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HISTORY OF LEGISLATIVE CONTROL OF MONOPOLISTIC AND DISCRIMINATORY TRADE PRACTICES IN WISCONSIN

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THIS is an era of industrial co-operation. The fact that individuals no longer satisfy their economic wants through their own isolated activity, but must depend to an enormous extent upon organizations of capital to which materials are brought from many sources to be worked upon in the factory in a mechanized process in which speed and quantity are the great *desiderata,* places immense rewards upon combination, and provides the motive for the keenest sort of competition. If unrestrained, combination knows no limits, and competition has little compassion for the rights of others. Therefore, it is necessary for government, which has been described as the "intelligence of collective society," to extend its paternalistic care to the potential victims of this industrial warfare. In considering a preventive of monopolistic and discriminatory trade practices, there are those who believe that the principles of socialism have the most to offer; while others are of the opinion that any governmental plan of control should be so designed as to preserve the benefits to be derived from private enterprise. It is the purpose of this discussion to show in what manner Wisconsin has dealt with this important question.

An examination of the legislative proposals and adoptions in Wisconsin dealing with monopoly and trade discrimination reveals two major methods of dealing with this important problem[1] of con-

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[1] With all due respect for those who advocate a minimum of governmental interference with business, and for those, too, who profess to have little faith in laws directed at monopolistic acts and unfair trade practices, if the destruction of democracy were contemplated, one of the first legislative acts would be the repeal of these laws in the various States, thus tearing away the too thin veneer of our social order and leaving exposed the ugly strain of human greed.

"From the beginning," says Edward Bellamy in *Plutocracy or Nationalism,* an address delivered at Tremont Temple, Boston, May 31, 1889, "Christianity has been at odds with its (monopoly's) fundamental principle—the principle that the only title to the means of livelihood is the strength to get and keep." And again he says that "the final plea for any form of brutality in these days is that it tends to the survival of the fittest. . . . But the retort is prompt and final. If this were indeed so, if the richest were best, there would never have been any social question. Disparities of condition would

trol in whole or in part. One method, drastic and socialistic in its nature, would require governmental participation in the business activities formerly managed by monopolies or trusts. A suggested plan would municipalize[2] those commercial enterprises concerned with the buying and selling of the common necessities of life; while the other would indirectly affect state monopoly and discrimination by the nationalization or collective federal ownership of "all industries which are organized on a national scale and in which competition has virtually ceased to exist."[3] The other method would leave industry in private hands, but would attempt to regulate it by law. Here there may be rigid control, consisting of more or less elaborate[4] legislation with centralized, co-operative, or decentralized enforcement,[5] or flexible control which

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have been willingly endured, which were recognized as corresponding to virtue or public service."

[2] Assembly Bill 482A, 1917, would give to all cities of the state the power to buy from, or sell without profit to, the inhabitants of such cities the common necessities of life when two thirds of the council shall declare such action necessary to provide protection from monopoly or extortion. This measure was vetoed by the governor on the grounds that it was both inexpedient and unconstitutional. Concerning the inexpediency of such a method of control, a quotation was employed from the Opinion of the Justices (1871) 58 Me. 590, 598, to the effect that "the less the state interferes with industry . . . the better. There is no safer rule than to leave to individuals the management of their own affairs. Every individual knows best where to direct his labor, every capitalist where to invest his capital." Among the several cases cited to prove such a law unconstitutional on the ground that taxes can be used only for public purposes are: Opinion of the Justices (1892) 155 Mass. 601; People ex rel. Detroit & H. R. Co. v. Salem, (1870) 20 Mich. 452; and Attorney General v. Eau Claire, (1875) 37 Wis. 400, 438, in which it was said: "The legislature can delegate the power to tax to municipal corporations for public purpose only. . . . Were this otherwise, municipal taxation might well become municipal plunder." For an extensive discussion of these points see the veto message of Emanuel L. Philipp, *Assembly Journal,* 1917, p. 1077.

[3] Three joint resolutions are to this effect: 47A, 1905; 91A, 1907; and 13S, 1911. In the latter it is declared that it has become impossible to control private property employed in large industrial enterprise for the benefit of society "without violating the very meaning of property and private ownership."

[4] For an example of very elaborate control see Assembly Bill 213A, 1923. This would make unfair a contract giving *exclusive* rights to sell any article in the state or in any part of the state.

