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THE REGULATION OF EMPLOYMENT AGENCIES

In a recent decision¹ the United States Supreme Court has denied to a state the power to regulate the fees of private employment agencies. The state of New Jersey had passed an act providing that an applicant for a license to conduct an employment agency, in addition to other requirements, must "file with the Commissioner of Labor, for his approval, a schedule of fees proposed to be charged for any service rendered to employers seeking employees, and persons seeking employment, and all charges must conform thereto."² Under this section the Com-

¹ Ribnik v. McBride, 48 Sup. Ct. 614 (U. S. 1928).

² N. J. Laws 1918, c. 227.

missioner of Labor refused to issue a license to Ribnik because "the fees proposed to be charged . . . were excessive and unreasonable." The Supreme Court of the state, called upon to review the denial of application, upheld the action of the Commissioner,³ and was in turn sustained by the state Court of Errors and Appeals.⁴

This judgment has now been reversed by the United States Supreme Court. It has found that the disputed section of the statute confers upon the Commissioner the power "to fix prices" in "a business . . . not affected with a public interest," and hence to amount to "a deprivation of property" without "due process of law." The decision of the court was announced by Justice Sutherland, in whose opinion Chief Justice Taft, Justices McReynolds and Butler joined. In a separate statement, Justice Sanford "concurred in the result . . . upon the controlling authority" of the theatre-ticket case,⁵ which he was "unable to distinguish." A vigorous dissent was read by Justice Stone, in which Justices Holmes and Brandeis joined.

This decision places in more or less peril the whole body of legislation which has been gradually built up for the regulation of "labor exchanges." The subject attracted the attention of law-makers as early as the nineties; during more than three decades statute has been added to statute; and at present the national government, most of the states of the union, and many municipalities subject employment agencies to formal control. Since the supervision of fees may take many different forms, and since in different enactments it is more or less inseparable from other provisions, it would take a detailed analysis of statutes to determine the extent of invalidity that follows in the wake of the decision. The court did not regard "the mere existence in other states of statutory provisions like the one now under review as entitled to persuasive force." Yet, although it defies accurate statement, a review of the movement for regulation will indicate something of the far-reaching significance of its declaration of unconstitutionality.

The need for a control of "the labor market" has come with an advance of industrialism. Until well in the nineteenth century production was carried on in small shops, goods were sold in a market near at hand, and each town with its bit of surrounding country was an almost self-contained industrial unit. Even as late as the eighties the nation was largely agricultural, business was little beyond the stage of petty trade, and all goods except a few "cash" staples were produced for local consumption. Under these conditions there was, save in name,

³ 4 N. J. Misc. 623 (1926).

⁴ 137 Atl. 437 (N. J. L. 1927).

⁵ *Tyson v. Banton*, 273 U. S. 418, 47 Sup. Ct. 426 (1927).

hardly such a thing as "a labor market." In the country or the small town, where everything was a matter of neighborhood knowledge, the jobs open and the laborers available were matters of common knowledge, and the two were brought together without difficulty. It was only in the city, which was still new and strange, that the problem of "hiring" did not solve itself and there was need for the service of brokers in human labor.

But, as with other things which are extensively bought and sold, in time there arose a "labor market." The coming of the machine, large-scale production, and the business corporation have put the prospective employer and the would-be employee out of touch with each other. The old self-contained community of many trades has ceased to be; each business has become a great industry localized in a few places, selling its product to the whole nation; and these businesses have been articulated into a gigantic industrial machine. With these changes the filling of places with laborers has ceased to be a personal and a local affair. The making of the best possible adjustment between the laborers of a nation and the jobs of a great industrial system has become a problem of the first magnitude.

This adjustment of men to jobs is always going on and is never ended. Its solution must make the best terms it can with many forces tending to upset the balance. As old workers die or retire they must be replaced by new ones; as occupations become seasonal, the laborer who would live the year round must rely on two or more of them; as technology robs experienced workers of their skill, they must seek employment in lines new to them; with the passing of old trades, the rise in new ones, the shift of industries from one section of the country to another; and the ebb and flow of prosperity which we call "the business cycle," the supply of labor has to be adjusted to an ever-changing demand for it. Always, everywhere, a surplus of jobs attracts men, a surplus of laborers has to be crowded into such jobs as can be found. In town, in a trade, in an industry, throughout the country at large, by myriad separate acts of employment, men and jobs must be organized into a going productive system.

In the maintenance of a mechanism adequate to the task of organization, all the parties to industry have a stake. The business man demands an adequate supply of labor adapted to his requirements. The laborer demands a job which is at once a protection against unemployment and a chance to earn a living. The public has an interest in the increase of wealth which must attend full employment, in avoiding the cost of relieving poverty whose chief modern source is a lack of available work, and in the higher living standards and the richer opportunities at life which come from the fullest utilization of human resources.

Nor has there been any lack of appreciation of the importance of the problem by business men, by laborers, and by the public. The business corporations have in increasing number established "employment divisions" and "bureaus of personnel," to go out and find suitable laborers, and to convert them into the trained workmen they demand. The workers themselves have sought to guard against the dangers which lie in making of human labor "a marketable commodity;" their attempt to exercise a constructive control over "hiring and firing" is one of the most important chapters in trade-union history. And with the growing importance of the problem and with increasing evidence that matters cannot take care of themselves, the public has come to take a hand in the matter.

The interest of the state has been manifest in a number of ways. As was inevitable for a time the organization of employment was left to whom it might concern. Private persons were free to undertake for a price to find men for jobs and jobs for men. Agencies came into existence for the placement of men of almost every trade from the least to the most highly skilled, and these exchanges came to constitute a very loosely organized "national labor market." Later, as abuses became matters of common knowledge, the federal government, various states, and not a few municipal councils directed inquiries into their adequacy for the task, the competence of their performance, and the fairness of their practices to those who used their services. It was discovered, with a unanimity that is rare in such matters, that private exchanges are unable to handle in a comprehensive and constructive way the placement of labor, and that the abuses which attend the unregulated exchange are seemingly inseparable from its operation.⁶ The information about "laborers wanted" has not been reliable; men have repeatedly been sent in search of jobs which did not exist. There is a continued story of collusion between foremen and agencies by which the former created vacancies and the latter passed over part of the fees collected for filling them. In his opinion Justice Stone mentions "the three gang system;" one gang just discharged is on its way home; a second is for the moment employed; a third, "hired by the agency is on its way to the job." The fees charged have been excessive; far too frequently they have been collected for

⁶ The earlier investigations are summarized by Justice Brandeis in *Adams v. Tanner*, 244 U. S. 590, 597-616, 37 Sup. Ct. 662, 665-673 (1917), and the later ones by Justice Stone in his opinion in the case under discussion. See particularly the REPORT OF THE COMMISSION ON INDUSTRIAL RELATIONS, SEN. DOC. NO. 415, 64th Cong., 1st Sess., Vols. 1 and 2, *passim*; PROCEEDINGS, NINTH ANNUAL CONVENTION, ASSOCIATION OF GOVERNMENTAL LABOR OFFICIALS (1923). There have also been a number of investigations by research and social welfare organizations, the more important of which are listed by Justices Brandeis and Stone.

services which have not been rendered. It is common to exact different fees of different laborers; the exchanges, instead of charging fair and reasonable compensation for their services, graduate their charges to what the several items of traffic can be made to bear. Often, in times when work is scarce, a monopoly price is exacted for a job. The reports agree that excessive charges and poor service lie at the heart of the problem, and that they are rooted in a lack of "bargaining power" on the part of the non-employed.

In course of time these investigations have ripened into legislation. The attempt at governmental supervision had its beginning in the nineties. A "model" act of regulation has been passed by Congress for the District of Columbia;⁷ all but nine of the states have dealt with the subject by specific statute,⁸ and many aldermanic bodies have aimed ordinances at particular abuses. In some states such provisions as the requirement of bonds, the demand for certificates of character, and the publication and filing of schedules of fees are in force; in others a license is required which is to be had only upon conditions designed to protect patrons. But, because of the character of the abuses, the dominant form of control is a supervision of the fees to be charged. Ten states fix specific fees to be charged;⁹ ten states limit fees to a percentage of wages;¹⁰ and eight states, including New Jersey, require the schedule of fees to be approved by a state official.¹¹ The general distrust of private agencies has gone so far that a number of states and many cities have established public free employment exchanges.¹² One state has by law prohibited private exchanges altogether,¹³ and another

⁷ 34 STAT. 304 (1906).

⁸ The exceptions are Alabama, Arizona, Delaware, Florida, Mississippi, North Dakota, New Mexico, South Carolina, and Vermont. But it is of note that in some of these, *e. g.*, Alabama and Florida, general statutes specifying the conditions under which persons are to be licensed to engage in various trades apply to employment agencies.

⁹ Arkansas, Colorado, Illinois, Kansas, Maine, Missouri, Montana, Texas, Virginia and Wyoming. By Act of Congress this is also true of the District of Columbia.

