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LAW AND THE RAILROAD LABOR PROBLEM

WALTER B. KENNEDY

A popular example of the breakdown of generalizations in the common law is Maine's famous dictum "from status to contract." This prophecy has been fair game for the legal writers in England and America.¹ Juristic signs amply justify the criticism. Individualism has been fighting a losing battle; the principle of laissez-faire has suffered from many invasions by courts and legislatures. To conserve the freedom of individual action it has been necessary to limit it. This paradox is not so startling as it seems when we attempt to infuse into the legal order the realities of equality and liberty, and to counterbalance the free play of economic forces. While we may commend the limitation of Maine's generalization in the industrial and social relations of our time, it is, however, the part of wisdom to avoid the danger of substituting another concept which may be equally vulnerable. This warning against the tendency of legal philosophers to generalize may be emphasized in connection with the banishment of Maine's attempt to plot out the future course of the common law.

Out of the death of Maine's formula "from status to contract" there is beginning to appear a new generalization "from contract to status." In their zeal to overthrow the theory that the evolution of law is from status to contract, juristic writers are tending to construct another principle of legal evolution and to claim for it a certain permanency and validity in the solution of the legal problems of today and tomorrow. Conceding that the recent movement in the law has been from contract to status, is there any certainty that we have unearthed a working principle which may be confidently applied without limitation to the social and industrial disorders of our day and place? Recent writings disclose a certain positive declaration that the progress of the law from contract to status is something more enduring than a particular and a temporary standard of the common law; there is visible an ambitious attempt to mould it into a fundamental mode of thought for future use in the development of American law:

"There is no escaping the conclusion that certain doctrines and institutions of the law have inherent worth and validity. . . . This is true of the conception of relation or status now coming back so prominently into our law."²

¹ "But in truth the dogma of Sir Henry Maine is a generalization from legal history only . . . it has no basis in Anglo-American legal history, and the whole course of English and American law today is belying it, unless, indeed, we are progressing backward." Pound, The Spirit of the Common Law (1921) 28.

² E. F. Albertsworth, From Contract to Status (1922) 42 Can. L. T. 102; Maine, Ancient Law (Pollock's ed. 1906) Note L.

“The idea of relation and of legal consequences flowing therefrom pervades every part of Anglo-American law. . . . If we cast aside the Romanist prejudices of the nineteenth-century historical school, we may perceive that in the idea of relation, in the characteristic common-law mode of treating legal problems which we derived from the analogy of the incidents of feudal tenure, we have an institution of capital importance for the law of the future, a means of making our received legal traditions a living force for justice in the society of today and of tomorrow."

It may be freely conceded that the swing of modern jurisprudence has been from contract to status or relation. Dean Pound has clearly demonstrated by many current examples that the feudal element has played no small part in the shaping of the common law. A doubt arises, however, when it is stated that “the conception of relation or status” has “inherent worth and validity,” and when it is predicted that this feudal element of relation has curative qualities “of capital importance for the law of the future.” In generalibus dolor latet. The fate of Maine’s dictum should warn us that there is danger in extending particular standards beyond their proper spheres and developing them into theories of general application. The universal picture, attempted by the juristic philosopher, is often unconsciously colored by the bias and prejudice of the time and place.

In no branch of the common law have greater inroads been made into Maine’s dogma than in the industrial relation of employer and employee. The contraction of the principle of laissez faire and the expansion of legal control in the industrial order are indications of the reception of the idea of relation and its utility as a legal conception. New cases are arising which lend support to the contention that the regulative conception of status or relation is received with approval and

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3 Pound, The End of Law as Developed in Juristic Thought (1917) 30 Harv. L. Rev. 201, 213 and 221; See also, Pound, op. cit. supra note 1, at p. 31.

While Professor Albertsworth uses the terms status and relation interchangeably, as indicative probably of a non-contractual idea, Dean Pound distinguishes the idea of relation from the idea of status. Ibid. 29, 30. “For status,” he says, “is an archaic idea, quite out of line with modern ideas.” Ibid 30.

The distinction taken is visible in the history of the common law. Pollock and Maitland, History of English Law (2d ed. 1899) 407-417. It seems to have a place in modern American law. “The very meaning of the word status, both derivative and as defined in legal proceedings, forbids that it should be applied to a mere relation. Status implies relation, but it is more than a mere relation.” De La Montanya v. De La Montanya (1896) 112 Calif. 101, 115, 44 Pac. 345, 348. Cf. Barney v. Tourtellotte (1884) 138 Mass. 106, 108.

For the purposes of this paper, while the distinction is admitted, it is not believed that it is material. Lack of volition and the non-contractual element, common to both status and relation, will be principally discussed.

4 Pound, op. cit. supra note 1, at pp. 22-31.

5 Pound, An Introduction to the Philosophy of Law (1922) 16, 17, 19.
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is being applied by the courts. The principle of individualism, however, finds ardent supporters who protest against the abandonment of freedom of contract in fixing wages and other terms of employment. Despite this tendency in the direction of relation, it is necessary to weigh carefully the prediction that the future progress of industrial law will be from contract to status; it may well be that a study of the present labor problems will reveal limitations in the potential worth and practical value of the conception of relation. It may be deemed expedient—for the present time at least—to work out a compromise settlement with the formula of Maine and to recognize that the spirit of individualism in America has not suffered a complete defeat in its struggle with its classical rivals in the common law.

The impending railroad labor problem offers an excellent and a fair proving-ground for testing the universality and efficacy of the new formula "from contract to status." In addition to the involved relation of employer and employee, the predominance of the public interest and the traditional treatment of public utilities in the common law argue for the extension of the idea of relation in the settlement of railroad labor disputes. It is natural to find that these factors have been stressed by those who are advocating the relational idea of compulsory arbitration of wages, rules and working conditions in railroad employ-

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*United Mine Workers v. Coronado Coal Co. (1922) 42 Sup. Ct. 570. In this case the Supreme Court recognized the suability of an unincorporated association. While the court reached its conclusion on the ground that federal legislation has dealt with trade unions as legal entities, a fundamental reason for the extension of the corporate feature to labor unions is that "out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such an organization as this has come to be recognized in some jurisdictions." Taft, C. J., at p. 575. Cf. St. Paul Typothetae vs. St. Paul Bookbinders' Union No. 37 (1905) 94 Minn. 351, 102 N. W. 725.

*Children's Hospital vs. Adkins et al. (1922, D. C. App.) 284 Fed. 613. This case declared the Minimum Wage Law for women, in the District of Columbia, to be unconstitutional. "No greater calamity could befall the wage earners of this country than to have the legislative power to fix wages upheld. It would deprive them of the most sacred safeguard which the Constitution affords. Take from the citizen the right to freely contract and sell his labor for the highest wage which his individual skill and efficiency will command, and the laborer would be reduced to an automaton—a mere creature of the State." Van Orsdel J., ibid, at p. 623.

