Economics and Jurisprudence

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When the physiocratic school of political economy which made land and its products the basis of wealth, held sway, the law, both statute and common, progressed in the direction of removing from land titles the clog of primogeniture and entails. In each case the science of law and that of economics investigating and operating independently was influenced by the prevailing beliefs of the times. Cruise in his work on the nature and operation of fines and recoveries[10] calls this prevailing belief a "bent," and well illustrates the action and the potency of these forces as well as the clash of interests which sometimes results. "The sense of wise men and the general bent of the people in this country have ever been against making land perpetually unalienable. The utility of the end was thought to justify any means to attain it. Nothing could be more agreeable to the law of tenures than a male fee unalienable; but this bent to set property free allowed the donee, after a son was born, to destroy the limitation and break the condition of his investiture. No sooner had the statute de donis repeated what the law of tenures said before, that the tenor of the grant should be observed, than the same bent permitted a tenant in tail of the freehold and inheritance, to make an alienation, voidable only, under the name of a discontinuance, but this was a small relief. At last the people, having groaned for two hundred years under the inconvenience of so much property being unalienable and the great men to raise the pride of their families, and in those turbulent times to prevent their estates from forfeiture, preventing any alteration by the legislature, the same bent threw out a fiction in Taltarum's case by which the tenant in tail of the freehold and inheritance, or with the consent of the freeholder, might alien absolutely. Public utility adopted and gave sanction to the doctrine for the real political reason, to break entail, but the ostensible reason from (because of) the fictitious recompense, hampered succeeding times how to distinguish cases which were within the false reason given, but not within the real policy of the invention, till, at last, the legislature applauded common recoveries by a variety of statutes." Here we have an illus-

tration of the potency and persistence of economic necessities in the formation of law, of the clash of interests which accelerates or retards such change, and of the weight of contemporaneous public opinion constituting the "bent" mentioned. "The utility of the end was thought to justify any means to attain it," says Cruise. This was an economic utility. Some of the means by which it was attained would be considered unjustifiable in our day. Blackstone tells us (2 com. 116) that Edward IV. "suffered" Taltarum's case to be brought before the court because he observed how little effect attainders for treason had on families whose estates were so protected, and that this "pious fraud" on the part of the court was for the purpose of evading the statute de donis, which one branch of the legislature would not consent to repeal. We know which branch this was. Blackstone, it will be observed, passes over without mention the economic causes suggested by Cruise. So with reference to the law of bills and notes, those conveniences originated in economic desire for facilitating exchange of wealth and were practiced as a custom among merchants and the custom of merchants found its way into the law. It required a struggle of nearly one hundred years with the common law of England before these instruments of exchange were fully recognized and given the legal effect to which they were entitled by the custom of merchants and which is now freely accorded them. In an appendix to 1 Cranch, original edition, is an interesting and detailed account of the growth and progress of the law on this subject.

The common law of England forbade the assignment of a chose in action, ostensibly upon the ground that under color thereof pretended titles might be granted to great men whereby right might be trodden down, and the weak oppressed, a thing which the common law forbade. I say ostensibly, for I do not believe that was the true reason, but it was the reason given for the rule. At the same time merchants found it necessary and convenient, instead of remitting money at the risk of accidental loss, piracy and robbery, in cases, for illustration, where one merchant in England was creditor to a foreign merchant in the sum of £1,000, and another person in England was debtor to this foreign merchant in the sum of £1,000, to transfer by bill of exchange the demand against the debtor of this foreign merchant to the creditor of this foreign merchant and a custom grew up of transacting business in this way. First equity and then, reluctantly and late, the common law
recognized and gave effect to this custom, but only in favor of merchants. In cases of entails and in the case cited of the law merchant, the economic necessity therefore had to meet not alone the task of founding a new rule which, aided by economic necessity or convenience, is comparatively easy, but also the abrogation of an existing rule supported by adverse economic interests, which is always difficult. Economic conditions were static rather than dynamic, and this, too, retarded the change.

We are often reminded that the law is for the main part founded on customs, but we need also to ascertain by what process customs become law. The student of law is frequently embarrassed to find the unanimity with which legal historians and legal philosophers and commentators agree that the common law is based on custom, and the great number of decisions stating that while this may have been true in the early stages of the law, it is not now true. Very few decisions can be found in any age in which allegation and proof of a custom formed the basis or starting point of a general rule of law. But neither the nature of the law nor the process of its growth has changed. There may have been a change in the requirement of proof of the custom which preceded the law and this would appear from an examination of the ancient cases as well as from some recent saying of distinguished jurists. Chief Justice Cockburn, of England, said: \(^{31}\) "It (the law merchant) is neither more or less than the usages of merchants and traders in the different departments of trade ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law." But at the present time and to a great degree in the past, as an examination of the cases will disclose, the usage is not often or generally proved before the court. Judges who sought to restrain and explain the force of custom as the forerunner of law, often neither understood, restrained or explained it, but themselves unconsciously extended the law in this direction in many cases. Customs are continually finding their way into and becoming part of the law, and this is done now mostly through the decisions in actions at law on contract, or through decisions in actions based upon tort, in which the tort is founded upon some relation created by contract, such as principal and agent, carrier and passenger, and in all cases calling for an application of the maxim respondeat superior.