¹⁰ Connecticut, Iowa, Michigan, Nebraska, New York, North Carolina, Oklahoma, Oregon, Utah and Rhode Island.

¹¹ California, Indiana, Minnesota, New Jersey, Ohio, Pennsylvania, South Dakota, and Wisconsin.

¹² As early as 1912 such offices were maintained by at least fifteen states. The states are Colorado, Connecticut, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Ohio, Oklahoma, Rhode Island, West Virginia and Wisconsin. The state of New York began the practice as early as 1896. See STATISTICS OF UNEMPLOYMENT AND THE WORK OF EMPLOYMENT OFFICES (U. S. Bureau of Labor, 1913) Bull. No. 109, 35-36.

¹³ IDAHO COMP. STAT. (1919) §§ 2297, 2308-2310. Although the statute would appear to be rendered invalid by the decision in *Adams v. Tanner*,

has forbidden agencies to collect fees for service from employees.¹⁴ Nearly twenty years ago there was a rather widespread demand for "a national clearing house for labor" and several ambitious schemes were put forward for its realization. Under the great necessity for "the conservation of labor power" which the war brought, there was organized "a national system of labor exchanges." This, it hardly needs to be said, was scrapped in the general demobilization of industry which followed the armistice.

In view of the large volume of legislation, the judicial history of the regulation of labor exchanges is surprisingly short. It may be, as Justice Sutherland insists, that many of the statutes have not been enforced; it may be, as Justice Stone is inclined to think, that their validity has in the past not been subject to serious question; it is only certain that the dockets of the courts have known little of the issue. The few state decisions aside,¹⁵ only three cases of importance have been before the United States Supreme Court. In the Michigan case,¹⁶ it was held to be within "the power of the state to require licenses for employment agencies and prescribe reasonable regulations to be enforced by the Commissioner of Labor." In the Washington case,¹⁷ a law of the state forbidding an agency to exact a fee from an employee for service rendered was found invalid. In the opinion of the court this prohibition deprived the agent of his chance to earn a livelihood, and hence was a denial of "a right to follow a distinctly useful calling in an upright way." Or, as Justice McReynolds, who on that occasion spoke for five of the nine members of the court, quoted Shylock, "you take my house when you do take the prop that doth sustain my house." The court expressly left open the door for "hedging . . . this business about . . . by proper regulation." The New Jersey provision for the supervision of fees is typical of the statutes passed in twenty-eight states; it is in the judgment of as many state legislatures the "proper regulation" by which this business should be hedged about. It is the validity of this form of regulation which is the issue in the *Ribnik* case.

244 U. S. 590, 37 Sup. Ct. 662 (1917), it presumably has not been enforced, as no case involving its somewhat questionable validity has come before the courts.

¹⁴ Washington. But cf. *Adams v. Tanner*, *supra* note 13.

¹⁵ Since the validity of statutes regulating private employment exchanges must necessarily turn upon constitutional issues, decisions of state courts holding laws ultra vires are of little account. The decisions of the California court, *Ex parte Dickey*, 144 Cal. 234, 77 Pac. 924 (1904), and *In re Smith*, 193 Cal. 337, 223 Pac. 971 (1924), declaring state statutes invalid, which Justice Sutherland cites, can hardly be called authoritative.

¹⁶ *Brazee v. People*, 241 U. S. 340, 36 Sup. Ct. 561 (1916).

¹⁷ *Adams v. Tanner*, *supra* note 13.

The argument by which Justice Sutherland finds the New Jersey provision unconstitutional is easily stated: his initial commitment is to make the supervision of fees a case of price-fixing. The core of his argument is a syllogism. The major premise comes easily; if a business is not "affected with a public interest," the fixing of prices by the state is "a deprivation of property" without "due process of law." The minor premise presents more difficulty and is achieved only through a series of steps. They are in order: (1) the business of dealing in theatre tickets has been held to be not "affected with a public interest;"¹⁸ (2) therefore, the work of "a broker, that is of an intermediary" is not "affected with a public interest;" (3) "the business of securing employment for those seeking work and employees for those seeking workers is essentially that of a broker;" and (4) therefore, the business of running an employment agency is not affected with a public interest. The conclusion, of course, follows: "it is not easy to see how without disregarding that decision,¹⁹ price-fixing legislation in respect of other brokers of like character can be upheld." Certain of his conclusions, yet not content, Justice Sutherland adds a more general argument. The running of an employment agency is of concern "to the public," but no more so than the business of "the druggist, the butcher, the baker, the grocer." It is not such "as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public."²⁰ The interest of the public is not "that 'public interest' which the law contemplates as the basis of legislative price control." Here "*granted*" and "*devoted*" and "that public interest" are ultimates. Back of these words the argument does not go; no aids to recognition are given; no criteria are set down by means of which these foundations of legislative price-fixing may be found out when they exist.

If Justice Sutherland's argument is easily stated, it is not so easily understood. It seems, alike in content and in method, to raise more questions than it answers. Does such a supervision of fees as is provided for in the New Jersey statute amount to price-fixing regulation? Why is the statute not valid under the police power, as a regulation properly directed against a gross and persistent evil whose continued existence is inimical to the public? Why does the concept of "public interest" have to be employed to justify governmental interference with price when it does not have to be used to justify interference with hours of labor, the methods of wage-payment, and responsibility

¹⁸ *Tyson v. Banton*, *supra* note 5.

¹⁹ The reference is to *Tyson v. Banton*.

²⁰ Here Justice Sutherland quotes from his opinion in *Tyson v. Banton*, *supra* note 13, at 430, 47 Sup. Ct. at 432.

for industrial accident? And are not all of these "like terms" of the same bargain? Is the basis of the concept of "public interest" a dedication and an extraordinary importance of a business to the public? Or is it only the need for regulation as evidenced by (1) the importance of the business to the public, and (2) the failure of the competitive system to protect its interest?²¹ Can a category of public interest be made to perform the practical legal task of distinguishing between cases which invite price-regulation and those which do not? Or, are not industries so varied in nature, the abuses which attend them so miscellaneous in kind, and their demands for legislative attention so specific in character that public interest can never be more than a label to be used in converting the need for regulation into the fact.²²

But if Justice Sutherland's employment of "public interest" is puzzling, his use of the concept "brokers" to complete his argument is doubly so. Whence comes his category, all the members of which are not affected with a public interest? Is it invented to get the dealer in theatre tickets and the employment agent in the same class in order that the same invalidity may be visited upon statutes regulating them?²³ If the judgment of the court upon the ticket dealer applies to the class to which

²¹ If the concept is to be used as a test of the validity of price-fixing legislation, it must be endowed with a specific meaning. The two criteria set down in the text seem to be the meaning which careful students extract from a study of the cases. See the list in the first paragraph of Justice Stone's opinion. It is significant that Justice Stone who dissents and Mr. Walter Gordon Merritt, of the League for Industrial Rights, who pleaded the case so successfully for Ribnik, agree on this. Justice Stone says, "As I read those decisions, such regulation is within a state's power whenever any combination of circumstances seriously curtails the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole." Mr. Merritt seems to see how easy it is to "affect" employment agencies with a "public interest" and to appreciate the weakness of his own case. Accordingly in his brief he tries to show that the openness of the trade and the competition between agencies gives adequate protection against abuses. The facts were against him; so he does not dwell on them. Instead he does the best he can by telling how competition is supposed to work. It is puzzling to know why Justice Sutherland did not avail himself of this inadequate but rather necessary bit of help. It has been made to serve before, and when facts are not as they should be the theory of how competition is supposed to work will be made to serve again.

²² Cf. Justice Stone, in *Tyson v. Banton*, *supra* note 5, at 451, 47 Sup. Ct. at 442.

²³ The creation of classes has had less attention than it deserves at the hands of students of the court. Maitland gives a nice example of the sixteenth century lawyer who created the "*corporation sole*" in an effort to get the King and the parson into the same class. See 3 MAITLAND, COLLECTED PAPERS (1911) 210.

he belongs, why is the clan of brokers selected in preference to a dozen others which includes him? If the question must turn upon an exercise in classification, why does the basis of distinction lie in a mere mechanical stage of a marketing process, which has nothing whatever to do with evils, regulation, or the ends of governmental control? It is surprising to find Justice Sutherland disposing of an issue in public policy by a purely conceptual argument; it is disturbing to find the selection of concepts resting upon nothing more basic than an arbitrary choice.