*"Taking no account of legislative limitations upon freedom of contract, in the purely judicial development of our law . . . . we have established that the duties of public service companies are not contractual . . . . but are instead relational; they do not flow from agreements which the public servant may make as he chooses, they flow from the calling in which he has engaged and his consequent relation to the public." Pound, (1921) op. cit. supra note 1, at p. 29.

Compare the following extract by Thayer, Liability Without Fault (1916) 29 Harv. L. Rev. 801, 806: "This stringent liability of the carrier is not due to his public calling, but to the nature of the agencies he uses, the helplessness of the passengers, and the perils to life and limb."
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The suggested legislative program involves the denial of the right to strike by employees of the carriers, and the enactment of punitive measures to enforce the rulings of the governmental wage board. The practical importance and novelty of the anti-strike principle in American law, and its possible extension to other industries, render it imperative to examine the proposal to prohibit strikes in railroad employment.

While the constitutionality of the proposed anti-strike remedy presents many interesting and debatable problems which have been frequently considered, the majority of the writers have passed the mechanical aspects of the legislation. For our present purposes, the constitutionality of this legislation may be conceded. The questions raised do not involve the right or the power of Congress to pass this prohibitory statute; they are mainly directed to the consideration of the limits of effective legislative action. In a word, the problem is legislative, and not judicial; the forum is the Congress of the United States, and not Professor Thompson’s excellent article, Labor and the Law in the Public Utility Field (1923) 21 MICH. L. REV. 1, should be consulted for a review of the feudal idea of relation and an argument for its applicability to modern industrial conditions in the field of public utilities. See note 12, infra.

In his Annual Address to Congress, December 8, 1922, President Harding includes the anti-strike remedy as a part of the railroad program of Congress.

The principle of the anti-strike has already been extended in Kansas. Mining, manufacture of clothing, preparation of food products and all public utilities are “declared to be affected with a public interest,” and are under the control of the Kansas Court of Industrial Relations. Kansas, Special Session Laws, 1920, ch. 29, sec. 3 (a).

“If the whole industry of the manufacture or preparation of food products may be enveloped in a public interest and regulated at will by the legislature, it need not stop, as does this act [Kansas Industrial Act], with the process of converting the products of the soil from a natural state to a condition to be used for food, but it may reach back to the farmer, determine the conditions under which he shall labor and employ others to work for him, the prices he may charge for his crops, and the methods by which he may dispose of them.” George W. Wickesham (1920) Proc. N. H. Bar Ass’n, 315.

While the present paper deals primarily with the application of the principle of compulsory service in railroad relations, it is submitted that the advocate of this remedy cannot logically stop with this one public utility. If it has curative value in solving the transportation problem, it must be applied, as in the Kansas Act, to other industries charged with a public interest. While transportation is an essential ingredient in our social order, the industries producing food, fuel, and clothing are just as important. If the principle of the anti-strike is extended to these industries, the reductio ad absurdum of Mr. Wickesham is only a step away.

It invites a study of the legislative function; Anglo-American institutions and character; the policy of passing a prohibitory law of this kind; its efficacy and enforceability; and the timeliness of this legislation in view of the present development of industrial law. This estimate of the probable results and consequences of anti-strike legislation logically should be made before and not after the passage of the suggested law.

If the pure positivism of the historical school of jurisprudence is to be condemned for its failure to view contemporaneous changes and its blind acceptance of the past, the historical jurist may retort that the modern legislator is frequently guilty of losing sight of the practical value of utilizing the juristic experience of other times and other places. While the flux of things brings forth new legal problems, peculiar to a given place, it is manifestly unwise to refuse to profit by the experience of other governments in coping with similar emergencies. The legislative function is not exhausted by the proof of the power to pass a specific law; it must also include a definite and frank consideration of the expediency of the given enactment, and its practicability to meet and to solve the particular social or industrial evil which it is intended to reach.

The distinction between the right of Congress to pass a given law and the policy or wisdom of enacting it has been noted by the courts in many industrial cases involving railroad labor.

"To an employee a wage law may be of more vital consequence, be of the very essence of his life, involving factors—many and various—which he alone can know and estimate, and which, besides, might not have an enduring constancy and be submissive to a precedent judgment. There well might be hesitation to displace him and substitute the determination of the law for his action. "I speak only of intention; of the power I have no doubt." McKenna, J., in Wilson v. New (1917) 243 U.S. 332, 364, 37 Sup. Ct. 298, 308.

"Where there is, or generally is believed to be, an important ground of public policy for restraint the court does not forbid it, whether this court agrees or disagrees with the policy pursued." Holmes, J., in Adair v. United States (1908) 208 U.S. 161, 191, 28 Sup. Ct. 277, 287, dissenting opinion.

"If circumspection and caution are a part of wisdom, when we work only upon inanimate matter, surely they become a part of duty too, when the subject of our demolition and construction is not brick and timber, but sentient beings, by the sudden alteration of whose state, condition, and habits, multitudes may be rendered miserable." Edmund Burke, On the Revolution in France 1790, 24 Harvard Classics 317.

Leonhard, Methods Followed in Germany by the Historical School of Law (1907) 7 Col. L. Rev. 573. 577.


"A much more difficult question than the question of constitutionality is the question of policy which the legislature—assuming that it has the power to make a suggested distinction—must consider in determining whether it is wise to do so." W. A. Sutherland, The Menace of "Counter" Phrases (1922) 28 W. Va. L. Quart. 179, 184; Jane Addams, Democracy and Social Ethics (1902) 151.
Law is a practical science. It recognizes that there are limitations of effective legislative action. While this inability of the law to reach out and control all forms of human activity is unfortunate, it is a condition which cannot be removed by the magic of a statute, and it must be candidly recognized as a deterrent to the ambitious attempts of Congress to control individual action. It is a trite statement, but it will be pertinent to keep it in mind at this time, that the life of a law is measured in terms of its enforceability. Unfortunately, this legal truism is frequently disregarded. The tendency of legislative bodies to attempt a cure-all of social and economic upheavals by the passage of hasty and ill-considered laws is a potent and a patent evil of the legal order. It has had a thriving existence in America with its many legislative bodies. The unwieldy size of the law-making groups, which has necessitated the transfer of legislative business to committees, has lessened the opportunity for a full and complete discussion of the merits or demerits of a proposed law. While the number of legislators has been increasing, it has been asserted that the statesmanship of these enlarged assemblies has been lowered, a factor of importance in determining the resultant quality of legislative output. Popular clamor, following national disorders which affect the social welfare, is immediately reflected in the agitation for a new law to remove forever the threatened security of society. The legislature responds to the insistent demand, passes a law without a careful analysis of its efficacy or feasibility, and the inevitable result is a postponement of the proper remedy, or its gradual evolution in the light of the failure of the earlier statutes. This symptom is visible in the current of legislation following railroad strikes. It is true that “we have come to believe in conscious lawmaking” and to realize that “legislation has for its