[5] The laws of Wisconsin do not provide for any single method of enforcement. This lack of uniformity is a product of time, and is partial evidence to support a move for a revision of the entire law in the interest of simplicity. The law dealing with contracts in restraint of trade or combinations to prevent or restrain competition is enforced by the attorney general, with the district attorney instituting action upon his advice (s. 133.01); unfair

states a general principle and provides a commission with fact-finding and order-making power.[6]

General Control

The first general[7] enactment in Wisconsin having to do with the

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discrimination in the purchase of dairy products is prosecuted by the district attorneys in their respective counties (s. 133.12); unfair discrimination in the buying and selling of commodities in general use is prosecuted by the attorney general himself or deputy with the cooperation of the district attorneys (s. 133.19); and prevention or restraint of competition by domestic corporations shall lead to a penalty to be enforced by the attorney general alone (s. 133.23). Senate Bill, 548S, 1913, embodying the general principles of monopoly control, provided for an action to be brought by the attorney general, who should by himself or deputy direct the action in the proper county with the assistance of the district attorney in that county. The bill was vetoed by the governor on the ground that only centralized control was provided for. He pointed out that the district attorneys are competent and the system of cooperative control between the attorney general and the local prosecuting attorneys has turned out well in practice, and that there was no necessity for a change. "The anomaly is thus presented," he says, "of a bill ostensibly devised to prevent monopoly, so framed as to secure an absolute monopoly to the attorney general in the enforcement of it. To limit the administration of law in this way cannot conduce to either economy or efficiency." See the veto message of Francis E. McGovern, *Senate Journal,* 1913, p. 1307.

[6] Chapter 571, Laws of 1921.

[7] The first example of the control of monopolies in Wisconsin is found in the "Potter Law," a drastic act passed in 1874 as a result of the agitation of the Patrons of Husbandry, commonly known as "grangers." This act regulated the rates of railroads. The law upon its passage was held in complete contempt by the railroads, but in an immediate decision by the Supreme Court of the state it was upheld as being constitutional regulation. However, the influence of the railroads was so powerful, and the people in general so little interested in the control of monopoly that it was repealed in 1876. The law is found in chapter 273, Laws of 1874, and the decision supporting the law in The Attorney General v. Railroad Companies (1874), 35 Wis. 425. The constitution of Wisconsin in dealing with the formation of corporations stated (Article XI, Section 1) that "all general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage"—a statement which meant, said the Court, that the decision in the Dartmouth College case never had any application in the state, that the state "emancipated itself from the thralldom of that decision in the act of becoming a state; and corporations since created have never been above the law of the land." (Page 574) Justice Ryan, in a long and well-reasoned opinion, made this historic statement in supporting the law: "The material property and rights of corporations should be inviolate . . . but it comports with the dignity and safety of the state that the franchises of corporations should be subject to the power that grants them; that corporations should exist as the sub-

control of discrimination and monopoly in trade was passed in 1893[8], three years after the Sherman Anti-Trust Act, of which it was a reproduction with the exception that it applied only to the commerce of the state, provided a lesser penalty, and made an exception in its application of labor unions and some other organizations.[9] The first section states that "every contract in restraint of trade or commerce" is illegal, while the second section, on the proper assumption that not every restraint of trade includes a monopoly, makes the necessary addition by penalizing "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person to monopolize any part of the trade or commerce of the state." An additional act in 1897[10] attempted to make the control more elaborate and effective by prohibiting corporations organized in Wisconsin from entering into "any combination, conspiracy, trust, pool, agreement or contract" intended "to restrain or prevent competition in the supply or price" or "to control or regulate" the price, or to "limit or fix the amount or quantity" which might be produced or sold.

The law of 1893—the state counterpart of the Sherman Anti-Trust Act—resulted in little more than a broad statement of public policy, was defective on account of the absence of an enumeration of particular prohibited acts, and was quite ineffective when tested in terms of the number of prosecutions under it.[11] After twenty years it had not been used except to support a private damage claim, and then only once.[12] A quarter of a century after the law had been passed, Attorney General Blaine said that while prosecution had been started, there had been no final decision in any courts of the state.[13] While the Supreme Court of Wisconsin had occasion several times[14] to deal with contracts

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ordinates of the state which is their creator." (Page 574) See E. A. Fitzpatrick, "Wisconsin," Milwaukee, 1928, for a rather complete history of this law.

[8] Chapter 219, Laws of 1893.

[9] See infra, p. 49.

[10] Chapter 357, Laws of 1897.

