ratably to the cost of maintaining social order?

It is not strange that John R. McLean should be using the Cincinnati Enquirer, which he owns, to rehabilitate himself in Ohio politics. His abandonment of his own county to the Republicans having exhibited him in no very pleasant light to the party he affects to affiliate with, his paper is endeavoring to show that the Democratic candidate for governor last fall, Col. Kilbourne, made a worse showing in the vote of other important parts of the state than he himself had done two years before. But the fact is that Col. Kilbourne carried his own county, Franklin, by 2,270, whereas McLean lost it two years ago; and that he scored a plurality of 115 in Cuyahoga (Johnson's county), which McLean also lost two years ago, running some 14,000 behind the Republican candidate. For many purposes the year of McLean's candidacy cannot be fairly compared with that of Kilbourne's. In the former year Mayor Jones shot like a brilliant meteor athwart the political sky, getting over 3,000 votes in Franklin and 36,000 in Cuyahoga. But this tremendous disturbance of normal conditions affords no explanation of McLean's weakness. The fact remains that Kilbourne has brought his own county of Franklin back into the Democratic column, and that Johnson wrested Cuyahoga for him from the Republicans.

TWO JUDICIAL DECISIONS ON DIRECT LEGISLATION.

Numerous paragraphs have been floating around for the past six months to the effect that the supreme courts of South Dakota and California had "knocked out" state direct legislation in the former state and municipal direct legislation in the latter. Editorials, wise and unwise, have been written in the same connection, on the futility of direct legislation. The exact nature of these decisions, however, has not been explained, but after writing numerous letters and suffering considerable delay, I have received the text of the opinions of the courts and am now able to set forth the exact facts.

I.

To begin with South Dakota, the decision of the supreme court of that state may be found in the North-Western Reporter, vol. 85, page 605. The case is officially described as the State ex rel. Levin et al. v. Bacon et al. Judge Corson writes the opinion of the court.

The case is one to determine the title of members of the state board of charities and corrections. Two Populists had been appointed by the previous governor, and the Republican legislature of 1901 had legislated them out of office. Section 3 of the act doing this declares that this—

is necessary for the immediate preservation and support of the existing public institutions of the state—

and enacts that the act take effect at once.

The defendants contended that this act did not take effect till 90 days after the adjournment of the legislature, because of the direct legisaltion amendment passed in 1898. The relators contended that as the act has an emergency clause, it went into effect immediately.

The significance of this can be seen by reference to the constitution. Section 22 of original constitution says: "No act shall take effect until 90 days after adjournment of session at which it was passed unless, in case of emergency, by two-thirds vote the legislature shall direct otherwise." Section 1 of the constitution as amended, 1898, reads: "Except such laws as may be necessary for the immediate preservation of the public peace, health and safety, support of state government and existing public institutions." The judge in his decision writes with reference to these provisions:

"It seems to be the well established rule in considering any provision of the constitution that the whole is to be examined with the view of arriving at the true intention of each part, and that effect is to be given if possible to the whole instrument. If different provisions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of that construction which will render every word operative rather than one which makes some words idle and nugatory. . . . . Thus construed, section 1, as amended, would read in addition to the exceptions therein stated, 'and except also such laws as are passed with an emergency clause as provided in section 22.' That such was the intention of the legislature and of the people in adopting it is manifest by the fact that no amendment was made to section 22, and that the amendment applies only to laws not yet in force." Also the legislature of 1899 acted under section 22 as well as that of 1901, and nearly half of the laws passed at these two sessions had emergency clauses. And the former and present governors and executive officers acted under them. The question was not raised, but this fact shows the general presumption that section 22 was still in force. Much business trouble would be caused if the court should hold that section 22 was repealed.

He then declares that—

laws passed under section 22 which contain an emergency clause can go into effect at once.

Also this law declared in it that it was—

necessary for the immediate preservation and support of existing public institutions;

and that—

that declaration is conclusive upon this court, and brings this case clearly within the exception contained in section 1 as amended.

