cases, quite pleasantly careless about their own affairs, jacks of many trades and usually masters of none—not even their own. A curious compound which I can not approve nor urge upon others; yet for myself I have enjoyed it all, remembering *video meliora,* and acknowledging *deteriora sequor.*

August, 1924.

ADDENDUM

The foregoing article manifests a boldness and an independence of thought which challenges many of the principles on which the members of the legal profession have been wont to base their professional attitudes. It is believed that much the same boldness and independence pervade Judge Hough's judicial opinions. Obviously, it is possible to present here only a few examples, and they selected after a very inadequate sampling of his opinions. During his ten years as district judge he wrote 1,809 opinions and in his eleven years service as a member of the Circuit Court of Appeals he participated in 2,047 cases, writing the opinion of the court in 675. Something in the quality and character of these judicial utterances gave to this judge the enviable reputation of being one of the half dozen really great judges of the Federal Bench.

Immediately following the World War housing shortage was very acute in many urban centers. To remedy this situation the New York Housing Laws of 1920 were passed. By them the existing rental of resident property in Metropolitan New York was stabilized at the rental of the previous September for a period of two years. The constitutionality of these laws came before Judge Hough's court and the following is from his opinion in *Marcus Brown Holding Co.* v. *Feldman,* 269 F. 306 (1920).

"But, no matter how astonishing the legislation appears to the citizen, it has been so many times said that the wisdom, expediency or sincerity of the Legislature is not open to judicial inquiry, that citation is superfluous. Judicial review is, and

always has been, properly limited to an inquiry into the reason for the ascertained legislative intention—starting with the premise that the mere "say so" of the Legislature does not furnish a reason by its mere existence. . . .

"The reason for the laws here involved is patent from the public documents above mentioned; no appeal need be made to common knowledge or contemporary observation. In October last, the Municipal Courts of New York City were flooded with more 'notices to quit'—*i.e.*, summary dispossess proceedings—than had ever before been known during an entire year. They amounted to 100,000, and according to the estimate of families commonly used by local relief associations and other statisticians the number of persons involved in each dispossess proceedings was not less than 4, and in all probability 5. This meant that nearly 10 per cent of the permanent population of the city would (if existing laws took their course) shortly be seeking other habitations on the eve of winter. . . .

"On reason, then, if a given subject-matter is appropriate to the exercise of sovereign action, and such action has not been expressly and absolutely prohibited by the federal Constitution as authoritatively construed, the legislative result is not forbidden, where the purpose is within the range of reserved sovereignty, the means appropriate, and the reason sufficient, even though in reaching the result some toes be trodden on; and how many toes and how severely they may be trampled is a question that varies with circumstances. We may inquire, therefore, whether the subject-matter of these statutes is historically appropriate for legislative regulation. While rarely, if ever, exercised in America, there can be no doubt that one of the oldest exercises of sovereignty has been to fix the price and use of some of the necessities of life, especially bread. Shelter is as much a necessary as bread, and that likewise has in times of stress been the subject of regulation, and indeed of apportionment. . . .

"There have been, however, since the dawn of our legal

history, some occupations closely allied with the necessities of life, which have always been governmentally regulated, both as to prices chargeable and persons to be served. The usual examples are innkeepers, carriers, millers, ferrymen, and wharfingers. At common law the property of these men was held to be devoted to a public use, and their occupations were public business. . . . it may be and has been asserted that any business is affected with a public interest as soon as the electorate become sufficiently interested in it to pass a regulatory statute. It is not necessary to go so far, but we must and do hold that the business of renting out living space, is quite as suitable for statutory regulation, and as much affected with a public interest, as fire insurance and trading stamps. It is easy to multiply quotations as to the inviolability of private business. It is singular how uniformly they come from decisions holding some business open to intimate regulation, while saying that, if such business were only private, it could not be regulated; but never is 'private business' defined. It is another of those phrases which is left to a process of 'inclusion and exclusion,' which really means a finding of facts."

The following extracts from *Associated Press* v. *International News Service*, 245 Fed. Rep. 244, manifest a purpose to confine remedial justice within its conceptual confines, but, as was the characteristic of Lord Eldon, boldly to expand them in the interest of justice. Judge Hough in this opinion struggled manfully to pin a 'property' label in order to bring the difficult fact situation within the benevolent protection of equity rather than to suggest an abandonment of the property requirement for equity's jurisdiction. His problem was to find a satisfactory justification for the granting of an injunction to enjoin a rival news gathering association from utilizing the plaintiff's bulletins after publication. Apparently unwilling, however, to rest his decision on the "property in news" basis, Judge Hough ruled that the defendant's conduct amounted to unfair competition.

