

THE LAW AND THE PROFITS

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Public exigencies have furnished occasions for laws fixing prices in ordinary businesses. Great wars, extensive plagues, and similar calamities have usually been followed by laws seeking to mitigate the resultant disaster by restraining freedom of contract. Less urgent situations have resulted in price-fixing for monopolies and public service businesses.

"Affected with a public interest"¹ was the hypostasis of public regulation, and prominent among the facts claimed to create a public interest was monopoly. Lord Ellenborough was quoted in *Munn v. Illinois* as follows:²

"There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms."

That the charges of businesses providing a public service, themselves more or less monopolies; and of monopolies generally, those of law as well as those of fact, may be regulated by law is a principle so universally accepted and so generally applied that examples need not be given.³ Regulation of business is as old as Hammurabi, and in A. D. 301 Diocletian tried price-fixing without success.⁴ Wars and plagues in England and the revolution in France furnished the motives for the most striking examples of price-fixing for ordinary businesses.

Augustine, in the third century, argued for a *justum pretium*, but his statements were moral and religious and enforceable only by religious sanctions, and the pious author recognized the moral and religious right to sell a thing for its "worth."⁵ At that time the Roman law left the fixation of prices to the "higgling of the market."⁶ Later Saint

¹ *De Partibus Maris* (1787) 1 Harg. L. Tr. 78; *Munn v. Illinois* (1877) 94 U. S. 113; *Stephens v. Central of Ga. Ry.* (1912) 138 Ga. 625, 75 S. E. 1041; 1 Watkins, *Shippers & Carriers* (3d. ed. 1920) 221, 232, 233, and sec. 45, with notes.

² 94 U. S. at p. 127.

³ *Supra* note 1; *United States v. American Tobacco Co.* (1911) 221 U. S. 106, 31 Sup. Ct. 632; *Standard Oil Co. v. United States* (1911) 221 U. S. 1, 31 Sup. Ct. 502; *Budd v. New York* (1892) 143 U. S. 517, 12 Sup. Ct. 468; *German Alliance Ins. Co. v. Kansas* (1914) 233 U. S. 389, 34 Sup. Ct. 612; Address of Edgar Watkins, University of the South, *The Sewanee Review*, October, 1910.

⁴ See *Stephens v. Ry.*, *supra* note 1; and Simon Litman, *Discussion of Prices and Price Control in Great Britain and the United States during the War* (1920), being No. 19 of the Preliminary Economic Studies of the War in the Carnegie Endowment for International Peace.

⁵ 1 Ashley, *Introd. to English Econ. History* (4th ed. 1909) 133 *et seq.*

⁶ Justinian, *Digest* IV, iv, 16 (4) xix, ii, 22 (3).

Thomas Aquinas, as well as the other canonists, contended for a "just price," but attempted no definition thereof.

England for centuries enacted laws to regulate trade. There were assizes of wages, of beer, and of bread. Those as to beer and bread dealt principally with standards of measurement, with weight, and with quality, although prices were assized or fixed. There was nothing indefinite as to the price of commodities or the rate of wages; and, however despotic the King was, there was opportunity for the trader or wage-earner to be heard.

Usually prices were fixed by the interested guild, by the clerks of the market, the justices of the peace, or by the mayor and common council, all except the guilds being aided by special juries who were acting under specific statutory power, authorizing the holding of hearings and the fixing of prices and wages. In all cases there was some hearing and the price-fixers had or obtained some definite knowledge of the facts constituting a reasonable price, and a definite price was named.

The statute of 1534 gave powers for settling the price of victuals by authority.⁷ By proclamation in 1618 the King directed the "Clerke of our Market" to "set reasonable and indifferent [i. e., non-discriminatory] rates and prices upon victuals and other provisions." The times and places of holding the court were fixed by the proclamation and the "Clerke of our Market" was directed to make his inquiry by the oath of "twelve men at the least to be impanelled."⁸

A form used by the justices of the peace, showing how wages were rated in the seventeenth century, is quoted by Cunningham.⁹ This in part reads:

"At the general quarter sessions of the Peace, of our Sovereign Lord the King, held for the County of Middlesex at Westminster in the said county, upon next after the Feast of Easter (to-wit) the day of, in the year of the reign of our Sovereign Lord Charles the Second, by the Grace of God, King of England, Scotland, France, and Ireland, Defender of the Faith, etc., the The rates of servants wages, labourers, workmen and artificers (in pursuance of the Statute of the Fifth of Queen Elizabeth, in that behalf made and provided) are rated and assessed by the Justice of the Peace of the said county at the said sessions assembled (calling to their assistance some others of the discreet inhabitants of the said county) as hereafter followeth:

"And it is ordered by the said justices, that the sheriff of the said county shall cause the said rates to be proclaimed and published according to the statute in that case also made and provided; and that after such proclamation and publication made of the said rates, that no person whatsoever (which may be therein concerned) shall (this present year) presume to give, allow, demand, receive, or take any greater wages than such as are mentioned in the said rates; neither shall any

⁷ William Cunningham, *The Growth of English Industry and Commerce in Modern Times* (3d ed. 1903) sec. 173.

