

Mr. PECK. It does not seem fair for industries such as ours to be required to set up reserves and carry the load for seasonal or fluctuating businesses, which do not afford steady employment to their employees.

In general we submit that, first, too ambitious and comprehensive a program has been proposed which, if enacted, might develop problems unforeseen at the moment and fail in the objectives contemplated, and, certainly, because neither employees nor employers in our industry can afford to carry such a burden at this time; and, further, the benefits from such a program will not become effective for a considerable time, and it will curb recovery so much needed at the moment, therefore, we strongly recommend postponement of legislation to establish the social-securities program.

The CHAIRMAN. Thank you, Mr. Peck.

Mr. James A. Emery, representing the National Association of Manufacturers.

STATEMENT OF JAMES A. EMERY, NATIONAL ASSOCIATION OF MANUFACTURERS, WASHINGTON, D. C.

Mr. EMERY. Mr. Chairman and gentlemen of the committee, with your permission I would like to make a general statement with respect to the position of the association and present to you two witnesses on special features of the legislation, one dealing, from personal observation and study, with the British experience as applied to this proposal, and the second, the economist of the association with respect to the operating effect of the tax in the form proposed.

The CHAIRMAN. Mr. Emery, those witnesses proposed are not on the calendar for today. How long will they take?

Mr. EMERY. That would depend upon the committee in part, Mr. Chairman.

The CHAIRMAN. The committee will adjourn at 12 o'clock.

Mr. EMERY. There may be some inquiries with respect to the statements made.

The CHAIRMAN. About how much time will these two gentlemen want?

Senator KING. If we do not interrupt them.

Mr. EMERY. I will say for Mr. Gall that his statement would take substantially about 20 minutes, and as to the economist of the association, he might perhaps take quite as long or a little longer.

The CHAIRMAN. They will have to be heard some other time;

Mr. EMERY. I would like to have them follow me, if I may, because it makes a connected statement with reference to the subject matter under consideration.

The CHAIRMAN. You may proceed, Mr. Emery.

Mr. EMERY. Mr. Chairman, in order to make the general position of the association clear, with respect to the principles involved in this legislation, I would like to call your attention to the fact that their position with respect to it was adopted at a convention of the association held in December, at which were present some 1,460 manufacturers from all parts of the United States, representing every variety of industry and operating in more than 40 States of the Union.

Their position is one of general sympathy with the objectives to which the legislation is aimed; that is, to provide assistance and a measure of reasonable security against the major hazards of life, so

far as it may be reached either by the private conduct of the individual or with the assistance of legislation validly aimed at the attainment of those objectives. We feel, however, that there are serious considerations which should be laid before the committee with respect to the capacity to maintain the burden that would be placed upon industry, and especially in view of the form of the tax here levied.

That goes, of course, to the question of whether the legislation which you have under consideration would aid this situation, in the light of your general objective the obtainment of recovery that private enterprise may resume, maintain and expand its normal employment. The approach of industry is well stated by Francis Place, whom Macauley described as "the greatest radical writer in England," who made a most commendable contribution to employment and labor conditions in England. He said:

Every man who greatly desires the well-being of his species has no doubt felt repugnance at finding himself compelled to abandon, as it were, the notions he would fain indulge without alloy, and to descend to calculations and comparisons of losses and gains, of trade, commerce, and manufacture, of the nature of rents, profits, and wages, the accumulation of capital, and the operation of taxes. But he who would essentially serve mankind has no choice; he must submit himself patiently to the pain he cannot avoid without abandoning his duty.

Now the situation with which we are confronted generally in this country today is a national debt which, at the conclusion of the fiscal year, will amount to substantially 32 billion dollars; that in addition thereto we have the debts of the States which bring the total to the neighborhood of 48 billion dollars; the fixed charges against this will substantially amount to about a billion and a quarter annually, in addition to the sums necessary to provide for sinking fund to retire the debts as they progress; that we are confronted now with an annual expenditure, of a public nature, national, State and local, of substantially 14½ billion dollars; we have estimated private debts aggregating about 217 billion dollars; we are confronted with increasing debts, with increasing taxes, in every direction, and there is an obvious necessity for relating these debts of the States and the taxes of the States to the tax structure of the Nation without piling up a burden that would be so excessive as to threaten the recovery of private industry itself. This is essential to the stimulation, the maintenance and the expansion of employment.