"As a matter of fact, one who, on hearing a rumor or assertion, investigates and verifies it, whether with much or little effort, acquires knowledge by processes of his own; the result is his. . . .

"With the existence of a truth, with physical facts *per se*, neither plaintiff nor defendant is concerned; for them, facts in that absolute sense are but an ore in a mountain or fish in the sea—valueless unless and until by labor mined or caught for use. Nor are facts, even after ascertainment, news, unless they have that indefinable quality of interest, which attracts public attention. Neither is news always synonymous with facts, in the sense of verity; indeed, much news ultimately proves fictitious, yet it is excellent news notwithstanding. . . .

"Whether there is or can be any property in facts *per se*, any more than there is in ideas or mental concepts, is a metaphysical query that can be laid aside; for there is no doubt, either on reason or authority, that there is a property right in news capable of and entitled to legal protection. Property covers everything that has an exchangeable value . . . that news possesses the quality stated, seems obvious enough, when it is observed that defendant takes it, in order to exchange it against dollars. . . .

"It is sought, if not to limit the doctrine of property in news to the time during which it remains locked up in the breast of its gatherer, to interpret the decisions cited as meaning only that news is 'like a trade secret' (198 U.S. 250, 25 Sup. Ct. 637, 49 L. Ed. 1031), lost when divulged in the course of business. . . . But news is far more than a trade secret, for that must remain private to have its best value, while news is obtained for publicity alone. . . . It is reasonable and just that each member of plaintiff and plaintiff itself should have a property right in its news until the reasonable reward of each member is received, and that means (with due allowance for the earth's rotation) until plaintiff's most Western member has enjoyed his reward, which is, not to have his local competitor

supplied in time for competition with what he has paid for. Surely this is a modest limit of rights. . . .

"*Equity, however, is not stayed because a name does not fit, or one is not at hand to accurately describe a wrong of a kind necessarily infrequent.** If defendant takes what some one else owns, and sells it as of right, in rivalry with the owner, such competition is more than unfair; it is patently unlawful and the wider term comprises the narrower. But, *laying aside the right of property** as the ultimate foundation of suit, the business method of selling, in competition with plaintiff and its members, something falsely represented as gathered by defendant otherwise than from bulletins and earlier editions is unfair because it is parasitic and untrue. It is immoral, and that is usually unfair to some one. . . .

"To commercially distribute news not gathered by the sender is under the facts shown here an invasion of property rights; to send it out as one's own labor is marked by that *dolus* which is fraud, and that is the basis of the doctrine of unfair competition in its wide sense."

The process by which equity expands into new fields or undertakes harder tasks in old ones, perhaps formerly refused, is strikingly revealed in *Kearns-Gorsuch Co.* v. *Hartford-Fairmont Co.*, 1 F (2d) 318.

" . . . defendant urges . . . that specific performance cannot be ordered, because by so doing the court would require from both parties, and would be required to supervise, 'the exercise of skill, personal labor, and experienced judgment in the continuous operation of a manufacturing business.'

"The contention rests on decisions, of which *Rutland Co.* v. *Ripley*, 10 Wall. 339, and *Javierre* v. *Central Altagracia*, 217 U.S. 502, are controlling here. The law *does* move with the times, and usually moves first in the lower courts; indeed, the historic function of Supreme Courts is to prevent too rapid

* Italics added.

advance. For me the statement (or perhaps *dictum*) of *Life Preserver, etc., Co.* v. *National, etc., Co.*, 252 Fed. 139, still represents the present state of the law, *viz.* protracted supervisions of a business *should not* be assumed, but it is not true that it *cannot* be assumed. Everything depends on how insistently the justice of the case demands the court's assumptions of difficult, unfamiliar, and contentious business problems. The tendency of the times is to 'take on' harder and longer pobs. . . . As a judge of first instance I would not nowadays hesitate to undertake any business enterprise for which, with the support of competent receivers, I thought a reasonably intelligent judge reasonably fit."