[11] "It cannot be said that the trust and monopoly statutes are ineffective, for it is my belief that the mere fact that the statutes exist prohibiting trusts and combinations has a deterrent effect a least." John J. Blaine, Attorney General, in an unpublished letter to State Senator William C. Zumach, May 27, 1919. This statement loses some of its effect, however, by a later reference to the "possible" beneficial effects of the statutes. During the course of his letter, also, he states that combinations have been "going on quite unabated" for the last twenty years, with "immeasurable harm and injury" to the people as a result.

[12] Memorandum Brief on Senate Bill 548S, 1913.

[13] Letter of John J. Blaine. See Note 11.

[14] National Distilling Co. v. Cream City Importing Co. (1893), 86 Wis. 352; Richards v. Am. D. & S. Co. (1894), 87 Wis. 503; Tectonius v. Scott (1901),

in restraint of trade, even these decisions were made under the common law, i.e., that contracts in unreasonable restraint of trade are illegal, and no mention is made of the law of 1893 for twenty years when it was said in Kuhland v. King[15] that the judicial policy of the state in the interpretation of contracts in restraint of trade was in accordance with the legislative declaration on the subject.[16] Governor Robert LaFollette, in calling attention to the ineffectiveness of Wisconsin's trust and monopoly control in his messages to the legislatures of 1901 and 1903 does not even mention the law of 1893, but says in the latter message that the law of the state is contained in the enactment of 1897. In his message of 1905, after speaking about the law of 1897, he says that the only other regulation on the subject was passed in 1893, but that the law is loosely drawn, is of doubtful construction, and will probably be determined unconstitutional on account of the exceptions[17] to its operation. It appears, therefore, that Wisconsin's control under the first enactment was of no more value than the federal act of which it was for practical regulatory purposes an exact copy.[18]

Reference has been made to the law of 1897. While the scope of control was broadened in terms of monopolistic acts, it was limited to corporations, with a still further limitation to corporations chartered in Wisconsin. It may be that the legislature visualized the greatest source of injury in the huge corporate accumulation of resources with corresponding powerful social and economic influences, and therefore singled such entities out, little realizing that great combinations need not necessarily take the corporate form; and that they confined the law in its application to those chartered in the state, thinking that the

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110 Wis. 441; Cottington v. Swan (1906), 128 Wis. 321; My Laundry Co. v. Schmelling (1906), 129 Wis. 597; Kradwell v. Thiesen (1907), 131 Wis. 97; Burton v. Douglas (1909), 141 Wis. 110; Eureka Laundry Co. v. Long (1911), 146 Wis. 205.

[15] (1913) 154 Wis. 545.

[16] Thus was established a "rule of reason" ante-dating the rule as pronounced by the Supreme Court of the United States in connection with the Federal enactment. In Pulp Wood Company v. Green Bay P. & F. Company (1914), 157 Wis. 604, 625, attention is called to the fact that the Wisconsin law has received the same interpretation as the Federal law "at least *sub silentio.*"

[17] The exceptions were labor unions and organizations for the purpose of legitimately promoting the interests of trade, commerce and manufacturing. See Brief for American Tobacco Company in State v. P. Lorillard Co. (1923), 181 Wis. 347, Vol. 1486, Wisconsin State Library, for an interesting argument against such exceptions. See also, infra, p. 50.

[18] "In its present form, during the sixteen years that have elapsed since its passage, it (the Sherman Anti-Trust Act) has proved a failure." Chas. G. Dawes, *The Sherman Anti-Trust Law*, North American Review, Vol. 183, p. 189 (1906).

provision of the Federal Constitution which placed the control of interstate commerce in the Federal government necessitated, in the interest of constitutional control, such kind of local restriction. In pointing out the limitations of the law, and referring specifically to the fact that it applied only to Wisconsin corporations, Governor LaFollette, realizing the limitations on effective control, said that "surely the state has some control over business transactions within its limits even by foreign corporations."[19] These two glaring defects in the law were matched by a third which made illusory even the control of corporations in Wisconsin. The legislature had provided a penalty, not for the act of monopolization, but only for a failure to answer inquiries addressed by the attorney general, a significant defect when reliance for evidence must be placed on other sources.[20] It was the seriousness of these defects that led Governor LaFollette to say that "the entire act, when carefully examined, so far as affording any relief to the people, is a delusion, a shadow, without any substance."[21]

In spite of the vigorous language used and the pressure that had been brought to bear by the governor in 1905, no legislation of general application[22] was passed until 1921,[23] when the defects of the law of 1897 were remedied.[24] However, proposals of one kind or another had been made in every intervening legislative session. In 1923 the control was further strengthened[25] by a law applying to price discrimination in any commodity between sections of the state or between those engaged in business in the state.[26]

From the application of the general control which has just been described, the legislature has excepted labor unions[27], organizations "intended to legitimately promote the interests of trade, commerce or

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[19] Message to the Legislature of 1905, Assembly Journal, Vol. I, p. 87.