In contrast, the opinion of Justice Stone is simple, clear-cut, and direct. Since the issue is the validity of an act of regulation by the state, he looks to see whether there was warrant for the specific exercise of power. He is interested in such questions as, did evils exist, were they grave and persistent, was their continuance likely to occasion serious consequences to the public, was the action of the legislature reasonably intelligent, were the particular measures taken addressed to the specific abuses to be corrected. He makes a careful inquiry into the function of the employment agency and a careful survey of its operation. He concludes that while "there may be reasonable differences of opinion as to the wisdom of the solution here attempted,"²⁴ . . . the choice of a remedy . . . should be left where, it seems to me, it was left by the Constitution—to the States and to Congress." He is quite able to distinguish the *Tyson* case: "Ticket-brokers and labor brokers are similar in name; in no other respect do they seem alike to me. To overcharge a man for the privilege of hearing the opera is one thing; to control the possibility of his earning a livelihood would appear to be quite another." It is significant that the precedents he cites are more numerous, more relevant, and more compelling than those used by the spokesman for the court.²⁵ He sees the action of the legislature as a proper regula-

²⁴ This concession is wholly rhetorical. There may abstractly be a better remedy for existing abuses; but no alternative proposal of greater relevancy, or of more certain legal validity is suggested anywhere in the materials dealing with the case. If he had needed to do so, Justice Stone might have made more of the ephemeral nature of the interest to which the court accords protection, the ease with which business accommodates itself to regulation, and the fly-by-night character of the general run of employment agencies. In fact if there is a "right" to be protected, it is transitory, while the evils which attend the lack of regulation are persistent.

²⁵ Justice Sutherland stakes his argument upon the *Tyson* case, and makes little use of other precedents. The case of *Wolf Packing Co. v. Industrial Court*, 262 U. S. 522, 43 Sup. Ct. 630 (1923), upon which he places some reliance, hardly sustains the burden put upon it. Here Chief Justice Taft, in his enumeration of classes of business affected with a public interest includes, "Businesses which though not public at their inception may be fairly said to have risen to be such." As his first example he sets down grain elevators, *Munn v. Illinois*, 94 U. S. 113 (1876); and Justice Stone

tion designed to eliminate evils which are serious, disturbing to the industrial system, and, if not corrected, persistent sources of mischief. Throughout he seeks to place the larger above the smaller value.

The position of the minority seems to be clearly in accord with legal tradition. It is the swift onrush of industrial change which has created alike the labor market and the need for its regulation. From time out of mind the law has attempted to prevent the unscrupulous from "trading upon a man's necessities." This solicitude has found expression in a maze of legislation of which the regulation of the rate of interest is a typical example. For just as long the state has been an active agent in the relief of the poor. Under modern industrial conditions the dangers of necessity and of poverty lurk in new places. Where the worker must take his labor that will not keep, to the market and exchange it for a living, it is unemployment that is the great source of poverty. If it is to be relieved in a constructive way the state must take appropriate measures to see to it that the labor market is so organized that the supply of jobs will go as far as possible. And the man whose inability to bargain is rooted in a lack of work needs protection from the job-broker as well as from the money-lender. The regulatory power of the state, even in late years, has by the courts repeatedly been held to extend to objects of far less concern to the nation at large. The weight of authority seems to be with the conservative position of Justice Stone. It seems to be squarely against the radical innovations of Justice Sutherland and the majority of the court who read into the Constitution of the United States the original ideas of ingenious attorneys for plaintiffs-in-error.

seems to be right in insisting that the Ribnik case is more like the Munn case than like the Tyson case. Aside from the California state cases already cited, the only other case which Justice Sutherland uses is the minimum wage case, *Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394 (1923).

In support of the proposition that "such regulation is within a state's power whenever any combination of circumstances curtails the regulative force of competition," Justice Stone cites the following cases upon the direct fixing of prices. *Munn v. Illinois*, *supra*; *Brass v. Stoeser*, 153 U. S. 391, 14 Sup. Ct. 857 (1894); *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389, 34 Sup. Ct. 612 (1914); *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252, 36 Sup. Ct. 583 (1916); *Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. 458 (1921); *Marcus Brown Co. v. Siegel*, 258 U. S. 170, 41 Sup. Ct. 465 (1921); *Levy Leasing Co. v. Siegel*, 258 U. S. 242, 42 Sup. Ct. 289 (1922). The following cases are cited upon the indirect fixing of prices. *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1 (1901); *McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206 (1909); *Mutual Loan Co. v. Martell*, 222 U. S. 225, 32 Sup. Ct. 74 (1911); *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586 (1895). A critical review of the list is of course impossible within the space limits here. But see *supra* note 21.

It remains to be seen what the practical effect of this decision will be. The power to grant licenses upon "reasonable conditions" still remains with the states. The legislature of New Jersey has already passed a new act attempting to get at the abuses of labor exchanges by the use of this device²⁶ and other legislatures will doubtless follow. It is doubtful whether private agencies can be subdued to the useful and the good by such regulatory circumlocution. As yet the right of the state to establish employment agencies in competition with private brokers is unquestioned. Since these services are usually free, if they can command patronage they may in time drive the private exchanges from the field. It would be interesting if the denial of the power to supervise fees should result in the organization of the labor market under a scheme of "state socialism."

But, whatever the future, the decision of the court leaves unsettled the question of the kind of thing the Constitution is. Is it a fetish which must be served whatever be the resulting inability of the State to look after its own affairs? Is Justice Moody²⁷ right in declaring that it is not "a system of law sufficient for the present moment which might in a few years become unsuited to or inadequate for the needs of the people," but rather an instrument of government "inspired and dominated" by "the spirit of the nation-builder and not of the code-maker"?

W. H. H.

BANKRUPTCY OF LESSOR AS CREATING OPTION IN LESSEE TO TERMINATE LEASE

By far the large majority of cases which consider the effect of the bankruptcy of one of the parties to a lease involve claims by lessors against lessees or their trustees in bankruptcy, and consequently the results in certain situations are fairly predictable. Thus, where there is a lease of realty, rent accruing subsequent to the tenant's petition in bankruptcy is not a claim provable against his estate¹ under the present Bankruptcy Act, and recovery is limited to a personal action against the bankrupt himself.² But if the lease provides for acceleration

²⁶ (1928) 18 AM. LABOR LEG. REV. 279.

²⁷ See *The Employers' Liability Cases*, 207 U. S. 463, 520, 28 Sup. Ct. 141, 154 (1908).

¹ In *re Mlle. Lemaud, Inc.*, 13 F. (2d) 208 (D. Mass. 1926). By § 63a of the Bankruptcy Act, claims provable against the estate are those which are "(1) a fixed liability . . . absolutely owing at the time of the filing of the petition . . . whether payable or not . . . (4) founded upon an open account, or upon contract express or implied." 30 STAT. 563 (1898), 11 U. S. C. § 103 (1927).

² In *re Hook*, 25 F. (2d) 498 (D. Md. 1928); *cf. Kessler v. Slappey*, 34 Ga. App. 614, 130 S. E. 921 (1925); 3 WILLISTON, CONTRACTS (1920) § 1985.

of future rent in event of the lessee's bankruptcy, a claim for that rent is provable.³ Where the lessor of realty is given a statutory lien for future rent on goods upon the premises, it has been held that bankruptcy does not destroy that lien.⁴ If the lessor re-enters, under a provision for re-entry in the lease, the tenancy is said to be terminated, and the bankrupt or his trustee are responsible neither for subsequent rent that would otherwise have accrued,⁵ nor for any deficiency in the rent which the lessor may suffer upon re-letting.⁶ Another type of claim was recently illustrated in a North Carolina case, where a petition by a landlord for forfeiture of the lease and possession of the premises held by an insolvent lessee corporation in the hands of a receiver was denied on the ground that the receiver had tendered all rent and costs to the landlord before judgment.⁷

The recent case of *In re Civic Center Realty Co.*, 26 F. (2d) 825 (D. Md. 1928), however, raises a novel and more open question. The Realty Company, as lessor of office space under a five-year lease, was to effect certain alterations in the building, and to assume the unfinished portion of the lessee's existing lease in another building with another party, the lease not to be effective until completion of the alterations. While the lease was entirely executory, the lessor was adjudicated an involuntary bankrupt. Although the trustees asserted their ability to carry out the agreement, the lessee petitioned for release, which was granted on the grounds of the uncertainty of performance of the covenants by the lessor, and the injustice of forcing the lessee to give up the premises it then occupied and abide by the lease.

The lack of authority where the lessor becomes insolvent is probably due to the fact that ordinarily a lessor's bankruptcy would not cause a tenant of realty any apprehension or desire to be relieved from the lease. Thus, while holding that the bankruptcy of a tenant *ipso facto* terminates the relation of landlord and tenant,⁸ one court said by way of dictum:⁹

³ *Rosenblum v. Uber*, 256 Fed. 584 (C. C. A. 3d, 1919); Note (1910) 31 L. R. A. (N. S.) 270; cf. Note L. R. A. 1917F 657 (referring to articles on different aspects of the subject).

⁴ *Dove v. Davis*, 25 F. (2d) 967 (C. C. A. 5th, 1928); *Britton v. Western Iowa Co.*, 9 F. (2d) 488 (C. C. A. 8th, 1925).

⁵ *Ex parte Houghton*, Fed. Cas. No. 6,725 (D. Mass. 1871).

⁶ *In re Shaffer*, 124 Fed. 111 (D. Mass. 1903).