In the case of *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.* (1914) 222 Fed. 1006, Judge Hough felt compelled to hold that the failure to comply with an arbitration clause in an English charter party was not a defense to an action for its breach in the Federal Courts. He concluded that "the decisions cited show beyond question that the Supreme Court has laid down the rule that such complete ouster of jurisdiction . . . is void in the Federal Forum." A large part of his opinion, however, is a vigorous protest against the doctrine and a fearless elaboration of its basic weakness even though it has the support of great names. The sweeping statutory changes in arbitration statutes which began about 1920 in this country by which the arbitration clause in commercial contracts was made enforceable and effective may have been stimulated in no small measure by this searching opinion.

"There has long been a great variety of available reasons for refusing to give effect to the agreements of men of mature age, and presumably sound judgment, when the intended effect of the agreements was to prevent proceedings in any and all courts and substitute therefor the decision of arbitrators. The remarkably simple nature of this libelant's contract breaking has led me to consider at some length the nature and history of the

reasons adduced to justify the sort of conduct, by no means new, but remarkably well illustrated by these libels.

"It has never been denied that the hostility of English-speaking courts to arbitration contracts probably originated (as Lord Campbell said in *Scott* v. *Avery*, 4 H.L. Cas. 811)—

'in the contests of the courts of ancient times for extension of jurisdiction —all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.'

"A more unworthy genesis cannot be imagined. Since (at the latest) the time of Lord Kenyon, it has been customary to stand rather upon the antiquity of the rule than upon its excellence or reason:

'It is not necessary now to say how this point ought to have been determined if it were *res integra*—it having been decided again and again,' etc. Per Kenyon, J., in *Thompson* v. *Charnock*, 8 T.R. 139.

"There is little difference between Lord Kenyon's remark and the words of Cardozo, J., uttered within a few months in *Meacham* v. *Jamestown, etc., R. R. Co.*, 211 N.Y. at page 354:

'It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary.'

"Nevertheless the legal mind must assign some reason in order to decide anything with spiritual quiet, and the causes advanced for refusing to compel men to abide by their arbitration contracts may apparently be subdivided as follows:

"(a) The contract is in its nature revocable.

"(b) Such contracts are against public policy.

"(c) The covenant to refer is but collateral to the main contract, and may be disregarded, leaving the contract keeper to his action for damages for breach of such collateral covenant.

"(d) Any contract tending to wholly oust the courts of jurisdiction violates the spirit of the laws creating the courts, in that it is not competent for private persons either to increase or diminish the statutory juridical power.

"(e) Arbitration may be a condition precedent to suit, and as such valid, if it does not prevent legal action, or seek to determine out of court the general question of liability.

"THE DOCTRINE OF REVOCABILITY

"This seems to rest on *Vynior's Case*, 8 Coke, 81b, and is now somewhat old-fashioned, although it appears in *Oregon, etc., Bank* v. *American, etc., Co.*, 35 Fed. 23, with due citations of authority; and in *Tobey* v. *County of Bristol*, 3 Story, 800, it is treated at great length.

"THE PUBLIC POLICY DOCTRINE

"No reason for the simple statement that arbitration agreements are against public policy has ever been advanced, except that it must be against such policy to oust the courts of jurisdiction. This is hardly a variant of the reasoning ascribed by Lord Campbell to the 'courts of ancient times':

> " 'Such stipulations [for arbitration] are regarded as against the policy of the common law, as having a tendency to exclude the jurisdiction of the courts.' *Hurst* v. *Litchfield*, 39 N.Y. 377.
>
> " 'Such agreements have repeatedly been held to be against public policy and void.' *Prince Co.* v. *Lehman*, 39 Fed. 704.

"The above are two examples of the cruder forms of statement; but of late years the higher courts have been somewhat chary of the phrase 'public policy,' and in *Insurance Co.* v. *Morse*, 20 Wall. 457, Hunt, J., quotes approvingly from Story's *Commentaries*, thus:

> " 'Where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not, any more than a court of law, interfere to enforce the agreement, but will leave the parties to their own good pleasure in regard to such agreements.'

"But neither the court nor the commentator pointed out any other method by which an arbitration agreement could be

against the policy of the law, unless it were by seeking to divest the 'ordinary jurisdiction of the common tribunals of justice.'

"Having built up the doctrine that any contract which involves an 'ouster of jurisdiction' is invalid, the Supreme Court of the United States has been able of late years to give decision without ever going behind that statement. . . .

