Professor Freund was unremitting in his efforts to procure adoption of various uniform laws by the Illinois legislature. That his efforts, ably supplemented by the work of other members and friends of the Conference, were fruitful is indicated by the fact that fourteen of the uniform acts have been enacted into law in this state, thirteen of them since he became a member of the Conference.

Among his other public services which are worthy of note were the leading part which he played in the preparation of a new charter for the City of Chicago in the year 1905 and his participation in the work of the constitutional convention of 1919–20 as an adviser on constitutional law. In this latter connection he drafted provisions which would have brought to the City of Chicago a large degree of autonomy in local affairs. These sections were adopted by the Convention only after the most vigorous and at times bitter attacks by various politicians and interested groups who sought to convey the impression that they were the work of an impractical idealist and academic theorist. By his success in repelling these attacks Professor Freund proved, if proof were needed, that his feet were upon the ground and that he was not lacking in a keen perception of the realities.

If only time can fully reveal the extent of his influence and the enduring values in his work, none will doubt the freshness and the stimulating qualities of his mind, the thoroughness of his scholarship, his high professional ideals, his strong sense of public responsibility, and his passion for social justice. When shall we see his like again?

ECONOMIC ILLUSIONS UNDERLYING LAW

DONALD R. RICHBERG*

THE ultimate sanction of law making rests upon the establishment of facts. The evidence presented in a court may or may not support the judgment entered; but if law making is to be effective, the judgment itself should be a fact. The judicial conclusion that Jones owes ten dollars to Smith may be founded in error. But the judgment will establish as a fact the indebtedness of Jones to Smith. In the higher realms of legislative and judicial law making, it becomes a matter of grave importance that legislators and judges shall not declare that to be a fact which is not a fact, or declare that to be fixed and established which is uncertain and unpredictable.

These preliminary observations may serve to introduce a brief criticism of the efforts of legislatures and courts to write economic illusions into law. There is, for example, hardly anything more difficult to determine than the "value" of property. But there is hardly any illusion more common than the notion that

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"The true view, as I submit, is that the law is what the judges declare . . . ." Gray, Nature and Sources of Law (1st ed. 1909), § 602.
things have intrinsic value and that, although market prices may rise and fall, at least those things which are commonly bought and sold always have a certain definite and ascertainable "value."

The constitutional provision against deprivation of property is one of the most important limitations on powers of government, and is a stalwart protection of individual rights. "Property," in legal definition, means the rights of an owner in a thing possessed; and it has been well held that a man is deprived of property not only by interferences with its physical possession, but by interferences with a reasonable exercise of his rights of ownership.

Unhappily the doctrine has developed in our jurisprudence that protection of property includes protection of the supposed intrinsic values of property. Therefrom has come an effort to make and establish law on the basis of an economic illusion—the illusion that a "value" is a durable fact and that the value of property is something which, having been ascertained at any particular time, can be legally established and made the foundation of legally enforceable rights. It is true that for exchangeable commodities a current market price can usually be ascertained from current market transactions. But to state a future price is to state an opinion—to indulge in speculation. Even an actual market price cannot be defined as a "fair" market price, because what is a fair market price will depend upon individual interests and upon social and economic theories and ethical concepts of infinite variety, which cannot be reduced by a legislature or a court to a formula for law making.

Therefore, when a court or a legislature begins to dabble with the idea of setting up something described as a "fair value" as the basis of law making, the law makers, however distinguished and wise, have undertaken the impossible task of establishing, as a legally authenticated fact, that which is not a fact. When a judicial robe is draped over a shadow, the shadow is not endowed with life. The judicial robe falls to the ground.

In that unhappy judicial error, entitled Smyth v. Ames, the court held that all utility rate regulations must be based upon "the fair value of the property being used." No one has ever known, and no one will ever be able to ascertain, the "fair value" of any property. Only the omnipotence of Deity could decide what a man should "fairly" charge his fellow-men for his services, or for the use of any material thing in which he has what are called property rights.

There is an economic concept of value which means "power to command a price." A thing may have at a particular moment a certain market value determined by, and expressed in terms of, something else for which it may be exchanged. But the only factual basis for this value is the fact that the exchange

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3 "We hold, however, that the basis of all calculations as to the reasonableness of rates . . . must be the fair value of the property being used . . . ." Smyth v. Ames, 169 U.S. 466, 546 (1897).
can be made. It may be a fair exchange, or a very unfair exchange. The common acceptance of a "fair value" is the current ratio of exchange. The "fair value" of the services of a human being in this day of misery, when twelve million willing workers are unemployed, may be accepted by some persons as one dollar per day or less. But a few years ago anyone who suggested that one dollar per day or less was the fair value of a day's work would have been generally de- rided. In the long view any person's idea of the fair value of a day's labor will depend upon his individual interests and upon his social and economic theories concerning desirable methods of production and distribution, and measures of the compensation which producers, distributors and others can and should receive.

