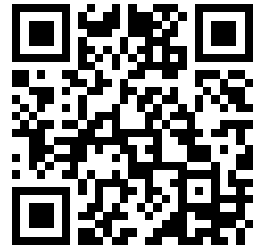

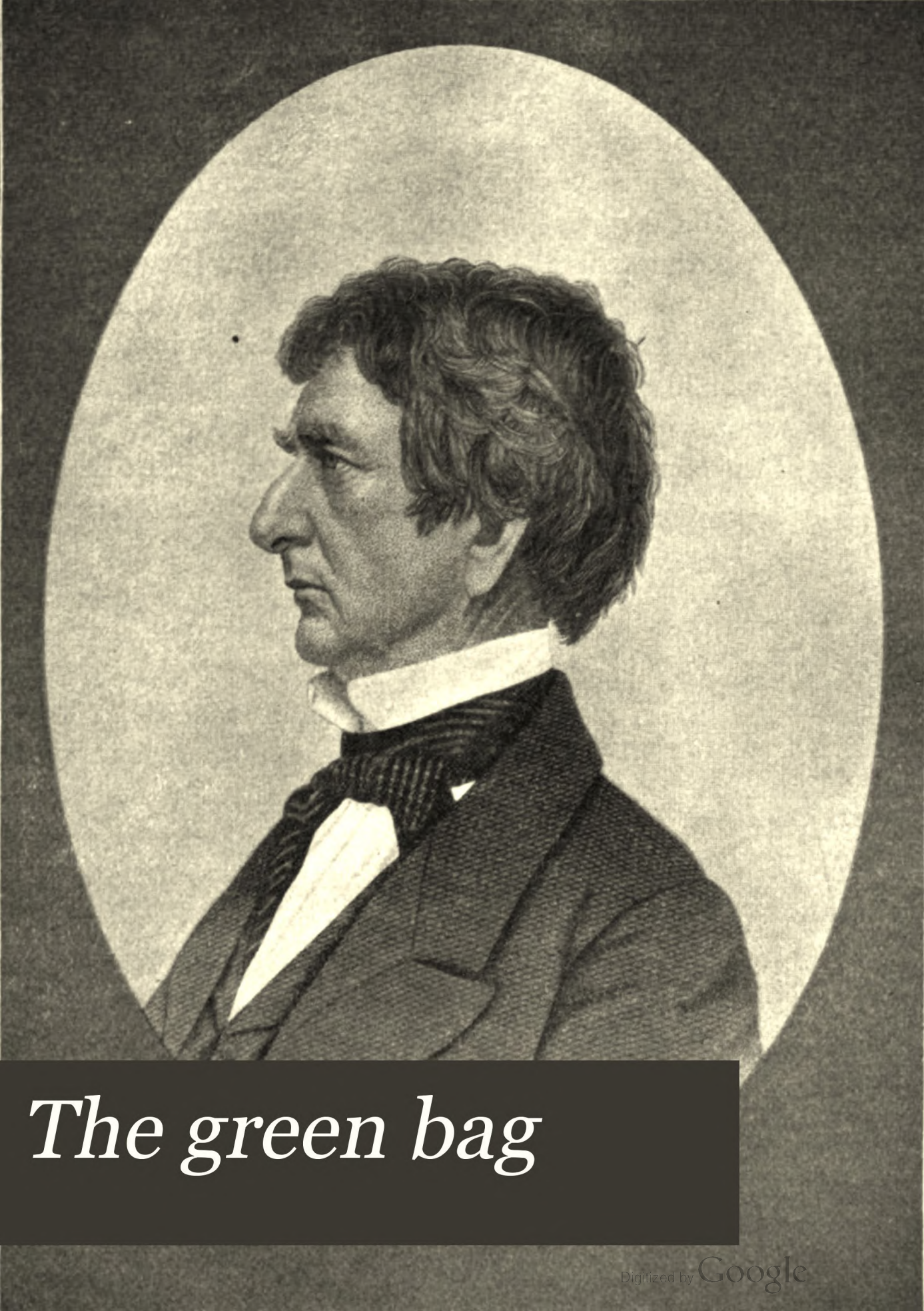

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Melville M. Bigelow

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A SCIENTIFIC SCHOOL OF LEGAL THOUGHT

By Melville M. Bigelow

I

TWO distinct schools have in succession held the field, more or less, of legal education in English and American law, the analytical of Bentham and Austin and the historical school founded by Sir Henry S. Maine; though the first-named, conspicuous in England in its day, hardly played any part at all in America. Discussed here with interest some thirty years ago, as expounded by its more recent masterspirit Austin — Bentham had long been only a name — it was discussed on the whole adversely, and soon passed by altogether, to give place to the historical school, so far as any distinct school of legal ideas followed. In England too, the school of Bentham and Austin failed to take root and has been entirely superseded by the historical school. The latter holds its place, wherever it has been received, in undiminished favor.

I will not attempt to set forth in detail the characteristics of these two famous schools; someone else perhaps will do that. It will be enough for my purpose to remind the informed, and to intimate to the uninformed, that the analytical school threw aside the teachings of history, except such as were permanent in nature — and these could hardly be called historical — and planted itself on its own conception of the nature of rights and law. On that footing Bentham could serve up codes and constitutions according to taste. These were the palmy days of *a priori* law — for Bentham.

The name "historical school" suggests what that school stands for. The law is to be found altogether in books; search the precedents, apply legal reasoning, and the result will be the law of a case not specifically covered by authority — so far indeed the historical school agrees with most current teaching of whatever school or of no school. But beyond this the historical school directs the student's attention to the study of legal history, as found in historical collections of precedent or other authority, as the true and main source of our present law. The whole of the past, as far back as the Norman era, is to be placed before the student, not because all of this, or the greater part of it, may be necessary to explain the judicial law of our day, but because there is one continuous stream of law from the earliest times to our own. The student is directed to the study of law as declared in former times because it is an earlier part of the stream — in that sense the source of law. An interested witness, and to a considerable extent a follower myself of this school, I must leave the special discussion of it to others, while I try to point out my preference for another. Suffice it for my part to say that it seems to me that the historical school, in professing to teach existing law through history primarily, confuses history with (what certainly should be taught) the sources of law in the proper sense of the word. Having regard merely to the existing law, legal history as such is for the historian, though history which throws light on the law as actually administered by our courts is a necessary part of a sound education for the bar. I shall come to that subject again.

I am persuaded that there is something

better than either the analytic or the historical school, better than both combined — something which will adopt whatever is useful in each having regard to the actual conditions of life in our day, and will furnish besides much of first importance which they pass by; in a word, which presents a sounder system of legal education; a suitable name perhaps for which appears in the title to this paper. The subject accordingly concerns the theory of legal education, not the mode of acquiring it.

Let me now endeavor to explain what I mean by a scientific school of legal thought.

Municipal law is founded upon the conception of right; which, as the courts profess and appear to treat it, signifies freedom to carry out one's reasonable purposes in any reasonable way; in short, to do whatever is reasonable. In so far as the law fails to realize this idea, it fails of what I mean by a scientific result; to work the idea into fact on all sides would be to make the law wholly scientific — the law would then be in fact what it professes to be. It cannot be too much to say that the law should be constantly working to that end What this means may not appear by the mere statement; as it is of the essence of a scientific school of legal thought, it should be worth finding out.

One thing of importance stands out in clear lines — the law follows right, if law is founded upon a conception of right; it must at least make that its constant aim. It is a mistake, as was noticed in a former paper,[1] a mistake growing out of taking figurative language for fact, to suppose that law is a distinct entity and cause of things. In a secondary way law may in certain cases be said to create rights; as where a grant of authority by the legislature to do what before could not lawfully be done has been accepted and acted upon; but this creative power of law itself springs from right, the right of the State to legislate for the welfare of the people. This appears plainly from the consideration that if the legislative act was itself unauthorized, that is if the State has conferred no right upon the legislature, the legislative action confers no right.

As, then, law follows or at all times endeavors to follow, the judicial conception of right, and right according to that conception signifies freedom to carry out one's reasonable purposes, it results, in sound theory, that law follows or endeavors to follow the reasonable exercise of purpose — law follows and conforms to men's business, men's pursuits. That should be the conclusion; but fact halts on theory, sometimes only in appearance indeed, far too often in reality. At first appearance it would seem that the discrepancy was very great, great enough almost to cause one to question whether any such theory has a place in the operation of law. Indeed the law seems to be flooded with *a priori* rules, rules fashioned, if not before, at least with small regard to, the pursuits of men. How full of such rules the law of property appears to be; how many there seem to be in contract, in criminal law, in tort! Even equity contributes to the common stock; and the statute book and, still more, written constitutions furnish another supply. The first glance would put aside any theory that law follows, or follows with anything approaching consistency, men's pursuits; it would even seem to take from the doctrine that law follows right itself all but a barely theoretic notion. But first impressions are apt to be untrustworthy.

I want to speak now, not merely to lawyers and students of the law, but to the less informed. I want to take the business man and the simple tradesman into my counsel and confidence; nay, I would fain speak to the wayfaring man, in language which I hope will go home to him as well as to his more fortunate neighbor. I would convert the rebellious laboring man to a better

[1] *Definition of Law*, Columbia Law Review, January, 1905.

way of thinking of his country, by showing him that its laws are after all much better than he is inclined to believe, that sound agencies are at work for better things, that the tendency is clearly and faithfully towards improvement. I would give him a hopeful for a despairing view and turn his animosity to respect and confidence. Here is, indeed, the opportunity of the patriotic lawyer; it is in his power to give effective help towards saving the country from perils more serious than any growing out of differences of political views, however great, however fundamental, however antagonistic, — the social perils which now darken our skies. It is, I believe, within the power of the legal profession to improve upon the famous but inconsiderate Norman boast, "Nolumus leges mutari," by a saner, safer word of our own people, "We are content."

I am then speaking to my fellow-men generally, as well as to those who will find my words familiar enough — familiar enough no doubt to be dispensed with — I am speaking to the uninitiated, and I shall use language which may not be so familiar to them, and hence may be worth using; but it must be language which they will in substance understand.

I begin then by saying that the objection laymen mostly raise, which in effect is that our laws do not conform to the pursuits of men — that they are largely *a priori* law, and so are not founded upon experience — while containing some truth, enough indeed to give it plausibility, has not the foundation, and especially has not the hopeless aspect, which they give to it. It is, I am sure, something to say and worth making clear, that most of the rules of law which now appear to be *a priori* were in their origin adopted from experience, for that is to show that the aim of those who are responsible for these rules has been right. These rules at first certainly followed the pursuits of men, and hence, so far at all events, are consistent with sound theory. A few, well-scattered, but simple illustrations, drawn from affairs of every-day life, will enforce the point.

The first shall relate to property in land, the particular subject of annoyance to my layman neighbor. "Are not these laws of real estate archaic?" asks my friend. Yes, some of them are — some of the most characteristic, some of those in most common operation. But if these are archaic, as they are, they are so because they are feudal or relate to feudalism; which is only to say that once they had in them the life of the time — they started out and lived for centuries on sound theory. And when at length that life began to die out, and the rules to become in effect *a priori*, remedies more or less efficient, perhaps I ought to say more or less blundering, but still well intended, were applied until finally little was left of the feudal idea but a shell — a lot of names and bare survivals, which will yet be dropt if lawyers are faithful to their calling and legislators are properly informed. "But there is more than that in it," replies my friend. "Why," he asks, "should there still be differences between real and personal property, why for instance between the drawing of deeds and of wills in disposing of the two kinds of property?" As for the broader question, it should help the inquirer to a proper frame of mind to be assured that legislation is gradually removing the differences — that the tendency is right, and that therefore he may look with confidence to a future not far off when all but the essential difference between land and goods will have disappeared. Obviously the business must proceed with caution; to attempt at a stroke to settle the matter might be productive of more mischief than good. And then in regard to the particular question of the difference between wills and deeds: in so far as that question has not been answered already it should be said that wills escaped in great measure the laws of feudalism, by having been shut out of the feudal economy. Wills of land came into existence when the light of feudalism had gone out; and so the

courts were permitted to administer the purposes of the testator with a comparatively free hand. The testator accordingly could devise his lands absolutely without the use of the troublesome language required in a conveyance by deed. The deed is in origin a feudal instrument, and is still clogged with some of the requirements of the time of the first King Edward; but these requirements have long since become in great part only a familiar formula of words, with which everyone is acquainted and indeed satisfied. It is, in fact, doubtful whether our deeds of conveyance of the present day could be improved. The historic words, "to the use" of the grantee, so potent originally and still of such legal significance, have a suggestion of meaning, which if not the true one, is sufficient to satisfy the layman. The layman would not strike them out.

To pass on to another case, our neighbor balks much at certain phases of the law relating to the sale of chattels. The seller is made to warrant his wares, when in point of fact, as he declares, he has done nothing of the sort; here, he insists, is a plain departure from sound theory — the law which makes him warrant when he did not, either in intention or in the natural meaning of his words, that certainly is *a priori* law. And so it seems at first perhaps even to the lawyer. But the second thought is better, and our friend will be helped when informed that, artificial as the rule of warranty in sales of personalty is, it is after all no more than an adjustment of the balance made necessary by one of the layman's own rules, the rule that the buyer must take care how he buys — *caveat emptor*. The last named rule is only a legal expression of the rather low morality of sales by salesmen, who have in England and America generally insisted that if they have committed no fraud in word or act the sale is good, though the seller knew, and knew that the buyer did not know, of facts affecting the value of the goods. The law has followed their lead, in most States, and made good the bargain notwithstanding the non-disclosure: that is to say, the law in such cases gives no redress to the deceived buyer. But that is hard: and to make things even, the law says that the buyer may regard any statement of fact made in the negotiation by the seller, touching the nature or quality of the goods, as a warranty unless he plainly refuses to warrant. The seller had too great an advantage under his rule of *caveat emptor;* the balance must be redressed. The situation might have been saved by having the rule of the sale run *caveat venditor*, as in the Roman law, ancient and modern; then there would have been no need of the judge-made warranty. But in that case the seller might equally say that the law does not follow experience; it is judge-made, *a priori* law. Here then again, the case only needs proper explanation to reconcile it practically to the theory under consideration.

The rule of joint contract next objected to, as being artificial, contrived in the back of the head, is perhaps more troublesome to explain. That does certainly appear to be *a priori* dogma; lawyers themselves generally so regard it. But surely, objectionable as it is, it is not so bad as men would make it, so bad I mean in relation to sound theory. If joint contract law appears to be *a priori* dogma, it was at the outset, it seems, only a deduction by the ordinary process of reasoning from the prevailing feudal rule of joint tenure. If joint tenure was not to be severed (before statute) without consent of all the joint tenants, why should joint contract, especially when the parties were joint tenants, be treated differently? But in that case logic no doubt was tending to part company with theory, though probably not of purpose or even consciously; it was only a case of applying reasoning to the subject, wrongly, it seems to me, for it overlooked the effect of feudal custom, but certainly applying a familiar process to the solution of a question.

Merchants, we are next reminded, have a grievance with the doctrine of considera-

tion in contract, where at any rate the contract is in writing; a man's signature, they say, should be binding; and eminent lawyers, like Lord Mansfield, have agreed with them. The answer, familiar enough to lawyers, is based on the economic idea that something should not be required for nothing — that dealings import exchange of things real and equivalent. A man may presently give away what he will, if creditors are not to suffer from the gift; but a man should not bind himself to give in the future, with the uncertainties of it. He knows the present and may give accordingly; to bind himself to a gift in the future might ruin him. This reasoning is of course unsatisfactory to the merchants, on grounds peculiar to the need of rapid transfer of pecuniary interests. But one of the chief grounds of objection has, one is glad to say, been removed in the final overthrow of Chancellor Kent's doctrine of value; a creditor may now safely receive a negotiable instrument from his debtor, as security for a pre-existing debt. It is not necessary to try to discover a consideration to support the transfer; the merchants have prevailed. After this there can be little ground of complaint against the rule requiring consideration.

The criminal law is a good field for the layman's criticism and yields at once its example. He sees that branch of the law breaking down under his own eyes, in what many laymen believe to be its failure to reach out an arm it ought to extend; an arm however, which long ago became withered in the socket.[1] It cannot strike as some would have it. Its blow was paralyzed for the most important of purposes, by self-imposed limitations of procedure; and now equity, which always had been required to keep its hands off the preserve, finds itself compelled not merely to lend, but to take, a hand in the business of keeping the public peace. And yet the criminal law has always professed to follow rights. And the profession was until well within the last century fairly carried out. There was no need of the injunction; the jury answered the purpose fairly well, even if in a somewhat tardy and indirect way. And thus the very idea of prevention was so far lost sight of in regard to crime that it came to be understood that criminal law could not work except in the one way of the jury. And parliaments and constitutions, as well as judges, learned the negative lesson in the same way. Now, in our day, under social conditions unknown until within our own memory, with social upheavals throughout the land, breaking up communications, interrupting peaceful vocations, sometimes of the most solemn kind, and threatening not merely the peace but the very life of States, now at last, in the opinion of those most closely connected with peace and order, the judges, it is found that something must be done to replace the withered, dead hand of the criminal law. The past, with its stagnation, with its stifling and crushing out of courage and manhood, is not sufficient for the day when men, under an improved but still depressing social order, begin to assert themselves; and the best men stand aghast at the situation. The criminal law of Edward the First or of Charles the Second or of George the Third will not do for the 20th century; that must be admitted.

Still the criminal law has always sought, after its way, to protect men in their reasonable pursuits, and, so far as any general policy is concerned, without attempting to force them into this or that way of carrying them on, and so has professed to conform, and hitherto practically has conformed, to the theory in question. To-day, in times

[1] What in effect was the injunction was in use in England long before the chancellor appropriated it. See Bigelow, History of Procedure, 192–196; also the references in the Index of *Placita Anglo-Normannica, sub voce* Injunction; Pollock and Maitland's *History of English Law*, ii, 593, 594. The writs in *Placita Anglo-Normannica*, 105, 159, prohibiting disturbance of men exercising their rights, have a familiar sound, as if of recent events.

of social revolution, it is crying out for means of conforming to it.

That may be true, the critic perhaps will say; but as he thinks of the matter the whole of the criminal law appears to him to be arbitrary and artificial. He wants to know why breach of trust in certain cases is a criminal offence while breach of contract is not; is there any consistent distinction running through the criminal law, which saves it from the charge of being haphazard? My friend does not object to a distinction between compensation and punishment; he knows that such a distinction has been well marked from the time when, according to a recent version of scripture, Adam and Eve "lost their property." The objection is only that the distinction is not carried out upon sound theory.

The answer must be given in broad lines. Our friend must be informed that the criminal law has two tap-roots, the first public defence, the second possession. In regard to the first, it will only be necessary to remind him that in early feudal times the chief danger to the king's government was the turbulence of the barons; their jealousies and enmities, accompanied as they inevitably were, with depredations and slaughter, often leading to outbreak and war. Such things must be put down, or the king himself would be unseated; they must be put down and the offenders punished — to take their lands and goods would be part of the punishment indeed, but only part. It was of the same idea, extending with time, that all disorder, of whatever kind, was dangerous to the State and must be similarly dealt with. In the earlier times — my friend is well informed on this point — little if any discrimination was made between small and great breaches of good order, except in regard to the weight of punishment; but breaches of contract, among a people not engaged in commerce, were matters of small importance, not touching the king's welfare; and so redress in such cases was left to the injured parties in the way of pecuniary compensation. And in process of time the smaller offences against order detached themselves from the greater ones, as not tending to affect the State, and they, like breaches of contract, became the subject of compensation only, forming our law of torts. There is surely nothing arbitrary in this, so far as the idea of the whole is concerned; though in regard to details there might sometimes be ground for difference of opinion. It is not necessary to consider changes of theory in regard to the purpose of punishment.

The other tap-root, possession, involves some technical law; but the essential idea of it may readily be understood by laymen. Possession in primitive, and indeed in civilized times, is a conception closely akin to ownership. We still speak, in ordinary language, of a man's possessions in the sense of his property, that idea was very greatly intensified in early times. My friend will now anticipate the point — a man could not steal what, though only for the time being, was his own.[1] Hence the distinction of to-day between larceny and "conversion"; the man in lawful possession of another's goods, who wrongfully converts them to his own use, must make compensation but cannot be punished as for crime, as he might have been had he not had lawful possession. Hence too the distinction in former times between larceny and embezzlement, a distinction now fortunately removed by statute — fortunately, because it is very important that embezzlers should be dealt with with the strong hand.

The criminal law is no doubt imperfect, but it began and still is proceeding, as far as it goes, on right lines, with a tendency more and more to plant itself on sound theory.

[1] The modern way of putting it is, that larceny begins in trespass, that is, in *wrongful* taking possession; which is the same idea. A man could and can steal his own goods, if only they are in the lawful possession of another — such is the potency of the old idea of possession. See Commonwealth *v.* Rourke, 10 Cush. 397, 399.

There is another difficulty laymen often feel, of a more general nature, which they would perhaps call an excessive fondness of the judges for reasoning, without due regard to what, if taken into account, might modify or even nullify the result. There is, I think, good ground for this complaint. The effect may be a true case of *a priori* law; that will be so when some just custom or practice, which might decide or materially affect the decision of the case, has not been considered. It is one of the boasts of our judicial law that it is a law of reason; of the significance and value of that fact Sir Frederick Pollock has written eloquently in the last of his lectures on The Expansion of the Common Law. Sir Frederick has there told us that this law of reason is the substantial and intended equivalent of the famous and salutary law of nature in Roman jurisprudence. There may have been no ground to complain, among the Romans, that this law was sometimes expounded without sufficient regard to actual life; I do not know, but one may believe that the Roman jurists generally were very practical men and would not be misled into reasoning not founded on the pursuits of men.

Be that as it may, it certainly cannot be said that our law of reason is always expounded with sufficient regard to relevant facts. Reasoning of the judges may not be "in the air"; it seldom is —it is generally legitimate reasoning on the facts upon which it professes to proceed. It is correct in purpose; but the objection is that the judges should have directed inquiry in many cases into the habits, custom, or practice of men in the particular situation, and that the inquiry properly pursued would have brought to light facts which would have more or less vitiated the reasoning. This is particularly apt to be true of branches of law which have sprung from the custom of merchants, such as the law of negotiable instruments, the law of insurance, and the law of partnership. Judges reason, in these cases from common law doctrines of contract, a subject with which negotiable instruments and insurance particularly are much at variance; so much so, it should seem, that judges should at once be put upon their guard. Much *a priori* law has been engrafted upon the subjects named because of this tendency of the judges to reason from the common law. The dangerous feudal and anti-mercantile doctrine of joint contract, already referred to, has been fastened upon commercial instruments and partnership, as if of course, with all the evil train of common law consequences. In the law of insurance judges will, to refer to a single case, reason of warranty from warranty in the common law subject of sales, to the confusion of the whole doctrine as custom has it.

We must not boast too much of our law of reason. The lesson of danger should be plainly taught. The layman's complaint has a good foundation; the only answer to it is, that the judges, notwithstanding their excessive faith in reasoning, are faithful in intention to the theory of rights as laymen themselves would define the term.

My friend brings forward still another subject of grievance which he, being a layman, can only define, for want of requisite technical learning, by saying that the proceedings of the courts are to him unintelligible, and often, he is certain, work to the defeat of justice. Practice and technicality, he says, constantly prevail over right. Putting the subject of complaint into one general term, his grievance is procedure. How much ground there is for the idea that procedure is out of touch with the fundamental idea of right so frequently stated in this paper, at least how much procedure *has been* out of touch with it, every well-informed lawyer knows full well. Time was when lawyers and judges would not admit the fact, or would admit it only with the answer that the evil, such as it was, was necessary; it was far better to ignore or endure it than that the sacrosanct laws of procedure should suffer violence. Was it not enough to sat-

isfy an ill-starred victim that his bad luck had thrown light upon "color" or "*absque hoc?*" The judge and the lawyer on the *other* side, they at least were satisfied; while the winning client wondered and praised God — or the law, in doubt perhaps of the real agent of his happiness, though certain "'twas a famous victory." But though men in middle life remember it, this is of the past, and only some ancient specimen of the order of special pleaders, outliving his day, now "casts a longing, lingering look behind," to the good old times.

The layman is right; procedure has been a prison-house for the law. Many a crippled rule of substantive law traces its appearance back sooner or later to some phase of procedure — to set forms of action, jurisdiction, "niceties" of pleading. I need not speak in detail, for my associates understand, and my neighbor layman would find his thoughts — or mine — confused in the technical language necessary to the discussion; enough to allude to the fact that the common law, standing in the early and middle period of English history for all the ordinary internal affairs of men, was for centuries imprisoned within the narrow walls of some half-dozen forms of action, and that the attempt of the counsellors of Edward the First [1] to set the prisoner free was foredoomed to failure. The lawyers disarmed the forlorn hope and turned it to their own account. There were now two victims to torment with curious and cunningly-devised mischief.

I have already spoken of the elaboration of an artificial system of pleading, without the business raising so much as a suspicion that the artificial might not be suited to things real; of this enough, after a word more. The artificial modes of thinking handed down for centuries could not but affect the legal profession even after the change which swept away the substance of false ideas. Medieval ideas, medieval modes of reasoning, have not yet entirely let up their grip. A single illustration may be useful even to my associates. There stands in our own books of pleading and evidence, in books not yet gone out of use, a rule to the effect that words of description in an allegation identify the fact to be proved; and now, *ergo*, according to medieval thinking, the proof must be exact and literal; beginning with an artificial premise you must push your conclusion to the utmost extent of artificiality — it is all a matter of reasoning and though the reasoning is in the air, it is reasoning and must prevail. Now what has come to pass? Suit within thirty years, in Massachusetts, for slander; the plaintiff alleges that the words were spoken to the members of a certain corporation, which identifies the mode of publication; *ergo* the plaintiff must prove that the words were spoken before the corporation; the plaintiff proves that they were spoken to a person who as a matter of fact was a member of the corporation; that will not do, and the defendant leaves court rejoicing.[1]

I make but one more remark on the whole subject. The case just put is probably an expiring word. Only a remnant of the false remains, a considerable remnant it may be in some States, but still a remnant, with the tendency of that to disappear. Would our lay friend see sound doctrine fully asserting itself, he may see it working as if with a stroke at the whole fabric, in our statutes touching procedure; if he would see it working a revolution of the whole machinery in a day, let him see what was done in England in 1873, and my own associates might well look into the English "Statements of claim" as the substitute for the whole ancient system of forms of action. The situation is full of hope; the tendency is plain.

There are other subjects for criticism which are not so much in the eye of the lay-

[1] St. Westminster 2, chap. 24.

[1] Perry *v.* Porter, 124 Mass. 338.

man as the foregoing; some of them may well be brought forward in aid of any case that may be made against the law in the particular under consideration. I shall now talk more to, or in the presence of, our lay critic than with him.

The law of torts bristles with examples in which the connection between the pursuits of men and the law seems to be lost. Trespass to property is the ever-recurring instance, and will suffice. The subject is founded upon what plainly looks like *a priori* doctrine, to wit the requirement of possession. To save the subject to the common law courts, it was found necessary as early as the 16th century for the judges to resort to fiction. A man who had the right to take possession of a chattel was deemed to be in possession of it; and while, for reasons relating to the effect of disseisin, they could not apply the fiction in full to reality, they could say that after a man who had been ousted of his lands had regained possession, he was deemed to have been in possession all the time and only to have suffered from the other man's daily intrusion and carrying off the emblements. And so here in effect the law was correcting itself to sound theory, though the immediate motive was to stay the hand of the chancellor. The real idea still was that law should follow the pursuits of men.

But the rule in trespass — the rule of possession — was not originally an *a priori* rule at all. In the case of lands it was in perfect keeping with the spirit of the times, it was indeed only a reflection of them, that a man who had been disseised, and of course only a full freeman could be disseised, must regain possession before anything else. Otherwise he would lose, in the eyes of the feudal state, the position of a freeman; to be a man he must be in control of a freehold. If the person ousted was only a tenant for years, he had no possession in law at all, until statute came to his relief, even though in actual enjoyment of the land. That was feudalism in practice; that was feudalism in law. As for chattels, that was a matter which naturally followed the rule in regard to land; the first impulse of a man of spirit, that is of a freeman, was to make war on the one who had made the invasion and recover the booty with interest. That too was feudalism in law, because it was feudalism in practice. Besides, there were remedies of a criminal nature suited to such cases. It was only, then, in process of time, upon the decline of feudalism and the appearance of another social order, that the rule of possession became an *a priori* rule, losing connection with life. Then came the new alignment of law.

Let us turn to equity. Equity has always delighted to "follow the law" — except when law has gone wrong, in which case it has been content to follow right. Equity is indeed the most faithful example the law affords of the theory we are considering, because, unlike the common law, equity could always adapt itself, and generally has adapted itself, to new situations as they have arisen without resorting to the devices which the common law has so often found necessary to rescue itself from danger. Equity has always been, what a sound system of law as a whole should be, flexible in its own nature and so adjustable to changing times and conditions. It supplies the idea and almost furnishes the model of a sound theory — almost, but not quite, for in equity, too, fact halts somewhat on theory.

The chancellor once had criminal jurisdiction of an important kind; indeed at first one of the chief grounds of the chancellor's jurisdiction as a judge was his power to put a stop to crime, when in high places, beyond what was supposed to be within the effective reach of the common law judges. He afterwards permitted that feature of his office to die out, as the ordinary judges found themselves more and more equal to the business of dealing effectively with wrongdoing by the rich and powerful. But the judges did not find it necessary to make use of the chancellor's weapon, the injunction; indeed,

in this later stage of the law they could not have done so without authority from Parliament, which probably would have been refused if it had been asked for — the chancellor now would have been ready to take care of any such suggestion. And the powerful, and in many cases the only effective weapon for defeating crime fell between the two and expired.

There is no *a priori* law in this impairment of the injunction; but it must be admitted that the failure of the chancellor to keep the injunction alive for possible needs is a serious departure from the idea that the law should follow and protect the reasonable pursuits of the people. The result is, that a great and serious cry is now going up against what might never have been disputed; and the cry is so widespread and influential that legislation is halting if not powerless, and only the judges know what to do.

Constitutions and statutes are apt to contain real expressions of *a priori* doctrine, constitutions particularly in the framing of government. The Constitution of the United States is of course the striking example, or rather contains a supply of examples; one has but to read the debates of the Convention which framed it to see how much of that famous instrument was fashioned on *a priori* lines — a thing of course to some extent unavoidable in such a case. And how liable the courts are to add to the difficulty — sometimes they are driven to it — in construing constitutional or statutory provisions. The word "commerce" in the commerce clause of the Federal Constitution is a striking and to the guild of insurance underwriters a painful example. Congress has power under the Constitution to regulate commerce between the States. "Commerce" was no doubt an unfortunate word to use; but what the framers of the Constitution were aiming at is made plain enough in their debates and in the notorious facts of the time, if not in the final language of the Constitution itself; they were endeavoring to break down the barriers to freedom of intercourse between the States — business intercourse especially, of all kinds. They however, without due caution, used the word commerce instead of business or some such term, and the Supreme Court of the United States, looking at the letter alone, could accordingly say, and did say, that insurance was not commerce, and hence that the States were not prohibited from discriminating against each other in regard to that important subject.[1] And so the business of insurance was put in fetters not intended.

The recent codification of the law of negotiable instruments affords another illustration. Objection has been found to details of the statute, and for the most part, it seems to me, justly. But a more serious objection, I cannot but think, is that the compilers seem to have drafted the law step by step, without sufficient grasp of the general theory which underlies the whole of the law merchant — a defect, it must be admitted, in which they have, now and then, the good company of the courts. The codifiers of the statute in question appear never to have sufficiently considered the fact that the basis of the law was the custom of merchants and bankers, and that that should, as far as possible, that is always if possible, be considered to have been the guide of the courts in expounding the subject, a guide sometimes lost indeed, sometimes not looked for, but after all the general guide. It should have been clear that the departure of the judges, whenever they do appear to have lost sight of the guide, was due, not to any real purpose to refuse a place to custom, but to the natural tendency to apply reasoning, that is common law reasoning, everywhere.

Indeed, the codifiers of the statute seem not to have taken to heart the plain intimation of theory given in one of the early sections of the act itself, — the section in

[1] Paul *v.* Virginia, 8 Wall. 168.

which it is in terms provided that where the statute fails the law merchant shall govern. Losing sight of this fact, or not giving sufficient importance to it, the codifiers could incorporate such a piece of *a priori* law into this important statute as a whole article on acceptance of bills for honor. It will perhaps be said that though our merchants and bankers have never adopted the English custom of acceptance of that sort, they may do so, and it is desirable that they should. That is the most that could possibly be said; and that on its face is unsound — it is the ground always taken for *a priori* law. It is not for one set of men to say what another set should do. If on the other hand it be said that no one is obliged to adopt the practice, then the answer is that the statute is an idle word. The law relating to negotiable instruments, of all laws, should follow business, and not seek to direct it.

The objection here raised is not to codification itself; founded on sound theory, to wit, that it must keep close to life, and not expect to last forever except in so far as it may in the nature of things be permanent, codification of some subjects may be useful enough to justify it.

The result of this prolonged examination of grounds for complaint is that we have much seeming and not a little real departure from sound theory; but even the latter seldom if ever of purpose. Generally it has arisen, as in the case of the loss of the injunction in matters of crime, because for a long period an arm of the law has found no occasion for use. It can safely be affirmed that the law has never for any considerable period, if at all, professed to deny that it should be obedient to the idea that men should be free to do whatever is reasonable. As a matter of fact, however, every ancient — or modern — rule of law which has been kept alive after the conditions under which it was laid down have essentially disappeared, has become from the time of the change an *a priori* rule, and so out of touch with sound theory. The rule may still be workable; we have many such a case, but we should at best tolerate rules of the kind only till the proper time comes to bury them decently, or turn them over to the historian. Of this, however, later on.

How to get rid of such rules, if at all, may not be easily seen. In the case of some of them there is but a survival of what is now nothing more than legal cant, and the judges have but to give up the cant. Why should any judge longer say that possession is necessary to a suit for trespass or conversion, and then take the truth out of his own mouth by saying that wherever it is necessary, a possession in law, which is no possession at all, will be considered to exist? The way is now quite clear for any judge with but a small amount of courage to say that if the plaintiff shows a right and an infringement thereof he shall recover. This would despatch business, by cutting off debate and delay over irrelevant questions, and what is much more, it would tend to cause the people to return to that respect for the law which they have long and not unnaturally been losing. They would then understand the law. Is it not time to show the people, upon suitable occasions, that their own laws are not secrets beyond the power of all but experts to understand? Of course there will be much which only experts can fully comprehend, just as — for the very same reason that — there is much in the daily pursuits of men which only men trained to the particular business can comprehend; but that the people should not be able to understand a rule of law because of some ancient and now useless formula, — jargon to the uninitiated, — should be as much a reproach to those who keep up the farce as it is a danger to the State.

I have thus far been talking with or to laymen, the people; not, and I wish to say this in the plainest words, — not by the way, assuredly not because it would sound commonplace to lawyers; I have been talking with and to laymen because of what

my first words towards them gave a hint. We want the people with us in this business of promoting sound doctrine; nay, we must lean on the people if we would succeed, I will not say in the lower duty of teaching law to students — my remarks would be senseless if they did not mean something quite different from that. We must lean on the people if we would hope to succeed in the higher duty of bringing the law into such perfect touch with them and their pursuits that all will be ready to say "We are content." I would hope to succeed still better than that, by enlisting the people at the outset in the attempt to bring the law, in fact as well as in theory, into practical conformity with the right of every man to carry out his reasonable purposes in life. May we not have ground to expect encouragement from the people if we make it clear that we are teaching young men a practical system of law, the law as it is manifested in the actual course of administering justice in our day — the law as it is, unflinchingly, with all its defects — and then in addition that we are endeavoring to impress on all who will listen, in the Law School and beyond, the importance, as a matter of patriotism, of working to better ends than those which the law has yet reached — may we not, with such aims expect encouragement as well as goodwill from the people?

I hope now that I have made it clear why I have been taking laymen into counsel and confidence in looking into some of their everyday relations to the law and examining their grounds of complaint in regard to it. If now, from this point on, I have to address myself more to the expert and the student, it will not be because I fear to make disclosure; it will be because I must necessarily appeal mainly to those more directly concerned with the administration or study of the law. Still I shall hope that the substance of what I may have to say will not be lost upon any one who cares to hear me.

II

No argument or setting out of illustrations is needed to convince lawyers of the tendency of the law — its general tendency to follow the pursuits of men. To the lawyer that is a perfectly obvious fact; every day's experience with him shows it; he knows indeed that no system of law could stand which denied or was even indifferent to the idea. The only person who needs to be convinced on that point is the dissatisfied layman. But now I want to say, as the very point of this paper, that it is not enough that the general tendency of the law is right. You may put your ship about to port and set your sails to the favoring winds, you may set your helm right. but unless the needle points true and you are vigilant and faithful to your single aim, you will at best only drift, or *tend*, towards it.

Tendency then should give way to definiteness of aim, and steady, persistent endeavor. As was said in one of the early paragraphs of this paper, by way of a keynote to the whole subject, the law should become what it professes and tends to be; it should be in harmony everywhere with the pursuits of men. Law should follow business so long as men of business do not invade the rights of others or interfere with the welfare of the state. When this stage in civilization is reached, the law will be serving its purpose towards accomplishing the ends of existence.

Legal education should, I think, be committed to this idea. The Law Schools, and the bar associations as well, by committing themselves to this definite idea, may powerfully help on the consummation; directly and indirectly they have the power to bring it to pass, perhaps within a single generation, certainly within the present century.

The definite aim should be centred in our day. By the reasonable purposes of men is meant the purposes of men of to-day; the law should be an ever-living fact, a fact of

the life of the present day. It should be for us who now live; to-morrow it will perchance, under change of conditions, be another thing — it will be for our successors. The law should be suited to him who needs its protection whenever he may live, in accordance with times and the pursuits of men. When this ideal is reached, the year 1800 will be no more to the people, so far as the law is concerned, than the year 1700 or 1600 or 1300. All of that, so far as it fails to shed light upon our own path, will be turned over to the historian, or used for another purpose than teaching our law. The historian of the law of yesterday will have his place, as has the historian of other things; he will have his place on the bench, for the bench will always need men of broad mind and learning; but in proportion as the ideal is reached, the judges should find less and less need of seeking authority in the Year Books or in Coke or in the worthies of much later times for their decisions. The life of another and different age will not bind our successors in the day of the full consummation. If we govern ourselves to-day by laws laid down yesterday, it is or should be because those laws are suited to us; they are our own laws, not *a priori* laws made for us by another set of men.

Are we then, in accordance with such a school of ideas, to overrule the past, with all its accumulations? Clearly not; we have only to leave it alone where it fails to serve us. The past served its purpose in its day; why should it have a posthumous life, to trouble men living under other conditions? After the period of the reasonable life of a decision not relating to constitutional or statutory law, let the decision, as a binding authority, die. The latest of the Year Books died long ago; the decisions temp. Talbot, temp. Hardwicke, Burrows' Reports — are these ever cited nowadays by the courts except for history? The Revised Reports of Sir Frederick Pollock, intended to cover all the living judicial law of England, begin but just before the 19th century. Statutes die — where are the judges who have had occasion, except for history, to cite a tithe of the statutes passed before the same 19th century? Who would venture to cite any of our colonial laws, even down to the revolution, as living law? The laws peculiar to our own day will go, because they ought to go, the same way; the only difference, when the new order of things comes fully into operation, being that their day in ordinary cases will be shortened. Let them live a reasonable time, that is so long as they are really useful — then let them die. It will be no cause for fear to see "authority" of the kind relaxing its hold upon the admin istration of justice.[1]

All this is far from suggesting that under the operation of a scientific method the law hereafter will be substantially different from what it is now. No one probably, under peaceable conditions of the State, will have occasion or desire to tear down the structure already erected; much of it is in its nature permanent — its interior walls generally are. These, it may well be expected, will remain substantially as they are now. The pinch of the past is mainly due to the building up of exterior walls; in building outer walls, limitations are often set to the adoption of reasonable pursuits. Even the interior walls may not in every particular be secure for all time. Larceny will always be a legal wrong — probably always a punishable wrong; instinct decrees it and the law must follow. Fraud and damage will always call for redress in compensation; instinct decrees and the law follows. *Et sic de aliis*. But instinct itself is subject to the legal limitation and control of reason. Larceny is likely to remain a crime throughout the future, but the ingredients of larceny and the conditions required for it as a crime are matters of judgment and may change with changes in men's ideas of what should be necessary for the purpose. Fraud

[1] Would there be serious ground of regret if at last we should come to German and French ideas of precedent?

and damage call for compensation, but men may differ in the future as they have differed in the past and now differ in regard to the ingredients of fraud. Instinct may be counted upon; but reason, and especially reasoning, will depend upon times and men. And so it should be; the past, as mere authority, should not lay a heavy hand upon the needs of the future. But after all, the interior structure of the law is likely to remain substantially as it is to-day, in the absence of destructive upheaval. No working of the scientific spirit is likely to tear out the inner walls of the law.

Legal history in any event will have a necessary place in the study and teaching of present law, so long as history is needed to inform men of the meaning of any part of the law under which they live. Illustrations appear in the first part of this paper. The teaching of legal history, to that end, cannot be a negligible factor in the work of legal instruction in our day — in the day of the youngest of us; but the teaching of legal history to that end — as part of a course in the law as actually administered in the courts of justice to-day — should stop where it ceases to throw light on what of the law would otherwise be unmeaning or obscure. To teach legal history as such, to such an end, to teach the stream simply because it has flowed down to us, would, it seems to me, be not merely waste — it would be positively misleading — it would be putting the chase on the wrong scent. A clear discrimination should be made between what influences the declaration of law and what may be useful for other purposes. As a field related to present law, as an outlook, the study of legal history as such — the whole continuous stream of it — will always be informing; to him who has the historic sense, it will be full of interest, and for broadening of the mind it will be of real value. On that last footing it should always have a place in our Law Schools; but this is anticipating the subject of the third part of this paper.

If then the law is to be, and to be kept, in touch with life as it is, if it is to be the obedient follower of the pursuits of men, it is plain that those who are responsible for its behavior should themselves be well informed touching life as it is and the affairs of the people. This is essential if the law is to be placed on a perfect, scientific basis. And so of the teaching of law; that should proceed not upon a blind adherence to and statement of the effect of authority, at any rate not until authority plants itself broadly and with full purpose upon sound theory — teaching should proceed from a competent knowledge of life, with a view to training men to take the right position in regard to the true function of law. In a word a scientific school of law should make it one of its paramount objects to see that sufficient study is made of the sources whence the law is to be declared — the sources of whatever kind, not merely the precedents, not merely the history of doctrine founded upon peculiar conditions of the past, which, notwithstanding all changes, still more or less prevails, but the direct and immediate sub-legal sources, — business and pursuits generally and the other less tangible influences which go to make up the sum total — the political, economic, psychological, and personal influences. Influences such as these have always played their several parts, important or minor, and are likely always hereafter to do so, in the declaration of law.

III

That the law should be brought into close touch with life — that it should "follow business" and the pursuits generally of the people — and that those who are to be chiefly responsible for sound doctrine should, in our schools of law, be trained accordingly — that is not all of what is meant by the title to this paper. In a former essay[1] I endeavored to show that all special educa-

[1] Not published.

tion should be considered incomplete — that after teaching the student the tools of his trade, he should be taken beyond his particular field into fields related to it, to the end of broadening his mind. I am committed by a firm conviction, based I hope on sufficient observation, to the belief that this is especially needful in legal education — a belief shared, I am persuaded, by a larger number of the leaders in the profession of law than is commonly supposed.

It is not enough to prepare young men for bar examinations; it is not enough to make lawyers in the ordinary sense of making or helping to make men proficient in the rules of law. That, taken alone, is special and hence narrow education, however wide the field of law. How special and narrow it is the world judges, too sharply perhaps, but still with much reason. The popular prejudice against lawyers, that they are narrow men, capable only of taking the "lawyer's view," could not arise of nothing. The lawyer in public life — the place for which he should be peculiarly fitted — is a standing illustration with the world, and too often a real disappointment. Thus, in Congress lawyers directly from practice or the bench are apt to fall short of leadership, however successful they may be on the lower level of debates on law or of giving technical aid in the drafting of bills and similar business. Commanding influence there comes as a rule only to men of broad mind and training; lawyers of that description come to leadership in public life, and everywhere.

The difficulty with the rest is, not their legal education — that should be a powerful help — it is that they have not been taken out of the rut and round of the practice of law. There the whole brunt of energy is expended on particular cases, on details; of the wider outlook upon even the whole body of the law, how much of that is there, in the life of the average lawyer, in the practice of the legal profession? The difficulty began and was hardened in the training for the bar. Had a wider education informed the student's special knowledge, then or afterwards — if then, it would have been likely to continue afterwards — the result must have been different, unless nature or inclination committed him to narrow ways.

We must add to our teaching of the tools of the trade an outlook upon, and as far as possible a knowledge of, the world that lies just beyond the field of law. The specialist is a dangerous man, even within his own specialty, if he has not the broader knowledge of acquaintance with fields adjacent. Men are, moreover, going more and more from the Law School into the world, instead of into the practice of law; and that is a thing much to be encouraged. The fact emphasizes the duty of the schools. Specialization is but a first step in education, a necessary step indeed, but only a first step; scientific education calls for the broadening of the mind. "This winter," wrote from Washington, last January, a distinguished friend of mine, who has made the most of unrivalled opportunities for observing the drift of legal affairs, and is entitled to speak on the subject, — "this winter here has convinced me that the function of the Law School must be broadened," in the way indicated in both the earlier and the present part of this paper, "if it is to perform its office."

What the related fields are need not much detain us. I have mentioned legal history; I close with the suggestion that perhaps the most important of adjacent fields are business and government on its political side. The former should at least include transportation, interstate commerce, insurance, and banking; the latter, international law, consular affairs, colonial relations, dependencies, responsibility for countries under protection against foreign aggression, and national expansion.

It will now be proper to present a summary of what, according to the views expressed in this paper, should be taught in

Law Schools willing to do their part in promoting a scientific legal education. The schools should teach

First, the law as we have it, that is to say as it is actually administered in our courts of justice;

Secondly, the nature of the defects discovered in the connection between the law as it is and the theory of rights, together with the duty of earnest, persistent endeavor to bring about a full conformity of the law to the actual affairs of life;

Thirdly, a substantial acquaintance with subjects related to the law, including the sources of the same, with a view to broadening the student's intelligence.

MELVILLE M. BIGELOW.

BOSTON, MASS., Sept., 1904.

TO WIT, TO WOO

A LAW PILL once a-wooing went,
With his said and aforesaid and much ado;
A Law Pill once a-wooing went,
Through a thick black wood of large extent
Where the owls their full-voiced chorus lent,
"To wit, to woo."

The Law Pill smiled with a vague unrest,
With his said and aforesaid and much ado;
The Law Pill smiled with a vague unrest,
But boldly he spoke, "Aye, hoot your best,
For I am on a merry quest,
To wit, to woo."

— *Harvard Lampoon.*

YOUR AFFECTIONATE FRIEND, JOHN MARCH

By L. C. Howard

ONE would scarcely expect to find much of human interest upon the revolving bookcase which stands at the elbow of the busy lawyer. The Revised Statutes, the latest almanac and Poor's Manual do not present a promising field to the eye of the literary bee, and he must be not only a busy, but a very ingenious bee, to extract from their dry pages anything of sweetness. However, on a certain book-case, standing between Desty's "Manual of Practice" and a Daily News Almanac, is a little brown book. One cover is loose, and the book is held together by rubber bands. A glance at the title page shows that it was "Printed for Mathew Walbanck and Richard Best, and are to be sold at Grayes-Inne Gate, 1655."

When I asked for the history of this little book, its owner said, with a reminiscent smile:

"Oh, yes; I bought that book when I was on my wedding trip. I found it in a little book-store in London, near the British Museum. I bought several books, and before the clerk wrapped them up for me, the proprietor of the shop came up and looked them over. When he saw that book, he said: 'I have had that little book in my shop thirty years, and I am almost sorry to see it go out of the shop.'"

I took the book home and spent a golden Sunday afternoon with "March on Slander." From its yellowed pages, with their long s's and quaint capital W's, arose a fragrance, which, if not the "odor of sanctity," still seemed to convey a sense of the sweetness, kindliness and genuineness of the long dead author.

According to the custom of the day, the book has an elaborate title, and the title page gives to the mental ear the key-note of the book, and is, in part, as follows:

"MARCH ON SLANDER.
ACTIONS FOR SLANDER:
OR
A Methodicall Collection,
under certain Grounds and Heads, of what words are actionable in the Law, and what not. A Treatise of very great use and consequence to all men, especially in these times, wherein Actions for Slander are more common, and doe much more abound than in times past: And when the malice of men so much increases, well may their tongues want a Directory."

It is difficult to make selections from this book, for the entire book is both quaint and interesting. The writer begins with an ingenuous statement of his motives, saying:

"I do not undertake this work, with an intent to encourage men in giving ill and unworthy language, or to teach them a lawless Dyalect, but (as my Lord Coke speakes) to direct and instruct them rightly to manage that which (though but a little member) proves often the greatest good, or the greatest evil to most men. And withall to deterre men from words, which are but winde, (as hee further speakes) which subject men to actions, in which damages and costs are to bee recovered."

A brief account is given of the history of the law of libel, which incidentally shows, by contrast, the progress which the world has made, in the intervening quarter of a millenary, toward perfect freedom and universal charity. Who can doubt, after reading the following paragraph, that the great collective soul of the world is rapidly evolving toward perfection? It is true that

when we look forward the way seems clouded and the goal remote, but when some echo from the past calls our reluctant attention to the backward path we see the heavy shadows, and realize that the distant starting-point is lost in impenetrable darkness.

"In 38 years of H. 8 our Books tell us but of five actions brought for scandalous words; . . . And these for no trifling words, for you shall finde that one of them was for calling a man *Heretike*, another for saying a man was perjured; and the other three for calling of one Thiefe, all of which are high scandalls to a man's reputation, and most of them tennding to the loss of life and fortunes; so that it is very true that the Reverend Chiefe Justice observed, that these Actions were very rare in our old bookes, and such as were brought were for words of eminent slander, and of great importance."

The gentle author closes his heart to heart talk with the reader by saying:

"You have heard my advise and direction before, therefore I will here close this with one word, though the tongues of men be set on fire, I know no reason wherefore the Law should be used as Bellowes to blow the Coles."

The many citations found in this book give us an idea of the methods of the embryo "yellow journalists" of the seventeenth century. It is to be hoped that subsequent incarnations have rendered these ancient slanderers more charitable, but their successors are scarcely more subtle, if less superstitious. For example, we find that:

"Hawly brought an Action upon the case against Sydnam for these words, he is infected of the Robbery and Murder lately committed, and smels of the murder, adjudged that the words were actionable, by reason of the word infected."

The decision in "Edwards his case" may interest the vivacious girl whose ambition is to earn the nickname "Witch."

"In one Edwards his case, Hill. 40 Jac. it was said to have been three times adjudged, that to call one Witch would bear an action, and also that an action would lie for calling of one Hag; but I doubt of the latter because I take Hag to be a doubtfull word. But why Witch should not bear an action, I know no reason, being the life may be thereby drawn in question, though I know it hath been doubted."

We are apt to think of our ancestors as matter of fact and perhaps stolid, but that they possessed most vivid imaginations is evidenced not only by their quarrels, but by their statutes, as we see by both case and statute referred to in the next quotation.

"Marshall brought an action against Steward, for saying the Devil appears to thee every night in the likeness of a blackman riding upon a black Horse, and thou conferrest with him, and whatsoever thou dost ask he gives it thee, and that is the reason thou hast so much money, adjudged the words were actionable. Note Reader, that by the Statute of 10 of King James, cap. 21 Conjuration or Consultation with the Divell is Felony."

In the next paragraph we find "one" who seems to have studied diligently the art of blackening character without rendering himself liable. No doubt he had a large family, and from generation to generation his descendants have improved upon the simple method of their ancestor, of whom the author says:

"One said to another, I dreamt this night, that you stole a horse, these words were adjudged actionable: And he said that if these and the like words should not bear an Action, a man might be as abusive as he pleased, and by such subtill words as these, always avoid an action."

The argument used in the next citation seems — at least to the mind of the layman — to be an application of one of those rules which work both ways.

"To say of a man that he deserves to be hanged; adjudged not actionable, because

they are too generall, for that hee doth not shew anything that hee hath done to deserve it."

As an example of hair-splitting distinctions and ingenious perversions, note the defense set forth in the following quotation:

"Benson brought an action against Morley for these words; Thou hast robbed the Church and has stollen the Leade of the Church. Upon not guilty pleaded it was found for the plaintiff, and it was moved in arrest of judgment, that the words were not actionable, because the Church shall be intended the Universall Church, and the Church Militant cannot bee robbed and so the words are impossible: but by Popham chiefe Justice, the action will well lie, and so it was adjudged, because the words in this case cannot be intended of an invisible Church, as is objected, but of a materiall Church, as is explained by the subsequent words, *and hast stollen the lead of the Church:* which cannot be understood of the invisible Church."

It is cheering to find that the ancient punster responsible for the next case met with his deserts:

"The like Case, where one said of an Auditor, that he was a Frauditor, was adjudged actionable."

The next offense is similar, still we may hope that justice in this case was tempered with mercy, for the provocation may have been great:

"One said of a Councellor at Law, that he was a Concealer of the Law, adjudged actionable."

Then comes the decision of a most wise judge, and one cannot but wonder whether, in arriving at his conclusion, he was influenced the more by his knowledge of the law or his knowledge of some lawyers.

"And likewise in this case it was said by Bartley, Justice, that where one said of a Lawyer, that hee had as much Law as a Munkey, that these words were adjudged not actionable, because that he hath as much Law, & more also, than the Monkey hath: but if he had said that he had no more Law than a Monkey, these words would be actionable."

The next and last quotation is interesting, not only because of the astonishing error of judgment of the unworldly Parson Prit, but because of the light it throws upon that time-honored chronicle, "Fox's Book of Martyrs." Apparently in those times the imaginings of some supposedly religious minds were, like the manners of the day, somewhat coarse, but the story told in this case is so absurd, and in its relation to Mr. Fox and his famous book, so interesting, that it can hardly be omitted.

"The case of Parson Prit in Suffolk was thus: In the Acts and Monuments of Mr. Fox, there is a relation of one Greenwood of Suffolk, who is there reported to have perjured himself before the Bishop of Norwich, in the testifying against a Martyr, in the time of Queene Mary and that afterwards by the judgment of God, as an exemplary punishment for his great offence, his bowels rotted out of his belly.

"And the said Parson Prit having newly come to his benefice in Suffolk, and not well knowing his Parishioners, preaching against perjury, cited this story for an example of the justice of God, and it chanced that the same Greenwood of whom the story was written, was in life and in the Church at that time, and after for this slander brought an action, to which the Defendant pleaded not guilty, &c. and upon evidence all the matter appeared, and by the rule of Anderson Justice of Assize, he was acquitted, because it did appear the defendant spoake the words without malice, and this rule was approved by the King's Bench in this case."

And to this day one may read in the "Book of Martyrs" this amazing tale of "one Greenwood," as well as many others quite as remarkable, and perhaps as authentic.

The delightful tone of intimacy and good will which pervades this book is emphasized in the closing sentences, where the

writer speaks as to some dear friend or favorite cousin:

"And so I have quite finished this small Treatise. May the Reader find as much profit and delight in the reading of it, as the Author had in Composing of it, such is the urgent desire of

Your affectionate friend,

JOHN MARCH."

Although March is frequently referred to as an authority in the leading works on slander and libel, it is not easy to find anything in regard to his life in the encyclopedias, most of them not mentioning his name. However, after a persistent search a sketch of some length was found in the *Dictionary of National Biography*, from which it appears that he was called to the bar in 1641. In August, 1649, the Council of State nominated him as one of four Commissioners to "order affairs" in Guernsey, and in 1652 he was sent to Scotland by the Council, with three others, to administer justice in the courts there. "In 1656," says the Dictionary, "he seems to have been acting as secretary or treasurer to the Trustees for the sale of crown lands at Worcester House, and died early in 1657." His widow, Alice, on the 5th of February, 1657, petitioned the Protector as follows:

"My truly Christian and pious husband was delivered from a long and expensive sickness by a pious death, and has left me with two small children, weak and unable to bury him decently without help. I beg relief from your compassion, on account of his integrity in his employment in Scotland, and his readiness to go thither again had not Providence prevented."

The Council immediately ordered that twenty pounds be paid to the widow.

It would not seem probable that Alice March was able to provide a monument to the memory and virtues of her husband. Perhaps his grave is unmarked, but he lives in every sentence of this curious, kindly and lucid book. Through its pages shines a gracious, just and charitable soul, and the reader feels that he has really made the acquaintance of "his affectionate friend, John March."

L. C. HOWARD.

CHICAGO, ILL., Dec., 1904.

THE MAINTENANCE OF THE OPEN SHOP

By Bruce Wyman

Of the Faculty of Law in Harvard University

I

THE greatest of conservative forces in organized society is the law as administered by the courts. Until the mass of men have deliberately changed their theories of society and adopted new ones in their place, the law remains as it was. So it is as to the rights of the trades unions to use their great powers to force non-union men out of the same employment. To one who follows the diverse currents of opinion that appear upon the surface of present day discussion, it might seem that the doctrine of the open shop was in the greatest danger, if indeed the doctrine of the closed shop was not already established. One who fears thus forgets the law, with which is the final decision. From ancient times our law has been the protection of the freedom of the individual against the oppression of the combination. So it remains to-day in the midst of alarms the steadfast exponent of the desire of the great majority of men for the maintenance of industrial liberty.

II

Our law against combinations goes back beyond legal memory. A learned editor of one of the Selden Society's publications (1 Pleas of the Crown 125) has found a case for us as early as the year 1225 of an action for interference by conspiracy. The whole report of this case of the Abbot of Lilleshall follows: "The Abbot of Lilleshall complains that the bailiffs of Shrewsberry do him many injuries against his liberty, and that they have caused proclamation to be made in the town that none be so bold as to sell any merchandise to the abbot or his men, upon pain of forfeiting ten shillings, so that Richard, the bedell of the said town, made this proclamation by their orders. And the bailiffs defend [*i.e.* deny] all of it, and Richard likewise defends all of it, and that he never heard such proclamation made by any one. It is considered that he do defend himself twelve handed, and do come on Saturday with his law."

All through our books from the beginning there are cases both civil and criminal upon conspiracy as a thing apart from individual right and wrong. Probably the leading case is Rex *v.* Journeymen Tailors of Cambridge, 8 Mod. 10. One Wise and several other journeymen tailors were indicted for a conspiracy amongst themselves to raise their wages and were found guilty upon one point. On motion in arrest of judgment the court held: "The indictment, it is true, sets forth that the defendants refused to work under the wages which they demanded; but although these might be more than is directed by the statute yet it is not for the refusing to work, but for conspiring that they are indicted, and a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them to do, if they had not conspired to do it."

Well down into the nineteenth century, if workmen acted in concert in any way against their masters they were in danger of being held conspirators both in England and America. But this law that mere combination was a conspiracy regardless of what was demanded by the employees of their employers gradually became obsolete. Combination is now permitted for the furtherance of certain ends by certain means; but it is not true to say that it is permitted for

any purpose by any method. It is necessary to-day, therefore, to make many distinctions before it can be determined whether any designated plan may be attempted by a combination by any given course of action.

III

This present state of the law is well shown by a parley between judge and counsel in the case of *Re* Doolittle and Another, strikers, 23 Fed. 544 thus reported:— "*Mr. Charles C. Allen.* Do I understand your Honor to say that the act of striking — merely carrying out of the strike — was unlawful? THE COURT (Judge BREWER). It is not the mere stopping themselves together, but it is preventing the owners of the road from managing their own engines and running their own cars, that is where the wrong comes in. Anybody has a right to quit work, but in interfering with other persons working, and preventing the owners of railroad trains from managing those trains as they see fit, there is where the wrong comes in."

A scientific application of this distinction to a difficult state of facts is seen in Old Dominion Steamship Company *v.* McKenna, 30 Fed. 48. This action was brought to recover $20,000 damages, alleged to have been sustained by the plaintiff through the unlawful action of the defendants in a strike of longshoremen, and in their attempt to boycott the plaintiff in its business. The defendants styled themselves the Executive Board of the Ocean Association of the Longshoremen's Union. Not being in plaintiff's employ, and without any legal justification, so far as appeared they procured plaintiff's workmen in New York and in southern ports to quit work in a body until it should accede to the defendant's demands, and pay southern negroes the same wages as New York longshoremen.

Mr. Justice Brown held that such unwarrantable interference by these combined defendants constituted an invasion of the business right of the plaintiff company. His reasoning is thoroughgoing as the following extract will show: "Associations have no more right to inflict injury upon others than individuals have. All combinations and associations designed to coerce workmen to become members, or to interfere with, obstruct, vex, or annoy them in working, or in obtaining work, because they are not members. or in order to induce them to become members, or designed to prevent employers from making a just discrimination in the rate of wages paid to the skillful and to the unskillful; to the diligent and to the lazy; to the efficient and to the inefficient; and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which their business shall be conducted, by means of threats, of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights, — are *pro tanto* illegal combinations or associations; and all acts done in furtherance of such intentions by such means, and accompanied by damage are actionable."

By the present law then, mere striking is not in itself wrong, and, therefore, merely threatening to strike is often permissible. But on the other hand the trades union is always put to its justification whenever a strike is called or planned. Individuals who interfere with the existing relations of others must show some affirmative reason in public policy why they should be excused; and by the same theory whenever the operations of a combination are proved to be subversive of the true interests of society, its actions will be stopped. Even competition is only a permission, granted when its operation is best for established society, forbidden when it is prejudicial to the industrial order. Therefore there may be acts that may be safely permitted single individuals which it might be dangerous to allow combinations to do.

IV

In the ruling case in England to-day, Quinn *v.* Leatham (1902) A. C. 495, we have one of the best examples of the sort of pressure which it must be obvious that a trades union should be forbidden to use, even to advance its own interests. The plaintiff in that case was a butcher engaged in business near Belfast. His employees organized a union to which they refused to admit one Dickie, a foreman; they later demanded of the plaintiff that he dismiss Dickie. Upon the plaintiff's refusal to do this, the defendants representing the union went to one Munce who bought meat of the plaintiff and warned him that unless he stopped buying while the trouble was on, his own men would be called out next. Munce at last yielded to this coercion and notified plaintiff to send no more meat until he settled with his men. This was the cause of action for which damages to the trade were claimed. The House of Lords, notwithstanding the contrary tendencies of Allen *v.* Flood (1898) A. C. 1, held for the plaintiff upon this showing.

The squarest opinion in this case is that of Lord Lindley who handles the question with characteristic method: "As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact —in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified —the whole aspect of the case is changed: the wrong done to others reaches him. his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances."

The ultimate motive, even in a case so outrageous as this, is to advance the interests of the trades union by strengthening its organization. But the court would not admit this circumstance as a justification for what was proved to have been done. And indeed, if a trades union were permitted by law to use the force of their organization to overpower opposition in this way there hardly would be any sort of boycott which could not be so excused. Upon boycott fortunately, the law is all one way; that is regarded as too serious a breach of the industrial peace to be permitted for any purpose. One man may refuse to deal with another man perhaps; but it does not follow that a body of men may concentrate their forces upon a single man. At that point the law steps in, as indeed it must; for all experience shows that one man is helpless against an organization. It does not alter this conclusion to plead that the union simply refuses to deal or threatens to refuse to deal, and that it only asks of

the employer or shopkeeper to refuse to deal or to so threaten. The fact remains that boycott involves so serious a breach of the industrial peace that it cannot be permitted for any purpose whatsoever. This is a way in which a trades union may not be allowed to use the force of its organization, even if its purpose is to advance its own interests.

The leading case in America upon the point is probably Crump *v.* Commonwealth, 84 Va. 927 (1888). In this case the strikers dragged the whole community into their dispute. They published a blacklist upon which they put the names of every hotel, boarding house, tradesman or shopkeeper who dealt with their former employers in any way or who had anything to do with the new employees. Finally matters came to such a pass that the ringleaders were arrested; and, being found guilty by the jury, they appealed upon points of law to the higher court. That court sustained the charge that a plot like this constituted a crime.

In dismissing the appeal Mr. Justice Fauntleroy spoke very sharply; his conclusion was as follows: "It was proved that the conspirators declared their set purpose and persistent effort to 'crush' Baughman Brothers; that the minions of the boycott committee dogged the firm in all their transactions; followed their delivery wagon; secured the names of their patrons; and used every means short of actual physical force, to compel them to cease dealing with Baughman Brothers — thereby causing them to lose from one hundred and fifty to two hundred customers and ten thousand dollars of net profit. The acts alleged and proved in this case are unlawful, and incompatible with the prosperity, peace, and civilization of the country; and, if they can be perpetrated with impunity, by combinations of irresponsible cabals or cliques, there will be the end of government, and of society itself. Freedom — individual and associated — is the boon and the boasted policy and peculium of our country; but it is liberty regulated by law; and the motto of the law is: *Sic utere tuo, ut alienum non lædas.*"

V

As our law stands, therefore, in some instances concerted action is permitted; while against many kinds of joint action redress may be had. It has been seen that simple striking is permitted in certain cases; a combination of laborers may, for example, demand higher wages, and then leave in a body if the increase is not granted. On the other hand, it has been seen that workmen may not bring their combined force to bear upon third parties to induce them not to deal with their former employer. These are the two extremes; the present problem of the legality of the use of pressure by the union to force non-union men out of the same employment lies somewhere between these two extremes. As this is one of the most important of modern questions, it might be well to state the leading cases with considerable detail, so that there may be clear appreciation of the precise issue involved in this present discussion of the right of a union to force a non-union man out of the same employment.

In Lucke *v.* Assembly, 77 Md. 396 (1892) we have a rather aggravated case of unionizing a shop. The plaintiff was a non-union man; he was a non-union man against his will as it were, because the assembly had repeatedly refused to take him in although he had several times applied for membership. Later the assembly demanded of their employers, Rosenfeld Brothers, that they discharge this non-union man, Lucke. Rosenfeld Brothers could not withstand the pressure; and they discharged Lucke at this dictation. Lucke then sued the assembly for damages for the loss of his job. The decision was for the plaintiff.

Upon the final appeal Mr. Justice Roberts gave these as the reasons: "In this case, we think the interference of the appellee

was in law malicious and unquestionably wrongful. The appellant was a man of family, a good workman, engaged in a lawful pursuit, performing his duties in an entirely satisfactory manner, without objection in any respect, and willing and desirous of becoming a member of the appellee if an opportunity had been afforded him. He was not able to obtain membership with the appellee, nor was he permitted to continue his work with his employers, who would gladly have retained him in their service, if they could have done so without loss or embarrassment to themselves. Can it then be seriously questioned, that from the evidence in this cause the appellee intended or expected any other or different result from the sending of the written notice than that which followed its reception by Rosenfeld Brothers? The testimony in this cause assigns no other motive, and there is not the slightest intimation from any source that there is any. If, therefore, the appellee sought to bring about the discharge of the appellant under the circumstances detailed in the evidence, if not malicious it was certainly wrongful, and by so doing it has invaded the legal rights of the appellant for which an action properly lies."

The most recent case in point is even more thoroughgoing in its denunciation of these attempts by the unions to force non-union men out of the same employment. In Erdman *v.* Mitchell, 207 Pa. 79, there appeared in evidence a series of labor difficulties in the construction of a building too involved to relate here. Finally the central union showed its hand and threatened a general strike unless certain men engaged on the work who were not members of an affiliated union should be immediately laid off. An application was made in time for an injunction which the lower court granted and the upper court confirmed.

Mr. Justice Dean held upon this case: "Trades unions may cease to work for reasons satisfactory to their members; but if they combine to prevent others from obtaining work by threats of a strike, or combine to prevent an employer from employing others by threats of a strike, they combine to accomplish an unlawful purpose — a purpose as unlawful now as it ever was, though not punishable by indictment. Such combination is a despotic and tyrannical violation of the indefeasible right of labor to acquire property, which courts are bound to restrain. It is argued that defendants, either individually or by organization, have the right now to peaceably persuade plaintiffs and others not to work, and their employer not to hire them. So they have. It is further argued that they can quit work when they choose. So they can. But neither of these suggested cases is the one before us. Here a strike on a large building was declared because plaintiffs would not join a particular society. The declared purpose of the strike was to cause loss of employment to plaintiffs because they would not join the Allied Building Trades, and chose to remain faithful to their own union, The Plumber's League."

The cases brought up for discussion in this section are undoubtedly less extreme than the cases under consideration in the preceding section. It may be admitted that in the case of unionizing, the ultimate motive of the union is to advance its own interests; but so it is in boycotting. In boycotting the end was held not to justify the means, and this may well enough be true of unionizing. The principal question is, then, whether this sort of concerted action is to be held justifiable or not. In this respect a difference may be urged between boycotting and unionizing; it may be said that in boycotting the methods employed are indirect, and much unnecessary damage is therefore done to third parties; while in unionizing it may be claimed that the methods are direct and that there is no unnecessary damage. But the fact remains that both in the case of boycotting and in the case of unionizing, we see the resistless force of numbers em-

ployed. The fear of this lies at the bottom of all of our laws against conspiracy.

VI

At least it may be made a working hypothesis that in unionizing we have the legal wrong of conspiracy. The right of the non-union man may be said to be, to have his employment free from interference; the wrong of the union may then be said to lie in such interference by such a tortious method as conspiracy. This view of the matter is consistent with the cases so far as the discussion has progressed; but as might be expected now that we are nearing the borderland between right and wrong, there will be found some conflict in the authorities that bear upon this issue.

A case so extreme that almost all courts would agree upon it is Curran *v.* Galen, 152 N. Y. 33. It appeared that in Rochester there was an agreement between the Ale Brewers' Association and the Brewery workingmen's Assembly that no person not a member of the assembly should be retained in the employment of any member of the association. The plaintiff got employment in one of the breweries but declined to join the union. The Assembly thereupon notified the Association, and he was at once discharged. His suit against the union was for conspiracy causing loss of employment; and it was held that action lay.

