, 620, 667-670, 798-819.

<sup>48</sup> BRITISH REPORTS, *op. cit. supra*, note 33, No. 5

<sup>49</sup> 7 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS (1896-99) 447 (proclamations), 472 (Message, Dec. 3, 1877).

<sup>50</sup> See 1 GRESHAM, LIFE OF WALTER Q. GRESHAM (1919) 393.

<sup>51</sup> *Ibid.* 384, 398, where his telegrams are quoted.

<sup>52</sup> Thomas Drummond (1809-1890) seems to have merited the affection and the respect with which he was regarded. He was of the school and time of Lincoln, David Davis, Sidney Breese and Lyman Trumbull—“a simple, honest, straightforward, true-hearted man” whose public and private character “illustrated all the old-fashioned virtues.” His appointment as District Judge for Illinois was by President Taylor in 1850; his promotion to Circuit Judge, by Grant in 1869. During the Civil War, in spite of his intense Union patriotism, he enjoined General Burnside's suppression of the *Chicago Times*. He played an important part in the expansion of Federal equity jurisdiction, deciding cases on what seemed to him sound principles—as they usually were, save perhaps for their tendency to mag-

Walter Q. Gresham was District Judge in Indiana.<sup>53</sup>

Full details of what Judge Gresham did in Indiana are preserved in his valuable biography. When the strike mob occupied the station at Indianapolis, Gresham held in his court room a mass-meeting of prominent citizens, most of whom had served in the Civil War. He said "that the community was in possession of the mob; that the governor, the mayor, and the sheriff, whose duty it was to act, were supine; life and property were in

nify Federal judicial power—without fencing with precedents, writing short opinions, or sometimes none. He was influential, under pressure from Gresham, in establishing the "tin bucket" priority in receiverships, overruling in *Turner v. I. B. & W. R. R.*, 8 Biss. 315 (1878), his own earlier view, expressed in *Denniston v. Chicago, Alton & St. Louis R.R.*, 4 Biss. 414 (1864), that "a railroad mortgage is the same as a mortgage on a farm or a house." His was the first opinion sustaining Granger legislation. *Peik v. Chicago & North Western Ry.*, 6 Biss. 177 (1874), *aff'd*, 94 U. S. 165 (1876). His biographer likens him to Lord Camden—with the qualification that he did not "altogether share that great man's just appreciation of the vital importance of jury trial to free institutions." Sketch by S. S. Gregory in 5 *LEWIS, GREAT AMERICAN LAWYERS* (1908) 503. See also *GRESHAM, op. cit. supra* note 50, at c. 22.

<sup>53</sup> Walter Quentin Gresham (1832-1895) was concerned from boyhood with law and politics in the often turbulent conditions of the Indiana-Kentucky border. He served in the Union army throughout the Civil War, commanding a division at the end, and was appointed District Judge by President Grant in 1869. After serving as Postmaster General under President Arthur, he succeeded Judge Drummond as Circuit Judge for the Seventh Circuit in 1884. On the bench he was at once vigorous and humane. His conception of equity as justice sometimes failed to meet approval from the Supreme Court. His most celebrated judicial utterance was: "Jay Gould can't run this court." For the circumstances, see his biography, *op. cit. supra* note 50, at 553-4. At the suit of bondholders complaining of inequitable subordination of their liens to Gould-Sage interests in the Wabash reorganization in the Eighth Circuit, he removed the receivers of the Wabash lines east of the Mississippi (who had been appointed by comity, having first been appointed by Judge Brewer at St. Louis for the lines west), appointing Judge Cooley in their stead, and impliedly condemning Judge Brewer's conduct of the receivership. *Atkins v. Wabash Ry.*, 29 Fed. 161 (C. C. N. D. Ill. 1886).

In the dead-locked Republican Convention of 1888 he was a leading candidate; his wife believes that he would have been nominated had he been willing to respond to overtures of Platt and Quay. In 1892, disgusted with both persons and principles dominant in the Republican Party, he supported Cleveland, who appointed him Secretary of State. The phrase "shirt-sleeve diplomacy" was coined during his incumbency of that office. He staved off for one term the annexation of Hawaii, hoping that the government of the islands could be restored to the natives from whom American adventurers had taken it. At the time of his death he was drafting a state paper on the Venezuela controversy, which Mrs. Gresham says would not have contained the celebrated ultimatum to England. Cleveland expressed regret that he had not appointed Gresham Chief Justice instead of Fuller. See his biography, *op. cit. supra* note 50, at 505. See also, *PECK, TWENTY YEARS OF THE REPUBLIC* (1908) 308, 329, 413 *et seq.*; *JAMES, RICHARD OLNEY* (1923) c. 9 and 10.

danger; that society was disintegrating, if it had not dissolved." <sup>54</sup>

He organized a vigilance committee, promising "that he would take no action as Federal judge in an administrative capacity" without the committee's approval.<sup>55</sup> He called for military volunteers, himself enrolling first. General Benjamin Harrison, though deprecating hasty action and protesting that the strikers had just grievances, took command of one volunteer company. General G. H. Chapman, spewing accusations of cowardice at William H. English for moderate counsels, took command of another. Gresham's first thought was to act in subordination to the governmental executive of the state. But first the Governor, and then the Mayor, rejected his services. So he instructed the United States marshal, General Spooner, to use the volunteers as a *posse*. There being no ammunition for the *posse*, General Spooner went alone to the station at Indianapolis. Upon his proclamation to the mob that they were in contempt of court, they peaceably permitted receivers' trains to move. Some of the leaders were subsequently arrested for their prior "contempt."<sup>56</sup> Federal troops, furnished at Judge Gresham's request, were put under the command of the marshal. Upon his approach at the head of a detachment, receivers' trains moved at Terre Haute and Vincennes. At the request of the president of the Vandalia, a solvent road with no receiver, Judge Gresham ordered General Spooner to keep troops at Terre Haute "for moral effect." General Spooner somewhat exceeded his orders. "He considered it a duty, in view of President Hayes' proclamation, the Judge's telegrams, his authority as United States Marshal, and his practical experience as a man," to move the Vandalia mail train, escorting it from the Terre Haute station under orders to his men to shoot the first who should attempt to interfere. "The legal lights of Indianapolis, including the Judge," said that General Spooner "did right."<sup>57</sup>

At Indianapolis the Judge's "Committee on Safety" hesitated to move trains on roads not in the hands of receivers. Finally, however, the Governor, yielding to importunities, added Gresham's volunteers to the organized militia under General Lew Wallace, and the strike was broken on all roads.<sup>58</sup>

Though no such wealth of detail is accessible as to events in Illinois, it is inferrable that they were similar, except in the degree of directness of judicial participation, to events in Indiana.

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<sup>54</sup> GRESHAM, *op. cit. supra* note 50, at 388.

<sup>55</sup> *Ibid.* 390.

<sup>56</sup> *Ibid.* 387-398.

<sup>57</sup> *Ibid.* 399-400.

<sup>58</sup> *Ibid.* 398.

## IV

In the excitement of the strike the Federal judges in Indiana and Illinois were but incidentally concerned with whether the direction of military forces was compatible with the judicial function in a government built upon the principle of the separation of powers.<sup>59</sup> They conceived themselves as dealing with a situation of revolutionary exigency. They were doing their duty as citizens. Their position as judges made them powerful as citizens. To have stayed their hands, in a lacuna of law incident to an insurrection, upon the ground that judicial power did not extend to empanelling an army or a police force, would have been pusillanimous.

Had they not been judges their activities as military volunteers would have been without significance in legal history. The powers exercised would have disappeared with the emergency that legitimized them. For judges, however, intervention in public affairs except in a judicial capacity is conventionally improper. The propriety of judicial conduct is normally established by judicial opinions. Occasion for judicial opinions arose when an extraordinary assumption of judicial power was superimposed upon the assumption of military power which might better have been justified as natural than as judicial. The mob leaders arrested by the United States marshals were tried without jury and sentenced to imprisonment for contempt of court.

Judge Gresham refused to sit in the contempt cases.<sup>60</sup> Judge Drummond tried and sentenced the men arrested both in Indiana and in Illinois.<sup>61</sup>

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<sup>59</sup> They naturally, however, took care from the beginning that their acts should appear, as much as possible, to be done in a judicial capacity. Judge Gresham inquired of Judge Drummond by telegraph whether he had authority to direct the marshal to use military volunteers and to make arrests without warrant. Judge Drummond replied that he had no doubt of the right to take these measures. *Ibid.* 387. But some of Judge Gresham's associates thought that "it was a situation to be dealt with by the executive arm of the government, which could act, as those men thought, only through the army and the police." *Ibid.* 393.

<sup>60</sup> *Ibid.* 401-402. "It is proper," said Judge Drummond on opening court at Indianapolis, "... to explain why I have come. . . . I understand that my brother judge has . . . taken a rather active part as a citizen, and as a good citizen, I believe, in aiding to put a stop to the contemplated or actual riots. . . . Under these circumstances he has felt a desire . . . that I should take the responsibility in the examination of the parties who are brought before the court." He also, though he had not sat with "citizen's committees," had done all that was in his power *officially* "to put an end to the state of affairs that existed throughout the country."

<sup>61</sup> *Secor v. Toledo, Peoria & Warsaw Ry.*, 21 Fed. Cas. 968, 971 (C. C. N. D. Ill. 1877) (two opinions: finding defendants guilty and imposing sentences, Aug. 1, 1877; on remitting sentences, Aug. 29, 1877); *King v. Ohio & Miss. Ry.*, 14 Fed. Cas. 539 (C. C. Ind. 1877).

The extension in these cases of the power to punish summarily for contempt of court was radical. That power theoretically exists because of its "necessity" in order to prevent obstruction of the administration of justice, and extends no further than that "necessity" requires.<sup>62</sup> It is hard to find a more reasonable theory on which to construe obstruction of a receiver's administration of a railway as obstruction of the administration of justice than this: courts administer justice; courts also administer railways through receivers; therefore the administration of a railway by a court through a receiver is an administration of justice. The relation of the administration of a receivership to the administration of justice is more closely considered in the Appendix. Operating receiverships had already in this country had a curious effect upon procedural rights in civil cases; a passenger injured by the negligent operation of a receiver's train could sue at law for damages only by leave of the court that appointed the receiver, and permission ordinarily was denied.<sup>63</sup> But never before had a court assimilated to contempt an interference with receivership assets by a thief or a casual turbulent. For non-privies to the suit in equity to which the receivership is incident, nothing ear-marks a business operated by a receiver as under special protection of judicial prerogative. It elbows its way, like other businesses, in a crowded world. It seeks the same end—private profit. It is exposed to the same weather, physical and social. Why should an outsider who, in the course even of his unlawful affairs, touches that business or is touched by it, find himself by the magic of that touch transported to another realm?

Judge Drummond was not forced by counsel who appeared for the defendants in the contempt cases<sup>64</sup> to consider the deeper questions which might have been raised: the nature and limits of judicial power; the nature and objects of receiverships and of the contempt power; the compatibility of the summary punishments with constitutional guarantees of trial by jury and due process of law. Conceding that under the statute passed to *restrict* the power of Federal courts to punish for contempt he could not punish the defendants unless they had *disobeyed or resisted a lawful order of the court*, Judge Drummond held that the defendant's interference with the running of trains amounted to *disobedience* of the orders of the court directing the receivers

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<sup>62</sup> See cases cited *infra*, Appendix notes 2-5.