In order to simplify a discussion of property values, it is well to observe at the outset that any general agreement upon the fair value of a day's labor is practically impossible. Next we should note that the actual value of a day's labor—its exchange value in commodities—is utterly inconstant. Since the values of all large properties are based principally upon labor costs of infinite variety and mutability, it must be evident that it is quite impossible to arrive at any general or lasting agreement as to what is the fair value of any large property.

For a generation since the doctrine of Smyth v. Ames was announced, the courts and legislatures have been struggling hopelessly to make sense out of the requirement that the rates for public utility service should be based upon the fair value of the properties devoted to public use. Throughout the rising and falling markets from 1898 to 1929, courts, commissions and legislatures struggled to solve the riddle which the Supreme Court of the United States in its un- wisdom had propounded.

The Congress of the United States, in a noble effort to pay proper deference to the authority, if not to the wisdom, of the Supreme Court, enacted an elaborate law providing that railroad rates should be fixed so as to provide a fair return upon the values of railroad properties. The Congress even had the temerity to pass a law requiring the Interstate Commerce Commission to ascertain and report the value of all property owned by railroads. The Congress also directed the Commission to consider everything under the sun which might aid in determining what values railroad properties had. As a result, for long years the Interstate Commerce Commission has struggled in vain to fix the values of railroad property. Just when the delusion of a Gargantuan Guess was about to climax these tremendous labors The Depression destroyed any hope of even self-deception. The valuation estimates accumulated for fifteen years became practically worthless over night.


5 "Original cost .... cost of reproduction new .... depreciation .... other values and elements of value .... original cost of all lands .... and the present value .... history and organization [of operating corporations] .... increases or decreases .... moneys received [from securities] .... net and gross earnings .... amount and value of any aid .... donation." etc. 41 Stat. 624 (1922), 49 U.S.C. § 19a (1927).
During this same period all over the land Public Utility Commissions have been struggling likewise to fix the values of hundreds of public utility properties. Many thousands of administrative proceedings have been conducted at the cost of millions of dollars in the pursuit of this great illusion. Many hundreds of litigations have moved with lame, reluctant feet through the lower courts and up into the Supreme Court of the United States, wherein the able and the dull, the brave and the timid have all sought in vain to solve the great riddle.

The Depression should prove even to the most dull and obstinate that the riddle of value can never be solved. It is difficult for those having faith in a beneficent Providence to understand why this economic calamity should have been visited upon the United States, and indeed upon the whole world. But perhaps it was necessary to teach mankind again the ancient lesson that physical properties have no intrinsic value; that all material values are in the nature of illusions; that the wealth of yesterday is gone tomorrow; that a factory or a railroad that cost ten million dollars yesterday may hardly be worth the price of destruction today; that the assets of a huge bank described as "sound and seasoned securities," may shrink millions of dollars in a year or a month; and that all the "values" of material things upon which we so proudly rest our future hopes and which provide us with such a pleasant sense of security, may dissolve into vapor between sunset and sunrise.

The present writer reviewed various opinions of the Supreme Court on the subject of value in an article in January, 1924, entitled "The Supreme Court Discusses Value"; and in another article in February, 1927, entitled "Value—By Judicial Fiat." A few years later in arguing, as a perhaps unwelcome "friend of the court" in the O'Fallon case, he again sought directly, but in vain, to convince the court that it must reject the illusion that a "value" was a durable economic fact. Counsel for the great railroads of the country were claiming that the railroads had a "true value," which they described as "the economic equivalent of the property." They were asking the court to base its law making on the economic fallacy that articles and material things have "true values," or in the language of the economists "abiding intrinsic worth." The Supreme Court, despite the powerful dissents of certain of its members of notable economic and social intelligence, has not as yet rejected the unwholesome and unsound theories of "value" to which it has been so long committed. But in the light of the evidence of the last three years we may well wonder whether it is conceivable that the supreme judicial body of the nation can longer cling to theories which have not only been discredited, but have been made a counsel of pure folly by the logic of events.

In the Southwestern Bell Telephone case, decided May 21, 1923, the majority opinion of the court was based upon a doctrine stated in the following ex-

6 17 Harv. L. Rev. 289 (1923).
7 40 Harv. L. Rev. 567 (1927).
extraordinary sentence: "An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances is essential."