[20] Letter of John J. Blaine. See Note 11.

[21] Message of 1905, Assembly Journal, Vol. I, p. 87.

[22] In 1909 a law was passed penalizing those who engaged in an intentional price discrimination in the buying of milk, cream, or butter fat (c. 359). This law was strengthened in 1923 by making any discrimination illegal whether intentional or not (c. 406); and was made more just in its application by allowing a difference in price if necessitated by quality or transportation charges.

[23] Chapter 458.

[24] Approximately the same language was used in the law of 1921 as in the law of 1897, except that its application to parties was made general. For the text of the law of 1921, see infra, p. 53.

[25] See *infra, Particularized Control.*

[26] Chapter 406.

[27] Chapter 219, Laws of 1893.

manufacturing[28]," and agricultural or horticultural organizations.[29]. Elaborate provisions, following the wording of the Clayton Act, remove from the injunctive power of the courts certain acts of laborers or labor organizations, as, for illustration, disputes having to do with the terms or conditions of employment, primary and secondary boycotts, and picketing.[30] Collective bargaining by associations of agricultural producers and associations of employees is not within the condemnation of the anti-trust laws, nor is collective marketing by farmers, gardeners and dairymen[31]; and while the Co-operatives Act formerly mentioned certain groups[32], the scope of this act so far as parties are concerned has been so broadened as no longer to constitute an exception.[33]

The philosophy underlying these exceptions[34] is that there are certain members of society who are at a serious disadvantage in the economic struggle for existence unless combinations among them is permitted, a disadvantage which results in moral, social and economic injury to the public. Labor has been legislatively declared not to be a commodity both by United States and Wisconsin law; and in elaboration of this idea it has been said that there is no parallelism between the rights of labor and the rights of capital; that "labor is not only blood and bone, but it also has a mind and a soul; and that 'labor is the creator' while capital is the creature."[35] There are also those other weaker members of society, as illustrated by the farmers, whose disunited efforts result not only in a low standard of economic life for themselves when in competition with others who are by financial and social equipment more advantageously placed than themselves, but also in a substantial waste to the public through undeveloped methods of distribution—members whose position in economic society is greatly improved by the benefits of combination, but still "humble at the best."[36]

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[28] Ibid.

[29] Chapter 211, Laws of 1919.

[30] Ibid.

[31] Chapter 278, Laws of 1919.

[32] Chapter 490, Laws of 1921. Those in the agricultural, dairy, mercantile. mining, manufacturing, or mechanical business were given the benefits of the act.

[33] Chapter 433, Laws of 1923.

[34] It is perhaps better to say that there are no exceptions, but that there has been a legislative declaration to the effect that their combination results in a public benefit. See John D. Miller, *Farmers' Co-operative Associations as Legal Combinations,* The Cornell Law Quarterly, Vol. VII, No. 4, p. 309.

[35] State v. Coyle (1913), Okla. Crim. App., 130 Pac. 316, 320.

[36] See Northern Wisconsin Tobacco Pool v. Bekkedal (1924), 182 Wis. 571.

The evolution of the anti-trust and monopoly law of Wisconsin reveals the application of more and more comprehensive and effective civil and criminal remedies during the course of the years. So far as civil action is concerned, it was provided in 1893 that the injured person might recover the damage sustained[37], but this control was greatly strengthened by the Whittet Law of 1917[38] providing that all contracts made by those while a member of any combination, conspiracy, trust, or pool should be void, and that any payment made in pursuance of the contract might be recovered in a suit brought within six years.

The penalties for violation of the monopoly laws have been progressively increased. In 1893[39] a violation of the law resulted in a certain money penalty and an injunction; in 1897[40] with reference to corporations chartered in Wisconsin there was a forfeiture of the charter for refusal to answer inquiries; in 1905[41] it was provided that there should be a cancellation of the licenses of foreign corporations doing business in the state; in 1909[42] appeared a provision declaring a forfeiture of corporate rights and privileges; in 1921[43] there was an increase in the money penalty over that provided in 1893; while in 1923[44] the penalty included both fines and imprisonment.

