THE CAMPAIGN AND THE SHERMAN LAW.

THE JURY CLAUSE OF THE CONSTITUTION.

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FOR the first time in our history, the issues of a national election pivot upon a particular statute. The measure of beneficial freedom to be accorded to business combinations, and the action of the Courts in reference to their transactions, centre around a single Act of Congress. This is the logical outcome of the anomalous conditions which the Anti-Trust law has created. That it introduced a novel economic policy into the practical affairs of the Federal Government is too evident for question. But it has not been made so apparent that, in the effort for the rigorous enforcement of that policy, provisions for punishments and remedies are accumulated in the statute without regard to the spirit of the Constitution, and in some likelihood contrary to its letter fairly interpreted. It is, therefore, a matter of immediate utility to analyze the structure of this famous enactment.

So much has transpired in the last few years concerning the injunction feature of the Sherman law that we have lost sight of its main characteristic. It is essentially a criminal statute. Its basic provisions are those which denounce acts in restraint of trade as crimes, and provide for their punishment as misdemeanors by fine or imprisonment. Several sections which follow these provisions are auxiliary to the criminal fabric of the law. This is especially the case with the section of the Act relating to injunctions—which purports to invest the United States Courts "with jurisdiction to prevent and restrain violations of this Act." As the sole violations of the Act are of the criminal character described, the effect of these provisions is to initiate in Federal jurisprudence a system of injunctions against the commission of crimes.

The legislation being of this "octopus" character, let us test it by the restrictions which the Constitution has thrown around the powers of the Federal Courts over criminal acts. By the Judiciary Article it is declared as follows: "*The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the crimes shall have been committed.*"

To what extent does this provision of the organic law limit the power of Congress? Is the constitutional institute confined to one form of trial of crimes—that known as trials before common-law courts? Can the identical acts be subjected to another form of forensic test—in a court of equity—without examination by a jury? The solution of this question depends upon the true scope and meaning of this primary provision of our Federal jurisprudence.

We have been recently told by the Supreme Court that this clause of the Constitution must be construed in the light of the law as it existed at the time we became a Federal nation—that it secured to us such jury rights as British subjects then possessed. In the historical conditions which existed during the ante-revolutionary period, we must seek the nature and proportions of this popular prerogative. It was evidently a right which had been the subject of attacks, and the memory of those attacks was still so fresh in the minds of the members of the Convention that they secured its protection in the forefront of the Federal charter. The withdrawal of proceedings from the cognizance of the courts of common law to other tribunals—consisting of one or more judges, without juries—had been a favorite trespass of the Stuart kings. This heresy assumed a variety of shapes—scrutiny before Chancellors, High Commissioners and Star Chambers. Their policy was also evidenced in the conferment of judicial power upon the colonial Governors, constituting them courts of equity so-called, and drawing to them and their Councils a variety of matters, both criminal and civil. The result, both in England and in this country, was to create an antagonism to all forms of trial, particularly of crimes, which did not include the verdict of twelve peers. This justifiable spirit is indicated in the Declaration of Independence. As the Articles of Confederation did not confer municipal jurisdiction, the evidences of this feeling will be found in the early State Constitutions, adopted during the

struggle with the Mother Country. In 1789, this spirit of opposition to one-man power on the Bench was reflected in the Constitutional Convention; it was intensified by the conflicts of opinion which preceded the foundation of the new Government, then regarded as a quasi-foreign authority. As the Hamiltonian influence waned at Philadelphia, the Judiciary Article was moulded according to this popular conception, and the result is apparent in the broad and comprehensive phraseology of this Jury Clause of the Constitution.

Certain judicial power was thus conferred on the novel General Government, but it was subjected to this distinct limitation—that under no pretence, nor through any transformation, should the trial of any or all crimes be had without a jury. In the first draft before the Convention the expression employed was "criminal offences," but the Committee of Style substituted the word "crimes," deeming it synonymous with the former words; though in popular acceptation the first phraseology might be esteemed more inclusive. However, it is apparent from other provisions that the verbiage includes misdemeanors as well as felonies, whether punishable by fine alone or by imprisonment.