The whole opinion of the Court of Appeals follows: "*Per Cur.* The organization of the local assembly in question by the workingmen in the breweries of the city of Rochester may have been perfectly lawful in its general purposes and methods and may, otherwise, wield its power and influence usefully and justly, for all that appears. It is not for us to say, nor do we intend to intimate, to the contrary; but so far as a purpose appears from the defence set up to the complaint that no employé of a brewing company shall be allowed to work for a longer period than four weeks, without becoming a member of the Workingmen's Local Assembly, and that a contract between the local assembly and the Ale Brewers' Association shall be availed of to compel the discharge of the independent employé, it is, in effect, a threat to keep persons from working at the particular trade and to procure their dismissal from employment. While it may be true, as argued, that the contract was entered into, on the part of the Ale Brewers' Association, with the object of avoiding disputes and conflicts with the workingmen's organization, that feature and such an intention cannot aid the defence, nor legalize a plan of compelling workingmen, not in affiliation with the organization, to join it, at the peril of being deprived of their employment and of the means of making a livelihood."

Plant *v.* Woods, 176 Mass. 492 shows one of the latest developments in this general problem. This was a case of a contest for supremacy between two labor unions of the same craft, having substantially the same constitution and by-laws. The chief difference between them was that the plaintiff union was affiliated with a national organization having its headquarters in Lafayette, Ind., while the defendant union was affiliated with a similar organization having its headquarters in Baltimore, Md. The plaintiff union was composed of workmen who in 1897 withdrew from the defendant union. The contest became active early in the fall of 1898. In September of that year, the members of the defendant union declared "all painters not affiliated with the Baltimore headquarters to be non-union men," and voted to "notify the bosses" of that declaration. This action was for an injunction to prevent threats being made in pursuance of this vote.

Mr. Justice Hammond stated the following as the reasons of the court for confirming the injunction against the defendants: "It is to be observed that this is not a case between the employer and employed, or, to use a hackneyed expression, between capital and labor, but between laborers all of

the same craft, and each having the same right as any one of the others to pursue his calling. In this, as in every other case of equal rights, the right of each individual is to be exercised with due regard to the similar right of all others, and the right of one be said to end where that of another begins. The right involved is the right to dispose of one's labor with full freedom. This is a legal right, and it is entitled to legal protection." To all of the conclusions in this case Mr. Justice Holmes dissented, in one of the best known of his opinions.

These courts believe that an organized union should not be allowed to work its will; that it would mean disruption of the industrial order if a union could be permitted to dictate who should work and who should not. As a matter of technique the argument is this; in the case of such action by a union every member may be conceived of as inducing every other member to cause the breach of the existing business relation between the non-union man and his employers; such interference requires justification, since in itself it is *prima facie* a tort. As a matter of law, then, the question whether the members of a union are liable when they demand that their shop be unionized depends upon whether the courts will find some basis for justification. But public policy seems to be the other way; and most courts seem to be convinced that to allow unionizing would be prejudicial to the best interests of society. The public wants the best services that can be gotten at the lowest wages that will be accepted. If we are to believe much testimony that is brought forward in current discussion, unionizing means less efficient services and increasing wages. This, then, is an instance for the assertion of the general policy of the law against combination in restraint of trade. Our general law is, of course, opposed to schemes to control the market in any way.

VII

There is some dissent to these prevalent doctrines, and in order that the discussion may be quite fair it is necessary to give this minority view a chance to be heard. The principal case on the other side is undoubtedly National Protective Association *v.* Cummings, 170 N. Y. 315. The facts in this case as they were brought out at the trial were somewhat complicated, as the final developments in the industrial organization have become so complex. The complainants were an association themselves, who sued both collectively and individually; the defendants were also an association and individual members of it. The defendant association wanted to put its men in the place of certain men at work upon certain works. They were in a strong position to do so; their walking delegates were members of the board of delegates of the building trades in New York, which had general power over the whole building situation. The trial court found that the walking delegate of the older association threatened to cause a general strike against the members of the newer association wherever he found them at work upon the same jobs with his men.

The opinion in this case deserves respectful consideration, as it is by former Chief Justice Parker. The basis of his opinion is that any single man may quit work alone. "The same rule applies to a body of men who having organized for purposes deemed beneficial to themselves, refuse to work. Their reasons may seem inadequate to others, but if it seems to be in their interests, as members of an organization to refuse longer to work, it is their legal right to stop. The reason may no more be demanded, as a right, of the organization than of an individual, but if they elect to state the reason, their right to stop work is not cut off because the reason seems inadequate or selfish to the employer or to organized society. And if the conduct of the members of an organization is legal in itself, it does not become illegal because the organization directs one of its members to state the reason for its conduct."

"The principles quoted above recognize the legal right of members of an organization to strike, that is, to cease working in a body by prearrangement until a grievance is redressed, and they enumerate some things that may be treated as the subject of a grievance, namely, the desire to obtain higher wages, shorter hours of labor or improved relations with their employers, but this enumeration does not, I take it, purport to cover all the grounds which will lawfully justify members of an organization refusing in a body and by pre-arrangement, to work. The enumeration is illustrative rather than comprehensive, for the object of such an organization is to benefit all its members and it is their right to strike, if need be, in order to secure any lawful benefit to the several members of the organization as, for instance, to secure the re-employment of a member they regard as having been improperly discharged, and to secure from an employer of a member of them, employment for other members of their organization who may be out of employment, although the effect will be to cause the discharge of other employees who are not members." Three of the seven judges dissented from this.

It may well be doubted how far this case is authority. It really is a decision upon a special case; that of skilled artisans who refuse to work except with those who have passed their qualifying examinations; this may well enough be an exception. That it is fair to distinguish the case thus is shown by the fact that the majority do not purport to overrule Curran *v.* Galen which, as may be seen from the abstract given in a preceding section, is square affirmation of the right of non-union men in general to protection from the unions. At least it may be claimed, therefore, that New York cannot be counted for either side in estimating the authority.

A case that plainly holds for the union is Clemmett *v.* Watson, 14 Ind. App. 38. In this case, again, a body of employees in a coal mine demanded the discharge of a certain man. The owners refusing, a strike was called; whereupon the employers yielded and the man was discharged. Again, the suit brought by the man forced out was to recover damages caused by the conspiracy.

The gist of Mr. Justice Garvin's opinion was this: "There is no law to compel one man or any body of men to work for or with another who is personally obnoxious to them. We cannot believe it to be in accordance with the spirit of our institutions or the law of the land to say that a body of workmen must respond in damages because they, without malice or any evil motive, peaceably and quietly quit work which they are not required to continue, rather than remain at work with one who is for any reason unsatisfactory to them."

Whatever weight may be given to these two decisions as authority, they represent the view of the minority; the contrary holding undoubtedly has the majority.[1] It is, therefore, the general American law that

[1] The position taken in this article that the non-union man is protected against the union is the law of the following jurisdictions at least — MAINE: Perkins *v.* Pendleton, 90 Me. 166 (1897); MARYLAND: Lucke *v.* Clothing Cutters Assembly, 77 Md. 396 (1893); MASSACHUSETTS: Plant *v.* Woods, 176 Mass. 492 (1900); PENNSYLVANIA: Erdman *v.* Mitchell, 207 Pa. 79 (1903). In the following jurisdictions the issue is in doubt — ENGLAND: Allen *v.* Food (1898) A. C. 1 and Perrault *v.* Gauthier, 28 Can. Sup. 241 (1899), are for the union, but Quinn *v.* Leatham (1901) A. C. 495 and Giblan *v.* National Amalgamated Union (1903) 2 K. B. 600 are distinctly for the non-union man; NEW YORK: Curran *v.* Gallen, 152 N. Y. 33 (1897) and Davis Machine Company *v.* Robinson, 41 Misc. 329 (1903) are for the non-union man, but National Protective Association *v.* Cummings, 170 N. Y. 315 (1902) and Davis *v.* United Hoisting Engineers, 28 App. Div. 396 hold for the union. In two jurisdictions at least the law permits the union to force the non-union man out — NEW JERSEY: Meyer *v.* Journeymen Stonecutters' Association, 47 N. J. Eq. 519 (1890) which, however is based upon the court's interpretation of the local trades union statutes; INDIANA: Clemmit *v.* Watson, 14 Ind. App. 38 (1895), in which again the court relies upon the repeal of the former conspiracy statutes.

legal wrong is done by a union in procuring the discharge of a non-union man. Even if their motive is self-interest, to get all the work for their own members, still most courts hold that the union cannot be allowed to use the force of its numbers to crush the non-union man. The law of conspiracy from time immemorial has protected the single man against the attack of the combination. This is a modern instance for its application. Any discussion which leaves out the fact of conspiracy and defends the union upon the basis of the permission given individuals to compete as they please, misses the real point upon which the decision turns. To maintain free competition in general the courts must prevent suppression of competition by the action of the combination.

VIII

Upon this point the majority of courts insist, the minority urge that what is permitted individuals should be permitted a combination; and that as one person in competition is permitted to refuse to deal with those who will not deal with them exclusively, even though the ruin of a rival follows, so a union ought to be allowed the same course of action. But is it fair to say that concerted action is of the same nature as separate action? Certainly, it is the usual fact that individual competition may be met, while combined action is overwhelming. The truth is that the combination gives to concerted action higher potentiality than separate action by individuals can ever have. Both boycotting and unionizing are conspicuous examples of the resistless force of numbers, and this underlying basis of fact is explanation enough of the substantial similarity of the way in which both are treated by the courts. The law is the same for both, holding both wrong whatever their object, because in both instances the courts still stand for the individual against the combination. Until individualism shall cease to be the predominant theory, the courts will continue to hold unionizing wrong. If in time the arguments for collectivism, which one hears so frequently in current discussion, shall ever command the adherence of the great majority of men, then the non-union man will be left to his fate by the law, but not until then.

BRUCE WYMAN.

CAMBRIDGE, MASS., Dec., 1904.

From Photo by Brady

WILLIAM H. SEWARD

WILLIAM H. SEWARD AS A LAWYER

By Eugene L. Didier

As the impression made by the Hague disappears when the traveller looks on Venice, so the early reputation of William H. Seward as a lawyer was dimmed, if it did not entirely pass away, before his later distinction as a statesman. Yet, for almost a quarter of a century, he occupied a high, if not a leading position, at the bar of the State of New York.

Most American statesmen have been lawyers in their early life, but few of them have continued to practise their profession after acquiring distinction in public life. Among those who have been included in his series of articles, Aaron Burr was the only one who remained at the bar to the end of his life; perhaps he would not have been the solitary exception had he reached the goal of his ambition, the Presidency. Seward's latest biographer, Frederick Bancroft, says that his vocation and life-long pursuit were politics — that his practice of the law was hardly more than an avocation to which he returned at times for financial reasons. Like Master Slender, he had no great love for the profession in the beginning, and was glad to exchange the smaller triumphs of the bar for the larger field of state and national politics. Although his heart was not in the profession, he worked at it effectively, and was a successful lawyer, but without enthusiasm or much satisfaction. He says himself, in his Autobiography, that he "practiced law only for a competence, and had no ambition for its honors, still less any cupidity for its greater rewards."

While as yet a law student, he formed a partnership with his preceptor, Ogden Hoffman, who afterwards became a celebrated criminal lawyer in New York. The arrangement was that Seward should receive one-third of the office business and all he earned in the justices' courts, while Hoffman had the counsel fees. After his admission to the bar, in October, 1822, the partnership of Hoffman and Seward was dissolved, and the latter formed a partnership with Elijah Miller, at Auburn, N. Y., being guaranteed five hundred dollars per annum, by the senior partner. Seward's first client was an ex-convict, from the Auburn prison, who entered a house to steal, but was frightened off before he had secured anything except a few pieces of worthless cloth. He was arrested, and indicted for petty larceny, for taking "one quilted holder of the value of six cents," and "one piece of calico of the value of six cents." The young lawyer convinced the jury that one piece was not "calico," but white jean, and the other was not "quilted" but sewed. In this way, he saved his client from serving another term in the Auburn penitentiary.

From the beginning of his practice, Seward gained experience by trying his own cases instead of depending upon the assistance of older lawyers. His first year yielded him more than the five hundred dollars guaranteed him. He soon became known as a safe, skilful, industrious lawyer, and business quickly came to him. His first chancery suit came to him in 1823, when he had been less than a year at the bar. The opposing counsel conducted the case so negligently that he was ruled out of court; the case was taken up by no less a person than Aaron Burr, who, by making use of his wonderful shrewdness and finesse, secured the plaintiff's re-establishment in court. This case was not finally determined until 1850, when Mr. Seward closed his business with the chancery court with a decision in his favor.

After practising eight years, Mr. Seward was elected to the New York legislature, in 1830 and 1832, serving four years. In 1835 he resumed the practice of the law, with all of his former industry, working day and night. His business steadily increased, and, in March of that year, he wrote: "I am now doing a very fair business. If I continue to attend to it, as I have done since my return from Albany, it would be worth more than $3,000 a year to me." He went to work at nine o'clock every morning, but he was interrupted by calls, messengers, letters, etc., and accomplished very little before dinner, which was at 3.30. In those days a country lawyer could not follow the same regular office hours as a city attorney. People called at all hours, and asked legal advice, but did not expect to pay for it unless a definite arrangement had been made.

His four years in the New York legislature, 1830–34; his position in the land office, 1836–37; and as governor of New York, 1839–43, had with the exception above noted removed him from active practice for at least ten years; and, when he resumed it in the last mentioned year, he had to begin almost at the bottom of the ladder. These years of absence from the trial-table had made him rusty in the law, and he was conscious that he knew less than he did twenty years before, and any young lawyer, fresh from his books, might have outwitted the ex-Governor. In a letter written about that time, he says: "I spend my days in my law office: I charge reasonable counsel fees, and they have thus far been cheerfully paid. My earnings have been equal to the salary (of Governor), for the same period of time; while my expenses are vastly diminished. I do not work hard, and especially devote myself as counsel; have no partner, and only one clerk. I may earn $5,000 this year, if business continues as it has begun." In August, 1845, he noted his continued progress, and, in December of the same year, he wrote: "For the first time, I begin to feel, as well as to enjoy, the dignity and ease of a counsel."

Seward made a great reputation as a jury lawyer by his defence of four criminals although he lost all of the cases. Two of these were murder cases; another was the celebrated Van Zandt case, in which an Ohio farmer of that name was tried for the violation of the Fugitive Slave Law; the fourth was that of Abel F. Fitch, who, with others, was indicted for entering into a conspiracy to destroy the property of the Michigan Central Railroad, and injure its passengers.

In the midst of his successful general practice, Seward became, suddenly, as it were by accident, a patent lawyer. The owner of a patent for a planing machine, heard Mr. Seward argue a case and was so much impressed by his ability, that he insisted on his accepting a retainer although he protested that he was not familiar with that branch of the profession. Nevertheless, he was so successful in this his first patent case, that business of that kind crowded upon him, and he was in great demand, not only in New York, but in other cities. Before he was elected to the United States Senate, in 1849, he had acquired one of the largest and most lucrative practices in the State of New York outside the city of New York. His forensic arguments were clear, brilliant, interesting, and convincing, but theyl acked that close, exact reasoning that persuaded the hearer that there was no other side to the case except the one on which he argued. His pleadings were always strong, and he brought to bear on the case everything that could be found in the books. As a lawyer, he was a model of industry; he studied sometimes half the night; occasionally all night, and when his clerks arrived at the office in the morning, they found the floor covered with paper containing the result of his lucubration.

EUGENE L. DIDIER.

BALTIMORE, MD., Dec., 1904.

THE STATE AND THE STREET RAILWAY

One Successful Solution of the Problem of Their Mutual Relations

By Bentley W. Warren

OTHER American states have frequently accepted the action of Massachusetts as a model on which to shape their own policy towards various problems of government. Massachusetts is one of the oldest and most populous of our commonwealths. Its people are democratic, prosperous, and contented to a degree that may well induce investigation by citizens of other states to determine how far this condition results from qualities peculiar to its inhabitants, and how far from differences in government, laws, and public policies. The census of 1900 shows that it is at least not due to a peculiarly homogeneous population, nor to a great preponderance of native born Americans; for, while the foreign born population of the country as a whole was 13.7 per cent, that of Massachusetts was 30.2 per cent, being exceeded only by Rhode Island and North Dakota; nor was it due to a less rapid increase of foreign born population, since in the decade 1890–1900, the percentage of increase in Massachusetts was 28.8, as against 12.4 for the United States, and was much greater than that of New York, Pennsylvania, and Illinois. Only Connecticut and New Jersey, among the older states, and half a dozen newly formed states, or territories, in the West, showed a larger rate of increase.

To what extent its example may be safely followed in adopting a particular policy is, perhaps, doubtful, unless other policies are first carefully studied to determine how far the apparent result is due to the selected policy and not to the combined effect of that and several others. Nevertheless, the policy of Massachusetts towards public service corporations has been, so far as its people are concerned, so successful, and has, upon the whole, resulted in such an extensive and satisfactory system of public utilities, that a study of that policy, and a brief outline of its development, may not be unprofitable at this time, when agitation of the general subject is widespread and pronounced, and the results thus far attained upon different lines in other states are apparently so little to the taste of their inhabitants.

It would be beyond the scope of a magazine article to attempt a discussion of this question as regards all public utilities. Probably, however, none affects so many people or excites more general interest than that of street railways. Certainly none has been the subject of more diversity of treatment in different jurisdictions. It is, therefore, proposed in this article briefly to describe the Massachusetts policy towards street railways, merely prefacing it with the statement that the Commonwealth's treatment of other public services is substantially similar, although, perhaps, in some cases less completely developed.

The business of street railway transportation in Massachusetts to-day is, speaking broadly, that of a governmentally regulated monopoly, conducted by private corporations, under conditions of public supervision designed to secure the highest degree of efficiency and accommodation at the least public expense. This attitude toward street railways is the result of half a century of

experience; but it is remarkable that so little departure has been found necessary from the broad general principles originally adopted by the legislature, as interpreted by the Supreme Court. The changes in detail have been many and frequent, but the amendment to the first charter in the very next year to that in which it was granted, practically established the entire legal system governing this public service.

Massachusetts is one of the few states which has followed, or, to speak with greater historical correctness, anticipated the Federal theory that judges should hold office during good behavior. The existence of a Supreme Court, whose members are secure in devoting their best years and ripest thought to a wise, mature, and historically consistent solution of the problems, and interpretation of the statutes, presented to them, has been of incalculable benefit to the community. Without this continuity of the court, and the resulting natural sequence of each decision with those which have gone before, the orderly and progressive development of a street railway policy, based upon the apparent anomaly of revocable locations, and the construction of many miles of track, would probably have been impossible. To the vagaries and shifting views of an elective judiciary, capitalists would never have consented to entrust the safety of their investments; and the policy which has been found workable here would have had few companies on which to be tested.

The first street railway decision in Massachusetts was rendered in 1860[1] by the distinguished Chief Justice Shaw, who thus stated the reason for the existence of street railways.

"The accommodation of travellers, of all who have occasion to use them, at certain rates of fare, is the leading object and public benefit, for which these special modes of using the highway are granted, and not the profit of the proprietors. The profit to the proprietors is a mere mode of compensating them for their outlay of capital in providing and keeping up this public easement."

All legislation in Massachusetts since that decision has been aimed at realizing the accommodation of travellers at certain rates of fare, and a limitation of the profits of the proprietors to a just compensation, and nothing more, for their outlay of capital.

Massachusetts differs from many of the states not only in the tenure of its judges, but in having no constitutional prohibition of special legislation, and no unreasoning dread in practice of resorting to it; influenced probably by the consideration that an unwise statute applicable to a single case works less harm to the community than an unwise general statute, which can be taken advantage of in numerous instances before its weaknesses become apparent and are remedied.

The first street railway companies in Massachusetts were both chartered by special acts in 1853. Each charter assumed, and the courts have held, that the construction of the proposed railway created no new servitude for which any land owner was entitled to damages; and neither recognized any special rights of abutters on streets in which the railway was to be built, beyond requiring that they should be given notice of the proposed locations, and an opportunity to state their objections. The cities, within which the franchise was to be exercised, were given, in their corporate capacity, slight participation. This was limited to a condition that the charter should not become operative in any city unless accepted by the city council and to a power of purchase upon terms provided in the statutes. These provisions, and that requiring notice to abutters, as distinguished from a general public notice before locating the railway, were repeated in a few subsequent charters only, and then entirely disappeared. The power to fix the precise lo-

[1] Commonwealth *v.* Temple, 14 Gray 69.

cation of the proposed railway in each city was delegated to its mayor and aldermen.

In the following year, before either railway had been constructed, both charters were amended by providing that at any time after one year from the opening for use of the tracks in any street, the mayor and alderman of any city might determine that so much of the track as was located within the limits of that city should be discontinued, and that thereupon the location should be deemed to be revoked and the tracks should be removed by the company, and at its expense. This provision constitutes the distinguishing feature of street railway tenure in Massachusetts, as compared with that in nearly every other state or country. It was inserted, either expressly or by reference to a later general statute to the same effect, in every subsequent street railway charter. Its importance cannot be over-estimated. It makes of the street railway in effect a tenant during good behavior. As stated by Mr. Justice Colt in the only case in which this provision[1] was directly considered by the Supreme Court:

"The franchise which the plaintiffs took under their charter is by the laws of the Commonwealth thus limited and qualified. Their right to the use of the streets is not for all purposes exclusive, and must be exercised in common with the rights of other travellers, and a just regard to public convenience; and this end is attempted to be secured by giving to the officers of cities and towns, as the most fit tribunal for that purpose, the powers above enumerated, to be exercised as in their judgment the weight of the public convenience in the use of the streets may require."

During several years after 1853, except for a few unimportant provisions of general application, no attempt was made to enact a general street railway law. The rights of each company were fixed in the special statute constituting its charter. In 1864, the first general street railway law was passed. It contained forty-five sections, and provided for many details of capitalization, construction, and operation. Nine years later this general law was revised and reenacted in a statute of sixty sections. Under both acts, however, it was still necessary to apply to the legislature for a charter to organize a street railway corporation, and it was not until 1874 that provision was made for the organization of such companies under general laws without recourse to the legislature itself for the charter.

From their introduction until the year 1887, and whether organized under special charters or under the provisions of the general law, the legislature, with regard to the location, construction, and operation, "adhered" in the language of Mr. Justice Hoar, "with great uniformity to the policy which was adopted from the outset, of making these corporations subject in a great degree to the direction and control of the board of aldermen of the cities, and the selectmen of the towns, in which their franchise is to be exercised."

As the law stood in 1887, these local authorities could grant, alter or revoke locations, could order the use of tracks to be temporarily discontinued, could make regulations as to the removal of snow and ice from the tracks, as to the rate of speed, as to the mode of using the tracks, as to the use of the tracks of one company by the horses and cars of another company, and as to the motive power to be used. In none of these respects was the action of the local authorities subject to any revision, except in the single case of a disagreement between the local authorities of two municipalities as to the necessity for the use of the tracks of one company, located in both places, by the cars of another company. In this one instance the decision of the question was left to the Board of Railroad Commissioners.

[1] Medford & Charlestown R. R. Co. *v.* Somerville, 111 Mass. 232.

While it had been the policy thus to leave to the local authorities the determination of so many questions affecting street railways, the Supreme Court had considered and settled the capacity in which the local authorities exercised this control. This principle, quite as important as the provision that street railway locations could be revoked, was first stated by Chief Justice Shaw in the case already referred to.[1]

"In the first place, all public easements, all accommodations intended for the common and general benefit, whatever may be their nature and character, are under the control and regulation of the legislature, exercising the sovereign power of the State either by general law or special enactment. It may be done by a charter or special act of incorporation, as in case of a bridge over broad navigable waters; or, where the necessity for its exercise is of frequent recurrence, it may be by the delegation of power to special tribunals, or municipal governments, by general laws."

In a case decided in 1865[2] the proposition was amplified and re-stated by Chief Justice Bigelow, in discussing the character in which the local authorities acted in this exercise of control over street railways.

"So far as they are intrusted with any power in relation to the location and construction of the road, and other matters connected with its use, these duties are specifically enumerated and defined, and they are to be performed by them, not as officers acting for or representing the city, but as a body of men on whom certain duties of a ministerial or *quasi* judicial nature are by law devolved. These duties have no necessary or essential connection with those which they are called on to perform in their official capacity, as a branch of the city government. They might have been imposed as well on any other body of men, if the legislature had seen fit, although it was doubtless wise as a matter of convenience and expediency that they should be performed by those who, in their official connection with the city, would be more likely to discharge them without difficulty and to the advantage of the public."

Mr. Justice Hoar in the case of Union Railway *v.* Cambridge[3] added after the sentence, already quoted, about the policy of making street railway companies subject to the control of local authorities, this definition of its nature: —

"This control is given to these municipal officers, not as representing a conflicting interest, but as independent bodies, charged with the duty of protecting the rights and promoting the convenience of the whole public."

These cases, however, established no new doctrine, but merely applied to street railways the principle already settled by the decision in Vinal *v.* Dorchester,[4] long before street railways had been thought of, regarding certain powers of aldermen and selectmen over railroads.

Two significant facts appear as a result of legislation and judicial decisions affecting street railways and their legal relation to the public down to 1887. These were, first, that the corporations owning and operating railways had received and enjoyed no vested rights whatever in the highways, and, second, that no relation, contractual or otherwise, had been established between these corporations and the cities or towns in which the railways were operated. The only legal relation existing was one between the Commonwealth itself and the street railway corporations and the only authority over them was that of the legislature, representing the Commonwealth, acting either directly, through general laws, or indirectly, through boards of aldermen and selectmen, to whom it had delegated certain of its powers. These facts must be borne con-

[1] Commonwealth *v.* Temple, 14 Gray 69.

[2] Cambridge *v.* Cambridge R. R. Co., 10 Allen 50.

[3] Union Railway *v.* Cambridge, 11 Allen 287, at 292.

[4] 7 Gray 421.

stantly in mind, for they are of great importance in considering the development of the system since 1887 when the introduction of electricity as a motive power, and the great multiplication of companies and increase in street railway mileage began.

That year ended the period of construction of street railways to be operated by horses. The use of electricity as a motive power began the following year; and within a few years had everywhere superseded the use of horses on existing railways.

At the same time the legislature began to abandon the employment of purely local bodies like aldermen and selectmen as its agents in the exercise of authority in the field of street railway construction and operation.

Some years previously the legislature had established the Board of Railroad Commissioners. A brief description of the purpose, functions, and character of this board will explain its prominence in street railway matters since 1887. The original design was to create, somewhat on the lines of the recently established Bureau of Corporations at Washington, an advisory commission to obtain full and intelligible reports covering the results of the operation, the financial transactions, and the physical condition of the railroads in the state, and to transmit to the legislature each year the information obtained, with suggestions and recommendations of legislation. Unlike the purpose in creating such commissions in many other states, the Massachusetts commission was intended to be little more than advisory, and, except in some minor details, was given no absolute authority. This original design has been generally followed during the thirty-two years of the board's existence. Even to-day, after a continuous extension of its jurisdiction, a careful examination of its functions shows that its powers are chiefly in the nature of a veto. There is little action which it can order a corporation to take, but the number of corporate acts forbidden, unless its approval has been obtained, covers a wide range of subjects.

With the exception of a few years, during which, under carefully limited restrictions, this board could compel reductions in street railway fares, and this exception no longer prevails, its only power with respect to both passenger and freight rates has been to hear complaints in specific instances, and to make recommendations of changes in cases deemed by it desirable and just. All such recommendations must be included in its annual report to the legislature. So fair has been its action, however, that the writer recalls but one instance in which a corporation has refused to follow such a recommendation. In that particular case the legislature, after considering the report and recommendation, authorized the board by a special statute absolutely to establish the new rates.

The commission is made up of three members, and a position upon it is regarded as a high honor; of the five lawyers who have acted as its chairman, one had resigned from the bench of the Superior Court, the great trial court of the Commonwealth, and another had declined appointment as a justice of the same court. All five have been men of high personal character and of undoubted professional attainments. In the two other members of the board, it has been customary to seek a representative business man, conversant with the effects of transportation on general business, and a practical railroad man, familiar with the problems of railroad operation. During all its history there has never been even a hint that any action of the board was influenced by corrupt or improper motives.

To this board, in the evolution of the street railway policy since 1887, has been transferred, either absolutely or indirectly, the greater part of that authority formerly delegated by the legislature to boards of aldermen and selectmen.

The legislative action by which the authority of boards of aldermen and selectmen has been either entirely superseded or else rendered ineffectual without the ap-

proval of some other tribunal, may be more conveniently examined under the two heads of that affecting construction, and that affecting operation, of street railways. The two processes, however, have been, in fact, contemporaneous.

By a special statute in 1887, authorizing the consolidation of all companies running cars into the city of Boston,[1] the legislature provided that no location, and no alteration or revocation of a location, of the tracks of a street railway company in Boston, Cambridge or Brookline, should be valid until approved by the Board of Railroad Commissioners. In 1888, it was provided that no company should run its cars over, or use the tracks of, another company, unless the authority to do so had been approved by the Board of Railroad Commissioners. In 1895 followed the enactment that no street railway track should be constructed at grade across a steam railroad track without the consent of the Board of Railroad Commissioners, or, at the election of the company wishing to construct the railway, of a special commission to be appointed by the Superior Court on petition of the company. In 1897, the grant by local authorities of the right to lay tracks in state highways, which in recent years have been greatly extended and now include 448 miles of important highway, was rendered useless without the approval of the Massachusetts Highway Commission.

In the same year, a special committee was appointed by the governor to consider the relation between street railway companies and the municipalities within the limits of which the railways were operated. Based upon the report of this committee, the legislature of 1898 passed an act[2] materially amending the provisions of existing law. The most important change, affecting the location of street railways, extended to the whole State that feature of the special law already in force in Boston, Cambridge and Brookline, that no revocation of a street railway location should be valid without the approval of the Board of Railroad Commissioners. Although this general act of 1898 did not require such approval to the grant of a location by aldermen or selectmen in every case, it provided that a location in any street should not be valid unless so approved, if ten in number, or a majority in value, of the owners of real estate abutting on the street, filed with the railroad commissioners a protest against the proposed location. The act also authorized the commission to grant an original location in a city, or town, without regard to the action of the aldermen or selectmen, when the location seemed to the commission necessary to connect existing locations in neighboring places.

About ten years ago, the legislature established a Metropolitan Park Commission, with authority to lay out and establish an extensive system of parks and connecting parkways or boulevards for the metropolitan district embracing Boston and a large number of the flourishing cities and towns within a radius of about ten miles. The Attorney-General having decided that the local boards of aldermen and selectmen could not grant street railway locations in these parks, or in the parkways leading to or connecting them, the legislature gave to the Metropolitan Park Commission exclusive authority to grant such locations.

In 1901, after a decision of the Supreme Court that street railways, with the consent of only the local authorities, might be constructed and operated upon private land outside the limits of public ways, the legislature at once prohibited such construction or operation without the approval of the railroad commissioners, and gave to them exclusive jurisdiction as to the details of the construction and operation. Two years later, when the legislature authorized street railway companies to acquire land by emi-

[1] These companies owned about one half of the 470 miles of street railway track then operated in Massachusetts.

[2] Acts, 1898, chapter 578.

nent domain, for certain limited purposes, the approval of the railroad commissioners was made a condition precedent to the exercise of the power.

The provision in the street railway act of 1898, for a protest by abutters against a street railway location, was construed by the railroad commissioners to authorize them to refuse their approval of the location only when an equally available location might be secured, and not when their refusal to approve might practically compel the abandonment of an entire proposed railway, to which the objectionable location was indispensable. This narrow construction caused much dissatisfaction, but its effect was not long felt, for in 1902 the legislature extended to the whole state, after fifteen years' experience of its operation and effect in Boston, the provision that no location, and no extension or alteration of a location, granted by a board of aldermen or selectmen should be valid until the Board of Railroad Commissioners certified that it was consistent with the public interests.

This statute finally rounded out the state's policy relative to street railway locations, and where fifteen years before a board of aldermen or selectmen could grant a location, extend it, alter it, or absolutely revoke it, in its own discretion, its action has now, in each of these respects, been rendered only initial or preliminary to that of the State Board of Railroad Commissioners, and possesses validity only as the State Board shall certify its approval. In passing upon a particular location the railroad commissioners consider not only the general question of the necessity for the proposed street railway, but also whether the conditions and restrictions imposed by the local board are consistent with the general laws of the Commonwealth and with the interests of the whole public.

The various changes, however, have not affected the legal situation of street railway companies. The legal security of their locations in the streets is no greater than before. Practically, no doubt, their owners feel more confident of securing just treatment from the action of one conservative and permanent board, than could be hoped for from many different and unrelated local boards, possessing no necessary familiarity with general transportation problems, and usually selected only for their fitness to deal with administrative questions of purely local interest.

There is still to be considered the development by which the control over the operation of street railways has been placed in the hands of State officials. The legislature, in 1891, gave to the railroad commissioners alone the power to order additional accommodations for the travelling public. In 1895 they were given exclusive jurisdiction of the subjects of providing street cars with suitable fenders, and of the method of suitably heating the cars during the winter months. By subsequent statutes the duty of the board to regularly inspect the railroads of the Commonwealth and their method of operation, was extended to include street railways; companies were required to equip their cars with such brakes and emergency tools as the board might order; and a prohibition was placed upon opening any street railway for public use until the commissioners should certify that all laws relative to its construction had been complied with, and that it appeared to be in a safe condition for operation. In 1903 the former permissive authority of boards of aldermen and selectmen to regulate the speed of cars and the mode of use of the tracks of street railway companies was made mandatory, and the law was further amended so that all such regulations of the local officers were subject to the approval, revision or alteration of the railroad commissioners.

The treatment of the question of fares is a subject by itself, but its importance, and the fact that it illustrates the same tendency toward exclusive state control, will excuse a brief reference to it. The legislature

itself, in the early charters, frequently inserted some maximum limitation of fares. These original limitations, however, were so far in excess of anything now charged as to be no longer material. Often, also, aldermen and selectmen endeavored, as a condition in locating a railway, to prescribe its fares. These attempts, though unauthorized, were indirectly recognized in some of the early general legislation. The first general act provided that the mayor and aldermen of a city, or selectmen of a town, might apply to the Supreme Court for the appointment of a special commission to revise street railway fares. The report of the commission, when confirmed by the court, was final and conclusive for one year, but the commission could not raise fares beyond the rate fixed by agreement between the local authorities and a company, as a condition of location, nor so reduce them as to deprive the company of a minimum profit of 10 per cent upon the actual cost of its railway property. The duties of these special commissions were transferred to the railroad commission, after its creation, but its action was subject to the same limitations. In the Street Railway Act of 1898,[1] both limitations upon their power were repealed, and there was substituted the single provision that fares should not be reduced below the average rate charged for similar service of other companies operated under substantially similar conditions.

In 1901 all absolute power to regulate street railway fares was, at the suggestion of the railroad commissioners themselves, taken away, and street railway fares were made subject to the provisions which had always prevailed regarding railroad fares: that the board should hear complaints and make recommendations, the authority to enforce the recommendations remaining in the legislature. In a very recent case[2] the Supreme Court held that this recommendatory power of the railroad commissioners is exclusive, and that attempted conditions to fix rates of fare in grants of location by boards of aldermen or selectmen are invalid and of no effect.

The old statute forbidding the special commissioners, and afterwards the railroad commissioners, to raise fares above the rate fixed by agreement as a condition of location or otherwise, refers specifically to agreements between the company, on the one hand, and the mayor and aldermen of a city or the selectmen of a town on the other hand. It in no way recognizes an agreement between a company and a municipality in its corporate capacity, or between a company and the local authorities as representing the municipality. This statutory reference did not, therefore, in any way conflict with, but rather confirmed the principle laid down in Cambridge *v.* Cambridge Railroad Company.[3]

Any statement of the Massachusetts policy regarding public service corporations, and particularly regarding street railway companies, would be incomplete without a word as to its features governing capitalization. It is at this point and in the regulation of this important matter that the State has successfully sought to limit the profits of those providing the service to a just compensation. The earliest street railway charters prohibited the issue of any share for a less sum, to be actually paid in, than the par value of the shares. Subsequent special charters contained the same provision, which was re-enacted in the general law of 1864. The further restriction was then added that the payment must be in cash, and that the directors should be personally liable for all debts until they filed a sworn certificate of the full cash payment of the company's capital. These provisions are still in force.

The first general act authorizing an increase of capital stock, and the first general act authorizing the issue of mortgage bonds,

[1] Acts, 1898, chapter 578, section 23.

[2] Keefe *v.* Lexington & Boston St. Ry. Co., 185 Mass. 183.

[3] 10 Allen 50.

by a street railway company, required the approval of the railroad commissioners to the increase of stock or issue of bonds, and an investigation by them of the physical and financial condition of the company. Unless such investigation indicated that the value of the company's property, exclusive of the value of its franchise or good-will, was equal to the amount of its liabilities, the approval could not be obtained. The practice, under these statutes, to ascertain such value, has been to require an expert independent appraisal of the physical property of a company seeking authority to issue either additional stock or mortgage bonds.

Prior to the passage of these two statutes, neither stock nor bonds could be issued except by authority of a special statute, and such special legislative authorizations were occasionally made after these general statutes had rendered them unnecessary. Unless a special act so required, an issue of securities under its provisions was not subject to the railroad commissioners' supervision. In 1894 the legislature enacted a series of statutes, usually called the Anti-Stock Watering Acts. These Acts prohibited the issue of any stock or bonds, whether the issue was authorized by special statutes or under general laws, without the approval of the railroad commissioners, and only to such amounts as they might from time to time vote to be necessary. They further provided that when stock was issued it should be first offered to the stockholders at its market price, as determined by the railroad commissioners, and if not taken by the stockholders, should be sold at public auction, but in either case, at not less than the par value. At the present time, the total capital stock and indebtedness of the Massachusetts street railways is nearly $110,000,000, of which $70,000,000 has been issued under the highly restrictive provisions of the Anti-Stock Watering statutes. Of the $40,000,000 issued before the passage of those acts, one-half was issued under the requirements for an appraisal of the physical property of the companies and for an authorization by the board. That these laws governing capitalization have been effectual is sufficiently shown by the United States census bulletin of 1902. That gives the average amount of stock and bonds per mile of street railway track in the whole country as $96,287, and the average in Massachusetts as only $39,067. Other states containing American cities of the first importance show these average amounts of stock and bonds per mile: California, $90,166; District of Columbia, $165,608; Illinois, $135,507; Louisiana, $113,313; Maryland, $156,142; Missouri, $152,206; New Jersey, $148,155; New York, $177,532; Ohio, $71,805; Pennsylvania, $103,267. The significance, to the public, of these figures is that the corporations must pay interest on so much of the capitalization as represents debt, and will strive to pay dividends upon that part of it representing capital stock, and that the Supreme Court of the United States may hold that they are entitled to earn dividends upon all their capital stock before they can be compelled to either reduce their rates for the service rendered, or substantially to improve the character of that service.

That Massachusetts has more miles of street railway than any other state except New York, shows that the revocability of locations has not unduly checked enterprise. Indeed, rather the reverse has been true. Until the power of local authorities to grant locations was restricted, many useless and unprofitable lines were built. Even with their carefully restricted capital, the street railway companies in 1903 paid to their stockholders in dividends only twice as much as they paid to the State in taxes; and several of the more recently organized companies have become financially embarrassed.

Could there be a greater contrast than that between the system in Massachusetts, and those which have been adopted or de-

veloped in other jurisdictions? In Massachusetts every location is subject to revocation, and every mile of track in the public highways may be ordered up at the expense of its owner, if certain designated officers think such action necessary in the public interest. Capitalization and indebtedness are limited by the independent judgment of expert public officials to the actual physical cost of the properties provided for conducting the public service. Every avenue to speculative profits and stock watering, in its many forms, is closed, and an investor may hope at best for only a very moderate return upon his actual cash investment. The hands of the government are tied neither by the existence of perpetual franchises in the streets, nor by the almost equally troublesome franchises for fixed terms under which the public is at the mercy of the company until the expiration of the term contracts, when a new bargain must be made. Massachusetts is free from the necessity for such bargains, in the negotiation for which the municipal authorities, if honest, feebly endeavor to foresee and provide for the changing conditions likely to arise during the twenty or more years to follow the date of the new contract; and, if they are dishonest, sell the property of the public, but themselves retain the consideration.

Whether it is too late to apply the Massachusetts system in other states, and whether their legal conditions and the temper of their people would render a gradual change to this system, as the term franchises expire, inexpedient or impossible, are questions which it would be presumptuous in one at a distance to attempt to answer. Undoubtedly such a change would be feared by the managers of corporations in those states, where a strong feeling of antagonism has grown up, either as a legitimate result of a mistaken system, or because of inherent differences in the attitude of the public toward corporations. If the change could be properly and safely effected, however, other states might be congratulated, as Massachusetts certainly is to be, upon having adopted a policy which has resulted in making of those who conduct its public services, real public servants.

BENTLEY W. WARREN.

BOSTON, MASS., Dec., 1904.

The Green Bag

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S. R. WRIGHTINGTON, 31 State Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

DEAN MELVILLE M. BIGELOW, whose portrait is our frontispiece and whose essay on the teaching of law is a feature of this issue, may be claimed as the product of all parts of our country as well as of England. He was born and educated in Michigan, graduating from the University of Michigan in 1866, and began practise in Memphis, where his first essays as a text writer were made. He has received the degree of Ph.D. from Harvard, and of LL.D. from Northwestern University. Though he has long served as non-resident lecturer at the Law School of the University of Michigan and has lectured at other schools, it is with the School of Law of Boston University that he has been most closely identified. He was a member of the faculty from its foundation and in 1902 was made its Dean. As the author of works of authority on estoppel, torts, bills and notes, wills, and the history of procedure, he is even better known to the profession. Some of these were written during his residence in England, where he enjoyed the acquaintance of the leading scholars and jurists of the time, and he relates that it was a phrase of Lord Bowen's in a conversation shortly after the famous decision of Mogul Steamship Co. *v.* McGregor, that "the law should follow business" that inspired the doctrines embodied in our leading article. His long experience as a teacher and his acknowledged rank as a scholar will make his leadership especially welcome to those who are disposed to criticise as too academic the methods of instruction favored in some of our most famous schools of law.

It is always difficult to secure contributions from lawyers in active practise, but we are fortunate in presenting in this issue an article of especial interest to all counsel for public service companies by Mr. Bentley W. Warren of Boston. Mr. Warren's interest in the broader questions of state policy has been shown by his work on the Massachusetts Civil Service Commission and his intimate professional connection with the recent great street railway development of Massachusetts entitles him to speak with authority. The growth of suburban electric lines is now pressing for solution in other parts of the country the problems that have already been dealt with in the more thickly settled sections of New England, and the conclusions drawn from local experience have therefore an application that should give them the widest interest.

BENTLEY W. WARREN

Professor Wyman, who contributes to this number, is already well known to readers of the GREEN BAG by his articles on the problems presented by the combinations of labor and of capital. Upon this general subject of the law governing the Industrial System, he has given several courses of lectures in recent years both in the Summer Quarter of the new Law School of the University of Chicago, and for the department of Economics of Harvard University. His course in the Harvard Law School on Public Service Corporations is closely connected with this line of work. Upon both of these related subjects he has edited books of selected cases.

BRUCE WYMAN

EVENTS of the past month of national importance have had also a special interest from a legal standpoint. Chief among these are the recommendations in the President's message relating to national regulation of railroad rates and insurance companies, and the bill already introduced in Congress providing for circuit courts of commerce. The constitutional questions involved and the possible changes in practise implied will at once command the thoughtful consideration of the bar. The hearing before the Privy Council of England in the Greene-Gaynor extradition proceeding, which will doubtless be decided by the time this is printed, presents subject for interesting discussion. The decision of the New York Court of Appeals in the "Transfer cases" apparently establishes a startling precedent if we may believe the early reports which state that they purport to overrule the Legislature on other than constitutional grounds. The opening of many state legislatures recalls the perennial problem of hasty and ill-considered legislation that seems inevitable under present political conditions, and the opportunity afforded to men trained in the law to perform a valuable public service in detecting and preventing these costly errors. Finally, the inauguration of Governor Folk of Missouri, the reward for his services in uncovering by skillful and persistent cross-examination and consummate handling of men, the sources of corruption in a great municipality, should afford inspiration to every patient and fearless attorney. We are glad to announce that all of these topics will be discussed in our next number by authors qualified to speak with authority.

CURRENT LEGAL ARTICLES

THE magazines of the month have been characterized by the publication of many interesting and important addresses, most of which were delivered before the Congress of Arts and Sciences at St. Louis in September. They deal with a wide range of topics, from problems of policy of bench and bar to discussions of ancient legal history and from international law to equitable conversion. Perhaps the most striking of the first mentioned, both from the prominence of its author and the bearing of his personal experience on the topic discussed, is the commencement address of Hon. Elihu Root at the Yale Law School, entitled "Some Duties of American Lawyers to American Law," which is published in the *Yale Law Journal* for December (Vol. xiv., p. 63). It opens as follows: —

"In this country of common opportunity for exceptional success, no career opens so many and such varied pathways to great usefulness and to fame and fortune as does that of the lawyer. The conditions precedent to a lawyer's success are severe. He must acquire sound learning; he must be trained to clear thinking and to simple and direct expression; he must be both intellectually and morally honest, and he must have the quality of loyalty to every cause in which he enlists. He should have the tact which comes from real sympathy with his fellow-men, and he will be far better for the saving grace of sense of humor, which brings with it sense of proportion and good judgment."

"The lawyer who exercises these qualities is certain of professional emoluments greater than those received by the members of any other profession, old or new. But he is certain of far more than this. As he goes on in life, a multitude of personal relations grow up between him and his clients. Some of these clients are strong and able, and with them the relation is of mutual respect and helpfulness. Others are weak and dependent, and to them he furnishes not merely learning, but support and strength of character and moral fiber. The feeling of all is characterized by confidence and trust. The growth of his own character responds to the requirements of this esteem. In time other people come to feel and to adopt to a great degree the opinion and attitude of the clients who know him best. And so he rounds out his career in possession of that priceless solace of age — the respect

and affection of the community which makes up his world."

"In all these relations the lawyer can, if he will, exercise a powerful influence over the thought and sentiment of his community." "All these opportunities carry correlative obligations."

"The lawyer's profession demands of him something more than the ordinary public service of citizenship. He has a duty to the law. In the cause of peace and order and human rights against all injustice and wrong, he is the advocate of all men, present and to come."

"It is of little consequence that any particular law fails of effect for want of public assent, except that each instance of disregard of law tends to weaken respect for law in general. But the same inexorable rule applies to the fundamental principles which underlie systems of law. If they come to be without the genuine assent of the people to their justice and expediency, they also will fail of effect; a system founded upon them will fail, and a general structural and institutional change will take place."

"The path of departure from true principles always proceeds by gradual and unobtrusive divergence. There are comparatively few who appreciate the value and importance of a rule, as distinguished from justice in a particular case. The great rules of right established in our constitutions were of impersonal and impartial origin."

"They can be maintained only by a people who believe in them." "To preserve and foster such a living faith of the people in the supreme value of the great impersonal rules of right which underlie our system of law, is the highest and ever-present duty of the American lawyer."

The rules which constitute such a body of law, however, change from age to age with changing conditions.

"Wrong constantly assumes new forms and adopts new methods, and the spirit of the law must answer with new expression and remedy. The law always tends to become fossilized; procedure always tends to become technical and complicated; eternal vigilance and ever recurring reform are the price of efficiency. The obligation to lead in these, rests first upon the lawyer."

"We find a class of rules," however, "which it is essential to preserve inviolate."

"These provisions seldom themselves declare the principles to which they are designed to give effect. They secure to the individual citizen certain specified statutory rights, the reason for which is not always apparent on the surface; and it frequently happens in individual cases that the assertion of these specified rights appears to the public to be technical and contrary to the justice of the case. Yet unless rules of law securing these specified rights are maintained inviolate, the general principles which we profess are not practically available for the protection of any citizen."

It is the duty and privilege of the lawyer to promote an appreciation of the reasons for these rules.

"There is one general characteristic of our system of government which is essential and which it is the special duty of lawyers to guard with care — that is, the observance of limitations of official power. This observance can be secured only by keeping alive in the public mind a sense of its vital importance."

"The more frequently men who hold great power in office are permitted to override the limitations imposed by law upon their powers, the more difficult it becomes to question anything they do, and the people, each one weak in himself and unable to cope with powerful officers who regard any questioning of their acts as an affront, gradually lose the habit of holding such officers accountable, and ultimately practically surrender the right to hold them accountable." "No one is so well fitted as the lawyer to ascertain the true limits of official authority, and no one can do so much as he to form public opinion regarding this class of questions, upon the lines not of partisan political advantage, but of independent and impartial judgment."

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A PERIL to our judiciary from political preferment for judges, is the subject of a timely article by Hon. Robert McMurdy in the November *Albany Law Journal* (vol. xvi, p. 335) entitled "Judges as Candidates."

"We may safely start," he says, "with the proposition that the great body of the people believe that the legislative and executive branches of our governments are under the influence of aggregated wealth. There is left but a single branch of the government free from this suspicion. Fortunately the judiciary has, with rare exceptions, enjoyed the confidence of the people in this country, but it does not follow that it always will have this confidence, nor indeed will it be entirely free from the influence referred to. The people are not deprived of their rights in a day. They sometimes have them restored in short order, but they are always taken away by degrees. Nor will the suspicion or belief that the judiciary is under the influence of the capitalistic class be a sudden realization, but rather a gradual dawning, and it behooves a patriotic people not only to see that its judiciary is kept free from the dominating influence of any class, but that the presence of such a condition be not suspected."

After calling attention to the feeling already existing in some cities against the police courts, and the dissatisfaction in others with the system of elective judiciary, he suggests the danger that the allurements of power could not be withstood by some and that in consequence all would be under suspicion.

"It is far better for the public good that no candidate for an administrative or legislative office should be taken from the judicial branch of the government than that now and then some brilliant public servant should be honored."

The importance of this is emphasized by the increase in litigation involving great vested interests. The author concludes that:

"Whether by constitutional amendment, as suggested by Justice Brewer, or by an enlightened public sentiment, it would seem to be well to establish the principle wherever we can, that no judge shall be a candidate for any but a judicial office during the term for which he is elected, whether or not he resigns before the term is ended. This would insure a judiciary largely removed from the influence of the party managers. It would keep off the bench men who are politically ambitious, merely. It would tend to more evenly balance the scales of justice. And it would be a large factor in insuring the confidence of the people not only in our judiciary but in our judicial system.

THE views of Mr. Justice Brewer referred to in the last article, though expressed some time since, may be appropriately summarized in this connection, especially since they have been recently reprinted in the *Chicago Law Journal*. The public always awaits with interest his utterances, and the article in *The Independent* (Vol. lvii., p. 311) on "Organized Wealth and the Judiciary" deserves more than passing attention. Though instances of even the suspicion of the direct use of money are singularly few, "it must," he says, "be conceded that there are good citizens who are apprehensive that the same insidious influence which corporations sometimes exercise over legislators is also exerted over judges. We all know that electing one to judicial office does not change his character or increase his wisdom. Election is not a work of moral reformation, and the judge is substantially the same man after as before it. True, there is quite a common feeling that a judge is possessed of superior wisdom."

"Still he is the same man that he was before election, and if then susceptible to improper influences, is in danger of yielding to like influences after his elevation. There is, however, not only in the incumbent, but in the community, a high regard for the judicial office; and in the selection of judges there is always a looking to the character of the man, almost, as one might say, an instinct, which chooses an honorable lawyer for the place."

"It must also be remembered that a high-minded man on his elevation to office, even a judicial office, does not change his previously settled political convictions."

"So it is not strange, but, on the other hand, is to be expected that, if a political question is presented, his prior convictions will largely influence his decision."

"There are two things which tend to minimize the possible effect of all outside influence, including therein the influence of corporate wealth and power. One is the indisposition of the American people to transfer one from judicial to political life. It is encourag

ing that this disposition is growing. I firmly believe in its wisdom, and should not regret even constitutional amendments forbidding any such transfer."

"The second is the permanence of judicial life." "There are some who consider this long tenure of judicial office as a sort of anachronism in republican institutions; but the surest guaranty of the permanence of republican institutions is the stability of judicial office.

"Coming closer to the specific question, it is urged that corporations by their wealth and power are potent in conventions and with executives, and thus have large, if not controlling, influence in the nomination or appointment of judges; that naturally they will seek to put in judicial position those friendly, and that thus gradually they will secure a dominance over judicial decisions, making them in harmony with their interests. It is well to look a matter like this squarely in the face and consider both the possibilities and dangers. It will be perceived that the question does not imply the gross form of pecuniary corruption, but only the insidious influence of accumulated wealth and power. It is useless to try to laugh the suggestion down as though it were outside the range of possibilities. But is there good foundation for the suspicion?

"The considerations already noticed are against it. They tend to place judges beyond the range of outside influence. Let me also notice other matters which may relieve the fears of many. Corporations generally complain that the administration of the law in the courts is unfavorable to them. There is, in fact, whether well or ill founded, a popular prejudice against corporations, and that prejudice finds expression in the verdicts of juries, which, in doubtful matters, usually favor the individual and punish the corporation. But so far as the individual and the corporation have conflicting interests, the administration of the law cannot favor each. If one is favored, the other is injured. When each complains, may it not well be because there is in fact no favoritism?"

The restraint of public sentiment and the publicity of the press are helpful. Managers of corporations, moreover, are not consciously public enemies. All their interests are in the wellbeing of the republic. The great bulk of litigation is not between corporation and individuals, but between different corporations, and their safety lies in the integrity of judges.

"But, after all, the surest guaranty is the growing earnestness of the demand for higher integrity in all official life. No one can compare generation with generation without being conscious of a wonderful improvement. A few centuries ago a judicial decision meant favoritism. Still later it meant corruption, and the great Lord Bacon could only plead the custom of the times in extenuation of his misconduct. All that has passed away, and now judicial corruption is a thing almost unknown. Nor is official integrity confined to judicial life. How very rare are the instances of failure! Think for one moment of the hundreds of thousands in the employ of this government and only here and there does one prove false to his trust. We hear through the papers of every such instance and are sometimes alarmed thereby, but we seldom think of the hundreds of thousands of those who are true and of whom no mention is made. More and more is integrity in officia life the rule. And it is the rule because of the increasing integrity in personal life. Officials will never be better than the people for whom they act, and as personal integrity prevails, so more and more will it become the characteristic of all official, and especially of all judicial, life."

An interesting discussion of "The Office of Expert Witness," by Professor M. J. Wade of the Iowa State University, appears in *The Law Register* of Nov. 23d and Nov. 30th, (vol. 24, pp. 926 and 942), in which he deprecates the indiscriminating abuse of experts and urges an intelligent effort to correct acknowledged abuses. He lays a foundation for this reform by a plain statement of the importance of such witnesses to a proper trial of difficult cases, and of the errors into which experts are prone to fall. In the first place their disagreements are no evidence of want of integrity. They are subject to the same limitations as lay witnesses, "And after a man has sat for years in a court-room, and has heard in nearly every trial lay witnesses, whose integrity is unquestioned, directly contradict each other as to

plain facts observed by them, he develops a feeling of charity for those who, in the field of inference and surmise, occasionally run counter to their brothers."

Their real faults are thus summarized:

"*First.* Many experts do not have a true conception of the office of a witness. Too many of them assume that they are employed to support or oppose a certain proposition in a case. They first find out what the party desires to have established, and they then proceed with untiring zeal to find authorities and reasons for supporting them in their position. Through the constant nursing of their theory, their judgment of things becomes warped; they develop a healthy prejudice against all opposition, whether of men or of books; and they get upon the witness stand with their mental plane narrowed and their vision obscured, while their pride resents any imputation of falsehood or error. Such a man, in such a mental state, is not fit to be a witness. He does not go upon the stand to assert the truth because it is the truth, but because it sustains his view of what the truth ought to be. He goes upon the stand pledged to an uncompromising and unyielding position, which must be sustained at all hazards."

It is admitted that lawyers are not without fault in encouraging and developing this trait, but the excuse of their professional duty to their client is urged.

The second fault of the expert is said to be his failure to appreciate his duty to carry conviction to the jury and speak a language they can understand and not dignify trifles with ponderous titles.

He concludes as follows:

"The reforms in expert evidence must begin with the experts themselves. The principal difficulties are beyond remedy by legislative enactment. These reforms will come only when the expert knows and feels deeply the important position which he occupies while in the witness chair. They will come only when the expert understands that his first duty is to convey truth to the mind of court or jury, and when he appreciates the fact that no matter what he may know, and no matter what he may say, his full duty is not done until what he knows and what he says reaches the mind of the judge or the jury. Evidence which does not have some convincing force upon the mind is of no value, and evidence, no matter how truthfully uttered, which obscures the truth and leads the mind to wrong conclusions, is little better than perjury."

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THE problem presented by our multiplicity of decisions and the inevitable approach of codification is the subject of one of the most striking papers of the month entitled "The Doctrine of Stare Decisis," by Edward B. Whitney, prepared for the Congress of Arts and Sciences and published in the December *Michigan Law Review* (Vol. iii., p. 89).

"It is a familiar fact," he says, "that in every English-speaking community the body of the law is divided into two portions: first, the so-called judgemade law, which is to be found in records and reports of the decisions and sayings of judicial officers; and second, the statute law, which consists of enactments by Parliaments, Congresses or Legislatures, together with executive regulations and municipal ordinances adopted under powers lawfully delegated by legislative authority. According to the theory of English jurisprudence, the so-called judgemade law was not made by the judges at all, but existed, although not written, as the ancient and general custom of the English-speaking people, and in the shape of ethical rules which they had tacitly recognized and adopted; but the authoritative evidence of such a custom was the decision of a court, and by the doctrine of *stare decisis* such a decision when once made became conclusive evidence — conclusive within the territorial jurisdiction of the court until overruled by some higher tribunal — conclusively establishing the existence of some rule which thereafter could not be changed except by legislative enactment.

"This judgemade law has been called by its admirers the perfection of human reason; and theoretically there is no other method equally efficacious of finding out what is the true rule of law applicable to any given state of things."

"From the necessary limitations of the human mind, no legal reasoning can be regarded as having passed the final test until it has been subjected to the practical analysis of an actual litigation."

The disappearance of the doctrine he regards as an inevitable result of human progress through the increase of business and the enormous multiplication of precedents.

"The argument and decision of any still unsettled question, or question claimed to be unsettled, thus involves an enormously greater expenditure of time at four different points — in the preliminary preparation by counsel, in the oral argument, in the court's subsequent examination of the previous authorities preliminary to the decision, and in their discussion (when, as often, they are discussed) in the opinion which is subsequently formulated, so as to serve as future evidence of the law. Now, on the contrary, instead of expending more time, all parties expend less." "Few if any of the Federal appellate courts, or similar courts in any of the larger States, can at the present time secure that assistance from counsel, allow that time for oral argument, go through that subsequent examination of the authorities, discuss and analyze the general principles of law, public policy, and ethics with that thoroughness, or observe that care in formulating the arguments approved and the decision reached, which are theoretically incidental to the development of judgemade law."

A tendency to disregard decisions as authority and seek relief in text writers is believed to be apparent. Some suggestion of remedies are considered but codification is declared to be "the one and only remedy that has ever been suggested which amounts to more than the mildest palliative, and which has received substantial support from any influential section of the profession and the public."

"The main real obstacle to codification in America is undoubtedly the experience which we have had of codification in particular, and of statutory law in general, in the past."

These, however, are declared to be avoidable evils, the main difficulty being to secure the right man to do the work. The author believes "that codification will be accomplished within the lifetime of men who are already admitted to the practice of the legal profession; and I believe that either it will be accompanied by the avowed abolition of the doctrine of *stare decisis* and substitution of the Continental method of treatment of judicial decisions, or else it will be accompanied by some such legislative sifting of the reports as I have outlined by way of suggestion; but I do not believe that it will be done until the present system has become so overloaded that the American bar with substantial unanimity will decide that almost any kind of codification would be an improvement."

A STRIKING confirmation of Mr. Whitney's theory of the logical succession of codification to judicial precedents is afforded by an examination of Roman legal history from the point of view of an English lawyer. Professor Munroe Smith's address before the Congress of Arts and Sciences on "Problems of Roman Legal History" is published in the December number of the *Columbia Law Review* (Vol. iv., p. 523). His comparison of the legal development of Roman law with that of England furnishes striking and instructive analogies showing the broad similarity of social development rather than direct borrowing. He finds these analogies in politics and government, but more especially in the judicial system. He refutes the theory that Roman law was in its origin a codification, and shows that it was developed by judicial opinions. The Roman jurists, though not at first public officials like our judges, were impartial experts rendering opinions on points of law without pay at the request of litigants to enable the *judices* who were laymen like our juries to decide cases. The jurists were the product of natural selection like the ancient "law-speakers" of the Germans, who were the ancestors of our judges. Under the Empire, the Roman jurists were selected by the state.

"Roman prætorian law and English equity are in so far analogous as they both represent what the Romans called *ius honorarium* — 'official law.' In both cases the new law was produced by governmental agencies which were not exclusively nor indeed primarily judicial — agencies which set themselves above the previously existing law, and not merely supplemented it but overrode it."

"It was by the iteration of the same rule in successive prætorian edicts (*edicta tralaticia*) that the Roman official law was built up. It was by the observance of precedents

and the development of a settled practice that English equity came to be a regular part of the English law.

"There was, however, one important historical difference, between the two movements. The development of the Roman prætorian law not only made Roman law more equitable, but it also introduced into that law the commercial customs of the Mediterranean — customs which apparently date back in part to the Babylonian Empire. A similar reception of European commercial law took place in England, but here it came later, after the development of equity and chiefly through the action of the common law courts. In both cases, however, as Goldschmidt has pointed out, commercial law was not brought in as a distinct and separate system, as in the modern continental European states; the English law was commercialized by decisions of the common law courts, largely rendered in the eighteenth century, just as the Roman law had been commercialized by the prætorian edict in the second and first centuries B.C."

Under the Empire the courts were brought into substantially the same form as those of the civil law to-day. The use of juries ceased and codification began.

"This change, however, was not the result of a progressive evolution; it was a symptom of degeneration. Judicial decisions ceased to be regarded because jurisprudence had sunk to so low an ebb that the decisions were not worth regarding."

The author closes with a plea for this method of comparative study.

"Furnished with a knowledge of the Roman law and of its development, the English investigator will more accurately gauge by comparison the excellencies and the defects of the English law. He may not find that the Roman law is more scientific — a statement which I take to mean that its broader generalizations are thought to be more correct — but he will certainly find that the Roman law is more artistic. The sense of relation, of proportion, of harmony, which the Greeks possessed and which they utilized in shaping matter into forms of beauty, the Romans possessed also, but the material in which they wrought was the whole social life of man. There was profound self-knowledge in the saying of the Roman jurist that jurisprudence was 'the art of life.' The comparative student will find also that while the English law has developed in certain directions further than the Roman, the Roman law in certain other respects had attained sixteen hundred or even two thousand years ago a development which seems to go beyond ours."

"Best of all, the comparative student will learn to distinguish between that which is peculiar and therefore accidental in both systems and that which is common to both and therefore presumably universal. It has long been the hope of some of the greatest modern jurists, both in English-speaking countries and in Europe, that by strictly inductive study it may be possible to discover a real instead of an imaginary natural law. The corresponding hope of the legal historians, that it will in time be possible to formulate the great laws that govern legal development, is not, I believe, an idle dream; and I am sure that the minute comparative study of Roman and Anglo-American legal developments will carry us further towards such a goal than any other possible comparison."

THE theory of the fundamental similarity of the Roman and the English systems of law, at like stages of civilization, which is the inspiration of Professor Smith's article, is also suggested by an essay on "Law in the Louisiana Purchase" in the *Yale Law Journal* for December (Vol. xiv., p. 77) by William Wirt Howe. It is mainly an historical summary beginning with the extension of the "custom of Paris" by royal edicts in the charters of early explorers and settlers, and then taking up the establishment under Spanish dominion of the codes based on the *Siete Partidas*. These two sources were at bottom alike, since based on the Roman system. Then came the control of the United States, which respected, however, existing municipal law.

"But Louisiana did not become in all respects a civil law state. She has a composite system. In criminal matters as we have seen, she has adopted the theories of the common law. In commercial matters, having no code of commerce, her supreme court has long ago held that the law merchant of England and the other states of the Union should be for-

lowed. Having no code of evidence, but having juries both in criminal, and often in civil cases, the same court has said that it will follow the general rules of evidence prevailing in the other states of our country, so far as not modified by some special statute. It will, therefore, be seen that the system is quite eclectic. So far as general provisions in regard to persons, property, and obligations are concerned, Louisiana may be called a civil law state. But in other important departments of jurisprudence, as pointed out above, she is largely indebted to English and American law."

The rest of the Purchase since hardly explored by the French and Spaniards was occupied by settlers from common law states, who brought and adopted their own system. The differences between the two systems are, however, less than they seem, and tend to diminish in the process of modern revisions.

The law of Louisiana is not our only modern bond of sympathy between the Common and the Civil Law. The Civil Code of Porto Rico is analyzed in the first section of an article by Joseph H. Drake in the *Michigan Law Review* for December (Vol. iii., p. 108) entitled "The Old Roman Law and a Modern American Code." It is largely occupied with a discussion of the historical development of the method of classification in the Spanish Code, followed by an examination of the variations from earlier standards that appear in this newest product. It is interesting to note that, owing to the scant consideration received by corporations in the Spanish Civil Code, the New Jersey corporation law has been adopted with a few variations.

A summary of the historical work of the month would be incomplete without reference to a learned exposition of "The Medieval Law of Intestacy," contributed by Professor Charles Gross to the November number of the *Harvard Law Review* (vol. xviii., p. 120), in which he says:

"Much obscurity overhangs the English law of intestacy before the thirteenth century. Blackstone, adopting the opinion of Coke, says that 'by the old law the king was entitled to seize upon his [the intestate's] goods, as the *parens patriae* and general trustee of the kingdom.' On the other hand, Selden and Pollock and Maitland deny that this was ever a prerogative of the crown."

"The evidence at our disposal indicates that according to the older law of England the personal property of the intestate was forfeited to the feudal lord." This proposition is supported by many citations from ancient rolls and charters.

"While there are indications of a struggle of the feudal lords to obtain or maintain their right to confiscate the chattels of intestates — a struggle which lasted from the time of Cnut to the time of Edward I., and of which we still find reminiscences in the records of the fourteenth century, — the main object of this paper has been to call attention to the fact that throughout the thirteenth century many boroughs were purchasing from their lords a favor or privilege which, according to Bracton, was the right of every free man. In the very decade when Bracton was asserting that the lord shall not meddle with the intestate's goods, the lords were selling a burghal franchise which implied that they had the right to seize such goods. The importance of personal property in boroughs, which was due to the predominance of mercantile over agricultural interests, would naturally make both the lords and the burgesses inclined eagerly to assert their claims against the pretensions of the prelates. The old law of intestacy, as set forth by Glanvill, pressed more heavily upon the tradesmen, whose wealth was made up mainly of chattels, than upon rural freeholders and villeins. It is not strange, therefore, that the town law since the thirteenth century strove to reject the pretensions of both lords and prelates, and to establish the rule that the chattels of the intestate should go to his kinsmen, who would, however, be expected to devote a portion of his property to pious works for the atonement of his sins and the benefit of his soul."

"Is there a Federal Police Power" is the title of an article of more modern interest by Paul Fuller in the December *Columbia Law Review* (Vol. iv., p. 559).

"The police power is," he says, "the power of the people for self-protection, the protec-

tion of the whole against any of its number, and its exercise is of necessity confided to the government — the State into which the people have organized themselves. The same reasoning would seem to indicate that when various peoples have formed themselves into States possessing the powers indicated, and then for the general purposes of a common intercourse and union, have organized these States into a federal union on the basis of a constitution which enumerates the powers to be exercised by the federal government, this inherent and plenary power to control the lives, liberty, and property of the citizens within the various States does not pass to such general government unless specifically enumerated. Especially must this be so when we find as the basis of such a union the constitutional provision."

"Manifestly no such power as is defined and sustained in these cases, is in terms vested in the federal government by the Constitution. If such power can be lawfully exercised by the Congress of the United States, it must be under the doctrine of implied powers, to be inferred from the necessity which arises for its use, in order effectually to carry out other express powers, such as the power over the mails, post offices and post roads, or the power to regulate commerce among the States or with foreign countries."

A comprehensive discussion of the cases is finally summed up as follows: —

"There seems, on the whole, to have been some difficulty in the establishment of a rule as to the exercise of Federal Police Power, and as to the measure in which such exercise supersedes the police power of the State; the pendulum has oscillated between two extremes and like a self-registering instrument, has left various indications of the prevailing sentiments of the moment; perhaps in this gentle swaying of the instrument lies our security against too rigid a construction of the respective rights and obligations of citizen and State, and central authority; however that may be, my function in this paper will end by an indication of some of the variations which the instrument has registered, leaving the reader to determine whether its action shows any marked trend in one direction, or the happy faculty of meeting the exigencies of the times as these manifest themselves in the universal expression of the popular will and the national needs.

"1. All that was within local circumscription was in the power of the State. Its internal regulations or police power was reserved intact.

"2. This power was left intact only as applied to matters concerning solely the denizens of a State and was extinct as to the exercise of any legislative function that could reach intercourse with other States or with foreign ports.

"3. All police powers, even over means of inter-communication with other States or with foreign ports remained within the province of the State, until Congress saw fit to exercise over the same domain the powers vested in it by the Constitution.

"4. The police powers of the State might be exercised upon subjects kindred to interstate or foreign commerce, so long as they were not a direct interference with such commerce; incidental interference with some of the agencies of commerce, was not an assumption of powers reserved to Congress.

"5. Even when Congress has not made any regulations with reference to the subjects confided to it, the States may not exercise any dominion over such subjects, even in the use of police powers for its internal government, as the silence of Congress must be taken as an indication that no regulations are to be made with reference to the subject.

"6. The police powers of the State are therefore extinct so far as their exercise bears upon any of the subjects entrusted to Congress by the Constitution, notably upon any inter-communication between the States or with foreign parts.