The relation of this tax structure to that of the States at all times is a matter of serious consideration for this committee, since we have reached the point, as the President has very dramatically stated, in which we are paying substantially "one-third of the income of the United States" for the "luxury of being governed."

I want to call your attention, then, in my statement, to substantially three things: First, to the nature of this tax and its operating effect. Before directing your attention to that, I want to call your attention to the record of previous studies which have been made by the Senate of the United States in field of unemployment insurance; one in 1928, under the chairmanship of the distinguished Senator from Michigan, by the Committee on Education and Labor, of the Senate, which declared:

Whatever legislation is considered on this subject, your committee is convinced, should be considered by the States. The States can deal with this subject much better than the Federal Government.

Further the committee said:

Insurance plans against unemployment should be confined to the industry itself as much as possible. There is no necessity and no place for Federal interference in such efforts at this time. If any public insurance scheme is considered it should be left to the State legislatures to study that problem.

Later, under Senate Resolution 483 of February 28, 1931, proposed by Mr. Wagner, a select committee of the Senate was appointed by the Senate to investigate unemployment insurance and make recommendations. That committee consisted of Senator Hebert of Rhode Island, a distinguished insurance authority; Senator Glenn of Illinois; and Senator Wagner of New York. The committee was appointed, held hearings and made studies between April 2 and December 10, 1931, reporting to the Senate on June 30, 1932. That committee reached the conclusion that:

The subject of unemployment insurance is not within the sphere of congressional action.

After studious examination of the questions of policy and law involved, there was no disagreement with the separate views of Mr. Wagner, which further urged:

The enactment of Federal legislation permitting a deduction of 30 percent of the cost of unemployment reserves or insurance, not from gross income, as recommended by the committee, but from tax.

He further specifically proposed:

2. Unemployment insurance or wage reserves to be successful, should be inaugurated under compulsory State legislation and be supervised by State authority.

3. The Federal Government should encourage State action by (a) cooperating with the States in the establishment of a Nation-wide employment service, and (b) by allowing employers to deduct from income tax a portion of their payments into unemployment reserves or toward unemployment insurance.

4. Every system of unemployment insurance for reserves should be organized to provide incentives to the stabilization of employment.

Now you are confronted here with the question of whether there should be a permanent system established levying burdens, many of which are indefinite and uncertain in their nature but the gigantic burden of which is obvious on the face of your proposal as the burdens accumulate. There is presented the further suggestion as to whether the legislation which you presently consider should be temporary in the matter of aids or whether it should be permanent in the light of what you would consider inadequate information in the possession of Congress at the present time. That is instanced by the fact that many of the most important and fundamental requirements of fact with which we presently require we do not possess adequate information on. Nobody can say, or at least we cannot say, from the information in our possession, what the extent of unemployment is, what it is in various industries and its causes. We have estimates, numerous estimates and some even conflicting, but what the facts actually are we do not know. I will submit for the moment, because of some statements made before the committee, that with the rise and technical progress of manufacturing industries between these years 1900 and 1929, in spite of the fact that our population was steadily increasing, our technical progress extraordinary, our capacity for increased production multiplied, the manufacturing industries in

the United States steadily added an annual average of 100,000 persons every year to their pay rolls. Between 1932 and 1934 they have, in the face of all of the difficulties with which they have been confronted, added over a million men to the pay rolls of the industries during this period of time and sustained a very large body of employees in their desire to assist in this situation, many of whom were not essential to the maintenance of the rate of production which the consuming capacity of their customers presented.

Now it has been said that we can readily pass on the form of tax which is here presented. I want to call your attention to the fact that if you pursue a pay-roll tax of the form which is here presented—and I address myself to the unemployment insurance aspect of the tax because the principles there established apply in part to the contributory system of old-age insurance, which would be an additional tax levied on the same pay roll—I want to call your attention to the fact that it is not obvious, in fact it is contradicted that the form of that tax would be readily passed on as a part of the cost of the goods. On the contrary, we think that the pay-roll tax, as it is presented to you, will operate as a turn-over tax, and that it will operate to re-duplicate the cost of the article to the consumer, and the labor cost of the article as produced all the way from the first operation in the raw material up to the ultimate article sold to the consumer, according to the number of operations that may be involved, between the use of the basic material itself and the ultimate form which it takes for consumption in the market.