⁸ *Ibid.* 94, 95.

⁹ *Ibid.* Appendix A, 887, 888.

master, or mistress, entertain or put away any servant, workman, or labourer; neither shall any servant, workman, or labourer, depart from any master or mistress, which may be mentioned or intended in the said Statute of the Fifth of Queen Elizabeth or any other statute in that behalf provided, without due observation of the said statutes, under such pains and penalties as are therein respectively mentioned."

So far as my investigation shows, the statement is justified that there was always a hearing, a definite rate or price fixed, and a public proclamation thereof.

By decree in May, 1793, France augmented the evils of assignats by the law of the "maximum" which undertook the fixation of prices.¹⁰

The common-law prohibition of engrossing, forestalling, and regrating had its basis in monopoly. "Engrossing" meant buying with intent to resell and was made a crime in order to prevent the small farmer or craftsman from selling to a middleman who might engross or monopolize the commodity. "Forestalling" meant to go out and meet the seller before he reached the market and buy his goods or dissuade him from coming to the market, the effect of forestalling being similar to that of engrossing. "Regrating" was a lesser form of engrossing, engrossing being wholesaling, and regrating, retailing. The regrator could not sell in the same market or within four miles thereof. These laws were for the protection of both seller and purchaser. Some of these statutes were repealed "as being detrimental to the supply of the laboring and manufacturing poor of the Kingdom"; and ultimately both the common-law and the statutory offenses were abolished.¹¹

John Stuart Mill, summing up the history of price-fixing, said:¹²

"...governments have thought themselves qualified to regulate the condition better than the persons interested. There is scarcely any commodity which they have not at some place or time endeavored to make either dearer or cheaper than it would be if left to itself."

Further discussing the question the learned economist concludes that such efforts have always proven futile.

Adam Smith, after quoting Dr. Burn as saying that 400 years of trial had shown that regulation of the prices of wages prevented "emulation" and left no room "for industry or ingenuity," said:¹³

"In ancient times too it was usual to attempt to regulate the profits of merchants . . . it may perhaps be proper [where monopoly exists] . . . But where there is none, the competition will regulate it much better than any assize."

¹⁰ See Litman, *op. cit.* 6, 7, 8, and Henry E. Bourne, *Maximum Prices in France*, *American Historical Review*, October, 1917, 107, 110. Carlyle, who was more sympathetic than historically critical of the French Revolution, thought that the "Maximum" and Assignats made possible whatever success there was in that Revolution.

¹¹ (1772) 11 & 12 Geo. III, c. 71; (1884) 7 & 8 Vict., c. 24; 1 Bishop, *Criminal Law* (8th ed. 1892) secs. 518 (2), 524 (1).

¹² *Principles of Political Economy* (1848) bk. 5, ch. 10, sec. 3.

¹³ *The Wealth of Nations* (1776) bk. 1, ch. 10.

Englishmen emigrating to America naturally brought with them ideas long prevalent in the land from which they came, and in John Winthrop's *Journal*, instances are recorded where both courts and the church sought to regulate prices. A merchant who "kept a shop in Boston" was in 1639 charged with "taking above six-pence in the shilling profit; in some eight-pence and in some small things above two for one and being hereof convicted he was fined 200 pounds." This case was debated at length both before the court and the church. Among the arguments urged against the accused was that he was "wealthy and having but one child"; while in his favor it was set forth that he was "liberal as in his hospitality, and in church communion." The accused shed many tears and expressed repentance. The result was a partial remitting of the fine and a sermon by the pastor in which the evils of covetousness were fully proclaimed.

Among the earliest discussions in America of the legal right to fix prices was in a case¹⁴ that involved an ordinance of Mobile, Alabama, which, among other things, provided:

"That all bread baked should be of good and wholesome flour, and that its weight and price should be in conformity with a proclamation, to be issued from time to time by the mayor, regulating these matters by a reference to the price of flour at the time of the proclamation."