"7. In the execution of the powers over commerce and over the mails, Congress may enact laws which regulate internal affairs of States that are in any way dependent upon or connected with communication with the exterior; such as the introduction into the State of any articles of food, drugs, etc., the control of navigable waters, the protection of health by quarantine laws, etc."

A NEW corporation law which is said to be proving attractive to promoters is discussed

in an article on "Corporations in the District of Columbia," by Fred. Dennett in the *Washington Law Reporter* of November 25th (vol. xxxii, p. 758), considering the right of a corporation organized under the Code when sued in a state court to remove to a Federal Court. A citizen of the District has no such right. Is the corporation a citizen of the District? Since corporate existence can be created only by a sovereign power through its legislative body, "if there exists no sovereign power in the District of Columbia acting through a legislative body to create, there can be no citizenship of the corporations under discussion." The author contends that "Congress cannot bestow the power on the District." The right of a territory to create a corporation is bestowed under the authority "to invest a territory with general legislative powers." "The clause of the constitution giving this constructive authority is much more general in its terms than that which provides for the control of the seat of government, and which lodges exclusive authority thereover in the Congress of the United States; under it general legislative authority cannot be delegated to its local government.

"It is held that the District of Columbia, being a distinct political society, may be classed as a State according to the definition of writers on general law, but that it does not come under the term 'State' as referred to in the Constitution of the United States."

The political status of the District is that of a municipal corporation; this, in the United States has not the power to create a corporation. Congress, however, is a legislative body having constitutional power to pass laws governing the District of Columbia.

"Has it such a separable dual authority that it can be construed to have the power to divorce itself of its Federal character, when acting on legislative matters concerning the District of Columbia, and act on these occasions merely as a District legislature, thus imparting a sovereign character to the District?"

The author holds that it has not, that the District has not of itself the power to create a corporation and that it cannot be delegated to it, that the Acts of Congress relating to it are of national authority though of limited application. Hence any corporation organized under the Code is organized under the laws of the United States. It has been settled that the Federal Courts have jurisdiction of a cause to which a national bank is a party since the law under which it was organized was necessarily put in issue. Corporations of the District have, therefore, the right of removal, if the law under which they are organized is constitutional. Though Congress would not have power to enact a general corporation law, under the power to legislate for the District, it may authorize the organization of corporations "to do business therein, the power remaining in the various States to recognize such corporations or not when attempting to do business outside."

ANOTHER article of present interest by Ditlew M. Frederiksen in the *Michigan Law Review* for December (Vol. iii., p. 119) discusses "The Old Common Law and the New Trusts" from a point of view somewhat different from that of many recent students of this important topic. Like them he finds analogous situations under early English economic conditions, and collects voluminous instances of ancient regulations of all industries in the days when free competition was the exception. He finds something more far-reaching than the law of "public callings" in "the laws against forestalling, regrating, and engrossing" which in modern times have been "overshadowed" by the laws against combinations and agreements in restraint of trade. In reality they furnish a safer means of regulating the trusts as combinations and conspiracies are hard to prove, and the injunctions forbidding them are, if possible, still harder to enforce.

"Most of the present anti-trust laws can hardly be called intelligent. People are there forbidden to combine and ordered to compete. Ordinary acts of leading citizens are called crimes, and are from the nature of things left unpunished. We have developed and are harping upon the criminal laws against combinations, and conspiracies, and have overlooked the old civil laws regulating prices and profits. If the rates themselves of the Northern Pacific and Great Northern were always reasonable and proper, it would not matter who held their

shares. They could in fact be more easily regulated when combined into one.

"Historical, economic, and legal development moves in waves, and swings from one extreme to the other. The development of modern industry beginning in the middle of last century, when steam and coal were applied to modern machinery, revolutionized former methods of production and trade, and commenced a period of free competition and *laissez faire* under which our modern law has grown up and developed until the laws applicable to conditions where monopoly was the rule have been in part forgotten. The new trusts, world wide in their power and extent, into which modern manufacturing and mercantile business seems to be gradually consolidating, have sprung up so rapidly that they seem to have outstripped the laws of their own time. The pendulum is now swinging back towards conditions resembling those outlined above, and the legal development must follow in the same direction and find precedents among these old laws and decisions or the very foundations of the republic may be shaken. Our legislatures and courts have made a false start in being led off in the direction of conspiracy, combination, and 'anti-trust' laws, when the true remedy is to fix maximum rates and to regulate and control profits and business methods. But some of the 'public service' decisions point the other way, and if these are followed in the future, the satisfactory regulation of the trusts may perhaps yet be expected."

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Less striking in style and subject but more permanent in value to the thoughtful student or practitioner are the discussions this month of propositions of case law. The most important of these is Professor Langdell's treatise on "Equitable conversion," which is continued in the December number of the *Harvard Law Review* (vol. xviii., p. 83). These are preliminary chapters dealing with "actual conversion and those legal principles and distinctions common to actual and to equitable conversion." In the former chapter he had defined conversion and had shown that the law is chiefly concerned with the validity of directions by a testator to sell or purchase land after his death and with conflicting claims to the proceeds. He then considered the effect of such a conversion and the validity of directions for it.

In the present chapter he takes up first the distinction between directions to sell for the purpose of disposing of the proceeds according to the will and for the purpose of satisfying a charge on the land. A charge is a bequest of a fixed amount and is a real obligation on the land analogous to a personal obligation of debtor and creditor, and exists only so long as there is a person to whom it is owed.

For most practical purposes a gift of the proceeds of a sale is a gift of personal property, but of personal property which does not belong to the testator at the time of his death. A charge differs from ordinary pecuniary legacies only in the added security for payment.

"A lapse, whether of a gift of a portion of the produce of land directed to be sold, or of a pecuniary legacy exclusively charged on land, will inure to the benefit of the person to whom the land, subject to the direction to sell it, or subject to the charge, shall devolve at the testator's death, unless the testator shall do something to prevent such a result, though the reasons in the two cases will be entirely different. How then can a testator divert the benefit of a lapse, or other failure, of the gift, in these two classes of cases, from the person to whom the land will devolve, to the testator's residuary legatee? In cases of the first class he can do this by simply including in his residuary gift so much, if any, of the money, produced by the sale of his land, as shall not be otherwise effectively disposed of by his will. But, though such an intention is not improbable, and may be easily expressed and in a great variety of ways, yet it must be expressed in some way, — it can never be inferred. In cases of the second class, however, it seems that the testator cannot divert the benefit of the lapse, from the person to whom the land will devolve, to his residuary legatee *as such;* for, as he can give the benefit of the lapse to another person only by giving him a legacy of the same amount, and by charging it upon the land in the same manner, if he give such a legacy to his residuary legatee, the latter will not take it as residuary legatee, but as any other person would take it, so that he will fill the two characters of residuary legatee and pecuniary legatee. The fact, therefore,

that one is a residuary legatee will not aid him, in the least, in proving that he also has a pecuniary legacy charged on land, and he must therefore adduce the same evidence that would be required of any other person, *i.e.*, he must show that the testator has given him a pecuniary legacy, of the same amount as that intended for A, and has charged it upon his land in the same manner."

Conversion by severance of crops, timber or minerals is briefly treated in closing.

"DISCHARGE of Contracts by Alteration" is the subject of careful study of cases by Professor Williston, the first part of which appears in the November number of the *Harvard Law Review* (vol. xviii., p. 105). He treats first of the ancient doctrine of discharge by alteration, distinguishing the effect of subsequent alteration of a deed which cannot affect a title validly passed and of a covenant which must be valid when enforced. This question of substantive law is complicated, however, with a question of evidence.

"Though the rule of evidence is often broadly stated, the English courts have held that not only in the case of alteration by a stranger may the altered deed be given in evidence as proof that a title passed, but that this may be done even where the alteration was chargeable to the party offering the deed, and similarly that the cancellation of a conveyance does not prevent proof by one consenting to the cancellation that such a conveyance was made."

"In this country alteration by a stranger does not generally avoid a deed, so that such a deed can of course be given in evidence, but it has been held generally, that if a material alteration is fraudulently made, the altered deed cannot thereafter be given in evidence."

"The doctrine is applicable only to unrecorded deeds, for when a deed has been recorded and subsequently fraudulently altered or destroyed, there is no difficulty of proof if the statute makes a copy from the records primary evidence. If, however, a deed is altered before it is recorded, the record can afford no help. If a writing is not necessary to the transfer of property, as is the case with chattel property, alteration of a bill of sale, or other writing, conveying such property will not prevent proof of the transfer."

The rule has been applied not only to all written contracts but even to writings like memoranda to satisfy the Statute of Frauds.

In England alteration by a stranger still discharges the contract, if the instrument were in the custody of the obligee; in this country it does not. An unauthorized alteration by the obligee does not affect the rights of the obligee, and an alteration to correct mistake and cancellation by mistake are not fatal in this country. At common law an authorized alteration of a sealed contract would be invalid, for the deed was thereby destroyed. To-day the obligee would be relieved from such consequences. An authorized alteration of an unsealed contract is binding on both parties and it will be enforced in the altered form. Ratification may be even more effective than previous authorization, for it may amount to a redelivery and therefore a revival of an altered deed. This would not suffice, however, if witnesses or acknowledgment were required. Restoration of an avoided contract is ineffective without the consent of the obligee, but if the alteration were innocent when restored, it will be enforced.

"WHAT Constitutes a Complete Transfer of Stock as against Third Parties" is the subject of an article by Romney L. Willson in the *Central Law Journal* of Dec. 2, 1904 (Vol. lix., p. 448). The conflict of authority between different States is analyzed and the conclusion is reached that "it is plain that the marked tendency in the decisions and statutes is toward the elimination of formalities, such as a transfer on the books. The opinion seems to be growing rapidly that public policy and convenience demands that this class of property, or rather its representative, the certificate of stock, be allowed to pass from hand to hand with as much ease as does commercial paper."

"Whether this tendency is salutary may be questioned in spite of such high sanction. That the more wealth is invested in certain kind of property the easier the transfer of that property should be made by law, is a theory that is subject to qualifications. The law should make transfers as easy as possible

consistent with the rights of third parties. This qualification is important and is the reason for a great many formalities of the law.

THREE essays on topics of international law delivered at the Congress of Arts and Sciences appear in the December magazines.

"Some Problems of International Law" is the title of a valuable and timely paper on the relations of belligerents to neutrals by Charles Noble Gregory, printed in the *Yale Law Journal* for December (Vol. xiv., p. 82). It is replete with ancient and modern citations of authority and precedent, and its interest is enhanced by its discussion of illustrations furnished by the stirring events in the Far East. The author takes up first the rule exempting from imprisonment neutrals on neutral blockade runners, and shows that this is a modern alleviation of older strictness. Of contraband, he says: —

"The doctrine that articles which may serve alike the uses of peace or war are not contraband unless intended for the military uses of a belligerent, rests on two broad principles: —

"First, that neutrals under modern usage cannot be hindered in their general right to trade in innocent articles of commerce with belligerents except by an actual blockade, never by a proclamation.

"Secondly, international law forbids a belligerent to make war upon the civil or non-combatant population of its opponent."

"Against earnest and concurrent action on the part of these two powers (England and the United States) it would seem strange if Russia should successfully carry out her plan for extending the definition of contraband, and so turning back the happy progress of neutral right. In so far as condemnations have already taken place, they will undoubtedly be the source of claims for damages which will not be easily satisfied."

"Neutral rights are the rights of the vast majority, and they should not be lightly prejudiced for those of the belligerents, who are always a small minority."

In regard to the attempts by the Japanese to cut out Russian vessels in Chinese harbors, he says: —

"It is believed that later practice and decisions in no way warrant the invasion of a neutral port even to seize or attack a hostile cruiser harboring there."

He sustains the practice of the Russians in sinking neutral prizes on the ground that "if, for good and sufficient cause, such neutral prize cannot be brought in, there is no obligation to allow her to go free, to reinforce the enemy with her cargo, but as a rule of necessity, to prevent the delivery of the cargo, she may be destroyed exactly as a belligerent, the crew and papers being preserved and the question of prize or no prize being adjudicated as if she had been brought in."

The author gives as a "result of this discussion of these several problems in international law (a few of the many lately mooted) a humiliating sense of the uncertainty, confusion, and conflict which still attend the maritime rights of neutrals in the time of war. One is forced almost to acquiesce in M. de La Peyre's recent statement, that maritime international law does not exist.

"It certainly shows the great necessity of an authoritative international conference to discuss, define, and establish the rights and duties of neutral commerce in time of war. Now that the vast and complicated machinery of war is of such desolating destruction, it is more true even than a generation ago, when the late Mr. Lecky so convincingly proclaimed it, that the rich nations are the potent ones in war, as in a ruder age they were not. It is true, too, that the very riches which enable them to support, powerfully persuade them to avoid, war. These great commercial powers possess the seas with their beneficent adventures and they must strive to keep the peace on those great highways of all the nations, and the ships that bear the means of life must be considered as of interest and human claim equal and paramount to those designed to inflict death."

The other addresses are: "To What Extent Will a Nation Protect Its Citizens in Foreign Countries," by Benjamin T. Abbott, printed in the *American Lawyer* for November (Vol. xii., p. 475); and that of J. M. Dickinson on "The Alaskan Boundary Case," printed in the *American Law Review* (Vol. 38, p. 866).

THE LIGHTER SIDE

STAGE "law" may not be quite the most fearful and wonderful mystery in the whole universe, but it's near it — very near it. We were under the impression, at one time, that we ourselves knew something — just a little — about statutory and common law, but, after paying attention to the legal points of one or two plays, we found that we were mere children at it.

We thought we would not be beaten and we determined to get to the bottom of Stage law, and to understand it; but, after some six months' effort, our brain (a singularly fine one) began to soften; and we abandoned the study, believing it would come cheaper, in the end, to offer a suitable reward to any one who would explain it to us. The reward has remained unclaimed to the present day and is still open.

The only points of Stage "law" on which we are at all clear, are as follows: —

That if a man dies without leaving a will, then all his property goes to the nearest villain.

But if a man dies and leaves a will, then all his property goes to whoever can get possession of that will.

That the accidental loss of the three and sixpenny copy of a marriage certificate annuls the marriage.

That the evidence of one prejudiced witness, of shady antecedents, is quite sufficient to convict the most stainless and irreproachable gentleman of crimes for the committal of which he could have no possible motive.

But that this evidence may be rebutted, years afterwards, and the conviction quashed without further trial, by the unsupported statement of the comic man.

That if A forges B's name to a check, then the law of the land is that B shall be sentenced to ten years' penal servitude.

That ten minutes' notice is all that is required to foreclose a mortgage.

That all trials of criminal cases take place in the front parlor of the victim's house, the villain acting as counsel, judge, and jury rolled into one, a couple of policemen being told off to follow his instructions.

These are a few of the more salient features of Stage "law" so far as we have been able to grasp it up to the present; but, as fresh acts and clauses and modifications appear, to be introduced into each new play, we have abandoned all hope of ever being able to really comprehend the subject.

JEROME K. JEROME,
in "Stage Land."

A NEW YORKER drawn for the jury to try Nan Patterson for murder declared that he had bias because he was defendant in a breach of promise case and could not, therefore, give any woman a fair trial.

IN Chief Justice Marshall's time the Supreme Court of the United States lived apart from the rest of the world and dined together at a sort of mess, only once a year dining in public at the White House. Justice Story was once rallied on this aloofness, and explained it drolly: —

"The fact is we justices take no part in the society of the place. We dine once a year with the President, and that is all. On other days we dine together and discuss at table the questions that are argued before us. We are great ascetics, and even deny ourselves wine except in wet weather."

Here the justice paused, as if thinking this last statement placed too great a tax on human credulity, and then he added, slyly: —

"What I say about wine, sir, gives you our rule, but it does sometimes happen that the chief justice will say to me when the cloth is removed: 'Brother Story, step to the window and see if it does not look like rain.' And if I tell him that the sun is shining, Chief Justice Marshall will sometimes reply: 'All the better; for our jurisdiction extends over so large a territory that the doctrine of chances makes it certain that it must be raining somewhere.'" — *Lancaster Law Review.*

"Your honor," observed Mr. Bailey, "my unfortunate client — "

"There the court is with you," gently interrupted the judge, with a grim smile.

And the future senator lost his case.

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM

(Copies of the pamphlet Reporters containing full reports of any of these decisions may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.)

ACCESSORY TO SUICIDE. (PUNISHMENT — IMPOSSIBILITY OF PUNISHING PRINCIPAL.)

KENTUCKY COURT OF APPEALS.

The unreported *nisi prius* case, in which a Hibernian judge informed a person convicted of having attempted suicide that a much heavier punishment would have been imposed by the court if the attempt had been successful, is almost paralleled by the Kentucky case of Commonwealth *v.* Hicks, 82 Southwestern Reporter 265, in which Hicks was tried as accessory before the fact to the crime of suicide. Some of the testimony in this case is quite interesting, though perhaps a trifle less instructive than the legal principles involved. For instance: Tom Sears testified that he was standing on the corner by Hunt's drug store, when Hicks came along and smiled and said: "I have got to go to the drug store and get Chris Haggard a quarter's worth of morphine. I reckon he's going to kill himself." A sister of the deceased testified that on Wednesday, preceding the death of the deceased, the accused offered to bet her that Chris Haggard would not live until Saturday night. The druggist testified that he sold the accused half a dram of morphine and that accused said he was purchasing it for a young man by the name of Haggard. Another sister of deceased testified that on Wednesday night before deceased died, Hicks asked him what night he had set for him (Hicks) to come back, and deceased told him Friday night, whereupon accused said: "Put it off. I can't come;" and Haggard said: "I will put off killing myself until Saturday night and you all can come to my burying Sunday." At the time of this conversation the witness said her brother Chris was playing the guitar and "seemed like he was just as lively as he could be." The court finds little difficulty in reaching the conclusion that suicide is a felony, reciting Blackstone's well-known statement that a felonious homicide may be committed either by killing oneself, or another person, and Bishop's conclusion that the same principle which forbids one to take the life of another prohibits equally the taking of his own life, so that self-murder or suicide, like any other murder, is a common law felony. Clark on Criminal Law and Commonwealth *v.* Bowen, 13 Mass. 356, are cited in support of the rule that inasmuch as suicide is a felony at common law, one who counsels another to commit suicide and is present when the act is committed is guilty of murder as a principal in the second degree. The most serious question in the case, however, arises under the Kentucky statute, which provides that in all felonies the accessories before the fact shall be liable to the same punishment as the principal and may be prosecuted jointly with the principal, or severally. This statute furnishes foundation for an argument that, as the principal in the crime was dead and could not be punished, the terms of the statute making the accessory liable to the same punishment as might be inflicted on the principal could not be applied so as to authorize the infliction of any punishment on the accused. The court, however, holds that as suicide at the common law is murder, and as the statute fixes the punishment of willful murder at death or confinement in the penitentiary for life, the case stands in principle as if one was accessory before the fact for the murder by his principal, of a third person and, after the commission of the crime the principal should immediately kill himself. In this case it would be impossible to punish the principal, but it is not believed that under any sound reasoning the accessory would thereby go free. On the contrary the very object of the statute is to make the punishment of the accessory entirely independent of the conviction or punishment of the principal. It is therefore concluded that under the law of Kentucky an accessory before the fact in the case of suicide is subject to punishment for the crime of willful murder.

CONSPIRACY. (UNFAIR COMPETITION — MALICE.)

KENTUCKY COURT OF APPEALS.

An insight into the methods pursued by the Standard Oil Monopoly in smothering competition is given in the case of Standard Oil Co. *v.* Doyle, 82 Southwestern Reporter 271. It appears from the statement of facts that Doyle for many years had been the agent of the Standard Oil Company, but left its employ and started in business for himself. He received oil from Cincinnati from another company in carload lots, and did a thriving business for several months. Very soon a special agent of the Standard Oil Company arrived at Lexington to look after the interests of that company. It seems that he went to one of the other

appellants, who was the oil inspector for that county, for aid and advice. These two gentlemen then proceeded to do everything in their power to break up the business of the appellee Doyle. It seems that they threatened the wholesale customers of Doyle to shut them up in business if they continued to purchase and deal with him. They threatened both the wholesale and retail customers that the Standard Oil Company would refuse to sell them oil, gasoline and other commodities so long as they continued to purchase such articles from the appellee. The oil inspector charged that the oil being sold was below the standard required by law, and had Doyle arrested on various charges of violating the ordinances and the criminal and penal laws of the commonwealth. Upon the trial for these offenses the charges were dismissed. The Standard Oil Company went to one Griffith, the third appellant, who was running an oil route and purchasing his oil from Doyle, and offered him a rebate of one cent a gallon if he would ship back to Doyle the oil which he had purchased from him, threatening that if he did not they would put wagons on the route in opposition to him and ruin his trade. Griffith returned the oil and formed a partnership with the oil inspector. They received two wagons from the Standard Oil Company to be used in peddling the company's oil. These wagons were run in opposition to Doyle's wagons, and the proof shows that they obstructed, annoyed and harassed the drivers of Doyle, by following them, sometimes going in front of them, stopping at every place where they stopped, going into the residences with Doyle's drivers, and there offering to sell oil at a cheaper rate, even offering to give their oil without charge if the consumers would not purchase of Doyle. Sometimes they would stand for hours at one place awaiting the movement of Doyle's driver. The appellants contended that their acts were legitimate and were solely for the purpose of building up their own business, and that if the appellee suffered any damage as a result thereof, it was such a loss as would not support an action of damages, and cited many cases. The court discusses these cases at length, distinguishing them from the case at bar, and states that it was shown by the evidence that a purpose was accomplished by unlawful means, and when the relation of the parties is considered, their manifest motives of self-interest, the manner in which the purpose was carried out, and the declarations of the parties, it is reasonable to infer that this purpose was accomplished by concert of action and conspiracy. The court sustains the action of the lower court in submitting the question of damages to the jury, and refuses to set aside a verdict of $2,300 against the Standard Oil Company, on the ground that a verdict of only $300 against the oil inspector shows that the action of the jury in the case of the Standard Oil Company was the result of passion and prejudice. The court refers to Buffalo Lubricating Oil Co. *v.* Standard Oil Co., 42 Hun, 153, Murray *v.* MacGarigle, 69 Wis. 483, 34 N. W. 522, West Virginia Transportation Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895, and also to other cases from New Jersey, Maine and Tennessee.

DOMICILE. (NAVAL OFFICERS AND OTHER OFFICIALS.)

KENTUCKY COURT OF APPEALS.

A holding, which, if applied to various phases of the law of domicile, may be of general interest, owing to our recently acquired insular possessions, and the number of American soldiers, sailors and government employés who have gone thither, appears in Radford *v.* Radford, 82 Southwestern Reporter 391.

Plaintiff was a naval officer in the service of the United States, and was at the time of the institution of the action in active service in the Philippines. The defendant, his wife, resided in the City of New York, and the action was brought against her for divorce. The question of jurisdiction was raised, and the court said: "The evidence shows the residence of appellant to have been in Christian County, Ky. He is a native of that county, owning property and paying taxes there, and had never claimed either a legal or actual residence elsewhere. Being in the naval service of his country, he is necessarily out of his native state whenever his duty calls him. He obeys the orders of his superiors, and goes when and where they direct. It has never been the policy of the law to add to the burdens of one serving his country in the army or navy the loss of residence in his native state from his constrained and involuntary absence therefrom. Such a one cannot be said, in any proper sense of the term, to have a residence anywhere other than the home he has left, since he has no choice as to where he goes, the time he can remain, or when he shall return. In order to gain either an actual or legal residence, there is, of necessity, involved at least the exercise of volition in its selection, and this cannot be affirmed of the residence of either a soldier or sailor in active service."

The logic of the case would seem to make its reasoning applicable to cases of government employés other than military officers, who are ordered to our dependencies.

The case of Tipton *v.* Tipton, 8 S. W. 440, in

which Tipton had voluntarily left his native state and gone to the West India Islands in the employment of a phosphate company and resided there several years, and was held to have lost his domicile, is distinguished. The gist of the distinction drawn is the absence of volition in the first case, and its presence in the latter.

FALSE REPRESENTATIONS. (BELIEF IN CHRISTIAN SCIENCE — MATERIAL TREATMENT FOR DISEASE.)

MICHIGAN SUPREME COURT.

The case of Meyer *v.* Knott, 100 Northwestern Reporter 907, in the words of the court, is "novel, not to say unique," and involves a rather attractive combination of psychological principles and pathological facts, and is expressly stated by the court to be considered upon the theory that Christian Science, as taught by Mrs. Eddy's book "Science and Health," is true. This work thus celebrates its initial appearance in the courts as an authority. The defendant was a teacher of Christian Science and "First Reader of the First Church of Christ, Scientist, of the City of Detroit," and the declaration alleged that she falsely and fraudulently represented to plaintiff that she was mentally and morally qualified and competent to give instruction in Christian Science mind healing, in reliance on which representations the plaintiff paid her a large sum of money for such instruction, but received no benefit therefrom. At the trial plaintiff produced evidence that two or three years prior to the contract defendant had had superfluous hair removed from her face by means of electrical treatment, and expert witnesses testified that superfluous hair is a "disease" known to pathology by the name of "hypertrichosis." The chief question in the case arises upon the competency of this evidence to show that defendant was not a true and conscientious believer in and follower of the principles of Christian Science, which is opposed to material treatment for disease. In considering the question the court says: "Apart from the consideration that this departure from the true faith, if it be such, occurred two years before the contract with plaintiff, thus leaving ample time for defendant to mature her belief, we deem it sufficient answer to the plaintiff's contention that, if it be conceded that superfluous hair is a disease, it is also regarded by many as merely a facial blemish. Some conceal it as well as they may by the use of face powder, some have it removed. The defendant, because her little son teased her about the appearance of this superfluous hair, caused hers to be removed. This was not done as a treatment for disease, but as a means of making herself more presentable. We think this does not tend to show that defendant was guilty of fraud in holding herself out as a teacher of Christian Science."

LABOR CONTRACTS. (BREACH MADE A PENAL OFFENSE — CONSTITUTIONALITY.)

ALABAMA SUPREME COURT.

In the case of Toney *v.* State, 37 Southern Reporter 332, a recent act of the Alabama Legislature, providing that the breach of a labor contract should constitute a misdemeanor, was before the court upon the question of constitutionality. This remarkable statute was presumably passed to correct the great evils which result from the abandonment of farms by laborers and renters without justifiable excuse; perhaps after obtaining advances and incurring indebtedness to the employer and often leaving the crops when it is almost impossible to secure other labor to work and harvest them. It provided, in brief, that any person who had contracted in writing to serve another for a given time, or any person who had by a written contract leased or rented land for a specified time, or any person who had contracted in writing to cultivate land or furnish teams or labor for this purpose, and who, before the expiration of the contract, without the consent of the other party, and without sufficient excuse, (to be adjudged by the court,) should abandon said contract and make a second contract of a similar nature with other parties, without giving notice to the person with whom the first contract was made, should be guilty of a misdemeanor, and upon conviction should be subjected to fine or imprisonment, or both. It will be seen that the act in question prohibits the employé or renter from making subsequent contracts of the kind which he had seen fit to abandon, except under one of three conditions; the consent of the employer or renter, second the existence of an excuse for the abandonment, which could not be determined except at the end of a criminal prosecution, and third, by the giving of notice of the existing contract to the future employer. The first condition could be made unavailable by the withholding of consent by the original employer, and the third would, of course, tend to prevent the making of a similar contract with a new employer for reasons which are obvious. The court unhesitatingly holds that such provisions are repugnant to the provisions of the United States Constitution to the effect that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, in that it restricts the right of contract. It is

also held to violate the provisions of the State Constitution to the effect that the protection of the citizen and the enjoyment of life, liberty and property is the sole object of government. This same act was held to be unconstitutional by Judge Jones, of the Federal Court, in the Peonage Cases, reported in 123 Fed. 671. Judge Jones reviews the evils which exist because of the abandonment of contracts to labor at times when such abandonment works an irreparable loss to the employer, but holds that another statute, providing that a breach of contract which occurs after the employé obtains money or personal property from the employer, and which is made with the intent to injure and defraud the employer, and is without just cause, shall subject the offender to the same punishment as if he had stolen the money or property of the employer, unless the same is refunded at the time the contract is terminated, goes as far towards the correction of this evil, as is possible by a criminal enactment, under our form of government.

MISCONDUCT OF JUROR. (INDEPENDENT RESEARCH — EVIDENCE NOT BEFORE THE COURT.)

KENTUCKY COURT OF APPEALS.

On the trial of the case of Gratz *v.* Worden, 82 Southwestern Reporter 395, which was an action for personal injuries, a juror who had evidently had experience in that kind of actions before, and was by nature somewhat more skeptical than his associates, determined to satisfy himself as to the extent and nature of plaintiff's injuries at a time when that worthy was not under the incubus of his testimonial oath, and hence followed him during a recess out into the corridors of the court house and satisfied himself in that manner that plaintiff's injury, as evidenced by a halting gait, was real and not feigned. Whereupon he readily united with his brethren in returning the customarily generous verdict for plaintiff, but committed the indiscretion of afterwards telling defendant's counsel of his exploit. Counsel thereupon drew up an affidavit, rehearsing the facts, and moving for a new trial on the ground of the juror's misconduct. Both the trial and the supreme courts took a common sense view of the situation, and said that the matter was of little importance. It would seem, however, that on other than technical grounds, such as the character of the evidence, as hearsay, and the incompetency of a juror to impeach his own verdict, that a conclusion reached by a juror on evidence other than that arrived at in the court, is not in accordance with a strictly legal theory of evidence and conduct of trial.

PERSONAL INJURIES. (FELLOW SERVANT DOCTRINE — DELEGATION OF DUTY.)

ILLINOIS SUPREME COURT.

In these days of the expansion of the fellow servant doctrine, the case of Rogers *v.* C. C. C. & St. L. R. Co., 71 Northeastern Reporter 850, is of interest. A fireman on a freight train was killed at a side-track by being crushed between his engine and a car left on the side-track at a point where it obstructed the passing train. The railroad's train dispatcher had been notified of the existence of the obstruction and informed the conductor of the freight train upon which deceased was employed, but the conductor negligently failed to communicate that information to the fireman. It was conceded that the different members of the train crew, including the conductor and fireman, were fellow servants within the "department rule" as it prevails in Illinois, where the accident occurred and where suit was brought. But the Supreme Court reversing the lower court said: "But we are here confronted with a rule of law, applicable to the facts of this case and binding upon the defendant company, in no way affected or controlled by the fact that the conductor and the deceased were at the time fellow servants, and that the death of the latter was the result of the negligence of the former. When the defendant received information of the obstruction, it became its duty to use reasonable diligence to warn the deceased of the danger; and that duty was one which it could not relieve itself of by directing his fellow servant to perform it. It being a duty owing by the master to the servant, it could not delegate that duty to another, even though a fellow servant of the deceased, and absolve itself from liability for the injury resulting in consequence of the failure to communicate knowledge to the deceased of the increased hazard. Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215. Several other cases were cited in support of the decision: Chicago, Burlington & Quincy Railroad Co. *v.* Avery, 109 Ill. 314; Chicago & Eastern Illinois Railroad Co. *v.* Kneirim, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259; Mobile & Ohio Railroad Co. *v.* Godfrey, 155 Ill. 78, 39 N. E. 590; Hess *v.* Rosenthal, 160 Ill. 621, 43 N. E. 743; Chicago & Alton Railroad Co. *v.* Eaton, 194 Ill. 441, 62 N. E. 784, 88 Am. St. Rep. 161.

PRIVILEGED COMMUNICATIONS. (PHYSICIAN AND PATIENT — TREATMENT OF PATIENT AGAINST HIS WILL.)

NEW YORK COURT OF APPEALS.

The question whether that confidential relationship which is presupposed to exist between physi-

cian and patient, and because of which the law makes privileged any information which comes to the physician under such circumstances, can exist in a case where the patient is an unwilling one, having taken a dose of poison with the intention of committing suicide, and where he resents the efforts of the physician to save his life, was considered in the case of Meyer *v.* Supreme Lodge, K. P., 70 Northeastern Reporter 111, and decided by a divided court. It seems that Meyer had gone to a hotel and taken a dose of Rough-on-Rats for the purpose of ending his life. He was discovered by one of the attendants of the hotel, who immediately sent for a doctor. Judge Vann, who wrote the majority opinion, sees the matter in the following light: A learned doctor was called as a physician; he attended as a physician; he made a diagnosis as a physician; and he administered remedies as a physician. In all that he did he acted in a professional capacity. While it is true that in all he did he acted against the will and in spite of the remonstrance of the man whose condition imperatively called for professional treatment, still the meeting was professional in nature, and all that he said or did was strictly in the line of his profession. Was the subject any the less a patient within the meaning and object of the statute because he was forced to submit to ministrations designed to save his life? Was the doctor guilty of assault when he gave the hypodermic injection? Was he bound to leave him there to die without an effort to help him? Was the statute designed to protect only those who are treated by consent, but not those treated through necessity? Does it not mean by a "patient" at least one who is consciously treated by a physician, even without his consent, when the facts tend to show that through bodily suffering his mind had partially lost its hold? Either the doctor was the physician of Mr. Meyer, or he committed an assault upon him, and was guilty of a crime. If the wife of the deceased had called the doctor, she would have acted as an agent by implied authority. The bell boy who in fact called him also acted on implied authority. While the doctor in either case could have retired, if he remained in authority, he remained as a physician, and the sick man became his patient, and he was acting in a professional capacity when, as a duly licensed physician, he actually treated Mr. Meyer as a patient. When one who is sick unto death is in fact treated by a physician as a patient, even against his will, he becomes the patient of that physician by operation of law. The same is true of one who is unconscious and unable to speak for himself. The fact that the patient told the doctor several times to let him alone, that he wished to die, and expressed himself in a brutal and profane manner, does not negative the existence of the relation of physician and patient. Judge Vann cites with approval the case of Renihan *v.* Dennin, 103 N. Y. 573, 9 N. E. 320, where another physician was called by the attending physician and went in his professional capacity to see the patient, and the case of People *v.* Murray, 101 N. Y. 126, 4 N. E. 326, where a physician was sent by the district attorney to attend a patient upon whom a criminal assault had been committed. Cases where physicians have been sent to report upon the sanity of a prisoner are also cited, it being pointed out that if the physician prescribes for the prisoner the statements of the latter are protected, and if he does not prescribe they are not protected. Judge Gray dissents and says that it seems difficult to assert, with any gravity of countenance at least, with Meyer rejecting the witness's presence and services and cursing him for his interference, and with the doctor's determined efforts to prevent Meyer from dying in the hotel, whose servants had summoned him, that the relation of physician and patient arose, and that the confidential relation existed which the statute has in view, and which, with a tender solicitude for a patient's interests, it is designed to safeguard. The recent case of Griffiths *v.* Metropolitan St. R. Co., 171 N. Y. 106, 63 N. E. 808, is cited as one somewhat in point and controlling in the present instance.

RAILROAD TICKETS. (Delay in Using — Limitation of Actions.)

Texas Court of Civil Appeals.

The question whether a first class unlimited railroad ticket is good until used is probably passed upon for the first time in the case of Cassiano *v.* Galveston, H. & S. A. Ry. Co., 82 Southwestern Reporter, 806. The ticket in question was presented fourteen years after it had been issued, and had been purchased by the appellant from an acquaintance, who had found it among some papers of his deceased father. When the ticket was presented it was refused, and as the appellant was not able to pay the fare demanded, he was ejected from the train, in the middle of the night, at a small station between Houston and San Antonio. He was delayed here until money could be sent to him, and as a result of this delay, he lost a position to which he was going in San Antonio. The court points out that the vital question at issue is whether the appellant was entitled to a seat by virtue of the ticket presented by him, it appearing that no unnecessary force was used in ejecting him. The statute of limitations was pleaded by the railroad company. It

was the contention of the appellant's attorneys that the ticket evidenced a contract which was to be performed on demand, and that time would not begin to run against it until such demand was made, and at first glance this would appear to be the rational and common-sense view of the matter. In disposing of this contention, however, the court says: When issued the ticket was evidence of the fact that the purchaser had paid for passage from Houston to San Antonio, and not being limited as to time, it could be used at any reasonable period after its purchase. When railroad tickets are purchased, common experience demonstrates that they are purchased for immediate use, and such use must necessarily be within the contemplation of the carrier and passenger when the purchase was made. The statute would, therefore, begin to run within a reasonable time after the issuance of the ticket. No one buys railroad tickets to store away and be kept to be transmitted as part of his estate to his heirs, but they are bought for immediate use, and such use of them must necessarily be in contemplation of the parties when the ticket is sold. The ticket held by the appellant could not occupy any better position as to the statute of limitations than a promissory note payable on demand, and it is the settled rule in Texas that the statute of limitations begins to run against such a note from its date, citing Cook's Adm'rs *v.* Cook, 19 Tex. 434; Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315; Pitschki *v.* Anderson, 49 Tex. 4; Swift *v.* Trotti, 52 Tex. 504; Henry *v.* Roe, 83 Tex. 446, 18 S. W. 806; Kampmann *v.* Williams, 70 Tex. 568, 8 S. W. 310.

STREETS. (Obstruction of Sidewalks — Rights of Abutting Owner and of Pedestrians.)

Illinois Supreme Court.

The slippery and unreliable banana peel which for many years has furnished questionable jokes and cartoons, makes its debut, so far as we know, in the literature of the law in a case the very title of which is more or less suggestive of bananas, viz., Garibaldi & Cuneo *v.* O'Connor, 71 Northeastern Reporter, 379. Garibaldi & Cuneo were dealers in fruit, and in the transaction of their business obstructed the sidewalk adjacent to their building with boxes containing bananas, or other fruit, bunches of bananas and barrels, so as to force pedestrians into a narrow passageway between the boxes and barrels. Plaintiff, while passing along this walk, was forced into this narrow passageway and, while walking there, stepped upon a banana with the usual result, and brought action for the injuries occasioned by the fall. The question of real legal interest in the case is the right of persons owning property adjacent to the street to incumber the sidewalk in the course of transaction of business, and upon this point the court speaks as follows: "Abutters upon a public street may use the sidewalks in front of their premises for the purpose of loading and unloading goods, merchandise, or other like articles in which they may deal or use, but the sidewalks belong to the public, and the public primarily have the right to the free and unobstructed use thereof, subject to reasonable and necessary limitations, one of which is the right of an abutting property owner to temporarily obstruct the walk by loading or unloading goods, wares and merchandise when such obstruction is reasonably necessary. Such obstruction must, however, be both reasonable as to the necessity therefor, and temporary in point of time. The prior and superior right of passage is possessed by the public. A merchant or business man cannot be permitted to so conduct his business of receiving and delivering the commodities in which he deals as that the sidewalks shall be substantially appropriated to the transaction of his affairs. A business which has reached that magnitude cannot be accommodated by the appropriation of the public sidewalks to its purposes, but the proprietor must enlarge his place of business, procure another location which will meet its demands, or otherwise provide for the transaction of his business in such manner that the public will not be asked to submit to other than reasonable and merely temporary obstructions of the public way." It is specifically held that inasmuch as plaintiff was compelled to walk in the narrow passageway, and as defendants were engaged in handling bunches of bananas on the sidewalk so that the dropping of a loose banana on the part of the walk where defendants compelled the public to walk might have been reasonably apprehended, they were liable for plaintiff's injuries.

TRADE NAMES. (Use of Own Name — Cases Distinguished.)

U. S. Circuit Court of Appeals.

Two cases involving the question of trade-names and unfair competition, both published in 122 Federal Reporter, are of sufficient interest to deserve notation. The facts involved in either case would furnish a sufficient reason for giving it mention, but the two become peculiarly interesting when they are compared and the fact is noted that precisely the same principle is applicable in each case, the only difference being that in one case the facts are held to fall within its purview, while in the other the contrary conclusion is reached.

The cases are those of Royal Baking Powder Company *v.* Royal, at page 337, and Wyckoff, Seamans & Benedict *v.* Howe Scale Company, at page 348, of the volume mentioned. In the first case it appeared that the Royal Baking Powder Company had for many years been making and selling a baking powder under the name "Royal," arbitrarily used to designate origin, and by which name its product was called for by purchasers and became distinctively known to the purchaser rather than by the appearance of the packages. Defendant, whose surname was "Royal," commenced the manufacture and sale of a baking powder which he put up in cans similar in size and shape to complainant's and having a label similar in color and general appearance bearing his name in large letters. He also advertised the same as the "New Royal." Having been enjoined from such advertising and from imitating complainant's labels, he changed the color of the label from red to blue on which was printed the name "Maxim Baking Powder," but still having his name in prominent letters on the front of the cans. There was evidence that his baking powder in some cases had been sold as that of complainant and that retailers had given it to customers calling for Royal Baking Powder without explaining that it was the product of complainant. Under these facts it was decided that complainant had appropriated the word Royal to indicate baking powder made by it and that whether or not it had a technical trade-mark in the word it had used it until it came to have a secondary signification which was entitled to protection. Defendant, however, had a right to use his own name in connection with his business, even though he might thereby interfere with or injure the business of another. But it was held that all the facts showed a purpose on the part of defendant to so use his name as to sell his product as that of complainant, and that while he would not be enjoined from using his name he would be enjoined from displaying it on the front label of his cans, and was further determined that the labels used by him (facsimiles of which are reproduced in the Federal Reporter) were such as to mislead the public by the fact that the name Royal was so conspicuously printed and the general character of the label such as to be misleading.

In the second case the complainant had acquired from the corporation E. Remington & Sons, the original manufacturer of Remington typewriters, its typewriter business and good-will with the right to use the name "Remington." After the machines had become widely known by that name, two sons of the former president of the Remington Company, also named Remington, acquired an interest in a typewriter invented by one Sholes, and a corporation was formed by the brothers to manufacture the same under the name of the Remington-Sholes Typewriter Company, the machines being marked "Remington-Sholes" and afterwards "Rem-Sho." It was held here that the right of the Remingtons to use their own name in their business did not extend to the right to use it in the corporate name or in marking the product of the corporation where, as must have been known and intended, it would produce confusion through which some trade would be diverted from complainant so that the company would be enjoined from so using the name. It was, however, held that the arbitrary name "Rem-Sho" was not sufficiently like "Remington" to be of itself a cause of confusion

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TRIAL. (When Trial of a Cause Commences.)

Supreme Court of New York.

In Goodkind *v.* Metropolitan St. Ry. Co., 89 New York Supplement 703, the question arose on taxation of costs as to when a trial actually commenced. The jury was examined by the attorney for plaintiff and accepted on the 23d of May. Thereafter on the same day defendant's attorney commenced his examination of the jury, but in the midst thereof he asked for an adjournment until the next day, which was granted, the court stating that the case was to be considered on trial. To this no objection was made by either party, and in the New York *Law Journal* of the next day the case was noted as on trial on the previous day and unfinished. Under these circumstances the court considered it as clear that the trial of the case was commenced on the 23d.

WILLS. (Time When Will Speaks.)

Supreme Court of New York.

In Waldo *v.* Hayes, 89 New York Supplement 69, the court decides that where the will of a testatrix gave her "diamond brooch" to one person and her "jewelry not otherwise disposed of" to another, and the brooch which testatrix had when the will was executed was subsequently disposed of, but at her death she had another, this brooch passed to the one to whom the brooch was given in the will and did not pass to the person to whom testatrix's jewelry "not otherwise disposed of" was bequeathed, on the ground that the will speaks from the time of the death of the testatrix. In support of this holding the court cites Brundage *v.* Brundage, 60 New York 544; Van Vechten *v.* Van Vechten, 8 Paige 104; Tifft *v.* Porter, 8 New York 516; Castle *v.* Fox, Law Reports, 11 Equity 551.

Joseph W. Folk

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THE LEGAL SIDE OF JOSEPH W. FOLK

By K. G. Bellairs

ONE of the brightest minds of the Missouri bar asked to analyze the legal side of Joseph Wingate Folk, Governor of Missouri, famous because of his fight against corruption in office, replied: "He is above all else an *Intuitionist;* and with this quality he is the happy possessor of wonderful energy and a marble immobility of poise." This definition of the man whose name is almost a household word by reason of his successful crusade against venality in public office, tells in few words the sort of man whom the boodlers had to face when he set his sinews and started in to clean out the Augean stables of the Municipal Government in St. Louis and the State Government in Jefferson City.

The quality of any individual human being is of too fine an essence to be susceptible of accurate and scientific analysis. Every analysis will be found to have been borrowed very largely from the analyst. This same baffling elusiveness is equally at hand when we mark out for analysis the more limited sphere of a man's business or professional activities. We can easily, like the cartoonist, catch a few peculiarities or characteristic habits; or we know that he has won this great case and lost that; we can guess with tolerable accuracy at his professional income, but the real man with the arc of his potentiality, cannot be measured, save by time and destiny.

The law is one of the most difficult of modern callings. It requires a rare combination of physical and mental energy. Your scholar who is happy in the library and in searching profoundly after the historically developed reasons of the law, is very seldom a keenly strenuous fellow who loves to mix with men, try hard-fought jury cases, handle headstrong clients, and take a lively interest in matters social and political. Yet I venture to say that your real all-round good lawyer is pretty apt to be a judicious compound of these diverse natures. In addition to these, or rather along with these, every successful lawyer has of course the peculiar aptitudes that determine for him the precise lines of his life work.

Joseph W. Folk, while he could not be rated as a profound jurist, — he is too young for that, — nevertheless has the combination of mental and physical energy in a very high degree; and he is so happily poised that he can turn rapidly from one to the other, without any sense of confusion, and with a clear perception of the ultimate end. He can investigate with surprising rapidity the available authorities upon a legal proposition and form from them a clear and certain image of the law; and he is superlatively active, resourceful and persuasive, always dangerous, with an uncanny and unerring faculty of finding and hammering the weak point in an adversary's case.

These are the characteristics of this foe to boodle, and to them he owes his advance within a space of three years, from a somewhat obscure practitioner of the civil law to one of the foremost prosecutors of criminal cases. The term "Intuitionist" is well applied to Joseph W. Folk, yet knowledge of the law was bred into him, for his father

was Henry B. Folk, one of the foremost lawyers of Tennessee. Joseph W. Folk was born in Brownsville, Tenn., October 28, 1869, and after finishing in the common schools of his native city he attended Vanderbilt University, where he graduated in law in 1890, returned to Brownsville, and built up a large and lucrative practice. From early life he took a deep interest in public affairs, and from his advent in St. Louis, fourteen years ago, he was recognized as a working Democrat with his personal interests subservient to the public good. His value as an organizer was apparent when he founded the Jefferson Club, one of the strongest political clubs in the West, of which for a time he was President. In the summer of 1900 he came into the public notice by his settlement of the great street car strike, a strike that had paralyzed the business interests of the city and made life unsafe on the public streets. What others far more prominent and infinitely more concerned had failed to do, this young lawyer accomplished by force of his own personality, and the work made him a logical candidate for office when a caucus of citizens met to determine on a clean local ticket in 1900. He accepted the offer of the Democratic nomination for Circuit Attorney only after three refusals, and a declaration: "If I take office I do so uncontrolled, free to do my duty as I see fit and under obligations to no one," which was regarded as a jest.

It was strange that his first act should be to bring to justice the very men of his own party who violated the law. Election frauds were charged and the new Circuit Attorney took up every case, saw that indictments were returned where the evidence justified, and prosecuted in every case despite frantic appeals of the Democratic "bosses," with threats and intimidation of every sort. His work was so vigorous that the "ward-heelers" were forced into their holes. Then came his campaign against the "Straw-bondsmen," a work that alone was enough to attract attention to the Circuit Attorney, because it put a stop to fictitious bonds and brought into the light men who were posing as wealthy, yet had naught. Five of these went to the penitentiary.

The judgment of Folk as a lawyer, however, must rest entirely upon his prosecutions in the bribery cases. Taking hold of an uncertain clew, he forced his way through a maze of corruption, indicted men high in life, and brought to trial all that the law could reach.

By way of explanation it is proper to state here that when Folk took hold of the bribery investigation in the city of St. Louis, there had previously been but thirty-five cases of bribery reported among all the authorities, and not one of these approached near enough to the cases brought to offer a guide to the prosecution. Therefore his work is all the greater in the eyes of lawyers, because by his prosecutions the way has been paved and future prosecutors of boodlers, if the necessity ever arises, will have plainer sailing. The law as to bribery is now established in Missouri and thereby clarified in other states.

Folk's career as an investigator began with the summoning to his office of the members of the upper and lower branches of the municipal government. This occurred in the middle of January, 1901. There had been a small publication in a weekly paper about the holding of $135,000 boodle money in two of the St. Louis trust companies. In one concern, the Mississippi Valley Trust Company, $60,000 was laid away for the members of the combine in the Council, and in the Lincoln Trust Company $75,000 was put aside for the debauching of the House of Delegates. The publication did not specify the trust concerns, nor the amounts, but simply set forth that: "Unless that boodle comes down there will be something doing, as the boys are getting uneasy." This was a very slight clue for even a Sherlock Holmes to follow up, but Folk undertook it. He had no detectives

at his disposal and the entire work devolved upon him. He started in on the members of both branches of the Assembly and found himself balked at every turn. Circumstances afterwards revealed that the Councilmen and the Delegates were carefully schooled. It appeared that the work of training these law makers devolved on three of the bribe-takers and for a time it was highly successful. Not a syllable of guilt could Folk wring from them.

"I never heard of a combine, know nothing of any boodle money, and would kill a man who accused me of bribery," was the invariable reply to all questions.

By dint of hard work, however, Folk brought out for the benefit of the Grand Jury, the foreman of which was William H. Lee, a leading banker, that there existed in both branches of the Assembly, what was known as a "Combine." This was a federation of men irrespective of party, whose sole object was control of legislation and exaction of money for every bill that passed. No matter how small the object nor how large the public benefit, unless money was forthcoming, the Combine held up or defeated every measure. This money did not go to the city treasury but into the pockets of the Combine. Just as a board of directors of any business house or bank would meet, so would the Combine work. The Speaker of the House was chairman of the caucuses of the Combine. He called the meetings together and measures were discussed as cold-bloodedly as a business man would discuss a business proposition with his directorate. The probable value of the bill would be "chewed over" and votes would be taken as to how much ought to be demanded for the passage of the bill. The figure voted for by the greatest number of the Combine, which in the House consisted of nineteen of the twenty-eight members, would be finally settled upon and then the Combine would appoint an "agent." It was the duty of the agent to seek out the promoter of the bill and approach him with the proposition of the Combine. The price demanded would be laid before him and he would be given his choice of paying or seeing the bill defeated. In very few instances did the object of the Combine fail. Folk's first information on this score was very vague, but he had enough to inspire him and he also learned that the bill in which it was stated the boodle money was "held up" was known as "House Bill 44." This was a measure to allow the St. Louis and Suburban Railway Company certain franchises over the public streets. The value of the franchise, if granted, would have been incalculable. Charles H. Turner was the president of the railway and he was summoned. He mentioned the name of Philip Stock, "Legislative Agent," who handled all such matters," and Stock was brought up to the Circuit Attorney's office with Turner. Stock held out valiantly for a time. He was supported by Turner, and it seemed that the State would make no headway. But the Folk system of questioning, which meets all contingencies with a smile, was not to be baffled.

"Gentlemen, you are but wasting your time," was the quiet remark of Mr. Folk.

"We are aware of that. Our time is valuable and our business demands that you cease this questioning and allow us to go," was the reply.

The smile never left Folk's face.

"The quickest way to do that is to tell the truth. Now I am going to tell you something. I know what you know. You must tell me what you are concealing or, gentlemen, I will paste an indictment on each of your backs and you have my word now that I will send you both to the penitentiary."

Turner and Stock lost their self-possession for the minute, and they were gone.

"Give us time to consult our lawyer," they begged.

"You have one hour," said Folk, the imperturbable smile never leaving his face, "but may I ask who your lawyer is?"

"Governor Charles P. Johnson," said both men.

They left and returned within the hour accompanied by Johnson. The latter sought to learn something from the prosecutor before advising them what to do, and plied Folk with a mass of questions.

"I know what they want to tell me. If they do not voluntarily testify, I will drag it from them and then invoke the law against them also," Folk threatened. It is a positive fact that at this moment Folk did not have a single thing upon which to base any sort of a charge. But his smile was so confident and his manner so convincing that Governor Johnson, one of the leading members of the western bar, fell into the trap.

"You had better tell it all," he told his clients.

Turner and Stock, the millionaires, were taken before the high inquisition. Both made full confessions detailing how Charles Kratz, member of the Council, and John K. Murrell, agent for the Combine in the House had demanded $60,000 in the first, and $75,000 in the second instance for the passage of the bill. They had put the money up and also had paid at the behest of Kratz, $9,000 to Emil Meysenburg, a broker, a member of the Council, to remove his objections to the bill in question. In the matter of Kratz, Stock stated that John G. Brinkmeyer was to act as the agent of Kratz and had been entrusted with the first key to the safe deposit box, Stock himself holding the second key. It took Folk two weeks to drag a confession from Brinkmeyer. Day after day he held out and denied ever hearing about the boodle fund. In his case Folk's cardinal virtues, perseverance, determination and thoroughness asserted themselves. He never lost his temper with Brinkmeyer. His smile was continual, but time after time he confronted him with Stock and Turner, and in the end Brinkmeyer broke down and confessed. Indictments were voted against Charles Kratz, John K. Murrell, and Emil Meysenburg. Then the Circuit Attorney beat the indictments to court. He secured a writ impounding all the money as evidence in the cases before the city knew a word about the investigation, and that writ still holds good.

The indictments of Kratz, Murrell and Meysenburg was but the beginning of the boodle crusade. The drawing up of the indictments was work of the utmost study, but between hours the strenuous Circuit Attorney found time to delve into the boodle conditions so that never a day passed for months without some surprise or other springing up. Harry A. Faulkner and Julius Lehmann, members of the House of Delegates, were indicted for perjury. Folk learned from Paul Reiss, an attorney, that these two men had approached Reiss with the unparalleled offer of making him attorney for the Combine in an effort to obtain the boodle money. So *blasé* were the boodlers that they actually had the temerity to suggest a civil suit to determine the interest in the money. The combines had been restrained by the Supreme Court from passing the bill, but the members felt that they had earned the money because of their willingness to pass the measure, and suit was threatened. Reiss testified. Lehmann and Faulkner attacked this evidence on the ground of privileged communication, but Folk beat the defense on law. "No communication suggestive of the commission of a crime can be termed privileged," he argued, and the courts sustained him. The indictment of Ellis Wainwright, a millionaire brewer, and of Henry Nicolaus, his partner in the brewing interests as well as in the Suburban railway, were next in order and then succeeded the recording of true bills against George J. Kobusch, a millionaire St. Louisan, and one against Robert M. Snyder, a wealthy promoter of Kansas City, who made his home in New York and whose business it appeared on trial was the debauching of legislative bodies.

These early indictments were startling to the public, but the general opinion was that

nothing would come of them. For years there had been knowledge of boodling in state and city affairs, but no one had been found to take office with the hardihood of attacking and rooting out this evil. No man of sufficient force had dared to assume the oath and follow his duty to the letter, and it was not thought possible that Folk, a man whose demeanor is always as gentle as a woman's and whose life seems a continual smile, could resist the pressure that was bound to be brought. But the Circuit Attorney had his own ideas. In his own way he was as great as Samuel J. Tilden, but his efforts were destined to be greater than those of the New York Reformer. He was after a monstrous clique as was Tilden, but while Tilden reached a few, Folk was to gather in a multitude. In Missouri the feat had never been attempted. The nearest approach to it was the Tweed case in New York, and then the whiskey ring prosecutions, a proceeding backed by the might of the Federal Government thirty years ago. Neither could have much weight in the Folk campaign, but he was likened to both the former prosecutors, until his work assumed such proportions as to bring him forth positively as a mighty apostle of reform in public office, greater than his predecessors because he began with nothing, and when it seemed that even the courts were against his idea, he went to the polls and drove the political adherents of the gang he was fighting down to the sea of defeat.

The law library furnished him little information to base his prosecutions upon, but he boiled down what he found and when the time came there was no: "*Mene, mene, tekel upharsin*" written on the wall.

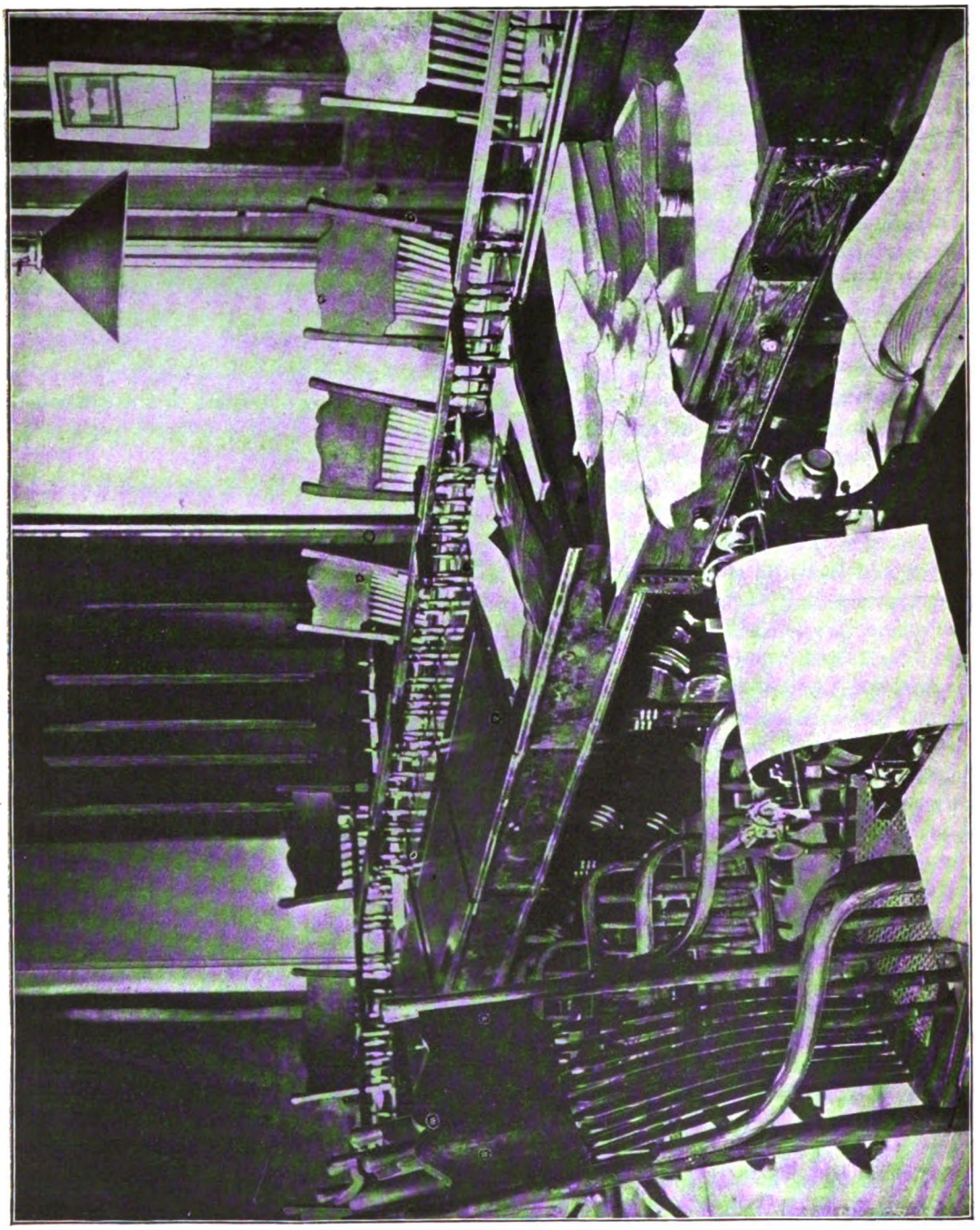
Folk's strength as a lawyer may be stated to be his dissipation of self. He prepares all his cases just as though he represented the defense. He has his indictment before him and the facts in the case, and his argument to himself is that: "If I were this man's lawyer I would fight this case just so." He lays down the defense and hunts up all the authorities in that line. As a bit of illustration I might here state that this was apparent when the Robert M. Snyder case went to trial. Folk, following up his idea of being the defendant's counsel, figured out almost exactly the line of defense that Judge Henry S. Priest, Judge Frederick W. Lehmann, Major Warner of Kansas City, Morton Jourdan and the entire defense planned. Snyder had the cream of the legal profession aligned against the State's prosecutor and the surprises that were intended for the State were met almost as soon as offered. "How in the world did you figure this out," one of the lawyers asked of Folk, and received the quiet rejoinder:

"Oh, if I were to defend this man I would certainly set up the statutes of limitation so as to try the question of residence and prevent bribery entering into it."

That was exactly the line of defense offered, and Folk was ready with his authorities and succeeded in confounding the lawyers for the defendant.

But reverting again to his investigation. The first indictments were followed by the flight, first of Murrell and then of Kratz. Folk, determined to smoke out the entire boodle gang, offered a reward for the capture of both, and the best citizens came to his assistance with a fund to carry on his work. He had no funds from the State and the city authorities refused to give him any aid. His life was threatened and the Chief of Police, fearful of what might follow an attempted assassination, placed detectives to guard him night and day. He ordered the detectives to attend to their regular duties.

With the cases in Court to work on, Folk continued his Grand Jury inquiry and at the same time planned surprises for the boodlers. His work on witnesses summoned was remarkable, and built his reputation as a cross-examiner. The information he obtained of boodling in State affairs was



THE GRAND JURY ROOM

THE DOOR AT THE BACK IS THE ENTRANCE TO THE "DARK" ROOM

beyond his jurisdiction until he learned of the changing of $1,000 bills by State Senators in the city of St. Louis. The summoning of half the higher branch of the State Assembly followed, and each one found Folk a most affable man. He met them with a fund of good nature, never bullied and teased them, and thereby half gaining their confidence, suddenly dragged from them the evidence he wished. In his explanation of Folk's methods one of the Grand Jurors said: "He has a little room adjoining the Grand Jury room which we call the dark room. In that the witnesses who are obdurate are made to sit. Other witnesses are brought in another way and if Folk wishes to confront them, the obdurate one is brought in, but only for a glance. Folk never lets one witness dream what he has obtained from another. He never changes his tone of voice, and for the months we were under him I did not see him lose his temper once. His method is to ask a host of questions along collateral lines, and then, suddenly without a change of inflection, ask a direct question. Unless the witness is shrewd and watchful, he is bound to fall into the trap, and a chance word is sufficient to give this prosecutor the upper hand."

One of Folk's favorite methods, used during his investigation, is to follow up the start obtained by this chance word. Evidence of bribery is the hardest sort of testimony to obtain. It is only by these slips that a start can be made. When it has sufficiently developed to wring from a legislator that he has been offered a bribe, Folk relies on the confronting method. All whom he suspects he summons, and they are left singly in the dark room, and every half hour or so brought into the chamber or into his private office to confront the informer. He is asked no questions in the presence of the man who has told all, but later is called in and given a chance to purge his conscience. Senator Busch was one of these. He held out for a long while when the State investigation commenced. Time after time he was confronted with witnesses, but he stuck to his statement that he had been an honest man throughout the twelve years he had served in the Senate. Finally Folk found his weakness.

"You are a God-fearing man?" he asked.

"Yes, sir."

"You and your wife say your prayers together night and morning?"

"Yes, sir."

"Senator Busch, go home and pray. Pray to God for The Light and come back to-morrow."

Busch returned the next day. He was weeping bitterly as he stepped into Folk's office, and rushing forward, he kissed the prosecutor's hands. "I will tell all," he said. "Thank God that I met you. I prayed last night and was shown the way. Take me before the Grand Jury at once." He kept his word and unravelled such a story of corruption in high office as staggered the State. Lieutenant-Governor John A. Lee was haled before the astute prosecutor. He at first asserted that the stories circulated were the machinations of political enemies.

"I am running for Governor of this State and my enemies wish to down me," he asserted.

"Governor, we will see about that," was the quiet response.

Folk at that time had information that Daniel J. Kelley, a New Yorker, the editor of a baking-powder journal, and the representative of a trust in that line had fathered a bill through the State Legislative bodies giving his concern a monopoly of the product in the State. It was known as the Alum bill, and no other concern was able to meet its requirements and dispose of baking powder in the State. Kelley had gone to Jefferson City as Brown. He had been known to speak often with Lee, and this was the clue that Folk followed up. He pressed Lee quietly but surely. "Now Mr. Lee, you can help me if you will. You

have the evidence and I know it. Let me tell you something. If you help me I will be your friend. But if you do not help me, I shall have to do something that will be very painful to yourself and your friends."

"Will it hurt my race for Governor?" Lee asked.

"If you have done no wrong, no. If you have, then the quicker you retire from public life the better for you."

Lee studied hard, and Folk left him. He brought in several other senators, among them Senator Frank Farris, who was Lee's bitterest enemy. The sight of Farris brought Lee to time.

"I only have the check," he said.

"Ah, let me see it," Folk begged.

Lee brought it forth. It was an ample check from Kelly to Lee for Lee's services as President of the Senate, in defeating a bill for the repeal of the nefarious Alum bill. The check was the ground-work for a State inquiry which resulted in many indictments and the resignation of Lee. It has had its fruit in the absolute elimination of the State Democratic Machine from political life, and the promises of a purer official era in the State.

But in the Municipal inquiry Folk's work was greater. Stock and Turner could only give evidence against two men, Kratz and John K. Murrell, as those were the only two outside of Meysenburg with whom Stock had dickered. It was necessary to get other information, and Folk slowly and laboriously gathered it in. He knew that if he could get these two men to talk, he would be able to reach fully a hundred boodlers, and he exerted himself to two purposes. First, he wanted the men back to force them to turn State's evidence, and secondly, he wished other informers to rake in the bribe givers. But he found it impossible to shake the Combine. He managed to work on an outside matter which resulted in the indictment of Edward Butler, a multi-millionaire blacksmith and Democratic 'Boss," on the charge of attempting to bribe Drs. H. N. Chapman and Albert Merrell, members of the Board of Health, but his ambition was to break up the clique which controlled Legislation in the Municipal Assembly. His inquiries led to the locating of Murrell and Kratz in Mexico. He learned that the boodlers had raised a large sum and sent it by another boodler to Mexico for Murrell, but that the boodler had kept it all and left Murrell sick and almost destitute in the City of Mexico. There was no treaty with Mexico, making bribery extraditable, but Folk tried it with Kratz and failed. On Murrell he worked differently. He reached Mrs. Murrell and talked to her so earnestly that while he made no promises she was certain that mercy would be shown her husband if he returned and made a clean breast. With that understanding she went to Mexico, and inside of three weeks Murrell returned here under cover. He was taken before the Grand Jury surreptitiously on the morning of September 8, 1902, and that day the world was astounded with the revelations. Fifty-four indictments were voted. The boodlers were locked up and their bail fixed at an enormous sum. Edward Butler was the first to rush to the assistance of the indicted men, and he secured bail for them and hired their lawyers.

Folk, in order to support the evidence of John K. Murrell, had to have corroborative evidence and he secured it from Edward E. Murrell, a brother of the fugitive, and George F. Robertson, both of whom had been members of the Combine. These two had perjured themselves before the Grand Jury time and again. They went before the inquisition on the morning of the revelation as firm as rocks. Subpœnas had brought them there as witnesses and they supposed it would be the same old line of questioning and the same answers were ready. But Folk met them outside and took them into his office.

"You boys ought to tell me the truth," he said.

"We have, Mr. Folk," was the reply.

"You don't know anything about boodling?"

"Not a word."

"Nor about a Combine?"

"Nothing."

"You know nothing about $250,000 for the Central Traction bill ; $47,500 for the City Lighting bill; $75,000 for the Suburban deal, and various sums for other bills."

"Not a word."

"Boys, I am absolutely ashamed of you."

He touched a button. An office attaché entered.

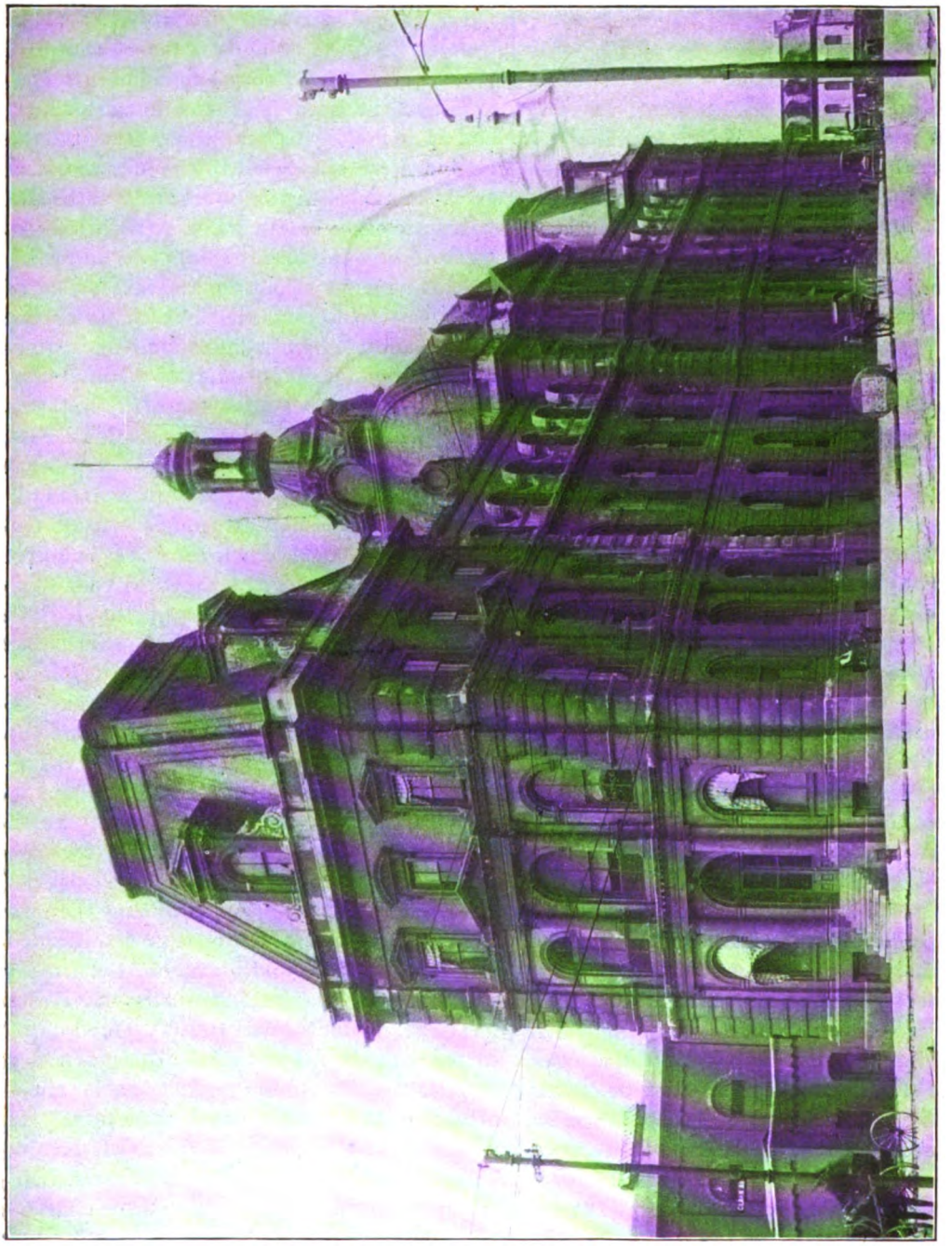
"Ask John to step in," said Folk.