The judge has strained a point when he says that a recent amendment of the constitution is overridden by a part of it adopted long before. If section 22, which says that the legislature by a two-thirds vote can pass laws to go into effect at once, had been a part of section 1 before it was amended, the amendment to section 1, which provides that no laws save a clearly-defined class, shall go into effect under 90 days, and not then if a referendum petition is filed, would clearly have amended out of existence the provision of section 22 quoted. Because section 22 happens to be in another part of the constitution does not make the amendment apply the less to it. The judge has reversed the usual proceeding and made the part passed earlier limit and define the later part. Instead, he should have decided that the part passed later limits and defines the part passed earlier.

Also, the act stated in it that it was "necessary for the immediate preservation and support of existing public institutions of the state," that bringing it under the exception mentioned in the direct legislation amendment. This is not a true statement. The act was not "necessary for the immediate preservation," etc. It is the duty of lawmakers to make such definitions. It is the duty of the judiciary to apply them. When the judge said "that declaration is conclusive upon this court" he failed to do his duty. The decision bears all the marks of being a partisan one.

The effect is to give the legislature the power, by a two-thirds vote, to make any law go into effect immediately, and, if other judges follow this one's ruling, which is not probable, to give the legislature the power, by a majority vote, to make of immediate effect any law which declares in it that it is "necessary for the immediate preservation," etc.

The initiative is not touched, the referendum is not repealed by this South Dakota decision. But it does let down the bars so that the legislature can pass acts for immediate effect, thus doing away with the opportunity for the referendum on them.

II.

The decision in California is found in California Decisions, vol. xxii., No. 1211, page 377. It was rendered August 26, 1901.

In 1897 the legislature passed a county government act which contains the following direct legislation provision:

> Whenever there shall be presented to the board of supervisors a petition or petitions, signed by legal voters of said county in number equal to 50 per cent. of the votes cast at the last preceding election, asking that an ordinance, to be set forth in such petition, be submitted to a vote of the qualified voters of such county, it shall be the duty of the board of supervisors, by proclamation, to submit such proposed ordinance to the vote of the qualified electors of such county.

Under this law, the voters of Ventura county enacted an ordinance regulating the sale of liquors in that county, and a man violating this ordinance appealed to the supreme court on the ground that this part of the county government act and the ordinance enacted under it were unconstitutional. It was decided that this part of the law was unconstitutional, and hence void, and also the ordinance enacted under it. Six judges favored this, but Chief Justice Beatty dissented very vigorously.

The main opinion, to which four judges sign their names, is a most wonderful piece of reasoning. It speaks of "the right to make any and all laws" directly by the people as "a startling innovation" and "a drastic departure from our form of government," but it expressly says that this point "need not here be passed upon," because it "finds expression only in imperfect and incomplete legislation." Having dismissed this point, it declares the law unconstitutional, not "because it disagrees with any part of the constitution," but because two parts of the same law seem to disagree with each other. Section 2 defines the powers of counties and says:

> "their powers can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law." And by section 25 of subdivision 25, boards of supervisors are empowered, "to license, for purposes of regulation and revenue, all and every kind of business not prohibited by law," etc. While by subdivision 31 of the same section boards of supervisors are authorized, "to make and enforce within the limits of their county, all such local, police, sanitary and other regulations as are not in conflict with general laws."

Section 13, part of which has already been quoted, established direct legislation, and the opinion says of it:

> "It is a direct grant of power to the voters of a county, or rather to a majority of such voters as may choose to exercise their right of franchise at an election, to pass any and all ordinances pertinent to the government of their county."

The opinion then goes on to say:

> "It is too plain to permit of argument that, under our system of government, there never can be, two equal, coordinate law-making powers, each existing without any restrictions the one upon the other. Yet such is the precise case presented. . . . . When an ordinance is thus passed by ballot it has no superior force, but has merely 'the same and equal force and effect as though adopted and ordained by the board of supervisors.' The right of the supervisors to repeal such ordinances is not taken away, and it is within their power to repeal one after the other, as soon as they shall have been adopted. Upon the other hand, it is equally the right of the people to reenact them after such repeal. . . .
>
> So far as legislation is concerned nothing could result but untold confusion. As the two sets of laws thus creating coordinate law-making powers, without check, limitation or restraint the one upon the other, cannot in the nature of our government exist, it follows that one or the other of the provisions is invalid and must fall. There can be no hesitation in declaring in this case that it must be section 13 of the county government act."