Particularized Control

Growing out of unsuccessful experience with general control, there has been a movement in some states in which the legislatures have shifted from mere reliance on a law stating a general policy to laws which particularize the acts to be prevented. The matter has been described in this manner:

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[37] Chapter 219, Laws of 1893.

[38] Chapter 646, Laws of 1917. This law was proposed by Speaker Whittet at a time when corporations were boosting the price of commodities due to the war. Before the bill became a law it was referred to as a very important piece of legislation, "especially in these times when the high cost of living and many commodities of business advanced to prices almost prohibitive of their use, have caused many to feel that lack of proper and more stringent state anti-trust or monopoly laws has in a sense fostered such price conditions . . ." Editorial, The Milwaukee Daily News, June 20, 1917.

[39] Chapter 219.

[40] Chapter 357.

[41] Chapter 506.

[42] Chapter 395. This same remedy was later applied to certain particularized acts of an illegal nature. For an example, see Chapter 165, Laws of 1913, referring to acts intended to destroy the business of a competitor.

[43] Chapter 458.

[44] Chapter 406.

"The legislative campaign against monopoly and to protect 'fair trade' took a long step from the codification of the common law against combinations in restraint of trade or monopolies to declaring illegal specified acts which the legislature considered as tending to destroy competition. Under the anti-monopoly acts a general rule was laid down to be applied by the courts to specific situations; under this new type of law, the legislature describes the acts it brands as outlawed, and anyone can tell from reading the statutes what he is forbidden to do."[45]

While an example of great particularization can be found,[46] Wisconsin has not gone so far in this direction. There are two outstanding examples of such legislation, however.[47] One is a law which applies to price discrimination in any commodity between sections of the state or between those engaged in the business in the state,[48] and the other applies to dairy products, the material part, so far as this discussion is concerned, being as follows:

"Any person . . . engaged in the business of buying milk, cream, or butter fat for the purpose of manufacture, that shall intentionally, for the purpose of creating a monopoly or of destroying the business of a

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[45] J. P. Chamberlain, "Legislative Prohibition of Unfair Practices," *American Bar Association Journal*, January, 1924, p. 45.

[46] Wyoming controls price discrimination in the buying of coal, oil, gasoline, natural gas, iron ore, certain dairy products, poultry and eggs. Chapter 82, Laws of 1923.

[47] See Bill 488A, 1917, which would control price discriminations with reference to coal.

[48] Chapter 406. The language of this law was previously used in Assembly Bill 245A, 1911, which was to be an amendment to chapter 359, 1909. It declared unlawful the selling of a commodity at a lower rate or the buying at a higher rate in one part of the state than in another for the purpose of intentionally destroying the business of a competitor. The Wisconsin Manufacturers Association was strongly opposed to this bill, pointing out that no allowance was made for any difference in the cost of operation in different parts of the state, or in supply and demand at various places, or whether it was a wholesale or a retail transaction, and that it did not take into consideration the credit of the purchaser or seasonal variations. A general condemnation of the bill was put in this language: "The law is a most dangerous invasion of the private right of doing business, and will result in great injury to the manufacturers and merchants of the State and will cause a raising of prices generally and the destruction of the business of the merchant having two stores which are operated at different costs." These arguments appear quite extravagant in view of the fact that the legislation was directed at only the intentional destruction of a competitor's business. An answer was attempted to this point by saying that the question of intention was one for the jury. See Valid Objections to Bill No. 245A, Wisconsin Manufacturers Association, State Control of Monopolies, Wisconsin Legislative Reference Library.

competitor in any locality, discriminate between different sections . . . of the state, by buying such commodity at a higher price . . . in one section . . . than is paid for the same commodity by said person . . . in another section . . . shall be deemed guilty of unfair discrimination . . . "[49]

The constitutionality of the anti-trust and monopoly laws has been challenged on several points and on two different occasions. Section 1847e[50], passed in 1921 for the purpose of making the control more effective, was tested in State v. P. Lorillard Company[51] on the point that it was in conflict with the due process clause of the constitution of the United States and of the constitution of Wisconsin. This section is as follows:[52]

"Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every combination, conspiracy, trust, pool, agreement or contract

> intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, to be produced or sold therein or constituting a subject of trade or commerce therein,
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> or which combination, conspiracy, trust, pool, agreement or contract shall in any manner
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> > control the price of any such article or commodity,
> > fix the price thereof,
> >
> > limit or fix the amount or quantity to be manufactured, mined, produced or sold in this state,
> >
> > or fix any standard or figure in which its price to the public shall be in any manner controlled or established,
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> is hereby declared illegal restraint of trade."