From an ante-room John K. Murrell entered. If a bomb had burst under the feet of the brother and of Robertson, it could not have paralyzed them more. For a few minutes neither could say a word and then they broke down completely and sobbed out a full confession. They were taken before the Grand Jury with John K. Murrell and told everything.

So much for the methods of the man in investigating these matters. In others he is just as thorough and just as certain. Not one of those early indictments based on a common sense understanding of the case, has been held defective by the Supreme Court. In not a single instance has he made an error in the trial of the cases which the Supreme Court found reversible. All of the cases remanded went back because of erroneous instructions of the court, or in some cases on technical points in which the Supreme Court has reversed former rulings. The frequency of these reversals roused the public to believe that the political standing of the defendants influenced the decisions, but in all these cases the error of the court below was clearly shown. These set-backs did not deter Folk in the least. He returned to the conflict, and reversals were but followed by second convictions, and so closely did he adhere to the rules laid down by the Supreme Court that in these second trials not a loophole has been discovered.

Folk's one plan in the prosecution has been to keep the issue clear before the jury. He has not allowed opposing counsel to confound the issues and thus confuse the jury, and when the matter was left with the twelve triers, they went to the jury rooms in every instance with the State's case and charges clearly before them. His addresses have been in the nature of appeals and some of them are fit to adorn the text-books of schools. He has pointed out to juries the awful results which would follow an acquittal and the high moral effect of a conviction, and the Supreme Court has held that this was proper. In all the prosecutions Folk has met the very best of Missouri's legal talent and not once has he been worsted.

Probably the hardest fought of all the cases were those in which Emil Meysenburg, Edward Butler and Robert M. Snyder were the defendants. Folk might have had clearer cases if he could have secured Charles Kratz as a witness. But Kratz refused to come and Folk was compelled to make trips to Washington, D. C., secure the coöperation of President Roosevelt, Secretary Hay, and others, and through them to force a new treaty with Mexico which included a clause for extradition for the crime of bribery. And his knowledge of law brought others to his view that the new treaty was retroactive, and thus he obtained Kratz. But he found a stubborn character when he did get him, and to this day Kratz has done no more than to say "Good day" to the Circuit Attorney. The Meysenburg case, as the first of the big ones to be tried, attracted more than usual attention. He was defended by Judge Chester H. Krum, Judge Priest, Judge Boyle, and Messrs. Lehmann and Jourdan. The State charged that Meysenburg held certain shares of stock in the St. Louis Electric Construction Company, a defunct corporation which gave way to a concern engineered by the very men who were back of the Suburban bill



THE FOUR COURT BUILDING, ST. LOUIS, MO.

CONTAINING THE OFFICE OF THE CIRCUIT ATTORNEY, THE GRAND JURY ROOM AND THE COURT ROOM WHERE MOST OF THE TRIALS WERE HELD

seeking the franchises and privileges which Stock wanted to pay so handsomely for. Folk charged that Meysenburg was a member of the Council and of the railroad committee of that body, that he held up the bill; that is, would not permit it to go out of the committee, and that when Kratz went to him and asked why he was keeping the bill back, Meysenburg stated he had been worsted by "the gang" and was but evening up. Kratz arbitrated and it was charged that he arranged with Stock to take up the shares at their par value of $9,000. This Stock did, in the presence of Kratz, and though Meysenburg voted against the bill when it finally came up for passage, he was charged with bribery.

In his examination of the talesmen, Folk mentioned the names of most of the other men accused of bribery, asking the jurors if they knew them, and this was grounds for the saving of exceptions by the defendant, the latter claiming that it was calculated to prejudice his case by linking his name with other defendants in kindred causes. The courts held that the questions were proper. Folk's trial of the Meysenburg case displayed his wonderful power of preparation. He was ready for every point raised by the defense and their authorities were his. He traced every move of the Combine, linked every act and overcame the defense so easily as to force the belief that he was a Moses of Criminal law. The same careful work was apparent in the trials of Edward Butler, at Columbia, Mo., for attempted bribery, and at Fulton Mo., for bribery. Butler was considered the political boss of St. Louis and one of the Democratic powers in the State Machine. Folk's audacity in attacking him was food for unlimited comment, yet the young prosecutor secured one conviction and a sentence of three years was placed on the head of the "Village Blacksmith" as Butler is called.

Folk is a master in the handling of a jury. Though not conspicuously eloquent, he has the power of binding his men to him and it takes him but a brief space to gain the confidence of a jury. He believes in stating facts but has a habit of drawing similes, often of the most beautiful kind. In the Meysenburg case, for instance, Folk's opening words were: —

"When you find paint upon the lily, or artificial perfume upon the rose, there is a suspicion in the one instance of the original whiteness of the lily and in the other of the original sweetness of the rose; so when you find so-called innocence defended with such eloquence there is a suspicion of the innocence so much eloquence defends."

Getting at the issue of the cause, Folk's assertions to the jury mainly were: — "After all this pyrotechnical display of words you have heard, I would have you to go back with me to the main issue in this case, and that issue is not regarding some foreign matter that they have endeavored from the beginning of this case to bring here to confuse this jury, but that issue is, — has this defendant been guilty of corruption in office under the facts in this case. These gentlemen appearing here for the defense are employed for that purpose and they do their duty well. We who appear for the State have the same motives, the same interest as you have. We are here for a common purpose, in a common cause, to vindicate and uphold the law, you as jurors and I as the Circuit Attorney. Gentlemen, Mr. Lehman speaks of the infamy that is supposed to be attached to the informer. That is no new gospel he preaches. You can hear the same doctrine in every den of thieves and haunt of crooks in all this city and all this land. It is the thieves' doctrine that one shall not tell on the other. If that doctrine could meet the sanction of this jury, it would delight every thief and every crook in this city and everywhere. If we do not have a man to turn State's evidence, then how is the law going to be vindicated in a case like this. It would take away from us the very means to prove bribery. How are we going to prove it

without the witnesses? It is a peculiar incident of human nature that criminals, no matter how depraved they may be, pride themselves on never breaking their word with their fellows. The jail, the penitentiary, or even the gallows holds no infamy for them, but if one criminal desires to bring upon his head the denunciation of his fellows, let him turn State's evidence. I say that when one has committed an offense he is more to be honored for confessing than concealing it. When one has committed a crime the highest atonement he can make is to kneel at the feet of justice and tell the truth."

. . . . . .

"Bribery, gentlemen, is not between private individuals. Whatever moral turpitude there may be in one private individual bribing another private individual to do or not to do something, that is a matter with which the law is not concerned; but when an official is corrupt, then the law steps in because the law seeks to hold all official acts above corruption and debauchery.

"Under our system of government, all power and all authority are vested in the people. The people rule. The people govern. The people can act only through their chosen representatives; they select some officials to make the law, others to interpret it, and others to enforce the law. All authority possessed by any official must trace its chain of title back to the people. All official power belongs not to the public official, but to the people he represents who gave the power. The legislator's vote and his influence are not his private property but that of his constituents. It is given him by the people as a sacred trust to be administered for the public good, and if there be in the category of crime, one that is greater than all others, the unpardonable crime, it is the offense of him in whom such a sacred trust has been reposed and who used it for his private gain and enrichment.

"Were all officials corrupt, and were all official actions for sale, then government would soon become the debauching tyranny of the few with wealth enough to purchase it. In this case we have an official elected by the people, charged with solemn and sacred duties, a trust reposed in him by the people: has the evidence in this case shown him to be a good and faithful public servant or not?"

These excerpts are taken from the beginning of his speech in the Meysenburg case. They may be taken as an indication of the beginning of all his addresses in the boodle prosecutions. While he has varied greatly in the use of the language, still he has brought the attention of his jurors to a full sense of the issue, and his summing up of the evidence has followed in calm, forceful and deliberate style. In this same trial he did not vary from his usual style of injecting some biblical quotation. For the Meysenburg jury Mr. Folk quoted: —

"And Jesus went into the Temple of God and cast out all them that sold and bought in the temple and overthrew the tables of the moneychangers and the seats of them that sold doves — And said unto them: 'It is written, My House shall be called the house of prayer; but ye have made it a den of thieves.'"

His closing remarks are always in the nature of appeals and not once has he failed to affect not only the jurors but even the defendants themselves. As a sample, his peroration in the Meysenburg case may be offered.

"Gentlemen," he said, "you are to set up the standard of official conduct in St. Louis. What do you want the standard of official conduct to be? Do you want it to be such as this defendant has done? Do you want him to be the type of official life in St. Louis? Do you want other officials to gauge their actions by his, or is your standard higher and better than that? I hope to God it is!

If all officials were like this man, then God pity our city! God pity the citizens who would be in the hands of such officials! Gentlemen, eager and anxious eyes are look-

ing at you, looking to you to vindicate the law and show to the world that St. Louis juries will punish corrupt officials. A conviction will do more good for St. Louis than anything that could happen in a hundred years; an acquittal would do irreparable harm. A conviction means the end of official corruption in St. Louis and its death knell. An acquittal means a carnival of corruption. It would be a thousand times better that bribery be undetected than not to be punished when detected. You can by your verdict, gentlemen, either send the boodlers a message of encouragement, of cheer and approval, or you can send them a stern and terrible condemnation. Gentlemen, I ask you in the name of the State and of this great city, I ask you in the name of every law-abiding citizen, of every man, woman and child, I ask you in the name of all that is holy and good to vindicate the law and set the stamp of your disapproval on such conduct, with such force as will put an end to official corruption in St. Louis for years to come. Be true to your State, be true to the law, be true to yourselves; — to each of you I say: be true to yourself, 'and it must follow as the night the day, that thou canst not then be false to any man' or to the community in which you live."

In the trial of Edward Butler at Columbia, Mo., Folk found inscribed over the entrance to the court-house the words:

"Oh Justice, when expelled from other habitations, make this thy dwelling-place."

Those words were his theme and made the iron-nerved millionaire wince. In closing, Folk sent a thrill through his hearers with his appeal: "Missouri, Missouri, I am pleading for thee, pleading for thee."

Folk is not a loud speaker. His voice is as soft as a woman's and goes straight to the heart of his hearers. He believes in a conversational tone in addressing a jury and not in the bombastic flights a great many lawyers so readily affect. He relies further on the intelligence of his jurors and in every one of the boodle trials has invoked the special jury law which commands the Jury Commissioner to summon veniremen of "More than ordinary intelligence." In the second Butler trial which resulted in an acquittal, the only acquittal by jury in the history of these prosecutions, the court overruled a request for a special jury and a jury of ordinary class was readily befuddled by the oratory of the legal talent at the command of the defense. Folk is one of the gentlest of men. He never becomes excited, and never fails to take advantage of any sudden anger shown by an opposing lawyer. He is distinctly a man of dignity and equipoise.

Honor, ability, and industry were his three powers in his fight against boodle, and his success is due above all else to his determination to perform his official duty according to his oath of office.

St. Louis, Mo., Dec., 1904.

THE NEED OF LEGISLATIVE EXPERTS

By Travis H. Whitney

IN a monograph on "Our State Legislatures" in the December *Atlantic*, Mr. Samuel P. Orth comes to the conclusion, after a minute statistical classification of our laws and legislators, that "we are law mad." The average annual output of statutes in all the states, over fourteen thousand, seems to bear this out. The widespread belief that law is a cure-all; special or private legislation; the failure to differentiate properly between legislation and administration; and, the influence of corporations over Legislatures, are considered by Mr. Orth as the causes of our law craze. He decides that the remedy lies in the alertness of the people and not in decennial or quadrennial legislative sessions or other constitutional limitations.

The purpose of this article is to point out how the alertness of civic organizations arising from bitter experience is working in New York towards preserving the statute books from needless and harmful legislation. The result may not be altogether the affirmative scientific legislation Mr. Orth pleads for but it is a long step in that direction.

The New York Constitution provides (*a*) that no special or private bills on certain enumerated subjects shall be passed by the Legislature; (*b*) that such matters must be dealt with by general laws; (*c*) that city authorities shall have a limited power of veto of measures relating to their cities. The City of New York has been given a charter constructed theoretically "upon the principle that it is expedient to give the city all the powers necessary to conduct its own affairs." Yet general laws may be modified and charters amended. The charter was given by the Legislature and it may be changed or taken away by the Legislature. The city may grant franchises, under its charter, for limited periods, but the Legislature can grant franchises freed from restrictions both as to time and compensation.

Advantage has been, and is, taken of all these possibilities by interested public-service corporations and corrupt legislators. In 1799 Aaron Burr obtained from the New York Legislature an act creating the Manhattan Company to supply water, then much needed in the city, but hidden away in the charter was a provision giving banking powers to the company, a privilege theretofore denied to Burr by his political enemies. The company established its bank, which still exists on Wall Street, with a tank maintained to comply with technical requirements of its charter.

In 1904 the Niagara, Lockport & Ontario Power Company tried unsuccessfully to have enacted into law a bill which in its title was merely "to extend its time to commence work and *otherwise*," yet hidden from all but the careful observer were provisions granting this company the unprecedented right of eminent domain in every part of the State, a franchise in every street and thoroughfare of every political unit of the State without compensation and in perpetuity, and unlimited use of the waters of Niagara. In the time between these two "sneak" bills came a long line of vicious bills, whose enumeration would be superfluous here.

The resulting scandals have given rise to the creation of committees on Legislation of certain organizations in New York City for the purpose of fighting such measures. The general method of procedure is as follows: Every bill is carefully studied as soon as introduced and every reprint is examined. Men, skilled in legislative matters, are maintained, both in New York City and in Albany, to devote their whole time to preventive Legislative work. A brief description of some of these organizations may

convey a clearer conception of their workings.

The Citizens' Union, "a union of citizens of New York City without regard to party, for the purpose of securing the honest and efficient government of the City of New York," maintains a representative in Albany during the entire session to gather general information concerning legislation, to get hearings on important bills, to appear before committees when hearings are suddenly called "over night" and in general to be on the spot when the need is greatest. The lobbyists of corporations are met by trained advocates devoted to the interests of good government. In New York City the organization has a Committee on Legislation, composed of some fifteen lawyers. The secretary of the committee, with adequate assistance, devotes his entire time to the examination of all bills that may seem to affect New York City or its citizens in any way. All bills that seem questionable are immediately sent to such members of the committee, or to such other lawyers, as are most familiar with the subject affected, with a request that a report be submitted covering the following points:

(1) How will the bill affect existing law, the city charter, rights or powers of New York City?

(2) Is it necessary or desirable in its present form, or with any changes you think worth while suggesting?

(3) What should be the attitude of the committee?

These reports are carefully considered at the weekly meetings of the full committee. If the bill is objectionable the opposition of the committee is expressed in a variety of ways, depending on the introducer of the bill, its relative importance and the influence that may be behind it. It is quite true, as Mr. Orth finds, that the majority of legislators are "average American citizens." Because they are such they prefer to do right rather than wrong and it is quite sufficient to point out privately to them that a certain bill which they have introduced is objectionable because violative of Home Rule, unnecessary because power exists in some board or city department, or is inaccurate or loosely drawn. If there is considerable pressure, however, behind a very objectionable bill, it is a fight to a finish. This means that the committee sends a brief, in opposition, to the Legislative Committee having it in charge, asks for and attends hearings, writes to every member of the legislature setting forth the facts, enlists the co-operation of citizens and other organizations, sends memoranda to the newspapers, and, if the bill finally passes both houses, fights it before the mayor and governor. Every legitimate channel is used to secure the defeat of the measure. On the Niagara bill letters were sent to the common councils of other cities calling their attention to the threatened invasion of their franchise rights and a number of them actively aided in the defeat of the bill.

The City Club has a legislative bureau which gathers, through a representative maintained in each house of the Legislature, facts relative to the introduction of bills, hearings, position on the calendar, etc. These facts, together with copies of all bills, are sent to New York City and immediately distributed to other organizations and committees. The secretary of the club, late deputy commissioner of the Tenement House Department, is in Albany a large part of the time and devotes his particular attention to proposed amendments to the Tenement House Law, which is still the object of vicious attacks by property owners who have been made to feel its burdens. Certain amendments in 1903 were defeated only after the most strenuous efforts, which included the descent upon the Legislature of a special trainload of indignant citizens including settlement workers, city officials and tenement house dwellers.

The Merchants' Association, aside from its great work as the leader of such associations throughout the country, devotes considerable money and energy towards pro-

tecting and increasing the efficiency of the city government. It has made exhaustive investigations of city affairs, such as the gas monopoly, the telephone monopoly, and the water department with its great plans for additional water supply. It does not hesitate to fight with the utmost vigor such bills as the Ramapo Water Steal, and its counsel and officers spend a great part of the winter on the State Legislature. The Board of Trade and Transportation co-operates with other organizations and has representatives at Albany almost constantly. Other organizations looking after legislation of one kind or another are the Transit Reform Committee of One Hundred, the Brooklyn League, the Civic Club, and a host of taxpayers; Boards of Trade and other clubs in the local Assembly Districts.

That the methods of these organizations are effective is shown by the record of 1904, when only one measure of the many opposed by the civic organizations of New York City finally became law. What this means may be shown by a brief summary of the objectionable measures of 1904, without mentioning bills defeated in preceding years. There were over fifty bills providing for salary increases of officials and employees of New York City to an amount in excess of one million dollars. Such of these as passed the Legislature were vetoed by the mayor on the ground that the city had full authority to raise the salary of any deserving official. Seventy-five other bills called for compulsory expenditures by the city of nearly ten million dollars, including a gift of two million dollars to the *volunteer* firemen of outlying districts of the city. The Metropolitan Street Railroad interests drafted and sent up six bills amending general laws in such particular terms as left no doubt as to the results; namely, the revivification of defunct franchises and the gift of new franchises worth millions of dollars, freedom from penalty suits, brought on by the company's own disregard of the provisions of the transfer law, and other favors desired by the company. Over fifty organizations united in opposition to these bills, mass meetings were held and large delegations sent to Albany with the result that the bills were not advanced beyond second and third readings. A compulsory voting machine bill, with the backing of certain politicians, was introduced in the closing days and rushed with astonishing speed. Had it become law, independent voting would have been impossible, to say nothing of the vast expense the city would have been under in purchasing machines for each of the fifteen hundred election districts of the city. The gas monopoly of the city, the Consolidated Gas Company, whose franchises are not as sound as they might be, was behind the Remsen Gas Bill, an amendment of an old statute, which would have made at least one franchise worth millions more than it is now. This passed the Legislature, was signed by the mayor, but finally vetoed by the governor after most energetic work on the part of civic organizations.

For the 1905 and following sessions these organizations have adopted still more effective plans to defeat offensive measures and to support such as will round out the Home Rule provisions of the city. Under the lead of such organizations as the Citizens' Union, City Club, Board of Trade and Transportation, Transit Reform Committee and the People's Institute, a confederation which will ultimately take in most of the organizations of the city, has been formed with a council consisting of delegates from each organization.

The officers of this council will keep fully and promptly informed concerning all legislation, will communicate at once with all participating organizations as to bills that are considered vicious and in danger of passing and will inform the public through the newspapers concerning dangerous bills. An aggressive plan will be followed even after the adjournment of the Legislature and the eighty and more assemblymen and senators

from New York City, if they prove at all attached to suspicious bills, will hear not merely the outcries of hated "reformers," but will discover that the citizens of their own individual districts are organized against them. An earnest of what may happen is shown by the fate of three members of the Legislature of 1904. A Republican Assemblyman, who asked from the Metropolitan Traction interests the "privilege" as he naïvely confessed, of introducing one of their bills, was driven from a meeting of the Republican Club of his district where he had gone with possible thoughts of commendation. He was not renominated. Another Republican Assemblyman, whose name is attached to the notorious gas bill, was renominated and defeated in a Republican district that gave Roosevelt an enormous majority. A Tammany leader, grown rich through favor, had sat in the Senate from time immemorial — until 1904, when a young man, aggressive and honest, defeated him, to his utter astonishment. Among his reported remarks on "Reform" is this choice specimen:

"It makes me tired to hear people talkin' about legislators bein' grafters, because we vote for bills that some corporations wanted. They're even callin' me a grafter because I put through the bill closin' up Spuyten Duyvil Creek so as to make room for the New York Central Railroad tracks. They say, that when the bill becomes a law I'm goin' to get the contract for fillin' in the creek. Well, what of it? Ain't there such a thing as honest friendship left in the world?"

So much for the efforts made by the citizens of New York City to keep from the statute books all but the best of the reams of bills annually presented to the Legislature. It remains to speak briefly of the methods. In the first place, civic organizations have been able to do their part in obtaining for their city its present powers and to preserve it from greater spoliation because they have been thorough and systematic. They have not depended on the corporation counsel of the city nor on honest Legislators to expose iniquitous bills, though there are many honest legislators in the New York Legislature, as there are in every State. Neither have they placed the responsibility on the newspapers, zealous as the great dailies of the city have always been in the detection of corruption and prompt as they are to aid when others expose graft and greed. The average legislator, because he is an "average American," has a multitude of duties and it can hardly be expected that he will study carefully the daily increasing pile of bills by the side of his desk. His time is occupied with sessions, committee meetings, constituents, and at the end of the week he must go home to attend to his private affairs. On the other hand, there is a class of legislators whose scrutiny of prospective legislation can hardly be depended on. To this class will probably belong an Assemblyman of 1905, from a solid Tammany district, who was described in the *Evening Post's* Voters' Directory thus: "bartender; out of work just now; first candidacy." The newspapers cannot give space, even when they are disinterested, to an analysis of all bills laid before the Legislature. Their legislative reporters cannot wade through the thousands of pages and be sure to hit on exactly the good and bad in every bill. In the Legislature of 1904 the number of bills and reprints numbered 2070 in the Assembly and 1378 in the Senate, with an average of over ten pages each. Of this number 734 in the Assembly and 418 in the Senate affected the City of New York in one way or another. It is not surprising, therefore, that the civic organizations of the city, made up as they are of public spirited men who gladly give of their time, yet find it necessary to employ men to devote their entire time to questions of legislation and the supervision of official administration.

The cure of legislation will come, not from vainly wishing for the good old days of parliamentary debates, but from the de-

velopment in the community of a trained body of legislative experts, men who are familiar with existing law, who are not burdened with official administration and who can instantly detect the damaging effect of an obscure bill introduced by an obscure member. A voluntary committee, reorganized every year, in the nature of things, cannot avail itself of accumulated experience. The retention of men skilled in legislative matters, alone makes possible the continuity which is so essential to any substantial reform.

Their value is shown by the recent situation in New York City. The Tammany commissioner in charge of lighting suddenly signed contracts with the gas monopoly at figures which had been rejected by the previous Reform Administration in order to force the company into court to litigate the reasonableness of its prices. Alarmed at the public indignation over its surrender to the company, the Board of Estimate and Apportionment instructed the corporation counsel to draft and have presented to the Legislature a charter amendment giving the city power to build a municipal lighting plant; an amendment that would have to meet in the Legislature tremendous opposition by the gas lobby. It was then pointed out by the Citizens' Union that if the Board of Estimate and Apportionment really were in earnest about wanting a municipal plant, it should instruct the corporation counsel to look at the charter in its present form before bothering with an amendment. When he looked he was so surprised that he distrusted himself and asked authority to retain ex-Judge Dillon who rendered an opinion that the city had complete power, without further legislation. The Tammany administration must now make good on the question of a municipal lighting plant or acknowledge that it was playing politics when it adopted a resolution in favor of such a plant at a time when it was thought that the city had no power and that a bill to give it power would probably be defeated.

In this movement New York is not alone. Chicago has its legislative league which has been of invaluable service in preserving the franchise wealth of the city from spoliation by corrupt legislators. The Merchants Association of San Francisco maintains a representative at Washington to watch legislation affecting the Pacific coast. These organizations have learned that they can best fulfill their objects by employing legislative experts who make effective the work of the scores of public spirited citizens who are ready to join in every movement for civic betterment. The consolidations of great financial interests which are employing the most astute legal talent of the country at prices which no private organization could, and which no municipality dare, pay to its legal advisers, and which find profit in procuring special legislative favors, has created a machinery too powerful to be successfully combated by individual or inexperienced citizens.

New York, N. Y., Jan., 1905.

FEDERAL CONTROL OF INSURANCE CORPORATIONS

By William R. Vance

IT is probable that that portion of the President's strikingly interesting message recently transmitted to Congress which has attracted most attention from lawyers is the sweeping recommendation of Federal control of all the great corporations engaged in interstate business. Certainly the most striking feature of this recommendation is that concerning insurance corporations, of which the President speaks in these words: "The business of insurance vitally affects the great mass of the people of the United States and is national and not local in its application. It involves a multitude of transactions among the people of the different States and between American companies and foreign governments. I urge that the Congress carefully consider whether the power of the Bureau of Corporations can not constitutionally be extended to cover interstate transactions in insurance." This recommendation, which comes almost as a shock to the lawyer accustomed to consider the doctrine that the insurance business is not interstate commerce as one of the few well settled rules laid down for the construction of the commerce clause of the Federal Constitution, should be read in connection with the following statement made in the same message: "When we come to deal with great corporations the need for the Government to act directly is far greater than in the case of labor, *because great corporations can become such only by engaging in interstate commerce*, and interstate commerce is peculiarly the field of the General Government."

This sentence gives the keynote to the general movement to secure Federal control of insurance corporations. In effect it declares that a corporation which has become so great as to transcend, in its business activities, the bounds of the state of its creation, and has become engaged in extensive interstate operations, is thereby brought within the purview of the interstate commerce clause, and so made subject to the legislative control of the national Congress.

That such a movement has already acquired considerable volume and force may be seen through evidence derived elsewhere than from the President's message. Thus in the Act of Congress establishing the Department of Commerce and Labor, approved February 14, 1903, we find, among other provisions defining the powers and duties of the Bureau of Corporations, the following: "It shall also be the province and duty of said Bureau, under the direction of the Secretary of Commerce and Labor, to gather, compile, publish, and supply useful information concerning corporations doing business within the limits of the United States as shall engage in interstate commerce or in commerce between the United States and any foreign country, *including corporations engaged in insurance*, and to attend to such other duties as may be hereafter provided by law."

The natural inference to be drawn from the words so quoted is that Congress considered insurance corporations to be included among those engaged in interstate commerce. Acting in accordance with the instructions so given, the Bureau of Corporations has carefully compiled the insurance laws of the several states, and collected a mass of other information concerning the conduct of the insurance business in the United States.

The Commissioner of corporations, Mr. J. R. Garfield, in a very able and readable report in which he urges Federal control, by means of a compulsory Federal franchise,

over all interstate corporations, speaks as follows concerning the powers of his bureau over insurance corporations:

"Federal control over insurance and the exercise over insurance corporations of the compulsory powers of the Commissioner rest upon the same legal basis, raising at the outset the question whether insurance is in any of its forms interstate commerce.

"A long line of decisions of the Supreme Court of the United States, commencing with Paul *v.* Virginia (8 Wall. 168), established the legal proposition that insurance was not interstate commerce in any of its forms — fire, life, or marine — as presented to the court. This line of decisions has been further supported by the uniform holdings of State courts.

"If this legal proposition is irrevocably settled, the powers of the Commissioner relative to insurance are purely of a statistical, voluntary, non-compulsory nature. He may collect, compile, and publish such information as may be voluntarily furnished to him, but he can not compel the production of such information, nor would he be justified in recommending any Federal legislation directed at Federal control of insurance. The rapid development of insurance business, its extent, the enormous amount of money and the diversity of interests involved, and the present business methods suggest that under existing conditions insurance is commerce, and may be subjected to Federal regulations through affirmative action by Congress. The whole question is receiving most careful consideration upon both legal and economic grounds."

Since it is thus apparent that an attempt is being made to bring about in some way Federal control of the insurance business, it becomes a matter of interest to learn the origin of the movement.

Statutes enacted by the states for the purpose of regulating the business of corporations operating within their respective bounds are found in nearly all instances to have sprung spontaneously from the legislatures, inspired by more or less clearly defined popular demands, while the corporations themselves doubtless pray, so far as their soulless character and metaphysical constitution will permit, for nothing so devoutly as immunity from further state regulation. But when their eyes are turned to the national government a change comes over the spirit of their dreams, and they crave national control. That is, the demand for national control of corporations comes almost exclusively from the corporations, and especially from the insurance corporations and those acting in their interest. And the reason is not far to seek.

Under the law as it now exists, the foreign insurance corporation is absolutely at the mercy of the states in which it desires to do business. The state has an absolute right wholly to exclude it if it so desires, or to admit it upon such terms as public policy, political cupidity, or legislative ignorance may suggest. The state may impose, as conditions of admission, not only capricious and arbitrary requirements, but in effect, it may also lay and enforce conditions in themselves illegal and void. For, since the state has an unqualified power to refuse the license required for admission, so it may revoke the license once granted, for any cause whatever, good or bad, or for no cause at all. Thus it has been held, and with manifest correctness, that the contract made by an insurance corporation as a condition of admission into the state, that it would not take advantage of its constitutional right to remove its causes into the Federal courts, is void and of no effect.[1] But it is also held that while the corporate insurer has the right to disregard his agreement and remove his cause to the Federal courts, the state may make the breach of such a void agreement a ground for revoking the license of the recalcitrant corporation. The right of revoking the license being absolute in the state, the reason for

[1] Home Ins. Co. *v.* Morse, 20 Wall. 445.

the revocation, or the motive actuating it, is not a proper subject for judicial inquiry.[1] In effect, the licensed foreign corporation must make its election between submitting all questions which it may desire to litigate to the state courts, and ceasing to do business in the state. Some question as to the permanence of the doctrine of the Doyle case has been raised in later cases,[2] but it is difficult to see how the conclusion reached in that case can be escaped without violating the principle giving the state the unqualified right of excluding foreign insurance corporations.

Under this doctrine the state may, therefore, make any requirement whatsoever of the licensed foreign insurance corporations, whose only alternatives are submission or withdrawal from the state and the consequent loss of business that has been built up at the expense of much time and money. There can be no doubt that these regulations are, for the most part, prescribed in a *bona fide* attempt to conserve the best interests of the people of the several states, and some are undoubtedly well adapted to that end; as for instance, the laws requiring of insurance corporations stated reports, official examinations, the deposit of guarantee funds, and the appointment of some representative resident in the state to receive service of process. Others, however, are distinctly vexatious, and repugnant to sound business principles as applicable to insurance, such as the so-called anti-compact laws, and the valued policy laws.

But even those state regulations that are not unsound in themselves are, for two reasons, most oppressive to the great insurance corporations under the existing order of things. In the first place, there are some fifty different states and territories, each with power to regulate in any manner it sees fit, the conduct of insurance business within its borders. It is but natural that there should result the greatest diversity in the regulations adopted by the several states. The great insurance corporations, carrying on their business in all of these jurisdictions, are compelled at their peril to cause their methods of doing business in each to conform to all of its regulating statutes. A form of policy valid in one state is invalid in another; a given contractual provision may be commended in one state and prohibited in another; one state requires notice of premiums due, while another does not. The confusion and expense resulting to the business of a corporation seeking to comply with this great multitude of diversified regulations can easily be imagined. Likewise, many troublesome questions of conflicting laws arise to introduce an element of paralyzing uncertainty into the business. Thus a policy may be written in New York, and by its terms made subject to the laws of New York, and delivered in Missouri to a resident of that state. Are the mutual rights and obligations of the parties to be determined by the special insurance regulations of New York or by those of Missouri? While in such a case the law of the contract is manifestly that of New York, yet a Missouri court will apply such of the local laws as may have been enacted in pursuance of the public policy of the state. But public policy is an uncertain quantity, and it is difficult for even the best legal talent to foresee what view any particular court may adopt with reference to it. Such uncertainties are fruitful of expensive and vexatious litigation, and seriously interfere with the efficient administration of the great insurance companies.

Again, the cost to the insurance companies of complying with all the requirements of the fifty different insurance departments of as many states and territories is almost incredibly large. The whole amount annually paid by the insurance

[1] Doyle *v.* Continental Life Ins. Co., 94 U. S. 535.

[2] See Cable *v.* United States Life Ins. Co., 191 U. S. 288, and cases cited at p. 307. See also discussion in Vance on Insurance, pp. 83, 84.

companies in fees for licenses, examinations, etc., and for taxes is said to be as much as $9,000,000. The insurance department of one state only, Wisconsin, in 1903, collected over $500,000 from insurance companies. The cost of state control of insurance as thus shown appears the more startling in contrast with the cost of Federal supervision of all the national banks of the country, which, during the same year amounted to only $325,000. These figures would lead us to believe that much of the state legislation regulating insurance is not so much for the benefit of the people in assuring to them honest dealing and financial responsibility on the part of the companies, as for the profit of the respective state treasuries.

But trying as these numerous and costly regulations may be, they are not in themselves the chiefest grievance of the insurance men against the present order of state control. The fullness of their woe is found in the unfair administration of the insurance laws by dishonest officials. While it is assuredly true that most of the officials of the state insurance departments honestly endeavor to enforce the insurance laws in accordance with their true spirit and intent, yet the unlimited power possessed by many of these officials to hector the insurance companies, or even to do them serious injury, offers them great temptation to exchange their official favor for monetary considerations. We have sufficient reason to believe that in some states insurance examiners regularly require large payments from insurance companies before giving the certificates necessary to enable them to continue to do business in those states; and that a perfectly solvent and sound company refusing to pay such a bribe will be denied the certificate that is given the bunco insurance company of the get-rich-quick-order that is willing to part with some of its ill-gotten funds for the private benefit of the insurance department officials. Of course the injured insurance company may have recourse to the courts, or with a reasonable amount of lobbying, might secure a legislative committee of investigation. But the very nature of these insurance laws requires the vesting of a large measure of discretion in the officials of the insurance department, and the insurance company denied by them the right to do business within the state, attacks their adverse ruling under a heavy handicap. The company labors under the popular presumption that a dishonest organization has been detected, while the official highwayman is supported by a popular belief that by very great vigilance and acuteness he has discovered a public peril, and rendered the people a mighty service, thus triumphantly justifying the establishment of an insurance department. If the matter comes to trial the defendant finds salvation in the complex and essentially difficult character of the insurance business. Neither judge nor jury is apt to be expert in insurance matters, or competent to comprehend adequately the complicated bookkeeping that tells the story of a company's business; nor are the members of a legislative committee more apt to be acquainted with the abstruse science of the actuary. Hence contests waged by the blackmailed insurance companies against the officials of insurance departments are apt to result only in expense and unpopularity. Insurance corporations never intentionally assume the rôle of martyr. Therefore, when "held up" by examiners and other insurance department officials, the insurance companies pay with such grace as they can command, and then cry out loudly for a change of system. It was recently stated in a reputable insurance organ that some of our large companies, though unquestionably solvent, pay as much as $250,000 in annual blackmail to state examiners.

In view of all these facts, we can readily understand the desire of the insurance corporations to be subjected to Federal control. They think, by taking to themselves a Federal master, to escape the servitude to

some fifty different despots under which they now labor. And such liberation from state control would seem to be the necessary consequence of the assumption of control by Congress. Granting that Congress can, under the commerce clause, assume the regulation of the insurance business, any state legislation that would interfere with such national control would unquestionably be unconstitutional under the well settled doctrine that although state regulation of interstate commerce in regard to matters upon which Congress has remained silent may be constitutional, such legislation becomes unconstitutional as soon as Congress speaks. Therefore, it seems that the effect of enacting a valid Federal law in regulation of insurance would wipe out practically the whole mass of state legislation on that subject, and leave only the one Federal department of insurance to be satisfied by those insurance companies operating within the bounds of the Federal Union.

That such a consummation is devoutly to be wished for, or even prayed for, by the insurance corporations seems clear. But is it equally desirable from the standpoint of the other party in interest, the people? It certainly would possess for them this general advantage—increased publicity. A regulation "hatched up" by or against the insurance corporations could not be "sneaked through" Congress at Washington as easily as in any of the state capitals. The limelight of public interest and of the public press is turned steadily upon Washington, and it is rather more difficult for lobbyists of the lurking, slimy variety to hide in the Capitol there. Likewise, it is probable that the degree of intelligence displayed in devising insurance regulations would be rather higher in Congress than is ordinarily to be found in the state legislatures, although, of course, no one would be so hardy as to refuse to credit Congress with its fair share of legislative mistakes in the past. The term "graft" has become distressingly familiar in connection with the officials of the great departments of the Federal government, and there is little basis for the hope that no "grafting" would take place in a Federal department of insurance, but it seems scarcely possible that the insurance corporations would be subjected to the monstrous blackmailing seen to exist in connection with the state departments of insurance, and money saved from the blackmailers is, presumably, saved to the policyholders. All these considerations, — publicity of enactment, intelligence in regulation, more honest and efficient administration, together with the greater certainty in the law determining rights under insurance contracts, — would seem to commend Federal control of insurance most highly to the people as well as to the corporations.

But there are other phases to the proposition, which are equally incident to the whole movement to transfer to the Federal government control of all interstate corporations, which will give the members of Congress pause before voting for the bill which has been introduced by Mr. Morrell, of Pennsylvania, in accordance with the President's recommendation concerning insurance. The old state lines still exist, and the states are still regarded as locally independent sovereignties. Since the most important enterprises are carried on by corporations, and since practically all important industrial corporations are engaged in interstate business, an act giving the Federal government control of all interstate corporations would strip the states of a large measure of their power, and deprive them of a large portion of their revenues. We can scarcely expect the states, or their representatives in Congress, to consent to so extensive an abdication; and even if the states would consent to abdicate, we may well question whether such an impairment of the original foundations of the Union would not be too great a price to pay even for a change in the present almost intolerable condition of corporation law in this country.

Again, it is a current belief among the people that the great corporations bear more than an equal hand in shaping Congressional legislation, and there exists a well grounded fear that if these corporations were wholly freed from the control now exercised by the state, and allowed to turn their whole attention toward Congress, with a probable readiness to use for the purpose of securing favorable legislation the same amounts of money, which they now pay to official blackmailers, or even more, the people might learn too late that national control of corporations will result in national control by corporations. Hence we conclude that however expedient Federal control of insurance corporations may be from the standpoint of the corporations, it is at least questionable from the standpoint of the people.

We now come to consider the last and most important phase of this proposed national control of insurance. Is it legally possible under our form of government? The Federal government has nothing to do with the business transacted wholly within the limits of the state, even though the parties to the transaction are residents of different states. In order for Congress to exercise, under the constitution, any power of regulation over business transactions, they must involve commerce between two or more states; and such commerce consists in the transportation of commodities or persons from one state to another. That the insurance business, in all its forms and incidents, involves merely intra-state transactions, and not interstate commerce, seems clearly settled by the decisions of the Supreme Court of the United States. The question first came before the court in 1869 in the case of Paul *v.* Virginia,[1] which involved the right of the state of Virginia to demand from agents of foreign insurance corporations doing business within the state license fees not required of agents of domestic corporations. In confirming this right to the state, the court unequivocally declared that insurance against fire was not interstate commerce. This holding was approved and followed in a number of subsequent decisions. In Hooper *v.* California,[1] which came before the court in 1895, it was contended that the rule laid down in Paul *v.* Virginia applied only to fire insurance, and that marine insurance should be considered as interstate commerce, since the contract directly concerned ships, which were unquestionably vehicles of commerce. But the court declined to adopt this view, Mr. Justice White, who delivered the opinion of the court, using this language:

"The contention here is, that inasmuch as the contract was one for marine insurance, it was a matter of interstate commerce, and as such beyond the reach of state authority, and included among the exceptions to the general rule. This proposition involves an erroneous conception of what constitutes interstate commerce. That the business of insurance does not generically appertain to such commerce has been settled since the case of Paul *v.* Virginia. The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

The dissent of Justices Harlan, Brewer, and Jackson from the decision in this case was on another point.

Notwithstanding the broad language just quoted from the opinion of Mr. Justice White, counsel took occasion to argue in the case of New York Life Insurance Co. *v.* Cravens,[2] which came up for decision in 1900, that the right of a resident of Missouri to make with a New York Life Insurance

[1] 8 Wall. 168.

[1] 155 U. S. 648.

[2] 178 U. S. 389.

Co. a contract that by its terms should be subject to the laws of New York was a commercial right protected by the commerce clause of the Federal constitution from interference by a Missouri statute. But this contention likewise met with no favor, the court, after quoting with approval the language of Mr. Justice White in Hooper *v.* California, as set forth above, declared that life insurance was no more to be regarded as interstate commerce than fire and marine insurance.

Despite the fact that these decisions seem to have unequivocally committed the Supreme Court to the doctrine that insurance is not in any of its forms or incidents interstate commerce, yet there are many lawyers who contend that the business of the great national insurance companies is in its nature interstate commerce after all; that the confusion, inconvenience, and oppression resulting to those interested in interstate insurance from state control and regulation exemplify in a striking manner the very evils that the framers of the constitution intended to prevent by the insertion of the commerce clause. The insurance people, therefore, being goaded to desperation by the harassing and vexatious conduct of the state insurance departments, have determined to secure the passage of an act of Congress for the regulation of the insurance business, and then, when the act is brought to the bar of the Supreme Court, to force that tribunal to repudiate the long line of cases declaring insurance not to be interstate commerce, and to hold the law constitutional.

That they will succeed in this aim seems scarcely possible. That the Supreme Court has in the past known several radical changes of heart and understanding is quite true. It is also true that at least one important rule of insurance law laid down in earlier cases has been repudiated by a recent decision.[1] But a change of opinion that would involve the absolute repudiation of a doctrine that has stood unshaken, though often assailed, during thirty-five years, and that would involve such far-reaching consequences as affecting the delicately adjusted relations between the Federal government and the states, scarcely seems possible. From an examination of the cases that have arisen under the Sherman Anti-Trust Act of 1890, beginning with the Sugar Trust case[2] and ending with the recent Northern Securities case,[3] there can be observed a growing tendency on the part of the court to broaden the significance of the term "interstate commerce" so as to include within it all business relations that are essentially interstate in character, even though the transportation between the states of commodities or persons is not immediately involved.[4] This tendency, however, being born of the court's desire to make the Federal act against trusts and monopolies effective so far as possible, is not strong enough to justify any hope that it will ever hold insurance to be commerce.

WASHINGTON, D. C., JAN. 1905.

[1] Northern Assurance Co. *v.* Grand View Bldg. Ass'n, 183 U. S. 308. Compare Union Mut. Life Ins. Co. *v.* Wilkinson, 13 Wall. 222.

[2] United States *v.* E. C. Knight Co., 156 U. S. 1.

[3] 193 U. S. 197.

[4] See especially Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211.

LORD BEACONSFIELD AND THE BAR

THE centenary of Disraeli recently celebrated recalls an incident of his early career not unworthy of the attention of the bar. In his first years in Parliament, a contested election was held in 1838 to fill a vacancy in another seat from the constituency he also represented. Corruption was charged and the successful candidate was retired on petition. Disraeli was not concerned in this election, but the prosecuting counsel, Mr. Austin, dragged his name into the proceedings on the petition by stating that "Mr. Disraeli at the general election had entered into engagements with the electors of Maidstone and made pecuniary promises to them which he had left unfulfilled."

BENJ. DISRAELI

In a letter to the *Morning Post*, Disraeli answered him and said: — "Sir, I am informed that it is quite useless, and even unreasonable, in me to expect from Mr. Austin any satisfaction for those impertinent calumnies, because Mr. Austin is a member of an honorable profession, the first principle of whose practice appears to be that they may say anything, provided they be paid for it. The privilege of circulating falsehood with impunity is delicately described as doing your duty towards your client, which appears to be a very different process to doing your duty towards your neighbor. This may be the usage of Mr. Austin's profession, and it may be the custom of society to submit to its practice,

but, for my part, it appears to me to be nothing better than a disgusting and intolerable tyranny, and I, for one, shall not bow to it in silence."

For this slur on the profession, the author was indicted for contempt of court. He made no defence, but the following extracts from his appeal for clemency, attacking Lord Brougham's famous definition of the duty of counsel to client, point a moral no thoughtful lawyer can ignore: —

"I will for a short time avail myself of the permission of the Bench to offer some observations which may induce it to visit this misdemeanor in a spirit of leniency. I stand before the Court confessedly guilty, not from any dislike to enter into an investigation of the circumstances which have induced me to commit this trespass, but because I have been advised that, whatever the moral effect might be, the legal effect could be but one, namely, conviction. I thought that, under all these circumstances, it would not be decorous by a prolonged litigation to resist the unquestionable result, nor was I anxious to deprive my honourable, my learned antagonist, of an earlier termination of the impending issue. It would be affectation in me to pretend that the (I will say, unfortunate) letter which has originated these proceedings was written for the atmosphere of Westminster Hall, but I believe if the data of the supposed facts upon which this letter has been published had been correct, my offence by the law would have been the same. Yet, under these circumstances, I should have applied with some confidence to your lordships — not as administrators of the law, but as members of the great social body — to look upon that transgression not only with mercy, but with special indulgence; and it is my wish to place the feelings and circumstances that induced me to write the letter before the Court, that I may prevail on your lordships even now to look at my offence in the same spirit.

"The learned Attorney-General has stated that this misconception arose from a report in a public newspaper — in a report of a speech alleged to have been delivered before a Parliamentary tribunal. That report had contained allegations against my character and conduct of no common severity. I was accused of having bribed the constituency whom it was my honour to represent, and afterwards having left unfulfilled the promise by which I had induced them to give me their suffrages. This accusation was of a most grievous character,— an accusation of public corruption and private dishonesty, — and I hope your lordships will for a moment consider the feelings of a man not very old and experienced in public life, when he found an accusation of this kind made by a learned member of the Bar before a public tribunal of the country; and although I had not immediately adopted the authenticity of that report, yet I submit that though it was possible the insult might not have been intended, the injury had already been experienced, for the report appeared in the evening papers, appeared the next morning in the morning papers, and had been copied into perhaps every provincial paper throughout the kingdom. I confess my feelings were at that moment considerably excited. I had lived to learn by experience that calumny once circulated is more or less forever current. You might explain the misapprehension and you might convict the falsehood, but there is indeed an immortal spirit in mendacity which at times is most difficult to cope with, and most dangerous to meet; and I confess, when I adverted to the serious injury I had already experienced, and observing also that there were no characteristics which might induce me to doubt the authenticity of the report, I felt myself writhing under feelings which I regret to remember.

"But I did not commit an act of such rash precipitancy as to write a libel upon a newspaper report. I took steps to ascertain its accuracy or inaccuracy; I applied to

a member of that tribunal before which the speech had been delivered. I found him rather a reluctant communicant, but he explicitly declared that the report was accurate. Under those circumstances I happened to meet an eminent member of the Bar, and one well versed in proceedings before the House of Commons. I mentioned to him the grievance under which I laboured, and the absolute necessity of my taking some steps to put a termination to the matter; and I had parted with the, I confess, unfortunate impression that my application to a member of the Bar would be fruitless; and indeed, if he desired to give me any satisfaction, it could not be applied for until I had given him an opportunity of proving the accusation he had made. I had waited in consequence, although it was more due to my constituents than to myself that some immediate steps should be taken, — I waited until the proceedings terminated,— as I subsequently learnt, abruptly terminated; but in the interval I had spoken without reserve to those who attended committees, that it might reach the ears of the learned gentleman, and I regret to think it had not produced some explanation which would have rendered the steps I had afterwards taken unnecessary. When I found those proceedings had terminated, and when I felt that during the delay the accusations had rendered me unfit for a seat in the House of Commons, and unworthy of any position in society,— that the attack had been circulated in every possible way throughout the Empire,— I found it necessary to take a step which should cope with the calumny, and which should be decisive.

"Two courses were alone open to me. I might have gone down to my seat in the House of Commons, and might have treated it as a breach of privilege. I might have made the observations I afterwards wrote, and, as your lordships know, I might have done so there with impunity; but I had a wish not to shield myself under my privilege. Late at night I wrote this unfortunate letter, and sent it instantly to all the newspapers. The Attorney-General seemed to think this an aggravation, but your lordships would not have had me publish a libel in only one paper, which the party might not read, and might only hear of the libel from others. I had thought the better mode was to publish it in all, that it should be made public by every means.

"I am not here to defend the language of that letter as regards any individuals or bodies who may be referred to in that composition, but I mention the haste with which the article was published, because there is a common impression that everything that appears in print is necessarily composed with the advantage of great reflection, even of revision; but I will venture to repeat, that a public journalist writes under the same impulses, and subject to the same feelings, as persons addressing popular assemblies, and often regrets in the morning what he has committed to paper the previous night. I have not the slightest wish to vindicate the language of that letter, even to save myself from the perils and punishments that may now await me. I did not think that the system of bribery spoken of by Mr. Austin prevailed in any borough, certainly it did not in Maidstone. I did not mean to say that when a new election takes place there, all parties might consider themselves properly remunerated for their labour.

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"After I had found I had written a letter, probably too violent even if the supposed attack had been made, and one which was not warranted by the words that were used, I took every step that a man of honour — that a man who wished not only to be just, but most generous — could adopt. I can only say that from the time your lordships graciously threw out your suggestion, anxious as I am at all times not to seem to avoid the consequences of my conduct, wise or unwise, right or wrong, I have done everything in my power to accomplish that suggestion. I appeared against the rule of

my counsel, and intimated my intention to two distinguished members of the Bar, one of whom was the honourable member from Liverpool. My learned counsel did not come into the court with his hands tied. I had given him no limitation as to what was proper to be done, except his own conscience. I had told him to act for me as for himself, knowing that he would not put me in a false position, and my honourable friend had said on that occasion everything which he thought a gentleman should say, or that another gentleman should have expected. He might have been unfortunate in the result, and might not have conveyed all that he intended, or all that he wished, but I am sure my friend had wished to convey all that I wish to convey now, and he did not do it in a niggard spirit.

"It is enough that I have injured a gentleman who was unknown to me, it is enough that I have outraged his feelings and treated him with injustice, but I hope not with injury. I regret what I have done. I not only regret, but feel great mortification for what I have done. I am sorry I should have injured the feelings of any man who had not attempted to injure me. I am sorry, through misconception, I should have said anything that could for a moment have annoyed the mind of a gentleman of the highest honour and integrity. I should myself be satisfied with that expression of deep regret and mortification. But, my lords, from the manner in which this declaration is couched, from several expressions that have fallen at various times during these proceedings, from the animus which has characterised them within and without these walls, I cannot help fearing that I am brought here by one of those fictions of the law of which I have read, and it is not so much for an offence against the law as an offence against the lawyers that I am now awaiting judgment. My lords, under those circumstances I shall appeal with confidence to the Bench for protection. I am sure, my lords, you will never allow me to be arraigned for one offence, and virtually punished for another. My lords, I am not desirous of vindicating the expressions used in that letter in reference to the profession, any more than the expressions used in reference to the individual. My lords, I thought the profession had attacked me, and I wished to show them that there might be a blot in their escutcheon. I have no hesitation in saying that my opinion of the Bar of England in my cooler moments cannot be very different from that of any man of sense and study. I must, of course, recognize it as a very important portion of the social commonwealth — one, indeed, of the lustiest limbs of the body politic; I know, my lords, to arrive at eminence in that profession requires, if not the highest, many of the higher qualities of our nature; that to gain any station there needs great industry, great learning, and great acuteness. I cannot forget that from the Bar of England have sprung many of our most illustrious statesmen, past and present; and all must feel, my lords, that to the Bar we owe the administration of justice to whose unimpassioned wisdom we appeal with the confidence which I do now. But, my lords, I have ever believed, I believe at this moment — I see no libel in the expression of that belief, no want of taste under the circumstances of the case, in expressing it even here — that there is in the principles on which the practice of the Bar is based a taint of arrogance, I will not say audacity, but of that reckless spirit which is the necessary consequence of the possession and the exercise of irresponsible power.

"My lords, I am told, and have been told often in the course of these proceedings, that I have mistaken the nature of the connexion that subsists between the counsel and the client, and of the consequent privileges that accrue from it. It may be so, but I have at least adopted that opinion after some literary, if not legal, research. The question is one indeed of great delicacy and great difficulty; it has been mooted

on various occasions, at various intervals, during our late annals; it has been discussed by very learned lawyers, it has been illustrated by very profound antiquaries, legal and constitutional; has been made subject-matter for philosophical moralists, and even touched by the pleasantry of poignant wits. I confess that I myself have imbibed an opinion that it is the duty of a counsel to his client to assist him by all possible means, just or unjust, and even to commit, if necessary, a crime for his assistance or extrication. My lords, this may be an outrageous opinion; but, my lords, it is not my own. Allow me to read the description of the duty of a counsel to his client, and by a great authority: 'An advocate, by the sacred duty which he owes his client, knows in the discharge of his duty but one person in the world — that client and none other. To save that client by all expedient means; and to protect that client at all hazards and costs to all others, and among those others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the sufferings, the torment, the destruction which he may bring upon any other. In the spirit of duty he must go on, reckless even if his fate should be unhappily to involve his country in confusion.'

"Here, my lords, is a sketch, and by a great master; here, my lords, is the rationale of the duties of an advocate, and drawn up by a Lord Chancellor. In this, my lords, is the idea of those duties expressed, before the highest tribunal of the country, by the Attorney-General of the Queen of England. According to this high authority, it is the duty of a counsel, for his client, even to commit treason. If then, my lords, I have erred in my estimate of the extent of these duties, it cannot be said, my lords, that I have erred without authority. Nor can this be considered as the extravagance of a mere rhetorical ebullition. My lords, I read this passage from an edition of the speech just published by the noble orator, who, satisfied with the fame that he has so long enjoyed, now deems it worthy of the immortality of his own revision, and has just published this description unaltered, after twenty years' reflection, and with its most important portions printed in capital letters. And, my lords, I ask is there any member of the Bar who has had any experience, who has had any substantial practice, any sway of business — my lords, I will say more, is there any member of this profession, I care not how noble his nature or name, how serene his present mind or exalted his present station — who can say that in the course of a long career in which this responsible power has been exercised, there have not been instances when the memory of its employment has occasioned him deep regret and lengthened vexation? My lords, I have done. I leave my case with confidence to your merciful consideration, briefly recapitulating the points on which I have attempted to put myself fairly before the Bench and the public. As to my offence against the law, I throw myself on your lordships' mercy; as to my offence against the individual, I have made him that reparation which a gentleman should, under the circumstances, cheerfully offer, and with which a gentleman should, in my opinion, be cheerfully content. I make this, my lords, not to avoid the consequences of my conduct, for right or wrong, good or bad, those consequences I am ever ready to encounter; but because I am anxious to soothe the feelings which I have unjustly injured, and evince my respect to the suggestions of the Bench. But as to my offence against the Bar, I do with the utmost confidence appeal to your lordships, however you may disapprove of my opinions, however objectionable, however offensive, even however odious they may be to you, that you will not permit me to be arraigned for one offence and punished for another. In a word, my lords, it is to the Bench I look with confidence to shield me from the vengeance of an irritated and powerful profession."

THE STUDY OF OLD GREEK LAW

By Frederic Earle Whitaker, Ph. D.

THE powerful genius of the classic Greek in literature, philosophy, and art is the wonder of the modern world. In the realm of jurisprudence, however, notwithstanding the great names of Lycurgus and Solon; Antiphon, the master of criminal law; Isaeus, the expert on the law of Inheritance; and Demosthenes, the greatest orator of the legal world, Hellenic law is esteemed little and studied still less. The reason for this is not far to seek, and lies in the fact that Roman law has seemed to be the sole repository and even fountainhead of ancient jurisprudence. But Roman law was not an instantaneous product, coming to perfection at a single bound; the roots of her system lay deep and reached out and back to the Old Hellas, her creditor in this as well as in those other indispensables of her power and glory. The laws of the "XII Tables" were not uninfluenced by Hellenic statutes, notably the Solonian laws of Athens. Though it has been the custom, following the iconoclastic tendency of some of our modern critics, to set aside all early Roman history, however firmly established in the minds of the intelligent Romans of late historical times, we are coming to see that the probabilities point to the Greek origin of these basal laws of Rome.

The first steps towards the compilation of this ancient code were taken in the year 452 B.C., three hundred years after the founding of the city of Rome, when the contest between the senators and tribunes, representing respectively the patricians and plebeians, had resulted so unsatifactorily for the popular party that the tribunes proposed a non-partisan commission to draw up laws ensuring their mutual liberties. The commission, consisting of Spurius Postumius Albus, Aulus Manlius and Publius Sulpicius Camerinus, was dispatched to Greece and the Greek settlements in Southern Italy, with orders to copy the laws of Solon, to study the statute law and legal customs, and in general to collect any materials that might be of service in the compilation of the projected code (Livy, Hist., Book III, cap. 31). Professor Muirhead of the University of Edinburgh, author of one of the most authoritative works on Roman Law, has said in this connection: "It may well be doubted whether the embassy ever went so far as Athens. It was quite unnecessary that it should, seeing how easily transcripts of Greek legislation were to be obtained in Cumae and other Ionic colonies not far from home as well as in the Greek settlements in Lower Italy and Sicily" (*Roman Law*, Edinburgh, 1886. Sect. 21, cp. 2, "XII Tables").

In 450 B. C. the commission having returned, the three delegates above mentioned were appointed on the board, as the people "believed that those skilled in the laws of foreign countries would be useful in compiling new ones at home." This board, under the presidency of Appius Claudius, was invested with consular powers for the express purpose of reducing the laws to writing. "In this task they had the assistance as interpreter of one Hermodorus (Cicero, Tusc. Disput. V 36; Strabo, p. 642; Pliny, Nat. Hist. XXXIV, 5, 11), whose presence seems to *confirm* the narrative of the previous collection of Greek material" (*Roman Law*, Muirhead, Note p. 2). The result was the ten tables of the Decemviral Law, to which two tables were subsequently added, making the celebrated law of the *XII Tables;* and "amidst the vast heap of accumulated laws" existent in Livy's time, this old code, founded and grounded on the laws of Greece,

the historian calls "fons omnis publici privatique juris."

Besides, the strong probability of the Hellenic origin of these laws were more decisive proof wanting, it is seen in the marked peculiarities characteristic of the two systems. The early Roman law, for example, does not appear to have possessed what we call a search-warrant for stolen property. The owner himself, as stated in the "XII Tables," could go into the house of another and make search for his own, provided he went clad only in a loin-cloth with a plate in his hands — probably as a preventive of dishonest secretion or accusation. The same legal custom is referred to by Aristophanes in the "Clouds," where Socrates directs the novitiate Strepsiades to remove his clothing and the candidate replies: "but I am not going in to search for stolen property" (*Clouds*, 499). Another marked correspondence to the laws in vogue in Greece is seen in the provision in the Roman Law that the conveyance following on a sale should not carry the property until the price had been paid or security given for it to the vendor — an enactment bearing a close resemblance to a statement of Greek law by Theophrastus. But there is no authority for saying that these particular laws were directly borrowed.

Examples like the above might, however, be further multiplied if necessary to our present purpose, but stronger proof is not wanting. The fixed belief of the great Roman jurists in the reality of the mission to the Greek states and the Hellenic origin of these basal precepts of Roman jurisprudence, is an undeniable matter of fact and this continuous tradition, if we so name it, must have had a foundation in reality to have survived the criticism of the many centuries it possessed or was possessed by the intelligent Roman. In no uncertain terms we learn from the orator Cicero, in late Republican times, that there were laws in the *Tables* that were "translata de Solonis fere legibus" — almost literal translations from the laws of Solon — and this is so stated with reference to particular enactments (*De Lege*, II, 23 p. 59 on Table X). The noted advocate and learned jurist of imperial days, Pliny the Younger, in his charge to Maximus, the recently appointed governor of the province of Achaia, reminding him of the fact that this nation, captive though she was, gave laws to the Romans and at their request, says, "Habe ante oculos hanc esse terram quae nobis miserit jura, quae leges non victis sed petentibus dederit" (Pliny's Letters, Book VIII, Let. 24, p. 174, l. 12). And finally, Gaius, the great Antoninian student and teacher of law, the discovery of whose "Commentaries" is said to have made the study of Roman law possible, in the quotations found in the Pandects, speaks of a certain law given by Solon to the Athenians, concerning boundaries of land (Gaius, Book 4 on XII Tables in Dig. X, l. 13; also XLVII, 22, 4). Such testimony can leave little doubt as to where Greece stands in the history of law, and we may be justified, in any event, in thinking there is good foundation for the story of the embassy to Greece.

It is also interesting to notice in this connection that few of the great teachers of Roman law itself were Roman by birth. Even in the time of the great imperial expansion of law, few great native Roman names are noted. The most prominent Antoninians were not natives of Rome but curiously enough were natives of those borderlands of the Greek seas where Alexander's conquests carried Greek civilization and Greek law kept the firm foothold previously won. The great Julian was an African; Papinian, a Syrian; Ulpian from Tyre; and Gaius, the great commentator, to whom Roman legal history owes so much, was a Greek. The genius for jurisprudence of those lands in closest contact with Greek law is most significant.

In concluding our consideration of the Greek origin of the basal code of Rome and the debt of the Latin to the Hellenic

system, it is to be noted that "nothing of the *customary* law or next to nothing was introduced into the 'XII Tables' . . . only one or two of the laws ascribed to the *kings* reappeared in them. . . . Neither were any of the laws of the *republic anterior* to the 'Tables' embodied in them. In saying, therefore, that for the most part the provisions of the decemviral code were of native origin all that is meant is that they were the *work* of the decemvirs themselves, operating upon the hitherto unwritten law in the direction already indicated" (Muirhead, R. L. p. 99). Though the codification of the laws in late Roman history is essentially Roman and a Roman stamp was put on its legal inheritance, yet through the sister Greek came the basal precepts of the Roman jurisprudence.

But until recently Greek law has not appeared in a codified form. The laws of Gortyna, in Crete, discovered in 1884, have furnished a partial basis for a systematic and unbiased consideration of the Hellenic legal mind as manifested in direct legislative enactment. The lack of a code and commentaries on Greek jurisprudence similar to the valuable work of Gaius in Roman law, noted above, has been an obstacle to the study of Hellenic law; for only by a great expenditure of time can the Greek law be obtained by careful study and more careful comparison of the statements of orators in actual speeches, in cases which are not always clear and are often filled with prejudiced interpretations, adapted to the object uppermost at the moment in the mind of the partisan exponent whose sole desire is to win his case. A recently concluded study of the Greek law of Inheritance, so far as relates to the title of "Adoption," has revealed to us the vast legal treasure buried in those old speeches and has convinced us that the tenacious toiler will come to a mine not only unworked but practically inexhaustible.

When Rome was still herding its migratory flocks and native land meant little more than the limits of the people's pasturage, even then, Greece, the land where Reason reigned, had sought fuller comfort and self-sufficiency in groups greater and higher than those of the family; her Reason formed her peoples into those little city-states, guided by the persuasions of Law; and that law was no longer the command of the father-chief; nor the superstitious reverence which the altar-worship won; nor even the expression of a monarch's whim; but the Law of the Land, which emanated from the people's self, benefiting the mightiest because it protected the humblest. And so to little Hellas, as to no people before her day, National Law owes its origin and first application to human society.

Notwithstanding, therefore, the difficulties involved in a satisfactory investigation of the principles and practice of Greek law, its close relation to the Roman codes as well as its own value as the First National Law in the history of the world, should lend interest and offer profit not only to the classical student and the general historian, but incite the jurist and student of legal history to a close study of the various articles of this system of jurisprudence.

WOONSOCKET, R. I., Dec., 1904.

INTERNATIONAL ARBITRATION THE PRODUCT OF THE MODERN INTERNATIONAL SYSTEM

By Hon. Hannis Taylor, LL. D. (Edin. and Dub.)

IN the presence of a death-grapple between two nations, involving a reckless sacrifice of human lives almost unparalleled, statesmen and philanthropists are struggling to force the realization of a dream which has been haunting the world for centuries. That dream foreshadows no less than a permanent international tribunal armed with the power to take jurisdiction over every question, or nearly every question, that may disturb the peace of the family of nations, and to enforce its decrees under the authority of treaties conceding the right of compulsory arbitration. Since the founding of the existing international system a series of efforts have been made in that direction with results always discouraging until the growing sense of humanity developed in our time prompted movements which have resulted in actual and practical advances. It does seem as if the time is at hand when the family of nations, armed with an international organization more complete than ever before, is to become strong enough and resolute enough to preserve, through moral means, its own peace and order.

THE MEDIEVAL EMPIRE AS AN INTERNATIONAL POWER.

Before the existing state system of Europe was born, the separate nationalities composing it, which arose out of the wreck of the empire of Charles the Great, had passed through a long childhood under the protecting wings of an institution that illustrated for centuries the enduring power of a political theory. That institution was known as the Holy Roman or Medieval Empire, which rested upon the magnificent notion of a vast Christian monarchy whose sway was absolutely universal. The chiefs of that comprehensive society were the Roman Emperor and the Roman pontiff — the one standing at its head in its temporal character as an empire, the other standing at its head in its spiritual character as a church. Finally after the Pope established his judicial supremacy over the Emperor, the theory was that all Christian princes stood to the Roman pontiff as great vassals to a supreme lord of suzerain; and as such suzerain the pope claimed the right to act as supreme judge in all grave affairs of his vassals, whether national or international. Thus, for centuries, the medieval empire stood forth as the one bond of cohesion, holding Europe together under the spell of a theory that assumed to provide a complete system of international justice, and a supreme tribunal adequate for the settlement of all controversies that could possibly arise between Christian nations. No matter whether the medieval empire was a theory or an institution the fact remains that until the splendid conception of a united Christendom it embodied was wrecked in the storm of the Reformation, it did what it could to secure to the world the conditions for which the most advanced advocates of international arbitration are now striving.

CREATION OF THE MODERN INTERNATIONAL SYSTEM.

The great earthquake that began in Germany struck at the root of the theory by which the medieval empire had been created and upheld — the theory that all Christendom consisted of a single body of the faithful held together under the dominion of the

eternal city ruling through her spiritual head, the bishop of Rome, and through her temporal head, the emperor. When that ancient and imposing theory was rejected, so far as the Teutonic nations were concerned, it became necessary for them to establish some common superior to whom all could bow without a loss of dignity. Then it was that an epoch-making man came forth, Hugo Grotius, the founder of the modern system of international law. He became imbued with the dominant idea of his age which was that nature herself is a law-giver. As such he placed her upon the vacant Imperial throne, and then undertook to interpret her mandates to nations who would admit no other superior. The corner stones of the Grotian system are, first, that each state or nation is sovereign and independent, and as such coequal with all the rest; second, that territory and jurisdiction are coextensive. Having thus established a common basis of equality, the difficulty that remained was how to subject sovereign states, through their own volition, to the yoke of legality. For centuries the family of nations, thus created, has been striving to solve that knotty problem through concerted action, in diplomatic congresses and conferences, and through treaties and conventions.

THE CONCERT OF EUROPE.

The first diplomatic congress in which the sovereign states of Europe ever assembled was that which concluded, in 1648, the famous Peace of Westphalia, whereby the conflict that had convulsed Germany for more than a century was definitely closed at the end of the Thirty Years' War, in the two treaties signed at Münster and Osnabrück. In those treaties was embodied a general settlement that survived without a break as the basis of the public law of Europe down to the French Revolution. The underlying motive of that settlement was the creating of such a concert of action between the greater states as would preserve what has since been known as the balance of power. According to the Grotian theory, which the Peace of Westphalia frankly recognized, all states, great and small, are, as territorial sovereigns, coequal before the law of nations. Within its own territory each is supreme; territory and jurisdiction are co-extensive. And yet, despite those plain provisions of the written code, there has grown up alongside of it a set of tacit understandings which have subordinated the legal rights of the theoretically equal European states to a higher law upon whose authority rests the primacy or overlordship vested in the powers that now constitute the Concert of Europe. That primacy or overlordship, gradually developed outside of the written treaty law since the Peace of Westphalia, represents the common superior which actually succeeded to the place made vacant by the collapse of the medieval empire as an international power. With the advent of the eighteenth century the European Concert — made up, in the main, prior to that time, of France, Spain, Austria, Sweden, Holland, and England — was widened by the addition of new elements that entirely changed the politics of the world. Such elements were represented by the new empire of Russia, built up in the north by the genius of Peter the Great and Catherine; by the powerful and independent kingdom of Prussia, lifted from a secondary place in the German Empire by the military ambition of Frederick II; and by the colonial possessions of Great Britain, France, Spain, Portugal and Holland in the continents of America and Asia, and in the eastern and western isles. The famous Peace of Paris, signed in 1763 by the four powers first named, for the purpose of concluding the world-wide contest, made possible by reason of their colonial dominions, marked a transition from a condition of things in which the relative weight of European states had depended entirely upon their possessions within Europe itself. The world had learned already that wars begun

within the limits of Europe might have to be fought out upon the banks of the Ganges and the St. Lawrence. Before the American Revolution ended, the Congress of the United States, which under the Articles of Confederation possessed jurisdiction over all international questions, professed, in the ordinance of December 14, 1781, obedience to the law of nations "according to the general usages of Europe." When the torch thus lighted in the West was passed on to those who kindled the fires of the French Revolution, the Concert of Europe reassembled in order to apply to the internal affairs of France the same principles of intervention which it had so recently applied with deadly effect in the case of Poland. Interference was justified by the declaration that monarchical institutions everywhere were endangered by revolutionary principles that threatened to extend from France to all other countries. To prevent that result the Concert undertook to intervene upon a vast scale, and in the end the intervention was successful. Napoleon was crushed and the throne of France restored to the House of Bourbon. But before the end came the ancient diplomatic fabric of Europe was shattered. Old landmarks were swept away; many of the smaller states were annihilated and some new ones created. The mighty task of reconstruction thus made necessary was committed to the famous congress that assembled at Vienna in November, 1815, the most important diplomatic body that had met since the Peace of Westphalia, a body that relaid the foundations of public law and restored to Europe a period of repose not seriously disturbed for forty years.