Relying on English precedents the Alabama court held that such regulation was within the police power but that the City of Mobile was not properly authorized to pass such an ordinance. "Affects the public interest" and "directly affects the body of the people" are expressions used to support the finding that the price of bread could be fixed by appropriate legislative authority.

The Supreme Court of the United States, with vigorous dissents accompanying each step, has progressed gradually from the basis of monopoly and public service businesses. The basic principles adopted by the Supreme Court and the gradual broadening of such principles are shown elsewhere by the author of this article.¹⁵

In the *New York Elevator* and the *Kansas City Insurance* cases¹⁷ and in cases cited in the majority opinions therein, monopoly of fact, although not definitely named and only described, was considered as furnishing one justification for the regulation there sustained. In the *New York Elevator* case where there was a natural monopoly of fact, Justices Brewer, Field, and Brown dissented, distinguishing between monopolies of law and monopolies of fact. Mr. Justice Brewer forcefully argued that a small country store might have a partial monopoly

¹⁴*Mobile v. Yuille* (1841) 3 Ala. N. S. 137, 36 Am. Dec. 441. The quotation in the text is taken from the latter report; it does not appear in the former. See also *Guilloite v. New Orleans* (1857) 12 La. Ann. 432.

¹⁵Watkins, *op. cit.* secs. 36 and 45, with notes.

¹⁶*Budd v. New York*, *supra* note 3.

¹⁷*German Alliance Ins. Co. v. Kansas*, *supra* note 3.

and said, "the magnitude of the business does not change the principle." In the *Kansas City Insurance* case, where there was an artificial monopoly of fact, Mr. Chief Justice White and Justices Lamar and Van Devanter dissented. An unusually able dissenting opinion was written by Mr. Justice Lamar in the course of which he quoted Judge Cooley's statement that "the right to fix prices was inconsistent with constitutional liberty." With a foresight equal to his great legal ability, he continued:

"There seems no escape from the conclusion that the asserted power to fix the price to be paid by one private person to another private person or private corporation for a private contract of indemnity, or for his product, or his labor, or for his private contracts, of any sort, will become the center of a circle of price-making legislation that in its application, will destroy the right of private property, and break down the barriers which the Constitution has thrown around the citizen to protect him in his right of property,—which includes his right of contract to make property,—his right to fix the price at which his property shall be used by another."

The rent cases discussed hereinafter are but the logical corollary of *Munn v. Illinois*. Mr. Justice Field clearly saw whither that case led:

"I deny the power of any Legislature under our government to fix the price which one shall receive for his property of any kind. If the power can be exercised as to one article, it may as in all articles, and the prices of everything from a calico gown to a city mansion may be the subject of legislative direction."

Mr. Justice Holmes, who never fears to follow where logic leads, even though he may be thereby compelled to sustain legislation which, were he legislator, he probably would disapprove, passed beyond "affected with a public interest" and arrived at "usage," "prevailing morality," and "preponderant opinion" as justifying regulation.

In the *Noble State Bank* case¹⁸ the power of a state to regulate the business of banking by requiring a common guarantee of deposits was sustained as a proper exercise of the police power, of which power, Mr. Justice Holmes, delivering the opinion of the court, said:

"It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518, 42 L. Ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

One less intellectually courageous and honest would probably not have expressed the principle so frankly, not to say boldly. But what shows "public interest" more clearly than usage, prevailing and preponderant opinions?

¹⁸ *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 31 Sup. Ct. 186, affirming (1908) 22 Okla. 48, 97 Pac. 590.

The writer fears that the language quoted opens a Pandora's box from which may proceed dangerous economic heresies, which demagogues and political quacks will seek to make effective in legislation; but logically there seems to be no escape from the conclusion stated by the learned Justice.

Appropriately Mr. Justice Holmes wrote the majority opinion in the rent-fixing cases.¹⁹ Public interest produced by "emergency" was here relied on but the *Noble State Bank* case was cited. The proposition discussed was that "Circumstances have clothed the letting of buildings . . . with a public interest so great as to justify regulation by law." Three sentences illustrate the method of establishing the proposition. At page 155 the Justice said:

"Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. . . . They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest. . . . They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair."

Circumstances may change and what is a public interest now may not be next month or next year.

In a case subsequently decided, sustaining the New York rent laws,²⁰ Mr. Justice Clarke in differing language applied emergency as a basis for finding a public interest. He said:

"If this court were disposed, as it is not, to ignore the notorious fact that a grave social problem has arisen from the insufficient supply of dwellings in all large cities of this and other countries, resulting from the cessation of building activities, incident to the war, nevertheless, these reports and the very great respect which courts must give to the legislative declaration that an emergency existed would be amply sufficient to sustain an appropriate resort to the police power for the purpose of dealing with it in the public interest."