In the foregoing sentence the court rested the whole machinery of public utility rate regulation upon the requirement that the regulators attempt success in an undertaking in which no trader in the entire history of the New York stock exchange has been able to succeed. If any human being could make an honest and intelligent forecast of probable future values, he should be elevated to the position of supreme dictator of the economic welfare of the world. Of course, a good guesser can make an honest guess at the probable future price of a single article within a limited period. A professional gambler, with plenty of experience, may be able to make a better guess than an amateur at the numbers which will appear when the dice are rolled. But should the guesses of gamblers be sanctified as "honest and intelligent forecasts" and made the basis of law making?

At the time of the foregoing opinion the majority of the Supreme Court seemed possessed of the delusion that price levels, after grave fluctuations, were becoming stabilized; that a new and "relatively permanent price level" had been reached. In 1926 the Supreme Court handed down a majority opinion in the Indianapolis Water case, in which the previous requirement of an honest and intelligent forecast was reaffirmed in the following language: "There must be an honest and intelligent forecast as to probable price and wage levels during a reasonable period in the immediate future."

The requirement apparently was that future values should be forecast on the basis of forecasts of probable price and wage levels in the immediate future. Any genius who could make such forecasts would be given employment on his own terms by practically any large manufacturing concern, or any investment, banking or trading corporation able to capture his services from a swarm of eager competitors.

Throughout the two opinions just cited, persists the illusion of the court that there are such things as "relatively permanent price levels," upon which estimates can be based of probable future "values," in disregard of the obvious fact that even costs do not determine value and that, therefore, even stable material prices and wages would not provide a sound basis for estimating values. We may point out that the dissenting minority of the court has been amply justified by The Depression in its protest, which was expressed by Mr. Justice Brandeis in the Southwestern Bell Telephone case as follows: "But for the assumption that there will be a plateau (of prices) there is no basis in American experience.""10

According to the unenforceable "law" which has not yet been rejected by the

10 In its earlier opinions the Supreme Court recognized economic realities: "Never was it held that the cost of a thing is the test of its value." C.C.C. & St. L. Ry. Co. v. Backus, 154 U.S. 439, 446 (1894). "The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner." Monongahela Navigation Co. v. United States, 148 U.S. 312, 328 (1893).

11 Southwestern Bell Telephone Co. case, supra, note (9), at page 303.
Supreme Court, rates for all public utility service in the United States should be based today upon the value of the properties devoted to public use. If, in fact, the public utilities of the United States were today revalued on the basis of the actual present market values of their properties, it is unlikely that many public utility corporations could avoid bankruptcy. There can be no question that the great railroad systems of the country could not meet their aggregate fixed charges, if rates were based on the present market values of their aggregate properties. A reduction of the rates of other public utilities so that they would provide only the current fair return upon the present market value of their properties would bring about wholesale receiverships.

Throughout the period when the advocates of "reproduction cost" were overwhelming the advocates of "prudent investment," with profound and imposing opinions of the courts, reeking with legal and economic fallacies, it was the pleasant custom of those who sought to have public utility properties valued at two, three or four times the amounts of the investment in these properties, to assert cynically that, if there should come a great downward trend in price levels, the lawyers for the consumers would shift their ground and advocate reproduction cost valuations and the lawyers for the utilities would shift their ground and advocate the protection of investment. Today it appears that the lawyers for the utilities are quite generally shifting their ground as they prophesied. But it is to be hoped that the lawyers who represent the consumer or public interests will remain steadfast advocates of a sound method of public utility rate regulation and will not be lead astray and follow the will-o’-the-wisp of value. There can be no eventual benefit to either public or private interest in having law making based on economic illusions.

A value is a fluctuating ratio.\textsuperscript{12} The values of commercial properties result from their earning power. It will be necessary in the future to find some measuring stick to determine what earning power should be permitted to large, monopolistic properties, whether devoted to public utility service, or devoted to supplying other essential commodities and services. In this development of law, which must involve some public control over private profit-making, it is of the greatest importance that legislatures and courts shall not attempt to work out their solutions in minds beclouded with economic illusions concerning property "values." Equally important is it to exorcise legalistic notions that the preservation of property rights requires the preservation of artificially established property values, which should never be created, and which in the long run cannot be maintained by legislative or judicial fiat.

\textsuperscript{12} "Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator." International Harvester Co. v. Kentucky, 234 U.S. 216, 222 (1913) (Opinion by Mr. Justice Holmes).

"The value of a commodity means in economics its power of commanding other commodities in exchange. It means the rate at which the commodity exchanges for others." Taussig, Principles of Economics, I, p. 115.

"The 'value' of a thing is always its value for the particular purpose, and in the particular conflict, in hand at the time of the valuation." 27 Col. L. Rev. 624 (1927).