THE ERA OF HUMANITY.

Before that period of repose ended the morning light of a new era broke upon the world, an era whose Christian spirit of humanity boldly proclaimed its purposes to be, first, the prevention, when possible, of all wars through the good offices of international arbitration; second, the greatest possible mitigation of the horrors of war, after the means of conciliation have proven ineffectual. A notable and practicable beginning was made when the plenipotentiaries who concluded the Peace of Paris of 1856 were given to understand that the time had come when the increasing outcry for the introduction of greater humanity into the rules and practices of war could be disregarded no longer. In obedience to that demand the question of the maritime rights of belligerents and neutrals was formally presented to the Congress, and the result was the Declaration of Paris, a protocol signed April 16 by all the parties represented, and subsequently adopted as a part of the public law of the world by all powers except the United States, Spain, and Mexico. The first great step thus taken was soon followed by the epoch-making act of President Lincoln, who, in 1863, requested Prof. Francis Lieber of Columbia University, N.Y., a famous publicist, to undertake the no less novel than human task of codifying the laws of war. The fruit of that effort was promulgated by the War Department in General Order No. 100 for the government of the Armies of the United States in the Field, a code which has profoundly influenced all subsequent manuals issued for the guidance of their armies by the European states, a code which certainly suggested to the eminent Swiss jurist Bluntschili his codification of the laws of war. But while it is a pleasure to every true American to concede all honor to the immortal Lincoln for this initial attempt to mitigate, in theory at least, the horrors of war, we must not forget the glory due to a great Virginian for the issuance of a famous military order which notably diminished the horrors of war in actual practice. I refer to General Order No. 73, issued by General Robert E. Lee from the Headquarters of the Army of Northern Virginia, at Chambersburg, Pa., June 27, 1863, in which he exhorted his troops to "have in keeping the yet unsullied reputation of the army, and that the duties

exacted of us by civilization and Christianity are not less obligatory in the country of the enemy than in our own. The commanding general therefore earnestly exhorts the troops to abstain with most scrupulous care from unnecessary or wanton injury to private property," and he enjoined upon all officers to "arrest and bring to summary punishment all who shall in any way offend against the orders on this subject." Even fences and growing crops were protected under that order which for the first time in the world's history declared "that the duties exacted of us by civilization and Christianity are no less obligatory in the country of the enemy than in our own." What an epitaph for a great Christian soldier! In the year that followed President Lincoln's order, whose fruit was the Lieber war code, met the famous body composed of the representatives of the fourteen states who signed, on August 22, 1864, the Convention of Geneva, regulating the treatment of the sick and wounded, and neutralizing all persons and things employed in their service, such as surgeons, chaplains, nurses, hospitals, and ambulances, provided such persons and things are distinguished by that sacred badge which has now become the proudest device in the heraldry of humanity — the red cross of Geneva. Nothing could be more romantic than the circumstances out of which that great movement grew. It was the work of two citizens of Geneva — Dunant, a physician who published a startling story that thrilled all Europe of what he had seen in the hospitals on the battlefield of Solferino, and Moynier, his friend, who conceived the idea of "neutralizing the sick wagons." Not long ago a lover of his kind left behind him a will in which he provided that out of his estate 100,000 francs should be awarded annually, by a committee, to that one who had done most for the good of humanity. When this committee determined that the name of Dunant, then nearly ninety years of age, should be inscribed among those who had loved best their fellow men, where do you suppose they found him? I am ashamed to tell you. In a poor-house near his native city of Geneva!

In order to revise and extend the original provisions of the convention of 1864 another was signed at Geneva in 1868, but never ratified, whose Additional Articles, including the neutralization of hospital ships, relate chiefly, though not exclusively, to warfare at sea. Less than two months thereafter a Military Commission at St. Petersburg, composed of delegates from seventeen states, including representatives from Persia and Turkey, agreed as between themselves "to renounce the employment of any projectile, on land or seas of a weight below four hundred grammes (fourteen ounces), which should be explosible or loaded with fulminating or inflammable materials." In the declaration then made it was said that the object of the use of weapons in war is "to disable the greatest possible number of men, that this object would be exceeded by the employment of arms which needlessly aggravate the sufferings of disabled men, or render their death inevitable, and that the employment of such arms would therefore be contrary to the laws of humanity." In 1874 met the Conference of Brussels, in which appeared the representatives of all the European powers of any importance, in the hope of bringing about the adoption by all civilized states of a common code for the regulation of warfare on land. As the delegates were not plenipotentiaries, the Conference was purely consultative; and the outcome was a series of articles embodied in a Declaration which remained as the basis for further negotiations between the governments concerned. In 1877 met the Conference of Constantinople which vainly endeavored to obtain from the Porte guarantees for the better government of its Christian subjects; in 1884–85, the West African Conference of Berlin, whose purpose was to regulate the affairs of that region, including the boundaries and independence of the Congo Free

State; and in 1890, the Conference of Brussels, which resulted in the Final Act for the suppression of the African slave trade.

PEACE CONFERENCE AT THE HAGUE, 1899.

Such were the path-breaking efforts which cleared the way for the meeting of the great Peace Conference that assembled at The Hague on the 18th of May, 1899, the year after the death of the mighty Bismarck whose warlike policy, through which France was humiliated and Germany consolidated, had converted the Continent of Europe into a military camp, in which each nation was vying with the other to build up vast armies and navies as an intolerable burden to all. In the hope of relieving that condition of things the Czar of Russia issued an invitation which was answered by a hundred delegates from twenty-six powers — twenty European, four Asiatic, and two American. At a very early stage in the proceedings of an assembly called by the chief of the great empire of the east of Europe, the first plenipotentiary of the great empire of the west, Sir Julian Pauncefote, formally proposed, in a remarkable *memoire*, the question of the creation of a permanent tribunal of arbitration. The delegates of the United States submitted at the same time a similar proposition, expressing the desire that arbitration might become a nominal method of adjusting international controversies. While the delegates of the German empire objected, and no doubt wisely at that time, to obligatory arbitration as a step too far in advance of existing conditions, they subsequently expressed the cordial adherence of Germany to a voluntary international court, Prof. Zorn declaring that his government "fully recognized the importance and grandeur of the new institution." In the original scheme submitted by Russia at The Hague, it was proposed that, "Arbitration shall be obligatory in the following cases, so far as they do not affect vital interests or the national honor of the contracting states." In that category were included differences regarding pecuniary damages suffered by a state or its citizens; and the interpretation or application of treaties upon certain designated subjects. But, after objection had been made to a part of the Russian scheme by the delegates of the United States, it was rejected as a whole upon a motion made by a delegate of the German empire. Thus the battle at The Hague in favor of compulsory arbitration was wholly lost; there was an unwillingness to concede it even when limited to the settlement of rights purely legal, as contra-distinguished from such as are purely political. The first battle in favor of compulsory arbitration within those limits was destined to be won upon the soil of the New World.

THE PAN-AMERICAN CONFERENCE OF 1901–2.

The Czar's invitations were limited to those countries having diplomatic representatives at St. Petersburg. And so no delegates came from the Central and South American republics. The only American powers present were the United States of America and Mexico. And yet when President McKinley, in his message to Congress in 1899, declared it expedient that the several American republics, constituting the International Union, should hold another conference, they promptly assembled in the City of Mexico, in October, 1901, not only to approve of what had been done at The Hague, and secure admission into its conventions as signatory powers, but to take a step in advance of its proceedings respecting arbitration. Russia's limited proposal which failed at The Hague was revived in substance in the Second Pan-American Conference in the following form: "It is now proposed to submit such cases to The Hague tribunal in accordance with the tendencies of which this assembly has given such unanimous evidence." Under the terms of Article 1, it is provided that: "The high contracting parties agree to submit to arbitration all claims for pecuniary loss or damage, which may be presented by their

respective citizens and which, in accordance with international law, can be submitted through diplomatic channels and can not amicably be adjusted through such channels, provided such claims exceed the sum of ten thousand dollars in gold; and provided, further, that such claimants shall not have voluntarily served or aided, subsequently to the ratification of this protocol, the enemies of the government against which the claim is presented." Such was the unanimous agreement assented to by the representatives of the United States of America, of the United States of Brazil, of the United States of Mexico, of the United States of Venezuela, and of the republics of Argentine, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Hayti, Paraguay, Peru, Salvador, and Uruguay. At the close of the Conference the Mexican minister for foreign affairs declared that it had ended in triumph. To employ his own words: "That triumph is undoubtedly the unanimous agreement of all the delegates, in spite of their apparent radical divergence as to the application of that great principle, to submit for settlement to the permanent arbitration court of The Hague all controversies that may arise among the governments of America due to the claims of private individuals for indemnities and damages. As those claims, at least in America, and in cases where powerful nations are involved, are without question the most frequent source of international controversies, the importance of this achievement can not be doubted." Although little progress has been made towards the ratification of these arbitration treaties signed at the Pan-American Conference, the fact remains that they were unanimously approved by the delegates. But what is more to the point the first treaty of obligatory arbitration actually concluded was made in 1902 between two of the South American republics, Chile and the Argentine, who, after disbanding their armies and reducing their navies by a sale of a number of their battleships, crowned the noble work by erecting on the highest peak of the Andes which marks their international boundary, long a subject of angry controversy, a statue of the Christ, the Prince of Peace.

ANGLO-FRENCH TREATY OF 1903 AS A STANDARD FOR IMITATION.

The most signal support, however, which The Hague court has so far received has been drawn, during the last year and a half, from the treaties of obligatory arbitration signed by Great Britain and France, France and Italy, Great Britain and Italy, Holland and Denmark, Great Britain and Spain, France and Spain, and France and Holland, entered into under Article XIX of The Hague Arbitration Convention, which provided that any of the signatory powers may make "New agreements, general or special, with a view of extending the obligation to submit controversies to arbitration, to all cases which they consider suitable for such submission." Most notable is the fact that the treaty between Holland and Denmark is without limitations. Article I boldly provides that "The High Contracting Powers undertake to submit to the Permanent Court of Arbitration all mutual differences and disputes that can not be solved by means of a diplomatic channel." The other treaties reserve questions of vital interest and honor, whatever they may be. On that basis was made the treaty between Great Britain and France on the 14th of October, 1903, after one of the most remarkable campaigns in the history of social progress. After a canvass conducted by Dr. Thomas Barclay and others, before all the important boards of trade and chambers of commerce in both countries, nearly three hundred of them voted resolutions in favor of the treaty. The American Conference of International Arbitration is now appealing to the people of the United States in support of the treaties of arbitratino being negotiated by this Government with France, Germany, Great Britain, Mexico,

and various other powers. While the terms of these treaties have not yet been made public, it is authoritatively stated that they are substantially the same as the arbitration treaty of 1903 between Great Britain and France.

SPECIAL DUTY OF THE UNITED STATES TO AID THE MOVEMENT.

I can not doubt that it is the present paramount duty of the people of the United States to give to this movement in favor of limited compulsory arbitration, now at a critical stage, the entire weight of their moral influence. That something we call destiny was not acting blindly when it planted this great Republic here in isolation, midway between Europe and Asia, so that it might become the most independent and therefore the most potential arbitrating power in the world. The high place to which we have now attained, from small beginnings, has been reached through two stages of growth. When we signed the treaty of peace of 1783 with Great Britain our position in the world was hopeful but not commanding. Our rise did not really begin until the wisest and strongest American expansionist, casting aside the weakest of all constitutional quibbles, added Louisiana to our domain, thereby securing the ultimate control of this continent and freedom from complications with European powers. If that step had not been taken we should have been in no position to defy the Holy Alliance when, in 1822–3, it resolved to dispute our primacy in the New World. For the second time the great Virginia expansionist came forth, and from his library at Monticello he sent out a definition of our new position in the family of nations, and that definition was labeled with the name of Mr. Munroe. Mr. Jefferson did more than all other men combined to establish the supremacy of this republic in the affairs of this hemisphere. Andrew Johnson and Mr. Seward did something when at the end of our civil war they invited France to retire hurriedly from the soil of Mexico. President Cleveland did far more when he notified the greatest of the world powers, in the affair of Venezuela, that the arbitrating power of the United States in this hemisphere is absolute and irrevocable. When Great Britain, in a just and wise spirit accepted that conclusion, the foundations were laid for that stronger and better understanding which now, thank God, unites the two great branches of the English speaking people in a moral alliance for the good of humanity. The results of the Spanish-American war have extended our influence beyond the affairs of this hemisphere; they have brought to us invaluable possessions in the eastern and the western isles. We have advanced to a position of commanding influence in the family of nations. Let us make no mistake; let us indulge in no self-deception. This aggressive and rapidly growing nationality is neither cowardly nor incompetent. It does not propose to retreat; it does not propose to shrink from the discharge of any of the high duties that destiny has put upon us. Let us remember one thing so clearly illustrated by the politics of the British Empire. In the conduct of our foreign affairs, let us hush all local differences, and stand shoulder to shoulder when we are called upon to deal with foreign nations. To that extent at least, let us resolve to be non-partisan and non-sectional. When a great Secretary of State, like the Hon. John Hay, wise, patriotic, tolerant, just to all men, is pressing forward some great measure like this for the common good of all mankind, let us not stop to inquire whether he is a democrat or a republican. Let it suffice for us to know that he is an American.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

ALTHOUGH much has been written regarding the work of Governor Folk of Missouri, we believe it has remained for Mr. Bellairs to publish in this number the first study of his career from a legal point of view. Mr. Bellairs was born in 1870 and is one of the many who have applied the results of their study of the law in the pursuit of other occupations. Though a law student he has never stood for the bar and has been a journalist for many years, for most of the time connected with the St. Louis *Chronicle*. During the war with Spain he was in Cuba as correspondent for the Scripps-McRae league, an association which controls many of the leading journals of this country. His special work for the *Chronicle* has been reporting the court news. In that capacity he reported all Grand Jury investigations and the trials of the boodlers and came in close personal contact with the subject of his article.

TRAVIS HARVARD WHITNEY is another example of the man trained in the law who has found his vocation in another field. Mr. Whitney was born in 1875 in Kansas and graduated from Harvard College in 1900 and Harvard Law School in 1903. Even before his graduation he had rendered service to the cause of municipal reform under the directions of the Citizens' Union of New York City, and in July, 1903, was appointed assistant secretary of that organization. In that office he served in the last Low campaign and since then has been especially assigned to the legislative work which he so graphically describes.

TRAVIS HARVARD WHITNEY

WILLIAM REYNOLDS VANCE, who writes in this number regarding "Federal Control of Insurance Corporations," is a native of Kentucky and was educated at private schools in Shelbyville and at Washington and Lee University, where he received the degrees of Ph. D. in 1895 and LL. B. in 1897. After practising for a short time at Louisville, he accepted a professorship in the department of law in Washington and Lee University and in 1902 became its dean. In 1903 he was elected professor of law at Columbian University (now George Washington University), Washington, D. C. He has made an especial study of the law of insurance, is a member of the committee on insurance of the American Bar Association, and the author of an authoritative text book which has recently been published on that subject.

WILLIAM REYNOLDS VANCE

AMIDST the hurry of modern practice it is pleasant to find that the zeal of patient scholarship is not lacking in the law, and that the material for proper comparative study of the broader phases of jurisprudence is being gathered by investigators of ancient law. While

much has been accomplished in the study of the laws of Rome, as is pointed out in Mr. Whittaker's article in this number, the field of old Greek law has been but little explored. Mr. Whittaker has devoted most of his life to the study and teaching of the classics at Brown University and at Kenyon College. In his study of Greek institutions he was led, while preparing for his doctor's degree, to investigate the Greek Law of inheritance. After several years' work in the original Greek sources with incidental comparisons with Roman Law and the modern codes, he has just completed a work on "The Legal Fiction of Adoption in Ancient Greece," which is one of the first attempts at a scientific treatise on the jurisprudence of a race whose guidance into so many other fields has been the subject of much fruitful investigation.

FREDERIC EARLE WHITAKER

WE are fortunate in presenting in this issue an address delivered by the Hon. Hannis Taylor before the West Virginia Bar Association last December on "International Arbitration." Mr. Taylor is well known to students of history as the author of one of the ablest works on the English Constitution, a book which is used in the leading universities of America and Great Britain and has been adopted as a text book by the University of Dublin in preference to the English works. He has more recently published a treatise on International Public Law which has been characterized as the best American work since Wheaton's, and is about to publish an exhaustive treatise to be entitled "Jurisdiction and Procedure of the Supreme Court of the United States." Mr. Taylor is a Southerner by birth and training who has rendered eminent service to our country, not only as a scholar but as a man of affairs. He represented the United States before the Alaskan Boundary Commission and is at present special counsel for the Spanish Treaty Claims Commission. From 1893 to 1898 he served as our minister plenipotentiary to Spain. At a special graduation ceremonial of the University of Edinburgh last summer the degree of LL.D. was conferred on him. Mr. Taylor is professor of international law at George Washington University.

HON. HANNIS TAYLOR

The daily press has contained of late discussions of the supposed abolishment of the Grand Jury in Minnesota and statements that a bill for that purpose was to be introduced in the Illinois legislature. Besides these indications of discontent with our Grand Jury system there have been criticisms of our methods of trial by petty juries, and after the repeated delays in the Patterson trial, the proposition was renewed in New York to abolish the requirement of a unanimous verdict. It remained, however, for the press of Boston to raise the most startling criticism of a verdict in the comments made upon the conviction of Tucker for the mysterious Page murder. Those who followed the newspaper reports of the evidence seem to have been greatly surprised at the verdict and editorials have boldly declared that a great injustice has been done. These signs of discontent with our jury system are symptomatic of the impatience with the technicalities of the law which was so well illustrated in Dean Bigelow's article in our last number. The discussion of these proposed changes, as well as an account of the Tucker case by an eye witness, should be, therefore, of interest to the profession, and we are glad to announce that these articles have been promised for our next number.

CURRENT LEGAL ARTICLES

This department represents a selection of the most important leading articles in all the English and American legal periodicals of the preceding month The space devoted to a summary does not always represent the relative importance of the article, for essays of the most permanent value are usually so condensed in style that further abbreviation is impracticable.

AGENCY (Liability of Principal in Contract)

UNDER the title of "Agency by Estoppel," Walter W. Cook in the January *Columbia Law Review* (Vol. v, p. 36) criticises what he states to be the "new view which seems to be gaining acceptance," that the liability of the principal in case of apparent as distinguished from real authority so-called, is an application of the doctrine of estoppel by misrepresentation. In opposition to this he contends that there is "a true contractual liability as well where the authority of the agent is only apparent as where it is real." "It is fundamental in the law of contracts that a person is bound not by his real but by his manifested intention. It results from this that contracts often arise where there has been no mutual assent, no meeting of the minds of the parties in fact." "One may manifest his intention not only by his own words or acts, but also through the words and acts of another." The analogy of the formation of a contract by correspondence is relied upon by the author. He says that the advocates of the theory of estoppel must assert that there is a distinction between manifesting intention through a letter and through another human being on the ground that in the latter case the "agent exercises discretionary power." But this discretionary power also exists in the case of real authority.

"It is submitted, therefore, that the only difference between real authority and apparent authority is that in the case of the former there is a meeting of the minds in fact as well as in law, *i.e.*, the principal is bound and intends to be bound, whereas in the latter there is a meeting of the minds in law but not in fact, *i.e.*, the principal is bound although he does not intend to be bound."

AGENCY (Master and Servant. Liability for Acts of Stranger Assisting Servant)

A VALUABLE discussion of a department of the law of master and servant which had previously not been carefully analyzed, appears in the *Michigan Law Review* for January, (Vol. iii, p. 198), entitled "The Liability of the Master to Third Persons for the Negligence of a Stranger Assisting His Servant," by Floyd R. Mechem.

ASSOCIATIONS (Transfer of shares in Partnerships and Corporations)

CHARLES WHARTON PEPPER contributes to the December number of the *American Law Register* (Vol. lii, p. 737), a discussion of the law relating to "The Transfer of Interests in Associations," which is probably the most valuable contribution to the literature of the month. He states in a note that it is a preliminary study in a chapter on the work of the law of the associations and in it he discusses transfer of interests in partnership associations as well as that of shares in corporations.

The article is to be continued.

CODIFICATION (German Code)

IT is interesting in view of our present attempts at codification of special departments of the law through uniform state legislation, to learn from the article on "The Making of the German Civil Code," contributed by A. Pearce Higgins to the *Journal of the Society of Comparative Legislation* (N. S. No. 13, p. 95), that the way was paved for the movement for the drafting of the recently adopted German Code by a series of uniform codifications of special subjects enacted by the separate German States prior to the present union. The present code is founded upon a draft which was a result of seventeen years of labor by a commission appointed in 1874. Their work was criticised as too academic, and in 1890 a new commission began to revise it. This was completed in January, 1896. This draft was submitted to a committee by the Reichstag, after which, by skillful handling it was finally passed to take effect January 1st, 1900. Of the

broader aspects of the enactment the author says, "the codes of Justinian and Napoleon which have exerted such tremendous influence on the world were produced under the direction and at the commands of despotic rulers. The German Code, however, is the result of a great national desire for unity which was an outcome of the Napoleonic wars."

"The German code is, in fact, a striking illustration of the effect of idealism in politics. It was rendered possible only by the passionate devotion to a great ideal which permeated all the masses of the Empire, who had passed *a* code long before *the* code received the official sanction of the Imperial Legislature. The making of the code is a standing object-lesson to all States that are looking forward in the future to a scheme of codification, and the Germans may well be proud of the labors which for twenty-two years were devoted to its consideration. *Finis opus coronat*, and the end was the production of 'the most carefully considered statement of a nation's laws that the world has ever seen.'"

CODIFICATION (Porto Rican Code)

THE study of the Porto Rican Code by Joseph H. Drake, entitled "The Old Roman Law and a Modern American Code," is continued in the *Michigan Law Review* of January (Vol. iii, p. 185). In conclusion he says:

"From the comparison, on the one hand, of the old Roman law with its modern descendant, and, on the other, of the modern Roman-Spanish Code with the Anglo-Saxon system, we may note that the tendency in the late continental Roman Code seems to be in the direction of a return to the classic model. The most important differences between the Spanish Civil Code and the Code Napoléon, in matters of classification, at least, are shown in the greater likeness of the Spanish Code to the institutional treatises of Gaius and Justinian." "The comparison of the Spanish Code with the Porto Rican shows in the first place a considerable diminution in bulk." "The subtractions are, in the main, from the provisions in regard to marriage, legitimacy of children, and the law of guardian and ward; together with the omission of all distinctions between Spaniards and non-Spaniards. The main additions are in the long corporation act, taken from State laws on the subject, and in the more elaborate provisions as to the effect of absence, taken from the Louisiana Code. We find the variations between the Spanish and the American Codes in those branches of law most affected by the play of emotion; namely, in the law of husband and wife, and parent and child." "The main addition to the Porto Rican Code, on the juristic person, reflects faithfully the spirit of the present day which is giving to the corporate personality perhaps more attention than to any other legal institution.

"One of the practical suggestions of the study of this codification to a student and teacher of law, is the possibility that some modern Blackstone, as gifted as his great predecessor, may some day give us a new institutional treatise on law. The question of codification or no codification has resolved itself of late years — after our not too flattering practical successes with codes — into a pedagogical question rather than one of practical application of law in the courts. Such a treatise must present in succinct form the essential principles of modern law, and it would seem that no more efficient working model for such a book on the institutes of law can be found than one of our modern American codes based on the old Roman law. The improvements on the Code Napoléon made by the Spanish legalists, in El Codigo Civil Español, are mainly in the line of a return to Gaius, and the successful adaption of this code to a modern American territory shows that the fundamental principles of world law may now be stated lucidly and in moderate compass."

CODIFICATION (See Suretyship and Conflict of Laws)

CONFLICT OF LAWS (Foreign Judgments)

THE address of Mr. Justice Kennedy of the English High Court before the St. Louis Congress, on the "Recognition of Foreign Judgments," is printed in the *Journal of the Society of Comparative Legislation* (N. S. No. 13, p. 106). It is an interesting statement of the importance of international uniformity in this department of law, and contains valuable suggestions as to how it might be attained.

CONSTITUTIONAL LAW (Presidential Succession Act)

THAT the undoubted intention of Congress in enacting the Presidential Succession Act of 1886, to remove every difficulty which could have arisen under the old law, was not effectuated, is the attitude of Hon. Charles S. Hamlin in an article, entitled "The Presidential Succession Act of 1886," in the January *Harvard Law Review*, (Vol. xviii, p. 182). By an examination of the proceedings of the constitutional convention he shows that "the framers of the Constitution did not intend that the acting President should necessarily serve for the balance of the unexpired term; on the contrary, they so drafted the Constitution that an intermediate election of President could be held." That this interpretation is correct has, however, been disputed. Of the Act of 1886, he says: —

"It must be admitted that the Act, so far as relates to the constitutionality of the designation of the President *pro tempore* of the Senate and the Speaker of the House, has, by substituting the Cabinet officers, met the difficulties successfully. As regards, however, the important question, — whether Congress has constitutional power to provide for an intermediate election of President, and whether the exercise of such power is expedient, — we shall find that the difficulties have not been removed, but that, on the contrary, the doubtful questions have been left in greater uncertainty than before."

"Although the Act of 1886 did specifically repeal the special election provided by the Act of 1792, yet the Ingalls amendment deprived this repeal of any significance, and left the question in suspense. There can be no possible doubt as to the motive in securing this latter amendment. It was made perfectly clear, both by Senator Ingalls and Senator Sherman, as shown above, that the object was to have Congress, when called together by the acting President, consider and determine whether or not to order a special election of President."

"Conceding, however, that there is good ground for difference of opinion, both as to the constitutionality and expediency of a special election, it will surely be agreed that the time for its discussion should not have been postponed, as it is by the Act of 1886, until the coming together of Congress in special session at the call of the acting President. Surely, also, there is no one who would not regret the possibility of Congress being influenced in its determination of such an important question by the opinion the members may entertain of the person at the time holding the office of acting President. Such a condition, if it ever arose, might make this government one of men rather than of laws."

"What, then, is the remedy for such defects? The American people desire above all things to have certainty with regard to the succession to the Presidency. Two courses are open. The Act of 1886 may be amended so that the acting President shall expressly hold office for the balance of the unexpired term or until the disability be removed. Or, in the alternative, the Constitution may be amended to provide that a special election of President shall speedily be held where the offices of President and Vice-President are both vacant through other causes than disability, and that the Secretary of State and other Cabinet officers respectively shall act as President only during disability or until the inauguration of the specially elected President. To remove all possible doubt, it should also be provided that the President so elected shall hold office only for the balance of the unexpired term. The vacancy in the Presidential office could then be filled with a minimum of disturbance to the business interests of the country. The new comer would hold office for a fixed term and would be independent of Congress, as was intended by the Constitution, whether he were designated as acting President or elected specially as President. The difficulties and doubts first arising under the Act of 1792 and rendered little less obscure and disturbing by the Act of 1886, would disappear.

"It may be true that the difficulties pointed out in this article are somewhat remote and not likely to arise in the near future. They are, however, just as likely to arise as is the double vacancy, on the possibility of which the Act of 1886 depends. A fair discussion of the questions involved, therefore, would seem to be not without some useful purpose."

CONSTITUTIONAL LAW (Powers of the President)

THE striking address of Charles A. Gardiner before the New York State Bar Association entitled, "The Constitutional Powers of the President," was given such wide publicity in the morning newspapers of January 19th (it is printed in full in the *Boston Herald* of that date), and has aroused so much hostile criticism that we depart from our custom to review only legal periodicals, and assuming the accuracy of the report will review it while it is still fresh in the public mind. It has often been observed that the office of President might well in great national emergencies take on all the powers of a dictator, and the Civil War demonstrated in a measure, the truth of this. Mr. Gardiner, however, seems to have described these powers as the ordinary incidents of the office and finds an exemplification thereof in the conduct of the present administration and a confirmation in the last national election. He sums up his conclusions as follows:

"1 — Under the constitution, the President is sole executor of his office. Congress has absolutely nothing to do with it, nor have the courts. Possessing sole power and being bound by his oath to exercise it, the President must necessarily possess exclusive and absolute discretion in executing the entire presidential office.

"2 — Nor is the President's discretion limited in executing the constitution. His power to execute it, we have seen, is plenary. It is also exclusive. The courts have no power to execute it. Nor has Congress. It has permissive authority to 'enforce' the war amendments by 'appropriate legislation.' That defines the means of enforcement — by legislative enactment — by enacting 'appropriate' laws — not by executive action. Whatever else Congress may do, it cannot encroach upon the executive power of the President. His power to execute the constitution is exclusive. Hence, also, his discretion must be equally exclusive and absolute.

"How much of the constitution the President can execute is a problem for practical statesmanship. Whatever is 'complete in itself,' said the court, 'is self-executing.' 'It executes itself,' 'it needs no further legislation to put it in force.' (179 U. S. 403.) The great substantive grants of the constitution are 'self-executing,' and specifically, I maintain, are freedom secured by the 13th amendment, negro citizenship granted by the 14th, and equality of suffrage guaranteed by the 15th — and the President can execute all these on his own initiative without interference from courts or Congress, and with exclusive and absolute discretion.

"3 — The discretion of the President in executing the laws of Congress is also absolute. The subject matter of a law is determined by Congress, and the President can neither add to nor detract from its substance. Congress may also regulate all ministerial details even in the minutest particulars — but whatever is left for the President to execute, be the same more or less, he can execute with as absolute discretion as he executes his office or the constitution.

"Another consideration, however, must always govern the President. By the very law of his being he is subject first to the constitution, and in executing statutes his discretion must be subordinate to the higher law of his being — the obligation faithfully to execute his office and the constitution. He must first decide whether or not a law should be executed at all, and in deciding that, he may subordinate laws of Congress and decrees of courts to reasons of state.

"When, in his judgment, the highest good of the people forbids him to execute a law, he may refuse to execute it, although Congress may direct him to do so.

"When his judgment pronounces a law constitutional, he may execute it, although the courts declare it unconstitutional and forbid him to execute it; and he may refuse to execute a law that the courts declare constitutional and command him to execute. Such exercise of his discretion cannot be revised by any judicial or legislative proceeding (4 Wall. 498–9); the only remedy is impeachment. But so long as he acts 'faithfully,' that is to the best of his judgment, his discretion is final and conclusive."

"The doctrine governing the whole subject is best summarized by Jefferson. 'Each of the three departments,' he said, 'has equally the right to decide for itself what is its duty under the constitution, without any regard to

what the others may have decided for themselves under a similar question." (Works. x, 142.) That principle is as sound to-day as when announced. Any departure from it will work ruin to our institutions. While I believe there should be reciprocal confidence between the departments, yet I stand on Jefferson's historic doctrine and claim for the President exclusive, unqualified, and absolute discretion to execute his office, the constitution and the laws of the United States without any regard to what others may have decided for themselves under a similar question.' "

"Such are the constitutional powers of the President. Their discussion on this occasion seems peculiarly appropriate. We have entered on a new era of political development. This is the age of executive expansion. Until the rebellion Congress ruled supreme all things centered in it, and under its great leaders it gradually expanded until it assumed a disproportionate and dangerous ascendency in the government. As civil war settled down over the land it became apparent that both Congress and the courts stood arrayed against the people. Then out of their ranks came Abraham Lincoln. Like Pallas Athene of old, he stepped forth from the very head of sovereignty, crowned with independence, girded about with the constitution, and armed with the express command to preserve the Union. Lincoln was four long years executing that mandate, and over the graves of slavery and nullification and secession he founded a new republic whose spirit is nationality and whose dominating force is the President of the United States.

"With all the impetus of the rebellion, those principles now for a generation have been permeating the body politic with an insistence as irresistible as the forces of nature. The failure to impeach Johnson, the reconstruction measures of Grant, Cleveland's struggle for executive independence, and McKinley's extra-territorial policies, all immeasurably strengthened the office .and expanded its domestic and foreign powers.

"When President Roosevelt came before the people, he was known throughout the land as the incarnation of nationality and executive expansion. For three years he had maintained a domestic rule as uncompromising as Cleveland's and a foreign policy more aggressive than McKinley's. He stood on that record, and before the bar of the people unflinchingly maintained the constitutionality of every act of his administration. The Democratic party met the issue squarely. Then followed an unprecedented campaign. The whole body politic made the constitutional powers of the President their supreme issue — not academically, but as applied to representative domestic and foreign problems, the Philippines, Panama, the Isthmian canal, the pension order, the trusts.

"The verdict of the people was an overwhelming indorsement of the President. He had claimed practically all their executive and magisterial sovereignties and absolute discretion to exercise them, and 7,600,000 electors, representing 46,000,000 citizens, voted that he was right and peremptorily commanded him to use them.

"That is my conception of the election of 1904. It was the most remarkable popular interpretation of the constitution ever made in this republic, and every argument I have made shows it was right. Thus my ideal of the President coincides with the ideal of the people — a majestic, constitutional figure, uncontrolled by Congress, unrestrained by the courts, vested with plenary constitutional power and absolute constitutional discretion — a sovereign over 80,000,000 people, and the servant of 80,000,000 sovereigns, whose sole inspiring purpose is to serve his fellow-citizens, guard their liberties, and make this nation the freest, most enlightened, most powerful sovereignty ever organized among men."

CONTRACTS (Action by Beneficiary)

"THE Limitations of the Action of Assumpsit as Affecting the Right of Action of the Beneficiary" is the title of an article by Crawford D. Henning in the *December American Law Register*, (Vol. lii, p. 764) in which he endeavors to show that "the right of action of the beneficiary was previously recognized and firmly established in the ancient actions of debt and of account years before the rise of the action of the case on "promises." "It is safe, therefore," he says, "to assume as an abstract proposition, and aside from the tech-

nicalities of procedure, that modern commercial sentiment outside of England is in favor of effectuating the intention of the contracting parties who have attempted to confer rights on a third party in respect of their contract."

This article is to be continued.

CONTRACTS (Discharge by Alteration)

PROFESSOR SAMUEL WILLISTON concludes his very important treatise on the "Discharge of Contracts by Alteration" in the January number of the *Harvard Law Review*, (Vol. xviii, p. 165). It is impossible to adequately summarize it here.

EQUITY (Judicial Discretion)

AN address of interest in connection with Dean Bigelow's article in our January number delivered by Roscoe Pound before the Nebraska State Bar Association, entitled "The Decadence of Equity," is printed in the January *Columbia Law Review* (Vol. v, p. 20.) He says that the origin of equity jurisdiction was in the demand for greater flexibility and wider discretion than could be attained in the courts bound by precedents. That the pendulum has since swung back and "the work of liberalization being accomplished, the system whereby it was brought about remains merely as an accident of judicial administration."

Commercial and industrial development make for certainty, for the commercial world demands rules. Hence the author finds that several causes, chiefly the introduction of the common law theory of binding precedents and resulting case law equity have brought about the development and the decadence of equity, as a system.

"Are we, then, to condemn the reform which has given us one procedure instead of two, which allows litigants to adjust their disputes in one cause instead of two, which has relieved us of circuitous methods and put direct ones in their place? Surely not. To declaim against the fusion of law and equity to-day is no less futile than were the ponderous arguments of the sixteenth century sergeant-at-law who inveighed against chancery in his 'replication' to Doctor and Student. The moral, I take it, is simply that we must be vigilant. Ihering has told us that we must fight for our law. No less must we fight for equity. Law must be tempered with equity, even as justice with mercy. And if, as some assert, mercy is part of justice, we may say equally that equity is part of law, in the sense that it is necessary to the working of any legal system. We who have the shaping of the law in our hands in this era of the decadence of equity have no less responsibilities than those who pleaded and judged in its founding, its development, and its crystallization."

HISTORY (Development of Law. Jurisprudence)

THE article on the "Historical Development of the Law," by George H. Smith, in the *American Law Review* of November–December (Vol. xxxviii, p. 801), is closely in line with Professor Munroe Smith's article on "Roman Legal History," reviewed in our last number. His statement that "the genealogy of our law is to be studied not in the old common law of England of which nothing remains to us but the rational part, but through the English and Roman law, and that of the Greeks" and his statement that "with the Greeks, owing to the popular character of their Courts, there was no systematized body of law such as was afterwards developed in detail by the Roman lawyers, but except as modified by statute the common notions of justice received by the people constituted the law and the only law of the land" are interesting in connection with Mr. Whitaker's article on the study of Greek law in this issue.

HISTORY (Source of Law. Year Books)

IN the December Number of the *American Law Register* (Vol. lii, p. 755) under the title of "A Rhapsody of Antiquated Law," Margaret C. Klingelsmith pays a just tribute to the work of Mr. Maitland in his new translation of the year books, the first volumes of which have been recently published. The author shows that the old prejudice against this rich source of authority arose from their apparent incoherence due to unsatisfactory translations. Valuable as these volumes are as a picture of the life of their times, they are infinitely more valuable when correctly under-

stood, to the student of law. It is to be regretted, therefore, that so few subscribers to this publication are found in this country.

INTERNATIONAL LAW (Biography. Grotius)

An interesting sketch of Hugo Grotius by Sir William Rattigan, K. C., is printed in the *Journal of the Society of Comparative Legislation* (New Series No. xiii, p. 68). It is largely concerned with his celebrated treatise *De jure Belli et Pacis*, to which subject it is interesting to note that his attention was turned in the active pursuit of his profession, as advocate for the Dutch East India Company, which was formed, it is true, for the peaceful purposes of commerce, but had been compelled, like the English company, to repel force by force. "No one," he says, "prior to Grotius knew how to unite to the same extent the authority of reason combined with that of experience; his is the fruitful alliance of philosophy and history, which has so profoundly impressed the modern political world. The method which our author adopts is the inductive one. The individual man and his social instinct is the factor producing law and the State; but this *appetitis socialis* is not the mere need for a life spent somehow in community with his fellow-men, but tranquilly and as a reasonable being for the welfare of others in contrast to mere utility irrespective of all ethical motives. It is this tendency to the conservation of society, which is in agreement with the nature of the human intellect, that forms the source of Jus or Natural Law, properly so-called." "In this way, he leads up to the humane principle which pervades his whole treatise, that between individuals, as between nations, it is not Utility but a common law of Rights which is of force in governing their mutual relations. To have established this principle and to have extended its operation to the conduct of war was to have justified his claim to be regarded as the founder, or as Marten calls him, the father, of the science of International Law, and to be called, as Vico suggests, 'the juristconsult of the human race.' That his work is not perfect, that he does not conceive as clearly as some later jurists — like Christian Thomasius, for instance — have done the distinction between religion on the one hand, and law and morality on the other, and that he has not completely succeeded in disentangling himself from the bewildering maze of incoherent and arbitrary notions of ethical philosophy which prevailed in his time, may be conceded without detracting from his general merits, as one who, in the midst of a cruel and desolating war, was the first to discover a principle of right and a basis for society which was not derived from the Church or the Bible, nor in the insulated existence of the individual, but in the social relations of men, and to make it thus easy for those who followed him to broaden the pathway he had broken, and to elaborate his science."

JURISPRUDENCE (Nature of Law. Definition of Law)

The most important publication of the month in the field of abstract jurisprudence is an analysis of the nature of Law and attempt to formulate a definition of the term by Melville M. Bigelow in the *Columbia Law Review* for January (Vol. v, p. 3). Though difficult to condense, it may be summarized as follows: —

A scientific school of legal thought requires a working definition of the term law. Blackstone's famous definition, "Law is a rule of civil conduct prescribed by the Supreme power in a State commanding what is right and forbidding what is wrong" is dangerous in what it suggests as well as unsound in details. (1) It suggests that the sovereign may be external, but supreme power under English or American law is not external, but a necessary phase of organized society of which every member is a part. It is external only with reference to individuals. (2) "Rule of civil conduct" is indefinite, for no hint of the basis of the rule is given. "Rule" suggests requirement, yet much of the law may be simply a grant of authority for acquiring rights which before had no existence except in the State. (3) The word "prescribed" is unsatisfactory whether in the sense that law must be "notified to the people" or that it is to be set down in fixed terms; it is enough, so far as any requirement of notice is concerned, that

the law proceeds from the people; instead of being set down in fixed terms, it is a product of times and conditions changing in light and shade accordingly; and further, instead of being prescribed, it is part of the very life of the State. (4) The definition should not declare that law consists in commands and prohibitions. Courts command. The law is general, the precept particular. (5) The words "right" and "wrong" in their context import divine rather than municipal law, and he explains them as referring to the declaration of the sovereign.

A definition need not exclude what it does not suggest and a definition of law that puts the term within rigid lines would be perilous to use in the administration of justice. Allowance should be made for the great indeterminate forces that relate to law. "A correct analysis of the typical phenomena of law — a grip of things as they are — should lead to the desired results."

The elements of law in the sense of requirement are right, duty, and a relation between the two. Right, apart from natural fundamental rights and rights not in dispute is whatever the judge decides. It is based on the idea of "freedom to do whatever is reasonable." What is meant by reasonable, so far as the meaning of right or law is concerned, must be left indeterminate until decided by the courts. Duty is the complement of right. Both are particular and pertain to the individual. Law, however, is general and is the relation between the individuals to whom they respectively pertain. Law in the sense of authority signifies legislative authority.

"Municipal law signifies the existence of binding relations direct and collateral of right and duty between men or between the State and men; or legislative grant of authority under which such relations may be created; each in virtue of freedom to do whatever is reasonable."

"Remedial law signifies the existence of relation of right and duty between the State and the members of the same in consequence of a breach of duty, binding the State to enforce compensation in civil and punishment subject to pardon in criminal cases.

"Procedure signifies the means provided by the State for enforcing the law original and remedial."

MARITIME LAW (Harter Act)

In the *Albany Law Journal* (Vol. lxvi, p. 369) and in the *American Law Review* (Vol. xxxviii., p. 843) is printed an address by John C. Walker, delivered before the Texas Bar Association of interest to admiralty lawyers, entitled "The Harter Act." A careful explanation of the results of this change in the liability of ship-owners for negligence is concluded as follows:

"Does not this act afford food for thought respecting the future trend of national legislation? Rightful complaint is made of want of uniformity in the statutes of different States; for example, the conflicting divorce laws, with their far-reaching consequences, and a cry is often heard for Federal control of that subject. It can not be denied that, generally speaking, uniformity *is* to be desired in all laws. Would not the great railroad systems, those stupendous combinations of capital reaching through every State of the Union, be benefited by similar legislation relieving them of liability for the negligence of their servants in any degree? May they not have the abstract right to be placed on the same footing with the great steamship corporations? Is not the argument more than plausible that special privileges should not be granted to one class of common carriers which are denied to others? And may not these railroad systems in time *demand* to be placed on an equality with carriers by water? Such demands when made by the representatives of powerful moneyed interests are likely to obtain at least a respectful hearing before the national lawmakers. When we recognize the power of the National Legislature to regulate interstate commerce, does not the thought suggest the possibility that at some time hereafter Congress, in its wisdom (or want of wisdom), may enact a law applying provisions like those contained in the third section of the Harter Act to interstate carriers on land?"

PARTNERSHIP (see Associations)

POSSESSION (Theory of)

A DISCUSSION of refinements as to the theory of possession by Albert S. Thayer appears in the *Harvard Law Review* for January (Vol. xviii, p. 196). "To possess," says the author, "is to have absolute power of dealing with the thing oneself and absolute power of excluding the action of everybody else." This condition may be a consequence of physical strength or it may depend upon a deference to the will of the possessor imposed by habit, the moral sentiment, religion, or law. It is "a highly abstract idea never perfectly realized except in imagination." Attempts at definition he thinks necessarily futile, for the technical conditions of legal possession are subject to no limit of variation. "Whether any manifestation of superior strength unaccompanied by submission, will nowadays give legal possession of another's land is extremely doubtful." "It is one thing to be beaten and another to give up, and whatever effect modern law may give to mere mastery, the ordinary condition of acquisition of legal possession of land against the will of owners is the exhibition, as a fact of the particular case, of dominion and submission, or adverse possession, a relation to be carefully distinguished from possession *ex consensu* and legal possession."

"To infer correctly dominion and submission from a succession of more or less equivocal acts of user is no easy matter. And if we accept the fact of dominion and submission so proved as a condition of legal possession, we are also obliged to consider what continuance of acts of user shall be deemed to show dominion and submission, and what continuance of dominion and submission shall be deemed to give legal possession, and we may say, I think, that there are no rules to help us to answer either of these questions."

"The ordinary case, therefore, of a possessor without title displays this *de facto* basis, — possession *ex consensu* as against the generality and a continuing dominion and submission with respect to adversaries."

STOCK, TRANSFER OF (see Associations)

SURETYSHIP (Comparative Jurisprudence)

HENRY A. DECOLYAR contributes to the *Journal of the Society of Comparative Legislation*, (N. S. No. 13, p. 46), a consideration of the law of "Suretyship from the Standpoint of Comparative Jurisprudence," in which he discusses the variations and similarities in this department of law in different countries of modern times and suggests an outline upon which a codification satisfactory to all might be attempted.

TAXATION (Succession Taxes. Double Taxation)

AN address by Judge Simeon E. Baldwin before the American Association for the Advancement of Science is printed in the January *Yale Law Journal* (Vol. xiv., p. 129). Under the title of "The Modern 'Droit d'Aubaine'" he discusses a modern instance of double taxation arising from the collection of succession taxes upon property both by the state of the owner's domicile and by that of the *situs* of the property. In the former case the tax is on the prolongation by the will of the political sovereign of the former owner's interest in the property; in the latter it is on the privilege of taking the goods away under the title derived from the succession. This is not double taxation within the meaning of any constitutional prohibition, nor an infringement of the privileges and immunities of citizens of other states.

The author questions the wisdom of such a policy and indicates the methods already being adopted to evade the succession taxes and the impetus which will be given to them by a continuance of such injustice. The policy must also operate as a divisive force within the American union. Since he feels that an attempt to extend the control of the national government under the commerce clause would be inexpedient, he proposes as a remedy reciprocal interstate agreements embodied in uniform legislation, for which many precedents are cited.

"The tendencies of the time make for such a movement. Individualism and State-isolation are each giving way at every point of material contact to Collectivism. The time-spirit and the world-politics of the twentieth century alike point to reciprocal governmental action on a great scale, for the prevention of international or inter-State complications and collisions, as the true basis of national prosperity."

TRUSTS (Scottish Church Case)

AN interesting explanation of the exact scope of the decision of the House of Lords in Bannatyne *v.* Lord Overtoun, entitled the "Scottish Church Case," by James Ferguson, K. C., appears in the *Juridical Review* for December, (Vol. xvi, p. 347).

The controversy arose from the act of a large majority of one non-conformist Presbyterian body in joining with a similar sect holding slightly different views on church policy, the one though non-conformist being in its origin an advocate of an established church, while the other was opposed to this principle. The small minority of the former church sought to oust the united body from the control of its temporal property on the ground that its trustees by submitting it to the control of others of different religious views had committed a breach of trust. In the Scotch Courts the act of the majority was sustained on the ground that the differences in principle of the two denominations were of secondary importance. Though differences of doctrine were also in issue, the abandonment of the establishment principle was the chief point of contention, and upon this ground the English House of Lords reversed the decision of the Scotch Courts.

"Thus all five judges gave judgment on the ground of the abandonment of the Establishment principle, treating it as sufficient for the determination of the case. Two (Lord Davey and Lord Robertson) also were satisfied with the fundamental change operated by the substitution of the fluid and mutable 'doctrine of this Church' for the 'whole doctrine of the Confession of Faith' declared to be 'the truths of God.' Two (Lord James and Lord Alverstone) declined to go beyond the Establishment question. One only (the Lord Chancellor) proceeded on the abandonment of the Calvinistic doctrine of predestination. Neither in the decision nor in any of the judgments is there a trace of any interference with the principle of spiritual independence. The judgment simply affirms that the property, whether given immediately after the Disruption or subsequently acquired, being settled in trust for the Free Church of Scotland, and the constitutional documents which expressed the principles on which the Free Church was formed containing the principle of Church Establishment side by side with that of spiritual independence, those who continue to hold both are the Free Church of Scotland, and the property can be vindicated by them, even though a minority. There is no judgment of the House to the effect that a Dissenting Church may not explain or modify a theological doctrine, and none to the effect that the passing of the Declaratory Act *per se*, or any particular change or abandonment of doctrine as opposed to constitutional principle is a breach of trust."

"The opinions of the judges, other than that of the Lord Chancellor, do not hold out much hope of a similar decision being pronounced, where the materials for determination can only be found in doctrinal differences, or the interpretation of purely theological statements of belief. The judgment, of course, deals only with temporal and civil consequences of changes which any dissenting Church has full freedom to make; it was a civil determination as to which of two competing claimants was the owner of certain property, and it is a misuse of language to describe it as 'penalising' the unsuccessful litigant, or as involving any denial on the part of the Law of 'the Liberty of the Church to live.'"

CORRESPONDENCE

TEMPLE, LONDON, ENG., December, 1904.

There is probably no place in the world where the connection between the civic business of a municipality and the administration of the law of the land is so close and intimate as in London.

As in American cities there is in the city of London a mayor and boards of aldermen and of councillors, but the manner of selecting these officials, not only in London but elsewhere in England, is vastly different from that which prevails in the United States. The members of the lower house of the legislative body only are elected, and those who are entitled to vote at municipal elections are a comparatively small part of the community. Furthermore such elections occur only at long intervals, as a councilman once elected retains his office so long as he cares to do so, provided he takes an interest in and pays proper attention to his duties. Thus an election is held only when a vacancy occurs through promotion, death or resignation. The Board of Aldermen, as vacancies occur in that august body, is, generally speaking, recruited from the councilmen, such of the latter being called to the upper house as have shown a peculiar fitness or adaptability for civic work. The office of alderman is one of great dignity and importance, as in addition to his other duties he sits as an examining magistrate, with power to commit for trial, in a large number of offences of the gravest character. The Lord Mayor is chosen from the aldermen and must in rotation serve the office of civic magistrate or pay a fine in lieu thereof. This system, therefore, not only secures the services of municipal legislators who are trained by years of experience to a faithful discharge of their functions, but ensures the presence in the mayorial chair of a man of affairs and of wide acquaintance with municipal government.

In addition to their other duties, the mayor and aldermen and the sheriffs assist by their presence the administration of justice at the Central Criminal Court, or the Old Bailey. The ceremony of opening the court each day of the session is quaint and interesting. When the bailiff cries for silence, counsel and witnesses and all in the court stand, then the judge and one or more aldermen and the sheriffs and chaplain and an under sheriff, file in, in a stately procession. The aldermen wear their robes, trimmed with fur, and jewelled chains of office over their shoulders, while the sheriffs and under sheriffs appear in court dress. There are from three to five courts simultaneously in session at the Old Bailey, and each of the courts is daily opened with this formality. It is not only a survival of ancient custom, but it appears to impress the class most likely to be awed by the majesty of the law. Another quaint custom is the provision of a bouquet to the judge, a fresh one being handed to him every day. This custom took its rise in the days when jail fever was a menacing terror and the judge was supposed to hold the flowers to his face in order to escape contagion while trying a criminal who had been in custody. For the same reason the dais and the approach to the bench are still thickly strewn with rosemary and other fragrant dried herbs, although the present jails are probably in as sanitary a condition as the average modern house.

But what would most strike a stranger accustomed to criminal courts in America is the hospitable provision made for the judges and officials and the leading counsel by the mayor and sheriffs. Every day there is provided a luncheon of generous and sumptuous proportions, and tea is served in the afternoon. This is furnished at the expense of the three officials named, out of their private purse, and the cost must be a tax upon even a large income. In fact, the expense to a sheriff, who receives no pecuniary compensation whatever for his services, amounts to close upon $20,000 a year. This is willingly defrayed for the honor of the office.

The mayor having been elected makes his first appearance in state in a journey from the Guildhall, through gaily decorated streets, to call officially upon the Lord Chief Justice. This is what is popularly known as "the Lord Mayor's Show." This year the cere-

mony, which has just been carried out, included a procession nearly a mile in length with over a dozen military bands, and certain allegorical tableaux upon "floats." Arrived at the Law Courts the Mayor left his state carriage and, preceded by his officials, entered the Lord Chief Justice's Court. The business of the latter was temporarily suspended, additional judges left their own courts and appeared on the bench, and an introductory address was delivered by the Recorder. This was followed by a homily from the Lord Chief Justice, who, as is customary, availed himself of the occasion to speak of matters connected with the administration of the law, especially a new act which makes provision for counsel for the defence of accused persons without means, and other subjects of general and municipal importance. At the conclusion of the judge's remarks the Lord Mayor was sworn to administer the law justly, and then before returning he tendered the usual invitation to the judges to dine with him at the Lord Mayor's banquet in the evening.

Reference was made in these columns recently to the case of Adolph Beck, who was twice convicted and who served one term of seven years' penal servitude, for a crime of which he was innocent. He was the victim of mistaken identity, and under such circumstances as aroused the indignation of the public to a remarkable degree. In order to examine into the circumstances and to ascertain the responsibility for so great a miscarriage of justice, a commission was appointed which was presided over by the Master of the Rolls. It heard the evidence of the police, of the counsel in the case, the representatives of the government, and even of the judges who tried the accused, and has now issued a carefully considered report. It exculpates everybody, but suggests that the Recorder, who was the trial judge in the first conviction, was in error in refusing to admit evidence which would probably have disclosed the mistake as to identity, and should have stated a case which would have enabled the points of law to be reviewed upon appeal. It also suggests that in the Home Office there should be a specially qualified legal adviser to the officials to whom applications by way of petition from convicted prisoners are made; but to the surprise of many connected with the administration of the criminal law it reported that a court of criminal appeal is in the opinion of the learned commissioners unnecessary. This to the mind of an American trained to regard appeal in all criminal matters as a right inherent in the individual, and as a matter of course, may seem a startling conclusion. But there are grave objections to the institution in England of a criminal court of appeal which will be appreciated by those who have had experience of the administration of justice in the United States. It must be apparent that at least nine out of ten cases, and practically all capital cases, would be appealed, on the chance that some technicality in the evidence might be found which would lead the appellate judges to order a new trial. A second trial after some interval of delay is largely in the accused's favor, as not only are witnesses less certain of their evidence after a lapse of time, but in the interval they may have become subject to influence in the prisoner's behalf, or may possibly have disappeared. It is further urged that if a prisoner convicted of a capital crime is guilty, one of the chief objects of criminal law is defeated if punishment does not descend upon him swiftly.

What will probably come to pass is the making of some additional provision for the encouragement of judges to state a case for review by a higher or other court, and for having such cases heard forthwith. This would not involve the reading of masses of papers and voluminous transcripts of shorthand notes of evidence, such as would be necessary if criminal appeals were to be allowed as in civil cases, where it is alleged there has been a misdirection, or that the verdict is against the weight of evidence or that the sentences are excessive. Counsel defending a prisoner may, if the new rule is adopted, ask the judge after sentence has been pronounced, to state a case involving the precise point of law upon which he thinks the court has erred, and if that is done and the point can be argued and submitted to other judges within ten days or a fortnight, as would probably be the case in this country, the chance of the miscarriage of justice would be reduced to a minimum, while the majesty of the law would be unimpaired.

STUFF GOWN.

THE LIGHTER SIDE

THERE is an inexhaustible fund of rich humor in the reports and in the biographies of lawyers, and that branch of legal literature should not be neglected. Even "googoo eyes" have come up for judicial definition, and their Lordships were equal to the occasion, crystallizing them for all time as "attentions with intentions contrary to conventions." The British Columbia student who amended the old form of writ, "Victoria, by the Grace of God," etc., to "Vancouver, by the Grace of God," etc., deserves honorable mention. A widow (though derived from *vidua*, not always an aching void), was forbidden by the civil law to marry again *infra annum luctus* — within the year of mourning — which appears strangely inconsistent with only forty days of quarantine. A widow's second marriage has been judicially defined as "the triumph of hope over experience." No doubt any of your Toronto readers could write a rattling article on widows alone, seasoned with attic salt, and full of legal lore in *aula ecclesiae et aula amoris*. Lawyer's epitaphs, too, might be collected. Not all would be so doubtfully complimentary as the ancient one of Brittany,

Ci git St. Evona, — un Breton,
Avocat, — non larron!
Hallelujah!

— WILLIAM N. PONTON in the *Canadian Law Times*.

THE scholarly librarian of a large Bar Library, finding this "merry story" in an old text-book entitled "A Treatise of Trover and Conversion. London: 1696" Chapter 6, Page 76, is kind enough to send it to THE GREEN BAG.

"But I will end this with a merry Story of a Clerk, who was drawing a Declaration in Trover for several Goods, amongst the rest he meets with an instrument for which he could not find a proper Latin word, but briskly goes on; and *de uno Tweedledum, Tweedleton, Tweedledum twea (Anglice) a pair of Bagpipes.* And of another who could not readily tell what was Latin for a Stick. But he very logically concludes thus: *Candela* is a Candle. *Candelabrum*, a Candlestick, *Ergo brum* is Latin for a Stick; but he that rendered the word *Ladder* by *adolescentior* was wonderfully cunning, because he knew *adolescens* signified a *Ladd*."

THE longest complaint on record has just been filed in an action brought by the Brooklyn Teachers' Association and the Class Teachers' Organization of Brooklyn, as plaintiffs, against the Board of Education of New York City. The complaint covers 3,414 pages bound in two volumes, each the size of a Standard Dictionary. 3,413 causes of action are specified in the complaint, each representing the assignment to the plaintiffs of a claim of a teacher for salary under certain schedules of salaries. It took four accountants two months to prepare the schedules showing the balance of salary due to each teacher and then seven months were completely taken in drawing the complaint. If technical objections are raised to the claims, it will be necessary to bring to court all of the 3,413 teachers and the schools of Brooklyn will be practically closed during the trial.

EVEN in the days when he was a struggling young lawyer Chauncey Depew was gifted with a considerable deal of the self-confidence which in later years came to be known by many men. One of the first cases he had in court involved a somewhat complicated question of inheritance. But Chauncey gaily tackled it and prepared what he regarded as an unanswerable argument. He had proceeded for some time when he noticed that the judge seemed to lose interest. Lawyer Depew hesitated and said, "I beg pardon, but I hope your honor follows me." The judge shifted in his chair as he replied, "I have so far, but I'll say frankly that if I thought I could find my way out I'd quit right here." — *The Law Register*.

THE attorney on the stand is usually a cautious witness, but the limit was recently reached in Boston when a distinguished au-

thority on trusts was called as a witness for the plaintiff. The defendant was a brother attorney and the distinguished witness was evidently embarrassed. His repeated lapses of memory grew almost ludicrous. An important question raised a storm of technical objection from the defence and for several minutes court and counsel were absorbed in the discussion of profound problems of evidence. At the first lull the suave voice of the witness was heard. "Your honor, I think I can solve this difficulty. My answer is 'I really cannot remember.'" The witness was allowed to retire.

ONE of Assistant Attorney-General Beck's stories at the Hardwicke Society dinner in England was especially appreciated by the students. A general in the Civil war applied at the close of the conflict, for admission to the bar of the United States. A committee of three examiners reported that he had answered correctly two thirds of the questions put to him. A judge, astonished at the general's success, asked the chairman of the committee what the questions were. "Well," he replied, "the first was, 'What is the rule in Shelly's case?' and the answer was 'Writing poetry.' That was not correct. Then we asked him what was a 'contingent remainder' and a 'vested interest,' and he said he did not know. That was correct, and we admitted him." — *Chicago Law Journal.*

THE MAIDEN AND THE LAW PILL

SHE.—Do you ever, while in Cambridge, Mr. Blackstone, indulge in sparring and such fine athletic sports?

HE.—When two men fight though each consent, yet each is liable. See any leading writer on the law of torts.

SHE.—I hear your cousin, Mr. Lighthead is just engaged; now is the story really true?

HE.—A contract with a lunatic is always voidable. See 25 Queen's Bench Division, page 52.

SHE.—They say, but tell me what do you think, Mr. Blackstone, that seals on letters have been going out of late?

HE.—An instrument under seal needs no consideration. "Meeson and Wellsby," vol. II, page 68.

SHE.—What awful weather we've been having, Mr. Blackstone! Now don't you think it looks as though it were going to pour?

HE.—The evidence, I think, is hardly satisfactory. See "Common Bench," new series, pages 3 and 4.

SHE.—It's very late: I must be going, Mr. Blackstone. Remember you have promised that you'll call some day.

HE.—I am afraid that promise is a *nudum pactum*. "Pollock on Contracts," page 121, note *a*. —*Harvard Lampoon.*

REV. EDGAR J. HEILMAN, of Norristown, Pa., who is being sued for $10,000 damages because in an unguarded moment he asked Miss Blanche Gertrude Keck to be his, and afterwards regretted it, has set up a defense which, if sustained, would throw into confusion all the established methods and traditions of courtship. He alleges that the contract to marry was entered into on Sunday and was therefore void. A Sunday is generally understood to be the day of days for the inception of such agreements; it can readily be seen that many of Pennsylvania's fair ones must be uneasy regarding their rights of action. Fortunately we are able to allay their fears by referring them to Fleischman *v.* Rosenblatt, 20 Pa. Co. Ct. 512. In that case the ungallant defendant similarly claimed that his promise, having been made on the Sabbath, was void under Pa. Act of April 22, 1794, which forbids the doing or performing on that day of any "worldly employment or business whatsoever," save only works of "necessity and charity." He contended that the contract in question was "business" and was not a work of either "necessity" or "charity." The plaintiff's counsel, however, maintained that an engagement to marry was a contract both of necessity and charity, which view the court also adopted. So it is safe to say that no minister of the gospel who on Sundays puts in his spare time between sermons plighting his troth to his fair parishioners can escape retributive justice on the ground that Sunday is *dies non*. — *Chicago Law Journal.*

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM

(Copies of the pamphlet Reporters containing full reports of any of these decisions may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.)

AUTOMOBILES DEFINED. (CARRIAGE OR MACHINE.)

MASSACHUSETTS SUPREME JUDICIAL COURT.

A recovery was sought in the case of Baker *v.* City of Fall River, 72 Northeastern Reporter, 336, for injuries received upon the highway under the Massachusetts statute which provides that highways shall be kept in a reasonably safe condition for travelers with horses, teams, and carriages. An excavation had been made in the street, and the plaintiff riding in an automobile was thrown out and injured while attempting to pass this obstruction. The point was raised by the state that recovery could not be had for the reason that one driving an automobile was not in a carriage within the meaning of the statute, but that an automobile must be considered as more like a machine. The trial judge dodged the direct issue by instructing that, while he did not feel at liberty to state that an automobile could not be considered as a carriage, still, in spite of the fact that the plaintiff was in one at the time, he was on the highway as a traveler, and if the other elements of liability were established, he would be entitled to recover. The upper court distinctly holds, however, that an automobile is plainly a vehicle which can carry passengers or inanimate matter, and so is such a carriage as the legislature had in view in the use of that word in the statute under consideration, citing as authority the case of Richardson *v.* Danvers, 176 Mass. 413, 57 N. E. 688. The court calls attention to the fact that it has been held in the case of Spring *v.* Williamstown (Mass.), 71 N. E. 949 (recently noted in this department), that a traveler riding upon a bicycle is not precluded from recovery under the statute.

CARRIERS. (STATUTORY DUTY TO FURNISH CARS — INTERSTATE COMMERCE.)

TEXAS COURT OF CIVIL APPEALS.

In Houston & Texas Cent. R. Co *v* Mayes, 83 Southwestern Reporter 53, is discussed the interesting claim that the Texas statute providing that railroad companies must supply freight cars upon request, under certain regulations was repugnant to the interstate commerce clause of the federal constitution. The law referred to in brief provides that when a shipper of freight of any kind shall make application in writing to any agent in charge of the transportation arrangements of a railroad company to supply at a certain place a specified number of cars, it shall be the duty of the company to supply the same within six days, and that such requests for cars must be filled in the order in which the applications are made, providing that if less than ten cars are desired they must be furnished within three days, and that if the application be for fifty cars or more, they must be provided within ten days. The applicant further must deposit with the agent of the company one-fourth of the freight charges. Fines are provided for failure on the part of the railroad company to supply the cars within the prescribed time, and penalties are also prescribed for delays on the part of the shipper in loading the cars. The railroad company in the case under consideration contended that as the stock in question was to be shipped from a point in Texas to a point in Oklahoma, the statute could not be legally applied, owing to the fact that the commerce affected was interstate in its character, and that the power to regulate commerce between the several states was reserved to the federal government. In deciding that these laws are not a regulation of interstate commerce, the court cites at length from the decision of the Supreme Court of Texas in Railroad Co. *v.* Dwyer, 75 Tex. 572, 12 S. W. 1001, as follows: "The statute we have under consideration, like every other law which gives a remedy to the shipper against the carrier for a violation of his contract, does in some remote degree affect interstate commerce when applied to a contract of carriage from one state to another, but it imposes no tax. It neither fixes nor regulates rates. It makes no discrimination between commerce wholly within the state and that between the state and other states. It imposes no duty upon any carrier not already imposed by the common law. It applies to all railroad companies in the state and to all contracts of carriage alike, and merely provides a penalty for the purpose of enforcing a compliance with an obligation which already existed at common law. In this respect the statute is not distinguishable from any other law affording a remedy for the breach of a contract of carriage of goods between two states." In the Dwyer case

the following cases decided by the Supreme Court of the United States and supporting the doctrine there laid down are cited: Chicago, M. & St. P. R. Co. *v.* Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; Richmond & A. R. Co. *v.* R. A. Patterson Tobacco Co., 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759; M. K. & T. Ry. Co. *v.* McCann, 174 U. S. 580, 19 Sup. Ct. 755, 43 L. Ed. 1093; Western U. Tel. Co. *v.* Call Publishing Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765. The court holds, following the decision of the Supreme Court of Texas in the Dwyer case, that the statute in question is not a regulation of interstate commerce, and is a proper exercise of the police power reserved to the state, and is therefore valid.

CHINESE DEPORTATION. (RETURN TO CONDITION OF SLAVERY — THE THIRTEENTH AMENDMENT)

UNITED STATES DISTRICT COURT, WASHINGTON.

A very novel and interesting application of the provisions of the Thirteenth Amendment will be found in the case of United States *v.* Ah Sou, reported in 132 Federal Reporter, 878. It appears from the evidence that Ah Sou is a Chinese woman, sold into slavery by her foster mother in China, and illegally brought into this country by her purchaser for immoral purposes. After living a miserable and degrading life, she escaped and took refuge in a Presbyterian home, where after a time she was married to a Chinese inhabitant of this country who was duly registered as a Chinese laborer. Deportation proceedings were subsequently brought, and the learned District Judge, upon appeal, takes up first the question as to whether by her marriage she could lawfully be entitled to dwell in this country. While she was legally married by a minister of the gospel, in compliance with the laws of Washington, it appeared that the husband and wife had never lived together, and that it was doubtful whether the man had a very clear idea as to his status as the woman's husband. It was certainly open to suspicion that the marriage was arranged to give the woman the required status to enable her to remain in this country. The laws excluding Chinese immigrants and women imported for immoral purposes, require the court to cause the person to be deported to China; but the court says that a compliance with the statute in this case would, in his estimation, be a barbarous proceeding, for it would be equivalent to remanding the woman to perpetual slavery and degradation, and that it is shocking to contemplate that the laws of our country require the court to use this process to accomplish such an unholy purpose. On the other hand, it is proper to consider that as an outcome of a bloody civil war the people of the United States by the thirteenth amendment, ordained that slavery should not exist in the United States or any place subject to their jurisdiction. This article is a part of the supreme law of the land by which all branches of the government must be controlled. It is a guaranty of liberty and a vital principle of our government, to secure which our people did not hesitate to sacrifice their most priceless treasures. It is not a mere abstract theory of liberty, impotent when subjected to the test of a practical application to the case of a helpless victim of oppression, but a mandate from the highest authority requiring the exercise of all the force necessary for the protection of the liberty of any and every individual whose right to liberty is not forfeited by a conviction of crime. The court holds that an order of deportation would be equivalent to a sentence to actual slavery, and for this reason directs that the woman be discharged from custody.

CONSPIRACY. (PROCUREMENT OF ARREST — FEES.)

NEW YORK SUPREME COURT, APPELLATE DIV.

An amusing state of facts is shown in the case of People ex rel. Rice *v.* Board of Supervisors, 90 New York Supplement 318, and the plot which was concocted might well be used in modern comic opera. It seems that in the fall of 1903 an unusually large number of claims for fees in criminal proceedings were discovered when the town auditors were settling up their accounts. These claims were largely for the arrest of tramps and "rounders" as intoxicated or disorderly persons, and the frequency of the arrests, the character of the offence and the fact that a few of those arrested were repeatedly apprehended upon the same charge gave color to the suggestion that some of them were fictitious, or else that an epidemic of drunkenness had broken out in the town. As the result of this astonishing discovery an investigation was ordered. Public sentiment ran high as the details of the plot were unfolded. It was disclosed that part of the constables of the town had entered into an agreement with certain tramps and hangers-on at the village tavern that they should be arrested, not as vagrants but as intoxicated persons, or on a charge of disorderly conduct. The next step was to have them arraigned before a justice of the peace, who had been taken into the confidence of the plotters, and upon a plea of guilty in each case, the prisoner was sentenced to the county jail. Quite a profitable business was worked up in pursuance of this scheme. By laying the accusation of intoxication or disorderly conduct, a fee of about

three dollars was due the constable, while if a vagrancy charge had been made, a fee of but seventy cents was allowed. The tramps and rounders who were taken in were entirely content with the few drinks of whiskey, which placed them in a proper condition to be arrested, and for the short term in the county jail where they were well fed by the sheriff at the expense of the county and to the profit of the sheriff. It seems that the plan worked so well that it extended to other towns. As soon as the term of service of one of the tramps had expired, he renewed the scheme in another locality, and they soon worked out a small circuit of towns to be included in their wanderings. As the court says, they obtained quite a close acquaintanceship with certain peace officers and with the interiors of certain county jails along the route of their peregrinations. The serious side of the case is brought out in the claim that the items were improperly disallowed, and effort was made to have the action of the town auditors reviewed by the courts. In finally disposing of the point the Appellate Division holds that the Board of County Supervisors must be given the widest latitude, and that the courts will very rarely interfere with boards' discretion when exercised reasonably and in good faith.