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19 Pound, The Limits of Effective Legal Action (1917) 3 A. B. A. Jour. 55.
20 "... a legal rule without legal coercion is a contradiction in terms, a fire which does not burn, a light that does not shine." Rudolf von Ihering, Der Zutzh im Recht (4te Aufl. 1903) transl. by Husik, under title Law as a Means to an End (1913) 241. Cf. Duff, Spinoza's Political and Ethical Philosophy (1903) 340; Amos, Science of Law (1894) 30.
21 Bryce, The American Commonwealth (Revised ed. 1910) 593 et seq.
23 "The legislative branch of our national government probably has never been at a lower ebb than it is today." Sec. of War, John W. Weeks, Commencement Address, Western Reserve University, June 15, 1922, N. Y. Times, June 16, 1922.
function to introduce new premises," but it is the part of the legislative function to 'think through' a proposed law and to weigh it in the scales of the environing circumstances.

The purpose behind the anti-strike law is entirely laudable; the primacy of the public interest in the operation of the railroads is no longer debatable. The crux of the problem, however, is the determination of the most efficacious remedy to cure the interruption of train service; the gravity of the situation does not forbid, but rather accentuates, the importance of analyzing the practical utility of the given legislative proposal.

American institutions are charged with an independence of individual action. The Puritanical concept of liberty and the pioneering spirit are interwoven into the fabric of our common law. Individualism has an important place in the daily life of the American. As one English critic expresses it: "American individualism is not our English or Scottish individualism with its feudal or clannish restrictions of caste and class. . . . It is very broad and deep, this American individualism, and has been the secret of American achievement from first to last, whether in the realms of war or peaceful progress."

These institutions and laws are not mere accidents; they are the direct reflections of the character, customs, traits, and spirit of the people. While it may be urged that these characteristics of laws and men obstinately and unfortunately persist in our social order, the probable success

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26 "The freedom of action on the part of workmen and on the part of employers does not measure in importance with that of public welfare and national security." Address of President Harding to the coal operators, July 18, 1922. Cf. W. S. Carter, Pres. of Broth. of Locomotive Firemen; "Whenever a nation reaches that point where public convenience is used to suppress the individual rights of the people, then that nation has reached its zenith, is on the downward path." The Objections of Labor to Compulsory Arbitration (1917) 7 Proc. Acad. Pol. Sci. 36, 42.
27 It is important to note, as indicative of the pronounced strength of our individualism, that of the seven factors which, Dean Pound says, "have contributed to shape our American common law . . . all but one of these made strongly for individualism. . . ." Op. cit. supra note 1, 14, 15.

While this single factor, happily called "the feudal element" by Dean Pound, has demonstrated its utility and adaptability in the industrial society of our day, it may be doubted whether this numerical and weighted supremacy of individualism in our law is ready to withdraw completely from the juristic leadership in the American common law in favor of its more ancient rival. Although the feudal law "has given to our legal system a fundamental mode of thought" which has been an invaluable aid to the courts, its further extension cannot be invoked solely on account of the respectability which goes with age; it must prove its worth as a workable solution of concrete problems of the time and place. Cf. Pound, Judge Holmes's Contribution to the Science of Law (1921) 34 Harv. L. Rev. 449.
28 Lt. Col. Chas. A. Repington, Washington Times, Nov. 19, 1922. For a recent analysis of the importance of individualism in American life, see Herbert Hoover, American Individualism (1922).
of a law, which cuts across these deeply-rooted national inclinations, must be measured by conditions as we find them. And the alleged failing of stubborn resistance does not lessen the difficulties, which the legislative fiat must remove.29

As a practical matter, it may be seriously questioned whether this background provides the proper setting for this repressive industrial law.30 This doubt about the efficacy of laws to prohibit strikes has been expressed not only by labor officials,31 but also by non-partisan juristic writers,32 publicists,33 and others.34 It is noteworthy that there is a counter-movement in industry, which is in spirit and purpose the antithesis of this policy of compulsion. Its primary purpose is to

29 "The Americans will sacrifice any amount of money, undergo any privation or suffering, put forth any effort, for his beliefs." Nicholas M. Butler, The American As He Is (1908) 41.
30 "The whole atmosphere of our country, with its aggressiveness and individualism, coupled with their exploitation, tends to arouse these workers to demonstrate in blind, eager and intense ways that they are not pack-animals but human beings." Tead, Instincts In Industry (1918) 89, 90.
31 "What lifts the bristles of man is, however, external pressure. He kicks against the pricks; whipping makes him balk. . . . The passion for liberty, then, limits that social interference which calls for pressure." Ross, Social Control (1901) 420.
32 Samuel Gompers, Testimony Before Senate Com. on Manufactures, Feb. 9, 10, 1921; W. S. Carter, op. cit. supra note 26.
33 "... it may be questioned whether, purely as a matter of expediency, it is wise to attempt to prohibit strikes; whether coercion or persuasion is the best way to the avoidance of those clashes of interest which involve the public in so much loss and annoyance." George W. Wickersham (1920) Proc. N. H. Bar Ass'n, 313.
34 "There can be no perfect control of personal conduct by legislation. Its attempt must be accompanied with the full expectation of very many failures. The problem of preventing vice and crime, and of restraining personal and organized selfishness is as old as human experience. We shall not find for it an immediate and complete solution in an amendment to the federal Constitution, an act of Congress, or in the findings of a new board or commission. There is no magic in government, not possessed by the people at large, by which these things can be done." Calvin Coolidge, Vice-President of the United States, op. cit. supra note 23, at p. 275.
35 "How impolitic are all laws that proceed only by prohibitions! We must fight human nature with itself!" Kohler, Lehrbuch der Rechtsphilosophie (1909) transl. by Albrecht, Philosophy of Law (1914) 141.
36 "The time and occasion has not yet arrived when the principle of compulsory arbitration should be attempted by legislative enactment. Indeed it is subject to grave doubt as to whether compulsory arbitration will accomplish the purpose of its enactment. It is not yet claimed, even by the advocates of compulsory mediation in those countries where it has been adopted, that it is the solution of the problem." William L. Chambers, U. S. Comm'r of Mediation, (1917) 7 Proc. Acad. Pol. Sci. Part 1, 8; Hilaire Belloc, The Servile State (1912) 176.
humanize the labor phases of industrial activities by releasing the cre-
tional and cooperative impulses of the workers. Labor copartnership is a definite expression of the innate individualism of the workers and an honest endeavor to carry it into practice in the regulation of the relations of the employer and employee. This democratization of industry is not academic; it is being successfully used in many industrial plants. Its application has been suggested in the solution of the railroad labor problem, and has been indorsed by eminent capitalists. The churches have advocated its adoption as an essential in industrial reconstruction. This growing liberalization in the industrial order, and its striking exemplification of the spirit of American institutions, is in marked contrast with the formula which seeks to attain industrial peace by repression and force.