The paucity of material extant concerning the debates in the Federal Convention deprives us of the benefit of some light on this subject, but this loss is somewhat repaired by the fuller reports of the proceedings in the several State Conventions, whereby the Constitution was finally ratified. The general conception of this subject was expressed by Mr. Dawes in the Massachusetts Convention: "The word 'Court' does not exclude, either by a popular or technical construction, the use of a jury to try the facts." In these thirteen constituent bodies there was much opposition to the Jury Clause, as it was framed, on the ground that it did not extend far enough, that juries should also be made indispensable in Federal civil trials. The answer to this proposition made by James Wilson in the Pennsylvania Convention seems conclusive. That profound jurist said: "There is a want of motive or power in the Government to oppress where suits are between individuals. . . . *But, whenever the Government can be a party against a citizen,* the trial by jury is guarded and secured in the Constitution itself." The essential idea involved in the Jury Clause is expressed in those few words—when the struggle is between the National Government and a citizen, a jury must

participate in the arbitrament. The multiplied provisions of the Sherman Act cannot be reconciled with this language of a leading framer of the Constitution. Of course, in proceedings that are criminal in form, the Government is arrayed against the defendant. Could the General Government declare that certain acts should constitute crimes, and then through any form of procedure—called in equity or otherwise—try a citizen for having committed those very acts, without the aid of a jury? The test is found in Wilson's presentation—if the Government is the actor, a jury is necessary. By these proceedings for injunctions against acts made criminal by this statute the Government violates the letter as well as the spirit of Wilson's interpretation of the Constitution—it is a party both in form and substance against a citizen, and in these conditions the Sherman Act seeks to evade the constitutional requirement of a jury.

The verbiage of the Jury Clause is not contained in a technical document, but in an instrument of government—the powers of which it enumerates but does not define. Following this formal canon of constitutional construction, as enunciated by Marshall, does not the language employed correspond to the historical surroundings and the inclusive purpose of the authors? "The trial of *all* crimes shall be by jury" indicates that legislative enactment cannot subject any criminal acts whatsoever to scrutiny by any other form of proceedings. Moreover, it is not the trial *for* all crimes, but *of* all crimes—apparently pointing to the testing of the commission of crimes through any procedure, rather than the punitive effect of such a trial. The sole exception, in favor of impeachments, strengthens this view—as it indicates that no other modes or methods of trying issues involving crimes are permissible outside the constitutional protective provisions. The breadth of language employed, therefore, reflects the great political object aimed at—to prevent judicial procedure against any individual by the United States in any cause where the gravamen is criminal, unless a jury be empanelled.

The nature of the judgment in equity under the statute does not detract from, but adds to, its substantial antagonism to the constitutional safeguards. A decree against the continuance of a business assailed *as a violation of this criminal enactment* is practically as far-reaching as a judgment in *quo warranto*. It is a real forfeiture, effected without a jury. Under the criminal

clauses of the Sherman law, the maximum result may be a fine of five thousand dollars, but under this quasi-criminal proceeding, called "a bill in equity," the user of millions of property may be forfeited. Therefore, from the point of view of its punitive character, more severe results can be accomplished under the guise of a bill in equity than by an ostensible criminal form of punishment provided in the misdemeanor clauses of the Act.

The decisions of the Supreme Court upon this class of Constitutional provisions dictate their untechnical and liberal construction. Proceedings by the United States for forfeiture of property, though made civil in form, have been pronounced criminal in their nature. Under these pronouncements, no testimony can be forced from a defendant where the result would involve a forfeiture in any form. By parity, must a proceeding civil in form, but involving the same issue as a criminal proceeding, be regarded as substantially the latter—for the preservation of the right of jury trial. In the Debs case, the Supreme Court was careful not to justify the injunction under the Sherman law, but did so directly under the constitutional powers of Congress in reference to mails and interstate commerce.