Senator KING. You think there would be pyramiding then of these various taxes?

Mr. EMERY. There will be, sir, a pyramiding that will operate in many ways. I want to call your attention to the fact, first of all, that it falls in equal amounts upon those employers operating at a profit and those operating at a loss. That becomes a serious factor in a situation like the present. The consolidated corporate returns of the United States will show that since the year 1930 corporation business in the United States has operated without profit, and the net deficit in their operation in 1932-33 has been between 5 and 5½ billion dollars annually. Yet, in spite of that, the proportion of the national income which has gone to compensate labor operations, has been maintained at about two-thirds of the whole, during that entire period.

The pay-roll tax is cumulative in its effect on the cost to the consumer from, as I have said, the raw material to the finished product. It cannot be theoretically held to be passed on. This would be especially true of what we call "price goods" and what we would call the "durable" or heavy goods. That is especially important, because at this time we know the bulk of unemployment lies in the field of the durable or capital goods industries. It lies there most heavily. Those are the industries most difficult to revive, because the financing is carried on over a long period of time. Such goods are not paid for on delivery. They require long-term investment. It is in that field that the greatest amount of unemployment exists today. The same is true of the service industries, tributary to the capital goods industries.

The higher the percentage of labor cost the more telling is the relation to the pay roll. The relation of the pay-roll tax to the final cost of the article will be determined in the individual instance by the percentage of wages and salaries to the total cost of production.

This becomes evident when you notice that in the industries themselves the labor cost of an article itself will run all the way from a minimum of 4 percent to the maximum of 70 or 80 percent. So the percentage of the pay-roll tax in relation to the labor cost of the article will rise in accordance with the unit of the labor cost which is involved in the industry itself.

Senator BLACK. What is the average?

Mr. EMERY. The average would run somewhere around 35 percent, I think.

Senator BLACK. I saw some figures the other day purporting to be released by the Bureau, to the effect that the average amount that went to labor from the increased manufacturing was 16.6 percent.

Mr. EMERY. That is the labor cost of the article?

Senator BLACK. Yes.

Mr. EMERY. I doubt that very greatly, because it would all depend upon the character of the industry. It is peculiarly true that the labor costs will increase very greatly in so-called "service industries" as distinguished from producing industries. Take the railroads for example. That is a service industry in which the labor costs represent a very high proportion of the dollar spent for transportation.

Senator BLACK. That was information given, as I recall, by the Labor Department.

Mr. EMERY. The tax is inequitable between employers because it often occurs that two companies with the same pay roll, paying the same tax, have obviously a different gross annual business, according to the nature of the product, the rapidity of the turn-over, and the risk in the particular industry involved as to either profit or loss. Of course our industries are not conducted on a profit system, but on a profit-and-loss system.

The pay-roll tax, in its effect, is a production tax, a distribution tax, and an additional processing tax. On the theory that it is to be carried forward as a part of the cost of operation, it is a turn-over sales tax with all of its disadvantages and none of its benefits. To the extent that it is transferrable and this in many instances is impracticable-it is a hidden sales tax paid by each purchaser for a given product or service. When I say it would be carried forward in many industries, it must be obvious in what are called price-goods industry, for instance the large supply of goods to the 5- and 10-cent stores, or the department stores, stores of that character, where the margin of profit is so narrow it is quite impossible to add a new cost to it in the terms inferred in the relationship here between the labor costs of the article and the pay-roll tax itself.

Of course it is asserted that foreign countries operate under this tax. It will have to be realized that they operate on a lower standard of living. It is a fair presumption that the cost of such taxes is a partial reason why they are unable to maintain the standards of living which we possess.

The Congress has rejected a general sales tax or a manufacturer's sales tax on the ground that it would be passed on to the consumer. The present tax is being urged on the ground that it will so operate and its cumulative effect is apparently ignored.