Although invasions have been made into the freedom of individual action, and further encroachments are inevitable, this cross-section of the American character and institutions indicates—at this time at least—an appreciable opposition to the principle of compulsory service in the industrial order. In this conflict between the common-law ideas of relation or status and the current emphasis in American law upon individualism and self-assertion, it is not quite clear that the American public is ready to pass from the "Scylla of laissez faire" to the "Charybdis of excessive public regulation."

The principal objective of legislation to prohibit strikes is the insurance of continuous transportation. Its advocacy is prefaced by a forcible and proper assertion of the priority of the rights of the public. The commendable end, however, of a legal regulation is not a guarantee of its efficacy or enforceability. We may learn this lesson from courts of equity, which refuse their aid to enforce contracts of personal

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5 John Leitch, Man to Man (1919). The articles cited in note 35, supra, deal with the practical operation of labor copartnership in industrial plants.


7 "I believe the most potent measure in bringing about industrial harmony and prosperity is adequate representation of the parties in interest. . . . I believe that the most effective structure of representation is that which is built from the bottom up, which includes all employees. . . ." John D. Rockefeller, Jr., Address before War Emergency Conference, cited in Cohen, An American Labor Policy (1919) 18.

8 The pronouncements of the churches as to industrial reconstruction are collected in Lauck and Watts, op. cit. supra note 35, App'x M.


10 Pound, op. cit. supra note 19; Coolidge, op. cit. supra note 23.
The reluctance of equity to decree specific performance of labor contracts can hardly be attributed to a lack of sympathy with the merits of the case; it seems to rest squarely upon the mechanical difficulty of enforcing its decrees. If equity has refused to issue mandatory orders against individuals on account of the practical objection of non-enforceability, the same concrete impracticability, immeasurably magnified, confronts the advocate of compulsory service in railroad employment. Passing the peculiarly involved and isolated acts of railroad employees engaged in the movement of trains, a fact which complicates the feasibility of the equitable process, it may be asked whether the attempt is not against public policy.

It is true that other legal remedies are available. The imposition of "disagreeable consequences," in the form of imprisonment of the strikers, has been proposed as a workable substitute for equitable relief. Adhering to the mechanical aspects of this proposal, it does

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4"The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employee of merely personal services, any more than will compel an employer to retain in his personal service one who, no matter for what the cause, is not acceptable to him for service of that character. . . . Relief of that character has always been regarded as impracticable." Arthur v. Oakes (1894, C. C. A. 7th) 63 Fed. 310, 318. See also, Toledo, A. A. & N. M. Ry. v. Penn. Ry. (1893, C. C. N. D. Ohio) 54 Fed. 730. Cf. Ex parte Lennon (1897) 166 U. S. 548, 17 Sup. Ct. 658.

The contrary view as to the enforceability of a contract for personal service seems to be maintained in Thompson, op. cit. supra note 9, 21, 22. He cites Ex parte Lennon to sustain this contention. Sed quære. The court distinctly stated that "the question whether the court has the power to compel performance of a personal contract does not arise." The statement of the learned writer that the decision rested upon a failure of the employee, Lennon, to exercise "his constitutional right to permanently retire from the (railroad) service" does not seem to be justified by a reading of the case. The decision of the court is placed on the finding of the lower court that Lennon had not retired, temporarily or permanently, from the service of the company; that he was at the time of the disobedience of the injunction in the employ of the railroad, and, therefore, bound to obey the injunction.

4"It would be impracticable to enforce the relation of master and servant against the will of either. Especially is this true in the case of railway engineers, where nothing but the most painstaking and devoted attention on the part of the employee will secure a proper discharge of his responsible duties; and it would even seem to be against public policy to expose the lives of the traveling public to the danger which might arise from the enforced and unwilling performance of so delicate a service." Taft, J. Toledo, etc. Co. v. Penn. Ry. supra note 43.

4"It is, however, practicable, if legal, to induce performance by attaching disagreeable consequences to the breach of service contract. Such breaches of contract have always involved liability on the part of the defaulting contractor to respond, in damages for the injury done to the other contracting party." Parkinson, op. cit. supra note 12, at p. 45.

The alleged parallel between the commercial contract and the service contract fails to cover the many strikes which take place when there is no contract or, at
not clear away the noted difficulties underlying specific performance. If imprisonment were the penalty for an infraction of the compulsory statute, and a concerted strike occurred, the confinement of the offenders would match the task of Sisyphus. And the possible success of the exercise of the police power presents the paradox of the necessary suspension of train service, intensifying the very disaster which the anti-strike law is intended to prevent. The levy of fines, against the union or its members, is free from the tangible obstacle of lack of judicial power. While the procedural difficulty of reaching the funds of the national unions seems to be disappearing, the question remains whether its use will accomplish the main purpose, namely, the continuance of the operation of the trains. The levy of fines against individual members is hardly practicable as a preventive. Conservation of the funds in the union treasury, admittedly a matter of importance to the officials, would frequently be lost sight of by the members. Outlaw strikes are not uncommon; and the unauthorized strike presents the additional complication that the funds of the national union could not be attached. If the powers of a court of equity, with its flexible decrees, are inadequate to insure the continuity of train service, the return to the common-law judgment is not likely to be a workable alternative. Equitable relief is usually sought when the common-law remedy is inadequate. The proposed substitution of a fine for specific performance contains the anomalous turn-about-face: legal relief is to be sought when the equitable remedy is inadequate.

Comparative legislation has its function in enabling the legislator to profit by the experience of other places in dealing with similar problems. The comparative method, it may be said, merits cautious treatment and the candid admission that the success or failure of a given law must best, a contract at will. Under these circumstances there is no breach of contract and no contractual liability to respond in damages. The real question involved in this situation is not contractual, but relational. It presents the problem whether, in the absence of a contract to work, the employees may be compelled to continue their services. See Comments (1923) 32 Yale Law Journal, 160, 161.

If there is a service contract which is broken by the employee's refusing to work, there is, of course, a remedy for breach of the service contract without any additional legislation. Schlesinger v. Quinto (1922, N. Y. Sup. Ct.) 117 Misc. 735; Nederlandch Amerikaansche Stoomvaart Maatschappij v. Stevedores' & Longshoremen's Benevolent Society (1920, E. D. La.) 265 Fed. 397.