\(^{31}\) Goodwin vs. Roberts, 1 App. Cas. 476.
Omitting that narrower rule which permits proof of the usages and customs of a particular trade or business to be given in evidence to aid in the interpretation of a contract otherwise ambiguous, the process is as follows: Men contract, embodying in their contract stipulations and provisions suggested by former experience or by other contracts or by common knowledge; or, in other words, the contract stipulations themselves conform to usages and customs. This contract and these stipulations are enforced by the judgments of the courts unless they be contrary to express law or against public policy. Old rules are applied, it is true, but the law is, nevertheless, modified and shaped by the custom. Take the newest custom, that of leasing telephone instruments; this is a general custom and a new one. These contracts will come before the courts and the courts will look into the old law of leases and no doubt find some rules therein applicable to the new custom. But the conditions are so novel and the subject-matter so variant from that of a lease of house or land, that the courts will finally be called upon to decide whether in the absence of statute, common law rules relative to the termination of a tenancy obtain; whether holding over renews the contract on the same terms from year to year, whether the rules forfeiting the tenant’s interest are applicable, whether the doctrine of non-liability of the lessor to the lessee on account of dangerous or dilapidated condition of the thing leased, obtains, to what extent, if any, the lessee is bound to repair, and many other questions now difficult to foresee. The final result will be that from this custom, without any proof of the custom before the court, a series of legal rules will be established applicable to this particular subject-matter. Other illustrations may be given, as follows: The form of land contract appropriate to an executory agreement for the sale of land which is very ancient, comes to be used to secure a loan of money, and questions upon such instrument come up for decision. The law of the forum applicable to the relation of mortgagor and mortgagee is applied and the result in this state is that he who has the legal title by deed is the lienholder, and he who is in possession under the executory contract of purchase is the owner, subject to all the legal incidents of such relationship. All this is without any averment or proof of custom.

When railroads came to carry the commerce of the country and vast quantities of wheat and other grain came to be shipped in bulk, instead of in sacks or packages, and warehouses adapted to
this handling of grain became necessary, economic convenience requiring this to be done as cheaply and expeditiously as possible, it became the customary mode of handling grain to put the grain of the same grade, but belonging to different owners, in one bin, to issue a warehouse receipt to each showing the number of bushels to which he was entitled and which he might draw out on presentation of this receipt. Here was a comparatively new condition and this new custom coming before the courts in actions at law gave birth to these rules of law found in Young vs. Miles, 20 Wis. 615 and cognate cases. When it became customary to secure by a mortgage to a trustee a series of bonds each under seal, but payable to bearer, which bonds were in business treated as negotiable instruments, although neither common law nor the law merchant recognized such instruments as negotiable, the instruments coming before the courts in suits thereon, they were declared to be negotiable instruments and law to that effect was established. So certain bank messengers found it convenient to meet at a designated place for the collection of checks by set-off and payment. Economic policy approved this method and it became a custom, found its way into the courts, and the rules of law relative to the clearing house were developed and promulgated. So the customary disuse of seals upon contracts and actions upon such contracts developed many rules of law materially modifying the rules of the ancient common law. So in respect to the authority of the cashier to represent a bank, the authority of the president to represent a corporation, and the rules governing the relation of principal and agent or master and servant. These are all constantly receiving accessions from custom, and in all these cases no custom is averred and proven, but the facts in the case show that the parties acted or contracted with reference to certain conditions, or stipulated that certain things be done. These conditions and these things to be done are themselves customary conditions and things customarily done. Neither can the judges avoid applying their individual experiences and their beliefs. In a few instances the courts have boldly taken judicial notice of a custom so general as to be a matter of common knowledge and they are always and at all times affected by the learning and beliefs of the period in which they live. Many other instances might be cited. Now, as heretofore, in matters of trade or property, and in the production and distribution

23 Am. & Eng. Ency. 837, 838 and cases.

10 ibid. 113.
of wealth generally, men are swayed by economic desires and interests, and, taken in mass, they knowingly establish no usages and knowingly enact no laws, and knowingly interpret no laws contrary to such interests. That which gives the economic considerations more potency in the present day, is not alone that the great states are organized upon an industrial basis, but that this organization and its continuance is essential to support the teeming population of the world. Industrial organization and improved means of production and transportation have multiplied the population of the world and must now furnish this vast population the necessaries of existence. We are children of a commercial and industrial age whether we will or no, and consequently not only is the effect of economic interests in shaping the law intensified, but the occasions and the instances of economic demands are multiplied manyfold. The problems which confront those who make, apply, interpret or study the laws now or in the near future will be vastly greater, in the number of persons affected, in the magnitude of the interests involved, and in the disastrous consequences of error than at any stage of legal history ever heretofore known. The fact that custom, except with reference to the usages of a particular trade or profession with reference to which custom the parties are presumed to have contracted, is no longer a subject of pleading and proof in actions at law, apparently narrows the effect of custom in creating or shaping law, but it really does no such thing. The door through which customs enter into the law is wider open than ever because men incorporate into their contracts stipulations based upon custom, because the judges interpreting the law and applying it to these contracts cannot avoid drawing upon their own experience and their own knowledge which is affected by these customs, because the subjects of judicial notice have been increased, and because of the extent to which popular legislatures reflect the habits and wishes of their constituents. Some illustration of the tendency of courts at present in these directions might be appropriate. Take the case of *Briggs vs. Spaulding,*14 relative to the liability of bank directors for negligent inattention to duty. The same facts, the same federal statutes and the same precedents convinced five of the judges that Spaulding was justly and legally held not liable, and convinced four of the judges that "no bank can be safely administered in that way," and that "such a system cannot be properly characterized otherwise than as a farce." With