It is said that the method of taxation proposed, as it meets with response by the States, will secure uniformity in costs of production. If competitive equality will be produced among the States, we obvi-

ously face competitive inequality with foreign competition. It is a serious question as to whether the equalization of the costs of operation among the States is a sound policy, because, on the contrary, we are not only due to respect the differences in economic conditions, the advantages in lower living costs; access to raw materials and the various natural advantages enjoyed by the States, but, throughout the life of the N. R. A., the claim for labor differentials, based upon a recognition of these inequalities, has been a continuing issue requiring recognition and adjustment. This tax discourages rather than encourages an increase of employment, for every additional employee adds to the tax. As it became more onerous it would stimulate mechanization, for it is men that are paid, not machines. Just as the increasing cost of accident compensation calls for higher physical standards in the selection of employees, so the penalizing of a pay roll is not a stimulating method of encouraging employment itself.

I want to say just one more word on the nature of this tax itself from a legal standpoint, and the difficulty that is presented here if you pursue a pay-roll tax in the form proposed in this bill which, upon the face of it, has as its purpose not merely stimulation of legislation by the States, but the very purpose of the legislation upon its face, is to compel the legislative action of the States. It is not the purpose of this legislation, on its face to raise revenues for the Federal Government. On the contrary, the success of this bill as a revenue raiser would be the defeat of its purpose as social legislation. It is intended not to produce revenue but to produce legislation. Its objective is to secure that legislation and for that purpose it levies a tax, requiring State legislation as a condition of the employer receiving the credit which he is to obtain under this bill. He is to receive his credit only on condition that the State accepts the conditions which are laid down by the Federal Government, and legislates in accordance with such standards and submits to the Federal Government the control of all the funds which it raises and places them under the management, direction, and investment of the Secretary of the Treasury.

The real question that arises in that connection is the very serious one as to whether or not the tax so levied is a tax at all because we understand that a tax is a charge or a pecuniary burden for the support of government. It is the compulsory taking of private property for public purposes and in that sense it is the taking of private property for the purposes of securing Federal revenue. On the face of it and it is only on the face of legislation like this that the test of its validity as tax legislation can be determined on the face of this proposal it is not intended to secure revenue for the Federal Government. Nor is it intended to secure revenue for the Federal Government for the general objectives of this legislation for the revenue procured by the Federal Government is not earmarked to take care of or contribute to unemployment compensation itself, it is intended to go into the General Treasury of the United States so much of it as is retained, if any is retained at all, by the nonaction of the States. It is intended, under those circumstances, to be used for general and not for special purposes.

Senator COUZENS. After making that statement, do you conclude that that provision is unconstitutional?

Mr. EMERY. I think it is a very serious question. I think the question raises most serious doubts if you proceed in this manner with this kind of a tax.

Senator BLACK. May I ask you one question. As I understand it, your idea is if it is unconstitutional it is because the Government is raising money for some purpose other than the purpose of raising money to pay for the expense of running the Government?

Mr. EMERY. No; it is because the purpose is not to procure revenue to run the Federal Government; but to produce legislation on the part of the States;

Senator BLACK. Yes.

Mr. EMERY. And the purpose of the legislation is not to obtain revenue which is to be used for Federal purposes but to obtain legislation which the Federal Government believes should be enacted and it will obtain it in accordance with standards, which Congress lays down, by virtue of which, if accepted, the tax is recovered by the citizens of the States.

Senator BLACK. In other words, fundamentally your statement, is that the object of the tax is to raise money for government purposes?

Mr. EMERY. It is to be raised for Federal purpose in this instance, because it is a Federal taxing authority.

Senator BLACK. What about the tariff tax that is raised for the purpose of the so-called "protection" of American goods, which went so high at one time that they had to redistribute it among the States; was that unconstitutional?

Mr. EMERY. The Supreme Court has passed on that entirely, it uttered the last word, and I accept it, although not entirely with the description supplied by the Senator.

Senator BLACK. Yes.