*Let us suppose that 2,000,000 men should at the same time and by common agreement all quit their work at the stroke of the clock. What are you going to do with them—put them in jail? When you did, when the last railroader is in jail, who would run your railroads?* Senator A. O. Stanley, Speech in the Senate, December 16, 1919. 59 Cong. Rec. Part I, 672.

*"A corporation is responsible for the wrongs committed by its agents in the course of its business. . . . But it must be shown that it is in the business of the corporation. Surely no stricter rule can be enforced against an unincorporated association like this." United Mineworkers v. Coronado Coal Co. supra note 6, at pp. 577-578.
be tempered by the place and the people that gave it birth. This reservation is peculiarly appropriate in the analysis of labor laws; racial characteristics and national traits cannot be eliminated in gauging the results of the legislative experiments. The most recent examples of compulsory service enactments are found in Australia, South Australia, and Kansas. The Australian Court has been fortunate in the selection of an able jurist to preside over the destinies of the court during its formative period. The carefully enunciated opinions of Mr. Justice Higgins disclose an endeavor to build up a traditional body of principles, and indicate the true judicial approach to the solution of an intrinsically complex problem. In South Australia, Mr. Justice Brown has brought to his judicial office a similar effort to develop standards and precedents in industrial cases. Despite the unquestioned integrity and ability of the justices, the Australasian legislation has failed to end strikes. Two principal methods of enforcement, fines and imprisonment, have not had the intended effect. The Australasian experiments hardly convey the assurance that the idea of compulsory service can be expanded to meet the greatly enlarged area of railroad activities in this country.

The propinquity of the Kansas attempt to reach industrial peace makes it especially interesting and important to the American public. The trial is being conducted upon most fertile ground for the germination of the idea of compulsion as an industrial solvent. Kansas is an agricultural state; its industries, including mining, are of minor importance. Despite this overwhelming majority of the ‘party of the third part,’ three major labor disorders, the mine strike, the packers’ and the shopmen’s strikes, have occurred since the passage of the law. No appreciable effort was made to apply the repressive provisions of the Kansas law, although the violation of the law by the strikers seems to have been unquestionable. The failure of the court to set the

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49 South Australia, Industrial Arbitration Act, 1912.
50 See note 11, supra.
52 Compare the success of Commissioner Neill and Judge Knapp, in railroad labor arbitration cases, under the Erdman Act, as an indication of the supreme importance of the personnel of industrial courts and boards. C. O. Fisher, op. cit. supra note 12, 34.
54 Sir Lynden Macassey, The Industrial Courts Act, 1919 (1920) 2 JOUR. COMP. LEG. (3d ser.) part 1, 72.
55 Sec. 17. “. . . it shall be unlawful for any such individual employee or other person to conspire with other persons to quit their employment or to induce
The machinery of the law in motion against the strikers must be deemed a silent admission of inability to compel individual service. The brevity of the ambitious, but consistent, attempt to extend the anti-strike principle to all industries charged with a public interest prevents any positive prediction as to the final outcome of the Kansas program, but it is safe to say that it has not given evidence to date of reducing the dangers of strikes by means of legislative mandate or forced labor.

Even conceding the efficacy of the anti-strike law and its power to compel personal service, a major consideration faces the legislator in the attempt to introduce law and order into the settlement of railroad labor disputes. Have we developed juristic methods which warrant the passage of this law? Has our industrial law progressed to the point where we may assure the employee in railroad service a workable substitute for the strike, surrounded by the safeguards and guarantees which we associate with the administration of justice in the legal order? In this connection, it is eminently proper to emphasize that performance, and not mere promise, of jural adjudication is required. This preliminary insurance of the establishment of legal machinery is imperative and its importance is fairly recognized by those who contend for the substitution of wage-fixing by judicial order and the withdrawal of the strike

other persons to quit their employment for the purpose of hindering, delaying, interfering with, or suspending the operation of any of the industries, employments, public utilities, or common carriers governed by the provisions of the act.

Sec. 18. "Any person willfully violating the provisions of this act, .... shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction of this state shall be punished by a fine of not to exceed $1,000, or by imprisonment in the county jail of not to exceed one year, or by both such fine and imprisonment ...." Kan. Special Session Laws, 1920, ch. 29.

This failure of the Industrial Court to prosecute the strikers for violations of the anti-strike clauses of the act, in the more important industrial controversies, is more remarkable in view of the manner in which the court has construed the contention of Mr. Justice Huggins—the author of the act and the presiding judge of the Industrial Court—that "the jurisdiction of the Court of Industrial Relations does not attach except in case of an emergency which threatens the public peace or the public health"; see Huggins, Fundamentals of the Kansas Industrial Court Act (1921) 7 A. B. A. Jour. 265, 267.

For example, see Court of Industrial Relations v. Charles Wolff Co. (1922, Kan.) 207 Pac. 805, where the court assumed jurisdiction in a wage dispute between the defendant and 300 employees. In this case it was admitted by the majority that "the defendant's plant is a small one, and it may be admitted that, if it should cease to operate, the effect on the supply of meat and food in this state would not greatly inconvenience the people of Kansas." Cf. the strong dissent by Burch, J., in this case.

The results of the Kansas Law to date are considered in Smith, Practical Operation of Kansas Industrial Law (1922) 8 A. B. A. Jour. 680. For a bibliography of the Kansas Industrial Court Law, see Phelps, University Debaters' Manual (1921-1922) 48-51.

"The legislator does not create the law arbitrarily. He has no power to make rules which are not prepared for by the march of social progress. Legislation passed in any other way remains a dead letter and totally unapplied." Korkunov, op. cit. supra note 2, 404.
as the only economic weapon of labor. Although "the inalienable right to strike" has been frequently denied as a 'counter' phrase, which has wrought havoc in the social order, it has a definite place in the vocabulary of the worker in the present industrial system until there is erected a legal substitute in its place.

There are many indications of the gradual unfolding of a distinct branch of the law under the euphonious title of Industrial Jurisprudence. Legislatures and courts have gone far in shaping and defining the relations of employer and employee. But the particular phase of wages and working conditions is still in the stage of primitive law. The give-and-take principle prevails; the main objective is peace and the bargaining power of the contestants fixes the price. This vacuum

"Sponsoring the railroads as we do, it is an obligation that labor shall be assured the highest justice and every proper consideration of wage and working conditions. . . ." Address of President Harding to the Congress, December 8, 1922.

Senator Cummins, an ardent advocate of the anti-strike law and co-author of the Transportation Act, 1920, said: "I do not believe that the right to strike should be taken away from the employees without substituting something better." Speech in the Senate, December 4, 1919, 59 Cong. Rec. Part I, p. 146; See also T. S. Adams, Labor Problems (1925) 205.