<sup>63</sup> See text of Appendix following note 41.

<sup>64</sup> The defendants in Illinois were represented by Michael C. Quinn; in Indiana by A. G. Porter, William Herod, and Ferdinand Winter. The array of counsel for the prosecution included, in addition to the United States Attorneys, J. N. Jewett in Illinois; in Indiana, Benjamin Harrison, Charles Warren Fairbanks and A. W. Hendricks.



to operate trains.<sup>65</sup> Though he recognized that disobedience of the orders of the court "is the only offense of which we can take cognizance,"<sup>66</sup> he enlarged rather in his opinions upon the enormity of the defendants' offenses against society. His arguments were such as might have been addressed to a jury, under a latitude of deviation from technical issues such as jury lawyers are apt to strive for, or to a legislature in support of the adoption of a novel policy. He referred with feeling to the hardness of the times and conceded that the railway employees might have reason for dissatisfaction. Still, a majority of the people of the country probably have to support their families on less than railway pay.<sup>67</sup> No one has a "right," moreover, to any particular rate of pay. The right of a laborer is simply to contract with his employer for the pay which the employer is willing to give and the laborer is willing to take—which is determined "by the demand and supply of labor." "It is a matter of common bargain and agreement, and unless it can be settled in this way we have to destroy all the relations of life."<sup>68</sup> "The proper way, as it seems to the court, for any class who desire to have the service which they perform compensated at a better rate, is to spread the facts touching that service before the community and thus create a public sentiment in their favor, so that justice may ultimately be done to them by their employers."<sup>69</sup> If receivers' employees have grievances, "the court is always open to hear those grievances, consider them and instruct the receiver to do complete justice to all employers . . . ." <sup>70</sup> When it is claimed that the rights of labor consist in not only refusing to labor, but in interfering with the labor of others we, of course, can have no feeling of respect for any such right as that. . . . <sup>71</sup> "Every man . . . has a right to leave the service of his employer . . . but men ought not to combine together and cause at once a strike among all railroad employees . . . because the injury there is public in character. . . . Suppose in seed time the farm hands throughout a large section of this state should come to the conclusion that the farmers did not pay them wages enough,

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<sup>65</sup> See Appendix note 8.

<sup>66</sup> 14 Fed. Cas. 540 (1877).

<sup>67</sup> 21 Fed. Cas. 970 (1877). He mentions wages of from \$400 to \$700 a year as not uncommonly low.

<sup>68</sup> 14 Fed. Cas. 541. "We cannot change the nature of man. . . . We cannot make all men alike. . . . Different kinds of labor receive different kinds of compensation. . . . But it is one of the glories of our common country that every man, if he will only exercise the talents and the industry which he possesses, has the opportunity for rising as high as his talents, his industry and his capacity for business will enable him." 21 Fed. Cas. 970.

<sup>69</sup> 14 Fed. Cas. 542.

<sup>70</sup> *Ibid.* 541.

<sup>71</sup> 21 Fed. Cas. 969.

and should combine together and go around to the various farms . . . and prevent in this way the planting of seed? . . . Would that be right? . . . And yet that would be the same thing in principle as these railroad employes have done in this case. . . . Suppose that on any of these trains there was money or property which was to save a man's farm or house from loss or sacrifice. Suppose that there was a traveler who was going to the bedside of a dying wife, husband, son or daughter. . . ." <sup>72</sup> "These railroads are among the principal means of modern civilization by which the business of the country is transacted. Therefore when a man interferes with a property whose object is so important, which affects so materially all the relations of society, he commits as great an offense against the rights of individuals and against the rights of the public as can well be imagined. . . . A public example must be made, and it must be made emphatically. . . . It is . . . indispensably necessary that the court should not tolerate any interference, however slight, with the management of the railroads . . . in its custody. . . . This thing must be stopped, and, so far as this court has the power to do it, it shall be stopped." <sup>73</sup>

This disquisition was unquestionably as sincere as it was fervent. In spite of occasional interjections to the effect that he considered "only the disobedience of the orders of the court and not the general criminal act," <sup>74</sup> it is obvious that Judge Drummond was but slightly concerned to disguise the fact that the policy which determined his punishments was not the policy of the contempt power, but the policy of protecting society, already disturbed by the internecine competition of capital, from the further disturbances of competition between capital and labor.

## V

The policy of summary punishment for disorders incident to strikes which Judge Drummond inaugurated is at least debatable. It is also debatable whether courts should have power to establish an innovation so radical. Of course it has never been and can never be true that "judicial power, as contradistinguished from the power of the laws, has no existence;" or that "courts are the mere instruments of the law and can will nothing." <sup>75</sup> Yet such statements express an ideal which, though few probably would wish to see it fully realized, has deep roots in the common sense which, perceiving that "power is of an encroaching nature," <sup>76</sup> has endeavored so to shape government that

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<sup>72</sup> 14 Fed. Cas. 541, 542.

<sup>73</sup> 21 Fed. Cas. 970.

<sup>74</sup> *Ibid.* 973.

<sup>75</sup> Marshall, C. J., in *Osborn v. Bank*, 9 Wheat. 738, 866 (U. S. 1824).

<sup>76</sup> *The Federalist*, No. 48.

power shall be subject to checks and balances. That ideal has not been superseded by our recognition that "the true grounds of decision are considerations of policy and of social advantage," and that it is the *duty* of judges to weigh such considerations.<sup>77</sup> For fully as clear as our modern sense of this duty is our sense also that there are limits which courts may not pass in its fulfilment.<sup>78</sup> Concrete definition of those limits somewhat baffles even Judge Cardozo's penetrating lucidity. But unless the theory of popular participation in the adoption of momentous policies is to be superseded by a theory of judicial Fascism, is not the limit, however it may be defined, passed when a court enacts that the popular check, through juries, upon law enforcement shall be abolished in a class of cases where a special usefulness of that check may be strongly felt? Could such a step constitutionally have been taken by a legislature?

Judge Drummond's decisions, moreover, begged a question of priority. Which was more important in 1877—that persons guilty of disturbance should be punished; or that pressure should be exerted to abate the cruelties of the economic anarchy of which such disturbance was an inevitable by-product?<sup>79</sup> Judge Drummond spoke for a large constituency in making concern for law and order exclusive. A writer in the *Nation* echoed him: the kindest thing to untaught immigrants would be to show them that "society as here organized, on individual freedom of thought and action, is impregnable." Wages are fixed by supply and demand; "society does not owe any particular rate of wages to anybody." It owes "protection of life and property and personal rights to all its members." We should therefore strengthen the army and militia. And philanthropists should hold their tongues and not treat all things as open to discussion.<sup>80</sup> To John Hay this appeared adequate: "The very devil seems to have entered into the lower classes of workingmen, and there are plenty of scoundrels to encourage them to all lengths."<sup>81</sup> The "light of the

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<sup>77</sup> Holmes, J., in *Vegelahn v. Guntner*, 167 Mass. 92, 106, 44 N. E. 1077, 1080 (1896), and in *The Path of the Law* (1897) 10 HARV. L. REV. 457, 467.

<sup>78</sup> CARDOZO, NATURE OF THE JUDICIAL PROCESS (1921) Lect. III.

<sup>79</sup> The British *chargé* reported on July 31 that order was said to be restored; "but it is in my opinion only the acute form of the disease which has subsided; the seeds of future weakness which it has sown will not be eradicated until a more radical cure has been applied than shooting down the rioters, and running the trains, as was done in one case, with a Gatling gun in front of the locomotive. . . . The power wielded by the great corporations in this country is almost incredible, and in their treatment of their subordinates they ignore entirely the principle that property has its duties as well as its privileges." BRITISH REPORTS, *op. cit. supra* note 33, Report No. 3.

<sup>80</sup> (1877) 25 NATION 68, 85, 99.

<sup>81</sup> THAYER, JOHN HAY (1915) 5. See also Hay's unacknowledged novel, *THE BREADWINNERS* (1884).

flames at Pittsburgh" seemed to reveal to a good many people who were perhaps rather dazzled than illumined by that light that "the Communist is here."<sup>82</sup> The militia was strengthened in the industrial states. This was important; but it did not touch the roots and causes of unrest. There were expressions of benevolent concern that something be done in that direction. The President of the United States communed anxiously with himself in his diary.<sup>83</sup> The Governor of Pennsylvania discoursed in his annual message upon the "broader and deeper lessons of the strike."<sup>84</sup> Minds occupied with those lessons tended, however, to assume that the educated conscience of individuals could and would—unaided, it would seem, by less abstract forces—lead society to some vague ultimate satisfactory order. The "sympathy" upon which theoretical anarchists, since Adam Smith,<sup>85</sup> have relied as adequate to restrain anarchic ferocity is, to be sure, a real factor in human affairs. But its single power is insufficient to produce important progress towards civilized amenity. Such progress is not made until the general interest in amenity, which normally confines itself to pious wishing, is

<sup>82</sup> *Supra* note 22.

<sup>83</sup> 3 DIARY AND LETTERS OF RUTHERFORD B. HAYES (1926) 440: Aug. 5, 1877: "The strikes have been put down by *force*; but now for the *real* remedy. Can't something be done by education of the strikers, by judicious control over the capitalists, by wise general policy to end or diminish the evil? The railroad strikers, as a rule, are good men, sober, intelligent and industrious. The mischiefs are: (1) Strikers prevent men willing to work from doing so. (2) They seize and hold the property of their employers. (3) The consequent excitement furnishes an opportunity for the dangerous criminal classes to destroy life and property. Now, every man has a right, if he sees fit to, to quarrel with his own bread and butter, but he has no right to quarrel with the bread and butter of other people. Every man has a right to determine for himself the value of his own labor, but he has no right to determine for other men the value of their labor. (Not good).

"Every man has a right to refuse to work if the wages don't suit him, but he has no right to prevent others from working if they are suited with the wages.

"Every man has a right to refuse to work, but no man has a right to prevent others from working.

"Every man has a right to decide for himself the question of wages, but no man has a right to decide that question for other men."

<sup>84</sup> MESSAGE OF GOV. JOHN F. HARTRANFT TO THE GENERAL ASSEMBLY OF PA., Jan. 2, 1878, 15-17: The big business of a big society makes corporations and labor organizations both inevitable. "The people have a right to demand that while the profits may accrue to private individuals, their management shall rise above merely selfish aims, and consult also the public utility and welfare." The roads to settlement are "diffusion of higher education among the workingmen, and the conviction on the part of capital that it has now to deal with an equal competitor, whose claims and rights, together with its own, must be decided and adjudged by arbitration."

<sup>85</sup> *Supra* note 14.

aroused to assert itself by imposing compromise upon the parties to social conflict. It is not aroused until its peace is disturbed by pressure—often pressure which in its immediate direction is towards immoderate extremes.

Labor pressure gained cohesion and momentum after 1877. To Samuel Gompers, then a young cigar maker in the New York East Side, the strike “was the tocsin which sounded a ringing message of hope to us all.” He recognized that the unorganized and tumultuous character of the strike had made it barren of direct benefit to the strikers. But it showed the possibility of a labor power which, with organization and discipline, might affect the “natural” law that fixes wages.<sup>86</sup>

The question for a humane impartial realist in 1877 was as to the extent to which even the interest in law enforcement is subordinate to the interest in a labor pressure sufficient to lead to compromises. Anarchic competition can be conducive towards the general welfare only if under as well as upper dogs can bite. There is sense in Jefferson’s somewhat hair-raising dictum as to Shay’s Rebellion: “What country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance?”<sup>87</sup> The sense is the same as that of the insistence of Socrates upon his own social value as a gad-fly.