Senator BARKLEY. One of the things that offers an objection, to the tax and that raises the question of constitutionality in your mind is that it is to be used for general purposes by the Government although it is in the guise of a tax for unemployment insurance, as far as the money that is retained by the Government is concerned because some States may not take advantage of it, may not pass the law and comply with it?

Mr. EMERY. That is true, Senator.

Senator BARKLEY. I do not know whether it is wise or proper for the Federal Government to levy a tax on pay rolls or anything else in the States for the purpose of unemployment insurance, and then use that money for general purposes; The question of constitutionality does not seem to me to enter into it. It is a question of policy and wisdom.

Mr. EMERY. I think, Senator, if you will permit me, the serious question is raised on the face of the tax because it is the first time that I can remember, and I think there is no other instance to the contrary, where the Federal Government, on the face of its own tax measure, has provided the means of defeating its own revenue. That is precisely what this tax does.

Senator BARKLEY. If all the States came along and complied with this statute of course the Federal Government would be deprived of the revenue raised by this tax.

Mr. EMERY. Except that part of it which it retains for the purpose of administration which amounts, on its own calculation, to 10 percent, of the whole.

Senator BARKLEY. Insofar as any number of States refuse to follow suit and go on with this law the Federal Government will gain?

Mr. EMERY. It will.

Senator BARKLEY. That is one of the things it seems to me that it will be necessary to have, in order to offer an inducement, or to have a sort of a penalty to compel States to act. It is unfortunate that we have to do it that way, it seems to me.

*Mr. EMERY. If you will pardon me, Senator, the moment that you attach the view which you have so well expressed of a "penalty" to secure legislation by the States you are immediately confronted by the child labor tax case, *Bailey v. Drexel Furniture Co.*, (259 U. S. 39), and *Hill v. Wallace*, (259 U. S. 44).

Senator BARKLEY. I do not think the question raised in that case is analogous at all.

Senator GERRY. Haven't you done it in the estate tax?

Mr. EMERY. No sir. The estate tax involved no suggestion upon its face or in its terms of any efforts to compel or influence the enactment of legislation by the States. On the contrary, 46 States had already enacted legislation. Furthermore, the revenue derived was for no other purpose than the support of the Federal Government. To provide an analogy, it would have been necessary for the estate tax to have made the credit against the State levy available only on condition that such estate tax was conformable to standards established by the Congress. On the contrary, each State was left without suggestion as to the form of its own tax.

Senator GERRY. The idea was to make the States raise the estate tax.

Mr. EMERY. There is no suggestion of that on the face of the legislation. The ulterior purposes of Congress are never open for examination to the court, except the purpose of Congress is expressed on the face of the legislation. In the child-labor-tax case you had already had the previous act of Congress invalidated in the 247 U. S., as a direct attempt on the part of the Federal Government to regulate production within the States under the guise of regulating commerce. In the child-labor-tax case you had a tax of 10 percent, in addition to all other taxes, levied on the product of labor under the same terms and conditions as the previously invalidated act. The court then took the position that on the face of this legislation the regulation provided was not incidental to the collection of the tax, which is the true test of whether or not it is a revenue act or a tax. On the contrary, it was obvious, on the face of the act, that it was intended, by a penalty, to compel the States to legislate in the manner desired by the Federal Congress.

Senator GERRY. I think you will find in the debate in the Senate that that matter was covered in the discussion of the estate tax.

Senator COUZENS. May I ask, Mr. Emery, whether you are opposed to this bill? Are you going to propose anything with respect to relief of unemployment?

Mr. EMERY. Yes, sir.

Senator KING. I hope as many Senators as possible will remain, because it is our desire to have Mr. Emery finish and to have the other two witnesses before we adjourn.

Senator BARKLEY. It is impossible to do that. The other two witnesses will take 20 minutes apiece; and with the questions that

are liable to be asked, it will take over an hour. I thought it was understood that we would finish with Mr. Emery, if possible, and then come back with the others tomorrow. Most of us have got to go on the floor.

Senator KING. The chairman of the committee wanted the committee to continue and hear Mr. Emery.

Senator BLACK. I want to ask him one question.

Senator KING. Pardon me. The other two witnesses will be heard tomorrow.