"On analysis, however, this phrase (the inalienable right to strike) will be seen to confuse the constitutional right actually and bona fide to retire on reasonable terms from a particular service or vocation with the alleged right to strike. In fact the strike is quite a different thing. It is an abrupt, arbitrary and concerted cessation of work, not for the purpose of quitting the employment, but obviously and admittedly with the definite object of continuing in that very employment upon the strikers' own terms." Thompson, op. cit. supra note 9, at p. 21.

If the learned writer means that this distinction between "the constitutional right to retire" and "the alleged right to strike" is generally taken by the courts, it is believed that he is in error. A general denial of "the right to strike," accepting the author's specification of the purposes back of the strike, is not apparent in the decisions of the courts. American Steel Foundries v. Tri-City Cent. Trade Council (1921) 257 U. S. 184, 200, 42 Sup. Ct. 72, 78; Parkinson Co. v. Building Trades Council (1928) 154 Calif. 581, 98 Pac. 1027; De Minico v. Creig (1911) 207 Mass. 593, 94 N. E. 317; Martin, Law of Labor Unions (1910) sec. 27, 28. The vigorous criticism by the writer of the case of In re Claim of Employees of the Minneapolis Steel & Machine Company (1920) 6 War Department, Decisions, Contract Adjustment Board, 835 may be heartily indorsed on the ground that the threatened strike was "in violation of an existing wage agreement" and that it was an "unconscionable and disloyal exercise" of the power to strike in time of war. The case, however, is hardly a suitable premise for the conclusion that the "alleged right to strike" does not exist at all.

A similar statement is made in Storey, The Right to Strike (1922) 32 Yale Law Journal, 99, 102. For a criticism of the same, see Comments (1922) 32 ibid. 160.

"Morris L. Ernest, The Development of Industrial Jurisprudence (1921) 21 Col. L. Rev. 567. The solidification of industrial law is concretely evidenced by the appearance of legal treaties upon the subject. See, for instance, Martin, Law of Labor Unions (1910); and Sayre, Cases on Labor Law (1922).

of principles must be dealt with as an integral part of the labor problem; it must be regarded as a tangible difficulty in the balancing of the interests of the parties.\textsuperscript{64}

Juridical empiricism and adherence to rules and standards are clearly marked tendencies of the common law.\textsuperscript{65} It is not too much to expect that the entrance of government into industry must be paralleled by the development of “predetermined premises” proceeding along a “known technique” and “fixed lines.” This does not mean that the legislature should attempt the impossible by the “premature crystallization of principles” as Mr. Justice Higgins expresses it,\textsuperscript{66} with its resultant danger of the erasure of all flexibility in the application of the law. It does mean that it betrays a comfortable optimism to create a wage board with arbitrary power to fix wages without principles or standards to guide or control it, and to point to the erection of the wage board as a complete and entire satisfaction of the employees' claims to a legal machine and legal methods in the determination of wages, rules, and working conditions.

It is, therefore, in order to glance at the three available methods for settling railroad labor controversies, and to view them with respect to the presence of juristic methods. These three prevalent modes of settlement are: first, settlement by force, that is, by the strike or lockout; secondly, settlement by voluntary arbitration; and thirdly, settlement by a permanent government board with mandatory powers over the litigants and authority to fix wages, rules, and working conditions. The use of the strike or lockout, needless to say, amounts to virtual warfare in which the only visible principle is that might makes right. Voluntary arbitration in practice has involved the same lack of principle; it is invoked to protect the public and the merits of the

\textsuperscript{64}“Ninety per cent of the industrial disputes which occur, do occur simply because neither side knows what principle should be applied. Where there are no principles—\textit{tot homines, quot sententiae} and strikes.” Sir Lynden Macassey, \textit{op. cit. supra} note 55.

\textsuperscript{65}Pound, \textit{op. cit. supra} note 1, 181, 182. “It would be most unfortunate if both legislature and court should be governed by a conception of law as will and proceed to lay down whatever seemed best, for that reason alone, unrestrained by the necessity of going upon predetermined premises or developing them by a known technique and along fixed lines. The chief success of our common law doctrine of precedent is that it combines certainty and power of growth as no other doctrine has been able to do.”

The growth of equity and the fusion of natural law and morals, as examples of the conscious moulding of the common law along flexible lines, guided only by the conscience of the individual judge, are not in point in the present stage of industrial controversies. These methods, invoked to ease and to soften the rigidity of the common law, followed the age of strict law, with its fully developed, though unyielding, principles and formalism. They were appendages, engrafted upon, and later absorbed by, the common law. See Pound, \textit{Ibid} 140-143; \textit{op. cit. supra} note 5, 108-120.

\textsuperscript{66}The Printing Trades Case (1918) 2 So. Aust. Ind. Rep. 31; Sayre, \textit{op. cit. supra} note 52, 905, 917.
controversy or the rights of the parties are submerged in the interest of the public. This defect has been plainly apparent in the use of arbitration in railroad labor disputes. The case against the adequacy of the legal methods of the stage of voluntary arbitration has been summed up by a recent writer:

"Until a system of basic assumptions carefully defining a 'fair wage,' 'proper working conditions,' 'a fair day's work,' and the like is erected, which can fill the place in these bodies the common law fills in ordinary courts, arbitration will remain in the stage of primitive law with the resultant danger that the judges themselves, in their zeal to define principles under which they are to work, will build up for themselves a system of fixed principles leading to the unfortunate result of a stage of strict law."

It is true that the era of voluntary arbitration is a long step in advance of the strife and discord of strikes and lockouts, but it does not appear to have progressed very far beyond the primitive law in the definition of jural material. Its primary rule has been settlement at any price "with the State as the keeper of the lists."69

The final stage in the adjudication of railroad wages is reached with the advent of the Railroad Labor Board created by the Transportation Act, 1920.70 It marks the definite, and probably the permanent, estab-
lishment of a government tribunal with wage-fixing powers and the
right to compel the parties to submit their disputes to the Railroad
Labor Board, where the dispute is likely to interrupt appreciably the
movement of trains. The designation of the Railroad Labor Board
has been heralded as the beginning of a new era in the adjustment of
the relations of the carriers and their employees.\footnote{It has been regarded
as an agency which removes the strike as a necessary weapon for rail-
road labor.} The Railroad Labor Board is now in its third year of
existence—at least long enough to permit a preliminary examination of
its policies and accomplishments—and its results may be estimated by a
brief study of its major decisions.