INJURIES TO SERVANT. (PROXIMATE CAUSE — MANNER OF PROOF.)

NEW YORK SUPREME COURT, APPELLATE DIV.

A most extraordinary disquisition upon the doctrine of proximate cause is found in the case of Stenger *v.* Buffalo Union Furnace Co., 90 New York Supplement 222, which was an action brought to recover for the alleged wrongful death of plaintiff's intestate while employed in operating a blast furnace of the defendant. The deceased died from injuries received by falling into the hopper at the top of the furnace after being overcome by escaping gas. It is conceded that a certain amount of gas must necessarily escape while the furnace is being operated, but it is alleged that at this particular time, owing to the fact that the appliances were not in proper condition, unusual quantities of gas escaped, and it is upon the negligence of the company in permitting these conditions to exist that the suit is based. In attempting to ascertain the proximate cause, the court delivers this remarkable statement: "In this case the burden rested upon the plaintiff to prove that the gas which overcame plaintiff's intestate escaped because of defendant's neglect. We think she failed to sustain such burden. There is no evidence which tends to prove that at the time of the accident the explosion doors opened because of their defective condition, and if so open, there is nothing to indicate what amount of gas escaped from them, or what effect it had upon the air at the top of the furnace. Again, the evidence fails to show what amount of gas, if any, escaped from around the outside of the hopper, or if it did so escape, that deceased inhaled any of it. So, with respect to the alleged defect in the hopper extension, did the gas which overcame deceased come up into the hopper while it was being filled, because of such defects, or did it escape immediately previous when the bell was lowered and the entire top of the furnace practically uncovered? The answer to the question cannot be found in the evidence. There is no proof that any gas, or if any, how much, escaped from the cracks or defects which were in or about the explosion doors, or that such gas came in contact with the deceased. Upon the night in question there was gas about the top of the furnace sufficient in quantity to overcome the deceased and affect his fellow workers. Some of it was there properly and unavoidably. Some of it, we may assume, was there improperly and because of the neglect of the defendant. What proportion escaped and was present because of defendant's negligence, and whether or not it caused the injuries complained of, it is impossible to determine from the evidence. It is pure speculation to say that the gas, if any, which escaped by reason of the negligence of the defendant, caused the injuries of which the plaintiff complained, rather than the gas which was unavoidably about the top of the furnace, the presence of which was in no manner due to negligence." A summary of the evidence which was submitted is interesting. The court itself says "that it tended to show that the brick work between the lower edge of the hopper and the walls of the furnace was cracked and broken, that the plates covering the space at the upper edge were warped and out of place, that thus gas was permitted to escape from around the hopper; also that the hopper extension which was intended to fit closely around the edge of the bell was broken and in such condition that gas could escape into the hopper while it was being filled; also that the explosion doors were out of repair and in such condition that gas could escape around them when closed; that they would open too easily, and when thrown open by the force of the explosion would not close automatically as they were intended to do. While the evidence which tended to establish such facts was contradicted by the defendant, it was of such a character as to raise a question of fact as to these issues, and to justify the jury in finding that the defendant was negligent in respect to the matters adverted to." The evidence also showed that

upon the night when the injury occurred two other of the defendant's employés were also overcome. The ruling of the court, then, simply means that where a certain amount of gas is unavoidably escaping from a blast furnace, and that additional gas is also escaping through the negligence of the employer in quantities large enough to overcome three men, it is necessary to prove, in order to recover, that while the deceased no doubt inhaled both legal and illegal gas (as we may put it), the proportion of illegal gas which was inhaled must be proved, and that this proportion must be large enough to have caused the injury. The court attempts to strengthen its position by saying: "It may be said that under such interpretation of the evidence a recovery could never be had in a case like the one at bar. The difficulty in making the proof, the seriousness of the accident, and the hardship resulting therefrom can in no manner change or modify the well established rule of law that in actions for negligence, in order to warrant a recovery, it must be shown that the negligence of the defendant was the proximate cause of the injury sustained." And all this in spite of the fact that the jury which heard the case concluded that the gas which was escaping illegally was the cause of the injury.

INJURIES TO SERVANT. (CONTRACT RELEASING LIABILITY — CONSTRUCTION AND VALIDITY.)

NEW YORK SUPREME COURT, APPELLATE DIV.

For the first time it is believed the holding has been squarely made in the Appellate Courts of New York that contracts between employer and employé, made at the time of the employment, whereby the employé agrees to assume all risks incident to the employment, and to release to the employer all claims and causes of action connected with any injuries so received, are contrary to public policy and void. This question was disposed of in the case of Johnson *v.* Fargo, 90 New York Supplement, 725, where the agreement in question was as follows: "In consideration of my employment by said American Express Company, that I will assume all risks of accidents or injury which I shall meet with or sustain in the course of such employment whether occasioned by the negligence of said company, or any of its members, officers, agents or employés, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said company, a good and sufficient release of all claims, demands, and causes of action arising out of such injury or connected therewith or resulting therefrom." It was argued that under the line of cases known as the Express Cases, of which Baltimore & Ohio R. Co. *v.* Voight, 176 U. S. 498 20 Sup. Ct. 385, 44 L. Ed. 560, may be considered the leading one, this agreement could not be declared illegal. It will be remembered that in the Voight case the express company agreed with the railroad company, for a certain consideration, to protect and hold the latter harmless from all liability which it might be under to employés of the express company for any injuries sustained by them while being transported by the railroad company, whether the injuries were caused by the negligence of the railroad or its servants or otherwise, and Voight, the express messenger, by his contract of employment with the express company, in turn agreed to assume the risk of all accident or injury, whether occasioned by negligence of the railroad company or otherwise, and undertook and agreed to indemnify the express company for any claims which might arise for any damages sustained resulting from negligence. The Supreme Court of the United States held that this agreement prevented a recovery against the railroad company for its negligence by the employé of the express company. The New York Court, in distinguishing this class of cases from the case under consideration, points out that the contract in the Voight case limited the liability of a third party, and was not a limitation of the liability of the express messenger's employer. What the Supreme Court really held in that case was that the messenger was not a passenger. It is concluded that public policy requires that such contracts as the one under consideration be set aside. Attention is called to the fact that while the exact question has not been adjudicated, the whole drift of legislation in New York has shown a distinct tendency to better protect the safety and health of employés, and that the courts have been inclined to strictly construe and limit agreements for the release of liability for negligent and improper conduct. The legislature has clearly held to the principle that the public at large has such an interest in the health, safety, and welfare of classes of its citizens that as a matter of public policy laws may properly be passed securing these conditions through prescribing details of employment. While the courts cannot go as far as the legislature, the same considerations of general well being are a potential argument and a sufficient basis often in condemning contracts which impair or threaten the protection which the legislature has given. In conclusion the court says that it is argued that the labor market is free and open, and that the employé is entirely competent to take care of himself and need not accept work under the risks of such a release unless he chooses to, and that if he does, it is a matter of individual

interest which concerns no one else. While this is theoretically true, the principle, if carried into actual and general practice, would result in many evils. For many of those coming within the class denominated as employés, work is a compelling and insistent necessity which cannot long be postponed without distress. If it came about that one of these releases was the ordinary incident of employment, it would be demanded and accepted as any other usual condition. The more ignorant and the more unskilled the laborer, and therefore the more needing protection, the more readily would he yield easy submission to such an exaction. It is held that the question presented must be decided upon the theory that the court is not adjudicating for this particular plaintiff and defendant, but for all who may desire to take advantage of the principle which shall finally be established upon this question, and that the effect of sustaining the present release would be to say to employers as a class, they may procure from their employés contracts which will absolve the former from all obligations to reasonable care and prudence, and subject the latter to all the risks and dangers which will follow from indifference and carelessness. Such a policy, if adopted and resulting in increased dangers and injuries to the lives and health of a great mass of citizens, could not but be the cause of wide-spread harm and a matter of general concern. These considerations lead to the conclusion that the release should be held void as opposed to public policy.

NEGLIGENCE. (Dogs — Degree of Care Required.)

North Carolina Supreme Court.

For the first time in the history of the state the Supreme Court of North Carolina was called upon, in the case of Moore *v.* Charlotte Electric Ry., Light & Power Co., 48 Southeastern Reporter, 822, to consider a civil action brought by the owner of a dog to recover damages for its killing by a railroad company. The statutes of the state make it *prima facie* evidence of negligence on the part of a railroad company, in an action for damages against the company, whenever it appears that any cattle or live stock are killed by the engine or cars running upon the railroad. As the dog cannot be included in the category of cattle or live stock, the court notes that the company cannot be charged with negligence without proof. Contrary to the decisions in some of the states, however, it is held that the dog is a species or subject of property recognized as such by law, and for an injury to which an action at law may be sustained, citing the case of State *v.* Latham, 35 N. C. 33. The question to be disposed of, then, is one involving the degree of care which must be exercised by the agents of the company in cases where dogs are found on or near the tracks. After citing cases dealing with this question as applied to mules and horses, the court cites from the case of Jones *v.* Bond, 40 Fed. 281, where this tribute was paid to the intelligence of the dog: "I presume the reason that other cases of like kind have not been before the courts is that the dog is very sagacious and watchful against hazards, and possesses greater ability to avert injury than almost any other animal; in other words, takes better care of himself against impending dangers than any other. He can mount an embankment or escape from dangerous places where a horse or cow would be altogether helpless; hence the same care to avoid injuries to an intelligent dog on a railroad is not required of those operating the trains that is required in regard to other animals. The presumption is that such a dog has the instinct and ability to get out of the way of danger, and will do so, unless its freedom of action is interfered with by other circumstances at the time and place." The North Carolina court then says that the dog, on account of his superior intelligence and possession of the other traits above mentioned, in respect to the diligence and care which locomotive engineers owe to their masters and to them, must be placed upon the same footing with that of a man walking upon or near a railroad track, apparently in possession of all his faculties, and that the engineer would be warranted in acting upon the belief that the dog would be aware of the approaching danger and would get out of the way in time to avoid the injury. As the engineer would be negligent if he ran over or injured or killed a man upon the track who was apparently helpless, so he would be if he killed or injured a dog under the same circumstances, or if he was totally oblivious to his surroundings. In this latter connection the court refers to the case of Citizens' Rapid Transit Co. *v.* Dew, 100 Tenn. 317, 45 S. W. 790, where the court allowed a recovery because it appeared that the dog which was killed was standing upon the track engaged in pointing some birds, which fact the motorman saw for a considerable distance before the car ran over the dog.

NEGLIGENCE OF MUNICIPALITY. (Governmental Capacity and Corporate Capacity.)

Appellate Court of Indiana.

A nice distinction as to the liability of a municipal corporation for alleged negligent acts is made in the case of Aschoff *v.* City of Evansville, 72 Northeastern Reporter 279. Action was brought

against the city to recover for damages which resulted from the flooding of plaintiff's cellar by reason of the bursting of a water main, a part of the waterworks system owned by the City of Evansville. The break occurred while the fire department was engaged in extinguishing a fire, and when extra power and pressure had been added at the pumping station. The plaintiff alleged first, after setting out the facts as to the break in the pipes and the ownership of the waterworks system by the city, that the city was notified immediately after the break, but refused, through its agents, the fire department, to shut off the water which was running through the broken pipe. He also alleged that as the owner of the waterworks system it was the duty of the city to properly and regularly inspect the same, but that they had neglected to do so, and that by reason of the defective, cracked, corroded and worn out condition of the water plug where the break occurred, and by the carelessness of the city's agents in neglecting to repair such worn out appliances, the pipe burst under the unusual pressure. The rule is announced by the court as firmly settled that a municipal corporation is, for the purposes of its creation, a government, possessing to a limited extent sovereign powers which in their nature are either legislative or judicial, and may be denominated governmental or public. Being public and sovereign in their nature, the corporation is not liable to be sued either for a failure to exercise them or for errors committed in their exercise. Other duties of a purely ministerial character are expressly enjoined by law upon such municipal corporations, or arise by necessary implication, and they are responsible for any damages resulting from a neglect to perform such duties, or for their performance in an improper manner. Brinkmeyer *v.* City of Evansville, 29 Ind. 187, City of Anderson *v.* East, 117 Ind. 126, 19 N. E. 726, Vaughtman *v.* Waterloo, 14 Ind. App. 649, 43 N. E. 476, are cited. In the extinguishment of fires, and in making arrangements therefor, the municipality acts in its governmental capacity, and is not liable for damages caused by the negligence of its fire department. Nor is it liable for the negligent construction, maintenance or use of appliances used solely for the extinguishment of fires. Citing Robinson *v.* City of Evansville, 87 Ind. 334; Davis *v.* Lebanon (Ky.) 57 S.W. 471; Wright *v.* Augusta, 78 Ga. 241; Mendel *v.* Wheeling, 28 W. Va. 233; Butterworth *v.* Henrietta (Tex. Civ. App.) 61 S. W. 975; Hayes *v.* Oshkosh, 33 Wis. 314; Edgerly *v.* Concord, 61 N. H. 8; and Tainter *v.* Worcester, 123 Mass. 311. It is further pointed out, however, that where a water system is conducted by a municipality partly for profit, as where it supplies water to its citizens and makes charges therefor, it acts in its private capacity, even though such waterworks system is also used for the extinguishment of fires, and under these circumstances it stands upon the same footing as would an individual or private corporation, and is liable for injuries to adjoining property resulting from the negligent operation or maintenance of the plant. The court also cites the case of Eisenmenger *v.* St. Paul Water Board, 44 Minn. 457, 47 N. W. 156, where the municipality was liable for injuries to adjoining property resulting from its negligence by causing adjoining land to be overflowed; Baker *v.* Northeastern Borough, 151 Pa. 234, 24 Atl. 1079, for negligently permitting water to escape from the pipe whereby a horse was frightened; Hand *v.* Brookline, 126 Mass. 324, for undermining a highway by water leaking from the pipes, and Yik Hon *v.* Spring Valley Waterworks, 65 Cal. 619, 4 Pac. 666, for throwing a stream of water into adjoining rooms. Taking up the application of these doctrines to the case in hand, the court points out that the use which was made of the waterworks system at the time of the injury complained of, that is, extinguishing a fire, was a purely governmental one, and for an injury incidental thereto there is no right of recovery. But upon the question of the negligent maintenance of the plant, the court says that it was incumbent upon the city to see that the plant was so constructed that it would be reasonably safe for public or private use, and that reasonable care in maintaining the plant required that the pipes should be in condition to resist the high pressure to which they were subjected during fires, and that the city was directly charged with negligence in failing to replace parts of the waterworks system which had become defective, corroded, and worn out, and that recovery might be had against the city for such negligence.

PHYSICIANS AND SURGEONS. (MENTAL HEALERS -- REGULATION BY STATE.)
IOWA SUPREME COURT.

The interesting question was raised in the case of State *v.* Heath, 101 Northwestern Reporter 429, as to whether a magnetic healer was required to take out the license which the state law prescribes should be taken out by all persons who shall publicly profess to be physicians. The law seems to deal with three classes, namely, all who profess to be physicians and assume the duties, all who make a practice of prescribing and furnishing medicine for the sick, and all who publicly profess to heal under circumstances indicating that the profession is made with the idea

of undertaking the treatment of the sick. The doctor advertised himself as a cancer specialist and magnetic healer, and enumerated a list of ailments which was certainly intended to cover every disorder to which the human race is subject, all of which could be cured by mental science. The doctor was accompanied by Mrs. Heath, who conducted a teachers' class in "Individual and absent treatment in mental science, the art of attracting Opulence and scientific Autosuggestion, self-healing, health, magnetism, latent genius for business or any profession developed by treatment, present or absent; development along psychic and occult lines a specialty." Although the doctor did not prescribe or use medicines, the court concluded that he must comply with the statute. It is stated that the power to prescribe such regulations for the practice of medicine as in the judgment of the legislature shall be necessary to protect the people from the consequences of ignorance or incapacity are so well settled as not to require citation of authority. Attention is called to the fact that the statute under consideration does not discriminate between different schools of medicine. No method of attempting to heal the sick, however occult, is prohibited. All that the law exacts is that whatever the system, the practitioner shall be possessed of a certificate from the board of medical examiners. This excludes no one from the profession, but requires all to attain reasonable proficiency in certain subjects essential to the appreciation of physical conditions. The object is not to make any particular mode of effecting a cure unlawful. It is pointed out that the individual alone often suffers from want of proper attention, but, on the other hand, in many cases of contagious or infectious diseases, the entire community may be in danger. The court refers to many authorities sustaining legislative acts regulating the practice of medicine, and as to the application of these laws to those professing to be magnetic healers, cites People *v.* Phippin, 70 Mich. 6, 37 N. W. 888, and Parks *v.* State (Ind.), 64 N. E. 862. As applied to treatment through Christian Science, it is stated that there seems to be some diversity of opinion, depending somewhat as to whether the supposed agency relied on is divine or human. On this point the court cites Kansas City *v.* Baird, 92 Mo. App. 204, but states that they express no opinion upon the matter.

TRADE-NAMES. (Distinguished from Trade-Marks — Unfair Competition.)

Iowa Supreme Court.

An interesting summary of the legal documents applicable to that branch of the law known as "unfair trade" is to be found in the opinion of Chief Justice Deemer in the case of Sarter *v.* Schaden, 101 Northwestern Reporter 511. It would appear that the plaintiff used a certain label containing the word "She" for designating a brand of cigars manufactured by him, and had built up quite a trade in this particular brand of cigars. The label was a stock one purchased from a printing concern in New York, but this was modified after several years' use upon it coming to the attention of the plaintiff that it was used upon other brands of cigars in different localities. It was also registered as a trade-mark under the State law, but the printers of the label did not consent to this registration. It was the custom of these printers not to sell labels to competing cigar manufacturers in the same locality. The labels were never copyrighted by the printers, but no one else had ever printed or sold the stock label printed by them. In discussing the unfair trade proposition the court says: "These rules, while new, are nevertheless well settled, and easily stated abstractly. Difficulty only arises in making application thereof to concrete cases. There is a well-marked distinction between what is known as the 'infringement of a trade-mark' and 'unfair competition.' A trade-mark is an arbitrary, distinctive name, symbol, or device, to indicate or authenticate the origin of the product to which it is attached. And an infringement thereof consists in the use of the genuine upon substituted goods, or an exact copy or reproduction of the genuine, or in the use of an imitation in which the difference is colorable only, and the resemblance avails to mislead, so that the goods to which the spurious trade-mark is affixed are likely to be mistaken for the genuine product; and this is upon the ground that the trade-mark adopted by one is the exclusive property of its proprietor, and such use of the genuine or of such imitation of it is an invasion of his right of property. Consequently in infringement cases we have all sorts of questions regarding what names and devices may be exclusively appropriated, whether or not they have been dedicated to the public or abandoned by the holder, and many other intricate and puzzling problems which are not as yet fully settled. But aside from the law of trade-marks, courts will protect trade-names or reputations, although not registered or properly selected as trade-marks, on the broad ground of enforcing justice and protecting one in the fruits of his toil. This is all bottomed on the principle of common business integrity, and proceeds on the theory that, while the primary and common use of a word or phrase may not be exclusively

appropriated, there may be a secondary meaning or construction which will belong to the person who has developed it. In this secondary meaning there may be a property right." The court refers particularly to the case of Scheuer *v.* Muller, 74 Fed. 225, 20 C. C. A. 161, and the excellent note found in the Circuit Court of Appeals Reports, and also cites Hygeia Dist. Co. v. Hygeia Co., 70 Conn. 516, 40 Atl. 534; Walter Baker & Co. *v.* Sanders, 80 Fed. 889, 26 C. C. A. 220; American Waltham Co. *v.* U. S. Watch Co., 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. Rep. 263. "Consequently unfair competition is distinguished from trade-mark cases in this: that it does not involve necessarily the question of the exclusive right of another to use the name, symbol, or device. A word may not be capable of becoming an arbitrary trade-mark, and yet there may be an unfair use of the word which will constitute unfair trade. The whole doctrine is based upon the theory of protection to the public whose rights are infringed or jeopardized by confusion of goods produced by unfair methods of trade, as well as upon the right of the complainant to enjoy the good will of a trade built up through his efforts, and sought to be taken from him by unfair methods. Whether or not such facts are shown as to bring a particular case within these rules depends upon the testimony in each particular case in which the issue arises, and if it appear that such confusion has been or is likely to be produced, that there have been actual sales of one product for the other, that there have been actual mistakes of one for the other, or if there be such similarity of the two brands as that one may readily be mistaken for the other, a case is made out." Citing Fairbank Co. *v.* Luckel, King & Cake Soap Co., 102 Fed. 327, 42 C. C. A. 376; G. W. Cole Co. *v.* American Cement Co. (C. C. A.) 130 Fed. 703.

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Osgoode Hall. Reminiscences of the Bench and Bar. By *James Cleland Hamilton.* The Carswell Company, Ltd., Toronto. 1904.

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CHARLES S. DENEEN.

The Green Bag

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GOVERNOR CHARLES S. DENEEN

By Edwin Burritt Smith

CHARLES S. DENEEN, the new Governor of Illinois, is first of all a lawyer. In fact, his successful career as a lawyer is the basis of his present political prominence. During the past eight years he has served as the highly efficient State's Attorney of Cook County (including Chicago), Illinois. He so administered that important office as to make his name known and respected throughout the State, to say nothing of the even wider reputation thus acquired.

Mr. Deneen was born in Edwardsville, Ill., on May 4, 1863. His father was for many years professor of Latin and Ancient History in McKendree College, Lebanon, Ill. Here the son received his education, graduating in 1882. He taught school from 1882 to 1885, meanwhile studying law. Upon his admission to the bar in 1885, he removed to Chicago where he was quite unknown. For the next four years he served his apprenticeship as a clerk in a law office, practiced in the criminal court and taught in the night schools of the city. In 1892 he was elected a member of the lower house of the General Assembly of the State. He served one term, acquiring a knowledge of legislative methods that will be of value to him in his present position.

This varied preparation naturally led to an active professional career. Mr. Deneen was about this time admitted to junior partnership in the law firm of Blanke, Chytraus & Deneen. Upon the election of the senior member to the bench, the firm of Chytraus & Deneen succeeded to the business. In 1898 the firm was again dissolved because of the election of its senior member to the bench. It was succeeded by the firm of Deneen & Hamill, which continues in general practice and in excellent standing at the Chicago bar. Thus Mr. Deneen, though mainly occupied with exacting official duties since 1896, has kept in touch with the general practice of his profession. Though engaged in politics, his principal activities have always been professional; and he has won and holds high standing as a sound and able lawyer.

In 1895 Mr. Deneen was appointed general counsel for the Board of Drainage Trustees, the public corporation created to dig and maintain the great drainage canal connecting Lake Michigan with the Illinois River. In 1896 he was nominated by the Republican county convention for State's Attorney. He was elected to that office at the November election and re-elected in 1900, running ahead of Mr. McKinley. Upon the expiration of his second term he retired almost immediately to assume his duties as Governor of Illinois, to which position he was chosen last November, running ahead of the national ticket with the largest vote ever given any candidate in the State.

Mr. Deneen's first great opportunity came with his election as State's Attorney in 1896. How well he improved it is shown by the universal esteem in which he is held both at home and abroad. It is not too much to say that he was the best State's Attorney Chicago ever had. The contrast between his administration of the office and that of some of his recent predecessors was greatly to his credit and most gratifying to the people. While of course some of his predecessors made good records, none of them equaled him in the executive work

of the office. Under his administration the office was well organized and all its work was thoroughly done.

It is one thing for a public prosecutor, who handles more than five thousand criminal cases in each year, to make a record in occasional prosecutions of great public importance or interest. It is quite another matter and requires skill of a higher order for a public prosecutor to strike terror to the criminal classes generally. Thoroughness and efficiency characterized Mr. Deneen's administration of his important office. While he was State's Attorney criminals, whether little or big, could not count on either laxity or mercy at the hands of the public prosecutor. Punishment for all manner of offenses was never so certain in Cook County as during the past eight years.

Mr. Deneen, as State's Attorney, conceived it to be his whole duty to bring criminals to justice. To his mind no part of the pardoning power should be administered by the public prosecutor. The issue in each case was the guilt or innocence of the accused. That issue he pressed home to court and jury. He believed that guilt should lead inevitably to conviction and punishment; that only the innocent should go free.

A story was told of him, in his first year as public prosecutor, to the effect that some of his party leaders appealed to him to make it as easy as possible for one of their number accused of ballot box frauds, urging that the accused "is of our party and a leader in the ward." Mr. Deneen replied: "I recognize no criminal as a member of my party. When a man commits a crime he by that act becomes an outlaw and belongs to no party." The accused was promptly convicted and served his term at Joliet. That such was the unfaltering attitude of the new public prosecutor towards criminals of all classes soon became known to the entire community; and it is but the truth to say that, during Mr. Deneen's service, "pull" was unknown in his office. While of course crime was not suppressed, it was not encouraged by laxity or favoritism on the part of the public prosecutor.

We have seen that as State's Attorney Mr. Deneen exhibited executive ability of a high order. His office during his term of service handled more than forty thousand cases. He had an average of about fifteen assistants, besides clerks, detectives and other subordinates. From four to six trial judges were kept constantly occupied, and during most of each month a grand jury was in session. It is difficult to understand from this mere statement of totals the extent of detail, the directions to be given, the witnesses to be seen, the papers to be served, in carrying on so great a business.

Mr. Deneen called to his aid a body of able and aggressive young lawyers chosen on the basis of merit. He persistently day and night, from first to last, gave his personal attention to the entire work. To this end, he gave up social and club life and made his home merely a place in which to sleep and occasionally eat. Again and again almost every week he remained at his office into the night with some of his assistants preparing cases for the grand jury or for trial. In many cases he personally saw the witnesses, examined trial briefs, and consulted with his assistants. He participated in some of the more important trials. In these cases he usually left to his first assistant the examination of the witnesses and the opening to the jury. He would carefully watch the proceedings, advise with his assistant, take full notes of the evidence, and make the closing address to the jury.

The accused had much to fear from the closing speech of the State's Attorney. Mr. Deneen is neither sensational nor eloquent. He speaks directly, plainly, earnestly, convincingly. As public prosecutor he addressed himself to the jury. He knew that it was composed of average men; and he used language and illustrations intelligible to such men. He had no thought of the

newspapers or the public. There was but little in his speeches to call for sensational headlines or extended reports in the newspapers. It was enough for him that they rarely failed to convince the jury.

A striking characteristic of Mr. Deneen as State's Attorney was his persistence. He took his work seriously and carried a serious purpose into it. He inspired all his subordinates with a like purpose. They conducted no perfunctory trials. Every case was tried with intent to win. If the jury disagreed on Friday, perhaps after a prolonged trial, the case was likely to be set down for another trial on the following Monday. Few indictments were allowed to grow stale. Fewer still were quietly dropped.

No case of wide general importance and interest was tried in the Criminal Court of Cook County during Mr. Deneen's incumbency of the office of State's Attorney. The high reputation which he won as public prosecutor is for this reason a notable tribute to his zeal and efficiency in the regular work of his office. No such opportunity as that which well improved made Mr. Folk a figure of national interest came to Mr. Deneen. The reform of the Chicago City Council was well begun when he entered upon his duties as public prosecutor. While subsequently there was some boodling in that body in behalf of public service corporations, it was relatively trifling in extent and was carefully concealed. Indeed, affecting but a minority of the Council, it had to be done with unusual secrecy.

It should not be inferred that there were no prosecutions of grave importance and difficulty while Mr. Deneen was public prosecutor. There were such prosecutions involving difficult questions in the greatest variety. Among these were many prosecutions for murder, cases involving a system of jury bribing on behalf of certain street railway corporations, cases of embezzlement by bankers and brokers, cases involving election frauds, and cases of conspiracy. Many of these causes were defended with the utmost skill and attracted general local attention. Although a large proportion of them were close and perplexing, convictions were usually secured — if not on first trial, on some subsequent trial.

That several of the most important judgments entered on verdicts of guilty, particularly on convictions involving jury bribing, election frauds, and conspiracies, were reversed on appeal on narrow technical grounds, is not regarded here as reflecting on the skill of the State's Attorney. If rules laid down on appeal in certain cases are finally sustained, it will hereafter be impossible to convict in this jurisdiction men notoriously guilty of some of the gravest public offenses. Mr. Deneen is credited with having contended for doctrines more conducive to public welfare. It is of course not within the scope of this article to discuss whether he or the Appellate Court was right as to these matters of difference. Suffice it to say that the Supreme Court has sustained him on some points in similar cases, practically reversing the intermediate court. Unfortunately the State has not the right of appeal in criminal cases. Mr. Deneen urges that it be given this right and that certain grave abuses of the writ of *habeas corpus* be corrected.

Early in December last, after eight years of faithful public service, Mr. Deneen laid down his great work as public prosecutor. He had entered upon it at thirty-three but little known. What he had before done merely gave promise of usefulness in the larger sphere to which he was called. His task performed, he relinquished his great office — rich in achievement, universally esteemed, still in his early prime — to assume the chief magistracy of his native State by warrant of a majority of about 300,000 votes.

There is nothing sensational or showy about Governor Deneen. He is a plain, direct, sincere man. He takes himself and his work seriously. The office of State's

Attorney in his view was not a place to be attained and privately enjoyed. It was to him an opportunity to render important public services. To him his opportunity was the measure of his duty. Never before in Chicago did the office of State's Attorney seem so much a public institution. Never before were criminals, whether powerful or weak, so certain of punishment. The public prosecutor went forth the representative of the people in their name to bring the perpetrators of crime to justice. It was a serious commission which he held, and seriously he performed the duty it imposed.

The reader who is unfamiliar with political conditions in Illinois cannot realize, from the foregoing sketch of a strenuous and useful professional career, the significance of Mr. Deneen's election to the governorship of the State. Indeed, those who reside in boss-ridden States can scarcely realize its significance at all. Mr. Deneen was not the candidate of a boss or of a machine. He holds his commission from the people of Illinois and is responsible only to them. How this can be, it falls within the scope of this article only briefly to indicate.

Illinois has never become the private game preserve of a political boss. Though it has suffered from the depredations of these parasites, it has always, if sometimes narrowly, escaped falling completely under their dominion. In 1896 a syndicate of bosses sought but failed to complete the conquest of the State. More recently, the "Federal crowd" (composed of the two United States Senators and certain members of Congress from Illinois), having taken possession of all the avenues leading from Illinois to the national public service, tried to obtain control of the public service and to direct the exercise of the public authority of the State. This attempt met defeat last year in the election of Mr. Deneen.

There existed in Cook County prior to 1904 what was known as "The Organization," used interchangeably with "Republican machine." This body, though not a corporation sole as in Pennsylvania and New York, was long dominated by William Lorimer, now a member of Congress. Under his leadership it was not an eleemosynary institution. It sought to hold and distribute the public offices and to exploit the public authority. To this end, it maintained close working relations with the "Federal crowd" and with a down-State organization existing for like purposes. The combination elected Governor Yates in 1900. It held control of the national, State and Cook County (as distinguished from the Chicago) patronage. It also maintained close and mutually advantageous relations with the more important public service corporations throughout the State, exercising the public authority rather more than less in the interest of privilege.

Mr. Deneen, soon after his arrival in 1885, established himself in one of the best resident districts of Chicago and soon became active in local politics. Here he and his friend, Roy O. West (now senior member of the law firm of West, Eckart and Taylor, member of the Cook County Taxing Board of Review, and chairman of the Republican State Committee) became there cognized political leaders in several wards. This sort of leadership is the one thing that commands access to the inner party circle. It made Mr. Deneen a member of the County and State committees of his party. It also in time made him a powerful factor in "The Organization." For some years he usually acted with Mr. Lorimer, who was then gradually evolving as city boss. Mr. Lorimer not unfrequently favored excellent candidates. Among these in time was Charles S. Deneen, who was long regarded as one of Mr. Lorimer's lieutenants of the better type.

Mr. Lorimer, with increasing power, became more arrogant and less regardful of public interests. Mr. Deneen, on the contrary, became more independent and if possible more devoted to public interests with every passing year. The inevitable clash

came in 1901 over the mayoralty nomination. Lorimer won, and Deneen bided his time. The breach widened until in the spring of 1903 the break came at Springfield, Lorimer favoring the street railway corporations and Deneen the people of Chicago touching some bitterly contested street railway legislation then pending. Deneen won and returned home openly to contest with Lorimer the leadership of their party in Cook County. In connection with this fight, and partly in aid of it, Deneen announced himself as a candidate for the governorship. In desperation, Lorimer adopted as his candidate Mr. Frank O. Lowden, a man of public spirit and excellent standing — in fact, personally much better known about town than Deneen himself — who had rendered valuable public services in advocacy of civil service reform.

The overwhelming success of Mr. Deneen at the primaries in June, 1904, placed him in undisputed leadership of his party in Cook County and gave him a large majority of its great delegation to the Republican State convention.

The success of Mr. Deneen in thus gaining the leadership of his party organization in Cook County was made possible by the achievements of independent Chicago voters within recent years. These voters, under competent leadership with powerful newspaper support, have within the past ten years made the City Council representative of public interests, held the public service corporations at bay, and inspired the entire community with new confidence in really democratic government. Incidentally, they have brought to confusion some of the schemes of spoilsmen engaged in exploiting the public authority of the State. In various ways they have made their power felt at Springfield. Largely through their initiative the people of the State have come to demand and expect the passage this year of a civil service law governing the service of the State and its various penal and charitable institutions.

While Mr. Deneen has confined his efforts in the main to party channels and has never avowed himself a reformer, those active in non-partisan reform movements have had his sympathy and coöperation. They in turn have given him their confidence and support. Thus it became possible for him to transform an odious party machine into an organization responsive to the best public opinion and to go into the State convention of his party enthusiastically supported by the great public newspapers of Chicago and about one-third of the delegates comprising that body.

Ex-governor Richard Yates, the son and namesake of the famous war governor of Illinois, bears a name widely honored. He took a just pride in having achieved the high station once occupied by his father, and greatly wished the indorsement of a re-election. His administration had been in most respects creditable. Wherein it had met the wishes of the "Federal crowd" and the Lorimer machine it was discredited. The managers of that unholy alliance, perfectly aware that association and coöperation with them had affected the governor's availability, sought to banish him to a minor foreign mission. This sort of promotion not being in the line of his ambition, he proved unexpectedly obdurate, and made an aggressive campaign for delegates to the State convention. When the convention met it appeared that rather more than one-third of the delegates were committed to the governor and that most of the others were divided about equally between Lowden and Deneen.

The Governor was strongly supported by delegates from many parts of the State outside of Cook County. The United States Senators, Speaker Cannon and Congressman Lorimer and the shattered remnants of his machine were there supporting Mr. Lowden. Mr. Deneen, backed by about four hundred delegates mostly from Chicago, appeared, representing in fact though not in name the reform movement. The convention was

long and dramatic. After several days spent in balloting without result, it adjourned for ten days. Upon reassembling the deadlock continued unbroken for four days. Finally on the fourth day Governor Yates threw his support to Mr. Deneen, nominating him on the seventy-ninth ballot.

Thus, under the leadership of Charles S. Deneen, the Republican combine of Illinois was transformed. Again it became, as in other days, a real political party — an instrument for the expression of the will of a large body of citizens desiring to coöperate for public purposes.

The full meaning of this transformation does not yet appear. It is known that Mr. Deneen regards a political party only as a means; that in his view if a party would live it must solve political problems as they arise in the interest of the people. If he can measurably succeed in making the practice of his party conform to this ideal, the opposition will be forced to assume higher and more democratic ground than it now occupies — a result greatly to be desired.

It is the problem of our time to determine whether the public authority shall be exercised for private or public ends. This is but a phase of the old struggle between privilege and popular rights. The new Governor of Illinois, strong in body and mind and fully equipped for fruitful public service, may be counted upon to stand for the people in the promising public career which opens before him. Though no longer State's Attorney, he is still the public prosecutor.

CHICAGO, ILL., Feb., 1905.

FEDERAL REGULATION OF CORPORATIONS

A Dangerous Departure

By John E. Parsons

THE Statutes of the State of New York (the same is doubtless true of other States) prescribe that conveyances and other instruments may be recorded in Registers' offices upon being authenticated when executed abroad, before specified officials, among the number being United States Consuls. Recently deeds conveying land, the execution of which was acknowledged before a Consul of our country, have been certified by him describing himself as American Consul General. Whether in the official title of our foreign representatives shall be used the name United States, a name back of which is history and which is pregnant with signification, or there shall be used the term which has been directed by the State Department, is a subject about which there may be a wide difference of opinion, but in taking the action of the Department, the Secretary can scarcely have had in mind the manifold directions in which the name heretofore always borne has permeated the life and legislation of all parts of the country. In the particular case to which reference has been made, while the Consul found no difficulty in calling himself American Consul General, no provision seemed to have been made for a change of his seal. The result was that he wrote himself down American Consul. But his seal certified that it was of the United States of America that he was Consul. Naturally, so far as the difficulty existed, this did not remove it. I think that it would be troublesome for the Department to suggest how the change can be made to conform to existing State legislation.

The illustration is to the point that matters of the kind show the wisdom of the old maxim about looking before you leap. It is peculiarly applicable to Mr. Garfield's report. The points which have universal and immediate bearing are that there shall be compulsory federal incorporation of interstate commerce companies, that a federal license or franchise shall be required for interstate commerce, that corporations shall be prohibited from engaging in interstate commerce without such franchise or license, requirements as to corporate organization, for reports, etc. For reasons which are unimportant in the consideration of the subject, there is an increasing tendency to incorporate not only manufacturing and other enterprises which involve large amounts and the participation of large numbers, but to adopt the same course with any kind of business enterprise: grocers, shoemakers, butchers, dealers in supplies of any kind, avail of incorporation laws to do business as an incorporated company. And the means of communication between the States bring all parts of the country into such close touch that it may easily be claimed that almost all corporations essentially local do interstate commerce. An incorporated establishment doing business in any one of the large towns, which sells to a customer who happens to be on the other side of a State line is brought within decisions which hold that he is doing interstate commerce.

It is not difficult to see, therefore, that if the recommendations of Mr. Garfield's report shall become effective, the business of the country will in large measure be brought within federal control and certain consequences will result which deserve serious consideration. Our federal system is anomalous and incongruous, but there would have been no United States of America at the time the Constitution was adopted if it had not been for the compromises to which that instrument bore witness.

The riots in New Orleans a few years since are fresh in memory. The killing of the Italians justified a remonstrance by the

Italian Government. It was not difficult for us to understand that the responsibility was individual, or was that of the city of New Orleans or of the State of Louisiana. No domestic responsibility rested upon the general Government. And yet no appeal could be made by the King of Italy to the State of Louisiana. It was the President with whom alone he could communicate. And it may be assumed that there was no right in the President, nor in the general Government, to coerce the State of Louisiana or to compel the State to force reparation either from the city of New Orleans or from individuals. A system which leads to such results may easily be criticized. It is difficult of comprehension even by foreign statesmen of high intelligence. None the less, it is the legacy which was left to us by our fathers; their children have fought to maintain it; and it has resulted in so nice an adjustment between the functions which belong to the States and those which may be exercised by the general Government, that in working order only occasional difficulties arise, and those up to a recent period have been capable of adjustment by decisions of the Supreme Court without serious consequences of a general character.

The proposition which is presented by Mr. Garfield's report is whether in a most essential respect all this shall be changed. It can scarcely be contended that any such outworking of the commerce clause of the Constitution could have been within the contemplation of those who framed it. It is within the recollection of every student of history that there was indisposition by the States to give up any of the sovereign rights which they claimed to belong to them. There was indisposition to subject their affairs to the power of a creation of their own, the control of which might be hostile to particular States. Such proved to be the case with the slave States, and the sequel was a struggle which made the most important event since the formation of the Government.

It was necessary, in framing the Constitution, to recognize that there would result transactions between the States, and as neither could regulate such transactions against the other, it followed that Congress must have the power to regulate interstate commerce. It may be difficult to reconcile the decisions of the Supreme Court upon the interpretation which is to be put upon the commerce provision of the Constitution. But it may be affirmed without contradiction, whatever signification may be attached to the language, that it could not have been within the intention of the framers of the Constitution that it should confer upon Congress the authority which is required to carry out Mr. Garfield's recommendations.

The question of power can be considered in the light of the Supreme Court's decisions. Innumerable points of difference which may come before that Court are suggested by the report. It may be that as to some the right of Congress to act may be sustained; that as to others, such may not be the case. Passing the question of power, there is presented the consideration of expediency. And the slightest reflection shows that the adoption of Mr. Garfield's recommendations or the adoption of the fundamental principle upon which those recommendations go, would be to bring about a business change, the serious consequences of which it would be difficult to overestimate.

Mutual interest up to this time has led to the necessary comity between the States, the laws of each making provision for carrying on business within its borders and for the ownership of property by corporations created under the laws of other States. To bring about this situation has required time, and it has had the benefit of much practical experience. It is in working order. The new system will start afresh. It is stated in the public press that the officers of the Govermnent have already encountered difficulties in dealing with that one of Mr. Garfield's recommendations which makes compulsory federal incorporations of inter-

state commerce companies. If any kind of corporate combination can come within the authority conferred by the commerce clause of the Constitution, railroads, the very vehicles of commerce, must be included. And if authority to regulate rates which is recognized as within the right of the States to legislate about may be exercised by Congress, it would seem until the subject is carefully considered, as if it ought not to be difficult to devise the necessary federal legislation to meet that case. And yet the difficulty may be insurmountable. Important as is the railroad interest, it affects a smaller number in comparison with that which concerns manufacturing, mining and other kinds of industrial corporations. They exist and do business under every conceivable diversity, of geographical position surroundings, interests, in fact of every essential condition. Laws relating to them fill the statute books of all the States. They are the subject of discussions before committees, of differences of opinion in legislative bodies. They may or may not meet with executive approval. Is it possible that they can be unified into a single system, taking its authority from an Act of Congress? The time of Congress is too short now to deal with the questions which necessarily come before it and to hear those who are on one side or the other of all such questions. How is time to be made for intelligent consideration of a subject which admits of such endless variety and affects such diverse interests?

And if, granting the necessary power, Congress were to attempt to act, will a State quietly acquiesce in being shorn of a power which concerns its own citizens, and which may be a source of large revenue? If Congress is to grant a license or franchise, is it to fix the fee, and without limit as to amount? And is the State to be deprived of its right to impose a franchise tax? Is there to be a double tax and a double right to impose license or franchise fees? What official is to see that such reports as are called for are given, and what is to be the remedy if they are refused?

If federal officials are to be appointed to the duty, it will require a large addition to the present official staff of the Government. And if the remedy, in case of a necessity for resorting to the Courts, must be prosecuted before Federal tribunals, it means an addition to their already overburdened jurisdiction which it would be difficult to handle, and litigants may as well make up their minds at the beginning that it is hopeless to expect that the manifold questions which will arise can reach or be readily disposed of by the Supreme Court which already finds difficulty in keeping up with its work.

Suggestions pointing to difficulties might be indefinitely multiplied. All that seems to be required now is to point out that there are serious, I think controlling, difficulties. We are at the parting of the ways. The tendency on the one side is to centralize at Washington; on the other, to stand by the doctrine that the original seat of power always has been, is and should remain in the States. Granting, as I do not, that it is permitted by the Constitution, much more convincing reasons must be adduced before I can reach the conclusion that there is any necessity for such a change as is proposed in our political system.

New York, N. Y., Jan., 1905.

FEDERAL REGULATION OF CORPORATIONS

A Public Necessity

By William J. Curtis

MODERN business methods and conditions require the organization of corporations in order that the capital necessary may be readily obtained, and also concentration in the management of the business. This is not a new or novel proposition; but it is nevertheless especially emphasized at the present time.

The true public policy should therefore be to encourage these aggregations of capital and this modern business agency; otherwise business progress and commercial development will be retarded and our industrial growth embarrassed.

The corporation as a business agency is becoming the recognized, and, in fact, the only method for the conduct of business enterprise requiring large capital. This is true, whether the business is confined to the borders of a state, or (as is almost invariably the case) extends into other states and territories, and, not infrequently, into foreign countries.

The enormous development of our country has brought about a condition which justifies the encouragement of every proper agency for the extension and development of our internal and interstate commerce.

In every state laws have been passed permitting the organization of corporations for all classes of business. Among some, great rivalry has been shown; while in others retaliatory laws have been passed, so as to exclude foreign corporations from the benefits derived by domestic corporations with the intention of offering a premium to companies to organize under local laws. Companies organized under the laws of the various states may engage in business in foreign states only at the will of the foreign state, or, as it is expressed, as a result of its comity. Under this rule it is the practice to require the performance of certain conditions precedent to engaging in business, such as filing of copies of charters, making of reports, etc. In several states attempts have been made to prevent foreign corporations from resorting to the Federal courts in litigation. In almost all states corporations are required to file reports with some public officer, stating facts relating to their financial condition or corporate management. These requirements are more or less stringent, according to the purposes to be accomplished; most information being required for purposes of taxation. Under the present system a corporation engaged in commerce between the states is subject not only to regulation of the kinds above indicated, but also to an additional and oppressive burden of taxation on its property located within the state as well as upon its business and franchise.

If an individual were to transact the same business, with the same capital, and in the same places, he would escape the regulations and burdens referred to.

There seems to be a spirit prevailing in our country, which is on the increase, to pursue, oppress and obstruct companies, good, bad and indifferent; and this spirit finds expression in some form, at least biennially, in nearly forty-eight legislatures, so that conducting business under corporate organization is subject to innumerable annoyances, restrictions and burdens, all under the guise of regulation.

That many of these companies are engaged in commerce between the states is manifest. They are organized in one state have their principal office in another, thei manufacturing establishments in still an other, and sell and transport their goods in all, as well as in foreign countries.

The regulation of companies thus doing business between the states and foreign

countries is under active consideration by Congress. The President and Commissioner Garfield have strongly urged the adoption of some legislation regulating all such corporations, and Mr. Littlefield has recently reported a bill from the Committee on Judiciary of the House of Representatives, embodying the views of that committee, which is in full accord with the recommendations of the President and Commissioner Garfield.

This measure is very limited in its scope, and seeks only to secure publicity respecting certain formal matters connected with the incorporation and management of companies included within the act, such as details of organization, amount and character of capital, kind and amount of consideration paid for share-capital, amount of cash capital paid in, etc., in other words, substantially the same information that may be found in any standard Manual of Statistics.

The questions presented by such legislation are: first, the power of Congress; second, the public policy of federal regulation; and, third, its advantages or disadvantages from the standpoint of the corporation.

It is hardly profitable at this late day to discuss the question of the power of Congress to incorporate companies for the purpose of engaging in commerce between the states. The exercise of this power does not necessarily establish its constitutional existence, but the fact that Congress has repeatedly exercised the power indicates that it has been assumed to exist under the Constitution. This has been true in the case of several of the transcontinental railroads and the Maritime Canal Company, and especially true in the case of the national banks. For a complete justification of the exercise of this power, the reader is referred to Mr. Story's work on the Constitution, and to the case of California *v.* Pacific Railroad Company (127 U. S. 1).

The power to create being conceded, the power to regulate must necessarily follow.

As to the public policy of such regulation, there is considerable room for difference of opinion. The benefits to be derived by the public from the enforcement of the provisions of the Littlefield Bill are very much exaggerated. No amount of legislation will make men honest or prevent confiding simpletons from being imposed upon. With very few exceptions, the substantial information required by the Bill may now be obtained from one or more sources. As a rule, the best index of the value of share capital is the stock market. Respecting the values of stocks or bonds of companies of sufficient dignity or importance to come within the list under discussion, quotations may be obtained in the markets of some or all of the large cities. A wide discrepancy is noticed in the quotations. Why is it that Bay State Gas sells at two or three dollars a share of the par value of fifty dollars, and Standard Oil sells for a premium of five hundred dollars? It is because of the difference in character, management and intrinsic values. And yet there is no report on file in the Department of Commerce giving the information necessary to form an opinion as to the investment or speculative value of these shares. The ordinary investor does not need the protection of such legislation; and, indeed, it would do him no good, if passed, for it is not available to him. Having the information on the files in Washington will not help the confiding speculator or investor.

While the advantages may be magnified, it does not follow that the provisions of the Bill or the policy involved are objectionable.

As has been stated, corporations are now subject to regulation by the states, substantially to the extent of the proposed regulation, and there is certainly nothing in the portions not covered by existing state regulations, which can reasonably be objected to by any corporation entitled to engage in commerce between the states and foreign nations.

It has been urged that this policy is an extension of the tendency towards central

ization of power, and therefore to be condemned. This is political sentiment and not fundamental principle. If the power did not exist, then the policy would be objectionable, but assuming the power to exist, it should be exercised, not only to the extent indicated by the Littlefield Bill, but to its full extent, and that is by the enacting of a law by Congress that will permit the incorporation of companies doing an interstate commerce business. Such a law should contain the most conservative restrictions respecting capitalization, so as to prevent stock watering, but in other respects should facilitate the easy conduct of business. Modern business conditions require some such law in order to remove business conducted in corporate form from the annoying, petty, retaliatory and unnecessary restrictions now existing. Corporations doing business in the various states should enter those states as a matter of right, not as a matter of comity. Commerce should be encouraged, not restricted. This is a public necessity. The business and franchises of these corporations should not be a prey to the legislative greed of every state and subjected to burdensome and certainly unequal taxation.

This brings us to the consideration of the subject from the standpoint of the corporation.

The best modern corporate practice favors publicity. This is illustrated by the voluntary and elaborate reports published by many of our largest corporations. The late Mr. Coster, of the firm of J. P. Morgan & Company, insisted upon the utmost publicity (consistent with prudent management) of the business of the many large corporations under his direct charge; and to him is in large measure due the credit of establishing in this country this high standard of corporate management, which properly recognizes the public interest in the affairs of large industrial, railroad and financial corporations.

No business is more sensitive than that of banking, and yet the publicity given to this business, its supervision by the Comptroller of the Currency and the necessity of filing elaborate reports, have not been to its prejudice, but have rather increased the confidence of the public in the management of banks.

It is not conceivable that any Federal regulation would encroach upon property rights, such as trade secrets, and advantages due to individual skill or endeavor. No danger may be expected from Congress, to which, multiplied to the *n*th power, corporations are not now exposed by the states.

The criticism (from the standpoint of the corporation) to which the present policy is subject, is not that it attempts to regulate, but that it does not go far enough. Congress should create corporations as well as regulate those now in existence. If this should be done, it would be welcomed by the business and corporate world. The advantages that would result are many, chief among which are relief from local state regulation, burdensome taxation and franchise fees, and the security afforded by the administration of the law in the Federal courts. The latter advantage is now secured in many cases by the fact that there is usually a diversity of citizenship in litigation. It is so important an advantage, that oftentimes companies are purposely organized in a state foreign to their principal place of business in order to secure this protection from local courts and influences as well as incompetent judges and worse juries. To say that this would impose additional burdens upon the Federal courts is merely to state what the business and territorial extension of our country is already making clear, that the number of courts and judges must be increased in order to meet the inevitable and natural growth of the business of the country. At present, this necessity exists in a few circuits only. The increased labor that may be required of the Federal courts by the legislation proposed would not be appreciable. But even if it were,

this is no reason why corporations should not be subject to Federal regulation. It would be a reason for furnishing our citizens and business interests with increased court facilities and more judges.

It is not to be expected that these views will be shared by all corporate managers. Too many of them are narrow in their vision, blinded by some special interest, or more often affected with a species of corporate mania which compels resistance to everything affecting the regulation of corporations, regardless of its advantages or disadvantages, and frequently to the great injury of corporate interests.

There is an underlying principle in all this which must be recognized, and that is that all large corporations are affected with a *public* interest, and are not in the narrow sense, private affairs. The character of their business, the amount of their capital, the extent of their powers and influence, and the numbers of their shareholders, all take them out of the purely private class of business interests. If this be true, Federal regulation is to be justified from a broader standpoint than the mere advantage to the corporation, and in time this will be recognized and appreciated.

NEW YORK, N. Y., Feb., 1905.

THE BROKEN PIECES OF TUCKER'S KNIFE
(Actual Size)

THE TUCKER TRIAL

By Hugh Bancroft

WHILE murder is always shocking, rarely has New England been more startled than by the murder of Miss Mabel Page. A highly respected woman, without an enemy in the world, was stricken down and stabbed again and again in her own home on a highway in a suburban village in the middle of the day by an assassin who came and went unseen. The story, as disclosed by the evidence, of the tragedy and of the incidents that led to the detection, apprehension and trial of the suspected murderer, rivals the extraordinary creations of the mind of Conan Doyle. The Page family was well-known and respected in Boston and vicinity. Edward Page, the father of the murdered woman, was formerly a very prosperous, not to say wealthy, business man, but in his declining years met with severe reverses. He was obliged to give up his residence on the Back Bay in Boston and removed to his summer home in Weston, a pretty rural town a dozen miles from Boston. The home was on South Avenue, one mile from the stone bridge over the Charles River, which there forms the boundary between Weston and that part of Newton known as Auburndale. Mr. Page, who at the time of the murder was seventy-eight years old, usually went to Boston daily to attend to what little business there was left to him. The other members of the family were his son Harold and daughter Mabel, and a single servant, Amy Roberts. Harold Page was about thirty-five, a Harvard graduate, and employed as a clerk at the South Terminal station in Boston. Amy Roberts had been in the Page household for six years and was regarded almost as a member of the family rather than as a servant. Mabel Page, the murdered woman, was forty-one years old. Her life in Weston had been quiet and retired, devoted to her father and brother and a small circle of intimate friends.

On March 31, 1904, Harold Page went to Boston early in the morning as usual. The father went to Auburndale a little later. Amy Roberts left the house at half-past ten to spend the day in Cambridge and Boston, leaving Miss Page alone. The father, returning home early, found the dead body of his daughter lying on the floor of her bedroom in the second story of the house, at about half-past two in the afternoon. She had on her hat and was completely dressed to go out except her overskirt. That was discovered later in a heap behind a door in a corner of the room, full of fibers of the straw matting which formed the carpeting of the chamber, and with the hooks and eyes of the placket torn off. Nothing in the house was out of place or in any way disarranged except the rug outside of the door to her room.

The local physician was sent for. He observed a horrible jagged wound in the neck, of the type frequently found in suicides. Without further examination he telephoned to the medical examiner that there was a case of probable suicide requiring his attention. The medical examiner arrived that evening, and found that there were two wounds in the neck and several cuts on the hands. He concluded to wait until daylight to perform an autopsy, and seemed, upon his first observation, to have regarded the case as one of suicide, although he was much mystified at the failure to find any weapon. When the undertaker was caring for the body late that night, he discovered for the first time that there was a deep wound in the back, eliminating any possibility of suicide. At the autopsy the following morning still another wound was found, this one in the chest and penetrating through the heart. Aside from the knife wounds there was no other indication of violence on the body.

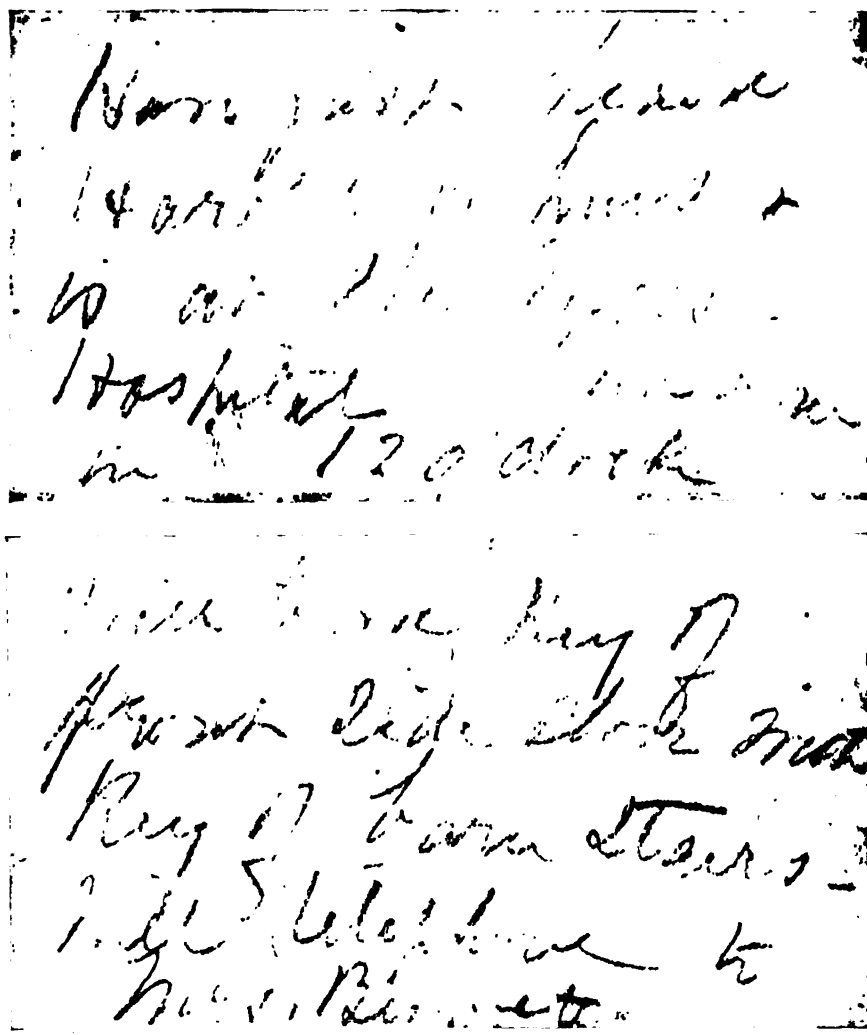
As a result of this first impression that it

was suicide, the murderer had a day's start in which to cover his traces, before the investigation of the crime began.

Soon after discovering his daughter's body, Mr. Page found downstairs in the living-room a note in her handwriting, evidently meant for him, written on both sides of a piece of paper torn from a small block near at hand, which read as follows:

"Have just heard Harold is hurt and is at Massachusetts Hospital. Have gone in twelve o'clock. Will leave key of front side door with key of barn stairs. Will telephone to Mrs. Bennett."

The "Massachusetts Hospital" meant the Massachusetts General Hospital in Boston. Mrs. Bennett was a neighbor whose telephone the Pages occasionally used. It was clear that this message about her brother had been given to her by her assassin, either to get her out of the house, or to explain his presence there, for her brother had met with no accident, but was at his work as usual. The note furnished this important clue to the identity of the murderer, — it must have been someone who knew that she had a brother who worked in Boston.

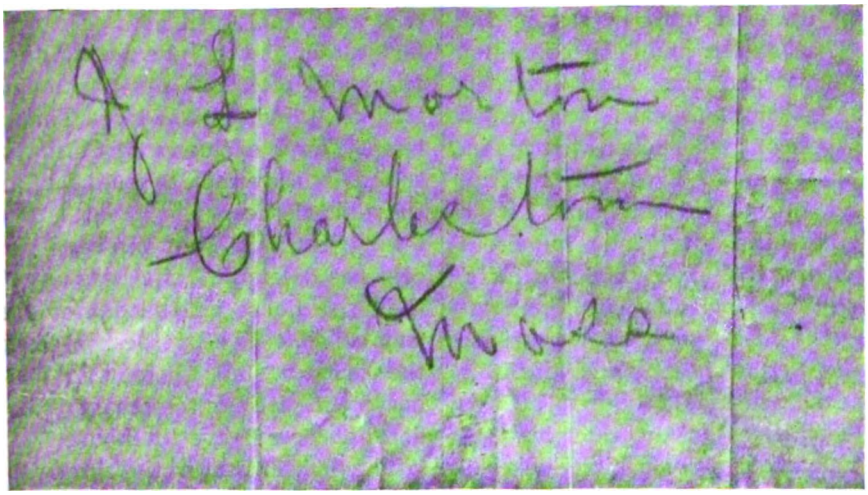


THE FRONT AND BACK OF MISS PAGE'S NOTE

On the floor of her bed-room near her body were her gloves and veil, and on top of them was a slip of paper from the same block, on which was written in a rather scrawly hand merely these words in pencil:

"J. L. MORTON,
Charlestown,
Mass."

This was found to be a fictitious address. An examination of the house showed that there was missing from a pocket-book in a drawer in the large living-room some money which had been there on the morning of the murder, amounting to at least twelve dollars. From Miss Page's room two stickpins were missing. One of these was a silver enamel pin in the form of a shield with a crown on top with a design including the coats-of-arms of the various Canadian provinces. It was of a type very likely common in Canada, but it was found impossible to duplicate it in Massachusetts. It also appeared that Miss Page was last seen alive by a laundry-man, who delivered a package to her at the house at eleven o'clock.



THE MORTON ADDRESS

The defendant, Charles L. Tucker, lived in Auburndale, not far from the bridge to Weston. He was twenty-four years old and had been married, but his wife had been drowned a few months afterwards, while canoeing with him. He had worked about the boathouses on the Charles River, and as a salesman in various Boston stores, but with the exception of two years at the South Terminal station, did not appear to have had continuous employment. At the time of the murder he was without employment. He had been endeavoring for several days to raise funds by selling or pawning many of his personal effects and much of his clothing. He was slightly acquainted with Harold Page and had called to see him at the Page house on at least two occasions.

It was ascertained that he had been seen on Weston bridge going in the direction of the Page house on the day of the murder at about noon. Accordingly, on April 4th, he was questioned by the police as to his whereabouts that day. He stated that he had worked about his house all the morning until lunch time and then took a walk across the bridge, out South Avenue, but claimed that he turned off at Cutter's corner a third of a mile before reaching the Page house, and then returned home in a rather roundabout way. At that time there was nothing known to the police to control his story, and no further action was taken on that day. But there were facts which were soon to become known that forcibly verify

the truth of the old saying, "Murder will out."

Early in the afternoon of the murder Tucker dropped from his pocket a knife-sheath upon the seat of a market wagon which he had boarded on Weston bridge and on which he rode a little distance. On the end of the sheath there were imprints of teeth of peculiar shape and it was later found that Tucker's front teeth exactly fitted into them. The boy who was driving the team picked it up after Tucker left, and acting on the principle that "findings is keepings," put it in his pocket and did not think of it again until he saw by the newspapers that Tucker had been examined in connection with the Page murder. Through his father the sheath was turned over to the police, and Tucker was again, on April 9th, summoned to police headquarters and questioned; this time with a stenographer present. He made numerous false statements with reference to facts, which tended to connect him with the murder. Among the most significant were those with reference to the sheath and knife.

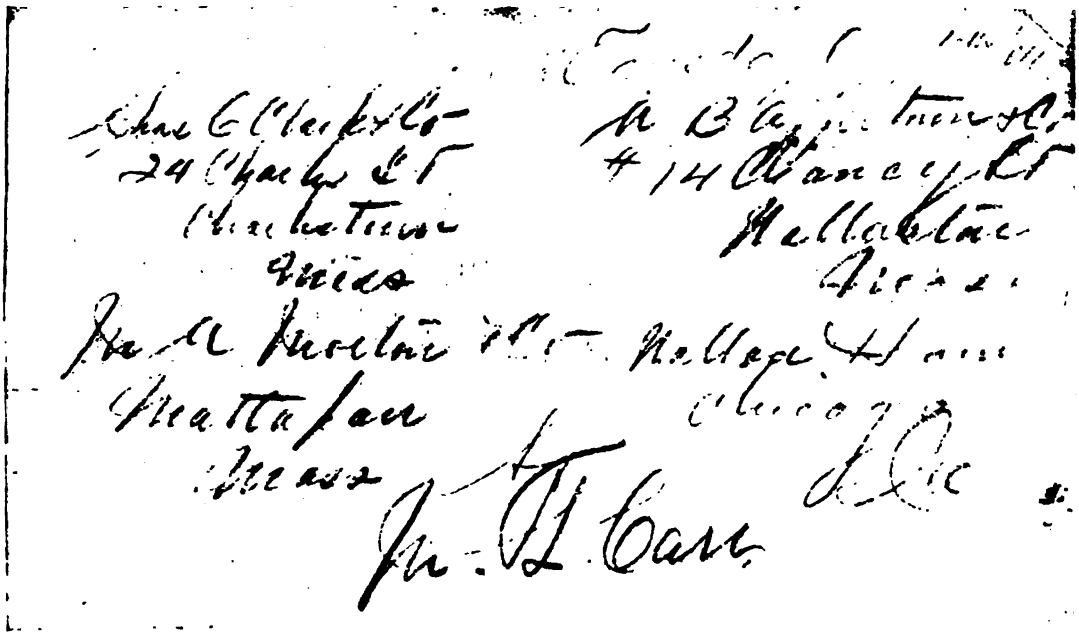
When the sheath was produced at this interview, Tucker evidently thought that the officer had taken it from his (Tucker's) overcoat pocket. He asserted that it was his, but that he did not have it with him the day of the murder, and that it had been at home in his room all the time since the murder. He maintained very vigorously that he owned no hunting-knife, or any other kind of knife, and had not owned one for years. Before the interview was finished some officers who had been searching his room came in. They had found in a coat pocket in his room, the blade of a hunting-knife broken into several pieces; the cutting edge had been chipped and bent, and an attempt had been made by filing to obliterate the maker's name. When Tucker was confronted with this, he admitted that it was his knife, and that he had broken it up for fear that it would connect him with the murder. That knife when whole fitted into the sheath; and that knife, according to the testimony of all but one of the medical experts, could have made all of the wounds in Miss Page's body; and according to the testimony of the physicians called by the government, the wounds, from their appearance, measurement and character, must have been made by a knife of this type.

In that same pocket of Tucker's from which the broken pieces of the knife were taken, a Canadian stickpin was also found.

Tucker was arrested after the interview on April 9th; "probable cause" was found at the preliminary hearing before the district court on April 22d. He was indicted for murder at the June sitting of the Grand Jury, and after one postponement came to trial on January 2d, 1905. The trial lasted twenty days exclusive of Sundays, and resulted in a verdict of guilty of murder in the first degree. So far as a most painstaking research shows, every person, except the defendant, who was anywhere near the Page house on the day of the murder, was called either by the prosecution or by the defence, but there was no one who heard the victim's screams, or saw the murderer enter or leave the house.

The greater part of the time was taken by the testimony of expert witnesses, and yet the issues which concerned them were far from the vital ones in the case. In a capital trial in Massachusetts, the State not only pays the defendant's counsel and summon such witnesses as he desires, but the court may on motion authorize the employment of experts on his behalf, — who are also paid by the State. The defence in this case was authorized to employ six experts on handwriting, but by agreement of counsel four only testified on each side. The experts consulted by the government had reported that the J. L. Morton address was in Tucker's handwriting. The defendant's experts then examined the standards, and declared that Tucker had not written it, but with equal positiveness said that it was clearly in the handwriting of Mabel Page.

The District Attorney distinctly stated in opening the case that the Morton address was relied on only as confirming the other undoubted facts, and there was other evidence tending to show that "Morton" would be a likely name for Tucker to choose if he were giving a false name to Miss Page. This included the fact that there was a J. D. Morton who worked at the South Terminal station in that part of the building where Tucker was formerly employed. There was also a postal card found in Tucker's pocket, on which he had written four fictitious addresses a few days after the



CARD FOUND IN TUCKER'S POCKET

murder. On this card the name of Morton appears in one address, and "Charlestown, Mass." in another. The testimony of the experts on this point, however, of necessity took much time, and for that reason this seems to have been regarded in many quarters as the vital issue of the case.

There was an excellent opportunity to study these men and their methods. They came from all parts of the country and were all men reputed to stand at the very head of their profession. There was a wealth of standards of the defendant's writing, — more than a hundred pencil memoranda which he had made in his business as a salesman within three months of the murder.

We cannot help feeling that this science, or better, this art, is not yet in a satisfactory stage of development, when we find so many of its leading exponents, starting with precisely the same premises and material, arriving at totally different, and to the lay mind, absolutely irreconcilable results. It is certainly true that the opinion of a handwriting expert is worth nothing in itself in court, unless it is supported and fortified by reasons which a jury can understand and accept. It is not right that any expert witness should appear in the rôle of an advocate and argue to the jury the propositions which the side calling him is seeking to establish. Yet that seemed to be the attitude of many of the handwriting authorities. If their side was seeking to establish that two writings were in the

same hand, the similarities only were pointed out and emphasized, but if it was claimed that the authors were not the same, the differences were seized upon and proclaimed.

The method of employing experts militates against a fair and impartial opinion. The income of the handwriting experts comes chiefly from their services in litigated cases. They know that in any given case, unless their opinion coincides with the contention of the counsel who consults them, their remuneration will be little or nothing. The most conscientious man can hardly give an entirely unbiased opinion under these circumstances.

When all experts are paid by the State, it should be possible to have them appointed by and report to the court. Their compensation should be fixed in advance, and they should not be nominated by counsel after a consultation to see that their opinions are as desired. If no other experts were allowed to testify, and if those so appointed might be called to testify by either side after making their report to the court, the testimony of the handwriting experts would be of infinitely greater value to the jury than under the present system.

The medical expert testimony presented in many respects a refreshing contrast to the handwriting testimony. Besides the Medical Examiner and the two physicians who assisted him at the autopsy, three physicians were called by the Government to give their opinions on various aspects of the case, and five physicians were called by the defence. The questions that they passed upon were the presence of blood on Tucker's clothing and his knife, the nature of the weapon that caused the wounds, the order in which the wounds were delivered, and the length of time that the struggle occupied. Although there were some apparent inconsistencies in their opinions, except possibly in one instance, they were easily reconcilable, and due to the different hypotheses in the questions propounded to them by the Government and the defence.