One remote mountain store to which a community of a half a dozen families must go for food and clothing may be "affected with a public interest"; a small coal yard with a supply limited because of a strike of railroad employes and coal miners may be so affected by that emergency as to be a subject of regulation; but there remains in Pandora's box one hope: the form that the regulation takes and the manner of enforcing it must be such as the constitution authorizes. So far at least as the criminal provisions of price-fixing laws there must be "an ascertainable standard of guilt", and the statute must be "adequate to inform persons accused of violation thereof of the nature and cause of

¹⁹ *Block v. Hirsh* (1921) 256 U. S. 135, 41 Sup. Ct. 458; *Marcus Brown Co. v. Feldman* (1921) 256 U. S. 170, 41 Sup. Ct. 465.

²⁰ *Levy Leasing Co. v. Siegel* (1922) 42 Sup. Ct. 289.

the accusation against them.”²¹ The rule applicable to civil rights may be less strict,²² but even as to these rights there must be opportunity to be heard. In a case fixing railway charges the Supreme Court has said:²³

“In the comparatively few cases in which such questions have arisen, it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the ‘indisputable character of the evidence . . . or if the facts do not as a matter of law support the order made.’”

So far as it is a subject of legislation, “police power,” it seems, is limited only by prevailing public opinion and that opinion might justify soviet regulation of production and distribution; but even though the power to legislate exists, that power must be so exercised as to conform to the constitutional right to a hearing before judgment and to a fair trial before conviction.

This immense power for good or evil possessed by public opinion makes necessary that such opinion should be wisely guided. To restrain the exercise of such power might perhaps hamper the development of mankind; perhaps the human race is not sufficiently advanced safely to exercise such power; perhaps logic should be subject to the theory of relativity and not be followed in a direct line to what seems a necessary conclusion; but these are questions which this paper does not attempt to answer. Doubt exists but faith and hope abide.

This article may properly close by quoting the words of two statesmen-judges. Judge Putnam, of the Circuit Court of Appeals, in *United States v. Winslow*, a case later affirmed by the Supreme Court, said:²⁴

“We have lived in so much peace for more than a century under the protection of the constitutional provisions to which we refer that whole masses of citizens and some of their leaders are slumbering in reference

²¹ *United States v. Cohen Grocery Co.* (1921) 255 U. S. 81, 41 Sup. Ct. 298. See brief of this writer in *Oglesby Grocery Co. v. United States* (1921) 255 U. S. 108, 41 Sup. Ct. 306, where are cited cases holding that criminal statutes must be free of “uncertainty, vagueness and indefiniteness.”

²² *Supra* note 20. In this case the court pointed out that the decisions on the Lever Act (Act of Aug. 10, 1917, 40 Stat. at L. 276) might be different in a civil case and said, at page 330: “The standard of the statute is as definite as the ‘just compensation’ standard adopted in the 5th amendment to the Constitution, and therefore ought to be sufficiently definite to satisfy the Constitution. *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516, 14 A. L. R. 1045, 41 Sup. Ct. Rep. 298, dealing with definitions of crime, is not applicable.” The holding of the Circuit Court of Appeals in *W. H. Goff Company v. Lamborn & Co.* (1922, C. C. A. 5th) 281 Fed. 613 is contrary to the implication in the language quoted above from the opinion of Mr. Justice Clarke.

²³ 2 *Watkins*, *op. cit.* sec. 316 and note 127, where are cited other similar decisions of the Supreme Court.

²⁴ (1912, D. Mass.) 195 Fed. 578, 587.

to them, while our forefathers who were brought into almost immediate contact with all the devices to which tyranny was accustomed, were fully awake. The courts, however, are not permitted to slumber."

In *Ex Parte Jackson*, Judge Bourquin said:²⁵

"The inalienable rights of personal security and safety, orderly and due process of law, are fundamentals of the social compact, the basis of organized society, the essence and justification of government, the foundation, key, and capstones of the Constitution. They are limited to no man, race, or nation, to no time, place or occasion, but belong to man, always, everywhere, and in all circumstances. Every nation demands them for its people from all other nations. No emergency in war or peace warrants their violation, for in emergency, real, or assumed, tyrants in all ages have found excuse for their destruction. Without them democracy perishes, autocracy reigns, and the innocent suffer with the guilty. Without them is no safety, peace, content, happiness, and they must be vindicated, defended and maintained in the face of every assault by government, or otherwise."

²⁵ (1920, D. Mont.) 263 Fed. 110, 113.