If government, as an impartial umpire of competition, is to exert a degree of control upon anarchic individualism,<sup>88</sup> it must see to it that the fangs of one competitor be not too drastically blunted while those of his rival are strong. In the nineteenth century there was available no governmental mechanism more adequate to this service as between labor and capital than the system of trial by jury. Courts cannot be expected to recognize even the existence of a question as to the extent to which it is desirable that society shall permit itself to be stung by labor gad-flies. The answer, moreover, varies from time to time. Was not society in truth served by the state of public feeling in 1877 which made criminal convictions of mob leaders by juries unthinkable? Supposing it to be clear that the Federal judges unlawfully imprisoned men whom their marshals had unlawfully arrested, their prosecution or impeachment was equally unthinkable. If law is not to become master instead of servant to society, it is essential that natural feeling should in special

<sup>86</sup> GOMPERS, *SEVENTY YEARS OF LIFE AND LABOR* (1925) 140.

<sup>87</sup> Quoted 1 BEVERIDGE, MARSHALL (1916-19) 303, from 5 JEFFERSON, *WRITINGS* (Ford) 263, 362.

<sup>88</sup> Cf. President Hoover, as quoted in newspapers of Oct. 8, 1930, and in (1930) 12 *LAW AND LABOR* 249: “In the American system, through free and universal education, we train the runners [in the race of life]; we strive to give them an equal start, our Government is the umpire of its fairness.”



instances have power to prevent unnatural rigor of law enforcement. And it is as true in law as in mechanics that a structure which must oppose extraordinary stresses with unyielding rigidity is less durable than a structure which is flexible, or from which pressure can be diverted. The jury's power of exception in cases where the grounds of exception, though strongly felt, elude legal generalization, has served rather to maintain than to impair the integrity of normally satisfactory rules of law.<sup>89</sup> Without it hard cases would make bad law more often than they do. In some instances, moreover, the resistance of the "natural reason" of juries to the "artificial reason" of the law has contributed to change bad law for good. Erskine's arguments prevailed in the long run over Lord Mansfield's doctrines of seditious libel; truth became a defense, and criticism of public men and measures became a right.<sup>90</sup> Juries in personal injury cases resented the fellow servant rule; the principle of Workmen's Compensation laws is in process of extension. Is it not likely that legislation would have gone much further than it has towards abating the causes of friction between workmen and employers if juries had had more to do with strike cases? Of course the jury's power of exception would have been abused in such cases as in others. All power is subject to be abused. If it has become true that abuse of power by juries is more evident than their salutary use of it, it is either because power to select competent jurors has not been well used, or, if the jurors selected are in fact fairly representative of average honesty and intelligence, because those qualities in our people are far gone in decay. If a people is healthy, it cannot afford to surrender its direct participation in the administration of justice. For when law is administered by judges *and* juries, the justice and injustice that result are more truly the justice and injustice of society than when law is administered by judges only. When a jury verdict is felt as oppressive, the grievance is against society and its law. But a sense of grievance toward a judicial decision is against the judge or the courts. In spite of the truth

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<sup>89</sup> See Wigmore, *A Program for the Trial of Jury Trial* (1929) 12 J. AM. JUD. SOC. 166, 169-171. Dean Wigmore points out that most of the objections to jury trial as we now see it—those stressed, for example, by Leon Green, *Why Trial by Jury?* (1928) 15 AM. MERCURY 316—could be remedied if we cared to take the trouble; and that jury trial serves these important objects: (1) It prevents popular distrust of bureaucratic justice; (2) It permits desirable instances of exception to the application of legal rules without the destruction of the rules which would result from exception by judges; (3) It educates citizens in the administration of law; (4) It checks biased fact findings; for jury verdicts require reconciliation of varied minds and temperaments. Cf. Comment, *Rate Litigation—Fact Determination by Judicial Guesswork* (1930) 40 YALE L. J. 81.

<sup>90</sup> See CHAFEE, *FREEDOM OF SPEECH* (1920) 23; 8 LORD CAMPBELL, *LIVES OF THE LORD CHANCELLORS* (5th ed. 1868) c. 178-181.

of most of the facts adduced by adverse critics of the jury system in its modern state of degeneration, "there are still reasons for its support which lie deep in the philosophy of the human mind."<sup>91</sup>

## VI

To contemporary observers of the strike the summary punishments of a few participants were minor episodes. To the newspapers the *Donohue* case in New York<sup>92</sup> was as important as the cases in the Middle West. The general public, tired of the strike and shrinking always from law, except when it is dramatized in jury trials, as an esoteric mystery, gave them little attention. Editorial comment was in general superficial and approving.<sup>93</sup> The only important expression of concern at the

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<sup>91</sup> Cooley, *New Aspects of the Right of Trial by Jury* (1877) 25 AM. L. REG. 705, 721.

<sup>92</sup> Matter of Barney Donohue, 12 N. Y. Daily Register 321 (Aug. 18, 1877) (earlier proceedings reported in issues of July 30 and 31 and Aug. 1); see also N. Y. Evening Post, July 26, 28, 30, 31, Aug. 15, 17, 1877. The order of the court recited that Donohue had wilfully resisted an order of June 15, 1875, directing Hugh J. Jewett as receiver to operate the Erie, by preventing the movement of trains on July 20, 1877. Donohue's counsel relied solely upon technicalities—chiefly upon the point that the citation of Donohue to answer interrogatories violated his constitutional immunity against self-crimination. The Court, Charles Donohue, J., said: "The Erie road being in the hands of the officer of this Court and his possession being attacked, it became the duty of the Court to protect it. Substantially, I do not understand the prisoner's counsel as denying that if the papers are in form correct, and the facts proved, that there is any doubt of the right of this Court to punish; but if the right had been denied, the action of all the Courts that followed the course pursued here [this reference is to the opinions of Judge Drummond discussed *supra*] has decided the question in the affirmative." Since the prisoner Donohue was also subject to criminal prosecution for his acts, and since his confederates had desisted from disorder upon his citation for contempt, only thirty days imprisonment was imposed for the contempt. Mr. Justice Donohue doubted the constitutionality of federal military intervention and found cause for gratification in the fact that "that which, unfortunately, elsewhere the federal military power was invoked to accomplish was here enforced by the power of the Courts." Counsel for Barney Donohue (retained by a "Bread Winners' League"): General Roger Pryor and ex-judge George M. Curtis; for the Erie receiver: Laroque and McFarland.

<sup>93</sup> "The last thing that ever could occur to any of the strikers would be that they were by their acts guilty of a contempt of court. This, however, was the case in several instances, where the railroads interfered with were being operated by receivers, and the only rioters thus far punished were those who have been committed for contempt." 16 ALBANY L. JOUR. 110 (Aug. 18, 1877). It appears from a subsequent editorial deploring Judge Drummond's remission of contempt sentences that the editor had no intention of questioning their propriety. *Ibid.* 158 (Sept. 8).

"If thirty days is a sufficient imprisonment for a man who does his best to reduce the society of a great community to a state of anarchy, our

implications of the decisions was by Judge Cooley.<sup>94</sup>

penal scale should be revised." (1877) 25 NATION 111. The allusion is to the Donohue case, *supra* note 92.

<sup>94</sup> *Op. cit. supra* note 91, at 715-720. Judge Cooley approached the question from a general consideration of other exercises of extraordinary power in receiverships. He implies, though he does not pursue, a doubt as to the appropriateness of judicial operation of railways: "The receivership is not a matter ancillary to the settlement of rights and adjustment of equities in a pending suit . . . the suit becomes an incident to the receivership, not the receivership to the suit." The doctrine that it is contempt of court to sue a receiver without leave strikes him "as unnecessary to the receiver's possession, and unsound. . . . It is obviously one thing to . . . enjoin suits for the property in his hands, and quite a different thing to shield him against the consequences of his own trespasses, negligences, or refusals to observe his contracts." He questions "whether the extent of the protection accorded to receivers has not insensibly been enlarged so as to embrace cases not within the original intent. . . . A riot on the New York Central Railroad which interferes with the running of its trains is only a riot; but on the Erie Railroad it is a contempt of the Court of Chancery. In the one case only a jury can deal with it, and twelve men must agree concerning its legal bearings; in the other a single judge may administer summary punishment. This may be a useful power, but it is an enormous power, and it is not surrounded by the usual securities which protect individual liberty; and we may be reasonably certain that its frequent exercise will lead to new consideration of the logical foundations of jury trial, and perhaps also of the limitations to the power to punish as judicial contempts acts not committed in the presence of the court. Rights and protections ought to be the same everywhere; the property which the receiver manages for its owners is no more sacred than that which the owners manage in person; it ought to have the same protection and no more.

"It has not been our purpose to question the correctness of any recent judicial action, but rather to direct attention to some very noticeable and important facts. One of the most remarkable of these is, and one deserving of special attention and reflection, that since the late riots great gratification has been expressed in various publications, that the courts were enabled in certain cases to bring the rioters summarily before them and to inflict speedy and effectual punishment without delay or the opportunity to appeal to a popular tribunal. This gratification has had no regard to the fact that the property was peculiarly situated; that was only a circumstance which was thought fortunately to afford opportunity for the summary remedy; and the latter has been treated as a good thing in itself.

"Now the power of the courts to punish for contempts is exceedingly vague and indeterminate. . . . For the most part [it] is in the breast of a single judge, without fixed rule or landmark limiting his discretion. But manifestly if a discretionary authority like this is good and useful in some cases it is good in all similar cases, and its exercise ought not to depend on a circumstance that in no manner affects the degree of offence or the just rights of the accused to a deliberate and careful trial. The logical conclusion is that it would be better for the state that some tribunal—perhaps a court, perhaps a ruler unrestrained by constitution or statute—should have discretionary power to deal with all breaches of order as contempts of authority, and to punish them without the hindrance which the necessity of associating himself with others for the trial might

Obviously, under the theory of summary power adopted by Judge Drummond, railways under receivers were in exactly the same position as if they were protected against unlawful interference by injunctions binding upon all the world. President Scott of the Pennsylvania Railroad was as quick as Judge Cooley to note that the limitation of this extraordinary protection to roads undergoing receiverships was arbitrarily discriminatory.<sup>95</sup> He advocated Congressional legislation extending the summary power to all cases of disturbance of the operation of roads carrying mails or interstate commerce:

"It will hardly be contended that the railroad companies must become bankrupt in order to make secure the uninterrupted movement of traffic over their lines, or to entitle them to the efficient protection of the United States government. . . . The laws which give the Federal courts the summary process of *injunction* to restrain so comparatively trifling a wrong as infringement of a patent right certainly must have been intended or ought to give the United States authority to prevent a wrongdoing which not only destroys a particular road but also paralyzes the commerce of the country and wastes the national wealth."

This, it is believed, was the first suggestion of the possibility of labor injunctions in the United States.

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cause. The expressions referred to are distinct admissions of belief that the restraints which we impose on power are worse than useless, and they exhibit us in the aspect of abhorring unbridled authority in theory while we applaud it in practice."

<sup>95</sup> In his article cited *supra* note 39.

## APPENDIX—RECEIVERSHIPS AND THE CONTEMPT POWER

### I. THE CONTEMPT QUESTION

SOMETIMES courts say that legal generalizations apply only to cases within their reason. At other times, however, they hold a rule applicable to a case within its letter when the application in truth raises a novel and perhaps disputable question of policy. This is one of the techniques of legal change. It is illustrated in the contempt cases of 1877.