14 141 U. S. 132.
reference to the stricter liability contended for, the majority cited with approval a statement found in some decided case as follows: "Were such a rule to be applied, no gentleman of character and responsibility would be found willing to accept the place"; which to the wayfaring man might mean that gentlemen of character and responsibility are disposed to shun positions of responsibility. But to the minority it seemed that gentlemen of character and responsibility should not lend their names to inspire confidence and beget credit and then show their lack of character and responsibility by failing utterly to direct or manage the affairs of the bank. But the point applicable to this discussion is, how did the courts know of this disposition of gentlemen of the kind described? Why should this consideration enter into the legal rule? Why did the facts, statutes and precedents inspire members of the court differently? Because in this, as in all such cases, the personal knowledge of the judge, personal experience, mental habits, knowledge of business usages which is knowledge of custom, entered into the decision. As a result there was established the very important legal rule that bank directors are not liable to a receiver of the banking corporation for mere negligent nonfeasance in failing to attend meetings or in failing to examine and inspect the books of account and assets of the bank.

We have seen how slowly customs and laws grow when the industrial organization is in a static or normal condition. We of the present time and place cannot know much of this condition except from history because our generation has had experience for the most part only with the most dynamic economic conditions perhaps ever known. When the tide of emigration from the older states of the Union and from Europe poured into the Northwest Territory, it found a condition unparalleled in economic possibilities for profit and the production of wealth. A vast territory of extent and fertility never surpassed, favored with a healthful climate, abounding in timber and minerals, had the price of land artificially fixed much below its real value. The army of emigrants brought with them the capacity to labor, and there was, with comparative suddenness, thrown in together all of the economic elements for the production of wealth except that the facilities for exchange and distribution were few and insufficient. Much of the interesting and valuable economic history of these times, I fear, has been lost, but I will give a fragment from official sources which properly understood, is very suggestive.
In A. D. 1842, Governor Doty in his message to the territorial legislature of Wisconsin reminded it that excessive legislation was an evil of the greatest magnitude, quoting Jefferson. Edward V. Whiton, chairman of the committee to whom this part of the message was referred, reported as follows: 15 "The committee are of the opinion that the measure recommended, however, proper in older states where great changes in the condition of the people seldom take place, would be found very inconvenient and indeed almost impracticable in a community as new as ours, where the population increases with such great rapidity, where wealth is accumulated with so much facility by almost every class of people, and where consequently great changes are constantly occurring. Where these changes take place new interests are constantly springing up which require the speedy attention of the legislature, and if a year was allowed to elapse between the bringing in and the final passage of a bill, great injury might result."

The economic conditions described in this committee report affected the rapidity of the growth of law and molded the character of the laws. Statutes were copied from the older states and enacted into laws here and so the newest and most progressive statutes and codes came into existence almost without a struggle and in an incredibly short space of time, for there were few ancient interests, customs or laws to be displaced or uprooted, and the dynamic economic conditions demanded and secured prompt action and definite results. The republican form of government with a legislature elected annually from the body of the people speedily brought into existence laws reflecting the economic desires, customs and sentiments of the people from among whom the members of both houses of the legislature were chosen. Sometimes these laws were illy considered and hastily enacted, but they were also readily modified or repealed and in the end conformed to the desires of the people as surely as if the slow outcome of judicial precedents. The court of last resort was at work in the disposal of litigated question applying, limiting, harmonizing, extending or annulling as unconstitutional these statutes and also adding to the body of the law by precedent, and the judges were not entirely insensible to the spirit of the times in which they lived. For it must not be forgotten in considering the relation between economics and law, nor indeed in considering the formation and growth of law generally, that the law being a product of the human

15 Assembly Journal, 1842.
mind acting upon externals carries with it the characteristics of the mold from whence it came. One of the peculiarities of the mind is that it attempts always and under all circumstances to correlate, classify and systematize knowledge or theory. Every science, every religion, every belief has been so adjusted and systematized. Give a man a few facts, some scratches on a smooth boulder, the order in which the rocks forming the earth's crust lie when undisturbed, the form of their displacement, and he begins to construct a system of geology. He cannot examine, investigate or study without comparison, correlation and system. Let him believe that the sun revolves around the earth or the earth around the sun, it matters not which, and he will construct a system of astronomy to match either fact. It is the same with law. Given a statute or a code, a precedent or a number of precedents, and men will, in extending or applying these and all subsequent additions, incline to construct a system of law and incline to fit all new discoveries into the system which they have created or imagined. Accordingly and as one of the fruits of this tendency we find the legal maxims announced that statutes are to be construed conformably to or in the light of common law. That statutes in derogation of the common law are strictly construed. That statutes ought not lightly be given an unreasonable construction, they should be harmonized with existing rules of law when this can be done without doing violence to the language. In this way statutes come to acquire a meaning never really intended, but presumed to have been intended because necessary to harmonize with the system of law and this is called interpreting the statutes conformably to or in the light of the common law. Again, where there are many rules there is necessarily much antinomy. This brings up that most difficult question of the antinomy of rules. The judges do not always appreciate or understand the relative paramountcy of rules. Inexactness in thought is supplemented by the difficulty of exact expression. Compromise and concession follow and all these forces deflect and even change rules therefore assumed and proclaimed to be sound and general.