Mr. EMERY. If you will permit me, Mr. Chairman, the testimony of the other two witnesses is much more important than my own, because it goes to the very heart, of the bill and to the practicabilities of the measure itself.

Senator KING. You may proceed.

Senator BLACK. Mr. Emery, as I understand it, you take the position that the way we propose to raise money is unconstitutional and therefore we should not do it that way?

Mr. EMERY. I say it raises a serious doubt as to whether it is constitutional.

Senator BLACK. You would agree with me, I assume, that we would have a perfect right to raise it by an excess-profits tax, a manufacturers' tax, a tax on high incomes, high inheritances—that we could follow the plan we had adopted heretofore in reference to State highways, where we granted the States a subsidy; you would not raise the question of constitutionality on that kind of a tax, would you? . . .

Mr. EMERY. No.

Senator BLACK. You think that kind of a tax would be constitutional, and you think this one that we are considering now is not constitutional?

Mr. EMERY. I would not question the constitutionality of an excess-profits tax and estate tax or income tax, as long as you would raise revenue by it.

Senator KING. Unless it was confiscatory.

Senator HASTINGS. Mr. Emery, what would you say about a Federal tax levied for the specific purpose of taking care of the unemployed? Do you think that is within the Constitution?

Mr. EMERY. You mean if a special tax were raised for the purpose of meeting the emergency conditions with which we are confronted, in further aid to the unemployed?

Senator HASTINGS. Yes.

Mr. EMERY. I think somewhat contemporaneously the exposition of the situation in the form of State aid gives very considerable support to such a proposal, where the funds are raised to meet the existent emergency, and that passes away when it passes away.

Senator HASTINGS. Do you not think the way we have escaped that in the past is we have made those contributions out of the general fund. Would it not be very much safer to provide for the payment out of the general fund and then levy the necessary taxes to meet the general fund, without specifying that it must be used for a specific purpose, like taking care of the unemployed?

Mr. EMERY. Of course the limit of a Federal tax for State aid raise questions that are not—I want to make it clear-capable of a juridical remedy. In testing the validity of it, and you may be able to levy

a tax which in some respects might be entirely anticonstitutional, but might be unconstitutional with reference to the levy of this tax.

Senator HASTINGS. I agree with you entirely.

Senator KING. Proceed.

Mr. EMERY. The only thing I want to say in conclusion, Mr. Chairman, on that point is I would like to refer to one additional case, *Florida v. Mellon* (273 U. S. 11), and simply call your attention to the fact that in that case, which went to an effort on the part of the State of Florida to prevent the collection of the Federal estate tax, the simplest examination of that case, in comparison with those I have cited here, would show there is no analogy between the two. No argument can be drawn from the Florida case whatever to support the suggestion that the estate tax was enacted, or that it was administered for the purpose of compelling any action on the part of the States. No analogy can be found between these two, unless the condition for the receiving of credit by the citizen through the payment of the estate tax rested upon the proposition that the Federal Government had attached conditions to it which compelled the States to enact legislation in order to receive the credit for the citizen. It was obvious on the face of this tax that the regulations suggested is not for the purpose, incidentally, of assisting in its collection or administration and enforcement, but that the tax was levied with no intent to secure the revenue but with the major purpose of securing action by the State.

So as a general conclusion we point out that on the face of this legislation, the success of it as it is written, as its proponents assert, as its terms identify it, all go to the proposition that as a revenue measure it must fail in order to be successful as a social measure. In other words it will fail exactly to the degree contemplated by its proponents if it raises revenue instead of procuring regulation, by the States; and thus carries on its own face the means of defeating its own revenue objective.

Senator HASTINGS. Did you put in the record the reference on that Florida case? You may hand it to the reporter.

Mr. EMERY. Now, Mr. Chairman; I would like to present two additional witnesses to you who are more expert in the presentation of the case than I am.

Senator KING. The chairman is very anxious that we conclude this hearing this morning, but all the other Senators who were here are departing and they have insisted that we adjourn at this time; so in obedience to their wishes I shall declare the meeting to stand adjourned until 10 o'clock tomorrow morning.

(Whereupon, at the hour of 12:10 p. m., the committee adjourned until 10 a. m. of the following day, Friday, February 15, 1935.)