The power to punish summarily for contempt is an exception to the ordinary requirements of due process of law.<sup>1</sup> The exception is justified by the expediency—loosely called “necessity”—of prompt and vigorous action to prevent or remove obstructions of the administration of justice.<sup>2</sup> Justice is duly administered when legal duties incident to a litigation—duties of witnesses to testify, for example, *not* legal duties of whatsoever nature—are specifically performed.<sup>3</sup> The summary power, unless limited by statute, extends to whatever is within the “necessity” on which it rests<sup>4</sup>—but no further.<sup>5</sup> Obviously it cannot, compatibly with its nature and policy, extend to anything that is not an obstruction of the administration of justice, or to any case in which its exercise would tend to subvert the due administration of justice which it exists to serve. The law of contempt can have coherence and logic only if the minds which administer it look steadily at the limits implicit in the nature and policy of the summary power. To look rather at definitions of particular contempts invites confusion. This also is illustrated in the contempt cases of 1877.

The interference by strike mobs with the judicial operation of railways was clearly within the language of a definition for which abundant judicial reiteration was citable: “any wrongful disturbance of a receiver’s possession is a contempt of court.”<sup>6</sup>

<sup>1</sup> 4 BL. COMM. 280.

<sup>2</sup> *Ibid.* 286; *Bessette v. Conkey Co.*, 194 U. S. 324, 327, 24 Sup. Ct. 665, 666 (1904); *Ex parte Hudgings*, 249 U. S. 378, 383, 39 Sup. Ct. 337, 339 (1919).

<sup>3</sup> *Hough, J.*, in *Rosner v. United States*, 10 F. (2d) 675 (C. C. A. 2d, 1926): “there is a difference between obstructing justice, and obstructing the administration of justice.”

<sup>4</sup> The power must be ample; but its amplitude “is a command never to exert it where it is not necessary or proper.” *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 451, 31 Sup. Ct. 492, 502 (1911).

<sup>5</sup> *Anderson v. Dunn*, 6 Wheat. 204, 227 (U. S. 1821).

<sup>6</sup> Judge Drummond cited no authorities specifically, saying only that “it has been considered by all the authorities, the Supreme Court of the



No lawyer could argue that the interference was not *wrongful*; the property affected was in the hands of receivers; the mobs had notice of the receiverships. The dogma covered the facts; and such legal minds as were available for defendants in strike cases, baffled by the superficial tightness of the case against them, saw no way to impeach or qualify the dogma. Yet throughout the period of its application in strike cases dissatisfaction smouldered.<sup>7</sup> Judge Cooley was not alone in feeling that the contempt power was out of bounds when it punished exuberances of social unrest as obstructions of the due administration of justice.

Only the soundness of this feeling will be here considered. If the cases were within the policy of the contempt power, any inadequacy of Judge Drummond's attempt to show that they were within one of the specific categories of contempt to which the power was confined by Federal statute might be condoned; if they were outside the policy, no statutory question was properly up for consideration.<sup>8</sup>

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United States among others, that any wrongful disturbance of the possession of property held by a receiver, is a contempt of the authority of the court." 21 Fed. Cas. at 971. The reporter added a note to the effect that the authorities can be found in 2 DANIELL, CHANCERY PRACTICE (4th Am. ed. 1871) 1743 and in HIGH, RECEIVERS (1st ed. 1876) §§ 163-174. The relevant cases cited by Daniell and High are among those cited *infra* notes 25 and 26.

The expressions of the Supreme Court to which Judge Drummond referred were doubtless those in *Wiswall v. Sampson*, *infra* note 25, and in a general disquisition *obiter* in *Davis v. Gray*, 16 Wall. 203, 217-218 (1872).

<sup>7</sup> The following cases were substantially similar in facts and result to the cases described in the preceding article, cited therein in note 61: *In re Doolittle*, 23 Fed. 544 (C. C. E. D. Mo. 1885, Brewer and Treat, JJ.); *United States v. Kane*, 23 Fed. 748 (C. C. Colo. 1885, Brewer, J.—*cf.* *Frank v. D. & R. G. Ry.*, *ibid.* 757); *In re Wabash Ry.*, 24 Fed. 217 (C. C. W. D. Mo. 1885, Krekel, J.), s. c. on rehearing, *United States v. Berry*, *ibid.* 780; *In re Higgins*, 27 Fed. 443 (C. C. N. D. Tex. 1886, Pardee, J.); *Thomas v. C. N. O. & T. P. Ry.*, 62 Fed. 803 (C. C. S. D. Ohio 1894, Taft, J.) There were other cases prior to 1894 which were not reported.

In 1885 the Knights of Labor passed resolutions demanding the impeachment of Judges Treat, Krekel and Brewer "for malfeasance in office and for high treason to the American people," and commending Major William Warner and General John M. Palmer "for their manly and gratuitous defence of our distressed brothers." BUCHANAN, STORY OF A LABOR AGITATOR (1903) 230.

<sup>8</sup> The statute provided "that the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ,

Grounds for question whether the summary punishments were

process, order, rule, decree or command of the said courts." 4 STAT. 487 (1831); U. S. C. § 385 (1926).

The object of this statute, which was provoked by a punishment for newspaper criticism calculated to affect pending cases, was to confine the exercise of the power to cases clearly within its policy even at the cost of excluding from its exercise other cases arguably within its policy. Unless within the exceptions as to misconduct of officers and "disobedience or resistance," any obstruction of the administration of justice topographically remote from the presence of the court was to be punishable, if at all, only after conviction by a jury. Nelles and King, *Contempt by Publication* (1928) 28 COL. L. REV. 401, 525-532.

Recent cases construe the "so near" clause as embracing all obstructions, however remote, making the statutory limitations meaningless. *Cf.* Toledo Newspaper Co. v. United States, 247 U. S. 402, 38 Sup. Ct. 560 (1918). In the seventies, however, the language and intention of the statute were still respected. See *Ex parte Robinson*, 19 Wall. 505, 510-511 (U. S. 1873). Judge Drummond deemed it necessary to show that the defendants had disobeyed or resisted a lawful command. The receivers had been ordered to operate the railways. Judge Drummond held that the defendants, by obstructing the execution of these orders had themselves "disobeyed" the orders. 21 Fed. Cas. at 972. He would have looked in vain for decisions indicating that a judicial command could be *disobeyed* except by a person to whom it was addressed.

How the construction of language may be influenced by the fact that it is or is not the language of a statute is illustrated by two cases decided in 1897. In England, where the "inherent" or common law contempt power is not limited by statute, it was held that the doing of a thing enjoined (conducting a boxing match on certain premises) by a person who had not himself been enjoined was not a *disobedience* of the injunction by that person—though since it was a contumacious obstruction of the administration of justice by that person he was punishable notwithstanding. *Seaward v. Paterson*, [1897] 1 Ch. 545. In the United States, where, in the view then held of the "so near" clause, the doing of a thing enjoined by a person not enjoined was not punishable at all unless it was *disobedience*, it was held to be disobedience—in effect ratifying Judge Drummond's statutory construction. In *Re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658 (1897).

The reports of the 1877 strike cases show that in addition to the orders to the receivers to operate, the courts had issued orders in the nature of writs of assistance directing their marshals to do everything necessary in order to enable the receivers to run trains. It might be inferred that Judge Drummond could, with less strain on language than was involved in his findings of *disobedience*, have described the contempts as *resistance* to the execution of writs of assistance. That was Attorney General Devens' expectation. It seems, however, that the defendants did not in fact resist the marshals, but were punished for interferences with trains prior to the marshals' execution of the orders in the nature of writs of assistance. 1 GRESHAM, LIFE OF WALTER Q. GRESHAM (1919) 387, 393, 394, 398-9. In view of the peculiar nature of writs of assistance (see *infra* note 34) it may be doubted whether resistance to their execution is reasonably to be considered a contempt unless it is in the interest of a party to litigation. See *Lacon v. De Groat*, 10 T. L. R. 24 (1893).

Argument for strict construction of statutory words is, however, aside from the purpose of this article—though not from that of the framers the Federal contempt statute.

not subversive of policies paramount to the policy of the contempt power have been suggested in the preceding article. In this appendix attention is invited to what is conceived to be the irrelation of operating receiverships, in their contacts with the general public, to the administration of justice.

If a court, at the instance of judgment creditors, should invest the assets of a judgment debtor in the stock market in the hope of making them adequate to satisfy the judgments, what relation would the investments have to the administration of justice? If the court's broker should embezzle the securities, could he be said to have obstructed the administration of justice? Would a judge managing a business venture in person in the interest of parties to a law suit carry his judicial capacity with him to the broker's office? Is his agency an agency for the law or an agency for the parties? If he appoints a sub-agent, who looks for compensation to the parties through the subject matter of the venture, is the sub-agent the "hand of the court," and are his possession and management the possession and management of the court itself? Is the protection of his possession and management "against all the world" within the "necessity" which justifies exception from the ordinary requirements of due process of law in order to abate obstruction of the due administration of justice?

## II. RECEIVERS AS CUSTODIANS AND AS MANAGERS

The reason a court sometimes takes charge of private property pending litigation is to assure that the effectuation of its adjudications of private rights in the property shall not be impaired by prior acts in the interests of *parties to the cause*. "A receiver is an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation *pendente lite*, when it does not seem reasonable to the court that either party should hold it." "To warrant the interposition of a court of equity by the aid of a receiver, it is essential that the plaintiff should show, first, either a clear legal right in himself to the property in controversy, or that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to satisfaction of his demand. And, secondly, it must appear . . . that the property itself, or the income from it, is in danger of loss from the neglect, waste, misconduct or insolvency of the defendant." The suit *in personam* in which a chancery receivership is initiated becomes upon the appointment of the receiver substantially a proceeding *in rem*, to which all claimants of rights in the *res*, or of rights theretofore accrued against the defendant which may be satisfiable out of proceeds of the *res*, stand in the relation of *quasi parties*. "A court of equity, by its order appointing a

receiver, takes the entire subject matter of the litigation out of the control of the parties and into its own hands, and ultimately disposes of all questions, legal or equitable, growing out of the proceeding." "The purpose for which a receiver takes possession is closely allied to that of a sheriff in levying under execution, except that the scope of the receiver's authority is more comprehensive, since he is usually required to pay all demands upon the fund in his hands, to the extent of that fund."<sup>9</sup>

The original idea of a receiver is that he is a custodian—the keeper of the chancellor's pound. But even early instances in which a receiver was held down to an entirely inactive custody of inactive property were probably few. At the beginning of the nineteenth century he was most often appointed to protect the interest of a junior mortgagee in a landed estate, collecting rents, making leases, and even, by special leave of court, contracting for repairs. In suits to dissolve partnerships owning breweries or collieries Lord Thurlow appointed receivers to prevent squabbling partners from destroying the adventure: "I have even," he said, "taken the management from them sometimes."<sup>10</sup> A distinction between receiverships and managements has always been strongly felt in England; the double title "receiver and manager" is there still usual.<sup>11</sup> And the chancellors, feeling that supervision of the management of a business was inappropriate to the judicial function, strenuously resisted applications for managers. Lord Eldon felt obliged by Lord Thurlow's practice to take over the management of the Drury Lane Theatre—and repented it. When later he was asked to appoint a manager of the Italian Opera House, he refused; to do so would "justify an expectation that this court is to carry on every brewery and every speculation in the kingdom." He would liquidate the business; order it sold or foreclosed; "deal with it as property: but no further."<sup>12</sup> In other cases, when he could not harangue the parties into agreeing as to management, or compel the managing partner to manage equitably by injunction, he sometimes appointed managers for brief service pending liquidation, usually not till after decree for dissolution.<sup>13</sup> In the case of the Covent Garden Theatre, saying "that it was

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<sup>9</sup> The quotations are from *HIGH, op. cit. supra* note 6, at 2, 11, 5, 3. Their equivalents may be found in any text book on receivers.