"Where there is mind there is order and system, correlation and proportion; a harmonizing of forces and an interconnection of parts. The organism which is gifted with intelligence shows it by arranging its actions on a certain plan. It adopts means to ends, which is one sort of correlation, and in so doing it perhaps brings a past experience to bear, interpreting perception, for example, by
memory, and this is another sort of correlation. In proportion as its acts tend to promote the same end its conduct may be termed organized and its several actions correlated.\footnote{Hobhouse on Mind in Evolution, par. 5, ch. 1.}

While this mental quality tends to uniformity, system and certainty in the law, its evil effect is to create and multiply rules of law which are merely machinery for enforcing the really useful and necessary laws, and there is in consequence also a tendency to become lost in this legal machinery. This tendency brings about many unforeseen consequences from statutes, precedents, contracts or customs, and in consequence of this tendency the statute often extends further than, or falls short of, its foreseen purpose, the custom appears somewhat distorted in the law so as to fit into the system, the precedents are given a force and effect they otherwise would not possess, incidents are annexed to certain contracts and to certain relations created by contract which the parties to the contracts never foresaw and never intended, but which they are presumed to have intended. But all this is necessary to the certainty and to the understanding and the impartial administration of law because all this is but the essential of order, system and uniformity of rule. Another peculiarity of the human mind which asserts itself in the growth and interpretation of the laws is the tendency to measure the novel or the unknown by what is old and known, and to attribute innovations to a desire to return to the old law.

With the establishment of popular elective legislatures meeting frequently and responding quite readily to the desires of their constituents, wants and desires are no longer obliged to go through the slow process of first establishing customs then making economic and social usages conform to these customs by contracts or contract relations, and then when these contracts find their way into court founding a rule of law thereon. This process is at work continually, but there is contemporaneous with this another and more direct mode. Economic desires in their infancy are communicated directly to the members of the popular legislature, often hastily and prematurely before their effects are fully known. The legislature proposes a law which is usually opposed, criticised and analyzed to a greater or less extent by those adversely interested or injuriously affected, and it becomes a law or fails to become a law according to the relative strength of the opposing forces. During this contest extravagant arguments are made on
both sides, excitement runs high, the advocates and the opponents of the measure meet in the political contest, "each side claiming truth and truth disclaiming both." They convince themselves and seek to convince others that a crisis has been reached in matters of government and some seek to ride into office and power upon the movement, who otherwise have no concern therewith and often little understanding thereof. This, however, is an unimportant incident of the struggle. But after the contest is over,

The shouting and the tumult dies,
The captains and the kings depart,

and the old and ever present economic forces resume their sway. The courts interpreting and applying the law adapting it to the existing system as they understand it, what is good or useful in the new law is usually retained, industrial and social interests somewhat adapt themselves to the new order of things and this order continues until some other similar contest is precipitated by an economic change disturbing the existing equities and calling for a new alignment. If we wish to make some further application of these more general observations a convenient subject will be that of railroads, for the reason that practically all the laws concerning and regulating railroads have come into existence in our generation. Some ancient and remote analogies existed, no doubt, in the highway laws or the laws relating to carriage by ship, caravan or wagon train, some law rules governing analogous relations are applied, but for the most part the railroad is to the realm of law a new subject and the railroad laws are new laws. Bearing in mind the economic conditions existing in the northwest as described, and the meagerness of the facilities for transportation and distribution compared with those for the creation and production of wealth we are prepared to expect an extraordinary demand for the construction of railroads, turnpike roads, highways, and for the transportation and exchange of the wealth so readily produced.

The Revised Statutes of Wisconsin for 1849 contain no general railroad laws. Beginning about A.D. 1847, with the territorial legislation of Wisconsin and continuing up to A.D. 1852, with the state government, numerous special charters of incorporation for railroad companies were enacted. There were many more charters of this kind granted and many more railroads projected than the commerce of the state could possibly maintain. Almost every little town and village in the state was to be connected with every other little town and village by a railroad. For illustration: the
legislature of 1851 incorporated the Potosi & Dodgeville railroad company, the Milwaukee & Fond du Lac railroad company, the Madison & Swan Lake railroad company, the Milwaukee & Madison railroad company, the Rock River Valley Union railroad company, the Green Bay, Milwaukee & Chicago railroad company, the Fort Winnebago, Baraboo Valley & Minnesota railroad company, the Manitowoc & Mississippi railroad company, and the Delavan railroad company. These were all incorporated at one legislative session, and I think the charters granted by the legislature of 1852 were still more numerous. The general form of these charters was the same. Corporate powers were conferred on certain persons named, their successors and assigns, the organization and stock subscription provided for and the power of eminent domain and power to construct and operate a railroad conferred. The state had more projected railroads by railway incorporation acts than its commerce or industrial resources could support, or than all its available capital could construct. The supply of labor then exceeded the supply of capital very largely, but the supply of labor was probably also inadequate. The moving cause of this legislation was the desire to acquire wealth, privilege and advantage and to take advantage of the promising situation of a new, large, fertile country being rapidly settled and developed, lying remote from markets and to which transportation was an absolute necessity. Expectation as usual outran realization. This economic condition and these charter laws created an extraordinary demand for capital, which demand suggested, and within two years thereafter secured the passage of a series of special acts authorizing particular towns, cities and villages to issue bonds to aid in the construction of railroads, authorizing other cities or towns to borrow money for investment in the capital stock of railroads, such as ch. 11, Laws of 1853 (Racine), ch. 112 id., ch. 204 id. (Milwaukee); ch. 95 id., ch. 171 id., ch. 289 id., ch. 403 id., ch. 123 id. (Watertown), and many other like acts. These acts, the offspring of pressing economic desires, were upheld by the supreme court upon strictly economic grounds as follows: "The power of municipal corporations when authorized by the legislature to engage in works of internal improvements, such as the building of railroads, canals, harbors, and the like, or to loan their credit in aid thereof and to defray the expense of such improvements and make good their pledges by an exercise of the power of taxing the persons and property of their citizens has always been sustained on the ground
that such works, although they are in general operated and controlled by private corporations are, nevertheless, by reason of the facilities which they afford for trade, commerce and intercommunication between different and distant portions of the country indispensable to the public interests and public functions. It was originally supposed that they would add, and subsequent experience has demonstrated that they have added vastly and almost immeasurably to the general business, the commercial prosperity and the pecuniary resources of the inhabitants of the cities, towns and villages and rural districts through which they pass and with which they are connected. It is in view of these results, the public good thus produced and the benefits thus conferred upon the persons and property of all the individuals composing the community that courts have been able to pronounce them matters of public concern for the accomplishment of which the taxing power might lawfully be called into action."