To illustrate: Prof. Wood of the Harvard Medical School called by the Government, testified that there were blood stains on the back of the knife; that he examined them on April 10, and found that the blood corpuscles were $\frac{1}{3250}$ of an inch in diameter, showing that the blood was consistent with that of a human being and of certain wild animals such as the monkey and seal. There was not enough blood present to make the further and more decisive chemical test. Dr. Leary for the defendant testified that he examined the knife several months later and found that the blood corpuscles were $\frac{1}{4100}$ of an inch in diameter, and that the blood was consistent not only with that of a human being and of the animals mentioned by Prof. Wood, but also with several other of the commoner wild and household animals; yet, this apparent inconsistency of results was accounted for by both witnesses by the fact that the diameter of the blood corpuscles would tend to be diminished in the course of time by the action of moisture and of rust.

It was interesting to see that in many matters of opinion, all of the physicians were entirely agreed. They all testified that the wound in the back was the first one struck, and all said that the blood found on Tucker's overcoat was human blood. Obviously, it would have been very much to the defendant's interest if possible to have had different opinions on both these questions. The medical experts, with one exception, seemed to be nearly free from the attitude of the advocate. Their testifying in court is a mere incident in their life-work, and for that reason they are not so susceptible to the influences which affect the opinions of the other class of experts who were in the case. Without doing any injustice to the other eminently fair gentlemen who testified in this connection, it is not too much to say that Prof. Wood fulfilled all the requirements of an ideal expert. Recognized as the leading living authority in his particular subject, he came

upon the witness stand with his methods and conclusions stamped as those of a real expert. He had no theories to maintain argumentatively. He had observed and analyzed the suspicious blood stains submitted to him, and came into court to tell just what he had seen and what he observed, and what that meant. His replies in cross-examination were just as responsive, clear and unevasive as those in his direct examination, and called out a well-deserved tribute to his fairness in the closing argument of the counsel for the defence. It was pleasant also to observe that his former pupil, Dr. Leary, who testified on the same question for the defence, had acquired his former instructor's habit of testifying impartially, as well as his methods of careful and accurate observation.

The evidence upon which the conviction was based was, as is usual in capital cases, of that character termed circumstantial. It is not uncommon to hear attorneys even refer to such evidence as if it were of an inferior nature and of less probative force than so-called direct evidence. The writer has made a careful investigation of the Massachusetts records and has been able to find no case that has come to light in recent years of a mistaken conviction by a jury based on circumstantial evidence, though there have been several such cases where the evidence was direct. The most notable of these was one prosecuted by the present Attorney-General when district attorney. Two men were positively identified as members of a gang of thieves; they did not testify and were convicted. It developed later that they had been in a different part of the state, but they did not testify because at the time specified they were actually taking part in another burglary.

The danger of a mistake in identity or of undetected perjury is always appreciable, yet a jury can hardly fail to accept the testimony of really or apparently honest witnesses who appear to be sure of their statements. But if the proved circumstances are only sufficient to cast suspicion on the prisoner or to make it probable that he is guilty, his counsel and the court as well never fail to point that out to the jury, with the result that convictions on circumstantial evidence are not obtained unless the sole and necessary inference from the proved circumstances is the guilt of the accused.

The defence made a strenuous attempt to have the knife and stickpin excluded from the case altogether. They based this on the claim that the officers who found them, gained admittance to the house and searched by virtue of a fraudulently obtained search warrant for stolen property. It was alleged that the police knew that the graphophone which was named in the search warrant, and which there was reason to believe had been stolen by Tucker, had been returned to the owner long before the search warrant was sworn out. The court was not called upon to pass upon the question of the admissibility of the evidence so obtained, for they found upon the evidence presented to them upon this issue that the search warrant was obtained in good faith, and that it was not used, but that the search was made with the permission and at the invitation of the defendant's family.

The defence contended that Tucker's story was true that he went no nearer the Page house than Cutter's Corner and that he turned off from South Avenue at that point and walked down West Newton Street. There was no controversy that Tucker was on the Weston bridge as the noon factory whistles were blowing, and that he was at a switch tower on the Boston and Albany Railroad at ten minutes to one. The Government contended that in that fifty minutes he could have walked from the bridge to the Page house, and from the Page house to the switch tower, and yet have been in the Page house from fourteen to twenty minutes.

The defendant called a witness, a laborer, who testified that he saw Tucker on East Newton Street just after he had turned off

South Avenue, that he had come from the direction of Auburndale and not from the direction of the Page house, that it was then between twenty and twenty-five minutes past twelve, and that he fixed the time from the fact that he himself arrived at the barn at Cutter's Corner at twelve o'clock, and found his dinner waiting for him, and also that he looked at his watch a few minutes after Tucker went by and that it was then half-past twelve.

This witness illustrated very interestingly the workings of the human mind when it is surrounded by a continuous discussion of some question of great importance. This man's daughter was a witness for the defendant and testified to seeing Tucker on the bridge that day. There seemed to be little doubt but that the witness was trying to tell the truth and that he believed what he was saying. Yet it appeared from statements made by him to credible witnesses from a deposition of his and from his sworn testimony before the grand jury, that there had been a gradual progress to this definite conclusion from a very hazy starting-point. When first interrogated by his employer shortly after the murder, he said that he had seen a young man on the day of the murder but couldn't say that it was Tucker, nor could he say when he saw him. Two weeks later, after the preliminary hearing in the case at which his daughter testified, he first came to the conclusion that he had really seen Tucker on East Newton Street, but he could not then say what direction he had come from. He then began to work out the time; his first approximation was somewhere between twelve and one; he testified to the grand jury that his idea of time was all an estimate, and that he did not look at his watch between five minutes of twelve and one o'clock. On the witness stand at the trial after the lapse of ten months he remembered for the first time that he looked at his watch at half-past twelve and so was able to fix the time that he saw Tucker almost to the minute. It is not uncommon to find a witness believing after a time that he has seen things that he has heard frequently spoken about, but it is seldom that the different stages of the formation of a belief can be traced as closely as here.

One of the most interesting contests in the case centered about the Canadian stickpin found in Tucker's pocket. The Government produced very positive testimony that it was the pin which had been in Miss Page's pin-cushion until just before the murder, and it was identified by certain peculiarities of the stem and point as well as by its design. The defendant claimed, however, that it was his pin and that he had owned it for several years. Clearly, if this claim of the defendant was proved to be false, and the jury was satisfied that the pin belonged to Miss Page, from these two circumstances alone, the conclusion was irresistible that the defendant was the assassin. Counsel for the defendant in opening their case stated that they would prove that Tucker had owned the pin for several years; that he habitually wore it in the front of a yachting cap which he used to wear when employed about the boathouses on Charles River, and then called a large number of the defendant's friends to testify that they had seen him wearing it. It was in this connection that the skill of the Attorney-General as a cross-examiner was seen at its best. All of these witnesses were testifying only from casual observation several months or years previously, and those who attempted to state positively that it was the same pin at once found themselves in great difficulties. The net result of the testimony of the group of friends was, that several declared positively that it was not the pin that they had seen Tucker wear, and the remainder stated that it resembled a pin that Tucker had worn. But all the witnesses testified that the pin to which they referred which they had seen on Tucker was an enamelled pin in the shape of a shield with a crown on top and having some for-

eign design or coat-of-arms, and all said that they had never seen him wear but one pin of that description. In connection with this testimony, there was an incident which in many ways was one of the most pathetic in the trial, when the defendant's mother, after testifying that she knew it was his pin because she had worn it herself several times, upon being shown by counsel for the defendant the pin in question and another pin somewhat similar but larger and of a different color and different material, pointed out the wrong pin as the one that her son had owned. The Government replied to this testimony about the pin by offering the negative of a photograph taken of Tucker in a group at a boathouse on the river, wearing the yachting cap referred to, and showing a pin worn in the front of it in the same way the witnesses had described Tucker wearing the pin of which they had spoken. An enlargement of the negative showed that it was an enamel pin in the shape of a shield with a crown on top, but bearing the Spanish coat-of-arms. Thereupon the defence produced the very pin which the photograph represented, and then argued that it was so different from the Canadian pin that the witnesses for the defendant could not have referred to the Spanish pin when they were testifying. If upon this testimony the jury was satisfied that the pin found in Tucker's pocket was Mabel Page's, and after listening to the evidence it is hard to see how they could have arrived at any other result, the conclusion from this point alone that the defendant was guilty was irresistible. The critics of circumstantial evidence should note that the question whether the pin belonged to Mabel Page or the defendant was settled solely and wholly by direct evidence.

The entire trial was marked with that dignity and solemnity which is a characteristic of the Massachusetts courts. There were no theatrical or sensational gallery plays and no unseemly bickerings between counsel. The case was fairly tried upon the evidence. The defendant was represented by able and devoted counsel. There was no attempt made by the prosecution to introduce any detrimental facts of the defendant's past life. There was a strong current of sympathy for the parents and brother of the accused, which, however, did not warp the judgment of the Court or jury.

The jury was a remarkably representative one and composed of men who were not afraid to do their duty as they saw it. In the early stages of the trial, the Government was severely criticised for not challenging one of the members of the panel, a retired minister. When the Court was questioning the jurors as to their opinions and bias, this juror replied in substance that he would not convict in a capital case unless the evidence was overwhelming, yet that was the type of man that the Government wished to have upon the jury. This murder was one entirely without palliation or excuse, starting with a cowardly blow in the back. If the defendant was guilty, he was guilty in the first degree. There was a strong feeling, however, that the jury might be sufficiently moved by the sympathetic elements in the case to find some way to report a verdict in the second degree; but the jury took the law as it was most clearly given to them by the Court; they had sworn on their oath to give their verdict according to the law upon the evidence, and they did. Theirs was no hasty conclusion. They returned twice into court for further instructions on the question of what constituted a deliberate murder before they reported their solemn verdict.

At the present writing, a motion for new trial is pending, and if that is denied, unquestionably the counsel for the defendant will take the exceptions which they saved at the trial to the Supreme Court of the Commonwealth, and possibly to the Supreme Court of the United States.

BOSTON, MASS., Feb., 1905.

MARTIN VAN BUREN, THE LAWYER

By Adrian H. Joline

THE name of Martin Van Buren has been obscured and his fame as a lawyer has been dimmed by the persistent injustice of posterity. Nothing is more unfair than the judgment of an indifferent public concerning a man who did not carry his success to a dramatic climax. The majority of us have no time to waste in the appreciation of men who have suffered defeat; and Van Buren, after a life of triumphs, was defeated at the end. The career which goes on from victory to victory, and terminates at the supreme moment—the career of such men as Lincoln, Garfield and McKinley—is secure and the decision of the world gives to them the crown of immortality. It was not the fortune of Van Buren to preserve his hold upon the imagination of succeeding generations.

Few men of the present comprehend the truth that Martin Van Buren was a great lawyer in the days when lawyers needed something more than a copy of the Code, Abbott's Forms, and the latest edition of White on Corporations to qualify them for successful practice; when it was not necessary to search through hundreds upon hundreds of volumes in order to ascertain in how many different ways the courts have decided the same question; but when original thought and creative genius were requisite for leadership in the battles of the bar. People think of him as a politician who was styled "The Kinderhook Fox" and "The Little Magician"; supposed to be cunning and devious in his methods; who, as they are inclined to believe, reached the highest place in the land by adroit manipulation and sedulous self-seeking. They regard him as one who was, in the vernacular, a skilful wirepuller; master of the arts by which the people are often deceived into promoting a charlatan, a trickster, and a shallow and plausible manager of men, to the loftiest positions in the commonwealth. The fallacy of this judgment has been admirably demonstrated by our fellow-lawyer, Edward M. Shepard, in his masterly biography of Van Buren which many competent critics regard as the best of the American Statesmen Series.

But we are not concerned at present with Martin Van Buren, Senator of the United States, Governor, Secretary of State, Vice-President, and President: we are dealing only with Martin Van Buren, counsellor at law, who was at twenty-six Surrogate of his County, at thirty a member of the highest appellate court of his State, at thirty-three Attorney-General of New York; and until his election as Governor one of the busiest and most prosperous members of the bar. From 1828 until his death in 1862 he gave no time to the law. To him who looks upon a professional life as an ideal one, it may be permitted to regret that he bartered for the uncertain and illusive rewards of politics the glorious years which might have been given to the noble work of an able, independent, high-minded and conscientious advocate. Is the memory of the politician, often obscured by erroneous opinion, but lasting in a sense, better than the memory of the great lawyer? In later generations the fame of such men as George Wood, Charles O'Conor, William Curtis Noyes, and Nicholas Hill will surely be of no less value than that of the men who wandered from the law into the benighted regions of politics.

Van Buren was the son of a farmer of moderate means, and he had neither the benefits nor the disadvantages of a college education. When at fourteen he left the Kinderhook Academy, he began the study of the law with Francis Silvester, who is almost invariably styled in sketches of Van Buren, as "a respectable lawyer of

Kinderhook," and he was for one year a student in the New York office of William P. Van Ness, afterwards United States District Judge. Van Ness was only four years the senior of his student and, according to Hammond, the historian of early New York politics, he was "one of the most shrewd and sagacious men that the State of New York ever produced." I am not prepared to say that every lawyer should have a college training, but the conditions to-day are not the same as those of 1802. Colleges then were materially different from the colleges and universities of to-day. I doubt if Van Buren would have been any more or less successful if he had been a college man. As to a clerkship in an office in New York City, I am convinced that it helped him. We city men recognize the fact that the country lawyer is usually better founded in the principles than the busy men of the metropolis who are compelled to concern themselves more about the doing of a thing than about the technicalities of the performance. The magnates of finance in New York City care very little about the niceties of the law; they want to achieve results. In 1802 there was not so much difference between the legal business of the city and that of the country; but yet I think the year's work in New York was of advantage to Van Buren, although he says himself that Van Ness did not have much business.

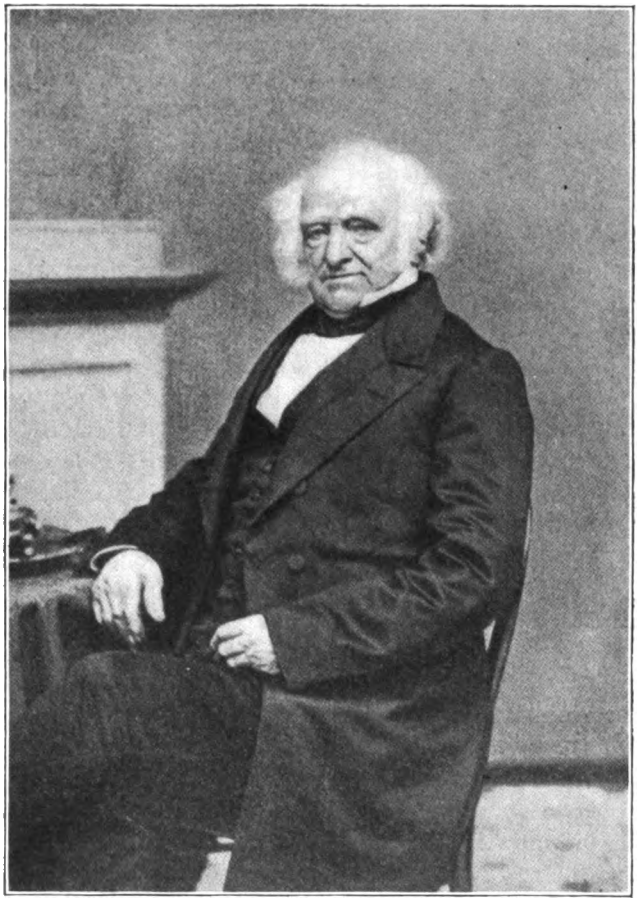
He was licensed as an attorney in November, 1803, and opened an office in his native village in association with his half-brother, James I. Van Alen. At the next term of the county courts he was admitted as attorney and counsellor, and in February 1807, he reached the ultimate stage of professional standing, the office of Counsellor in the Supreme Court. In those days they were fond of fine distinctions in the grades of lawyers; they had not learned that the lawyer finds his level by the force of his intellect rather than by the title which he bears. In 1808 he was appointed Surrogate of Columbia County and served until 1813. In 1809 he removed to Hudson and became a partner of Cornelius Miller, the father of Judge Theodore Miller whom most of us remember as a Judge of the Court of Appeals. It is perhaps almost undignified to refer to the fact that Van Buren and Miller did what is called a "paying business." It is very pleasant to think of our profession only in its loftier aspects, but we cannot deny that there is a financial element about it which is not devoid of serious interest. The question of pay cannot be overlooked; and it is no mean test of the ability of the men who try and argue causes, this test of the sums which clients are willing to pay for their services. At the age of forty-six he was compelled by the exigencies of public life to relinquish private practice. He had amassed what was at that time a comfortable fortune, acquired by faithful and distinguished professional labor.

In the autobiography, he sums up his legal life thus: "For my business I was to a marked extent indebted to the public at large, having received but little from the mercantile interest or from corporations, and none from the great landed aristocracies of the country. It was notwithstanding fully equal to my desires and far beyond my most sanguine expectations. I was not worth a shilling when I commenced my professional career. I have never since owed a debt that I could not pay on demand nor known what it is to be without money, and I retired from the practice of my profession with means adequate to my own support and to leave to my children not large estates but as much as I think it for their advantage to receive."

The bar of Columbia County has always been conspicuous for ability, but it was unusually brilliant in the early days of the nineteenth century. Jacob Rutsen Van Rensselaer, Ambrose Spencer, Thomas P. Grosvenor, William W. Van Ness,—who must not be confounded with Van Buren's preceptor—and Elisha Williams made it famous all over the State, and indeed among lawyers all over the country. Those who

have a liking for the stories of the lives of lawyers will find its history well told in the privately printed book of Peyton L. Miller,—the grandson of Van Buren's partner, Cornelius Miller,—entitled "A Group of Great Lawyers of Columbia County, New York," printed in the neat and attractive style of the De Vinne Press. There you may read of Van Buren, of Tilden, of the Livingstons, of the Spencers; of the multitudinous Van Nesses and Vanderpoels; and of the mighty Williams. The tradition of Williams still survives. Raymond, the biographer, who wrote more than fifty years ago, says that after Van Ness was made a Judge of the Supreme Court in 1807, Van Buren was employed in the trial of almost every important cause that was tried in Columbia County until he removed to Albany, and generally opposed to Williams.

Van Buren was a plebeian, a Democrat; Williams, an aristocrat and a Federalist. He was a worthy foe. The best comparison of the two men was drawn by Benjamin Franklin Butler, the partner of Van Buren from his admission to the bar until 1828 and a student in the office of Van Buren & Miller, a member of the cabinet of Jackson and of Van Buren, and Van Buren's most intimate friend. "Never," said Butler, "were two men more dissimilar. Both were eloquent, but the eloquence of Williams was



MARTIN VAN BUREN

declamatory and exciting; that of Van Buren insinuating and delightful. Williams had the livelier imagination; Van Buren the sounder judgment. The former presented the strong points of his case in bolder relief, invested them in a more brilliant coloring, indulged a more unlicensed and magnificent

ELISHA WILLIAMS

invective, and gave more life and variety to his arguments by his peculiar wit and inimitable humor; but Van Buren was his superior in analyzing, arranging and combining the insulated materials, in comparing and weighing testimony, in unravelling the web of intricate affairs, in eviscerating truth from the mass of diversified and conflicting evidence, in softening the heart and molding it to his purpose, and in working into the judgments of his hearers the conclusions of his own perspicuous and persuasive reasoning." There is an ancient story which expresses the truth more concisely than the stately, old-fashioned phrases of the great Reviser. Williams is reported as saying tersely of his rival: "I get all the verdicts and you get all the judgments."

Van Buren himself says of Williams: "I invariably encountered him with more apprehension at the circuits than any of the great men I have named, and I am sure I speak but the opinion of his professional contemporaries when I say that he was the greatest *nisi prius* lawyer of the New York

bar. * * * It seemed scarcely possible to excel his skill in the examination of witnesses or of his addresses to the jury, but with these his ambition seemed satisfied; for arguments at the Term he was seldom well prepared and far less successful."

Do you ever take down from the shelves the dingy volumes of Johnson or of Cowen, whose wretched law-calf binding comes off on your hands and your coat, and skim through the contents for the mere pleasure of it? It is like the study of the mastodon by the palæontologist. If a man cites Johnson or Cowen now-a-days, his adversary is adamant and the judges talk among themselves about something contemporaneous. You might as well quote the Year Books, or refer to East or Hobart or Plowden. But there is in all the old reports abundant material for delightful study. It may be that they are not what might be styled "light literature," but they are infinitely more suggestive, more stimulating to the imagination, and indeed more instructive than the one hundred and odd volumes of New York Reports, or the latest volume of the Federal Reporter. You cannot fail to discover that there were giants in those days—giants at the bar and on the bench—and you may measure their stature. In those historic days, briefs were not prepared by clerks or opinions dictated to stenographers; counsel were not held down to hours or minutes; judges did not move uneasily in their seats and throw aside the records as a signal for the termination of an argument too prolix. The highest energies of the courts were not devoted to the question whether or not the cause was technically before them, and matters of large importance were accorded the full measure of consideration, as when the Court of Appeals gave an entire term to the case of Curtis *v.* Leavitt which involved $1,500,000 and devoted two-hundred and ninety-seven pages of the 15th N. Y. to the statement and the opinions. I do not mean to be understood as presuming to utter a word of criticism upon our courts of to-day or upon counsel of the present. The whole country and its business have grown so enormously that speed has come to be a necessity. The volume of litigation, the magnitude of amounts, has continually increased, but the day is still but twenty-four hours long and it cannot be made longer by legislatures or even by Congress, notwithstanding the Interstate Commerce clause of the Federal Constitution. If the stately and solemn lawyers or the grave and deliberate judges of the olden time could be brought in contact with the conditions of the present, they would gasp with breathless amazement, fly to their libraries, and perish from intellectual apoplexy. In those times the courts were almost as full of ejectment suits as they now are of suits to recover damages for personal injuries, those obstructers of the calendars and encouragers of fraud, perjury, champerty, and maintenance. The progress of the ages seems to make the world wither and the individual more and more, so that disputes about land have practically disappeared, and questions about personal injuries appear to have supplanted them, not to the benefit of the bar. We have become divided between real lawyers and ambulance lawyers. It is difficult to imagine Hoffman, Radcliff, Van Vechten, Van Buren, Livingston, Cady and Jordan contending over problems of contributory negligence and the vagaries of guards and motor-men.

An examination of the books reveals that at twenty-six, Van Buren was already arguing cases in the Supreme Court and was either with the famous Williams or against him. Evidently he had made his mark, and friends and neighbors, whose judgment is usually sound, estimated him at his true worth.

He asserts that he was extremely unwilling to accept political office, but circumstances compelled him to become a candidate. In November, 1812, he took his seat as Senator from the Middle District and

thus became a member of the Court for the Correction of Errors and Trial of Impeachments, that odd tribunal composed of the Chancellor, the Judges of the Supreme Court, the Lieutenant-Governor, and the thirty-two Senators, of which might be said what has been said of the Court of Errors and Appeals of New Jersey, that it was too large for a court and too small for a town-meeting. In the reports appear some interesting opinions by him, interesting frequently as indicating the grim delight he had in punishing that luminary of the law, the Federalist, Kent.

We look at these old opinions and the abstracts of the arguments of counsel, and we are apt to think that in those ancient times lawyers were far more learned and courts far more astute than they are in this twentieth century. It may be so far as the lawyers are concerned, but we must not forget that men used to lead what is now called "a simple life" and that the complexities of this generation were wholly unknown in those halcyon days. The manifold complications of this generation would have bewildered the lawyers of the olden times. The subtle questions which agitated our courts a century ago have long since been relegated to obscurity. Our courts must needs deal with modern problems, and they endeavor to decide them according to their view of what is right—often, however, if I may be permitted to express an humble opinion, giving their judgment in favor of what they happen to think is right in the particular case before them, rather than with regard to rule and precedent.

In February, 1815, Van Buren was chosen the successor of the distinguished Abraham Van Vechten as Attorney-General—an office which was considered to be of such eminence and importance that only lawyers of the greatest reputation were selected to fill it. While a Senator of the United States, he had a narrow escape from occupying a seat on the bench of the United States Supreme Court.

In dealing with Van Buren as a lawyer, it is not easy to refrain from quoting the words of Mr. Shepard. "Van Buren's work as a lawyer," he says, "brought him something besides wealth and the education and refinement of books, and something which neither Erskine nor Webster gained. The profession afforded him an admirable discipline in the conduct of affairs; and affairs, in law as out of it, are largely decided by human nature and its varying peculiarities. The preparation of details; the keen and far-sighted arrangement of the best, because the most practicable plan; the refusal to fire off ammunition for the popular applause to be roused by its noise and flame; the clear, steady bearing in mind of the end to be accomplished, rather than the prolonged enjoyment or systematic working out of intermediate processes beyond a utilitarian necessity—all these elements Van Buren mastered in a signal degree, and made invaluable in legal practice." It is said of him that he was not an orator, but he persuaded men. They thought much more then of what may be called "fine speaking" than we do, and Van Buren was not of the order of speakers who arouse the tears and applause of jurymen and spectators; but he was effective and he had the art which made the British juryman disparage Scarlett in comparison with Brougham. We have only tradition to tell us of his exploits in the trial courts, for none of his addresses to juries were ever reported.

It was said of him that whether before a jury or the court in *banc* he particularly excelled in the opening of his subject. The facts out of which the questions for discussion arose and the mode in which he intended to treat them were always stated with great clearness and address. Undoubtedly this careful lucidity of statement was a great factor in his power. We all know that the statement of facts is usually the most important part of any argument and that causes are won oftener on the "statement" than on the marshalling of

authorities, mainly perhaps because the judges generally know more law than we do but not so much about the facts of our case. William Allen Butler always preferred to argue for the appellant because it gave him the first chance at the facts, always an advantage as he learned from his distinguished father who was so unfortunate as to bear the same name as a certain Massachusetts general. If we may judge by his political writings, Van Buren was elaborate and copious. I have read the autobiography, and it is a monument of diffuseness. He could speak well without much previous study, but he was exceedingly laborious and industrious, mindful of the value of careful preparation. In the "Life and Letters" of Mr. Charles Butler, who was a clerk in the office of Van Buren and Butler, it is recorded that on the first morning of his clerkship "being minded to despatch work he rose at half-past four and at five in came Mr. Van Buren himself, ready for the business of the day." In a letter written at the time, Mr. Butler says: "I rise early, and what is more provoking Mr. Van Buren some mornings back has risen at half-past four. I rise at five and find him up. This morning he rode five or seven miles before seven o'clock. I can't imagine what possesses him." He owned what in those days was an excellent library, and he used it systematically. He seems according to those who knew him well, to have been fluent and facile; felicitous in expounding the intricacies of fact and law; mild, insinuating, never declamatory; going to the pith of the subject without the arts of rhetoric.

Many are the tales which are told of his imperturbable demeanor, his adroitness of speech, and his amusing non-committalism. In all this we may discern only the habitual caution of the experienced lawyer, sensible of the danger which lurks in loose and unreflecting assertion. He was always angry at the accusation of non-committalism, calling it contemptuously a "party catchword."

The absorbing work of the politician took Van Buren from the bar all too soon. After 1828, he belonged to the nation. As Holland says, "for some years preceding his final withdrawal from the bar, his practice, it is believed, was unsurpassed in its extent and responsibility by that of any lawyer in his native State and perhaps in the United States." I am loath to leave him—a notable character, unjustly decried by ill-informed or partisan historians. There is no doubt that he deliberately sacrificed his chances for the Presidential nomination in 1844 by his letter against the annexation of Texas, "one of the finest and bravest pieces of political courage" as Shepard well says, and one which "deserves from Americans a long admiration." He was never non-committal about the essentials.

In the early days of the rebellion, he was patriotic and staunchly devoted to the cause of the Union, although sometimes unjustly accused of sympathy with secession. When his will was opened they found that it began in these words: "I, Martin Van Buren, of the Town of Kinderhook, County of Columbia, and State of New York, heretofore Governor of the State and more recently President of the United States, but for the last and happiest years of my life a farmer in my native town, do make and declare the following to be my last will and testament." And so, at the end, after an active career of sixty years, during which he had attained the highest rank in his profession and the most exalted office in the nation, he gave his testimony to the emptiness of honors and the worthlessness of political rewards, and "his dust returned to the earth as it was, his spirit to the God who gave it."

New York, N. Y., Jan., 1905.

RESORT TO THE JUDICIARY TO PRESERVE THE PURITY OF ELECTIONS

A Recent Colorado Case Reviewed

By William E. Hutton

THOSE who view either with equanimity or misgiving the tendency of the times to enlarge the use of the writ of injunction and to extend it to new purposes will find food for reflection in the case of the People of the State of Colorado, ex. rel., Attorney General *v.* Tool et al. recently before the supreme court of that state. The case is of interest for two reasons, first, as showing the extraordinarily broad powers vested in the supreme court under the prevailing construction of the state constitution, and secondly, as showing the extent to which reliance is placed upon the judiciary to protect even political rights and liberties against designing or corrupt officials.

We are accustomed to the exercise by the courts of a controlling power over executive and administrative officers while in the performance of certain functions of a non-discretionary character. This power however has been marked by certain well understood and well defined limits. Mandamus is the process by which it is ordinarily exercised, and in a general way the cases in which that remedy may be invoked indicate the main limitations upon the jurisdiction of the courts over executive or administrative action. These cases disclose *inter alia* three notable limitations upon the issuance of this writ. It will not issue in anticipation merely of a wrongful action, nor to control discretion, nor to compel action contrary to law. The first is a leading feature of the jurisdiction of the writ although not universally regarded. Until an official has either failed to act when by law required to do so or has acted in a wrongful manner the general rule is a court will not presume to direct him. The court will not anticipate that a public official will do other than his lawful duty. It presumes that he will be faithful to his trust. Such has been a hitherto generally understood boundary line between judicial and executive authority. Of late however in some states there is a marked tendency to use the writ of injunction to restrain and prevent anticipated breaches of public duty. A striking illustration of this tendency is to be found in the case which forms the subject of this article. It is worthy of a full and careful statement.[1]

The State of Colorado, in its sovereign prerogative capacity, on the relation of its attorney-general, filed its original bill in the supreme court of the state, invoking the original prerogative jurisdiction of that court, as conferred by the terms of the state constitution, for the purpose of securing an injunction against the various local election officials of the City and County of Denver, its police officials and divers other local officials and persons to prevent certain wrongful and illegal acts threatened and anticipated to be committed at the general election to be held on November 8, 1904, and for certain other relief. The general scope and purpose of the bill was to secure a *judicial enforcement* of the various statutes of the state relative to the holding of elections, the counting of votes, certifying of returns and the canvassing thereof. Various national, state and local officers were to be voted for at said election.

The theory upon which the bill was framed was that a systematic and widespread conspiracy existed among practically all of the local officers, including the police, sheriff, prosecuting attorney and those specially charged with the administration of the

[1] The statement is drawn from a brief of the Attorney-General.

election laws, to procure the commission of divers and sundry illegal and fraudulent practices, to pollute the purity of the ballot box and thereby frustrate the will of the lawful voters of the City and County of Denver and in turn frustrate the will of the people of the State of Colorado. The bill disclosed a history of gross, outrageous frauds and illegal practices in Denver elections for a number of years resulting in the practical disfranchisement of the lawful voters, and that the officials who were then and who would be in charge of the election machinery on November 8 represented the same political party and were in fact substantially the same individual officials who had connived at, procured, aided and abetted in the perpetration of the frauds and illegal practices at prior elections. The bill further alleged that the election officials had knowingly and fraudulently caused the registration books and lists to be padded with fictitious names to the number of at least 10,000 with the object of causing lawless and vicious persons to vote under such fictitious registrations by repeating, personating and the like.

The gravamen of the bill, in short, was that unless the injunctive relief prayed for was granted, the state would be powerless to prevent the violation of its own election laws, or thereafter succeed in punishing the violators of such laws through the ordinary criminal processes of the state, because of the existence of such widespread local official conspiracy, not only to frustrate the will of the lawful voters, but, in addition, to shield from conviction or punishment the individuals and instrumentalities employed to debauch the ballot box, thereby inflicting irreparable wrong and injury to the state in its sovereign capacity and as the protector of the liberties of its citizens.

On the 5th of November the court ordered that the relief be granted as prayed. Accordingly a "Writ of Injunction and Order for Additional Relief" issued, the injunction being directed against the precinct judges and clerks of election, the sheriff, the fire and police board, the local canvassing board and others, in substance as follows: it enjoined any interference with or prevention of a free, fair, open and lawful election; it enjoined the exclusion from the polling places of the judge of election appointed by the minority republican member of the election commission; it commanded the sheriff and fire and police board to issue strict and imperative orders to all deputies and members of the police force to protect the republican judges, clerks, watchers and challengers of election in the discharge of their duties, and to be prompt and diligent to prevent as far as possible any act of force, fraud or artifice designed to interfere with the exercise of the duties of said officers, and to assist them to serve freely and unobstructedly until their duties were completed; it commanded the subordinate members of the police force individually to carry out the terms of the order, any other instructions or directions, official or unofficial, notwithstanding; it enjoined the judges of election from so arranging the polling places as to prevent the watchers and challengers from getting a full and unobstructed view of every act performed by the judges of election from the opening of the polls until the last official act was performed, and from causing or permitting to be removed from the polling places, any ballot boxes, official records, minutes or memorandums so that they might not at every instant of time be in the unobstructed view of the watchers and challengers of the republican party; it ordered that to the end that the court might more fully guard the purity of the election, the court would appoint two persons for each precinct to be suggested to the court by the petitioners, and approved by the court, said persons to be known as "supreme court watchers," who should have power to be and remain at all times during the election at the polling place, inside or outside the guard rail, to witness all proceedings until the sealing of the ballot boxes, and to

examine the poll books, tally lists and registration books, and in case of challenge to compare the description of the proposed voter with that given in the registration books, in such manner however as not to interfere with the fair, honest discharge of the duties of the election judges and clerks; it commanded the election judges to follow strictly the law in regard to the appointment of clerks of election, and that in compliance with the law they appoint one clerk of opposite political faith from that held by the other clerk, and "in order to more effectually carry into effect this order the said judges are required to appoint, as one election clerk, the person designated" by the republican election judge. The "supreme court watchers" were duly appointed and performed their duties.

Attention should be called to the two-fold nature of this injunction. In the main it commands the performance in a general way and specifically of duties devolving upon the several defendants by the election laws. In two interesting respects however the order goes further. In the first place no provision is made in the election laws nor in any other legislative enactment for the appointment by the court of watchers of election or for their presence in the polling place. On the contrary the law specifically provides that "no person other than the election officers and the watchers provided by law, and those admitted for the purpose of voting, as hereinafter provided, shall be permitted within such guard rail, except by authority of the judges of election, and then only when necessary to keep order and enforce the law."[1] In the second place the election laws invest the judges of election with the power to appoint the clerks,[2] whereas the court required the judges to appoint as one clerk a person selected by one of the judges. In these two respects last mentioned the order is significant when we come to consider later on the nature of the power assumed by the court.

On issuing the above injunction the court announced that it expressly reserved full jurisdiction of the cause to the end that it might make and enforce all other and further orders to secure a full, fair and free election, for the safe preservation of the election records, together with the power to summarily punish any persons violating the court's injunction and order and to make other orders in the premises.

The election was held and notwithstanding the injunction great frauds were committed as in previous elections. After the election the court in the exercise of its reserved jurisdiction tried numerous election judges, clerks and policemen for contempt of its orders and punished them. The contempt established against such persons commonly consisted in knowingly aiding and abetting fraudulent voting, the substitution of fraudulent votes for valid ones, in interference with supreme court watchers or the exclusion of the clerk designated by the republican minority judge of election. A great portion of the court's time for nearly two months after election was devoted to the hearing of evidence in the trial of these contempt cases. The court further exercised its reserved jurisdiction by way of direction and control of the election commission or canvassing board during the counting, abstracting and certifying of the election returns. It appointed its own watchers to keep watch over the election records and returns and to be present while the canvassing of the same proceeded; it commanded that the returns be not unsealed until opened for the canvas; it ordered the commission to make the canvas publicly, and to give prior notification to the democratic and republican parties, and to permit at least two representatives of each party to be present to watch the canvas; where discrepancies occurred in the returns it directed the commission as to how it should proceed; it enjoined the commission from

[1] Mills Ann. Stat. of Colorado, Vol. 3, sec. 1625 x.
[2] Mills Ann. Stat. of Colorado, sec. 1598.

certifying any returns or issuing any certificates of election until ordered to do so by the court; it prescribed the form which its certificates should take and finally it commanded the commission to exclude from the abstract of the votes the returns from ten precincts on the ground that it appeared from the evidence adduced before the court in the trial of persons charged with contempt that the returns from those precincts were so tainted with fraud that it was impossible therefrom to determine the number of legal votes actually cast for any person.[1]

Let us now consider the source of the jurisdiction of the court to issue this extraordinary writ under the circumstances described. The authority of the court is found if at all in Article VI., sec. 3 of the state constitution as follows: "It (the supreme court) shall have power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, injunction, and other original and remedial writs, with authority to hear and determine the same." The incongruity of the association of the writ of injunction with the other writs named in this section; the mingling without distinction of common law and equity processes, of prerogative writs and an ordinary judicial writ in the same clause, and the impossible characterization of the writ of injunction as an "original and remedial writ" early received attention. It would be an interesting study to trace the origin and history of this section and similar clauses in the constitutions of other states. The section is not first found in the constitution of Colorado. A substantially identical provision is embodied in the constitution of Wisconsin and has been construed in a number of decisions by the supreme court of that state. The first case, however, in which the jurisdiction of the court to issue the writ of injunction upon original application was fully considered in that of Attorney-General *v.* Railroad Companies.[1] In a very able opinion Chief Justice Ryan there points out the peculiar association of writs of a different nature and the difficulties of construction, and enters into an exhaustive treatment of the nature and limits of the original jurisdiction conferred. The conclusion is reached that the constitution puts the writ of injunction to prerogative uses, and uses kindred to the uses of the other writs associated with it, and it thereby becomes a quasi prerogative writ. Those prerogative uses are such as appertain to and are peculiarly appropriate to the state as a sovereign power. Chief Justice Ryan thus explains the original jurisdiction of the court:

> "It is therefore plain that the original jurisdiction of this court is both legal and equitable, within certain limits; legal for the use of the common law writs; equitable for the use of the chancery writ. The use of the former must be according to the course of the common law courts. The use of the latter must be according to the course of courts of equity; in each case, subject to statutory modifications of the practice, which do not impair the jurisdiction granted.
>
> Here are three jurisdictions but one policy; to make this court indeed a supreme judicial tribunal over the whole state; a court of last resort in all judicial questions under the constitution and laws of the state; a court of first resort in all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people.
>
> Here are several writs of defined and certain

[1] A direct effect of the exclusion of these ten precincts was to change the balance of power in the state senate from the democratic to the republican party, and thereby insure the confirmation of the nominations of two republican supreme court judges, to gain whose confirmation there was much party solicitude. It had a significant influence also in determining the relative political strength of the two leading candidates now engaged in a contest for the office of governor before the joint assembly.

[1] 35 Wisc. 425 (1874).

application classed with one of vague import. We are to be guided in the application of the uncertain, by its certain associates. The joinder of the doubtful writ with the defined writs operates to interpret and restrict its use, so as to be accepted in the sense of its associates; so that it and they may harmonize in their use for the common purpose for which it is manifest that they were all given. And thus for this use and for this purpose, the constitution puts the writ of injunction to prerogative uses and makes it a quasi prerogative writ.

The writs are given to the circuit courts as an appurtenance to their general jurisdiction; to this court, for jurisdiction. Those courts take the writs with unlimited original jurisdiction of them, because they have otherwise general original jurisdiction. Other original jurisdiction is prohibited to this court, and the jurisdiction given by the writs is essentially a limited one. Those courts take the prerogative writs as part of their general jurisdiction, with power to put them to all proper uses. This court takes the prerogative writs for prerogative jurisdiction, with power to put them only to prerogative uses proper."

This view of the original jurisdiction of the court was subsequently approved in the Colorado case of Wheeler *v.* Irrigation Co.[1] That court said that "original jurisdiction of the writs mentioned except in cases presenting some special or peculiar exigency, should not be here assumed, save where the interest of the state at large is directly involved; where its sovereignty is violated, or the liberty of its citizens menaced; where the usurpation or the illegal use of its prerogatives or franchises is the principal and not a collateral question." The court also suggests that in a proper case "a citizen interested could probably institute the proceeding in the name of the people without consulting with the attorney-general."

Without entering in detail into the facts and issues in the different cases where the courts of Wisconsin and Colorado assumed or refused to assume original jurisdiction, it is to be observed that the discussion in the various cases as to the nature of the original jurisdiction bestowed by the constitution turns upon the question what matters may come before the court as a court of first resort as distinguished from those matters which may come before it as a court of last resort or as an appellate tribunal. As was said in Attorney-General *v.* Railroad Companies this section of the constitution had the effect of making the supreme court a court of first resort with reference to a certain class of judicial questions, to-wit, judicial questions affecting the sovereignty of the state or the liberties of its people. It does not appear to have been conceived that the grant of certain original jurisdiction had the effect of making any matter judicially cognizable which otherwise would not have been, in other words, of enlarging the field of judicial power or the function of the judiciary as one of the three great departments of government. Thus in Attorney General *v.* Railroad Companies the court having decided that the case was one for the exercise of original jurisdiction then proceeds to inquire whether it was one for equitable cognizance. It was assumed that even the supreme court had no jurisdiction unless the case was one within the established bounds of equity jurisdiction. The question being in that case, whether equity had jurisdiction to enjoin the usurpation, excess or abuse of a corporate franchise, it was held that it had.

But the case which was particularly urged upon the supreme court of Colorado as supporting its jurisdiction to issue the injunction which it did issue was that of State ex rel. Attorney-General *v.* Cunning-

[1] 9 Colo. 248.

ham, Secretary of State.[1] In that case the supreme court of Wisconsin in the exercise of its original jurisdiction, issued an injunction restraining the secretary of state from carrying into execution an act commonly known as the "Apportionment Act," on the ground that it was unconstitutional, and more particularly that he refrain from giving the notices of the election of members of the senate and assembly as apportioned and districted by said act. The main contention made before the court was that the legislative apportionment of the state into districts was not a matter of cognizance in a court at all, but was political or legislative in its character in the sense of being non-judicial. The court however held that in a case where the question arose merely as an incident to the court's jurisdiction over the conduct of a purely non-political ministerial officer acting without discretion, it was its duty to pass on the constitutionality of the statute. It is unnecessary here to consider the soundness of this view. The court also carefully considered whether the issues before it involved the sovereignty of the state or the liberties of the people, and because it found that they were involved it took original jurisdiction. On a proper reading of the opinions in the Cunningham case, it is not to be inferred that the court took the view that its judicial power attached to the case because the liberties of the people were involved, thus treating the "liberties of the people" in and of themselves as an independent and distinct subject-matter of jurisdiction. Rather the implication of the liberties of the people was treated merely as a criterion of original jurisdiction as distinguished from appellate jurisdiction. The late Wisconsin case of State ex rel. Cook *v.* Houser[2] shows in very clear language that no such inference as above suggested can be made as to the position of that court.

But the Cunningham case was in effect urged before the supreme court of Colorado as a case in which the Wisconsin court founded its power to take jurisdiction as a court, and indeed as a court of first resort, upon the fact that the essential subject matter involved was the "liberties of the people." Thus it was maintained with great boldness that jurisdiction over all questions whatsoever involving the liberties of the people is embraced in this substantive grant of power to the supreme court by the constitution. These original prerogative powers it was said are *sui generis* and cannot be exercised by any other tribunal in the state. The rules which affect the exercise of equity jurisdiction were said to have no application when this power is invoked.

In this country where the functions of government are separated to a great extent by constitutional requirement, and legislative, executive and judicial powers are distributed amongst distinct departments, a more revolutionary principle of law it would seem can hardly be imagined. So extraordinary is this claim of power for the court that it is not to be wondered at when in addition it is said that this original jurisdiction which we have been considering is concurrent with that of the legislature. And so when it was pointed out that the constitution provides that "the general assembly shall pass laws to secure the purity of elections, and guard against abuses of the elective franchise"[1] and it was claimed that the legislature has exclusive jurisdiction over the matters therein enjoined to be done as to when and how they shall be done it was answered: "The direction to the legislature to pass laws for securing the purity of the ballot was not designed to deprive the state supreme court of any jurisdiction conferred upon it by other portions of the fundamental law. The enforcement of statutes in the premises would be merely cumulative to the general supervising power and original jurisdiction with which the court is clothed. It is also worthy of notice that the legislature of

[1] 51 N. W. Rep. 724; 81 Wisc. 440.
[2] 100 N. W. Rep. 964.

[1] Const. Art. VII, sec. 11.

Colorado has never attempted to declare that the statutes framed to secure honest elections should be deemed exclusive, and that courts should not exercise jurisdiction in that behalf, except as authorized by the legislature. Conceding *arguendo* that such a prohibitory statute would be valid if enacted, its non-existence is a controlling factor in favor of the jurisdiction here assailed."[1] These high prerogative powers with which the supreme court is clothed are it is said the same prerogative powers which belonged to the King of England before the separate existence of the Court of King's Bench or Chancery and at the time of the *Aula Regia* where in theory the king always presided as the fountain of justice, and expounded and enforced the law. Under that theory to the court "belongs authority not only to correct errors in judicial proceedings, but other errors and misdemeanors *extra judicial* tending to the breach of peace or oppression of the subjects, or to the raising of faction, controversy, debate, *or to any manner of misgovernment*, so that no wrong or injury, either public or private, can be done, but it shall be (here) reformed or punished by due course of law."[2] Needless to say the *Aula Regia* was before the days of Montesquieu.

So much for the powers claimed for the supreme court of Colorado. The court has not yet handed down an opinion and hence we do not know to what extent, if at all, the court will accept the views which were presented to it as to its original jurisdiction. Let us however now consider some aspects of the circumstances and effects of the issuance of the writ of injunction and other orders by the court. We find that under circumstances where there was no dispute as to the existence or construction of any law, and where no wrong had actually been committed, public executive and administrative officers were commanded to do their duty; that the exercise of their discretion was in some respects controlled by the orders of the court; that they were in some instances compelled to act in violation of the duties imposed upon them by statutory enactment; and that they suffered interference and control while in the performance of other duties devolved upon them by statute. After acting, while acting and in anticipation of their acting they were at all times under the direct supervision of the court. We find that contrary to generally accepted principles, the process of the court issued to prevent crime pure and simple, although no circumstances involving any of those classes of rights such as ordinarily call for the interposition of a court of equity were present. We find further that the legislature enacted an elaborate system of laws to protect the political liberties of the people, and yet the court assumed to add to such laws or change or defeat them in the exercise of a concurrent power to protect those same liberties. It may well be doubted whether a state can invest such powers in a court in so broad a field as is covered by matters touching "the liberties of the people" and yet retain in its essential substance the principle of the separation of the powers of government, for, the protection of "the liberties of the people," it would seem, broadly speaking, covers the whole object and end of a free government. It does not help matters to say as was said to the court that there is a resort simply to a "*judicial enforcement*" of the laws. Strictly speaking there can be no such thing as a judicial enforcement of any law or the judicial protection of constitutional rights and liberties unless these laws or rights and liberties come before the court in the form of a judicial question and arise in a judicial proceeding. Until they do they are not susceptible of the exercise of judicial power at all. What are judicial questions and judicial proceedings is often a matter of doubt, but the broad fundamental demarkations of what con-

[1] Quoted from the brief of the Attorney-General.

[2] Quoted in the brief of the Attorney-General from Bagg's case, 11 Coke 93B.

stitutes judicial as distinguished from legislative and executive questions, proceedings and powers are pretty well defined and understood.

Let us consider the situation which was before the court when its jurisdiction was invoked. It is difficult to conceive of any matters of fact, any probable contingencies, any considerations of policy, any anticipated dangers to the liberties of the people which were before the court, which had not also been before the legislature when it enacted what appears to be a complete code of laws for the control of elections and the protection of the political liberties of the people. It must be assumed that it did not choose to add more to what it enacted. Among other things it fixed certain definite penal sanctions to insure the enforcement of the laws. The court by issuing its injunction simply added to those sanctions. Under the circumstances was that not a simple piece of judicial legislation? For note that the penalty imposed by the statute and by the court for disobedience of the one and of the other was imposed for breach of the same duty, the duty to the state to obey the statute. Quite different are all those cases where there is a duty not only to the state but also to a private party and the court having proper cognizance of the latter in the performance of its ordinary judicial function restrains the commission of what constitutes not only a private wrong but also a crime. We have here a clear instance of a court of equity enjoining a crime where none but public and purely political rights were involved and where no conceivable grounds of ordinary equitable jurisdiction existed. The prospect of a more speedy and certain punishment had possibly some deterrent effect upon those who inclined to commit frauds, but the question naturally comes to mind, why did not the legislature make some provision for such more speedy and certain punishment if it was its desire that disobedience of the law should be punished in that manner? It would seem that the court might well have acted upon the principles it laid down for the guidance of inferior courts in the following language:

"However desirable or convenient it might be to put a stop to criminal practices (in this instance gambling) by invoking the extraordinary writ of injunction, we cannot permit the constitutional and statutory rights of individuals to be thus violated. We cannot allow the writ of injunction to usurp and take the place of the orderly processes of the criminal law which the constitution and the legislature have provided. Such a course as the district judge adopted, if approved by us, would make of a single judge both court and jury in the trial of a criminal action whose sole object is to punish one for committing a crime; and if a defendant refused to obey his injunctive order, there could be no redress from a sentence for contempt imposed for its violation. Such an unlimited power is too great to confer, at least it has not yet been intrusted, to any judge or court by the constitution or laws of this state." [1]

Are not these same observations fairly applicable to two judges who form the majority of a court even though the court be the highest judicial tribunal in the state? The court might also have said that the primary function of a court is the exercise of judgment, that of the executive, action, and that in cases where the law is clear, simple and positive, where there is no need of construction, and no difficulty in the application of the law to facts, the naked enforcement of the law becomes purely an executive function. The truth is that the court by the process of injunction is as helpless as the legislature is helpless to compel enforcement of the law. The nature of the case requires reliance, first, upon the integrity and law-abiding inclination of executive and administrative officers; and secondly, upon penal sanctions.

In another aspect, even assuming that

[1] People *ex rel.* L'Abbe *v.* District Court, 26 Colo. 397.

the court has the jurisdiction claimed for it, the issuance of the writ of injunction under the circumstances might well be considered of doubtful justification. In order to call for the exercise of the extraordinary prerogative power of the court not only must "the liberties of the people" be endangered, but the danger must be exigent.[1] Let us test the circumstances of the case by that requirement. The danger if any, consisted in the possibility of the will of the people being defeated by the causing of a candidate or candidates to appear to have received a plurality of the legal votes who in fact did not, and thereby to become entitled under the statutes to a certificate of election and to hold office until by the methods provided by the constitution or by legislative enactment the right to it is disproved. But what constitutes the exigency of such a danger? It is not in the fact that the law provides no remedy except by appeal to this extraordinary prerogative jurisdiction of the supreme court. The law does provide a remedy by contest or by *quo warranto* proceedings. Neither does the exigency consist in the number of threatened illegal votes. 10,000 fraudulent votes will not create an imminent danger to the public liberties unless they change a minority into an apparent majority vote. On the other hand 100 or 10 or conceivably even one fraudulent vote may have that result. Furthermore the court cannot anticipate the political judgment of the people. It cannot anticipate whether the popular vote will be evenly divided among candidates for the same office or widely divergent in its distribution. The constitution of Colorado anticipates and provides for the possibility of a tie vote for governor and other officers. Therefore how can the supreme court predicate in advance that there is not an exigency, and therefore refuse to issue its injunction when called upon to do so and when in any part of the state there is any threatened fraud whatsoever?

In the recent Wisconsin case of State *v.* Houser [1] it is said:

"It is not sufficient, however, that the question be *publici juris*, that it affect the liberties of the people, and that it be of sufficient public importance to move this court to exercise its original jurisdiction, but it must also appear that there is no other efficient and adequate remedy in order to call for the interposition of the equitable powers of the court. In this respect the same rule applies to this court as to trial courts. It is now to be considered whether the legislature has afforded another remedy."

The Colorado legislature has provided a detailed and complete plan for the trial of contests over the right to office. Notwithstanding this remedy afforded by the statutes, the court, having discovered, upon a partial and indeterminate investigation as an incident to its hearings upon contempt proceedings to which the candidates were not parties, that the election returns from certain precincts were tainted with fraud, ordered the canvassing officers to exclude such returns from its count and treat them as naught, and that certificates be issued to candidates having the highest number of votes after their exclusion. Observe that the entire returns from these precincts were ordered to be excluded from the count. No attempt was made to ascertain and separate or otherwise determine the number of legal votes. The court had previously declared the law to be that the canvassing officers had no discretion "to go behind the returns, to reject votes, or otherwise inquire into the validity or conduct of the election." [2] In consequence of the court's order certificates of election were issued to certain candidates who would not, except for the exclusion of such returns, have received certificates. In defense of this action it was said that it

[1] Wheeler *v.* Irrigation Co., 9 Colo. 248; Att'y Gen'l *vs.* R.R., 35 Wisc. 425.

100 N. W. Rep. 964.

[2] Kindel *v.* Le Bert, 23 Colo. 398.

would not affect the rights of the candidates, which could still be determined by subsequent contest or other proceeding before the proper tribunal; that it had the effect merely of changing a rule of evidence; that is, it imposed the burden of instituting a proceeding to try the right to the office on one candidate instead of another. It merely determined which candidate had a *prima facie* right to the office. In other words the court did not pretend to say that the party to whom it caused a certificate of election to be issued had a good right or title to the office. Confessedly upon a contest before the legislature or other tribunal it might develop that the certificate of election had been issued in compliance with the mandate of the court to a candidate who failed to receive a plurality of the legal votes. It will be remembered that the purpose for which the court exercised its extraordinary jurisdiction in issuing its injunction before the election was to prevent if possible a defeat of the will of the people by fraud and violence intended to result in certain candidates appearing to receive a plurality of the votes and thereby becoming entitled to certificates of election when in truth they received less than a plurality. How is this peril removed when the court itself without any complete or final judicial inquiry arbitrarily causes not only the fraudulent but also the legal votes of whole precincts to be disregarded and certificates of election to be issued to persons other than those who would, but for the court's interference, receive them in due course of law, and whose right or title to the certificates or to the office the court does not have the power nor does it even pretend to prejudge? When such inherently arbitrary action by the court results in changing or determining the political complexion of a legislative body, of the court itself and of a governor, how long will the court be permitted to remain outside of the arena of politics? If we must choose in this matter between the peril of fraud at the polls and the peril of such exercise of power by the court, surely few will hesitate to choose the former.

The action of the supreme court of Colorado relating to the late election is, as the writer believes, one illustration among many to be found in the reports showing how desirable it is that there should prevail a more distinct and historically correct conception of the function of the judiciary. We are prone to lose sight of the reasons for the limitations upon its power, which the great statesmen of earlier days conceived to be of first importance.

DENVER, COL., Feb., 1905.

The Green Bag

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Communications in regard to the contents of the Magazine should be addressed to the Editor,
S. R. WRIGHTINGTON, 31 State Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THOUGH the transition from law to politics moves Mr. Joline to regret in the case of Van Buren, it is a tendency which laymen as well as the Bar have always appreciated. The criminal prosecutor stands on the boundary of the two professions, but it has sometimes been thought that sympathy for the defeated breeds public hostility to the successful public prosecutor. The election of last fall, however, in two notable instances proved that faithful discharge of duty brings public endorsement and political promotion to even the state's attorney. In recognition of the position their legal work has brought we have deemed it appropriate to publish sketches by associates at the bar of Governor Folk and of Governor Deneen.

It is not without significance when a partisan wins the unqualified approval of reformers and independents and it is, therefore, peculiarly fitting that one of the men who realized in Chicago one of the most successful efforts of municipal reform should contribute an estimate of Governor Deneen. Mr. Smith is a native of Pennsylvania though for most of his life a resident of Illinois. He attended Oberlin College and received his legal education at the law schools of Northwestern and Yale Universities. His early experience in practice was as reporter of decisions. He was later professor of law of Real Property at Northwestern University. Since 1885 he has been in active practice in Chicago and is now a member of the firm of Peckham, Smith, Packard and ApMadoc. His work has been mainly in real estate and corporation law, but for the last two years he has been special counsel for the City of Chicago in the litigation involving the street railways of the city and the negotiations for settlement with the traction companies.

EDWIN BURRITT SMITH

It is seldom that a question of international policy involves such important changes in the practice of law as that raised by the recommendations of President Roosevelt and Commissioner Garfield for centralized control of corporations engaged in interstate commerce. The interest of the profession is already being evidenced by discussion in legal periodicals, one of which by Professor Wilgus of the Law School of the University of Michigan is reviewed in this issue. The opinions of men who have guided the development of some of the great corporations which are the cause of the demand for federal control should be of great interest to the Bar. We are fortunate therefore, in persuading two of the most eminent corporation lawyers of the country to take time to contribute to this issue brief outlines of the reasons that lead them to oppose or favor this tremendous change. Mr. Parsons formerly of Parsons, Shepard & Ogden, now of Parsons, Closson & McIlvane is generally esteemed the leader of the New York Bar. He has been well known not only as counsel in important corporation matters, notably the formation of the American Sugar Refineries, but as one of the most efficient cross-examiners in the State. He has always found time, however, to take an active interest in civic matters.

JOHN E. PARSONS

Mr. Curtis graduated from Bowdoin in 1875 and received his legal training at the Columbia Law School. As the second member of the

firm of Sullivan & Cromwell he has been intimately connected with most of the great corporate reorganizations. Their work has recently been in the public eye in the affairs of the Panama Canal Company and the reorganization of the American Ship Building Company.

Few crimes have presented more baffling elements of mystery than the murder of Mabel Page and few trials have attracted a keener public interest than that of Charles L. Tucker for that murder at Cambridge, Mass., in January last. Those who followed the newspaper reports seem to have confidently expected his acquittal. So startled indeed was the public at the verdict that a reputable Boston paper in an editorial said:—

William J. Curtis

"What evidence has the government been able to produce with all the skill, all the experience, yes, all the cunning of the chief prosecuting officer of the commonwealth, that would justify this verdict that condemns Tucker to the electric chair?" * * * "It is our opinion that justice demands that a new trial be given and that the verdict of murder in the first degree that has been rendered by the jury should not be allowed to stand as a finality."

Hugh Bancroft

In view of these criticisms of the jury's decision and of the evidence of handwriting and medical experts which played a conspicuous part in the trial it has seemed that an account of the trial by a lawyer and eye witness would be of value to the profession. Mr. Bancroft is a member of the firm of Stone, Dallinger & Bancroft and one of the most successful of the younger practitioners of Boston. He bears the rare distinction of having rowed on a winning Harvard crew and he ranks as Lieutenant Colonel in the State Militia. Since graduation from the Harvard Law School in 1901 he has been constantly engaged in the trial of cases both as one of the counsel for the Boston Elevated Railroad and as Assistant District Attorney for Middlesex County, in which latter capacity he served as junior counsel for the prosecution of the Tucker trial.

Adrian H. Joline

The busy lawyer who takes time from his practice to prepare an analysis of the life and labors of one of his predecessorsd eserves the thanks of his less public spirited brothers. The account of the legal side of Van Buren which is published in this number is founded upon a recent address by the author before the New York State Bar Association. Mr. Joline was formerly of the well-known admiralty firm of Butler, Notman, Joline and Mynderse. He is now the senior member of Joline, Larkin and Rathbone of New York City.

The increasing resort to the courts in our conflicts, social and political, seems to some a panacea, to others a menace, but at the least the precedents from Colorado which are treated in Mr. Hutton's article, suggest a tremendous advance in jurisdiction that deserves our serious consideration. Mr. Hutton graduated from Harvard College in 1895 and from Harvard Law School in 1898, where he was a prominent debater. He has always had a deep interest in constitutional law, and as one of the organizers of The League for Honest Elections, he has been active in the campaign against election frauds in Denver.

William E. Hutton

CURRENT LEGAL ARTICLES

This department represents a selection of the most important leading articles in all the English and American legal periodicals of the preceding month. The space devoted to a summary does not always represent the relative importance of the article, for essays of the most permanent value are usually so condensed in style that further abbreviation is impracticable.

ADMIRALTY (Fellow-Servant Rule)

A BRIEF protest against "The Extension of the Fellow-Servant Doctrine," to the Admiralty by Frederick Cunningham appears in the February *Harvard Law Review* (Vol. 18, p. 294.) The author describes the satisfaction of the bar when it was decided that the common law doctrine of contributory negligence would not be applied in the Admiralty Courts and the corresponding dissatisfaction with a recent dictum of the Supreme Court of the United States in The Osceola, 189 U. S., 158, implying that the fellow-servant doctrine is applicable in admiralty. The author regards such extension of the common law doctrine as unnecessary since the doctrine of *respondeat superior* when properly applied does not have its full force in the admiralty and hopes that when the question is directly presented to the Supreme Court its recent dictum may be reconsidered.

ADMIRALTY (See International Law)

CONSTITUTIONAL LAW (Corporations. Federal Control)

PROF. HORACE L. WILGUS publishes a careful analysis and criticism of Commissioner Garfield's report in the February *Michigan Law Review* (V. 3, p. 264), entitled, "Federal License or National Incorporation" which is of interest in connection with the discussion by Messrs. Parsons and Curtis in these pages. He contends that the objections to the incorporation plan apply with still greater force to Federal license; that it would "stop present business methods making them illegal and provide no law for reorganization;" that it would not touch the most dangerous combination, the holding company. As to the objection to the incorporation plan that federal government cannot confer the power to produce, he contends that it is not necessary that such a power be granted to corporations engaged in interstate commerce, but that if it is, while the United States cannot as Commissioner Garfield contends confer the full legal right to do so within a State without its consent, it can confer the power to do it with consent, and it is highly unlikely that any State would prevent this. As to the policy of incorporation he says:

"As things now are, commerce is carried on by corporations that owe no Federal but only state allegiance; the license plan proposes to continue this; the life of the *individual* who disobeys Federal law may be taken if the law so provides, —but the life of the state-created corporation can not be, except by the state that creates it. We do not believe in this discrimination. Let the corporation that carries on interstate commerce owe as direct and positive allegiance to the Federal government as the individual citizen who engages in such commerce. This is not offensive centralization; it is only justice and fairness; it is the 'square deal' all around; besides, it goes back to first principles,—the government that undertakes to control should operate *directly* on the persons, natural or artificial, to be controlled, and only the government that has adequate power should undertake it. Two ideas dominated the Federal constitutional convention, viz.: that the Federal Powers should operate directly upon all persons everywhere, without consulting state laws or state prejudices, and that the government should have adequate powers to accomplish the duties with which it was charged. Five different times the convention resolved unanimously that Congress should be given power '*to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.*' These were the directions given and observed in formulating the express powers of Congress; these were the ends to be accomplished; the powers given were given to accomplish these ends. The occasion has now arisen for their application to our commercial affairs. To ap-

ply them directly and in the simplest way is in accord with our political principles: to give to the township, the county, the city, the state, the Nation that power which each can best use for the best interests of those directly affected, and by the direct operation of the powers given, on the things to be regulated, has been the dominant political idea of our life from Plymouth Rock to Appomattox, if not from the *Germania* of Tacitus to the *American Political Ideas* of John Fiske. The government under the Confederation was not constructed on this plan,—and failed; the National government is so constructed. Federal incorporation is the National stage; Federal license is the Confederation stage; the Confederation plan did not work. The National plan will."

CONSTITUTIONAL LAW (Interstate Commerce. Regulation of Rates. Federal License)

INTERESTING in connection with Mr. Parsons' argument in opposition to federal control of corporations in this number as supporting his contention of the unconstitutionality of Mr. Garfield's proposal is a thoughtful argument appearing in the *Columbia Law Review* for February (V. 5, p. 77) entitled, "Chief Justice Marshall on Federal Regulation of Interstate Carriers," by E. Parmalee Prentice. It is founded upon an explanation of the exact decision of the early case of Gibbons *v.* Ogden to which recent decisions of the Supreme Court and Mr. Garfield's now famous report have seemed to turn for authority. The author states that "there was nothing new in the establishment of the rule which to most modern readers seems the great achievement of the case, that Federal power over commerce is exclusive. To the extent then under consideration, it had always been so regarded. The case holds that navigation is within the commercial powers of Congress, and that a Federal coasting license is a sufficient authority to navigate the public waters of a state.

It has been common, however, to assume that the decision went far beyond a determination of this narrow issue. It is said that the language of the opinion is unambiguous,—why then should not its words be literally accepted and applied in their natural meaning?

"The answer to this question is not far to seek. The natural meaning of the words is not now what it was when the opinion was written. Within a few years after this decision the whole economic situation was changed by the introduction of railroads. Marshall could in 1824 safely frame his definition of commerce in the broadest terms, because commerce itself was a narrow operation. When easier means of intercourse brought the States closer together, even judges who sat on the bench with Marshall differed under the new conditions, as to the meaning of the language in this case." "The decision in Gibbons *v.* Ogden then related solely to transportation by water; it held that navigation was within Federal control."

"When the court in 1824 held that the Federal power over commerce is indivisible it referred to operations of commerce which had always been considered within this rule. To this doctrine, and to no other, had there been contemporaneous and long continued assent. At the very time, however, that the rule was announced a distinction was made, as has been shown, between transportation and navigation,—Marshall's broad definition of commerce did not include transportation in its relation to the carrier. This is not, and at that time had never been considered as, a part of commerce."

"The policy which Attorney-General Knox in 1902, and Commissioner Garfield still more recently, advocated in regard to interstate commerce as a means of trust regulation was in fact intended by the framers of the Constitution as a means of regulating international relations,—but for international purposes only. In other relations the right of navigation does not come from the Federal Government, and no Federal franchise is needed for its exercise." "Interstate transportation by land was, to a considerable extent, originally instituted and for many years after the adoption of the Constitution, supported by the establishment of monopolies." "Plainly, the public, and apparently the courts, were then far from considering individual control of interstate transportation to be a ground for governmental or judicial interference."

"The Federal Government not only was without power to establish monopolies of interstate transportation, but it could not even interfere with the monopolies of such trans-

portation which were established by the States. Local self-government was the theory of the Constitution. If State monopolies were wrong, it was by the States that they should be abolished. The motion which was made in the Second Congress to permit proprietors of stages employed in carrying the mails, to carry passengers also, was lost as being beyond the power of Congress. Gibbons *v.* Ogden destroyed State monopolies of coasting navigation, but had no effect on State monopolies of interstate transportation by land, or by water when not conducted coastwise."

An opportunity for expansion of this earlier doctrine was afforded by the decision in Cooley *v.* Port Wardens which applied literally the rule of Gibbons *v.* Ogden and held that "in all matters which demand a single uniform rule or as the doctrine is broadened by later cases in all matters which admit of a single uniform rule the silence of Congress is equivalent to a declaration that commerce shall be free." "Before this decision interstate carriers were within the power of Congress only in their relation to shippers and travellers. As carriers merely, Congress had no power over them." The influence of the Civil War in expanding jurisdiction was soon felt in a broader doctrine but even then it was conceded that the carrier's rate was not subject of regulation.

"Federal control of interstate carriers as such, and from the standpoint of the carrier, has therefore grown from small beginnings to its present extent since the date of these cases. It has, however, at all times been understood that the primary relation of the carrier is to the State in which it operates. Federal control relates directly to but one of its functions and to the carrier only because of, and in respect to, its exercise of that function. Amid all changes therefore this one rule has always stood unquestioned and unquestionable, that matters relating to the ownership of facilities of transportation have been exclusively within State jurisdiction."

"It is in this respect that the decision in the Northern Securities case makes a complete break from the rules which have controlled the decisions of the Supreme Court, the practice of Congress, and the conduct of States and individuals during the whole period which has elapsed since the adoption of the Constitution.

The report of the Commissioner of Corporations goes however far beyond any expressions of this case. Following suggestions previously made by the Industrial Commission, and by Mr. Knox, he urges that the Federal Government deny the right to engage in interstate commerce, to all corporations, except such as shall voluntarily comply with Federal requirements as to corporate organization and management. A similar suggestion as to Federal powers was made on April 22d, 1886, during the debate on the Interstate Commerce Act. The Senate then refused to take the suggestion seriously and the consideration of the subject ended with the statement that the reply made to this suggestion, 'undoubtedly demolished the proposition.'"

CONSTITUTIONAL LAW (Obligation of Contracts. Reserved Right to Repeal Charters)

THE first instalment of an elaborate discussion of the "Limits of the Power of a State under a Reserved Right to Amend or Repeal Charters of Incorporations," by Horace Stern appears in the January *American Law Register* (V. 53, page 1). It begins with an elaborate analysis of Fletcher *v.* Peck and the Dartmouth College case, in explanation of the enactment of the common provision for the amendment or repeal of the charters of corporations. The author shows that if the grant of franchise constitutes a contract the reserved power is the reservation of an authority to change a particular contract and is in no sense the creation of a new and distinct power. The State cannot regulate such property and rights of the corporation as are not given to it by its charter, to any greater extent than the similar property of other citizens. It is admitted, however, that the same result can be accomplished by imposing it as a condition precedent to the continued exercise of its franchise.

"This latter power is enormous in its extent; it is too dangerous a power for any legislature to exercise." "Realizing the perils of such a condition, and frequently confronted in specific instances by unfair exercises of this power, the courts have often refused to apply to the cases the principles logically controlling them."

"It is submitted that the proper solution of the problem is to be found, not in illogical decisions, but, as has already been suggested, in such constitutional or statutory limitations upon the exercise of the reserved power as will prevent unjust action by the legislature, and will protect the property and interests of stockholders, bondholders, and mortgagees. The constitution of every state in the Union should contain a reservation of the right to revoke, amend, or repeal charters, but attached to such reservation should be the provision, not less fundamental, that this reserved power should never be exercised in such manner as in the opinion of the judiciary would be unreasonable—that is, in such manner as would work injustice to corporators or to third persons under the facts in any particular case."