Part of a law is declared unconstitutional, not because it conflicts with the constitution, but because it is affirmed that two equal, coordinate legislative powers cannot exist side by side, and hence that one part of the law conflicts with another part of the law.

Two of the judges, seeing the patent foolishness of this reasoning, sign their names to a concurring opinion which has the following significantly aristocratic paragraph—

> "Our system of government is not that of a pure democracy, but it is a representative republic. This holds throughout, from the smallest subdivision such as cities and towns, up through counties and states to the federated or national government. The people in their individual capacity do not make or enforce laws to govern them, but they delegate the power to their agents to make laws, and also to construe and enforce them.

Chief Justice Beatty says in his dissenting opinion:

> "The constitution (Art. XI, Sec. 11) makes a direct grant to every county of the power to 'make and enforce within its own limits all such local, police, sanitary and other regulations as are not in conflict with general laws.' This grant to the counties of the power of local legislation is, of course, a grant to the people of the respective counties. How they are to exercise the power, whether in their primary capacity by voting at the polls, as in the case of the adoption of a state constitution or of amendments thereto, or by their chosen representatives in boards of supervisors, is purely a matter of legislative regulation, and I cannot see how it is possible upon any recog-

nized principle of constitutional construction to deny to the legislature the power to confer upon the qualified voters of the respective counties the right to make local laws which will be valid and effective within their territorial limits.

"That the legislature did intend by the act of 1897 to enable the people of the respective counties to enact local ordinances by popular vote is not, and cannot be, denied; but their intention is held to have failed, because they have left it in the power of the boards of supervisors to repeal or alter or supersede the ordinances by popular vote. I do not agree with this construction of the act. . . .

"I am not aware of any rule of construction or principle of constitutional law upon which a court could declare the law invalid. It might well be argued that such a law would be inexpedient, or even foolish, but laws cannot be invalidated upon that ground. They are only invalid when the legislature has exceeded its powers in attempting to enact them. Here, upon the construction given to this law, there is no excess of power—only an absurdity, or supposed absurdity, in the possible consequences to which it may lead. This, however, I conceive to be a more potent argument against the construction placed upon the act than against the power of the legislature to pass it.

"And, finally, are the possible consequences of the court's construction of the law so very absurd? Suppose the board of supervisors has the power to repeal an ordinance which has been ratified by popular vote. It is a power which it may be presumed will not be exercised in any case of doubtful expediency. The expression of the popular will would have a moral and practical force in any event, and in many cases would operate permanently. As to the confusion and uncertainty which it is feared might result, I see no reason for apprehension. It is conceivable, of course, that there would sometimes be found a board of supervisors determined to thwart the will of the people of their county, and that they would repeal ordinances as fast as the people could pass them, but this, it may be safely asserted, would rarely occur, and in such rare instances the mischief would be less in degree than frequently follows when the legislature undoes what its predecessors have done."

On the making public of the decision, the San Francisco papers at once raised a great hue and cry. The Call, of August 27th, headed a column and a half with "Knocks a Big Hole in the New Charter," and said in heavily-leaded type:

"Leading attorneys are a unit in declaring that the decision rendered yesterday by the supreme court has a direct bearing upon the provisions of the charter . . . of San Francisco for the initiative and referendum and the acquirement of public utilities. While the supreme court does not deny the right of the people to express by ballot what they may desire in the way of legislation, it holds that it can only come in a suggestive form, while the actual power to carry out the wishes of the people is vested in the legislative body to which they have delegated the power to enact and enforce the laws."

This is not true, and Mayor Phelan clearly shows this in the San Francisco Bulletin of August 27th.