<sup>10</sup> *Ex parte O'Reilly*, 1 Ves. Jr. 112, 130 (1790).

<sup>11</sup> *KERR, RECEIVERS* (9th ed. 1930) c. 9. It is evidence of the stability and coherence of which law is capable when it is treated more as *law* and less as a conjurer's bag than happens in this country that the structure and much of the text in the 1930 edition of Kerr are the same as in the first edition, 1869.

<sup>12</sup> *Waters v. Taylor*, 15 Ves. Jr., 10, 25–28 (1807–8); for subsequent proceedings see *Taylor v. Waters*, 1 My. & Cr. 266 (1836).

<sup>13</sup> See his cases cited in 2 *DANIELL, op. cit. supra* note 6, at 1727.

not the business of the court to manage or carry on from time to time a partnership of any kind," he would not appoint a manager; but he appointed a receiver to act as treasurer.<sup>14</sup> And when, in the middle of the century, railway and other public service companies commenced to defeat the hopes of investors, the courts conformed as nearly as possible to this precedent. *Receivers* were appointed at the suit of bondholders or judgment creditors, with fiscal duties with respect to tolls or income; but *management* was left in the company.<sup>15</sup> The courts did not say squarely that their duty *as courts* was to adjudge claims and order them satisfied so far as practicable, and that to engage in business in order to provide funds from which claims could be satisfied was an entirely different matter. But it is believed that their perception that railway management is inconsistent with the judicial function was a stronger ground for their refusal to undertake it than the technical ground which legalism put foremost, *viz.*, lack of power to take the management of a public undertaking from those to whom Parliament by charter had entrusted it.<sup>16</sup>

The attitude of American courts was in extraordinary contrast. Power to appoint managing receivers was assumed by the Federal courts without legislation and without adjudication.<sup>17</sup> There were instances of real judicial reluctance to make

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<sup>14</sup> *Const v. Harris*, 1 Turn. & Russ. 496, 518, 528 (1824). Chancellor Walworth of New York appointed a receiver of a newspaper for no longer "than is absolutely necessary to prevent a sacrifice of the property;" until sale, the defendants were to continue in editorial charge, under the direction of the receiver, who was to be *personally* liable for any improper publication. *Martin v. Van Schaick*, 4 Paige 479 (N. Y. 1834).

<sup>15</sup> A grant of managing powers to a receiver was condemned as inadvertent in *Russell v. East Anglian Ry.*, 3 M'N. & G. 128 (1850). See the directions as to forms of orders limiting the receiver's powers in *Fripp v. Chard R.R.*, 11 Hare 239, 262 (1853) and *Gardner v. London, Chatham & Dover Ry.*, L. R. 2 Ch. App. 201, 223 (1867). See KERR, RECEIVERS (2d Am. ed. 1877) 66-80.

<sup>16</sup> The judgment of Lord Cairns in *Gardner v. London, Chatham & Dover Ry.*, *supra* note 15, was clearly as much influenced by the first as by the second consideration.

The Railways Act of 1867, 30 & 31 VICT. c. 127, § 4, gives only to judgment creditors the right to obtain a *manager* of a statutory undertaking, *i. e.*, a public service corporation. KERR, *op. cit. supra* note 11, at 68, 308. The court will appoint at the suit of mortgagees a receiver of the fiscal officer type; or the mortgagees may themselves appoint a receiver or manager (formerly only if the mortgage so provided; now by statute), who, however, is their own agent or the company's, not the court's. *Ibid.* c. 14. Even under the Railways Act, *supra*, "it is submitted that the Court has no power to authorize a receiver or anyone else to carry on the undertaking except as agent for the undertakers." *Ibid.* 308.

<sup>17</sup> *Covington Drawbridge Co. v. Shepherd*, 21 How. 112 (U. S. 1858), is sometimes cited as an authority for the appointment of managing re-



the courts instruments to promote the business interests of litigants or of the financiers behind them.<sup>18</sup> From the beginning there were often circumstances in connection with corporate receiverships which raised a suspicion of foul play—not easy, in view of the faintness of the light thrown by reported cases upon the real aim and tendency of complicated transactions, to verify or to rebut.<sup>19</sup> Judges ethically fastidious were wary of permitting their courts to be used for ends not always apparent on the surface. But the Federal courts in middle western and southern circuits had but few important matters on their dockets. Some judges were doubtless flattered when national leaders of the bar pressed respectfully for protection of vast pecuniary interests. The patronage incident to protection was, moreover, fat. And if the Federal court would not appoint managers, a state court often would.<sup>20</sup> Moreover, when a court accepted jurisdiction real services to justice could be, and often were, rendered. With most judges the convention of reluctance inherited from Lord Eldon became little more than a form of words. Had interests opposed to the confusion of the administration of justice with the administration of business been audi-

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ceivers. But the receivership there sanctioned was rather a receivership of the tolls, on the English model.

<sup>18</sup> Collected by M. M. Cohn, *Railroad Receiverships* (1885) 19 AM. L. REV. 400. Justice Miller and District (later Circuit) Judge Caldwell were conspicuous in resistance to pressures to appoint managers.

<sup>19</sup> For example, one of the earliest "general" receiverships was at the instance of an embarrassed railway company itself, in the alleged interests (1) of the public, which would suffer if it ceased operation, and (2) of its bondholders (who, however, were not parties), in a suit to enjoin its judgment creditors from levying executions. The railway was ordered sold as a whole and its proceeds distributed among its creditors. It was bought in for what looks like a song—though it may have been a fair price. A large holder of bonds protested and declined to file a claim. In his subsequent suit his lien on the road was held to have been wiped out. *Macon & Western R. R. v. Parker*, 9 Ga. 377 (1851).

Chief Justice Chase declined jurisdiction of a similar bill by a corporation against its judgment creditors. *Hugh v. McRae*, Fed. Cas. No. 6,840. (C.C. S. C. 1869). But Justice (then Judge) Brewer appointed receivers of the Wabash *ex parte*. See *Wabash etc. R. R. v. Central Trust Co.*, 22 Fed. 272 (C. C. E. D. Mo. 1884). Objections deeper than to this procedural anomaly applied equally to many receiverships in "friendly" suits. See Moorfield Storey, *The Reorganization of Railway and Other Corporations* (1896) 30 AM. L. REV. 801; Chamberlain, *New Fashioned Receiverships* (1896) 10 HARV. L. REV. 139; Thompson, *The Court Management of Railroads* (1893) 27 AM. L. REV. 481.

<sup>20</sup> In *Williamson v. New Albany R. R.*, 30 Fed. Cas. No. 17,753 (C. C. D. Ind. 1857), Justice McLean declined to appoint a receiver in a foreclosure suit. The plaintiff then got a receiver and put through a shady reorganization in a state court. Judge Drummond, holding that Federal jurisdiction had attached in 1857, held these proceedings void and appointed a receiver. *Bill v. New Albany Ry.*, Fed. Cas. No. 1,407 (1870).

ble through counsel, perhaps the step would not have been taken. But the initiation of a receivership was usually virtually *ex parte*. In form there was a suit, with plaintiff and defendant. But the defendant admitted the allegations of the bill and joined in the prayer.<sup>21</sup> Any substantial questions to be litigated came up later on intervening petitions. The consent receiver was given managing powers without the addition of the word "manager" to his title. It is believed that there was never an important judicial consideration of the compatibility of protracted railway management with the judicial function. In 1881 Justice Miller, in a dissenting opinion, pointed out that the appointment of railway receivers, "as well as the power conferred on them, and the duration of their office, has made a progress which, since it is wholly the work of courts of chancery and not of legislatures, may well suggest a pause for consideration."<sup>22</sup> But this came late; Justice Miller noted in the same opinion that of five hundred or more railway companies in his circuit (the eighth, west of the Mississippi) hardly more than half a dozen had escaped the hands of a receiver. Power to appoint managing receivers, without ever having been a question, had become a fact.

But though the question of power to set up managing receiverships was perhaps no longer open, it was not too late so to define their legal nature as to prevent consequences subversive of ordinary rights and remedies. A theory of their nature adequate for that purpose lay within easy reach. Sense of it, though often inarticulate, has molded a large body of usage. It rests upon the obvious distinction between the receiver as custodian and the receiver as manager.

There can be no practical objection to regarding the receiver-custodian as the hand of the court to hold property safe beyond the reach of all who have claims to or against it founded on transactions prior to his appointment. As to them, and all others acting in their interests (which it may be convenient to call "pre-receivership interests"), the property lies as if static in an imaginary pound until their rights shall have been adjudicated and such satisfaction as is equitable shall have been awarded. The impounding is for their own ultimate benefit. But if the property is a business, their interests demand that it be maintained as a going concern. That demand cannot be complied with if the property must be deemed impounded as

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<sup>21</sup> "Out of one hundred and fifty cases spread over the last thirty years . . . there were eighty in which the president of the road in question was appointed receiver; twenty-five others were general managers; seventeen, superintendents; and sixteen, vice-presidents." SWAIN, *ECONOMIC ASPECTS OF RAILROAD RECEIVERSHIPS* (1898) 98.

<sup>22</sup> *Barton v. Barbour*, 104 U. S. 126, 137 (1881).

against all the world. Compliance with it is a favor to pre-receivership interests.<sup>23</sup> It would be reasonable for the courts to say to these interests: "The consequence of our granting this favor is that the property can be deemed impounded only as against yourselves. The receiver as custodian is the court's agent to assure that you do not interfere with the orderly effectuation by the court of your respective rights. But the receiver as manager is your agent, not the court's. The court will supervise and direct him and hold him accountable to you as trustee.<sup>24</sup> Beyond that, the business in its exposure for your benefit to the outside world can have no other rights, remedies, privileges or immunities than the law gives to any other business of the same nature."

### III. INTERFERENCE WITH RECEIVERSHIPS AS CONTEMPT PRIOR TO 1877

The cases prior to 1877 in which it had been laid down that the court would protect its receiver's possession from unauthorized disturbance, whether by violence or by suits at law, were consistent with this theory. In the "leading cases" there was in fact no question of disturbing the receiver's possession or of contempt of court.<sup>25</sup> The holdings were that after a re-

<sup>23</sup> Much has been said as to the *public* interest in maintaining insolvent railways as going concerns through receivers. See, *e. g.*, the majority opinion in *Barton v. Barbour*, *supra* note 22; *Union Trust Co. v. Illinois Midland Ry.*, 117 U. S. 434 (1886). The public is not represented by counsel in a private equity suit. An appropriate way for it to protect its interest would be by legislation.

There is of course no reason why a business should have greater immunities when it is operated by a public officer for the purpose of preventing its cessation of service than when it is operated by its private owners. In both cases the pecuniary interests in its earnings are private.