⁷ *Coleman v. Carolina Theatres, Inc.*, 195 N. C. 607, 143 S. E. 7 (1928). The decision was also based on statute. 1 N. C. CONS. STAT. ANN. (1919) §§ 2343, 2372.

⁸ *In re Hays, Foster & Ward Co.*, 117 Fed. 879 (D. Ky. 1902). This decision is clearly the minority view on this point. See *infra* note 18.

⁹ *Ibid.* 884.

"... different reasons would require a different result in case a landlord should become bankrupt. In that case, where the legal title to the real estate would devolve upon the trustee in bankruptcy, and who would then be the substituted but temporary landlord by operation of law, the land itself might be regarded as performing such duties to the tenant as his needs required. . . . Change of ownership of real estate never affects the rights of the tenant. It is a matter with which, in normal cases, he has no concern."

Part of an able report¹⁰ by a Special Master argues to the same effect:

"Bankruptcy of a landlord would not ordinarily constitute an anticipatory breach because his obligation in the lease is not ordinarily one to pay or deliver something in the future. He has already, by the lease, granted a term in property."

The doctrine that where one party to an executory contract puts it out of his own power to perform it, there is an anticipatory breach giving the other party an immediate right of action for damages, is generally accepted in the United States.¹¹ In applying this rule to the case of an insolvent corporation in the hands of a receiver, it has been said that,

"Bankruptcy is a complete disablement from performance and the equivalent of an out and out repudiation, subject only to the right of the trustee, at his election, to rehabilitate the contract by performance."¹²

This statement, however, would seem properly subject to a limitation imposed in a similar case: "It is probable that bankruptcy and insolvency do not break contracts when they do not in fact prevent performance."¹³ The landlord of a bankrupt tenant is faced with the prospective failure of his principal and often sole consideration—the payment of rent. But, as the assurance of occupation and the quiet enjoyment of the premises will generally insure to the lessee substantial fulfilment of his expectations under the lease,¹⁴ there is less justification for regarding the lessor's bankruptcy as an anticipatory breach.

However, the bankrupt lessor in the instant case had also undertaken the supplementary covenants to assume the un-

¹⁰ See *In re Bissinger Co.*, 5 F. (2d) 106, 112 (D. Ohio, 1925).

¹¹ ANSON, *CONTRACTS* (Corbin's ed. 1924) § 385; 3 WILLISTON, *CONTRACTS* (1920) § 1314.

¹² See *In re Neff*, 157 Fed. 57, 61 (C. C. A. 6th, 1907); *cf.* also *In re Swift*, 112 Fed. 315 (C. C. A. 1st, 1901); *In re Pettingill*, 137 Fed. 143 (D. Mass. 1905).

¹³ See *Penn. Steel Co. v. N. Y. City Ry.*, 198 Fed. 721, 743 (C. C. A. 2d, 1912).

¹⁴ See *supra* notes 9 and 10.

finished portion of the lessee's existing lease, and to effect certain alterations in the specified office space at a cost of some \$5,000. The court held that his bankruptcy rendered the performance of these covenants so uncertain as to give the lessee a proper claim for release. The decision was based on the case of *Central Trust Co. v. Chicago Auditorium Association*,¹⁵ in which the Supreme Court held, in a case of an executory contract for rights of baggage and livery service in a hotel, the performance of which would require the use of capital by the baggage company, that the bankruptcy of the latter constituted an anticipatory breach, damages for which gave rise to a provable claim against the bankrupt's estate. It would seem questionable whether, in view of the dissimilarity of the facts, the instant court was justified in its statement that while the *Auditorium* case "goes on the basis of an action for anticipatory breach, the same principles which support that action operate to give the lessee here the right to ask relief from his contract." In the *Auditorium* case it was the "lessee" who was bankrupt. The hotel company could plead prospective failure of the whole consideration—the payment of rent. In the instant case, the lessee has as a basis for his claim only the uncertainty of the performance of certain supplementary covenants by the bankrupt lessor. It would seem an established limitation of the rule as to anticipatory breach that the repudiation must go to the entire performance promised—must amount to a renunciation of the entire consideration.¹⁶

Although the instant case involved a lease of realty, the court ignored a dictum by the Supreme Court in the *Auditorium* case to the effect that cases arising out of the relation of landlord and tenant are distinguishable.¹⁷ There is a group of early cases which assume that the relation of the parties to a lease of land is severed by the bankruptcy of the lessee.¹⁸ But this assumption appears to have been definitely discarded.¹⁹ While the *Audi-*

¹⁵ 240 U. S. 581, 36 Sup. Ct. 412 (1916), L. R. A. 1917B 580.

¹⁶ *Johnstone v. Milling*, 16 Q. B. D. 460 (1886) (lessee not privileged to abandon the lease, where lessor announced his intention of not rebuilding as he had agreed); see *ANSON, op. cit. supra* note 11, § 383(b).

¹⁷ *Supra* note 15, at 590, 36 Sup. Ct. at 414 (1916). Referring to a number of landlord and tenant cases that had been cited, the court said, "Cases of the latter class are distinguishable because of the 'diversity between duties which touch the realty, and the mere personalty,'" citing *Co. Litt.* 292b, § 513.

¹⁸ *In re Jefferson*, 93 Fed. 948 (D. Ky. 1899); *Bray v. Cobb*, 100 Fed. 270 (D. N. C. 1900); *In re Hays, Foster & Ward Co.*, *supra* note 8; *In re Hinckel Brewing Co.*, 123 Fed. 942 (N. D. N. Y. 1903). For the argument of these decisions see 48 AM. L. REG. 656 (1900).

¹⁹ See *Watson v. Merrill*, 136 Fed. 359, 363 (C. C. A. 8th, 1905); *In re Ells*, 98 Fed. 967, 968 (D. Mass. 1900); *Witthaus v. Zimmerman*, 91 App.

torium case is generally taken to have definitely established the principle that where capital is required for performance, bankruptcy is the equivalent of an anticipatory breach of an executory lease of personalty,²⁰ it left unsettled the application of this principle to leases of realty.²¹ But subsequently in *In re Bissinger*²² the rule of the *Auditorium* case was held to apply in both situations. Although the *Bissinger* case arose on the bankruptcy of the lessee, the suggestion that "if the landlord perchance in a lease had agreed to rebuild or repair or do anything involving financial outlay, his bankruptcy should be regarded as an anticipatory breach of that provision in the lease,"²³ would apply directly to the instant case. But the situation was soon thrown into worse confusion by the subsequent reversal of the *Bissinger* case on the grounds that under the common law, which Ohio still followed in relation to leases, the distinction between contracts relating to personalty and contracts relating to realty, suggested in the *Auditorium* case, still exists, and a claim for anticipatory breach of the latter is not provable in bankruptcy.²⁴ The historical and technical basis for this decision seems too rigid in the face of practical arguments.²⁵ However, that this distinction still persists in the State courts as well, is evidenced by the recent Georgia case of *Kessler v. Slappey* in which, after a summary of the cases, the court said:

"These cases and others seem to formulate the rule in executory contracts pertaining to lease of realty, that not only is the contract not terminated by bankruptcy, but that a breach is not occasioned thereby, so as to give rise to a claim provable in the bankruptcy court."²⁶

Div. 202, 204, 86 N. Y. Supp. 315, 317 (1st Dep't 1904); *Liggett Co. v. Wilson* 224 Mass. 456, 458, 113 N. E. 184, 185 (1916). In the first of these cases, Sanborn, J., remarked, "... throughout the entire field of contractual obligations the adjudication in bankruptcy absolves from no agreement, terminates no contract, and discharges no liability."

²⁰ Note L. R. A. 1917B 585.

²¹ *Supra* note 17.

²² *Supra* note 10. The practical arguments of the Special Master in this case are undeniable.

²³ *Ibid.* 112.

²⁴ *Wells v. Twenty-First Street Realty Co.*, 12 F. (2d) 237 (C. C. A. 6th, 1926). The court quoted from *Gardiner v. Williams S. Butler & Co.*, 245 U. S. 603, 605, 38 Sup. Ct. 214 (1918): "But the law as to leases is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke."

²⁵ See (1926) 36 YALE L. J. 418.

²⁶ *Supra* note 2, at 619, 130 S. E. at 924 (1925).

Thus it may be seen that out of the dictum in the *Auditorium* case a conflict has arisen which perhaps can be settled only by further action by the Supreme Court. The instant case makes no mention whatsoever of this conflict and apparently ignores the limitations on the *Auditorium* case established by these subsequent decisions.

Viewed from a practical standpoint, however, there would seem to be a great deal of justification for the statement of the instant court that "under all the circumstances . . . it would be unjust to force the [lessee] to vacate its present location and abide by a lease which involves so much uncertainty." The suit was brought a month after the lessee was to have been given occupancy, and none of the alterations agreed upon had even been begun. It was not improbable that the heat, light, and other service would be inadequate. The lessee was probably not yet under any necessity of moving, as he still held his unexpired lease, which the lessor had promised to assume. Furthermore, as the lease was to be operative only on completion of the alterations, they would seem to have been regarded as of vital importance by the lessee. From the lessee's standpoint, a release from the agreement seems the only satisfactory solution.