"There is an essential difference between the provisions of the statute and the charter on the subject. . . . There is nothing in this law to prevent the supervisors from immediately repealing an ordinance adopted by the people. It seems to leave the supervisors and the people equally free to adopt ordinances. It appears at once that such a clumsy and ill-considered provision was a mere pretense, and did not accomplish the purposes of direct legislation at all. The charter provides that on a petition of 15 per cent. of the voters, the board of election commissioners must submit any ordinance presented, and that a majority vote shall be sufficient for its adoption, and that it shall have the same force and effect as an ordinance passed by the supervisors and approved by the mayor, and the same shall not be repealed by the supervisors. The latter clause gives it the superiority which an ordinance voted for under the county government act does not possess, and to which the supreme court has called attention. The charter gives the supervisors the power to submit a proposition for the repeal of such ordinance or for amendments thereto for a vote at any succeeding election. This makes the power of the people with respect to the ordinances supreme and secure.

"The court stigmatizes the clause in the county government act as 'so imperfect and incomplete' as to be practically unworthy of consideration. But the charter provisions are perfect and complete and do not involve the inconsistency of establishing, in the language of the court, 'two equally coordinate law-making powers, each without any restriction, the one upon the other.' Under the charter, when the people adopt an ordinance, it cannot be repealed except by the people. It would certainly be remarkable if the supreme court should take away the power of the people to adopt ordinances after discussion and deliberation. As a matter of fact, it merely means an appeal from the representatives of the people to the people themselves. For instance, the board of supervisors refuses to pass an ordinance for which there is a general demand. Fifteen per cent of the voters decide to appeal from them to the whole body of the people. Boards of supervisors and other legislative bodies are frequently controlled by bosses and wire-pullers, or may have been corrupted, and direct legislation puts the remedy in the people's hands. The mere knowledge by the supervisors that the petition by the people may be resorted to will deter them from resisting a clear expression of the public voice. The wholesome effect of direct legislation at once becomes apparent. Even without being resorted to, it clears the official and political atmosphere.

"The charter has therefore carefully safeguarded the public interests by enacting a consistent and rational scheme of direct legislation through the initiative and the referendum and will no doubt stand the scrutiny of the supreme court. But we should make asurance doubly sure and propose a constitutional amendment at the next legislature covering the whole question."

And the Bulletin of the next day closes an editorial with:

"Shall there be no means within the constitution by which the people can express their will in legislation when their agents refuse to do their bidding?

"The initiative has a very healthy effect upon the body politic, and there will be no legislative body, great or small, but which will be made better by the knowledge that the people have the power to legislate for themselves when their representatives fail them. The initiative gives confidence to the people of their own power, prevents turbulence and discord, and insures the orderly processes of civil government for the amelioration of the ills to which the state is subject."

The San Francisco Star of August 31st well says:

"The court has not decided that the law-making power now vested in legislative bodies may not be surrendered back to its source, the people, but only that either the people or their representatives must be superior, and that too great confusion is promised by a scheme which makes them equal, each with an unlimited veto over the acts of the other. The Star agrees with the court that such a condition is an affront to our principles of government. The whole

should always be greater than a part; the principle should have the power of veto over the agent, but never the agent over the principal."

Mr. Alfred Cridge, the author of the direct legislation provisions in the San Francisco charter, writes:

"In framing the charter it was at once perceived that the power conferred upon the voters by the initiative would be nugatory if the supervisors could undo the work; therefore it was provided that 'the same shall not be repealed by the supervisors,' but must again be submitted to the people for effective modification or repeal. This, therefore, obviates the objection in the decision to 'two sets of laws.'

"Even from that standpoint and as regards the law declared unconstitutional, the decision is absurd; because no board of supervisors would thus defy the people's will by reenacting a proposition of which the voters had disapproved, until there had been another opportunity for expression, either by direct vote or by electing another or part of another board in a manner indicating a change in the popular view."

There are two good things flowing from this California decision. First, the public attention called to direct legislation, and the wide discussion in the papers; and, second, the movement, backed by Mayor Phelan and other important men, to amend the state constitution so as to protect the direct legislation they have and to secure more.