We are not considering the soundness of the proposition above quoted, but only the economic desires and beliefs that induced and upheld the legislation in question. Taken literally the ground stated by Judge Dixon would support almost any kind of state socialism which the majority honestly believed would be attended with such beneficent results. But this is digressing. So far no statutes were enacted regulating the construction or operation of railroads. All enactments relating to railroads up to this time in harmony with economic desires merely granted authority, power and privilege. Inevitably illy considered enterprise carried along by enthusiasm with insufficient capital resulted in inability to pay for labor and consequently the first act regulating railroads in this state was ch. 86, Laws of 1855, which dealt with the subject of payment of laborers by railroad companies. Here again economic laws asserted themselves for the necessities of the laborer for his wages are the necessities for food and existence and are paramount to the conveniences of exchange or distribution. The construction of railroads necessitated the crossing of one railroad by another and there was probably some awkwardness and some recklessness on the part of those in charge of the railroads then necessarily inexperienced, which suggested and produced the enactment of ch. 26, Laws of 1856, the second act of regulation requiring a stop before crossing another railroad and imposing extraordinary penalties in double the value of the property injured or destroyed and

\[\text{Hasbrouck vs. Milwaukee, 13 Wis. 43, 44.}\]
not less than ten thousand nor more than fifty thousand dollars damages for each life lost in consequence of failure to obey this law. In 1857 two acts of regulation were passed relating to railroads, one to secure the payment of laborers, and another requiring signs at highway crossings. Having gotten many of the municipalities of the state with their heavy voting population in as stockholders in railroad corporations by the statutes above mentioned it was inevitable that some legislation relative to the rights of stockholders would be suggested and enacted, and accordingly ch. 91, Laws of 1858, was passed containing extended and minute regulations for the protection of stockholders. The fact that this and similar statutes were ineffectual to protect the shareholders is also attributable to the economic necessity of enlisting capital and employing labor in such enterprises, and to accomplish this giving the officers a free hand in borrowing money, creating liens to secure it, thereby procuring money at enormous rates of discount upon mortgage bonds which in time outgrew the real value of the road and extinguished the equity of the shareholders. The laws, it will be observed here, prevailed in the order of their economic importance. The Revised Statutes of 1858 contained some general laws relative to railroads, quite an advance over the Revised Statutes of 1849, but many of the important laws regulating railroads were contained in special acts. Because of some difference between the railroad companies and the shippers with reference to the shipper and the duty of the railroad company as common carrier, ch. 390, Laws of 1864, were enacted. This required the railroad company to receive grain when tendered for shipment, to give a bill of lading therefor, and authorized the shipper who owned an elevator, warehouse or mill to connect the same by sidetrack at his own expense with the railroad. By ch. 482, Laws of 1864, certain agents and directors of railroad companies were forbidden to engage in the business of purchasing wheat, lumber or agricultural products and transporting the same over the roads in which they were interested. The cause of this legislation is obviously economic. Only those articles of commerce which were in this state at that time produced or extensively transported were included. The bankruptcy and reorganization of railroad companies setting in, produced statutes authorizing the purchase of railroads and the reorganization and consolidation of railroad corporations. In this way statutes were enacted at every session of the legislature, too numerous to here mention specifically, but mostly regulations until
A.D. 1873. This was a year of great economic disturbance in this state and in the United States, the farmer, the manufacturer and the laborer keenly felt this disturbance and did not receive the expected or usual reward of his capital, enterprise or labor. The result was the Granger Law, ch. 273, Laws of 1874, which was construed and upheld by the supreme court in Attorney General vs. Railroad Companies, 35 Wis. 425. This statute divided the railroads of this state into three classes and fixed a maximum passenger rate per mile for each class, divided freights into four general classes and fixed the maximum freight rates on each class graduated roughly according to distance hauled, and imposed penalties for disregard or breach of the statute. It provided for the appointment of three railroad commissioners and prescribed their powers and duties, among which was the power to designate articles of freight as belonging in either of the classes above mentioned and to reduce rates on either class of freight. It was then the commonly accepted doctrine that railroad charters were in this particular unalterable contracts with the state and that transportation charges upon railroads for persons and property would be sufficiently regulated by competition between the different roads, and this pioneer statute on the subject met with much opposition. It did not long survive upon the statute books, but after it was upheld by the courts the railroads became much alarmed for the safety of their property rights, and one effect of the statute was to bring the railroads into politics to a greater extent than before. Free passes were industriously and extensively distributed to members of the legislature, judges of the courts, state officers and private persons of prominence and influence, and a standing lobby was maintained, all in the belief that this was necessary to the protection of their property from legal spoilation. Accepting and acting upon the impracticable theory of competition between railroads in the ordinary economic sense of competition, the practice of competitive bidding for patronage by rebates on freight charges became firmly intrenched as a part of the system and grew in extent and amount until the passes and rebates became not only a burden to the railroads, but a means of discrimination in favor of one city or village against another, and also in favor of the large and wealthy shippers who controlled much patronage against those of smaller means in the same branch of industry. There is in the business of carrying by railroad an element of competition which is always present in a greater or less degree in every monopoly
of any branch of industry not controlling the actual necessaries of life, that is, if the railroad company so raised its freight rates as to cut off all profit to the producer, production of that particular article for transportation and transportation of that particular article would cease or diminish and the earnings of every railroad suffer. This was thought to be a sufficient check upon rapacity. But with respect to the necessaries of life a community not self-sustaining would be at the mercy of the carrier had the latter an uncontrolled discretion to fix rates of transportation because all that a man hath he will give for his life. And the luxuries of one generation often become the necessaries of the next succeeding generation.

