Business and the Law

[An address delivered by United States Treasurer John Burke, before the Virginia Bankers association at their annual convention at Old Point Comfort, June 18, 1915.]

It is an honor as well as a privilege to meet with the representatives of the great banking interests of the great state of Virginia in this convention. I fully realize and appreciate that I am not only talking to business men and bankers, but to representative citizens of that state which has been rightfully called "The Mother of Presidents," and in which the love of liberty is as strong today as it was when Thomas Jefferson wrote the immortal Declaration of Independence, and when Patrick Henry, speaking for all Virginians, thundered "Give me liberty; or give me death!"

The successful banker is always a business man, learned of course in his own profession and with a practical knowledge of every line of business which necessarily does business through the banks. The banker is an important man in every community. His advice is sought and relied on in matters of business and upon financial matters generally. He is public spirited and always invited to contribute to every public or private enterprise, to which invitation he usually responds generously. He is interested in the growth and development of every business, for he knows that general prosperity means more demand for his money and prosperity for his bank. He believes with every other good citizen that honest business should have the widest liberty for growth and development. If someone undertakes to make it appear that the laws of the country are unnecessarily hampering business and preventing growth and prosperity and causing idleness and poverty, he desires specific information on the subject. What laws are hampering business; how are they hampering business; and why should they hamper business? Why, indeed? Laws should be made for the protection of business;—not to hamper—so that equality of opportunity may be preserved.

REGULATION OF BUSINESS

Quite recently a man of great reputation and wide experience in public life charged in a public speech that the sceptre had passed from the business man and laws were being enacted under influences which rejected the voice of those whom they immediately affected; that the testimony of the railroad man, the banker, the manufacturer, the merchant and the ship owner, was all rejected on account of interest and because of hatred and envy of wealth. In fact every law that attempted to regulate business in any way, including even the pure food laws and the reserve bank act, was condemned. The inference was plain that there should be no regulation of business by law whatever. He stated that the election in 1896 and in 1900 was controlled by the business men of the United States, and that the administration which followed the election of '96 was conducted in the interests of business and was a golden era of prosperity. This speech was given wide publicity in the newspapers under the headlines: "Time to end war on large affairs," "Time to call a halt," and other equally sensational headlines. Following along the same line, the department of justice has been criticised for appealing from the decision of the circuit court of appeals to the supreme court in the case against the United States Steel corporation. In addition to all this, practically every financial or business magazine or paper is publishing similar articles and speeches showing a systematic attack on trust laws. So it becomes a very important matter to know if it is true that business is being hampered by legislation. If it is, it is time to call a halt. We do not want any restraints on business that are not necessary for the protection of human rights and the preservation of human liberty.

Of course no one will give any serious thought to the criticism of the department of justice in appealing the case against the United States Steel corporation. The attorney general had no choice in the matter. This case had been started in the preceding administration and it was his plain duty to try it and appeal it to the supreme court for final decision, believing as he does that it is a combination in restraint of trade. No public official can be justly criticised for doing his plain duty under his oath of office and as required by law. The decision of the court of last resort, whatever it may be, will be much more satisfactory to the people of the entire nation for it will be accepted as final and conclusive.

LEGISLATION AGAINST BUSINESS EVILS

From some of the articles it would appear, and this is not sarcasm, that business men are so honorable that all questions of commerce might be left solely and alone to the business man, and it is argued that the law merchant is all the law that the country needs for the safe conduct of all business and of commercial transactions. So eminent an authority on the question of trusts, however, as Mr. George W. Perkins, in a recent article in The Market World, argues that there should be regulation and that at the time the "Sherman law" was passed "there was a crying need for legislation against the evils that were rapidly developing in the American business world, and that there was ground for the apprehension of the people regarding the far-reaching harmful effects of these evil tendencies. Business men were acquiring power to an extent that had previously been unknown and in many instances they were using that power for their own personal profit and aggrandisement and to the detriment and injury of their fellow men. They were practicing secretive business methods, beating down competitors, and forcing them to choose between bankruptcy or entering a combination on terms which were very unfair. This was clearly the tendency of the times; and legislation to check and prevent it was imperative." The "Sherman law" was passed in 1890, at a time when according to Mr. Perkins, there was great necessity for legislative regulation and prevention. It was held constitutional during the Cleveland administration, but was practically suspended during the administration following the election in '96. After the passage of the "Dingley bill" in 1898 there were more trusts and combinations organized than we ever had before in the history of the country, and the evils that Mr. Perkins complains of were multiplied. This was the time when the business interests controlled the administration and legislation.