ELTWEED POMEROY.

NEWS

The Fifty-seventh congress of the United States, elected 13 months ago, met on the 2d. In the lower house David B. Henderson, of Iowa, Republican, was reelected speaker by 190 votes, James D. Richardson, of Tennessee, Democrat, receiving 149, and Amos J. Cummings, of New York, Democrat, and William L. Stark, of Nebraska, Populist, receiving one each. The rules of the Fifty-sixth congress were readopted. Senator Frye presided in the senate, the vice president, Mr. Roosevelt, having succeeded Mr. McKinley as president. On the 3d both houses listened to the reading of President Roosevelt's first message.

The message opens with a tribute to the late President McKinley, proceeding from that to a denunciation of anarchism and anarchists, which leads on to a recommendation that Congress—

take into consideration the coming to this country of anarchists or persons professing principles hostile to all government and justifying the murder of those placed in authority.

The president advises that such persons—

should be kept out of this country, and if found here they should be promptly deported to the country whence they came, and far-reaching provision should be made for the punishment of those who stay.

He further advises that the federal courts—

be given jurisdiction over any man who kills or attempts to kill the president or any man who by the constitution or by law is in line of succession for the presidency, while the punishment for an unsuccessful attempt should be proportioned to the enormity of the offense against our institutions.

Proceeding along the same line, Mr. Roosevelt urges that anarchy—

be made an offense against the law of nations, like piracy and that form of man-stealing known as the slave trade, for it is of far blacker infamy than either. It should so be declared by treaty among all cizilized powers. Such treaties would give to the fedeal government the power of dealing with the crime.

Having dealt thus with the tragedy under whose shadow he acts as president, Mr. Roosevelt proceeds in his message to a consideration of the problem of wealth-concentration, with especial reference to what he describes in the message as "the great industrial combinations which are popularly, although with technical inaccuracy, known as 'trusts.'" While acknowledging the beneficence of these institutions, he points out some of their evils and proposes that—

in the interest of the whole people, the nation should, without interfering with the power of the states in the matter itself, also assume power of supervision and regulation over all corporations doing an interstate business.

To this end, he would, if necessary, have a constitutional amendment conferring the requisite power submitted for adoption.

Next among the president's recommendations is a suggestion that a new cabinet officer—secretary of commerce and industries—be established. This recommendation, he says, relates to—

one phase of what should be a comprehensive and far-reaching scheme of constructive statesmanship for the purpose of broadening our markets, securing our business interests on a safe basis, and making firm our new position in the the international industrial world, while scrupulously safeguarding the rights of wageworker and capitalist, of investor and private citizen, so as to secure equity as beteween man and man in this republic.

The scheme of statesmanship thus alluded to is outlined at length. It contemplates protection of American wage workers not only by the tariff but also by the reenactment of the Chinese exclusion law, by "fair" conditions in government work, and by laws excluding all immigrants "who are below a certain standard of economic fitness to enter our industrial fields as competitors with American labor," the object of the latter prohibition being to "stop the influx of cheap labor and the resulting competition which gives rise to so much bitterness in American industrial life." Within this scheme of which the new cabinet officer is a phase, there also comes the perpetuation of the protective tariff, in combination, however, with "a supplementary system of reciprocal benefit and obligation with other nations," to be secured by reciprocity treaties. The natural line of development for a policy of reciprocity is defined in the message to be "in connection with those of our productions which no longer require all of the support once needed to establish them upon a sound basis, and with those others where, either because of natural or economic causes, we are beyond the reach of successful competition." Mr. Roosevelt's outline of the scheme of statesmanship beginning with the creation of a new cabinet officer to be known as secretary of commerce and industries culminates in a proposition that "our government should take such action as will remedy" certain differences between American and foreign shipping caused by foreign subsidies, cheaper construction abroad, etc., and restore our merchant marine to the ocean. There is no specific approval of a ship subsidy, but the inference intended is unmistakable.

There are numerous approvals and miscellaneous recommendations in