The argument attempted to show that the act made illegal two classes of contracts: (1) those intended to restrain competition and (2) those which shall in any manner (a) control the price of any article produced or sold, (b) fix the price thereof, (c) limit or fix the amount of quantity to be manufactured or sold, (d) fix or control the price to the public; that (b) and (c) of the second class were declared illegal by the legislature whether in restraint of trade or not; and that if the second class were in restraint of trade it would be necessary to inter-

[49] Chapter 395, law of 1909. This law was strengthened in 1923 by making any discrimination illegal whether intentional or not (chapter 406).

[50] This is section 133.01 of the statutes of 1929.

[51] (1923) 181 Wis. 347.

[52] The graphical arrangement of this section was used in the brief of George E. Ballhorn in the Lorillard case, Vol. 1466, Wisconsin State Library, p. 38.

polate the phrase "intended in restraint of trade" after the word "contract" in the second part. But if such interpolation were made it would be necessary to abandon the usual meaning of the word "or"; that the second part would be mere surplusage; and that it would defeat the legislative purpose by weakening rather than strengthening the anti-trust enactment.[53]

The Court[54], after referring to this "elaborate and ingenious argument" decided that effect should be given to the legislative intent rather than to the exact letter of the law, such intent being derived from the statute taken as a whole rather than in dissected parts, and concluded that there was a prohibition of only "tainted" contracts.[55]

A very elaborate argument was also made to prove that the exceptions to the anti-trust law rendered the whole law void. It was contended that the "welfare" of labor organizations meant financial welfare, as there were references to the exceptions to "regulation of wages," "terms of employment," and the like; that conspiracies in trade are allowed if they "happen" to be entered into by labor unions; that the day when organized labor deserved special consideration is now passed, as the labor unions have been guilty of all the practices condemned by the anti-trust laws; and that the theory that the labor of human beings is not a commodity has been destroyed by a system whereby labor union officials through organization control and market labor power.[56]

The section granting immunity to associations, corporate or otherwise, of farmers, gardeners or dairymen, including live stock farmers and fruit growers engaged in making collective sales, was also challenged on the ground that the classification is arbitrary among producers for profit and thus denies the equal protection of the laws guaranteed by the constitution of the United States; and that there is no justification for the exception of agricultural and horticultural organizations even though they are instituted for the purpose of mutual help, do not have capital stock, and are not conducted for profit, as these facts do not negative the presence of financial motives.[57] The argument concludes:

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[53] Ibid, pages 39-61, passim.

[54] Pages 372-3 (1923), 181 Wis. 347.

[55] Practically to the same effect is the statement in State v. Coyle (1913), 130 Pac. 316, 317: "But we are of the opinion that they (the attorneys for trusts and monopolies) prove too much, for if they are to be followed it would be almost impossible to frame a law which would reach and destroy conspiracies in restraint of trade and commerce."

[56] Brief of George E. Ballhorn, op. cit. pp. 44-47, passim.

[57] Ibid, pp. 48-54, passim.

"Hence, under the cloak of humanitarianism the legislature, influenced by the groups, has been successfully prevailed upon to enact legislation legalizing the highest selling price and wage attainable by the power of organization and organized control in the case of products of agriculture and its allied industries of labor, while at the same time keeping under the ban of the criminal law all activities or organizations and organized efforts to enhance prices and control production or distribution of the products of trade, commerce or manufacturing."[58]

While the answer to these arguments would have been interesting and important, the Court, at least for the time being, was able to avoid the issue by relying upon the fact that the anti-trust laws had been enacted at various times, that the exceptions had preceded the enactment of 1921, which was used to support the action, and thus even if the exceptions were void, they were not the inducement for the statute relied upon.[59]

Although the question as to the constitutionality of the exception to the law has never come squarely before the Supreme Court of the state, some light is thrown on its possible attitude by the reasoning in the decision given on a rehearing granted in the case of Northern Wisconsin Tobacco Pool v. Bekkedal.[60]