Mr. Perkins, believing in statutory regulation of trusts and corporations, of course disagrees with the suggestion that all commercial transactions might be left to the law merchant, or to the honor of those engaged in commercial transactions. The common law did not leave all transactions to those engaged in such transactions. It only accepted and adopted those customs which were just and equitable and which became a part of the common law of the country and of which the courts took judicial notice. There is an unbroken line of English and American decisions holding that contracts in general restraint of trade are void and that contracts in reasonable restraint of trade are valid; so that while the merchants customs became law, they were the customs that were just, and not transactions which took away any right or which were tainted with fraud. Such transactions never were permitted by the courts to become customs and law. The law merchant was unavailing, or at least not enforced, against the evils existing at the time of the passage of the "Sherman act." While contracts in general restraint of trade were void, the term contract does not include all the means by which trade was restrained, for as Mr. Perkins says "They (meaning the corporations and trusts) were practicing secretive business methods, beating down competitors, and forcing them to choose between bankruptcy or entering a combination on terms which were very unfair. * * * This was clearly the tendency of the times." Mr. Perkins is right. It was clearly the tendency of the times, the proof of which is found in the opinions of the supreme court in the Standard Oil case and the Tobacco case.

THE ANTI-TRUST LAWS

It is also suggested that the "Sherman act" is a blight on enterprise on account of an alleged blunder of the supreme court in giving it a strict construction without reference to the common law or the light of reason, and the impression is left that this decision which was argued in 1896 and decided in March '97, is still the law. There is no reference to the case of the United States against the Standard Oil company, decided in 1911, and in which the supreme court gave to the "Sherman law" the construction which its critic claims that it should have had, and which decision is followed and re-affirmed in United States vs. American Tobacco company, decided in May, 1911. In the Standard Oil case the court held that "the terms restriction of trade and attempts to monopolize, as used in the anti-trust legislation took their origin in the common law and were familiar in the law of this country prior to and at the time of the adoption of the act and their meaning should be sought from the conceptions of both English and American law prior to the passage of this act, and when construed in the light of the common law it only prohibits contracts and combinations which amount to an unreasonable or undue restraint of trade in interstate commerce." Congress has been in session a great part of the time since these decisions were rendered and has not sought to change or modify this reasonable construction placed upon the law by the supreme court, but on the contrary it has recognized it in section 3 of the "Clayton act" which provides that it shall be unlawful for any person engaged in commerce, in the course of such commerce to "lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." In other words they may make any kind of a contract for any such goods, wares or merchandise, so long as the contract does not substantially lessen competition or substantially tend to create monopoly. The term "substantially" applies to the creation of monopoly the same as to the lessening of competition and it requires the exercise of reason on the part of the court to determine whether it is substantially lessening competition or substantially creating a monopoly. It is in fact the same as though congress had used the term "reasonable" instead of "substantial" for both require the exercise of reason, and hence this provision in the "Clayton law" is substantially the same as the rule of reason applied by the supreme court. It is not necessary, however, to go to the expense of a trial to determine whether such contract is a violation of the law, for under section 8 of the "Clayton act" it may be determined by the board upon notice, which board is provided for by the "Covington act"—"An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes." Under the liberal construction given to the "Sherman act" by the supreme court, supplemented by the liberal trust laws, known as the "Clayton act" and the "Covington act," there is no reason why any honest business man should fear the law or should be hampered in any way by the law. It is true, that under the "Sherman law" as construed in the light of reason, the same as at common law, what constitutes a reasonable restriction can not be defined by rule but must depend upon the circumstances of each particular case and the good sense and sound discretion of the tribunal before which the case is tried. It is not too much to ask business men to exercise their reason in their contracts, agreements and actions affecting the trade in which the general public is interested. They are as a rule reasonable men, far above the average in education and judgment, and conscience will tell them when their contracts and their acts are unreasonable and oppressive. It is not even asking them to know the law, by which all are bound. It simply asks the exercise of good sense and sound discretion and to know from that good sense and sound discretion that their contracts and acts are not oppressive and unreasonable in restraint of trade. Indeed, it is doubtful whether the trust laws, as now construed are any more drastic than the common law, to which they are an addition.

The attack is not confined, however, to trust laws. It is suggested that the business of the country is affected by the adverse tariff legislation, and it is argued by some of those who favor protection that a tariff which will produce enough revenue for the support of the government is all the protection that is necessary. If