<sup>24</sup> There seems to be no objection to calling a receiver a trustee more substantial than that he has no legal title to the property in his charge. CLARK, *RECEIVERS*, (2d ed. 1929) § 43. The word "agent" would meet that objection. See note 16 *supra*. Receivers appointed otherwise than by a court are not judicial officers. CLARK, *op. cit. supra*, at § 11 (c).

In an interesting case, a receiver appointed by debenture holders under the terms of their mortgage sought to restrain the collection from property in his hands of a fine for an offense of selling adulterated milk committed during his management. The court indignantly denied the injunction. *Jarvis v. Islington Borough Council*, 73 J. P. (N. C.) 323 (Ch. Div. 1909). Yet if he had been appointed by a judge the distraint to collect the fine would in this country conventionally be regarded as a contempt.

<sup>25</sup> In *Angel v. Smith*, 9 Ves. Jr. 335 (1804), the question was as to an action of ejectment which had been brought without leave of the Chancellor for lands in the possession of a chancery receiver. Lord Eldon "cautioned the Solicitor that he would proceed at his peril," saying that it was a contempt to disturb sequestrators or receivers: for when a receiver has been appointed in a suit the proper way to assert a claim adverse to those

ceiver had taken possession no valid title to the "estates in the cause" could be established by proceedings in another court without leave of the chancellor. For how could the chancellor do his duty of determining all rights in the *res* if rights which he decreed, or those of the purchaser under his decree, might be upset by a title which had never been before him?

In another class of cases persons acting in behalf of pre-receivership interests—against which, under the theory suggested, pound walls would be maintained—had seized (usually under process at law) property in the hands of, or money payable to, a receiver, or had entered the property asserting possessory rights. The due administration of justice requires that pre-receivership claims be enforced against the property only as allowed by the chancellor "in the cause." The disturbers were in contempt. But such contempts were not *punished*. They were dealt with as civil torts, in effect as by injunction requiring desistance and reparation on pain of punishment if the requirement were not complied with.<sup>26</sup> When such a require-

of the parties was by coming in to be examined *pro interesse suo*. But finding that the ejectment would be the best way of determining the claim, "the Lord Chancellor, after much discussion," permitted it to proceed.

In *Wiswall v. Sampson*, 14 How. 52 (U. S. 1852), the question was as to title to real estate. The successful claimant had purchased at a sale directed by a state court of equity in a suit in which a receiver had been appointed. While this receiver was in possession a Federal marshal had sold the property to the unsuccessful claimant in execution of a judgment at law in the Federal court. Incidentally to its holding that the marshal's sale was void the court said, on the authority of *Angel v. Smith*, that "when a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without leave of the court first obtained, will be a contempt on the part of the person making it." The execution sale did not in fact disturb the receiver's possession. The holding was simply that it was ineffectual to give title.

<sup>26</sup> Defendants or claimants of pre-receivership rights enjoined from attempting to enforce their claims without leave: *Johnes v. Claughton*, Jac. 573 (1822); *Langford v. Langford*, 5 L. J. Ch. (N. S.) 60 (1835); *Fripp v. Bridgewater Canal Co.*, 3 W. R. 356 (1855); *Vermont & Canada R. R. v. Vermont Central R. R.*, 46 Vt. 792 (1873); *cf.* *Turner v. Turner*, 15 Jur. 218 (1850). Judgment creditor or sheriff acting on his behalf required to abandon levy and restore property seized or *its value*: *Russell v. East Anglian Ry.*, *supra* note 15, at 100, 114-115, 117-119 (1850); *Hawkins v. Gathercole*, 1 Drewry 12, 17-20 (1852); *De Winton v. Mayor of Brecon*, 28 Beav. 200 (1860); *Lane v. Sterne*, 3 Giff. 629 (1862); *Commonwealth v. Young*, 11 Phil. 606 (Pa. 1876). Creditor required to abandon garnishment of claims payable to a receiver: *Ames v. Trustees of the Birkenhead Docks*, 20 Beav. 332 (1855); *cf.* *Chafee v. Quidnick Co.*, 13 R. I. 442 (1881). Goods replevied from receiver ordered returned: *In re Vogel*, 28 Fed. Cas. No. 16,983 (S. D. N. Y. 1869). Landlord dispossessing bankrupt required to give possession of premises to assignee in bankruptcy: *In re Steadman*, 22 Fed. Cas. No. 13,330 (N. D. Ga. 1873). Vessel taken under distress warrant restored to receiver: *Noe v. Gibson*, 7 Paige 513 (N. Y. 1839).

The same result as in the foregoing cases is often accomplished by injunct-

ment suffices to abate or repair an obstruction of the due course of justice, the summary power, if it is limited by its policy, does not extend to punishment. But when a contemnor is so contumacious—*i.e.*, so resistant to performance of or non-interference with specific legal duties incident to litigation that it seems impracticable to abate his obstructive conduct except by punishment, he is punishable. The object, however, is not punitive. It is the same as that of a requirement of desistance or reparation. Lord Eldon declined to punish for a forcible taking from a messenger in bankruptcy because he could not do so unless the taking was contumacious—a question which, since the property had been restored to proper custody, he declined to investigate; the messenger might if he saw fit pursue a remedy at law.<sup>27</sup> If the object of the contempt power has been or can be effected otherwise, or if it cannot be effected at all, reason for summary punishment fails.<sup>28</sup> Any *crime* involved in a contempt belongs to the criminal law.

But five cases before 1877 have been found in which persons who had disturbed the possession of a sequestrator or receiver

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tion on petition, instead of in contempt proceedings: *Skip v. Harwood*, 3 Atk. 565 (1747); *Ex parte Cochrane*, L. R. 20 Eq. 282 (1875); *HIGH, op. cit. supra* note 6, at § 747; *CLARK, op. cit. supra* note 24, at § 633.

In England, since the Judicature Acts, if a person taking property from a receiver without leave is found to be entitled to possession as against the receiver, the court, making such order as the justice of the case requires, authorizes his retention, and does not even require him to pay the costs of the contempt proceeding. *Searle v. Choat*, 25 Ch. Div. 723 (1884); *In re Henry Pound, Son & Hutchins*, 42 Ch. Div. 402 (1889).

In a contest for possession between two receivers, one state and one Federal, there were *in terrorem* findings of contempt; but the conflict was settled by a deal between the rival judgment creditors. *Spinning v. Ohio Life Insurance & Trust Co.*, 2 Disney 336 (Ohio 1858); *Bell v. Ohio Life Insurance & Trust Co.*, Fed. Cas. No. 1,260 (C.C. S. D. Ohio 1858).

<sup>27</sup> *Ex parte Page*, 17 Ves. Jr. 59 (1810).

<sup>28</sup> The confusion as to "civil and criminal contempts" arises from the habit of seeking definitions of particular crimes and torts. If we substitute for the question whether a particular contempt is *civil or criminal* the question whether punishment is "necessary" to secure due performance of legal duties incident to litigation, the haze blows away. The same sort of obstruction with the same sort of object may in some circumstances be remediable without punishment, in others not.

For discussions of the subject, not altogether satisfactory, see Beale, *Contempt of Court, Criminal and Civil* (1908) 21 HARV. L. REV. 161; 4 BL. COMM. 285; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492 (1911).

The nature of the contempt power is more fully discussed in an article entitled *The Reasonable Scope and Limits of the Summary Power to Punish for Contempt*, shortly to appear in the COLUMBIA LAW REVIEW. It is not pretended that judicial practice is consistently in accord with the views expressed. But the harmony is much closer than the sensational contempt cases which come first to mind might seem to indicate.



were summarily *punished*. In all, the disturbance seems to have been on behalf of a pre-receivership interest, in flagrantly contumacious disregard of the rule that no right or claim may be enforced in such an interest save as allowed by the chancellor. In one it was in the interest of the defendant whose goods had been impounded.<sup>29</sup> In another a judgment creditor of the defendant, after his own attorney had been enjoined from proceeding under the judgments, himself instituted proceedings to garnish claims of the defendant payable to the receiver and avowed his purpose to persist in efforts to collect his judgments notwithstanding the receivership, which he deemed a nullity.<sup>30</sup> In the other three cases the relation of the disturber to the interests cognizable in the equity suit was not stated; but the inference is strong that the disturbance was on behalf of a party or claimant.<sup>31</sup>

It may seem fortuitous that power to deal summarily with disturbance of a receivership had been used mainly, if not exclusively, within what may be called the family circle of the

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<sup>29</sup> Lord Pelham v. Duchess of Newcastle, 3 Swanst. 284 (1713). Sequestrators having sequestered at Paris House certain goods of the defendant Duchess, they were forcibly dispossessed by persons acting under Grandman, the Duchess's solicitor, who was committed.

<sup>30</sup> Richards v. People, 81 Ill. 551 (1876).

<sup>31</sup> Harvey v. Harvey, 2 Ch. Cas. 82 (1681). "Sir Thomas Harvey, the Plaintiff, had a Decree against the Defendant, for the Surplus of the Estate of Sir John Harvey as Residuary Legatee: The process to discover the estate went so far as a Sequestration, and Sir Thomas Hanmer was prosecuted on Contempt, for that the House wherein the Testator's Goods were, being secured, and the Trunks by former Order lock'd and sealed, Affidavit was made that a Smith in Disguise on Friday broke open the House, that then the Chests, etc., were opened, and carried away, and Goods, etc., and that Sir Thomas Hanmer was then there with others, and he being now prosecuted for the Contempt, was ordered to be examined on Debate." Nothing is stated as to Sir Thomas Hanmer's relation to the suit. But it seems highly probable that if he was not himself a party to the suit in which the surplus of the estate had been decreed to the plaintiff, he was acting in the interests of a party and contumaciously with respect to the decree.

Marsh v. Goodall, unreported, M. R. Jan. 1857, *Reg. Lib.* B 288, Vol. 1 SETON, FORMS OF JUDGMENTS AND ORDERS (7th ed. 1912) 454. Persons (presumably defendants in the suit or their agents) were summarily committed for their contempt in distraining for rent and persuading tenants not to attorn after the appointment of a receiver.

Broad v. Wickham, 4 Sim. 511 (1831). In a brief decision upon an ex parte motion Sir Lancelot Shadwell, V. C., directed that "a Person" who "had taken forcible possession of the Estates in the Cause, over which a Receiver had been appointed," be summarily committed, overruling the refusal of the Registrar to issue an attachment without opportunity to the alleged contemnor to show cause why he should not be attached. It is of course possible that the "Person" was a complete stranger to any interest in litigation in the cause. But it seems unlikely.

receivership, to prevent disorderly assertion of interests in the impounded *res* on behalf of members of that circle. It may seem that this indicates only that outsiders were not so audacious as to break in, and not that the power was felt as circumscribed by the circle.

This is to some extent rebutted by the only instances noted prior to 1877 of collision between receiverships and social unrest. Throughout the first half of the nineteenth century the Irish peasantry was not unnaturally turbulent. Receiverships of Irish estates were common. A receiver distrained upon a tenant for rent. The tenant "rescued the distress." A motion to attach him for contempt was denied. "I have no jurisdiction," said the Master of the Rolls, "to interfere in this case."<sup>32</sup> Another Irish receiver could not collect his rents. He had been assaulted and his life threatened. He obtained a writ of assistance requiring the sheriff to give him police protection. It was not contemplated that persons interfering or resisting should be punished for contempt. They were, like other law-breakers, to be turned over to the criminal courts. A magistrate of the locality was directed to assist the sheriff.<sup>33</sup> The writ of assistance had little of the quality of process in litigation.<sup>34</sup> It was in effect a commission to the sheriff to organize

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<sup>32</sup> *Fitzpatrick v. Eyre*, 1 Hogan 171 (1824). For the benefit of any reader to whom the technical reason stated may seem adequate to explain it, the decision is quoted in full: "I have no jurisdiction to interfere in this case. The receiver is proceeding to enforce the rent by a common law remedy; and he can have no remedy for this rescue but at the common law, or under the statutes which apply to rescue of distress, and those remedies are various and effectual. Had this tenant used any violence towards the receiver (who is an officer of this court) or threatened to use any, I would attach him, but not otherwise."