It had been argued[61] at great length that the statute providing for co-operatives violated the due process and equal protection clauses of the Federal Constitution. In substantiation of this it was said that all persons and corporations other than co-operative associations are subject to the anti-trust laws, thus "jailing" one and "honoring" another for doing the same thing; that there is no reasonable basis for the classification, adding that co-operative association is "nothing more than a pooling contract with the privilege of corporate entity;" and that there is no distinction between producers and others engaged in trade or commerce, citing Connolly v. Union Sewer Pipe Company, (1901) 184 U.S. 540. Furthermore, it was said that the justification, if any, is in the form of doing business—"the magic of the act of incorporation,"—but that all cannot avail themselves of this privilege due to the provisions that the incorporators must be residents of Wisconsin, and that there must be at least five in number; and, finally, that there is nothing in the buying and selling of leaf tobacco to justify the exercise of police power by the state.

The Court, answering in an able opinion by Justice Owen, stated that the legislature may make reasonable classifications if proper eco-

[58] Ibid, p. 59.

[59] (1923) 181 Wis. 347, pp. 374-5.

[60] (1924) 182 Wis. 571.

[61] Brief of Glicksman, Gold & Carrigan in Northern Wisconsin Co-operative Tobacco Pool case, Vol. 1482, pp. 17-40, passim.

nomic, political or social reasons are present; pointed out that the twenty years elapsing since the decision in Connolly v. Union Sewer Pipe Company had created a "wide-spread conviction throughout our nation that the farmer is subject to economic conditions which put him in a class justifying special legislative consideration in many respects;" and called attention to the fact that during this time state agricultural departments have stimulated the creation of co-operative societies "among the weaker and more scattered members of society." He also stated that there is a substantial difference between a combination of the powerful few who associate to dominate an industry and the weak and scattered many, as exemplified by the farmers; that the law itself, providing among other things, for one vote for each member, practically curbing proxy voting, and putting a limitation on the amount of return upon the stock, is not such as would give protection to one "harboring monopolistic purposes;" and finally, he declared, if monopoly did result, "it is lawful monopoly, and the legislature has a right to legalize monopoly."[62]

The constitutionality of the provisions of the law prohibiting the courts from enjoining picketing and the boycott has never been passed upon by the Wisconsin Court, although the Supreme Court of the United States found a law of Arizona with similar language unconstitutional in a five to four decision.[63] It would seem that the Supreme Court of Wisconsin might hold a different view as there is a reference with approval in the Tobacco Pool case[64] to the dissenting opinion of Mr. Justice Brandeis in the Truax case.

Commission Control

The law of Wisconsin in connection with the hours-of-labor of women wherein the general principle that no female shall be employed as to be prejudicial to her welfare, with power in a commission to investigate, and upon the basis of such investigation to issue orders, suggests that monopolistic and discriminatory trade practices might be controlled in the same general way. In 1913, two years after the industrial commission was created, a bill[65] was presented to the legislature to establish a market commission to prevent monopoly and contracts and combinations detrimental to public interests; but it fell far short of a control comparable to that given to the industrial commission as a fact-finding and order-making body. It was pointed out in another

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[62] (1924) 182 Wis. 571, pp. 593-96.

[63] Truax v. Corrigan (1921), 257 U. S. 312.

[64] Page 594.

[65] Assembly Bill, 1086A.

connection[66] that the courts are unable, as proved by experience in Wisconsin, to deal with intricate social and economic questions; and that the solution of these difficult questions must be handed to expert commissions with full fact-finding power "to discover the cause for existing economic evils resulting from unfair competition, causes, when discovered will quite readily and clearly indicate the remedy."[67] Attorney General Blaine in 1919 suggested a commission operating under a general law which would have order-making and enforcement power in addition to that of fact-finding. Thus he would propose a law

"whereby all trade and competition must be fair, just and reasonable * * * with power vested in some body to determine the fairness and justness and the reasonableness of any trade or competition, and to make an order with respect thereto, declaring such particular trade or competition unfair, unjust, or unreasonable, providing not only an injunction, but also a forfeiture to make such order and determination enforcible."[68]

In 1921[69] a law along these general lines was passed.[70] The general principle was laid down that competition in business and trade practices must be fair, with power in the department of agriculture and markets, consisting of three commissioners, to issue orders forbidding those trade practices that have been found to be unfair and prescribing those that are fair.[71] The department, at the request of the attorney general

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[66] Memorandum Brief on Senate Bill 548S, 1913.