It would be interesting to trace the legislation from 1875 to 1905 more in detail, but lack of time forbids. In short, the natural economic adjustment was disturbed and dislocated by this policy of the railroads to such an extent that an irresistible demand for regulation and readjustment grew up and brought about in 1902 as a step in disarming the railroads of an effective political weapon a constitutional amendment prohibiting the granting of free transportation to any officer. In 1903 there was enacted as a measure equalizing burdens a law changing the mode of assessment and taxation of railroad property, in 1905 a statute making it a penal offense to discriminate against or in favor of any person in freight rates and also the present railroad rate commission law which is ch. 362, Laws of 1905, which is extended and enlarged by several acts of the legislature of 1907. These latter laws reject the theory of leaving railroad rates to be regulated by competition between rival roads and are so framed as to exclude competition in the case of railroads as a means of regulating charges. They in effect forbid competition by forbidding discrimination between patrons which is one essential of competition. The law, acting through the railroad commission, in effect requires railroads as well as other public utilities to keep up rates to a reasonable price, as well as to keep down rates to a reasonable price. I need not add that this is a great departure from old economic ideas and we face the problem whether the law makers of the present time have builded wisely or well. From the viewpoint of social economy, the contract of carriage of freight or passengers is a contract to perform labor, although the performance of this contract requires capital to furnish the instruments and agencies for performance and management to employ and
direct the army of laborers engaged. So that the railroad corporation is to its patrons at the same time a capitalist and entrepreneur and a laborer in carrying out the contract of carriage. It would not be becoming for me to consider the present laws in greater detail, but enough has been said to show briefly the origin and progress of some of our railroad laws and the economic causes which brought them into existence and shaped their subsequent growth.

We may also briefly consider the labor contract from an economic viewpoint, and the legal relations between employer and employee. Great changes have been made not only in Wisconsin, but throughout the civilized world within comparatively recent times in the law relating to the contract of employment. Confining ourselves to books written in the English language, Adam Smith, who wrote about one hundred and thirty years ago, may be considered the father of two fundamental tenets of the science of political economy as he understood that science, first, that labor is the primary source and origin of all wealth; and second, that the true policy of law and government toward industry is laissez faire, laissez passer. Opinion of the present day has largely accepted the first and rejected the second as applied to the relations between employer and employee. There is at present a worldwide legal movement in this direction, and no country having an industrial organization is exempt therefrom. The possessor of capital may loan it and in that case the maximum rate of interest which he may exact is fixed by law. He may invest it in goods which require only the labor of transportation to bring them to the market, near or remote, and in that case he must not accept rebates upon transportation charges from the common carrier below the regular rates adopted by the carrier published and charged to others for like services. He may invest it in goods which require no further addition to fit them for the market, or in appliances appropriate to be used in the production of other goods for market, or in land and permanent improvements thereon, and in all these cases he is quite free to exercise dominion over the object of investment except that he may not by himself or in combination with other capitalists engross the market and thus raise the price of any article of prime necessity; and he is restrained to some extent in the use of his property by certain rules of law fairly represented by the civil law maxim sic utere tuo ut alienum non laedas, or as the somewhat cognate
rule is more comprehensively expressed in the new German Civil Code:18 "The exercise of a right which can only have the purpose of causing injury to another is unlawful." Subject to these rules of law and some police regulations, the law has fairly left him within the laissez faire doctrine, but if he choose to invest his capital in the purchase of labor, or as some of the economists put it, chooses to discount to labor its share of the goods produced by the joint action of capital, management and labor, he will find his field of operation much more restricted by recent laws. The same restrictions will apply if he invest his capital in any material which requires the addition of labor to fit it for market, provided he attempts to supply this labor. To begin with, he will find that the contract by which he sought to acquire the right to the labor of another while enforceable against him is not enforceable against the other party to the contract by reason of two legal rules; first, the law only enforces compliance with contracts by taking away by way of damages some or all of the property possessed from him who has it, and therefore there is no practical remedy for breach of contract against him who has it not. Second, the law will not enforce specific performance of a contract to perform personal labor and services. Next, the exemption laws permit the laborer to have some capital which cannot be reached or levied upon by the process of the courts in an action for breach of contract on the part of the laborer. His wearing apparel, his household furniture, a moderate amount of enumerated personal property, provisions and fuel for himself and family sufficient for one year's support, a sewing machine, certain life insurance, shares in building and loan associations, a homestead, his earnings for three months, and other property are assured to him beyond the reach of his creditors. One does not have to be a laborer to be entitled to the most of these exemptions, but, nevertheless, laborers and people possessed of small capital are those chiefly benefited by the exemption laws, and these are the persons intended to be benefited thereby. Laws relating to labor in Wisconsin have also progressed substantially, as follows:

