OUR DUAL SYSTEM OF GOVERNMENT.

A SUGGESTION FOR REFORM BY CHARLES NAGEL.[1]

COMMUNICATED BY THE EDITOR.

CHARLES NAGEL, of the St. Louis Law School Faculty, in an address delivered before the Missouri State Bar Association, calls attention to the weak points of some legal affairs in this country caused by the dual system of our government. Interstate commerce is subject to United States control, and also to state laws, and the confusion arising therefrom does a great deal of harm. Mr. Nagel demands a more friendly cooperation of the states with, and ultimately a regulation of our interstate commerce by, the Federal Government. He says:

"It is obvious that 'frank cooperation' can be had only if one or the other authority assumes entire control. The State cannot, because chaos would result. The National Government must, because it alone can provide uniformity of rule and action, by establishing the entire system."

What Mr. Nagel says concerning the irregular, partly lax and partly spasmodic enforcement of law, and incidentally also about the regulation of competition, is very instructive. He says:

"Between the failure to sustain wholesome law, and the rigid enforcement of antiquated law; and between the inadequacy of the law on the one hand, and its spasmodic extravagance on the other, the progress of fair commerce has been seriously embarrassed.

"Now that all commercial integrity is gauged by the presence or absence of competition, let us consider for instance the immediate and inevitable effect of lax or incompetent enforcement of law. Fair competition means competition within the rules of the game.

[1] Since this article was compiled for publication, Mr. Nagel has received the appointment to President Taft's new Cabinet as Secretary of Commerce and Labor. No greater recommendation could be given to Mr. Nagel than the distinction which is thus shown him.

Those rules ought to be upheld by the State. If they are not so enforced, new rules will be adopted by those who play the game; and *the meanest competitor will fix the standard.*[2] When the law lies dormant, the habitual lawbreaker becomes a factor. Failure to enforce the established rule against him, lowers the standard altogether, and forces every competitor to come to that lowered standard, or to retire. So far from permitting him to rise above the letter of the law, official neglect forces him to fall below, or to drop out. Such is one of the chief causes of illegal customs and finally of corrupt practices.

"A mere instance will suffice. We have heard of railroad rebates until we are weary. If we admit that national legislation has finally dealt them a blow, we must also admit that the need for national legislation had been emphasized by State inefficiency and inactivity. It will not be contended that the remedy was not always at hand. Such plain abuse of power and privilege granted by the State, left the railroads absolutely at the mercy of the prosecutor. But nothing was done until rebates without reason or excuse became the rule and not the exception. What was the result? Competition under a new rule, virtually installed by consent of the State. Competition among shippers was had primarily, not for customers, but for rebates. As has been well said, shippers contracted for rebates. Disregard of law became a test of success. Every dealer of consequence had to determine whether he would engage in business as it was done, or retire. How many retired no one knows. But we do know that whenever one retired for that reason, competition was weakened by the loss of a force that stood for more than the capital which it controlled.

"It is not fair, therefore, to lay the entire responsibility for the lowering of this standard at the door of those who yielded, or even of those who initiated. The State cannot escape its share.

"And this false standard did not control the shippers alone. The railroads, forced to compete by law and by commerce, were compelled to yield to the same levelling influence. It was for them, it is true, to resist the practice at its inception. But when the practice had once gained ground, they struggled under the peculiar disadvantage of being compelled to render public service and to earn dividends. They could not retire. They were subject to mandatory orders. *For them the illegal standard became practically compulsory*; and no power could rescue them but the State itself.

"This is only one illustration gathered from conditions to which

[2] Italics are ours.

public attention has been directed with particular Force. Throughout a similar tendency has prevailed. The custom that makes for undesirable business, is the growth of public indifference. The practice that ultimately leads to graft, is the creature of official neglect. And the rule of competition forces participation in both, or retirement from the game.