The termination of the lease, also, might be most advantageous to the lessor. The trustees no doubt relied on the rule that the trustee in bankruptcy may adopt the contractual obligations of the bankrupt.²⁷ The rent from the bankrupt's lessees would be a valuable asset to the estate.²⁸ But it seems more conservative for the trustees to lease the property to other parties, even for less rent, than to undertake such a substantial outlay of labor and expense. Indeed, where additional capital requirements are apparently necessary if the covenants in the lease are to be performed, the court would seem to be justified in refusing to rely on the trustee's assurance of their performance.

In giving a lessor²⁹ of personalty a provable claim in bankruptcy for damages as for anticipatory breach, the *Auditorium* case opened the way for the problem in the instant case. Whether a lessor or lessee will need capital or credit faithfully to perform his part of the lease in a particular case may be

²⁷ *Watson v. Merrill*, *supra* note 19; *Ex parte Faxon*, Fed. Cas. No. 4, 704 (C. C. D. Mass. 1869); *cf.* Notes (1902) 59 L. R. A. 673, II (a), (c); (1910) 33 L. R. A. (N. S.) 745. The Supreme Court in the *Auditorium* case held bankruptcy to be a breach, but recognized that the trustee may adopt or assign the lease. *Supra* note 15 at 590, 36 Sup. Ct. at 414.

²⁸ *Cf.* 1 TIFFANY, LANDLORD AND TENANT (1912) § 12 (7).

²⁹ A diversity of agreements may be included by litigants or courts within that elastic category of contracts called "leases."

arguable. Once this is determined, however, the instant court apparently seeks to provide a simple rule of administration—namely, that it will not investigate the extent of the capital requirements and the ability of the trustee to meet them, before releasing the solvent party from the lease³⁰—a rule which it establishes as a corollary to that in the *Auditorium* case.

THE DECLARATORY JUDGMENT IN LEASE CONTROVERSIES

The declaratory judgment¹ has proven particularly effective in avoiding the more cumbersome procedure of remedial litigation, where the interpretation of written instruments is involved. The English Acts of 1850 and 1852,² and the Uniform Declaratory Judgment Act³ make specific provision for the exercise of such power by the courts. A consideration of only those cases⁴ concerning lease controversies decided under these provisions will indicate the broad extent of their application.

In one type of case, where the interest of the grantor in the estate is contested by another claimant to title,⁵ or seems defec-

³⁰ Assuming the correctness of this inference, query whether such a privilege of abandonment would not carry with it a right to damages for anticipatory breach under the *Auditorium* case.

¹ The reasoning of the Supreme Court of the United States in *Willing v. Chicago Auditorium Ass'n*, 48 Sup. Ct. 507 (U. S. 1928), assuming by way of dictum that a proposed federal declaratory judgment act would be unconstitutional is criticized in Comment (1928) 38 YALE L. J. 104.

² The first legislative authorization of the declaratory judgment in England was the Act of 13 & 14 Vict. c. 35, § 1 (1850), which provided for the submission by the persons interested in "the construction of any Act of Parliament, Will, Deed or other instrument in writing . . . for the opinion of the said Court." This power was enlarged by the Act of 15 & 16 Vict. c. 86, § 50 (1852), and the Supreme Court Rules of 1883, 7 STAT. RULES AND ORDERS 54. See Borchard, *The Declaratory Judgment—A Needed Procedural Reform* (1918) 28 YALE L. J. 1, 27.

³ The Uniform Declaratory Judgment Act provides in § 2 that "any person interested . . . may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relation thereunder." 9 U. L. A. 87 (1923). Twenty-three states have adopted statutes of this and other types providing for declaratory relief. Cf. N. Y. C. P. A. § 473; Comment (1926) 35 YALE L. J. 473. The federal statute has passed the House of Representatives and is now before a committee of the Senate.

⁴ This discussion is confined to an examination of lease cases alone. A detailed exposition of the desirability of declaratory judgments in all kinds of controversies may be found in: Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment* (1917) 16 MICH. L. REV. 69; Borchard, *op. cit. supra* note 2; Kerr, *Declarations of Rights Without Consequential Relief* (1919) 53 AM. L. REV. 161; Borchard, *State Legislation on Declaratory Judgments* (1924) 18 AM. POL. SCI. REV. 305.

⁵ *Raghubar v. Bhaikdhari*, 3 Bengal L. R. App. 48 (1869) (action by lessor to declare a purported lease void as against the lessor); *Ram v.*

tive on its face,⁶ the power of the lessor to make the lease can be settled by a declaratory judgment. Where this remedy is not available the lessee has the choice, either of refusing to take the lease, to the possible detriment of both parties, or of taking the lease subject to the unknown risk of ejectment by the claimant of the legal title.

In another type of case the declaratory judgment has served to determine the lessee's disputed rights and privileges of user⁷ without the necessity of subsequent coercive relief.⁸

The broadest field for declaratory relief in lease controversies, however, lies in the interpretation of express covenants in leases. The numerous cases under this general head may be classified according to the covenant sought to be interpreted.

Privilege of subletting. Where the lessee covenants not to sublet without the permission of the lessor, such permission not to be unreasonably withheld, and the lessor refuses his consent, the most advantageous remedy is the declaratory judgment.⁹ Under the old procedure a right of damages for the unreasonable refusal to permit subletting exists, but the lessee would probably have to move out of the premises to maintain the action advantageously.¹⁰ It is unlikely, moreover, that the lessee would have been able to sublet the premises without the landlord's consent, inasmuch as few tenants would care to subject themselves to the risk of suit by the landlord. There would in any case be considerable risk involved on the part of the lessee if he sought to avail himself of the lessor's breach of covenant by moving out of the premises and suing for damages. The con-

Rughoo, 1 Ind. L. R. 456 (1876) (action by lessee to declare interest granted by lessor to third party void as against lease).

⁶ Kariher's Petition, 284 Pa. 455, 131 Atl. 265 (1925) (one of the lessors had merely a life estate in the property and had no power to make the lease).

⁷ Northern Pac. Lumber Co., Ltd. v. British American Trust Co., Ltd., 23 Br. Col. 332 (1915) (extent of right to lumbering on leased land); Consett Ind. & Prov. Soc., Ltd. v. Consett Iron Co., Ltd., [1922] 2 Ch. 135 (determining whether the lessee owed duty of subterranean support); Taylor v. Br. Legal Life Assurance Co., Ltd., [1925] 1 Ch. 395 (whether a right of way for pipes granted to lessee was subject to excessive user); Lane Mortg. Co. v. Crenshaw, 269 Pac. 672 (Cal. 1928) (lessee's right to manage property under lease agreement).

⁸ The court is not precluded in the declaratory proceedings from giving coercive relief if the interested party demands it. It is frequently suspended, however, in order to allow the parties to come to an arrangement. Cf. Attwood v. Llay Main Collieries, Ltd., [1926] 1 Ch. 444. Or in view of the difficulty in which the defendant would be placed if obliged to carry it out immediately. Cf. Vestry of St. Mary, Islington v. Hornsey Urban Dist. Council, [1900] 1 Ch. 695.

⁹ See Sarnier v. Kantor, 123 Misc. 469, 470, 205 N. Y. Supp. 760, 761 (Sup. Ct. 1924).

¹⁰ CARMODY, NEW YORK PRACTICE (1923) § 304.

fusion and loss which might result from such a procedure is quite appreciable.¹¹ The declaratory judgment device, however, renders this unnecessary.¹² The courts will allow the tenant to sublet, where it is found that consent has been unreasonably withheld,¹³ or at least will definitely settle the matter where the objection of the lessor is valid.¹⁴

Waste. In leases which provide that the penalty for committing waste is forfeiture of the term, the determination in advance whether certain conduct would constitute waste in disputed cases preserves the lease and protects the parties.¹⁵

Covenant to insure. Where under the lease the lessee is called

¹¹ The case of *Broadway & 94th St., Inc. v. C. & L. Lunch Co.*, 116 Misc. 440, 190 N. Y. Supp. 563 (Mun. Ct. 1921), is illustrative of the complexity of the old procedure. There the lessee assigned to X without the landlord's consent. X went into possession on the lessee's agreement that his possession would be undisputed for a period. The landlord gave the lessee notice that the lease was terminated and rejected X as subtenant. He threatened to turn off the steam and hot water, so that X vacated the premises. The lessee then re-entered into possession but refused to pay rent. The landlord brought summary proceedings to recover possession of the premises, and the lessee counterclaimed for damages sustained through the landlord's breach of covenant in refusing to give his consent to the subletting.

¹² "It seems to me that it would be quite shocking if the court could not put an end to the dispute in the way the learned judge has done by this order . . . if the parties having come to court, the court were bound to say, 'Although we have the whole matter before us, and although we consider the condition unreasonable, yet we cannot go any further and we must leave matters in this state, that the landlord may continue to abstain from granting his license and the tenant must assign at his own risk—that is, at the risk of forfeiture.'" Vaughan Williams, L. J., in *Young v. Ashley Gardens Prop., Ltd.*, [1903] 2 Ch. 112, 115.