<sup>33</sup> *Dillon v. Dillon*, Irish Chancery, 7th March, 1825, stated in SMITH, *TREATISE ON THE DUTIES AND OFFICE OF A RECEIVER* (3d ed. 1836) 146. The magistrate specified in the order for the writ was himself a defendant in the cause, and was said to have encouraged interference with the receiver's collections. Contempt proceedings against such a contumacious defendant would have been a different matter from contempt proceedings against the rebellious peasants. Compatibly with the view that jurisdiction depends on connection with the suit, the tenants might have been deemed in contempt if their resistance of the receiver's collections was on the ground of the defendant-landlord's right to the rents as against the receiver.

<sup>34</sup> The writ of assistance is a process *in rem*. *Penn. v. Lord Baltimore*, 1 Ves. Sr. 444, 454 (1750); 2 MADDOCK, *CHANCERY PRACTICE* (3d Am. ed. 1827) 469-470. It is a command to the sheriff to use force, not to transmit an order. It was ordinarily issued only as a last resort, after a person in wrongful possession has disregarded a tautological cumulation of orders and process *in personam*. *Dove v. Dove*, Dick. 618 (1783); *Kershaw v. Thompson*, 4 Johns. Ch. 609 (N. Y. 1820); DANIELL, *op. cit. supra* note 6, at 1062-3. But when the writ was sought to put a receiver in possession as against a defendant or his tenants, less preliminary formality

and direct a military force for the protection of the receiver. It did not, however, amount to a declaration of martial law under which the chancellor, superseding the criminal courts, would deal with offenders somewhat as at drum-head court martial.

In modern British usage, though judicial language has not conceded the limitation, the contempt power has continued to operate only within the family circle of the receivership. Its furthest reach has been when a party to the cause, or a person closely connected in interest with a party, has been restrained from unfair competition with the receiver as manager,<sup>35</sup> or from hiring away the receiver's employees.<sup>36</sup> A different picture is presented when an American court restrains an outsider from competition with a receiver.<sup>37</sup>

#### IV. THE RIGHT TO SUE RECEIVERS WITHOUT LEAVE

In other respects than in its restraint in use of the contempt power, British usage has been continuously consistent with limitation of the special privileges and immunities of a receivership to its family circle. Even in England, however, this limitation is not explicitly acknowledged by judicial language. And usage in the United States, though very considerably influenced by inarticulate feeling of its reasonableness, has been in important respects inconsistent with it.

A managing receiver acquires in the course of business claims in tort and contract against outsiders. Sometimes such a claim is summarily determined "in the cause;" sometimes it is remitted to plenary suit. Unless the interests involved are trifling, or the outsider's defense is clearly insubstantial, or the outsider consents to summary disposition, the court's own sense of fitness usually ordains trial in a plenary suit. When a plenary suit at law is authorized by a Federal judge in equity, he may require that it be brought in the Federal court,<sup>38</sup> and he himself—though usually he will not if another judge is available—may sit in it. If it is in fact true that the receiver's possession and manage-

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was required. *Sharp v. Carter*, 3 P. Wms. 375n (1735). The command of the writ was that the sheriff or marshal put and keep the person entitled in quiet possession. For forms, see 1 GRANT, CHANCERY PRACTICE (5th ed. 1845) 606; SETON, *op. cit. supra* note 31, at 417.

<sup>35</sup> *Helmores v. Smith*, 35 Ch. Div. 449 (1886); *cf. In re Woven Tape Skirt Co.*, 12 Hun 111 (N. Y. 1877).

<sup>36</sup> *Dixon v. Dixon*, [1904] 1 Ch. Div. 161; see KERR, *op. cit. supra* note 11, at 310n. *Cf. In re Gent*, 40 W. R. 267 (1892).

<sup>37</sup> *Brady v. South Shore Traction Co.*, 197 Fed. 669 (E. D. N. Y. 1912). That the summary jurisdiction extends to restraining an outsider from unjust discrimination against a receiver was, however, denied in *Wood v. New York & New England R.R.*, 61 Fed. 236 (C. C. Mass. 1894).

<sup>38</sup> *Porter v. Sabin*, 149 U. S. 473, 479, 13 Sup. Ct. 1008, 1010 (1893).

ment are the possession and management of the court itself, it follows that, in ancillary suits as well as in summary proceedings, the court sits as judge in its own case in violation of an elementary principle of due process of law. But objection on that ground would be felt as merely technical. For satisfactory justice is the rule in both sorts of ancillary civil proceedings against outsiders. The question of the outsider's *right* to have his obligations to a receivership determined in an independent suit in another court has never become important.

Outsiders acquire claims against businesses managed by receivers. Theoretical objections to chancery control of proceedings to establish such claims have been reinforced in this country by practical objections. In England a receiver has always been suable in other courts without leave of the chancellor on claims of outsiders arising during his own management.<sup>39</sup> The question of leave to sue on such claims has never there been important. For he is sued, not in his official capacity as receiver and manager, but personally. This is a strong recognition that as to those with whom he comes in contact as such, he is the manager of a private business and not an officer of the court. If his management has given rise to liabilities in tort or contract, he must pay; the question whether he incurred the liability in the course of his official duty, and is therefore entitled to indemnity from the property in his hands, is one between him and the chancellor.<sup>40</sup>

An antagonism in the United States courts toward the English usage of suing as freely for injuries when their infliction was incident to the operation of a business by a receiver as when it was incident to a private operation of business made the status of operating receiverships with respect to the general public an important object of attention until 1887. Obviously, when a farmer's cow is killed or a passenger or brakeman is injured by a receiver's train, it is not the court which inflicts the injury, nor is the administration of justice obstructed by legal exaction of reparation for it if it is tortious. The Federal courts had to a considerable extent recognized the incongruity—or at least the impracticality—of investing the operation of a receivership railway with special privileges. Receivers were required to pay debts as they accrued—taxes, wages, bills for

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<sup>39</sup> *Aston v. Heron*, 2 Myl. & K. 390 (1834). Lord Brougham asserted the power to enjoin actions of tort against a receiver on good grounds. But they may, without leave, be prosecuted to judgment unless enjoined. "Surely," he said, "it would be preposterous to contend that this court alone could punish or redress wrongs like these—preposterous to apprehend any peril to its jurisdiction—puerile to imagine that its dignity would sustain any diminution if the wrongdoer (i.e., the receiver) were left to answer for his offense before a jury."

<sup>40</sup> KERR, *op. cit. supra* note 11, at 299-309.

materials, adjustments with other railways, damages for goods lost in transportation.<sup>41</sup> But, anomalously, tort claimants might not liquidate the amount of their claims by suit, let alone enforce payment of judgments. To sue a receiver without leave, even for injuries incident to his own operation, was said to be a contempt of the court that appointed him.<sup>42</sup> And many Federal judges were prejudiced against tort claims.<sup>43</sup> Until Judge Caldwell broke the practice by granting a blanket leave to sue in an order appointing a receiver, "leave to sue a railroad receiver in a court of law was rarely given." The duty to conserve the property for pre-receivership interests was deemed a reason for denying it. The procedure by petition in the receivership suit "was attended with great delay, costs and inconvenience to the claimant. On the other hand, it was found extremely convenient and profitable to the railroad company and its bondholders to have the litigation growing out of the operation of the road carried on in a chancery court far removed from the locality where the cause of action arose and the claimant and his witnesses resided."<sup>44</sup> A railway employee injured, without negligence on his own part, in the course of his duties, might deem himself lucky if a special master, finding him "faithful and deserving," recommended that the court, as a gratuity, allow him his wages for the time he was incapacitated.<sup>45</sup>

The Supreme Court confirmed these practices by its decision in *Barton v. Barbour*,<sup>46</sup> holding an averment that the plaintiff had not obtained leave to sue a good defence to an action by a passenger for injury in an accident caused by a defective rail. The majority opinion could see no difference between suits against the receiver on claims incident to his own management and suits to effectuate pre-receivership interests. The adminis-

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<sup>41</sup> *Cowdery v. Galveston R.R.*, 93 U. S. 352 (1876); *Wallace v. Loomis*, 97 U. S. 146 (1877).

<sup>42</sup> *Thompson v. Scott*, 4 Dill. C. C. 508 (D. Iowa 1876).

<sup>43</sup> Till 1887 decisions as to tort claims against Federal receivers rarely got into the reports. The attitude is illustrated by the line of cases holding that an employee of a railway receiver can claim no benefit from a statute providing that employees of railway companies shall not be subject to the fellow servant rule. For a receiver is not a railway company. *Central Trust Co. v. East Tennessee Ry.*, 69 Fed. 353 (C. C. N. D. Ga. 1888).

<sup>44</sup> Caldwell, *Railroad Receiverships in the Federal Courts* (1896) 30 AM. L. REV. 161, 165. Judge Caldwell conceded that claimants were more liberally treated by juries than by special masters and chancellors and that scattered local suits would subject the receiver to inconvenience and the estate to expense. "But why," he asked, "should a court of equity deprive a citizen of his constitutional right of trial by jury, and subject him to inconvenience and loss, to make money for a railroad corporation and its bondholders?"

<sup>45</sup> See *Missouri Pacific Ry. v. Texas & P. Ry.*, 33 Fed. 701 (C. C. E. D. La. 1888).

<sup>46</sup> 104 U. S. 126, 128-130, 133 (1881).



tration of justice in the equity suit, the court thought, involved the ascertainment of priorities and equities not only among pre-receivership claims but also among claims incident to the receiver's management.<sup>47</sup> And it was conceived that to admit suits for personal injuries or for wages would not only "permit the trust property to be wasted in the costs of unnecessary litigation" but would also result in inequitable collections of the full amounts of claims liquidated by the suits. The argument that tort claimants would lose their right of trial by jury was condemned as ignoring the fundamental principle that that right "does not extend to cases of equitable jurisdiction."

Justice Miller, dissenting, perceived and stated the distinction which has been here stressed.<sup>48</sup> It was more clearly stated later, however, by Judge Caldwell in his opinion granting blanket leave to sue:

"Where property is in the hands of a receiver simply as custodian, or for sale or distribution, it is proper that all persons having claims against it, or upon the fund arising from its sale, should be required to assert them in the court appointing the receiver; [but] when a court, through its receiver, becomes a common carrier, and enters the lists to compete with other common carriers for the carrying trade of the country, it ought not to claim or exercise any special privileges denied to its competitors, and oppressive on the citizen."<sup>49</sup>

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<sup>47</sup> Sometimes indeed it did. All valid claims incident to the receiver's management must of course be paid before anything can be paid to pre-receivership interests—except on claims, as for wages or supplies, which have priority in the interest of maintaining the business as a going concern. And when railways were "milked" through receiverships, and a bankruptcy of the receivership superimposed upon the bankruptcy of the prior management, there was sometimes nothing at all left for the pre-receivership interests for whose theoretical benefit the receivership was undertaken. In the Illinois Midland case, for example, there were thirteen issues of receiver's certificates, and the controversy as to participation in the proceeds of sale was between their holders and other creditors of the receivership. A practical way to deal with such a situation might be to surcharge both the receiver and the judge who appointed him. When receiverships are not undertaken or are protracted without due regard for their ability to pay their own way, it is hard to see why claims arising during the receiver's management may not properly be both liquidated by judgment and collected under legal process. If in occasional instances there is reason why the enforcement of such claims should be regulated by a court of equity, injunctions against their enforcement without its leave would be sufficient. See *Aston v. Heron*, *supra* note 39.