The Revised Statutes of 1849 protected certain classes of laborers by giving mechanics and others liens on buildings and land in certain cases and providing a similar lien in favor of

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any mechanic or artisan who should make, alter or repair any article of personal property or perform any manual labor on any timber or lumber (ch. 120). These statutes also contained extended and detailed provisions respecting masters and apprentices (ch. 81) and liberal homestead laws, and exemption laws (ch. 102), but nothing more. The Revised Statutes of 1858 contained all these provisions without much extension except the protection of laborers employed by contractors on railroads and exempting the wages of certain railway employees from garnishment process. Twenty years later, in the revision of 1878, we find all these provisions continued and considerably extended. A certain number of days’ earnings of the laborer is exempted from execution or garnishment, the hours of labor for women and for children under the age of eighteen years employed in factories, workshops and other places used for mechanical or manufacturing purposes are limited to eight hours in one day. Children under the age of twelve years are not to be employed in any factory or workshop where more than three persons are employed. Children under the age of fourteen years are not to be employed in any factory or workshop for more than seven months in any one year. In all engagements to labor in any manufacturing or mechanical business where there is no express contract to the contrary, the days’ work shall consist of eight hours, and all engagements or contracts for labor in such cases shall be so construed. In case of the appointment of a receiver of a railroad upon foreclosure or upon creditor’s bill the receiver must report to the court the amount due to laborers and employees for wages accrued within the last six months and pay the same out of the first receipts and earnings of the railway after paying the current expenses of operating. Factories three or more stories high are required to provide and keep connected with the factory fire ladders ready for use at all times. No judgment for manual labor is to be stayed from execution. Every railroad corporation is made liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof without contributory negligence on the part of the person injured. Rules, contracts or regulations between the railroad company and the employee are not permitted by our statutes to impair or diminish such liability. This last provision was repealed by ch. 232, Laws of 1880, but was soon re-enacted in a still more stringent form. The next re-
vision was in 1898. In the revised statutes of that year we find extended regulations forbidding children under fourteen years of age to be employed in any mine, factory, workshop or place of public amusement or entertainment except upon a permit by the county judge or mayor of the city, who is given large discretionary power in withholding this permit, and he can give it only to those children over twelve years of age. The other statutes above mentioned are continued in force, and in addition all wages or compensation for labor or services is to be paid weekly or bi-weekly, in cash, except in the case of agricultural laborers, commercial travelers and some few others. A state board of arbitration and conciliation is established with power to consider any controversy or difference not the subject of litigation between employer and his employees, and advise the respective parties what, if anything, should be done or submitted to by either. A voluntary arbitration is provided for with power to conduct a trial, subpoenaing and hearing witnesses, etc. This is the state board of arbitration. The employer and employees may, however, designate a local board and submit their differences to it. Any person who by fraud, intimidation, force or coercion of any kind, hinders or prevents another from engaging in or continuing in any work or employment, or who shall attempt to do so, is to be punished by fine or imprisonment. Railroad corporations are made liable for wages of employees of contractors for the construction or repair of the road, upon notice by such employee, and also for the wages due its employees for the last six months by any railroad company to which existing railroad companies succeed. Railroads are made liable for injuries to their employees caused by defective appliances if such defect could have been discovered by reasonable and proper care, test or inspection, and proof of the defect is to be considered presumptive evidence of knowledge thereof on the part of the company. They are also made liable for injuries caused by the negligence of a co-employee, generally speaking. Contracts, receipts, rules or regulations between a railroad company and its employees which might exempt the railroad company from the liabilities thus imposed are also forbidden. Employees are also given preference in voluntary assignments for services performed within six months next preceding the making of the assignment. They are exempted from the necessity of putting up security for costs in suits for their wages. Labor unions are exempted from the operation of the statute for-
bidding combinations, trusts and monopolies (sec. 1791m). The governor is authorized to set apart by proclamation one day in each year to be observed as labor day, which day is declared by law to be a legal holiday. A bureau of labor and industrial statistics is established and a commissioner of the bureau appointed by the governor and there is to be appointed also a clerk, factory inspector, assistant factory inspector, and other aids. This commissioner is required to collect, collate and publish statistical and other information relating to the manufacturing interests, industrial classes and material resources of the state. He must also examine into the relations between labor and capital, the means of escape from and the protection of life and health in factories and workshops, the employment of children, the number of hours of labor exacted from them or from women, the education, sanitation, moral and financial condition of laborers and artisans, the cost of food, fuel, clothing and building material, the causes of strikes and lockouts and other kindred subjects pertaining to the welfare of the industrial interests and classes. He is given extensive authority with reference to these subjects and he is required to make report to the governor within ten days after the expiration of a biennial fiscal term, which report is to be printed in book form. He may set the criminal law in motion by notice to any district attorney that any hospital, factory, public building or other structure in his county is being used without fire escapes, watchmen or other means of safety, including means of communication between the rooms of manufacturing establishments. This legislation originated in 1883 and has since been frequently amended. By ch. 203, Laws of 1903, the commissioner of labor and statistics and his inspectors are authorized at all reasonable hours to inspect tenement houses for the purpose of ascertaining the sanitary condition of such buildings and also to ascertain whether or not the same are crowded so as to seriously interfere with the health of the occupants, to ascertain whether or not a sufficient quantity of wholesome water is introduced into such buildings and proper provisions made for closets and other conveniences necessary to preserve the health of the occupants. By another act the commissioner or his deputy, or the factory inspector or his assistants, may enter into any factory, mercantile establishment or workshop in which laborers or women are employed for the purpose of obtaining facts and statistics, examining the kinds of escape therefrom in case of fire and the provisions
made for the health and safety of operatives or for suitable seats for women therein, and in case he learns of any violation of or neglect to comply with the law, he is to give written notice to the owner or occupant, and if the latter does not remedy the defect or comply with the law within thirty days after such notice, the district attorney is required to prosecute. This officer is also authorized to publish all available facts concerning the manufacture, sale and consumption of intoxicating liquors used as beverages in this state. Free employment offices are created for the purpose of receiving the applications of persons seeking employment and of persons seeking to employ labor, thus bringing together parties desiring to contract, and each superintendent of these employment offices is required to report to the state bureau, weekly, the number of applications for positions received during the week and those previously received and remaining unfilled. These superintendents are to put themselves in communication with the principal manufacturers, merchants and other employers of labor, and to use all diligence in securing the co-operation of said employers, and they are to charge no fee or compensation, directly or indirectly, to the employer or employee. In certain trades the number of windows in the shop, the degree of ventilation and the minimum air space for each laborer is fixed by law, and if a forfeiture for quitting work, or a certain notice is required of the servant by the contract of hiring before quitting, the master, by making this contract subjects himself to like obligations on his part. Separate dressing rooms and closets are to be provided for the sexes, private employment agencies are to be licensed and to give bond and be responsible for frauds on laborers, checks to laborers in payment for labor must be payable at some designated place in the county in which the work was done, dwelling rooms are not to be used for manufacture of certain kinds, and detailed sanitary and other regulations exist relating to the manufacture of clothing, purses, feathers, cigarettes and umbrellas. Associations or unions of working men are authorized to adopt and use a label for the purpose of designating the goods or other products of the labor of its members; counterfeiting or imitating this label is forbidden. Without incorporation or individual ownership an officer of the labor union may in behalf of the unincorporated association, enjoin the use of any imitation and recover profits or compensation for its use. The laborer is entitled to be provided by his employer with a safe place in
which to work and with reasonably safe tools and appliances. The employer is forbidden to knowingly retain incompetent fellow servants to work with the laborer. The employer must securely guard and fence exposed belts, shafts, gearing, hoists, fly-wheels, elevators and drums which are so located as to be dangerous to employees in the discharge of their duty. The laborer does not assume the risk of injury from such unguarded appliances by continuing in the employment. The employer is required to warn or instruct inexperienced laborers in regard to ordinary dangers of operation which he might reasonably anticipate and which are not obvious to the employee, and, of course, the employer is, generally speaking, liable for all injuries to the employee caused by his negligent omission of duty. Later statutes much extend this liability. Congress of the United States with reference to certain employers engaged in interstate commerce and many state legislatures by recent enactments have further enlarged this liability. The now recent statutes relative to railroads in this state, practically re-enact the once discarded rule of comparative negligence in favor of railroad employees with certain specific exceptions.