¹³ *Jenkins v. Price*, [1907] 2 Ch. 229 (increase in rent demanded in return for consent); *Young v. Ashley Gardens Prop., Ltd.*, *supra* note 12 (on condition of payment of increased taxes); *West v. Gwynne*, [1911] 2 Ch. 1, *semble*; *Evans v. Levy*, [1910] 1 Ch. 452 (lessor demanded a binding covenant by lessee to pay rent); *Cornish v. Boles*, 31 Ont. L. R. 505 (1914); *Mills v. Cannon Brewery Co., Ltd.*, [1920] 2 Ch. 38 (objection, *inter alia*, on account of sublessee's nationality); *In re Winfrey and Chatterton's Agreement*, [1921] 2 Ch. 7 (landlord desired to occupy premises himself); *Ideal Film Renting Co. v. Nielson*, [1921] 1 Ch. 575 (objection that lessee had formed a new company, which was in effect a new tenant of doubtful credit, inasmuch as "it had done no business so far"); *In re Gibbs and Houlder Bros. & Co., Ltd.*, [1925] 1 Ch. 198 (landlord objected because prospective subtenant was lessee of other premises belonging to the landlord, and he feared the loss of a desirable tenant).

¹⁴ *Terrell v. Chatterton*, [1922] 2 Ch. 647 (lessee sublet part of premises without landlord's consent).

¹⁵ *Premier Dairies v. Garlick*, [1920] 2 Ch. 17 (clause in lease prohibiting removal of "all new and other buildings and erections" declared to include fixtures erected by the tenant); *London C. C. v. Hutter*, [1925] 1 Ch. 626 (clause in lease that the tenant must not "cut or maim any of the principal walls and timbers of the building" declared to prohibit fixing of an electric sign to the outer walls of the building).

upon to insure the premises, the question may arise as to whether there has been a substantial compliance with the provision or whether the lessor is entitled to reinsure at the lessee's expense.¹⁶ Obviously both parties are benefited if the question is determined without the necessity of reinsurance and a demand for the amount of the premium paid by lessor on account of the lessee.

Rebuilding destroyed premises. Covenants to repair frequently fail to provide where the loss is to fall in unforeseen contingencies. This may be determined by a declaration.¹⁷ So, also, the rights of a lessor may be declared where he seeks to rebuild premises destroyed, but the lessee denies that a building as is proposed by the lessor, if constructed, will create a duty on his part to pay rent.¹⁸ The alternative under the old procedure is either the termination of the lease with consequent loss of rent to the lessor, or the necessity of actually erecting a building in order to obtain a judicial construction of the lessor's and lessee's respective positions.¹⁹

Covenant to pay taxes. Where the covenant is ambiguous or so general as to include taxes which the lessee has grounds to consider himself absolved from paying, the determination of his duties in advance by the declaratory judgment²⁰ may avoid a lessor's re-entry under the lease or a suit in quasi-contract, and prevent the tying up of funds in the hands of one who is actually under no duty to advance them.

Notice to quit. In order to be valid, a notice to quit must be of such a character that the tenant can act on it with security. He ought to be assured at the time he receives it and when he is to act on it, that if he deliver up possession he will be acquitted

¹⁶ *Tredegar v. Harwood*, [1928] 1 Ch. 59, *rev'd*, 44 T. L. R. 790 (H. L. 1928).

¹⁷ *Enlayde, Ltd. v. Roberts*, [1917] 1 Ch. 109 (lessee paid for fire insurance, while the lessor undertook to rebuild premises if destroyed by fire; lessee responsible for all other repairs; declaration as to the responsibility of lessor when premises were destroyed by enemy bomb).

¹⁸ *Girard Trust Co. v. Tremblay Motor Co.*, 291 Pa. 507, 140 Atl. 506 (1928) (while no express duty to rebuild, no rent could be collected unless premises were rebuilt).

¹⁹ *Ibid.* 525, 140 Atl. at 512.

²⁰ *McCrory Stores Corp. v. Braunstein, Inc.*, 102 N. J. L. 590, 134 Atl. 752 (1926) (whether agreement to pay increase in taxes after Oct. 27, 1920 would cover the fiscal year 1919-20); *Christy v. The Company*, [1917] 1 Ch. 545 (whether receiver of lessee was entitled to deduct taxes in arrears paid under threat of distress from the rent due); *In re Salter and Awdry's Lease*, [1921] 2 Ch. 141 (whether landlord's obligation to pay 'rent charge' included obligation to pay tithe rate); *Busby v. Avgherino*, [1927] 2 Ch. 33 (whether the amount due on tithes should be determined by the customary payment of the statute governing the amount to be paid), *rev'd* on other grounds, [1928] 3 A. C. 290.

of all further claims in respect to the remainder of the term.²¹ A declaratory judgment can give such assurance,²² while the old procedure left both parties in doubt as to their rights until after an action in ejectment by the lessor.

Option to purchase. The declaratory judgment is a convenient method of ascertaining the legal position of a lessee claiming an option to purchase, denied by the lessor, without waiting for the time of performance to elapse.²³ Under the former procedure it would be necessary to tender the purchase price, demand a deed and procure a refusal from the landlord to execute the deed before the plaintiff could begin the action.²⁴

Privilege to re-enter. Under the old procedure, where the right to enter was denied by one in possession, a determination of rights was obtained either by a trespass or an ejectment proceeding. Declarations as to the rights of the parties,²⁵ however, have avoided the damages and expense of these alternative proceedings.

In all the above cases, under the old procedure, the plaintiff would have had to take what has been well described as a step in the dark involving either forfeiture of a lease, damages or a loss of profitable user. By means of the simple procedure of a suit for a declaratory judgment, the parties have been able to narrow the issues, avoid irreparable breach of legal relations attended by damages and consequent social and economic waste, and at the same time to obtain a speedy and final judgment of their respective rights under the lease.

²¹ See *Right v. Cuthell*, 5 East 491, 497 (1804).

²² *Burch v. Farrows Bank, Ltd.*, [1917] 1 Ch. 606 (effect of a covenant to deliver premises in repair upon proper notice); *Tozer v. Viola*, [1913] 1 Ch. 75 (effect upon the obligation of the assignor, original lessee of the premises, of a wartime statute allowing the tenant on joining the army to quit); *Croft v. William F. Blay, Ltd.*, [1919] 2 Ch. 343 (declaration determining the effect of a tenancy from year to year following upon a tenancy for a term upon notice to quit); *In re Bebington's Tenancy*, [1921] 1 Ch. 559 (validity of notice to quit part of premises, followed by other notice to quit the rest of the premises); *Gray v. Spyer*, [1922] 2 Ch. 22 (effect of option of renewal upon notice to quit); *Rochester and Chatham Joint Sewerage Board v. Clinch*, [1925] 1 Ch. 753 (effect of sale by one reversioner of part of premises which lessee has been notified to quit).

²³ *In re Leeds and Batley Breweries, Ltd.*, [1920] 2 Ch. 548 (effect of holding over from year to year upon option to purchase); *Sherwood v. Tucker*, [1924] 2 Ch. 42 (effect of informal extension of the lease upon the option); *Batchelor v. Murphy*, [1925] 1 Ch. 220 (effect of assignment of leave upon the option).

²⁴ *Carmody*, *op. cit. supra* note 10, § 304.

²⁵ *Civil Service Co-op. Soc., Ltd. v. Trustee of McGrigor*, [1923] 2 Ch. 347 (covenant provided for landlord's privilege to re-enter on lessee's bankruptcy).

THE RELATION OF PATENTS AND ANTI-TRUST LAW

The basic assumption which obviously underlies anti-trust legislation is that monopolies and combinations tending to produce monopoly conditions in an industry are not conducive to the general welfare. This may not be true of all types of industry. Indeed our laws recognize this fact and, at least to some extent, except so-called "natural monopolies" from their operation.¹ On the whole, however, this fundamental assumption seems warranted.² At any rate, this country is committed to a policy of suppressing monopoly, and maintaining an enforced competition.³ Both the Federal Constitution,⁴ and the Federal Congress,⁵ have also created one field in which monopolies are expressly sanctioned and authorized by law: the field of patents.

The Sherman Act makes monopolies and contracts in restraint of trade illegal;⁶ the patent law gives to the patentee the ex-

¹ Reference is had here to the so-called "public service" industries, particularly in the field of transportation and municipal public utilities. These probably function better as controlled monopolies. Moreover in these lines of production monopoly is inevitable. 2 TAUSSIG, *PRINCIPLES OF ECONOMICS* (3d ed. 1921) 116, 117; 2 FAIRCHILD, FURNISS AND BUCK, *ELEMENTARY ECONOMICS* (1926) 68.