<sup>48</sup> 104 U. S. at 138-9; this is the same opinion that was cited *supra* note 22.

<sup>49</sup> *Dow v. Memphis & Little Rock R.R.*, 20 Fed. 260, 268 (1884). Judge Caldwell did *not* authorize the enforcement against the receivership *corpus* of claims liquidated by judgments of other courts without leave of the chancellor. This qualification of outsiders' rights, though illogical, has become as a practical matter unobjectionable.

This opinion contributed to the settlement—a compromise—of the specific issue of the right to sue receivers without leave. Three years later Congress provided that a Federal receiver might be sued without leave “in respect of any act or transaction of his in carrying on the business” under his management. There was a proviso, however, that suits without leave should be “subject to the general equity jurisdiction” of the court in which he was appointed so far as “may be necessary to the ends of justice.”<sup>50</sup> The Supreme Court, restraining a tendency of the circuit courts to construe the proviso as nullifying the right,<sup>51</sup> held it to mean only that the Federal court in equity may control the time and manner of paying judgments obtained elsewhere so as to prevent inequitable priorities; it must, however, treat judgments elsewhere as conclusive of the validity and amount of the claims adjudicated.<sup>52</sup> So in a proper receivership properly conducted a judgment elsewhere without leave on a claim incident to the receiver’s operation is fully valid and effective.<sup>53</sup>

Other grievances against special privileges enjoyed by businesses run by Federal receivers were lessened by another section of the same Act of Congress requiring Federal receivers to manage property “according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.”<sup>54</sup>

#### V. SUMMARY PUNISHMENTS OF STATE OFFICERS FOR UNDUE ENFORCEMENT OF STATE POLICIES

Another hot grievance arose, however, in South Carolina under Governor “Pitch-fork Ben” Tillman at the height of the Populist uprising. A receiver defaulted in the payment of a tax, claiming that it was based upon an excessive and discriminatory valuation of the railway property under his management. A sheriff distrained excessively upon freight cars, in restraint of interstate commerce and in violation of the private rights of

<sup>50</sup> 24 STAT. 554 (1887), 28 U. S. C. § 125 (1926); 28 U. S. C. A. § 125.

<sup>51</sup> See *Central Trust Co. v. East Tennessee Ry.*, 59 Fed. 523 (C. C. Ky. 1894).

<sup>52</sup> Cases cited in *Riehle v. Margolies*, 279 U. S. 218, 226n., 49 Sup. Ct. 310, 313n. (1929).

<sup>53</sup> Such a judgment is not to be confused with a judgment in another court in a suit instituted before the receivership against a defendant whose property is put in the hands of a receiver during its pendency. Such a judgment, by a statute qualifying what has been said here as to chancery control of pre-receivership claims, is now conclusive as to the amount and validity of the claim adjudged. See *supra* note 52. But there is no presumption or probability that it will be fully collectible.

<sup>54</sup> 36 STAT. 1104 (1911), 28 U. S. C. § 124 (1926).

shippers and consignees. In a summary proceeding in the suit in which the receiver had been appointed, the court enjoined the collection of the tax until its validity should have been determined in a proper proceeding and ordered the sheriff to discharge his levy on the cars.<sup>55</sup> For disobedience of this injunction the sheriff was punished for contempt, and the Supreme Court sustained the Circuit Court's summary jurisdiction.<sup>56</sup> Somewhat contemporaneously, a constable seized without warrant an undelivered consignment of liquor from a freight warehouse of the same receiver as being within the state in violation of its Dispensary Laws. On the return of an order to show cause why he should not be punished for contempt he defended the seizure and made no offer to restore the liquor—which, having been delivered to a sheriff, was indeed no longer under his control. He was sentenced to be imprisoned until he should restore the liquor and for three months thereafter. The jurisdiction of the court to do this was sustained by the Supreme Court.<sup>57</sup>

The illegality of the conduct both of the sheriff in the tax case and of the constable in the liquor case scarcely admits of question. But it is to be noted that both were acting in support of policies strongly and not unnaturally sustained by dominant feeling in the state. A sense of the vindictive discrimination involved in Populist railway taxation should not obliterate the fact that the resentment which it expressed was reasonable. The extravagances in which that resentment resulted were perhaps necessary conditions precedent to a willingness of Congress to force railways to behave reasonably. The reasonableness and propriety of the policy of the state's Dispensary Laws are obvious. And resentment at its emasculation under cover of the constitutional limitation created by *Bowman v. Chicago & Northwestern Ry.*<sup>58</sup> and *Leisy v. Hardin*<sup>59</sup> may perhaps be conceded to have been both natural and just.

In view of the unlawfulness of the acts of both the sheriff and the constable, the only holdings in the contempt cases which natural resentment could condemn without confusing its objects were those sustaining summary Federal jurisdiction by reason of the receivership. The Memorial to Congress by the Legislature of South Carolina<sup>60</sup> did not, to be sure, avoid confusion of issues. Nor was it cool or fair. But the inflated language of its analysis of legal history unreasonably expressed a reasonable view of the anomaly of operating receiverships and

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<sup>55</sup> Ex parte Chamberlain, 55 Fed. 704 (C. C. S. C. 1893).

<sup>56</sup> In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785 (1893).

<sup>57</sup> In re Swan, 150 U. S. 637, 14 Sup. Ct. 225 (1893).

<sup>58</sup> 125 U. S. 465, 8 Sup. Ct. 689 (1888).

<sup>59</sup> 135 U. S. 100, 10 Sup. Ct. 681 (1890).

<sup>60</sup> (1894) 28 AM. L. REV. 161.

of the special privileges for private business which they had unnecessarily established.<sup>61</sup> Had the receiver proceeded against the tax and the liquor seizures not summarily but as a domestic corporation of South Carolina would have been obliged to proceed, the results would have been the same in the end; and resentment at the attrition of popular policies would not have been convertible into an outraged sense of subjection to judicial tyranny.

## VI. CONCLUSION

The South Carolina grievances merged and disappeared into those of the Bryan campaign. The leave to sue controversy subsided after the compromise act of 1887. The punishment of strike activities as contempt of receiverships ceased with the establishment of the labor injunction;<sup>62</sup> and labor resentment, many times multiplied, shifted to that legal institution. Latterly, the nearest to an occasion for popular attack upon the theory that interference with a receivership, in its management aspect, is obstruction of the administration of justice, was when Judge Mayer punished Comptroller Craig of New York City for statements as to his conduct of a street railway receivership.<sup>63</sup> Popular attack was averted by a Presidential pardon. It may now seem academic to insist that the theory that the operation of a business by a receiver is an agency for the court and not for private interests is contrary to fact, and to urge that it be discarded because it is a legal fiction. Many unobjectionable judicial practices have developed through that fiction. But insofar as they are beneficent, their survival will not depend upon the survival of the fiction. Its abandonment, moreover, would not only serve the reality and coherence of law

<sup>61</sup> Stripped of rhetorical extravagance the one-sidedness of the South Carolina argument might seem no greater than that of Judge Taft's answer to it in an address to the American Bar Association, *Criticisms of the Federal Judiciary* (1895) 29 AM. L. REV. 641.

<sup>62</sup> It is interesting to note that the last reported summary punishment—by Taft, J., in 1894, *supra* note 7—for unlawful interference with a receivership in a strike was incident to the same strike in which the Supreme Court, by its decision in *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900 (1895), may be deemed, regardless of its specific holdings, to have firmly established the labor injunction.

<sup>63</sup> *United States v. Craig*, 266 Fed. 230 (S. D. N. Y. 1920) and 279 Fed. 900 (S. D. N. Y. 1921); habeas corpus granted, *Ex parte Craig*, 274 Fed. 177 (C. C. A. 2d, 1921); dismissed, 282 Fed. 138 (C. C. A. 2d, 1922); dismissal *aff'd*, 263 U. S. 255, 44 Sup. Ct. 103 (1923). Mr. Craig's reliance upon habeas corpus when an appeal was open to him was held to preclude review of the correctness of his conviction. The concurring opinion of Taft, C. J., as well as the dissent of Holmes, J., leave it questionable whether Judge Mayer's holding that Mr. Craig's statements obstructed the administration of justice would, if reviewed, have been sustained.

but might also prevent occasional summary adjustments of private rights in contempt cases where the arbitrary procedure, if nothing more, may sometimes raise doubt as to the justice of the result.<sup>64</sup>

To return to the starting point of this inquiry: A question for lawyers raised by the punishments for contempt in 1877 is whether they were within the policy of a power which theoretically exists only to the extent that its exercise is "necessary" to prevent obstruction of the administration of justice. Whether conduct tends to obstruct the administration of justice is a question of fact. Judge Drummond might have directed the Federal District Attorneys who appeared in the cases to proceed by indictment in order that the question of fact might be determined by a jury.<sup>65</sup> He must have charged, in the language of the Federal criminal statute, that the defendants should be acquitted unless the evidence established that they had *by threats or force obstructed, or impeded, or endeavoured to obstruct or impede, the due administration of justice in a court of the United States*. How many lawyers, as jurymen—what they might argue as lawyers is another matter—would have found the defendants guilty?

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<sup>64</sup> If a person disputing a claim of lien by the receiver of a ship-yard takes from the receiver's possession his own boat, which the receiver had had for repairs, may he be punished for contempt? See *In re Dialogue*, 215 Fed. 462 (D. N. J. 1914); *cf. In re Day*, 34 Wis. 638 (1874); *United States v. Jose*, 63 Fed. 951 (C. C. N. D. Wash. 1894); *National Corp. v. Bartram Hotel Co.*, 263 Fed. 250 (E. D. Pa. 1920), *aff'd*, 263 Fed. 250 (C. C. A. 3d, 1920).

Is it fitting that a claim by a solvent railway of a joint right to use tracks of a railway in the hands of a receiver should be determined in a contempt proceeding? *Lake Shore Ry. v. Felton*, 103 Fed. 227 (C. C. A. 6th, 1900); *cf. Metropolitan Trust Co. v. Columbus Ry.*, 95 Fed. 18 (C. C. S. D. Ohio 1899). See also the competition cases cited *supra* notes 35-37.

To what extent may a Federal receivership arrest the enforcement of state criminal law against a receiver? See *United States v. Murphy*, 44 Fed. 39 (C. C. S. D. Cal. 1890). *Cf. supra* note 24.

If a receivership loses money through a bank failure caused by an absconding cashier who had knowledge of the receiver's deposits, is the cashier summarily punishable for contempt? Even the summary *punishment* (not a requirement to restore, but definitely punitive) of a receiver himself for misappropriating \$10,000 raises a question. *Cartwright's Case*, 114 Mass. 230 (1873).

<sup>65</sup> Under the statute which is now 31 STAT. 188 (1900), 18 U. S. C. § 391 (1926). It was originally § 2 of the contempt statute of 1831, of which § 1 is quoted *supra* note 8.