But it may be pertinently asked: Why has not the Supreme Court applied the Jury Clause, and refused to enforce the injunction section of the Sherman Act, in the Northern Securities case? The reply to this query is found in the record of that case, as well as in other leading causes—the double decisions of the Legal Tender and the Income Tax precedents. It consists in the abstinence from this proposition in the arguments made at Washington. It was indeed claimed that a Federal court of equity has not the power to grant injunctions against the commission of crimes—because such jurisdiction had not been inherited from the English courts of equity. This position was overruled by the Court on the ground that, where acts complained of affected property, and were continuing in nature—analogous to combinations in restraint of trade—Chancellors had enjoined them and could enjoin them.

But this is a different proposition from the one now under discussion; in some respects the present one is the converse of the point decided. The pending inquiry involves the ascertainment of the conditions created by our Constitution in reference to the application of the jury system to the national courts. Was

it not the intention to enhance and magnify that element, and thereby to restrain the powers which it was apprehended that the Federal Judges would exert, as shown by the contemporaneous debates?

Notwithstanding the absence of argument upon this constitutional question, a peculiar incident occurred in this connection in the Northern Securities case. One of the concurring Judges referred in a cursory way to the subject, saying: "But this is not a criminal prosecution." Should this remark, indisputable as matter of fact, be deemed an opinion limiting the scope of this constitutional provision, as if it were entertained after hearing argument? The history of the Dartmouth College case is fruitful of suggestion on this topic. Students of the subject are familiar with the fact that the constitutional ground on which that decision rests was invoked at the last moment as a forlorn hope. But we know that the Court estimated the proposition differently.

It will be noted that no question of the legal power of Congress to pass an anti-trust law is involved. But in the effort to make such a law omnipotent, it cannot run counter to provisions of the Constitution other than the interstate commerce clause. It might have simply provided for injunctions against persons or corporations combining to restrain such commerce. Or it might elect solely to constitute such acts into crimes. But it could not, within its juridical limitations, do both. No Federal crimes exist except treason, unless specially called into existence by Congress. Under such conditions, it would have required a bold legislator to present to the First Congress, or many of its successors, a Bill proposing to make criminal a commercial combination, and by one of its subdivisions to provide for action solely by a Judge to restrain a defendant from conducting his business on the ground that it was made criminal by the statute. The question of its criminality is the gist of the matter—which the founders have declared to be the province of laymen acting as a jury. Yet this anti-trust law purports to enable the judges to pass upon this matter of fact as the basis of injunctions.

The phase of this question which bears on the power of the Federal courts to commit for contempt is likewise worthy of discussion. Is not the "judicial power at law and in equity" to be construed in connection with the succeeding clause—requiring a jury for "the trial of all crimes"? Was not the exercise of

arbitrary power by the King's judges, sitting in equity, the main evil aimed at by the Jury Clause? In respect to the form of judgment, by imprisonment, the contempt power is more analogous to incidents of a trial of crime than the restraint of combination—which was not a criminal act at common law. To say that power to commit for contempt is inherent in the judicial power may be true, but it does not touch this question—which involves the mode of trying the offence of contempt, as indicated by the Constitution. The jury is as much a part of this judicial power as the Judge.

In its bearing upon the campaign for the control of the executive power of the nation, this crucial legislation may be considered in reference to the importance of its amendment. Whatever differences of opinion may exist concerning the exact legal scope of the Jury Clause, there can be little difference about the desirability of amending the Sherman Act to conform to the spirit of the Constitution. Our revolutionaries clearly disfavored determinations upon the issue whether a criminal act had been committed, without oral testimony, away from the vicinage, and by a single Judge. As all those incidents pertain to Chancery proceedings, they were repugnant to the spirit which pervaded the Anglo-Americans of 1789. This mental condition is illustrated by the parsimony with which some States dribbled equity powers by specific statutes alone. The fact that proceedings by affidavit or other written testimony, placed before a Chancellor, are of readier availability than oral testimony for injunctive purposes rather increased the original and historical antagonism to this course of procedure. Even if we deem these objections to dispensing with the Jury Clause a mere moral reflex of the Constitution, they should be respected.

What course of amendment to the Sherman Law on this line of thought should prevail? Which should be repealed, the criminal clauses or the injunction clause? The choice should be promptly made by Congress: as the conjunction of both may lead to a judicial re-examination, resulting in the annulment of the injunction clause, and leaving the ineffectual criminal provisions "standing solitary and alone."

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