Municipal public utilities are largely intrastate and, for this reason if for no other, do not fall within the operation of the federal laws. The Transportation Act [41 STAT. 482 (1920), 49 U. S. C. § 5 (4), (5) (1928)] looks to the ultimate consolidation of railroads into a limited number of systems, even if this should involve some elimination of competition. VANDERBLUE AND BURGESS, *RAILROADS* (1923) 410; see Lease of Valley Terminal Railway, 65 I. C. C. 105, 109 (1920).

² "As to combination, we concluded that, while there is undoubtedly some opportunity here for saving in cost of production, the true economy from combination of separate business units is neither universal nor very great. On the contrary, it appeared that the motive for combination and the explanation of its most conspicuous successes was generally the possession of monopoly powers." 2 FAIRCHILD, FURNISS AND BUCK, *op. cit. supra* note 1, at 46; see also TAUSSIG, *op. cit. supra* note 1, c. 15.

³ Anti-trust legislation is fairly general among the states. See for example: N. Y. CONS. LAWS (Cahill, 1923) c. 21, §§ 340-346; ILL. REV. STAT. (Cahill, 1927) c. 38, §§ 598-605; VA. GEN. LAWS (1923) § 4722. The most important federal acts are the so-called Sherman Act, 26 STAT. 209 (1890), 15 U. S. C. §§ 1, 2, 3 (1927), and the Clayton Act, 38 STAT. 730 (1914), as amended May 15, 1916, and May 26, 1920, 15 U. S. C. § 14 (1927).

⁴ U. S. CONST. Art. 1, § 8, cl. 8: "The Congress shall have power . . . to promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Writings and Discoveries."

⁵ 16 STAT. 201 (1870), 35 U. S. C. § 40 (1928) provides: "Every patent shall contain . . . a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention . . . throughout the United States . . ."

⁶ *Supra* note 3. The Sherman Act provides: "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is

clusive right to make, use, and sell the patented device or commodity.⁷ The patentee may grant or assign this exclusive right, or he may license others to share it with him, in part or in whole. License agreements frequently contain restrictions either as to the resale price, the use of the patented article, or as to other conduct of the licensee. And these restrictions are often imposed where no license agreement can be said to exist.

It used to be a common practice for manufacturers of patented articles to put a label on them restricting the vendee to using them only with certain unpatented products of the patentee. In the famous *Button-Fastener* case⁸ such a restriction was upheld, and the violation of it enjoined as patent infringement. The theory of the decision seems to be that since the patentee has the exclusive right to make, vend, or use the article, he may assign part of his right on any terms he chooses. The fact that the manufacturer's monopoly is thus extended to unpatented articles is defended on the ground that "the monopoly in the unpatented staples results as an incident from the monopoly in the use of the plaintiff's invention, and is therefore a legitimate result of the plaintiff's control over the use of his invention by others."⁹ The rule in this case was followed by the lower federal courts in other circuits and was finally adopted by the Supreme Court in 1912.¹⁰ In *Motion Pictures Patents Co. v. Universal Films Co.*,¹¹

hereby declared to be illegal . . . (violation declared a misdemeanor and punishment provided).

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

⁷ *Supra* note 5. For a discussion of whether there is conflict between patent and anti-trust legislation, see Peaslee, *The Effect of the Federal "Anti-Trust Laws" on Commerce in Patented and Copyrighted Articles* (1915) 28 HARV. L. REV. 394; Lamb, *The Relation of the Patent Laws to the Federal Anti-Trust Laws* (1927) 12 CORN. L. Q. 261; Podell and Kirsch, *Patent Pools and the Anti-Trust Laws* (1927) 13 A. B. A. J. 430; Workman, *Patent Pools in Relation to Patent Laws* (1927) 13 A. B. A. J. 585.

⁸ *Heaton—Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288 (C. C. A. 6th, 1896).

⁹ *Ibid.* 296.

¹⁰ *Cortelyou v. Lowe*, 111 Fed. 1005 (C. C. A. 2d, 1901); *Broderick Copy-graph Co. v. Roper*, 124 Fed. 1019 (D. R. I. 1903); *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364 (1912). The opinion in the Dick case was written by Justice Lurton who as circuit judge had written the opinion in the *Button-Fastener* case. For discussion of the Dick case, see Montague, *The Sherman Anti-Trust Act and the Patent Law* (1912) 21 YALE L. J. 433; Abbott, *Patents and the Sherman Act* (1912) 12 COL. L. REV. 709; Chamberlain, *Patented Articles; When are they Emancipated from the Patent Monopoly under which They are Manufactured?* (1912) 6 ILL. L. REV. 357.

¹¹ 243 U. S. 502, 37 Sup. Ct. 416 (1917). The Court said, "the exclusive

decided in 1917, the court reversed itself, holding that such a restriction on the use of a patented article was invalid, when the article had been sold. Restrictions on the use of a patented machine by the vendee have not, however, been entirely abolished.¹² Attempts to maintain the resale price of an article have been frequent and have met with varying success. Where the manufacturer sells the article he cannot restrict its resale price by a label, any more than he can so restrict its use.¹³ Here, too, the article is deemed to be emancipated from the patent monopoly by a sale.¹⁴ In fact, an express agreement between vendor and vendee that the latter shall maintain the resale price is held to be illegal.¹⁵ There is nothing illegal, however, in suggesting a retail price, and refusing to deal with those who do not maintain it.¹⁶ And an express stipulation is valid where the transaction between the parties is found to be one of agency rather than one of sale.¹⁷

right granted in every patent must be limited to the invention . . . and it is not competent for the owner of the patent . . . to . . . extend the scope of its patent monopoly by restricting the use of it to materials necessary in its operation but which are no part of the patented invention." *Ibid.* 516, 37 Sup. Ct. at 420. Justice Holmes dissented, adopting the *laissez-faire* reasoning of the Dick case, *supra* note 10.

¹² *Ideal Wrapping Mach. Co. v. Geo. Close Co.*, 23 F. (2d) 848 (D. Mass. 1928) (vendee of candy-wrapping machine is not privileged to violate a stipulation that he will not alter the machine so as to enable it to make candy of a different size).

¹³ This is true now whether the article be patented or unpatented. *Bauer & Cie. v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616 (1913) (patented); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376 (1911) (unpatented). Formerly a patentee could maintain resale prices in this way. *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424 (C. C. A. 7th, 1903); *The Fair v. Dover Mfg. Co.*, 166 Fed. 117 (C. C. A. 7th, 1908). But not the manufacturers of unpatented articles. *John D. Park & Sons Co. v. Hartman*, 153 Fed. 24 (C. C. A. 6th, 1907) (decided expressly on the ground that the article was unpatented).

¹⁴ *Bauer & Cie. v. O'Donnell*, *supra* note 13, at 10, 33 Sup. Ct. at 620.

¹⁵ *United States v. Schrader's Son, Inc.*, 252 U. S. 85, 40 Sup. Ct. 251 (1920); *Allen v. Parks*, 196 Iowa 943, 195 N. W. 745 (1923); (1924) 10 VA. L. REV. 483.

¹⁶ *United States v. Colgate & Co.*, 250 U. S. 300, 39 Sup. Ct. 465 (1919); *Landauer v. Bard-Parker Co.*, 125 Misc. 461, 210 N. Y. Supp. 635 (Sup. Ct. 1925).

¹⁷ *United States v. Gen. Electric Co.*, 272 U. S. 476, 47 Sup. Ct. 192 (1926). In this case, according to the contract between the defendant and wholesale and retail dealers, the dealers were to sell on a commission basis the electric light bulbs which were consigned to them by the defendant, transportation prepaid. The sales were to be at fixed prices and by the defendant. The dealers were required to pay all expenses except the original transportation. Unsold lamps were to be returned. The dealers accounted monthly for the proceeds and had to pay for all lost or missing lamps. The defendant in fact carried all other risks, including insurance.

What the parties label the transaction will not be controlling and devia-

Where the licensee of patented machinery is a lessee thereof, "tying clauses," or agreements in the contract of lease binding the lessee in effect to use all or none of a line of machinery produced by the lessor, were at one time enforced by the courts.¹⁸ Under the Clayton Act of 1914,¹⁹ however, "tying clauses" are now illegal.²⁰

It occurs not infrequently that owners of interfering, complementary, or competing patents pool their patents, and license each other to use them. This may be accomplished by a cross-licensing agreement,²¹ and probably such an agreement would not be illegal.²² Where it is coupled with an agreement to maintain prices, limit output and pool profits, however, such cross-licensing is within the prohibition of the anti-trust laws.²³ Another method of pooling patents is to assign them to an individual or corporation, which in turn licenses the contracting parties to manufacture the patented article, or use the patented process.²⁴ Sometimes a corporation acquires a monopoly or a

tions from the facts in the General Electric case may easily be deemed to constitute the transaction a sale. Cf. *Dr. Miles Medical Co. v. J. D. Park & Sons Co.*, *supra* note 13; *Ford Motor Co. v. Union Motor Sales Co.*, 225 Fed. 373 (S. D. Ohio 1914), *aff'd*, 244 Fed. 156 (C. C. A. 6th, 1917).