"Again, spasmodic enforcement of law carries with it disproportionate and often enough undeserved penalties. In saying this I discriminate between that which may be fairly regarded as the law of the land, and that which may merely be found upon the statute book. If we had to consider only those who suffer from an unexpected enforcement of wholesome laws, to whose suppression they have at least in some degree contributed, our sympathy would no doubt be meagerly extended. But there is a large body of laws which from their inception were but the accident of overzealous minorities, or which by common consent have been suffered to die a natural death. Laws which are called into life to give evidence of official activity, and which are technically applied to conditions for which they were not intended, and whose enforcement nothing but an inflamed public opinion would tolerate.

"I appreciate the danger of the distinction. Theoretically all law must be enforced. Practically, all law is never enforced, and was never intended to be. When all banks by common consent suspend payment a minor law is broken, in order that a greater law may be obeyed. The written law yields to the unwritten, and the decision is approved.

"True, if the executive decides to enforce, there is no further room for controversy. Nevertheless, 'the law does not exactly define; but trusts to a good man.' As ex-President Cleveland has pointed out, the executive is the real representative of the people's will. To seek to enforce what the people will not sustain is vain; to enforce what is demanded in the spirit of revenge, is unwise. Sudden, often spasmodic changes in official attitude are costly. While the public may enjoy the dance, some one must pay the piper. That cost is too often incurred for the mere delectation of 'The strong man, the darling and idol of weak governments.' A great lawyer, and one who stood for the ideals of the law as few did, James C. Carter, said: 'There are a vast number of laws on the statute books of the several States which are never enforced, and generally for the reason that they are unacceptable to the people. There are great numbers of others the enforcement of which, or attempts to enforce which, are productive of bribery, perjury, subornation of perjury,

animosity and hate among citizens, useless expenditure, and many other public evils. All these are fruits of the common notion, to correct which but little effort is anywhere made, that a legislative enactment is necessarily a law, and will certainly bring about or help bring about the good intended by it; whereas such an enactment, when never enforced, does not deserve the name of law at all, and when the attempted enforcement of it is productive of the mischiefs above mentioned, it is not so much law as it is tyranny.'"

Our unsystematic method of regulating interstate commerce gives rise to strange complications. Mr. Nagel says:

"In the light of our policy in foreign countries, it must fill us with wonder that in our country we permit one State to legislate against the commercial company of a sister State.....It must be matter of surprise that to-day a Missouri corporation which is welcomed in England, Italy, France, Germany and in South American states, might be denied admission in Illinois. A corporation compelled to transact business under the same regulations in St. Louis and Kansas City—two cities upon the remote borders of the State—might be prohibited from doing business in East St. Louis, although St. Louis and East St. Louis constitute one commercial center. Could a commercial system seem less calculated to further legitimate trade? ....Obviously, if foreign countries have not found it necessary to protect their citizens against the invasion of foreign corporations, it would seem that the extravagance of a misconceived interpretation of State rights has led us into an entirely absurd course.....

"Assume, now, that in a treaty between the United States and a foreign power, provision is made for mutual commercial privileges, involving, among other things, the admission of the regularly constituted commercial agencies and organizations of the respective countries;—and no feature is a more common subject for consideration in such treaties. It is not likely that an English company would be content with the admission to the United States as an abstract right, without the privilege to transact business in the several States of the Union. And it must be clear that if the treaty gives the right, that right may be enjoyed notwithstanding any conditions which an individual State may see fit to prescribe. Or, if the State shall be permitted, notwithstanding such treaty provisions, to exclude foreign corporations from its territory, what is more natural than retaliatory legislation on part of the respective foreign countries? Surprise may be expressed at this statement; and I perfectly appreciate that the authority over, and responsibility for acts of the several States, which the United States should and may have to assume

in controversies with foreign nations, is involved in much doubt, and may give rise to much conflict of opinion..... We might well be confronted with the remarkable result that Missouri may under its law, exclude an Illinois corporation, and may under a foreign treaty, be compelled to admit an English company of like kind. In practice this is not an improbable result. In theory it can hardly be supposed to have been contemplated.... While in some directions the tendency to centralization is ill advised and regrettable, I am satisfied that the interstate commerce of our country will not be or feel secure, until it has the protection of national law, as it has heretofore felt the chastisement of that law."