The question of immediate interest is: Has the Railroad Labor Board
supplied the lack of norms and standards which existed prior to its
origin? Has the promise of a legal order, which accompanied its
creation, been translated into performance? The following extract
from the Transportation Act furnishes a basis for the consideration of
the interrogation:

Section 307 (d) . . . . In determining the justness and reasonableness
of such wages and salaries or working conditions the Board shall,
so far as applicable, take into consideration among other relevant
circumstances:

1. The scale of wages paid for similar kinds of work in other
industries;
2. The relation between wages and the cost of living;
3. The hazards of employment;
4. The training and skill required;
5. The degree of responsibility;
6. The character and regularity of employment;
7. Inequalities of increases in wages and treatment, the result
of previous wage orders or adjustments.

A reading of this section indicates that Congress was not only leaving
to the Railroad Labor Board the usual degree of discretion, which is
found in statutes creating administrative boards,\footnote{but was in fact giving
to the Board the responsibility and duty of shaping and defining the} to the Railroad Labor Board. The latter is given the power to order the parties
to any dispute, which is likely to substantially interrupt commerce, to appear before
it. The Board is authorized to hear and to decide any dispute involving grievances,
rules, working conditions and wages. The Act contains no penalties for the
violation of its orders. Cf. Pennsylvania Ry. v. United States Labor Board
\footnote{C. O. Fisher, \textit{op. cit. supra} note 12, at p. 95.}
\footnote{Thompson, \textit{op. cit. supra} note 9, at p. 28.}

\footnote{"In my opinion the (Railroad) Labor Board is a body corporate, subject to the
jurisdiction of the Federal courts, and may sue and be sued. This does not mean,
however, that the courts have general authority over the exercise of a discretion
vested in an administrative body or officer." Page J., \textit{Pennsylvania Ry. v. United
States Railroad Labor Board et al.} (1922, N. D. Ill.) 282 Fed. 693, 694; E. F.
127; Cuthbert Pound, \textit{The Judicial Power} (1922) 35 \textit{ibid.} 187.}
scope of the enunciated assumptions. The stated factors were to be taken into “consideration” by the Board “so far as applicable,” and could be rejected as inapplicable after “consideration,” or at least subdued in the light of the evanescent clause “other relevant circumstances.” The flexibility of this latter provision in circumscribing the powers of the Labor Board was noted in the minority opinion of Decision No. 1074 (June 10, 1922):

“Attention should be called to the readiness to go afield under the broad provision “other relevant circumstances” to justify wage cutting, and the equally assiduous search for a means of qualifying the specific cost-of-living principle mentioned. The net result has been to interpret out of the law the clause relative to the cost of living, and to read into the law new bases probably never contemplated by those responsible for its passage.”

If the definition of specific principles or standards by Congress is a prerequisite to the orderly determination of wages by a government board, it is difficult to trace these certain norms out of the language of the Transportation Act.

Confronted with this evasive do-what-is-right mandate, it was necessary for the Railroad Labor Board to attempt to fashion these principles as it went along. In the first general wage case, Decision No. 2 (July 20, 1920), we find a frank admission that “the Board has been unable to find any formula which, applied to the facts, would work out a just and reasonable wage for the many thousands of positions involved in this dispute.” In this dilemma “it was necessary to adopt,” as a base upon which to erect the new wage scale, the existing schedules of wages established under the authority of the United States Railroad Administration. This wartime scale, passed to meet the exigencies of the moment, could not in the nature of things be any more than a temporary makeshift. It could hardly have been the intention of Congress that the Railroad Labor Board should build permanently on this formula. While this temporary wage-base was undoubtedly necessary in the first

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74 The latitude of the general clause “other relevant circumstances” is evidenced by the language of the Board in Decision No. 2 (July 20, 1920): “... the act provides the Board shall consider in determining wages “other relevant circumstances.” This, it understands, comprehends, among other things, the effect the action of this Board may have on other wages and industries, on production generally, the relation of railroad wages to the aggregate of transportation costs and requirements for betterments, together with the burden on the entire people of railroad transportation charges.” The above statement is repeated verbatim in Decision No. 1074 (June 10, 1922).

75 The wages of the United States Railroad Administration were fixed by General Order 27, issued May 25, 1918. This schedule was based upon the findings of the Lane Commission, appointed by Director-General of Railroads McAdoo, January 1, 1918, for the purpose of investigating railway wages. The commission filed its report April 20, 1918. See testimony of William G. McAdoo, 4 Hearings before Senate Interstate Commerce Committee, Railroad Revenues and Expenses, 1766-1788 (Feb. 1, 1922).
general wage case, owing to the brevity of time, and the complexity of issues, the same basis was absorbed into the general wage cases decided by the Board in 1921 and 1922. The point to be emphasized in this continuance of the emergency schedule is that it is a demonstration of the inability or unwillingness of the Labor Board to initiate and apply independent and original premises in the adjudication of wages. The old order is continued, resulting in the preservation of the compromises and split-evens of the periods of strikes and arbitrations. Its acceptance has also involved a lack of due consideration of the "inequalities of increases in wages or of treatment, the result of previous wage orders or adjustments," as provided in the Transportation Act.

The enunciation of reasoned and deliberate opinions, sustained and supported by a complete analysis of the evidence and the statement of the rules and principles applied by the court, is a distinguishing mark of the common law. This traditional element, Dean Pound tells us, is by far the most important ingredient of our legal system. In the absence of legislative precision in the definition of an industrial code to guide the Railroad Labor Board, the development of a traditional element is essential in view of its general powers and uncharted area of operation. It is not sufficient for the Railroad Labor Board to announce that the litigants have submitted a "very voluminous mass of evidence" and to reach its decision without further reference to this "mass of evidence," or that the Board "has considered the seven

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76 Decision No. 2 was dated July 20, 1920, about three months after the organization of the Railroad Labor Board.
77 Decision No. 147 (June 1, 1921).
78 Decision No. 1036 (June 5, 1922).
79 "It is hardly unjust to the railroads to say that they, like other employers, rarely pay more to their labor than they are forced to, and for this reason, the widening of the differential between the train-service and other employees must be attributed not to the diversion of just increases of the latter to the more skilled group, but to the relatively stronger strategic position of the train-service employees as a consequence of their highly developed organization." J. N. Stockett, op. cit. supra note 67, at p. 165.
80 See Decision No. 2 (July 20, 1920) where the Board accepts "(in general) the existing differential between different classes of employees which have come about in the railroad service and which may be considered prima facie to be based upon good reason." The reading of the subsequent general wage cases does not reveal any effort by the Board to discover and remedy "inequalities of increase in wages or of treatment, the result of previous wage orders or adjustments."
81 "The first essential is that the Court should deliver considered judgments explanatory of the principles on which it has proceeded in each individual case. Merely to award that the claim has not been established or an increase of wages equal to half the amount claimed is perfectly futile." Sir Lynden Macassey, op. cit. supra note 55. 75. Cf. Found, The Spirit of the Common Law (1921) 173-184.
82 Decision No. 147 (June 1, 1921). The hearings in this general wage case extended from April 18, 1921, to May 16, 1921. See 1 & 2 Proc. of U. S. Railroad Labor Board (1921), containing 1107 pages, and exhaustive supplementary briefs
circumstances suggested by the act” without any accompanying definition of the results of the “consideration”; or that the Labor Board “finds it just and reasonable under the law and the evidence” to make a certain schedule of wages. A reading of the major decisions of the Board in the general wage cases fails to disclose any uniform process or standard. On the contrary, a certain mechanical method of addition and subtraction is visible with scant attempt to disclose to the public or the litigants the exact basis for its conclusions. The return to the give-and-take principle, reminiscent of the days of strikes and arbitration, is not wholly absent from the rulings of the Board; the atmosphere of compromise is still prevalent.