In these cases the status of the dealer is interesting and relatively novel. For what purposes is he to be treated as an agent, and for what others as an independent entrepreneur? The legal incidents of his status do not seem to have been fully worked out as yet.

¹⁸ *United States v. United Shoe Mach. Co.*, 247 U. S. 32, 38 Sup. Ct. 473 (1918). But cf. *United Shoe Mach. Co. v. LaChapelle*, 212 Mass. 467, 99 N. E. 289 (1912).

¹⁹ *Supra* note 3: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . whether patented or unpatented, for use, consumption or resale within the United States . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor . . . or the lessor or seller, where the effect of such lease, sale, or contract for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

²⁰ *United Shoe Mach. Co. v. United States*, 258 U. S. 451, 42 Sup. Ct. 363 (1922) (holding Clayton Act constitutional); *Opinion of the Justices*, 193 Mass. 605, 81 N. E. 142 (1907). For an appraisal of the legal effect of the Clayton Act, see *Peaslee, op. cit. supra* note 7.

²¹ For example, *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, 166 Fed. 555 (D. Mass. 1909); *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Pac. 581 (1892).

²² *Lamb, op. cit. supra* note 7, at 279.

²³ *Cases, supra* note 21. In the Powder Co. case there was also a restriction as to territory to be operated in.

²⁴ The National Harrow Co. is an example. *Nat. Harrow Co. v. Quick*, 67 Fed. 130 (D. Ind. 1895); *Nat. Harrow Co. v. Hench*, 83 Fed. 36 (C. C. A. 3d, 1897); *Bement v. Nat. Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747 (1902). The "Bath Tub" Trust also illustrates this point. *United States v. Standard Sanitary Mfg. Co.*, 191 Fed. 172 (D. Md. 1911), *aff'd*, 226 U. S. 20, 33 Sup. Ct. 9 (1912).

substantial number of the patents in an industry by producing its own inventions.²⁵ The courts apparently treat license agreements similarly in both types of cases. If they are accompanied by no restrictions save the payment of royalties they are valid.²⁶ Agreements which require the licensed manufacturers to maintain fixed prices have also been enforced.²⁷ A stipulation that the licensee will use only products of the licensor in making the patented device has been upheld.²⁸ On the other hand where the record clearly shows that the patentee and licensees control most of the output in the restricted line, such agreements are apt to be considered as violating the anti-trust laws.²⁹

Any criticism of cases in this field should, it is believed, take into consideration the ends sought by our patent system, for in the last analysis the primary function of the law here is to further these ends. The system seeks to reward the inventor, encourage invention, and procure inventions for the use of the public.³⁰ To accomplish this it creates a monopoly, and obliges

²⁵ This was true of the American Tobacco Co., the Eastman Kodak Co., and the Radio Corporation of America. See 1 REPORT OF COMMISSIONER OF CORPORATIONS ON THE TOBACCO INDUSTRY (1909) 66, 67, 84; cf. *United States v. Eastman Kodak Co.*, 226 Fed. 62 (W. D. N. Y. 1915); FEDERAL TRADE COMMISSION, RADIO INDUSTRY (1923) 1-4; *Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co.*, 154 Fed. 365 (C. C. A. 7th, 1907).

²⁶ *Columbia Wire Co. v. Freeman Wire Co.*, 71 Fed. 302 (E. D. Mo. 1895).

²⁷ *Bement v. Nat. Harrow Co.*, *supra* note 24; *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 358 (C. C. A. 7th, 1907); *Massie v. Asbestos Brake Co.*, 95 N. J. Eq. 298, 123 Atl. 155 (1923); (1924) 37 HARV. L. REV. 1142.

²⁸ *Westinghouse Elect. Co. v. Diamond State Fibre Co.*, 268 Fed. 121 (D. Del. 1920); cf. *U. S. Consol. Seeded Raisin Co. v. Griffin & Skelley Co.*, 126 Fed. 364 (C. C. A. 9th, 1903) (contract upheld under which licensees were to use only licensed machines, were to deal with no raisins produced by unlicensed machines, etc.). These decisions seem to go rather far and will not, perhaps, be followed.

²⁹ In the *Bement* case, *supra* note 24, only the contract between the licensor and one licensee was before the court. In the other Harrow cases a different result was reached, the monopolistic scheme appearing of record. The "Bathtub" Trust, controlling 78% of the output of enamelled ware and 80% of the jobbers in that line, was held illegal. The license agreement here also fixed prices. *Standard Sanitary Mfg. Co. v. United States*, *supra* note 24. Where the Radio Corporation, controlling 70% of the supply of vacuum tubes, licensed manufacturers to make receiving sets under its patents, the licensees agreeing to purchase all tubes used in said sets from the Corporation, the contract was held to be within the Sherman Act. *Lord v. Radio Corporation of America*, 24 F. (2d) 565 (D. Del. 1928). It has been suggested that if the license agreement is only a reasonable method of protecting the patent monopoly, it will be upheld; but otherwise if it seeks to go beyond what is necessary for such protection. Toulmin, *The Patent Law and the Sherman Law* (1914) 1 VA. L. REV. 446; cf. *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, *supra* note 21, at 559.

³⁰ U. S. CONST. Art. 1, § 8; *supra* note 5; VAUGHAN, *ECONOMICS OF OUR PATENT SYSTEM* (1925) 27 *et seq.*

the immediate disclosure of the patented device, as well as a grant of the invention to the public at the expiration of seventeen years. The monopoly is not created for the benefits that it will confer directly upon society. On the contrary by hypothesis, monopoly is of itself undesirable, and is to be regarded as part of the social cost of the patent system. And as a result it surely follows that the patent monopoly should be restricted as much as is consistent with encouragement of inventions. What, then, is the effect on invention of encouraging an extension of the patent monopolies? Very few inventor-patentees manufacture their own inventions.³¹ Professor Vaughan in a recent book on the *Economics of our Patent System* states that the system at present tends to discourage inventors.³² The benefits of monopoly which are intended to accrue to the inventor, encourage and reward him, seem frequently to take quite a different course under modern conditions. Combinations and pools have not, however, resulted in unmitigated evil from the social point of view. Often enough the motive for their formation has been to settle differences and end litigation between patentees with conflicting claims.³³ Litigation in this field is slow and costly, and its elimination represents a saving to society. Then, too, a product which embodies all the best appropriate patents will be more efficient than one embodying only some of them. Moreover, such combination of resources is conducive to more extensive research and development. For instance, there is some doubt as to whether radio instruments could be as perfected as they are in the absence of a combination of radio patents.³⁴ Perhaps it is

³¹ H. R. REP., OLDFIELD HEARINGS BEFORE THE COMMITTEE ON PATENTS (1912) No. 10, pp. 19-20; No. 4, p. 11.

³² VAUGHAN, *op. cit. supra* note 30, c. 8. Professor Vaughan lists seven reasons for this: (1) the fact that some inventions are simply not of practical value; (2) the monopolistic character of patent rights. This discourages inventors by giving the holder of a basic patent a great advantage in bargaining power over the inventor of an improvement thereon, since no one but the basic patentee will be able to use the invention. Moreover, patent trusts are frequently the only possible buyers of any patents along the line in which they are interested, for a similar reason. (3) Unfair competition, the author includes in this category the activities of the A. B. Dick Co., and The Motion Picture Patent Co.; (4) The fact that under the present system the holder of a patent need not exploit it. A patentee may prosecute an action for infringement although he makes no use of the patent himself. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 28 Sup. Ct. 748 (1908); (5) Lack of capital by the inventor; (6) The nature of invention itself; (7) The characteristics of inventors.

³³ This was one of the reasons for combination in the *National Harrow Co.* cases, *supra* note 24. For other examples see *U. S. Consol. Seeded Raisin Co. v. Griffin & Skelley Co.*, *supra* note 28; *Massie v. Asbestos Brake Co.*, *supra* note 27.

³⁴ FEDERAL TRADE COMMISSION, RADIO INDUSTRY (1923) 24 *et seq.*

not desirable that science should be thus left to industry,³⁵ but we must give industry its just due for its contributions. On the other hand Justice Brandeis has pointed out that these great organizations have generally proved unprogressive.³⁶

Probably more good than harm flows from unrestricted cross-licensing. *Laissez-faire* under modern conditions apparently tends to discourage the individual inventor and encourage the formation of combinations and monopolies. But these may maintain a supply of inventions from their own laboratories. It is probably very questionable that the influence of the law on the number of inventions will be very great in either event. Therefore, our declared policy of suppressing monopolies and maintaining enforced competition should, it is submitted, govern in these cases.

³⁵ See the remarks of the Graduate Dean of Brown University, BULLETIN OF BROWN UNIVERSITY, REPORT OF PRESIDENT OF CORPORATION (1922) 33, 34.

³⁶ *Op. cit. supra* note 31, No. 18, p. 12.