[67] Ibid.

[68] Unpublished letter to William Zumach. See Note 11.

[69] Chapter 571, Section 1495-14-1.

[70] The law is similar to the federal enactment dealing with unfair competition and empowering the Federal Trade Commission to prevent it. See 38 Statutes at Large, 719, Section 5. Wisconsin has the unique distinction of being the only state to adopt this principle of control.

[71] "The legislature of Wisconsin has done the practicable thing, and is within its constitutional powers in delegating to an administrative department the authority, by order, to define unfair methods of competition. For the legislature to reject this alternative is to place itself in the dilemma of either having to enumerate an immutable category of offenses in the statute itself or letting its statute be destroyed upon the rocks of the United States Supreme Court's decision in the Cohen case, if it simply prohibits without further provision for specification of the wrong." Alvin C. Reis, *The Wisconsin Marketing Law*, Marquette Law Review, Vol. IX, April, 1925, p. 131. The Cohen case referred to is United States v. L. Cohen Grocery Company (1921), 255 U. S., 81, which held unconstitutional a statute which did not define in advance what was forbidden. The grounds for such holding were that there was both a denial of due process of law and a failure to inform the accused of the nature and cause of the accusation.

or of any district attorney, must assist in enforcing the anti-trust laws, and other laws of the state concerning trade.[72]

There are several arguments in favor of this flexible commission control. In the first place, it is impossible to frame a definition of monopoly, discrimination, or unfair competition that will be comprehensive and yet just to private enterprise. Second, a commission, with fewer rules and with less formality, would probably function with greater freedom and with more expedition than a court. Third, the attorney general is not in a position to deal effectively with the enforcement of a rigid law due to the shortness of his term, his usual lack of expertness in the economic field, the burden of his varied duties, the lack of sufficient investigating machinery, and the overcrowded condition of the courts in which he must bring his action.[73]

Summary and Conclusion

There are thus revealed three steps in the evolution of the legislative control of monopolistic and discriminatory trade practices in Wisconsin. The first is a statement of policy in general terms—a statement so general as to be practically ineffective while standing alone. The second, while not so prominent in Wisconsin as in some other jurisdictions, is to particularize to a certain extent the illegal acts which are to be controlled. The third, is to put the principle of control in general terms, allowing a commission to find facts and to issue orders having the effect of law. That there is value in all three controls has prevented the legislature from surrendering the first and second while moving on to the third.

As to what shall be the next legislative step it is impossible, of course, to say. There would probably be considerable merit in bringing the present unfair practices law from its relative obscurity in the department of agriculture and markets and giving it a prominent place on the statute books, but leaving the enforcement with the present commission.

There has been slow but very substantial progress since the first anti-trust law was passed in 1893, a progress illustrating the principle

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[72] Berneice N. Lotwin makes this comment on the functioning of the law: "Such assistance usually takes the form of investigations, though in some instances investigations of the department into alleged unfair trade practices or unfair methods of competition have revealed violations of anti-trust laws, in which case the facts found have been reported to the attorney general for proper action." "Trade Practice Work in Wisconsin," 7 Wis. Law Review, 212, 220.

[73] See Memorandum on Senate Bill 548S, 1913, for an extended discussion of the arguments in favor of commission control.

of evolutionary adjustment in the control by the state of business practices which are in a rather large degree elusive.[74] This principle was announced by Judge A. J. Vinje[75] with unusual insight:

"But this problem of adjusting the rights between industrial agencies and the public is not a problem that can be solved once for all * * * Its solution, like the solution of all great problems, will consist in growth, not discovery. It will consist in a continual approximation * * *, an addition here, an elimination there * * *."[76]

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[74] "If an objective standard for measuring the minimum efficiency that could be expected of business units under active competition in terms of prices, margins of profit, freedom from waste, or similar criteria—had ever been worked out, the task of those charged with the enforcement of the anti-trust laws would be greatly simplified. . . . Since no such standards have ever been formulated, let alone agreed upon, no one can tell from examining the products, prices, profits, or plant procedure of any competitive enterprise whether it is performing satisfactorily or not." Keezer and May, *The Public Control of Business,* New York, 1930, pp. 40-41.

[75] He was associate justice of the Supreme Court of Wisconsin from 1910-1921, and chief justice from 1922-1929.

[76] *The Legal Aspects of Industrial Consolidations,* Wisconsin State Bar Association, Vol. VI, (1904-5), page 159 at 179.