This long list does not comprehend all the legal regulations, statutory and common law, respecting the employer and employee. The references here made are illustrative and intended to show the progress of the law in this direction. Adam Smith noticed in his day that the law related more to the enjoyment of the reward of labor, namely, property, than to its creation or acquisition. He believed that the basis of all governmental forms was economical and that every state system had for its end the preservation of private property and that the reason of its existence consisted in the defense of the propertied and privileged few against the unpropertied and unprivileged many. If this was ever true it is true no longer. The law at present recognizes the right of every man to exclusive dominion over his own labor even to a greater extent than that of the property owner over his own property. It guards his liberty to sell or dispose of to the best advantage his capacity for labor, and it surrounds the contract of labor with a number and detail of regulations not found to exist with reference to any other contract. Nothing could be more opposite to the conclusions of the economists of the last century. Inspired by the desire for economic advantage, the labor laws are the logical outcome of manhood suffrage which gives to every laborer representation in legislation; of industrial progress which
increases the number of laborers in the community; and of general education of the masses which facilitates intelligent organization and effective action. We should not be too ready to believe that these good trees will bear bad fruit. But economic laws, like other natural laws, are cruel as death, remorseless as fate, and there is to be considered the effect of these apparently good laws in increasing the cost to the consumer and thus limiting demand which must eventually limit production and restrict the market for labor and the profit of capital. Stimulated by the example of the capitalists who resort to legislation for economic advantages, the laborers do the same and may thus substitute in some degree for the old and ever present economic struggle a political struggle for legislative privileges and advantages ranging those who would naturally co-operate in the production and distribution of wealth in hostile political camps. Those who believe in the efficacy of mere words may cry out in well-worn platitudes against the unwisdom of arraying class against class, but so long as the conflict for economic advantage is permitted to be transferred from the market place to the legislature and the courts, mere aphorisms will count for little.

(THE END)