"THE DOCTRINE THAT THE COVENANT TO REFER IS COLLATERAL ONLY

"This idea is set forth with his customary clearness by Jessel, M. R., in *Dawson* v. *Fitzgerald*, 1 Ex. D. 257. It was repeated in *Perkins* v. *United States, etc., Co., supra* and accepted in *Crossley* v. *Connecticut, etc., Co.*, 27 Fed. 30. The worthlessness of the theory was amply demonstrated in *Mun-* Fed. 926, where Judge Brown, accepting without query or *son* v. *Straits of Dover* [*S.S. Co.*], 99 Fed. 787, affirmed 102 comment the doctrine that any agreement which completely ousted the courts of jurisdiction was specifically unenforceable, found himself unable to award more than nominal damages for the breach of the collateral agreement. The opinion for affirmance (102 Fed. 926), is written by Wallace, J., who had himself pointed out in *Perkins* v. *United States, etc., Co., supra*, that the action for breach of the collateral agreement to refer was a remedy against the contract breaker who sued when he had promised not to. Comment seems superfluous upon any theory of law (if law be justice) that can come to such conclusions.

"THE THEORY THAT ARBITRATION AGREEMENTS VIOLATE THE SPIRIT OF THE LAWS CREATING THE COURTS

"This is the accepted doctrine in New York, as shown in *Meacham* v. *Jamestown, etc., Railroad, supra.* Yet it is surely a singular view of juridical sanctity which reasons that, because the Legislature has made a court, therefore everybody must go to the court.

"THE THEORY THAT A LIMITED ARBITRATION, NOT OUSTING THE COURTS OF JURISDICTION, MAY BE VALID

"This is thought to be the doctrine of *Delaware, etc., Co.* v. *Pennsylvania, etc., Co.*, 50 N.Y. 265, and it is plainly accepted by the Supreme Court of the United States. *Hamilton* v. *Liverpool, etc., Insurance Co.*, 136 U.S. at page 255, shows the familiar proviso in an insurance policy by which the amount of loss or damage to the property insured shall be ascertained by arbitrators or appraisers, and further that, until such an award should be obtained, the loss should not be payable and no action should lie against the insurer. This makes the appraisal or partial arbitration a condition precedent to suit. . . .

"But persons who would thus far avail themselves of compulsory arbitration must be careful, for it has been said:

> " 'While parties may impose, as a condition precedent to applications to the courts, that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. . . . Such stipulations are repugnant to the rest of the contract and assume to divest courts of their established jurisdiction. As conditions precedent to an appeal to the courts, they are void.' *Stephenson* v. *Insurance Co.*, 54 Me. 70, cited in *Insurance Co.* v. *Morse, supra*. . . .

"Whatever form of statement the rule takes, the foregoing citations show that it always amounts to the same thing, *viz.*: The courts will scarcely permit any other body of men to even partially perform judicial work and will never permit the absorption of all the business growing out of disputes over a contract by any body of arbitrators, unless compelled to such action by statute. Even such cases as *Mittenthal* v. *Mascagni*, 183 Mass. 19, show no more than a belated acceptance of the right to confine litigation by contract to a particular court, for even that opinion does not recognize the right of mankind to contract themselves out of all courts.

"The English Arbitration Act, . . . is such a statute. It has compelled the courts of that country to abandon the doctrine that it is wrong or wicked to agree to stay away from the courts

when disputes arise. It is highly characteristic of lawyers that, when thus coerced by the Legislature, the wisdom of previous decisions begins to be doubted. In *Hamlyn* v. *Talisker Distillery*, (1894) App. Cas. 202, Lord Watson said:

'The rule that a reference to arbitrators not named cannot be enforced does not appear to me to rest on any essential considerations of public policy. Even if an opposite inference were deducible from the authorities by which it was established, the rule has been so largely trenched upon by the legislation of the last 50 years . . . that I should hesitate to affirm that the policy upon which it was originally based could now be regarded as of cardinal importance.'

"Neither the Legislature of New York nor the Congress has seen fit thus to modernize the ideas of the judges of their respective jurisdictions. . . . "

Judge Hough appreciated the dangers of arbitrary power and the necessity for an established procedure to control administrative action. He appreciated a difference in these tribunals in this respect. The following from his pen was recently quoted by Professor Frankfurter.*

" 'When I have before me a case on review from the Interstate Commerce Commission, almost instinctively I want to sustain their order. When I have before me a case to review of the Federal Trade Commission, almost instinctively I want to reverse it.' " H. W. V.

* 12 U. of Cin. L. Rev. 271. (This statement was made in the early days of the Federal Trade Commission.)