The failure of the Railroad Labor Board to develop the traditional element by reasoned opinions is more than a formal defect. It increases the danger of arbitrary action, based upon expediency and the exigencies of the particular case; it weakens the force and virility of the decisions. And finally, and by no means least, it raises the serious questions whether the advent of the Railroad Labor Board has in fact resulted in the development of “predetermined premises” or a “known technique”; and whether the promise of a legal order, in the settlement of railroad labor disputes, has been attained in practice. It may be that the primacy of the public interest necessitates the immediate passage of

filed by the carriers and the employees. The presentation of the employees’ case, among other matters, included a consideration of possible economies in railway management, price movements and railway income, financial mismanagement and its effect on railroad labor and alleged inefficiencies in railroad operation. See 1 ibid. 351-484, 2 ibid. 593-641; for the reply of the carriers see 2 ibid. 919-1107.

Apart from the validity of the employees’ contentions or the sufficiency of the answers of the railroads, the fact to be emphasized is that, save for the general reference noted above, Decision No. 147 totally ignores the many issues relating to wages, raised by the briefs and oral arguments in the case, and omits examination or analysis of the data filed by the litigants.

Decision No. 2 (July 20, 1920).

Decision No. 1036 (June 5, 1922). This was a general wage controversy between the principal railroads and the Railway Employees’ Department, A. F. of L. (Federated Shop Crafts) et al. Less than three pages, under the title of “Basis and Analysis of Decision,” are required to state the opinion of the majority members of the Board. Cf. the reasoned opinion of twenty pages filed by the minority members in this case.

The undersigned must dissent from a decision which ignores these witnesses, the human needs of tens of thousands of families, which has given them not one word of answer. . . . No facts are stated to justify the opinion. The public is given no basis for understanding the case or forming a judgment.” Dissenting opinion, Decision No. 1036 (June 5, 1922) 28, 34.

Decision No. 1074 (June 10, 1922), 19: “Every citizen, including the railroad employee, should cooperate in a cordial spirit, should bear and forbear, until the carriers are back on their feet.” Cf. note 67, supra.

“Nothing very exact or scientific is to be found in all this (Decision No. 1028). It means that the (Railroad) Labor Board, like most such bodies, finds itself compelled to function by a process of more or less haphazard compromise.”

an anti-strike law, regardless of this dearth of jural material in the industrial order; that railroad labor must submit, in the interest of the public, to a principle of "free judicial decisions" by a government board. If this is the case, the step must be consciously taken with the realization that we are abandoning certain fundamental and traditional ideas of justice in the common law.88

Opposition to the enactment of repressive labor laws at this time need not result in the pessimistic conclusion that industrial warfare is above and beyond law, or that the periodical dislocation of industry is a necessary evil which must be endured by society; nor does it involve the positive assertion that the anti-strike remedy is, and always will be, a futile effort to reach the core of industrial disorders. Tempora mutantur, nos et mutamur in illis. The time and place of a given legislative program, however, are weighty factors in spelling out its wisdom, efficacy and justice. Limiting our problem to the present day and locality, there are indications that the doubtful value of force and compulsion in the name of law may be magnified; there are indications that we are prone to minimize the importance of a preliminary development of established principles and reasoned opinions. May we not pause to view the developing results of the application of the counter-idea of industrial coöperation, its accord with the ideals of America, and its applicability to the instant railroad problem? Is it not in order, at least, to face and to solve the task of defining, developing and applying a "known technique" and "predetermined premises" in our industrial law before stressing the feudal ideas of status and relation?

If classical common-law ideas are deemed sufficient to work out a solution of present industrial problems, we undoubtedly have them in the ideas of relation and status. The return to the recognition of slavery is not necessary; we can reject the status of slavery, quite apart from constitutional impediments, on the ground that slavery is "an archaic idea" and that it is abhorrent to the social order of our day. A mollified common-law form of serfdom—based squarely upon the idea of relation and not status89—is available for service. The convenient distinction between 'serf in gross' and 'serf regardant' may be

88 As Dean Wigmore expresses it: "... the moment you have general principles (in industrial law), you have justice in the form of law, as distinguished from the arbitrary justice of a Turkish Caliph, or from private struggle decided by force." A New Field for Systematic Justice (1915) 10 Ill. L. Rev. 592. Salmond says: "In the application of a fixed and predetermined rule, alike for all and not made for or regarding his own case alone, a man will willingly acquiesce. But to the 'ipse dixit' of a court, however just or impartial, men are not so constituted as to afford the same ready obedience and respect." Science of Legal Method, op. cit. supra note 2, Introd. lxxxi.

89 "In his treatment of the subject Bracton constantly insists on the relativity of servitude; servitude with him is hardly a status; it is but a relation between two persons, serf and lord; as regards his lord the serf as a rule has no rights, but as regards other persons he has all or nearly all the rights of a free man." 1 Pollock and Maitland, op. cit. supra note 3, at p. 398.
moulded by a process of analogy to fit the relations of the railroad employees to the public.90

Despite this wealth of common-law material, it is not clear that America—at this time—is ready to extend the eminently useful ideas of relation or status to the point of compulsory service. To sum up, there are five major difficulties, regarded primarily from the public viewpoint, which raise questions of the propriety, timeliness, policy, and efficacy of the proposed law to prohibit strikes in railroad employment. These are (1) the deeply-rooted individualism of the American people, which has developed a formidable and inherent dislike for governmental interference with individual action, (2) the limitations of effective legislative action, which are involved in the attempt to compel and to control involuntary service by railroad employees, (3) the primitive stage of industrial law and the lack of principles and standards in fixing wages and rules of employment, (4) the infinite ramifications of the anti-strike remedy in the industrial, and even the agricultural order, and (5) the failure of similar legislation operating in limited areas.

90 Hilaire Belloc, op. cit. supra note 33, 21. This book may be consulted for the development of its underlying thesis "that modern society . . . is tending to reach a condition of equilibrium by the establishment of compulsory labour legally enforceable upon those who do not own the means of production for the advantage of those who do." Ibid. 3.