CONVERSION (See Trover and Equity)

CORPORATIONS (See Constitutional Law)

EQUITABLE CONVERSION

A FURTHER instalment of Professor Langdell's learned treatise on "Equitable Conversion" is printed in the February *Harvard Law Review* (V. 18, p. 245). It is impossible to adequately summarize this important essay in the space at our disposal.

EVIDENCE (Expert Witnesses)

A DEFENCE and criticism of the expert witness, along the lines of Mr. MacMurdy's article reviewed in our January Number, entitled, "The Expert Witness," by D. C. Westenhaver, is printed in the *Albany Law Journal* for January (V. 67, p. 2) which is interesting in connection with Mr. Bancroft's suggestions in his account of the Tucker trial in this issue. The author believes there is necessity for this kind of testimony if we are to retain our jury system. Of the handwriting experts he says:

"The expert witness in matters of handwriting is the great bugbear to judges, lawyers and laymen. Indeed, able judges and thoughtful lawyers have gone so far as to declare that expert testimony in regard to matters of handwriting is not evidence at all in any proper sense of the word and should not be laid before a jury. But, should it be excluded entirely? And if not, where shall one draw the line?"

"Now, all evidence as to the identity of handwriting, except that of the person who saw the document written, is a mere matter of opinion; and the question at last is, Whose opinion shall be received in evidence and in what way the witness must be qualified to express it? One way, the one to which no objection is urged, the one most universally in use, whereby the witness has qualified himself to express an opinion, is by having seen the reputed author write, or having seen or received writings which the reputed author admitted or recognized as having been written by him." "The next step is by comparison of handwriting, and herein is the basis for the introduction of expert testimony. It is founded on a comparison between specimens of handwriting admitted as genuine and the one in dispute, and I can see no reason why it is not of equal or higher credit than the other kind."

"Handwriting, even if artificial, is to some extent a reflex of the nervous organization of the writer. There is a distinctive characteristic, which, being the reflex of the nervous organization, is more or less independent of the writer's will, and shows in his handwriting, and the aid of one specially trained in discovering the presence or the absence of these characteristics and the similarities or dissimilarities, seems to me not only unobjectionable, but that to exclude it would justly bring on the law the reproach that it shuts its eyes to the truth."

Of the causes of the admitted evils of expert testimony he says:

"The reasons why the expert witness is so often merely a hired advocate, are, it seems to me, first, the unlimited freedom given to each party to select and call, without limit as to number, his own expert witnesses; second, the absence of any regulation as to the amount of pay or the manner of making it."

While admitting the scandal and reproach that some witnesses have brought on expert testimony he doubts if they have seriously interfered with the course of justice for "juries have much more sense and shrewdness than those unfamiliar with trial practice are prepared to believe."

"In conclusion, it may not be amiss to call

attention to the fact that its system of evidence has stood the test of time and experience better than any other department of the English law. The substantive law itself has changed greatly in the past two centuries and is destined to change even more in the years that are to come. Methods of pleading have been entirely changed until the time-honored system of common-law pleading has been abolished in England and all her colonies and remains in force in not more than five States of the Union. But in two hundred years there has been but one important or fundamental change made in the law of evidence, and that has consisted in removing disabilities on the competency of witnesses, in order that even the doubtful evidence of interested persons might not be kept from the jury."

INTERNATIONAL LAW (Contraband. Food Stuffs)

THE right to treat food stuffs as contraband is discussed by Edwin Maxey in the *Law Quarterly Review* for January, (V. 21, p. 35) under the title of "Russian Raids on Neutral Commerce," which the author concludes as follows:—

"We discover a definite tendency toward an increase of neutral rights. This is due partly to the increased ratio of neutral to belligerent trade and partly to a general desire to ameliorate the harsh conditions of war which has manifested itself in many directions and particularly as regards non-combatants. So that in the present stage of development of international law the weight of authority is clearly against considering food-stuffs as contraband of war; and it is doubtful if neutrals will ever permit the opposite rule to be revived—their opposition to it on the ground of both sentiment and interest is too strong. If this conclusion is correct, the Russian seizures of neutral ships laden with food-stuffs, and such was the cargo of the most of those seized, billed to neutral ports such as Manilla or Hong Kong constitute an extreme stretch of the power of a belligerent, which cannot be said to be justified by international law. Were the goods billed to the commissary department of the Japanese army their seizure would be warranted, or if billed to any one else but captured under circumstances which made it clear that they were destined for use by the Japanese army they could be lawfully seized. But the location of the Russian fleets, particularly the one in the Red Sea, was such as to make it impossible for them to say with any degree of assurance that the goods were not going to the points to which they were billed."

Since the article was written a higher court at St. Petersburg has largely corrected the judgments of the prize court at Vladivostok.

INTERNATIONAL LAW (Destruction of Prize)

"THE right of a belligerent to destroy a captured prize" is considered in the February Number of the *Harvard Law Review* (V. 18, p. 284), by Francis J. Swayze. After a careful examination of the authorities he concludes:

"An examination of the authorities shows that although the right to destroy a neutral ship captured as a prize is perhaps not expressly denied, it is not established." "It seems that Calvo is right in saying that the publicists establish a distinction with reference to the character of the vessel, and make the legality or illegality of the act of destruction depend on the hostile character or the neutrality of the property destroyed."

"The weight of authority is in favor of the view that neutral ships ought not to be destroyed before condemnation. This also accords with the modern tendency to respect private property at sea as it is respected on land, and with reason. The right of destruction rests upon the theory that the former owner loses nothing; since the property destroyed is subject to condemnation, he has nothing to gain by proceedings before a prize court; this is so only in the case of a lawful prize. In the case of an enemy's vessel, the hostile character of the vessel makes it lawful prize, and this is a fact readily determined, about which there can be little dispute. A neutral vessel, on the other hand, is lawful prize only under exceptional circumstances, and it requires a somewhat nice judgment to determine whether or not those circumstances exist,—a judgment which, on general principles, ought not to be entrusted to her captor. Civilization and reason plead in favor of the neutral, and considerations of expediency on the part of belligerent governments are on the same side. The risk of unnecessary complications and even of war is so great, and the

injury to the enemy so indirect, that the power of destroying neutral vessels before condemnation ought not to be entrusted to the commanders of warships."

INTERNATIONAL LAW (Nature of. Jurisprudence)

THE Austinian doctrine that International law is more ethical than legal in its nature is refuted by James B. Scott in an article in the *Columbia Law Review* (V. 5, p. 124) entitled, "The Legal Nature of International Law." He submits that "the mere form of the sanction is immaterial, and that the nature of law cannot well depend upon the whim or ability of a sheriff or the mere success or failure of an army in the field. If the principle is binding at all—that is, if nations admit that a principle binds them, it is of no great moment whether the force is moral, ethical, or physical." "If nations enforce a given tenet of international law as law every time it comes into play, it must surely be because it is law and binding." He further contends, "that the sanction although usually accompanying is not absolutely indispensable to the conception of law." He submits that it is possible that two systems of law, municipal and international, may coexist and that each may be enforced in a different way corresponding to the nature of one and the other. He admits that in international law when the right in litigation does not arise in the Municipal Court of one or other of the nations, but arises between two given nations acting in their representative capacity, no legal sanction of the kind required by Austin exists at present in the law of nations, but that obedience to a principle of international law results from international public opinion or finally from the most formidable sanction known to nations,—War.

JURISPRUDENCE (Development of Law)

THE address of Prof. Joseph H. Beale, Jr., before the St. Louis Congress of Arts and Sciences on the "Development of Jurisprudence During the Past Century," is printed in the February *Harvard Law Review* (V. 18, p. 271). Of the changes in the "science of justice" as practiced in civilized nations he says:—

"The spirit of the time molds and shapes its law, as it molds and shapes its manner of thought and the whole current of its life. For law is the effort of a people to express its idea of right; and while right itself cannot change, man's conception of right changes from age to age, as his knowledge grows. The spirit of the age, therefore, affecting as it must man's conception of right, affects the growth both of the common and of the statute law. But the progress toward ideal right is not along a straight line. The storms of ignorance and passion blow strong, and the ship of progress must beat against the wind. Each successive tack brings us nearer the ideal, yet each seems a more or less abrupt departure from the preceding course. The radicals of one period become the conservatives of the next, and are sure that the change is a retrogression; but the experience of the past assures us that it is progress.

Two such changes have come in the last century. The eighteenth had been, on the whole, a self-sufficient century; the leaders of thought were usually content with the world as it was, and their ideal was a classical one. The prophets of individuality were few and little heeded. But at the end of the century, following the American and French revolutions, an abrupt change came over the prevailing current of thought throughout the civilized world; and, at the beginning of the period under discussion, the rights of man and of nations become subjects not merely of theoretical discussion but of political action. The age became one of daring speculation. Precedent received scant consideration."

"Starting from this point the spirit of the time for more than a generation was humanitarian and individualistic." "It was rather a destructive than a constructive age and its thinkers were iconoclasts, but a change beginning with the second third of the century was gradually accomplished." The application of steam and electricity made association the rule in business and as it became more effectual there it became more readily accepted in social and political affairs until we have become "more interested in the rights of men than in the rights of man; the whole has come to be regarded as of more value than the separate parts."

As a result he finds that not merely English

law but universal jurisprudence has developed in the direction of the progress of thought. He finds the most striking example of this in international law, more especially in the extraordinary development of the law of neutrality. His conception of the modern concert of the powers is strikingly like that of Dr. Taylor's in his article in our February Number. Like lines of progress he finds in the course of the movement for codification.

"This failure of the hope of the individualistic codifiers and the change in the spirit of the age have affected our ideal of codification. The purpose of the modern codifiers is not to state the law completely, but to unify the law of a country which at present has many systems of law, or to state the law in a more artistic way. In other words, the spirit of the modern codifiers is not individualistic but centralizing." "It does not do away with judge-made law; it does not enable the individual to know the law for himself; its only claim is that it facilitates the acquisition of knowledge by the lawyer by placing his material for study in a more orderly and logical form. The cherished ideals of the reformers of a hundred years ago have been abandoned, and an ideal has been substituted which is quite in accordance with the spirit of our own times."

The most characteristic development of the law during the last fifty years has been in the direction of business combination forming great commercial associations into legal entities wielding enormous commercial power. If they had been formed seventy-five years ago the spirit of the age would have left them free to act as they pleased. "The principle of freedom of action, the courts in all questions now agree, rests upon the doctrine that the interests of the public are best subserved thereby, and applies only so far as that is true. When freedom of action is injurious to the public it not only may be, but it must be, restrained in the public interest. That is the spirit of our age, and that is the present position of the law when face to face with combinations such as have been created in the last generation."

Of the development of legal scholarship during this period he says:—

"The impulse given to legal study by the work of Savigny and his school has in the last generation spread over the civilized world and profoundly influenced its legal thought. The Italians, the natural lawyers of the world, have increased their power by adopting his principles. In England a small but important school of legal thinkers have followed the historical method, and in the United States it has obtained a powerful hold. The spirit of the age, here too, has supported it. We are living in an age or scientific scholarship. We have abandoned the subjective and deductive philosophy of the middle ages, and we learn from scientific observation and from historical discovery. The newly accepted principles of observation and induction, applied to the law, have given us a generation of legal scholars for the first time since the modern world began, and the work of these scholars has at last made possible the intelligent statement of the principles of law."

PRACTICE (Dissenting Opinions)

THE public discussion of some of the recent decisions of the Supreme Court of the United States rendered by a divided Court has given rise to consideration of the value of dissenting opinions. Hon. Emlin McClain of the Iowa Supreme Court writing of "Dissenting Opinions" in the February *Yale Law Journal* (V. 14, p. 191), believes that the objection that such obvious divisions of opinion tend to bring discredit on the Court in the eyes of the public is less real than an apparent unanimity would be.

"One of the most significant features of our entire judicial system is the publicity with which every stage in the proceeding before a court of any character whatever is attended. To suppress all recognition of the fact of difference of opinion among judges would probably lead to the disquieting belief that the real uncertainties of litigation are much more numerous and dangerous than the actual facts would justify."

Of the function of the written opinion in our system of law as distinguished from the method of civil law he says:—

"It may well be suggested at once that the object of written opinions is not to satisfy unsuccessful litigants that the conclusion of

the court is right; the recognition in the common law system of the force and effect of precedents renders it necessary that a court whose decisions are to be given weight as precedents shall announce, not for the satisfaction of the parties concerned in the case, but for the guidance of those whose business it is to know and apply the law, and with as great definiteness as practicable, the exact rule of law which is applied in the case, in order that its scope and limitations, as applicable to other sets of facts in some respects analogous, may be understood."

The practice of giving reason for their opinion has been peculiar to English law from its earliest stages, "and the American practice of announcing dissenting opinions is merely the survival of the English practice by which each judge expressed his views of the questions involved in the case."

In conclusion he says:—

"The real problem in the application of a precedent is to determine what effect will be given to it in the decision of other cases to some extent analogous, but not identical, and for this purpose a dissenting opinion is often of as much value as the majority opinion, for it helps by contrast to make distinct the limitations which are likely to be recognized to the general statement of a rule of law by the majority. The writing of dissenting opinions has in many cases, no doubt, been unwise and injudicious. There is, perhaps, even greater danger of over-elaborating a dissent than an opinion which expresses the views of the court."

The author concludes that:—

"First, where the difference of view in the court is as to questions of fact, there should, in general, be no dissent whatever. The conclusion reached by the majority as to what facts are established ought to be announced without qualification as to the conclusion of the court, for such conclusion can be of no interest save to the parties concerned.

Second, the mere announcement of a dissent without any reason assigned for it, or any opinion pointing out the particular question as to which the dissenter has disagreed from the majority, is of no advantage to anyone unless the views presented in the majority opinion relate to a concrete question, so that the announcement of a dissent sufficiently indicates the views of the dissenters.

Third, the writer of the dissenting opinion should confine himself to a brief statement of the particular questions as to which the opinion of the majority is unsatisfactory. It is doubtful if in any case an elaboration of argument, illustration and authority will strengthen the opposition to the prevailing opinion. The writer of the dissent has a decided advantage in that his work is in the main critical and destructive rather than constructive.

The advantage which the dissenter has in stating his views against the majority explains perhaps the conspicuous fact that as a rule the dissenting opinion seems more reasonable and cogent than the majority opinion in cases where a dissent is written. The critic may select his point of attack and need not make a consistent exposition of either the law or the facts of the case. Dissenting opinions should, therefore, be read with caution lest a merely plausible argument, based on partial views of the law or facts, shall be allowed to lead the mind away from a fair consideration, in all its bearings, of the case which was before the court for its decision."

THE address of V. H. Roberts before the New York Bar Association on "Dissenting Opinions" is printed in the *American Law Review* of January (V. 39, p. 23). It is entirely in accord with the views of Judge McClain.

PROCEDURE (New Trials, Exceptions)

"THE Abuse of New Trials" is the subject of a brief article by Everett P. Wheeler in the February *Michigan Law Review* (V. 3, p. 257). The author pleads for the application to the common law of the equity and admiralty practice of sending up the whole case on appeal for a decision on the merits. He observes that this was originally the theory of the common law.

"The object of the common law system of pleading was to spread the case of the parties upon the record as fully as possible. The purpose of the plea, the replication, the rebutter, and all the other pleadings was to present upon the record a single issue to be

decided by the jury. When their verdict was rendered, it disposed of the issue of fact which was raised by the pleadings, and then judgment was rendered upon the whole record." "When the statute was passed allowing bills of exceptions, and when public sentiment seemed to call for a more lax system of pleading, the merits of the controversy between the parties ceased to appear upon the record, except in so far as they were incorporated therein by a bill of exceptions. When they came to appear in this form, the appellate courts at an early date abandoned their original and proper function of rendering judgment upon the whole record, relegated the decision of the questions of fact arising upon this record, to the court of first instance, and therefore, instead of deciding the cause finally upon the writ of error, remanded it for a new trial. Out of this English practice the practice in common law cases in the United States developed. Our courts, however, have become more technical than the English courts of the eighteenth century. Anyone who will, for example, examine Burrow's Reports, will find that new trials were then granted by the King's Bench much less frequently than they now are by most American appellate courts."

"The reason for the disposition of courts to grant new trials in cases tried before a jury, probably rests upon the impression that under the Constitution of the United States and the Constitutions of most of the states, there is some peculiar sacredness in a trial by jury. No doubt the right of trial by jury is guaranteed by these Constitutions. But where is there any Constitutional guarantee of the right to several trials by jury? That right, as has been shown, did not exist at common law."

TORTS (Right of Privacy)

"THE Right of Privacy and its Relations to the Law of Libel" is the title of an article by Elbridge L. Adams in the *American Law Review* for January (V. 39, p. 37). The author relates the original suggestion of this right in a legal periodical, its subsequent discussion in legal and other journals and the attempt to enforce it in courts with special reference to the recent Roberson case in the Court of Appeals of New York of which he says:

"What the court decided, and all that it decided, was that there is no such thing within the history or principles of jurisprudence, as a right of privacy which will restrain an unauthorized publication which is merely offensive to the feelings and which does not injure the property or the reputation.

"The New York Court of last resort, like the Federal court, and the courts of Michigan and of England, was unwilling to take upon itself the responsibility of extending the law of libel beyond the well fixed limitations which several centuries of judicial pronouncements have determined. It turned the whole matter over to the legislature, and there it must finally be adjusted. The practical question therefore seems to be: How far may the legislature, within the limitations of the Constitution, restrain the growing license of the press?

"It will probably not be seriously questioned that the American newspaper press, with a few honorable exceptions, has far over-stepped the bounds of decency and propriety in its betrayal by word and by picture of the private life of individuals."

In this connection he gives an interesting summary of the recent Pennsylvania statute which has received such vigorous condemnation from the newspapers of the whole country showing that "there does not seem to be anything in the law which creates new obligations except the requirement of the publication of the names of the owners or proprietors and of the managing editor in every issue." He says that the wildest misrepresentations of the nature and effect of the law have been made in the very papers which denounced the New York Court of Appeals for its decision in the Roberson case. In conclusion he says:—

"It is evident, therefore, that there is a growing demand on the part of society for some protection in law against the violation of the right of privacy. The idea is an attractive one to the social reformer, but to the lawmaker, who seeks to embody the idea into a statute, the subject is surrounded with serious difficulties. On the one hand, he must see to it that such a statute is general and is made to operate upon all, and to protect all, alike. Advertisers, newspapers and periodicals of all kinds, must be brought within its purview. On the other hand, he must avoid conflict

with the constitutional guaranty of the freedom of speech and of the press. He must define in some way who are private persons, and must make exceptions which will permit a free and untrammeled discussion of the fitness and capacity of candidates for public office, and of those holding public office."

Such a statute, however, it would seem very difficult to frame and it is certain that no such law has yet been suggested by the advocates of it.

TORTS (Unfair Competition. Motive)

AN article by Prof. William Draper Lewis entitled, "Should the Motive of the Defendant Affect the Question of his Liability—The Answer of One Class of Trade and Labor Cases," is printed in the February *Columbia Law Review* (V. 5, p. 107) in which the author concludes that "though there are cases to the contrary, the rule is to consider the motive of the defendant as a factor in determining the question of his liability for the harm which his act has caused the plaintiff." "There is no positive evidence in any trade and labor case that courts ever regard the ultimate motive of the defendant." The judges who take motive into consideration also hold that "if the natural consequences of the defendant's act was the harm of which the plaintiff complains, the defendant is liable unless he can show legal excuse. But if one natural consequence of the defendant's act is taken into consideration to determine the question of his liability, why not all other natural consequences? And if we should take into account all the natural consequences of the act, may it not be asked what difference should it make that the defendant desired those consequences or did not desire them? In other words, what difference should it make that a particular consequence was or was not the motive of the defendant? Again, if the only consequence of an act is harm to another, should the law in any case determine the actor's liability to the injured person by the pleasure or pain which he, the actor, obtained from contemplating the harm he had caused? If this should not be taken into consideration, it means that malice in the sense of ill-will should have no effect on the defendant's liability.

"In most cases there are not any natural consequences of the defendant's act, except perhaps the harm to the plaintiff, which are not the desired results of that act. This is true of all the trade and labor cases falling under the class which we have discussed. In these cases, it does not make any difference in the legal result whether one takes into account motive in the sense of purpose, or, disregarding motive, looks at all the natural consequences of what the defendant did. All the cases which have been cited in which motive was regarded as material, would have been decided the same way had motive been disregarded, but the consequences of the defendant's act considered. When, however, we have a case in which some of the consequences, though not desired, are nevertheless a natural result of the act, there may be and probably will be a different legal conclusion reached in accordance with whether we regard motives or consequences as the factor to be examined in determining the defendant's liability. So also in cases where the natural consequences of the defendant's act taken as a whole would excuse the defendant for the harm he has done the plaintiff, the court may hold the defendant liable or not according as to whether malice in the sense of ill-will is considered as affecting liability."

TROVER (Nature and History of)

A THOUGHTFUL analysis of the modern law of trover since the simplification of forms of action in England, which is of value to American lawyers, entitled "Observations on Trover and Conversion," by John W. Salmond appears in the *Law Quarterly Review* for January, (V. 21, p. 43) in which he shows that the ghosts of the old forms of action "still haunt the precincts of the law" and that "the law of trover and conversion is a region still darkened with the mists of legal formalism from which no man will find his way by the law of nature or with any other guide save the old learning of writs and forms of action and the mysteries of pleading." He explains that the action of detinue which originally was the remedy for a conversion was unsatisfactory because the "defendant had the right of defending himself by wager of law, a form of licensed perjury which reduced to impotence all pro

ceedings in which it was allowable." Thence arose the action of trover as a remedy in which the plaintiff might have the benefit of the verdict of a jury.

"No sooner, however, has trover become thus established than it begins to extend its boundaries, and it very rapidly succeeds in appropriating the whole territory both of trespass and of detinue. It becomes a universal remedy applicable in all cases in which a plaintiff has been deprived of his goods, whether by way of taking, by way of detention, or by way of conversion in its proper and original sense. In every case of wrongful taking the plaintiff might elect between trespass and trover, and in every case of detention he might elect between detinue and trover."

"Had the law developed logically it would have maintained to the end the position that an unlawful taking is merely evidence of a conversion, just as an unlawful detention is. This, however, was not so. At an early period we find it said without scruple or qualification that a tortious taking *is* a conversion, although to this day we continue to say of a tortious detainer that it is merely *evidence* of a conversion. This is an obvious lapse both from the history and the logic of the matter. If we use the term conversion in its original and strict sense, it is clear that neither a taking nor a detention is anything more than evidence; each amounts at the most to a constructive conversion, a conversion in law though not in fact. While if we adopt the wider sense, and mean by conversion any deprivation of property, it is clear that both a taking and a detention are actual conversions, if there is no lawful justification for them, and that there is no distinction to be drawn between them. To say that taking is a conversion, but that detention is merely evidence of one, is to use the term conversion in two diverse senses, its old and its new; it is to retain the old historical theory of trover in one case, and to abandon it in the other."

"There is yet another respect in which the abolition of forms of action enables us to rationalize and simplify the definitions and nomenclature of this branch of the law. Under the old practice no person could sue in trover unless he had, at the time of the wrong complained of, a right to the immediate possession of the chattel. That he was the owner of it was not enough; he must have been in actual or constructive possession of it. For reversionary ownership, therefore, trover was not the appropriate remedy, but a special action on the case analogous to trover but not identical with it. There is no reason, however, for the retention of any such distinction in modern law. The difference between a present and a reversionary interest may be very material with reference to the measure of damages, but it is irrelevant with respect to the nature of the injury committed. If a reversionary owner can show that he has been deprived of his property by the unlawful interference of the defendant, he has a good cause of action against him, and there is no subsisting reason why we should call the wrong so suffered by him by any other name than that of conversion."

TRUSTS (Bank Deposits)

A CLASSIFICATION of the authorities relating to the nature of deposits held in trust by a Bank in the light of the more recent decisions, entitled the "Ownership and Recovery of Trust Deposits," by Albert S. Bolles is printed in the *Yale Law Journal* (V. 14, p. 200).

THE LIGHTER SIDE

A YOUNG lawyer in a temporary fit of reminiscence sends us the following:—

Shortly after hanging out my shingle, if one may so call telling the Janitor in a big office building to put one's name on the directory, Mrs. Brown with whom I had a slight acquaintance, called.

I wont say she was my first caller but she was well to the head of the list and my heart warmed when she told me she "had a case for me." It seems a friend of hers, Mr. Ohl, a German, who spoke little English had confided to her that he had loaned a Mrs. Weiss $275.00 and had been unable to collect. I suggested that Mr. Ohl call on me and Mrs. Brown remarked she had called to arrange for that—would I let her have one of my cards for Mr. Ohl so he could find me? I did so.

Three months later I happened to meet Mrs. Brown who stopped me in the street and chatted for awhile on several subjects. As I had never seen Mr. Ohl, I gently steered the conversation his way. "Oh yes," said Mrs. Brown, "he collected his money." "How?" I inquired. "Well," she said naively, "I gave him your card and told him to call on you. He took your card to Mrs. Weiss, you remember, she owed the money? He told her he had retained you and unless she paid at once, you would arrest her. Mrs. Weiss was much alarmed and almost collapsed but Mr. Ohl waited and when she revived, she gave him $200.00 cash and paid him the balance the following week. He was very lucky to get his money, was he not?"

"Yes," I said. "He was very lucky."

JUDGE R. W. CLIFFORD of Chicago is proverbial for his original humorous stories, and one of his latest is told of a corpulent German who came rushing into the circuit court one morning before court was called and said:—

"I vant to git varrant for a man to kill a tog."

"Well, my man, you don't come to this court to get warrants in cases of that kind. If you want the dog killed you should go to a police court," said the judge.

The German started to leave, when the judge inquired in an interested manner:—

"Did the dog bite you?"

"Yeas, he bit me."

"Well! was the dog mad?"

"Vas de tog madt? No, I vas madt."

—*Boston Record.*

A JOVIAL, well-meaning Irishman, plaintiff in a suit for personal injuries against the city, in his eagerness to lay stress on the extent of his injuries, perpetrated an Irish "bull" which apparently did him no harm. After leading him, in direct examination, to tell of the circumstances under which the accident occurred, and his subsequent journey in an ambulance to his home, his counsel asked him, "Now, Mr. Murphy, were you able to sleep at all the night after this accident happened?" To which Murphy replied, with great emphasis, "No, sor, nor the night before!"

"WHO are those students with books under their arms?"

"They're taking up the law."

"And what's the old man in a gown, back of that bench doing?"

"Oh, he's laying it down."

TEXAS' highest court has decided that in a trial for homicide it is error for the presiding judge to leave the court room and court house for eight or ten minutes while counsel is addressing the jury though he leave his daughter on the bench.

A LAWYER was one morning sitting in his office in a small town in North Dakota, calmly smoking a corncob pipe and wondering whether he would have any clients that day, when his reveries were disturbed by a Swede, who walked in and addressed him:—

"Meester liar, I bote some land of Gunder Larson and I vant a mortgage."

"What is that? You bought land of Gunder Larson and want a mortgage drawn?"

"Yah, yah."

"No, no," said the lawyer, "you want a deed."

"No, no," said the simple-minded Swede, "I vant no deet. I bote land from Pader Paderson sum yahr ago and got a deet and anoder fellar coom long mit a mortgage and

took the land, so I tank a mortgage bin besser as a deet."

A LAWYER had stepped into the court room while a trial was going on, and had forgotten to take off his hat.

Judge Gary as soon as he saw the lawyer with his hat on, turned to the lawyers trying the case and said in his emphatic way: "Gentlemen, stop the trial of the case and let there be silence in the court room," then turning to the bailiff : "Mr. Bailiff close the windows and shut the door," (and pointing to the lawyer with his hat on,) "that poor gentleman may take cold."

THE late Judge John P. Rea, at one time National Commander of the G. A. R., was one of the judges of the district court of Minnesota, and was presiding at the trial of an important case in Minneapolis, in which the late Judge Shaw was counsel for one of the litigants. Judge Shaw had been a judge of the same court several years before.

Judge Shaw was arguing a question of law and read authority after authority, commenting at great length upon each one when Judge Rea stopped him, saying: "Judge, the law you are reading and arguing is undoubtedly good law, in fact it is elemental, and it seems to me you might assume that the Court knows elementary law."

"Well," says Judge Shaw, "I was a judge of this court once myself and my experience while on the bench taught me that it was not safe for a lawyer in the forum to assume that a Court knows anything."

IT has been said that by searching one can find decision of Courts upon almost any proposition but it is submitted that seldom has it been judicially determined that a court will not consider an assignment of error because they have not before them a particular brand of liquor; and further that its absence is liable to lead the court to a wrong conclusion, but such is the holding in the case of Hans *v.* State, 50 Neb. 150.

It is stated in the above case, on page 158, by the court: "It is disclosed on page 97 of the bill of exceptions that the state, in making out its case in chief, introduced in evidence the half barrel of 'Raspberry Cordial' and two cases of 'Eggine' indentified and referred to by the witness as having been found secreted on defendant's premises, and that two samples of the last named liquid were marked by the official reporter for identification as exhibits 'B' and 'C,' respectively, and that he likewise marked a sample of the 'Raspberry Cordial' exhibit 'D.' It is also recited that those exhibits are made part of the bill of exceptions; but we are unable to discover as part of the record either the half barrel of 'Cordial' or 'Eggine' introduced in evidence, much less samples of either of them." And on page 163; "We decline to consider the assignment that the verdict is not sustained by sufficient evidence, because the 'Raspberry Cordial' and 'Eggine,' or 'Tom and Jerry,' introduced in evidence in the lower court are not before us. To consider the remainder of the evidence without them might lead us to a wrong conclusion."

IT is easier to cope with a hold-up man in a dark alley than to wrestle with the intricacies of the English language in a civil service test. Such is the opinion of a large percentage of the 800 broad-shouldered men who took examination for the Chicago police force. Here are a few responses that indicate what legal terms mean to some laymen:

Quash—A garden vegetable.

Abet—The money they put up in a poolroom.

Panel—The lock on a door. To call a jury.

Waiver—A meschanic who makes cloth on a loam.

Statute—To write a statute is a pitcher. A picter or form of anything. A picter in marbel.

Defendant—A defendant is the man arrested.

Accessory—A man before the facts and after the facts.

Arrest—To make a pinch.

Homicide—To burn down your house to get the insurance.

Subpoena—To hit a prisner with the club. To serve papers.

Culprit—The culprit is hanged.

— *Chicago Record-Herald.*

Law and Lawyers have long stood the brunt of many sharp attacks from the wits and dramatists, and have been much misunderstood

by the average layman, but we will be charitable and assume that the disapproval and the resulting sarcasm is not due to the fact "that no man ever felt the halter draw with good opinion of the law," as a witty scribe once wrote. No doubt if the minute history of the far-away and shadowy empires of ancient Egypt and Mesopotamia were written, we would find the same interspersement of caustic comment, and the same railing and ranting at the law's inequity and iniquity that we find in our English and American literature.

The objection to law and its disciples is not often voiced in as heartless and cruel a manner as the inimitable bard of Avon has expressed it in Henry VII., where one of the creatures of his mighty brain is responsible for the following iconoclasm: "The first thing we do, let's kill all the lawyers." Could Shakespeare have been bothered with a copyright suit at the time, or must we look for the cause of this savage pleasantry in an injunction suit in Chancery, directed, perhaps, against a rival author or manager? Butler, too, has added his half-truth to the indictment, for he says: "In law there is nothing certain but the expense." No doubt if the Nisi Prius reports of his time were searched, we would find a case of Butler plaintiff, or Butler defendant, that would throw much light upon the genesis of this dictum.

To the count of discrimination, the differing attitude of the law in its dealing with rich and poor, how shall we plead? At first blush a traverse; but after calmer consideration we will not risk an issue, but adopt the convenient and conscience-quieting plea by way of confession and avoidance. As the cynical Gaul has it: "Justice is mighty, but money is almighty." Goldsmith has recognized and voiced the common plaint in his poem, "The Traveller," in the following language: "Laws grind the poor and rich men rule the law," though Oliver's credibility as a witness is much affected by his early lawless and predatory career and his latter series of questionable gallantries, but he could plead in justification or extenuation of this "obiter" the similar language of a recognized expert, the eminent Lord Bacon, who expressed the grievance to be: "That laws are like cobwebs, where the small flies are caught, and the great break through," though, quere, whether this was written before or after his fall from grace? If before, it is intelligible; if after, it is a strange observation for so keen an observer. The same thought caused Pope to write: "All look up, with reverential awe, at crimes that 'scape or triumph o'er the law."

The lawyer's fees have aroused the vindictive and jealous feelings of many a humble and worthy scribe. Douglas Jerrold, in a truly witty passage, has written: "The law is a pretty bird and has charming wings; it would be quite a bird of paradise if it did not carry such a terrible bill." Dr. Johnson has expressed a similar thought in this homely and forceful phraseology: "The plaintiff and defendant in an action at law are like two men ducking their heads in a bucket, and daring each other to remain longer under water."

Even Lord Brougham, whose judicial training and career should have taught him the truth, has cast the stone of reproach and ridicule at his chosen profession, for he says: "A lawyer is a gentleman who rescues your estate from your enemies, and keeps it to himself." Our own versatile genius, Dr. Franklin, broad and liberal as he was by birth and training, has expressed his convictions on the subject in the language of "Poor Richard," rather than the conservative and diplomatic tongue he knew so well, for he wrote, "that a countryman between two lawyers is like a fish between cats." Undoubtedly the far-famed Philadelphia type.

The artist who drew the picture of the lawsuit over the cow, one claiming the head portion, the other the rear end, and both tugging and pulling mightily, one against the other for possession, while the lawyer unmindful of the fierce contention is serenely milking the animal, seems to have been inspired by the same thought as the witty Pope.

But with all its shortcomings and its failure to reach the high level that Lord Coke spoke of, may we all be able to say and agree with Daniel Webster's thought: "The law, it has honored us, may we honor it."

— Theodore D. Gottlieb, *in the New Jersey Law Journal.*

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM

(Copies of the pamphlet Reporters containing full reports of any of these decisions may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.)

CONSTITUTIONAL LAW. (Due Process and Equal Protection of the Laws — Sales in Bulk.

Supreme Court of Indiana.

In Sellers *v.* Hayes. 72 Northeastern Reporter 119, the Supreme Court of Indiana administers a disabling solar plexus punch to the "Sales in Bulk" law, a test of legislation that has been very popular during the past two or three years, laws similar to the Indiana statute having been enacted in a large number of States.

Acts 1901, p. 505, c. 118 (Burns' Ann. St. 1901, §6637a, *et seq.*), declared sales of any portion of a stock of merchandise otherwise than in the ordinary course of trade, or sales of an entire stock in bulk, fraudulent and void as against creditors whose claims arise from the sale of some part of said stock of merchandise, unless the seller and purchaser shall, at least five days before the sale, make a full, detailed inventory, showing the quantity and cost price to the seller of each article to be included in the sale, and unless the purchaser shall, at least five days before the sale, make inquiry of the seller as to the name and place of business of each creditor of the seller, and the amount owing such creditors, and give each one notice of the proposed sale. Construing this statute as entitling any creditor who has a claim against the original owner on account of sales of goods at wholesale which have gone into the stock to subject the whole stock to liability to satisfy the indebtedness, no matter how small a remnant of the stock sold by him may remain, the court concludes that it constitutes a deprivation of property without due process of law, and a denial of the equal protection of the laws. "To so interpret the statute," says the court, "would mean that as to a certain class of property, the General Assembly has given to a certain class of creditors the monopoly of a remedy which enables them to impeach the transaction, irrespective of fraud, and that other creditors would be left remediless, so far as the statute is concerned. While there might be some reason in natural justice for giving a creditor a lien upon, or a special right in an article of personal property sold by him for the unpaid purchase price, yet, as there is no essential unity in a stock of goods, so that it can, in all cases, be said that the creditor's contribution to the stock is inseparable, and must, therefore, be held by him as a whole, or lost to him as a whole, what justice is there in giving to mercantile creditors an extraordinary right to follow the stock because they have contributed to build it up, or because some portion of the goods sold by them remains on hand? It will be observed that the remedy is not made dependent upon the question as to whether there is, in fact, a confusion of goods; whatever the remedy, it applies to all stocks. Why should a mercantile creditor be given a right as against that portion of a stock which is paid for, which is denied to other creditors? If the indebtedness is in part for goods which have been sold and the proceeds have gone into the corpus of the debtor's estate, why has the favored creditor the right to secure his pay in full when the banker, who also extended credit, the unpaid clerk, who aided in the transaction of the business, and the creditors, generally, of the merchant, are denied a remedy under the statute?"

As supporting the rule that under the fourteenth amendment to the federal constitution, the state cannot, through its agencies, exercise arbitrary and capricious power over persons or property, the court cites a number of decisions of the United States Supreme Court, among them: Yick Wo *v.* Hopkins, 6 Supreme Court Reporter 1064; Dent *v.* West Virginia, 9 Supreme Court Reporter 231; Duncan *v.* Missouri, 14 Supreme Court Reporter 570; Gulf, etc., R. Co. *v.* Ellis, 17 Supreme Court Reporter 255; Holden *v.* Hardy, 18 Supreme Court Reporter 383; Barbier *v.* Connolly, 5 Supreme Court Reporter 357.

CONTEMPTS. (Inherent Powers of the Court — Regulation by Legislature.)

Indiana Appellate Court.

Anderson *et al. v.* Indianapolis Drop Forging Co., 72 Northeastern Reporter 277, while resembling Jacobs *v.* Cohen, 90 New York Supplement 854, and People *v.* Grout, 72 Northeastern Reporter 464, elsewhere considered in these notes in that it is an outgrowth of the effort of trades unionism to enforce its demands, derives its main interest from the assertion of the doctrine that the power of a chancery court to enforce its injunctive decrees by contempt proceedings is inherent in the nature of the court and cannot be circumscribed or taken away by legislative enactment. The matter which receives most attention in the opinion is the construction of the scope and application of Burns' Ann. St., 1901, §§ 1024, 1026. This statute relates to contempts of court, prescribes the penalties and methods of procedure,

and authorizes, among other things, an acquittal on sworn denial of the facts charged as a contempt, but provides that nothing therein contained shall be construed as affecting proceedings against any party for contempt for the enforcement of civil rights and remedies. This statute, it is held, has no application to contempt proceedings in chancery brought for the violation of injunctive process against the court, and as the statute so construed does not attempt to interfere with the power of the court in the enforcement of its own decrees it is observed in the opinion that it is not necessary to refer to the inherent powers of the courts to enforce their decrees and command respect for their processes. As indicating its opinion, however, that such power must exist so long as the judicial department is recognized as a separate branch of our governmental system, the court adds that the existence of such powers is essential to the maintenance of our system of government and that no legislature can abridge, limit, or take away such power either directly or indirectly by attempting to define the offense, or undertaking to regulate the procedure. The case arose from violation by striking employes of the Forging Company of an injunction restraining them from interfering with, hindering, obstructing or stopping any of the business of the Company or its servants. The pickets employed by the labor union and who had actual knowledge of the injunction were held guilty of contempt in violating it although they were not made defendants in the suit for the injunction.

CONTRACT. (Employment for Indefinite Term — Right to Terminate.)

Texas Court of Civil Appeals.

The contract before the court in the case of Hickey *v.* Kiam, 83 Southwestern Reporter, 716, was one made and accepted by correspondence. It appears that the defendant wrote that he had an opening in one of his departments for a good forewoman, and that if the plaintiff thought she was capable of holding such a position, she would be started upon a certain salary, and if her services were satisfactory she could have the position as long as she wished to keep it. It was further stated that the position was permanent, and that the chances for advancement were good. The defendant further wrote: "We wish you to understand that we are not trying to get you down here just to keep you here until the season is over and then let you out. We want you to be a fixture with us in this town, and you will have a good and satisfactory position with us as long as you wish to keep it." The offer was accepted by telegraph, and the plaintiff entered upon the position at once. She was afterwards summarily discharged, without notice and without cause. The court holds that a contract to give an employee permanent employment for as long as the employee shall desire to retain such employment and the services of said employee are satisfactory is not one such as the law will enforce unless the employee fixes the period of his services at the time he presents himself for work, citing the cases of Railway *v.* Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758, and also Railway *v.* Smith, 81 S. W. 22. The plaintiff attempted to claim that the expression used in the letter "we wish you to understand that we are not trying to get you down here just to keep you here until the season is over and then let you out," fixed the period of employment at not less than one season, and that in accepting she accepted the offer for at least one season, and entered the employment with this understanding; but the court ruled against this construction on the authority of the Scott case above referred to. It has been held in other states that a contract to give one steady and permanent employment is enforcible, and in the case of Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289, it was held that under an agreement to furnish the plaintiff with steady and permanent employment the duty was imposed upon the master of employing the plaintiff as long as the latter was able, ready and willing to perform such services as it may have had for him to perform, and hence was not void for uncertainty.

CORPORATIONS. (Right of Stockholder to Sue on Behalf of Corporation — Adverse Interests of Directors.)

Alabama Supreme Court.

The right of a holder of corporate stock to sue in his own name to enforce the rights of the corporation, which are prejudiced by the adverse interests of the directors, is reasserted in a somewhat amplified form in Montgomery Traction Co. *v.* Harmon, 37 Southern Reporter, 371. It was there alleged that the Traction Company had entered into a contract with J. G. White & Co., which gave the latter corporation an undue and inequitable advantage, and, in effect, constituted a transfer of the property of the Traction Company to White & Co. without consideration. It was further alleged that a majority of the directors of the Traction Company were employees of White & Co. Under these circumstances, it is held that a contention that a stockholder could not maintain suit without first making demand upon the directors to do so is without foundation, and that a stockholder may bring suit in

equity in his own name without first requesting the directors to sue, when it was made to appear that if such request had been made it would have been refused, or, if granted, that the litigation following would necessarily be subject to the control of the persons opposed to its success. It is, however, said that where no demand upon the board of directors to institute the suit is shown, and the stockholder relies upon the fact that an application to the directors to sue would have been in vain, the facts upon which such conclusion rests must be set out, so that the court may judge intelligently for itself as to whether the conclusion of the stockholder is well founded. It is not sufficient to aver that the board, or a large majority of them, is under the control of the offending parties, nor that they are interested as guilty parties in the frauds and wrongs complained of. The facts showing such control, or such interest, must be set out. It is, however, held that the allegations of the bill as to the personnel of the board of directors of the Traction Company were sufficient to show an adverse interest, and to overcome the presumption that the directors would do their duty. Possibly the holding of chief practical importance in the case is embodied in the statement that under the circumstances disclosed, the contracts between the two corporations must be regarded as if between a corporation and its directors, or other trustees, and must be governed by the same principles, and that the court will set such contracts aside unless they are fair and reasonable. Thus, inferentially, at least, announcing the rule that the presumption is against the validity of such contracts, and that the burden rests upon those seeking to uphold them to show that they are fair and reasonable.

EMINENT DOMAIN. (CONDEMNATION OF CORPORATE STOCK — CONSOLIDATION OF CORPORATIONS.)

NORTH CAROLINA SUPREME COURT.

Spencer *v.* Sea Board Air Line Railway Company, 49 Southeastern Reporter 96, is worthy of note as an extension of the power of eminent domain. The doctrine is there applied to the condemnation of corporate stock, for the purpose of effectuating a consolidation of public service corporations. Private Laws 1901, p. 463, c. 168, conferred authority on the Sea Board Air Line Railway Company to consolidate with any railroad or transportation company in the United States, and provided for assessing the value of stock owned by dissenting stockholders and making payment therefor. This provision was attacked on the ground that it impaired the obligation of contracts but is upheld as a valid exercise of the power of eminent domain. This power is deemed sufficient to justify the provision, although the state had no power as against the corporation and its stockholders, to amend the charter. The case contains a somewhat lengthy and learned discussion of the history, origin, nature, and elements of the power of eminent domain, and it is said that the extended exercise of the power, which is sanctioned in this case, is a logical outgrowth of foundation principles which is rendered necessary to meet the demands of changing business conditions. "The advancing needs in regard to transportation and travel are," says the court, "deemed by the legislature to demand the formation of a grand trunk line or interstate system of railroad. If the Sea Board Air Line Company had, instead of consolidating, constructed a separate line or track, every foot of land necessary therefor could have been condemned for that purpose. We can see no reason why, in the exercise of the same inherent supreme power, the legislature may not empower the corporation to condemn the plaintiff's stock."

FRATERNAL SOCIETIES. (INITIATION OF MEMBER — LIABILITY FOR PERSONAL INJURIES.)

SOUTH CAROLINA SUPREME COURT.

While riding a mechanical goat during his initiation as a member of the Woodmen of the World, the plaintiff in the case of Mitchell *v.* Leech, 48 Southeastern Reporter 290, was severely injured, and action was brought against the Sovereign Camp of that order for damages. The defense was made that the Sovereign Camp was not liable for the acts performed by members of the local lodge during the initiation of members, it being pointed out that the mechanical goat, the contrivance through which the plaintiff was injured, was not authorized by the Sovereign Camp. The court goes into the authority which the Sovereign Camp exercises over the local lodges at great length, setting out the parts of its constitution which are pertinent to this subject. The conclusion is reached that in this instance, where it is shown that the Sovereign Camp selected and organized local lodges for the purpose of transacting the affairs of the order in various localities, and that such local lodges and the members thereof were under the complete direction of the Sovereign Camp, and that a ritual was prescribed by the Sovereign Camp, the subordinate lodges were the agents of that camp, and the acts of the local camps were binding upon the sovereign Camp if performed within the scope of the agency, even though the acts complained of were not authorized by the Sovereign Camp. Upon the

question of agency the court cites Supreme Lodge K. of P. *v.* Withers, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762; Murphy *v.* Independent Order of the Sons and Daughters of Jacob of America (Miss.), 27 South. 624, 50 L. R. A. 111; and Bragaw *v.* Supreme Lodge K. and L. of Honor (N. C.), 37 S. E. 905, 54 L. R. A. 602. While not referred to by the court, the case of Jumper *v.* Sovereign Camp, Woodmen of the World, 127 Fed. 635, decided by the Circuit Court of Appeals for the Fifth Circuit, is opposed to the decision as announced by the South Carolina Court.

LUNACY. (CONTRACT MADE DURING SANE INTERVAL.)

INDIANA SUPREME COURT.

In the case of Chase *v.* Chase, reported in 71 Northeastern Reporter, at page 485, the question was raised as to whether attorneys, who had been retained by the alleged lunatic before proceedings were instituted for the express purpose of protecting his estate in case lunacy proceedings were brought, had any authority to prosecute an appeal from these proceedings after their client had been adjudged insane. Under the Indiana statutes it is provided that the interests of the alleged lunatic are to be looked after by the prosecuting attorney, and in the present case, it is shown that the attorney represented the alleged lunatic in the lunacy proceedings. There was no doubt but what the agreement with the attorneys was made at a time when the person who had been adjudged a lunatic was perfectly sane and rational. The court holds that the question comes clearly within the general rule of principal and agent. It is stated that while it is yet an unsettled question whether the intervening insanity of a principal operates *per se* as a revocation of the agency against third persons who have, without knowledge of such insanity and before an inquest, dealt with the agent on the assumption that the prior authority still existed, yet it seems that no authority is to be found which sanctions as between the principal and the agent the right of the latter to act where he has full knowledge of the principal's insanity. In support of the doctrine that the subsequent insanity of the principal terminates the agency, the court cites from the leading text-book writers on this subject. The theory of this doctrine is that the derivative authority cannot continue beyond the time when the principal might himself lawfully act in the premises. The court also cites with approval the case of Davis *v.* Lane, 10 N. H. 156, where it is held that the authority of the agent does not exist during the insanity of his principal, for the reason that an agent's acts derive their validity from the presumed continued assent of the principal, a hypothesis that cannot be indulged while he is insane. It is pointed out that a fundamental objection to the agreement under discussion is, that it seeks to provide in advance for an extra judicial guardianship, whereas the law has made its own provisions for the care and custody of insane persons and their estates. The very fact that an attorney is an officer of the court furnishes a special reason why it should not be competent for him to bargain for a diminishment of the powers of such tribunal. It is further pointed out that the proposed agreement was intended to provide for circumstances which afterward existed, when the client was too insane to request counsel to defend him, or to exercise any act of authority over the litigation. Under these circumstances the agreement was contrary to public policy, for it is incompetent for an attorney to make an agreement authorizing him at his discretion and without let or hindrance from any one to carry out a defense to the limits provided by law.

JOINT TORT FEASORS. (CONCURRENT ACTS.)

CIRCUIT COURT, SO. DIST. OHIO.

The general haziness which in some jurisdictions has enveloped the question as to what relation must exist between the wrongful acts of different persons in order to constitute them as joint tort feasors, severally and collectively liable for resulting damage, is somewhat clarified by the opinion of Thompson, J., in Graves *v.* City and Suburban Telegraph Association, 132 Federal Reporter, 387. The petition in that case showed that a pole of the telegraph company had iron spikes driven into it at intervals to serve as steps; that a traction company had lines of trolley and feed wires carried on iron poles on the same street near to the telegraph company's lines and wires; that one of the feed wires of the traction company through the negligence of the two companies was allowed to remain in contact with one of the iron spikes where by reason of insufficient insulation the metal of the feed wire came in contact with the metal of the spike; that the guy wire of the traction company extended from one of its iron poles past and touching the wooden pole of the telegraph company to certain braces and stays connected with the trolley wires of the traction company; that through the negligence of the traction company the guy wire was not provided with a circuit breaker between the iron pole and the wooden pole to prevent currents from passing

along the same through the iron pole to the ground. Plaintiff's intestate was injured while climbing the telegraph pole by stepping upon the spike which was in contact with the feed wire of the traction company. Both the telegraph company and the traction company were joined as defendants and contended that this was erroneous because no joint negligence was shown. After quotation of authorities stating in general terms the principle that if persons acting independently by their several acts contribute to produce a single injury, each being sufficient to have caused the whole, they are joint tort feasors, holds specifically that upon the facts alleged the omissions of the two defendants were concurrent and contributed to produce a single injury, each being sufficient to have caused the whole, so that if either had performed the duty which the law imposed upon it, the accident would not have occurred.

JUDICIAL NOTICE. (VACCINATION — POLICE POWER.)

NEW YORK COURT OF APPEALS.

The Court of Appeals of New York has given additional support to the doctrine announced some time ago that courts will not pretend to be more ignorant than ordinary persons. In Viemeister *v.* White, 72 Northeastern Reporter, 97, it is held that the court will take judicial notice of the fact that it is the common belief that vaccination is a preventive of smallpox, and on this ground, Laws 1893, p. 1495, c. 661, as amended by Laws 1903, p. 1484, c. 667, § 2, constituting section 210 of the Public Health Law, is upheld as a valid exercise of the police power. This statute excludes children not vaccinated from the public schools, until they are vaccinated, and in addition to holding that a common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the courts, it is held that the possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive against the validity of the law, because the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. What the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does, in fact, or not. It is also decided that this requirement is not in contravention of Const., art. 9, § 1, providing for free common schools, wherein all the children of the state may be educated.

LIFE INSURANCE. (DEATH WHILE IN VIOLATION OF CRIMINAL LAW — ENCOUNTER BROUGHT ON BY ASSURED.)

ARKANSAS SUPREME COURT.

The insured in a policy exempting the insurer from liability if death is caused by the violation or attempted violation of any criminal law is not required, like the common law self-defender, to retreat to the wall when he encounters an unlawful personal difficulty, but he preserves his insurance from forfeiture if he is engaged in retreating from the scene of hostilities at the time death overtakes him instead of encountering the king of terrors face to face while aggressively continuing the disturbance. So says the Supreme Court of Arkansas in Supreme Lodge K. P. against Bradley, 83 S. W. Reporter, 1055. Bradley was the insured in such policy and, meeting an ancient enemy of his at the entrance of the Court House one frosty January morning, "smote him between the joints of the harness" with a piece of iron, whereupon the party attacked, retreating a few steps, continued the hostilities with a pistol. At this juncture, Bradley, remembering some such maxim as the ancient one, "Discretion is the better part of valor," or the more modern one that "A live coward is better than a dead hero," or possibly recalling the forfeiture clause of his insurance policy, precipitately retreated, choosing the sheriff's office as sanctuary. Bradley was killed by a shot which took effect in the back after he had commenced his retreat, and in an action on the policy, it was insisted that if there was a causative connection between the assault and the death, the death was the proximate result of the assault. To this contention the court replies that it contains the fallacy that an assault will be repelled with more than lawful force, and while this is often the case, it is not the result to be naturally expected under the law, which calls for the repulse of the assault by only such force as may be necessary to overcome it. Therefore, argues the court, when Bradley made his attack the other party was justified in overcoming that attack, and, if necessary to do so, in taking Bradley's life, so that a death resulting while so lawfully resisting the attack would be the natural result thereof, and there would be a causative connection between the assault and the death, or, in other words, the attack would be the proximate cause of the death. But as in this case Bradley fled from the conflict and received the mortal wound in the back while escaping, the other party was not justified in inflicting it; his act in so doing was unlawful, and hence the first violation of the law by Bradley was not the proximate cause of his death, but the subsequent unlawful act of the person he assaulted was the proximate cause.

MENTAL ANGUISH. (RECOVERY THOUGH NO PERSONAL INJURY RESULTS FROM NEGLIGENCE.)

NORTH CAROLINA SUPREME COURT.

The rule commonly known as the Texas doctrine, owing to its early support by the courts of that state, to the effect that recovery may be had for mental anguish, although no physical injuries result, has recently been extended to North Carolina by the decision of the Supreme Court of that state in the case of Green *v.* Western Union Tel. Co., 49 Southeastern Reporter, 165, to cases which did not involve sickness or death. In this case a telegram announcing the arrival of a sixteen year old girl, alone on a midnight train, in a town where she was a stranger, was sent to a friend in that town, with the request that she meet the young woman upon her arrival at the station. A mistake was made by the telegraph company in the name of the sendee, owing to the similarity of sound on the telegraph keys between one of the letters of the sendee's name and one of the letters in the name as incorrectly taken, although the address was correctly received. As the name could not be identified, no effort was made to deliver the message, and the young woman, upon her arrival, found no one to meet her. The conductor of the train put her in charge of the colored matron at the station, who later secured a hack, and after some delay she was driven to the house of her friend. While no physical injury resulted, the mental suffering of the plaintiff is made the ground of the action for damages. The court in considering the question calls attention to the fact that the telegraph company is a quasi public corporation, and possesses extraordinary privileges which, under the North Carolina constitution, can be exercised only by such corporations as are organized for a public purpose. The duties of the telegraph company are essentially public, it being in fact the complement of the postal service, and is one of those great public agencies so important in its nature and far-reaching in its application that some statesmen have deemed its continued ownership in private hands a menace to public interests. Hence it follows, both upon reason and authority, that the failure of the telegraph company to promptly and correctly transmit and deliver a message received by it is a breach of a public duty imposed by operation of law. As was said in an English case, a breach of this duty is a breach of the law, and for this breach an action lies, founded upon the common law, which action wants not the aid of the contract to support it. The cases of Cashion *v.* Tel. Co., 124 N. C. 439, 32 S. E. 746, 45 L. R. A. 160, Landie *v.* Tel. Co., 124 N. C. 528, 32 S. E. 886, and Cogdell *v.* Tel. Co., 135 N. C. 431, 47 S. E. 490, are also cited to this point. All the facts in the case are admitted, and it only remains, says the court, to consider whether the plaintiff is entitled to recover for the mental anguish she may have suffered as the direct result of defendant's negligence. Replying to the allegation that it does not require to be pointed out that if the barriers are once thrown down and any disappointment, annoyance, or unnecessary alarm occasioned by a delayed telegram shall be allowed to be the subject of damages, every barrier which the law has erected in the limitation of actions for damages will be thrown down, the court says: "We do not think that any such result will follow our decision in this case, but such a possibility should not deter us from giving to the plaintiff the full measure of justice to which she is entitled. . . . We feel compelled to carry out a principle only to its necessary logical results, and not to its further theoretical limit in disregard of other essential principles. We do not feel at liberty to adopt any one principle as the sole guide of our decisions and to carry it out to extreme and dangerous results regardless of other great principles of justice and of law so firmly established by reason and precedent. We are now considering the question of damages resulting from the breach of a public duty by a quasi public corporation. How far this principle may in the future be extended to other corporations and to other circumstances we cannot tell, and in the absence of any matter before us involving its further consideration, we have neither the right nor the wish to limit nor extend its application as a pure matter of legal speculation." The court reviews at length its prior decisions upon this point, and calls attention to the significant fact that it is the growing tendency of judicial opinion to allow damages for mental suffering even when disconnected with any physical suffering. In the case of Osman *v.* Leech, 135 N. C. 628, 47 S. E. 811, the doctrine was extended to a case of libel. In Texas recovery has been had for negligence in transmitting a telegram forbidding a county clerk to issue a marriage license owing to the fact that the girl was under age. Here the plaintiff was allowed to recover from the telegraph company damages for the loss of his daughter's services up to the age of eighteen and also for the mental distress involved. Much stress is also laid upon the Texas case of Missouri Pac. R. Co. *v.* Kaiser, 18 S. W. 303, where a girl sixteen years of age, accompanied only by a girl companion, was ejected from the train at a small town, where she was a stranger, and where she remained an hour before she was discovered by friends. The recent New York case of Gillespie

v. Brooklyn Heights R. Co., 70 N. E. 857, is also quoted from at length, on the ground that it unequivocally asserts the principle that recovery can be had for purely mental suffering without any physical pain resulting from the breach of public duty by a common carrier. In conclusion the court reviews at considerable length cases from Tennessee, Alabama, Kentucky, Iowa, Louisiana, South Carolina, Nevada, and Washington where damages have been allowed, and also cases where they have been denied from Florida, Georgia, Illinois, Indiana, Kansas, Minnesota, Mississippi, Ohio, West Virginia, Wisconsin, and Virginia.

OATH. (PERSONAL PRESENCE OF AFFIANT — VERIFICATION BY TELEPHONE.)

TEXAS COURT OF CIVIL APPEALS.

An interesting case, which involves a novel state of facts, and becomes more interesting still when compared with the case of Western Union Telegraph Co. *v.* Bailey, 42 Southeastern Reporter 89, which was mentioned at page 858 of the December (1094) number of THE GREEN BAG, is the case of Sullivan *v.* First National Bank of Flatonia, 83 Southwestern Reporter 421. The former case marked a further extension of legal recognition of the telegraph, it beingthere held that a telegraphic notice of the sanction of a writ of *certiorari* and of the time and place of hearing was a notice in writing within the meaning of the Georgia statute, requiring written notice to be given. In the latter case, the Court of Civil Appeals of Texas decides that an oath cannot be administered by telephone. It thus appears that though the electric current may be regarded as a sufficiently reliable bearer of intelligence to subserve the purposes of a legal notice, it cannot effect a transfer of so delicate a thing as the sanction of an oath, which, it appears, must be delivered in person. In the case under consideration, an application for a continuance bore the following remarkable jurat: "Sworn to and subscribed before me, this twenty-fourth day of December, 1903, by calling defendant, W. K. Sullivan, to the telephone, and asking him whether the contents of the foregoing application for continuance, which I had heard read to him over the 'phone were true, to which he answered in the affirmative, and stated that he had authorized his attorney to sign his name for him." In considering the sufficiency of this method of verification, the court states that in former times, and especially in other states and countries, certain forms were required in the making of an oath, and that the legislature had in mind the meaning and history of an oath when they required an application for a continuance to be sworn to. All these forms, such as raising the right hand, touching the Bible, Pentateuch, or the Koran, contemplated the personal presence of the affiant, and hence it is concluded that personal presence is required by the Texas statute, although there is no express provision to this effect. In answer to a contention that it is sufficient that the clerk and the attorney recognized the voice of affiant, the court says: "This brings us to a further consideration of the question with relation to a possible prosecution for perjury. In such a prosecution there must be established beyond a reasonable doubt the fact that an oath had been legally made, that the matter sworn to was false in fact, and that the defendant in the prosecution was the one who made the oath. Now, it may be true that one can be certainly identified by the sound of his voice, but that is not enough for the purposes of the rule in such a case. It may be true that the officer, when he takes the affidavit of one well known to him, might recognize his voice over the telephone, and therefrom be able to testify that he took the oath and made the affidavit an issue. But it must be borne in mind that the law does not require the clerk or notary to be acquainted with one who becomes an affiant before them. A stranger may appear, sign an affidavit, and demand that the officer swear him and affix his jurat. In that case the officer certifies and can swear to no more than that the man who affixed the name to the affidavit swore to its truth. The name he signed may have been fictitious, but the individual swore to it as the clerk or notary certified, and he would be subject under that name or his true one to a prosecution for perjury. Now, if the contention of appellant is sound, the rule must be laid down broadly, and whoever might demand the official jurat by his personal presence might also demand it over the telephone."

STATUTE OF LIMITATIONS. (WAIVER BY PRIVATE CONTRACT — INSURANCE CASES.)

KENTUCKY COURT OF APPEALS.

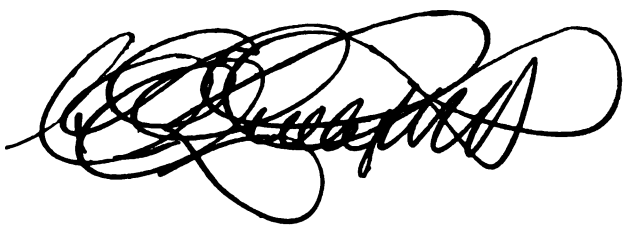
A decision which will have a far-reaching effect in insurance circles, and which is of interest generally because it is so at variance with the generally accepted doctrine, is that of Union Cent. Life Ins. Co. *v.* Spinks, 83 Southwestern Reporter, 615. The holding in brief is, that a provision in a life insurance policy, to the effect that no suit shall be maintained thereon unless begun within one year from the death of the insured, is void as against the public policy, the Kentucky statute of limitations prescribing a period of fifteen years for actions on such contracts. The following from the

opinion concisely states the position of the court. This suit was not brought until more than one year after the death of the insured. We are aware that this or a similar provision is contained in nearly all insurance policies, fire and life. We are further aware that the provision is upheld by many courts, including the United States Supreme Court (Riddlesbarger *v.* Hartford Ins Co., 7 Wall. 386, 19 L. Ed. 257), and is approved by text writers. This court has also, though with hesitation and misgiving, followed the other courts in approving it. We therefore have come to the reconsideration of this question with a deep sense of its importance and difficulty, and of our duty in the premises. The legal question is, can parties by contract substitute a period of limitation, binding upon the courts, for the statutes of limitation enacted by the Legislature? If they can, it must be upon some general principle, the breadth and far-reaching effect of which cannot logically be limited to mere contracts of insurance, but must incontrovertibly be applicable to all contracts; for, if it is a matter of agreement alone between parties competent to contract, the only inquiry that can ever be made is, have they agreed upon it.

Pleas of limitation were allowed long before there was any statute on the subject. The courts applied them upon the theory of a fiction to the effect that after so long a lapse of time, during which the claimant made no assertion of his rights, in a personal demand, a presumption was raised that the obligation had been paid or discharged, and, in the case of real estate, that a conveyance had been executed but lost. The fiction was justified in the reasoning of the courts by the evident justness of its effect; it being argued that one who had so long neglected his rights as to allow the other party to suffer by it, by the loss of evidence and the like, ought not to be heard to disturb a condition he had suffered to come about. But statutes of limitation have come to be enacted everywhere. They are not mere rules of evidence, presumptions of the payment or extinguishment of the obligation sued upon, but are statutes expressive of a public policy, and are favorably regarded by the law. They are not in operation or suspense at the mere will of the parties, but in spite of them. While the statutes themselves make provision for their suspension, it is to be noted that in every instance it is allowed for the purpose of continuing or prolonging a pre-existing right to sue, and never to close the door against suits by any kind of waiver in favor of an obligee.

Many statutory provisions are made for the protection of personal rights, which the parties may avail themselves of or not, in their transactions, as they may please. But where the statute is expressive of the public policy, any contract made in contravention of it is *ipso facto* void. Parties will never be heard to say that they elect to waive the public policy, and are willing to abide by their own substituted policy. The public policy, as the term indicates, is impersonal, and essentially of universal and exclusive application within the territory of the authority declaring it. There could be no public policy otherwise, and the whole people would be powerless to enforce any wholesome general rule of conduct in business transactions, where any number chose to ignore or violate it. Statutes of limitation belong to this class. They pertain to the administration of justice by the courts of the state — a subject of paramount concern to the whole public. That there may be a period of repose against stale claims is provided, recognizing the old idea that, but for the loss of evidence, death or removal of witnesses, forgetfulness, and so on, an apparent condition might have been explained away. The statute means more than that no suit shall be maintained upon the class of claims treated of by it after the lapse of the time fixed by it. It means, also, that until that time has elapsed the courts are open to hear the claim. The statutes are substituted in lieu of the common-law rules of presumptions and practice, and establish the public policy of the state on the subject of limitation of actions. They supersede not only the fictions of the common law, but also supersede the hitherto uncontrolled capacity of parties to themselves limit the time in which either may rightfully appeal to the courts for redress under their contracts. Agreements in advance to waive statutes of limitation altogether are held void on the grounds that such statutes are for the repose, the peace, and the welfare of society. Greenhood on Public Policy, 504; Kellogg *v.* Dickinson, 147 Mass. 432, 18 N. E. 223, 1 L. R. A. 346; Trask *v.* Weeks, 81 Me. 325, 17 Atl. 162; Green *v.* Coos Bay Wagon Road Co. (C. C.) 23 Fed. 67.

The court then discusses the definition of the term "public policy," giving Story's definition, and citing Brooks *v.* Cooper, 50 N. J. Eq. 761, 26 Atl. 978, 21 L. R. A. 617, 35 Am. St. Rep. 795, and People *v.* Hawkins, 157 N. Y. 12, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736, and also reviews the Kentucky cases bearing upon the question as to whether statutes of limitation are in that state indications of its public policy. The decision reverses the previous decisions in Kentucky upon this point, and is also against the general rule laid down by the United States Supreme Court and the courts of all of the other states, with the possible exception of Nebraska and Georgia.



The Green Bag

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THE IMPEACHMENT OF JUDGE SWAYNE

By Hon. Charles E. Littlefield

CHARLES SWAYNE was born in Guyencourt, Del., in 1842. From 1865 to 1885 he resided in Pennsylvania. In 1885 he moved to Sanford, Fla., and began to practice law, intending to make Florida his home. June 1, 1889, he took the oath as United States District Judge for the Northern District of Florida, having been appointed by President Harrison, and October 1, 1890, he moved with his family to St. Augustine, Fla., where he continued to reside until July, 1894. He immediately embarked upon the trial of some election fraud cases which were the cause of great local excitement and irritation. Witnesses were intimidated, and in one or two instances murdered. A Deputy United States Marshall was murdered and his murderer went unwhipped of justice. Others were intimidated and in a portion of the district they were unable in these cases to execute the process of the court. Being a recess appointment, when his appointment came before the Senate for confirmation a vigorous but unsuccessful effort was made to defeat

It is understood that the political considerations were fully ventilated in the discussion.

One of the attorneys for the defense in the election fraud cases having been elected to Congress introduced a bill which was approved July 24, 1894, changing the boundaries of the district so as to leave St. Augustine, Judge Swayne's home, outside the Northern District of Florida. In 1900 and in 1901, there were some prosecutions in his court for trespass upon timber lands involving influential persons which caused some bad blood. In 1897 he became a candidate for appointment as Associate Justice of the Supreme Court of the United States and filed letters of recommendation from lawyers in Philadelphia, California, Florida and Texas. F. Carroll Brewster, brother of ex-Attorney-General Brewster, certifying that he had "established a reputation for industry, integrity, learning and all the virtues which should adorn the bench. His patriotism and courage are undoubted."

Failing in this, later in 1899, he was a candidate for a position on the Circuit bench for the Fifth Circuit. In this candidacy he was supported by twenty-two of the lawyers of Florida, largely from Pensacola (some of whom afterwards became his prosecutors in the impeachment proceedings), although for nearly five years, if the contention subsequently made was well founded, Judge Swayne had been openly, notoriously, wilfully and flagrantly committing a "high misdemeanor" by non-residence in his district, for which he ought then to have been impeached. Yes, more than that, nearly six years before, as now claimed, he had committed an impeachable offense by corruptly converting to his own use a private car and sundry provisions belonging to a railroad in the hands of a receiver, a proceeding which was in 1893, if Prof. John Wurtz's (of the Yale Law School) reminiscences import verity, the occasion of "a great deal of scandalous talk." In view of the subsequent developments the statement in 1899 of an ex-United States District Attorney, afterwards counsel against Swayne, makes interesting reading. "Judge Swayne has presided over our District and Circuit Courts with great satisfaction both to mem-

bers of the bar and the public, evidencing in his decisions a fine discriminating mind and great judicial knowledge." He "cordially" endorsed him and "earnestly" urged his appointment, and felt that in so doing he voiced "the sentiment of all who have knowledge *of his character and ability*." One insisted that "his established reputation as a jurist, *his consistent courtesy to the members of the bar practising before his Court*, and his long and meritorious services as a member of the judiciary entitle him to the promotion he now desires"; and still another referred to him as "a gentleman of *unimpeachable character*." The italics are mine. Evidently these gentlemen were not then duly impressed with the great enormity of non-residence, or not absolutely continuous bodily presence in the district, or the especial iniquity of riding in a private car through the courtesy of the receiver of the road.

The resolutions of the Florida legislature which resulted in the impeachment proceedings were originated by Mr. W. C. O'Neal, who had been convicted by Judge Swayne of contempt in December, 1902, the action of the Judge being the basis of one of the articles of impeachment. Mr. O'Neal had the resolutions drawn and during a period of sixteen days with his attorney lobbied for their passage, spending as E. F. Davis testifies "a whole lot of money" and "from $200 to $300 for champagne." This seems to have been a champagne-inspired impeachment. The resolution adopted by the legislature of Florida in 1903 — charged Judge Swayne with having been a non-resident of his district for ten years, with having the reputation of a corrupt judge, with being ignorant and incompetent and with having so administered the bankrupt law as to waste the assets so that it had become "in effect legalized robbery and a stench in the nostrils of all good people." These resolutions were referred to the Judiciary Committee of the National House of Representatives, and by that committee referred to a sub-committee for the taking of testimony consisting of Hon. Henry W. Palmer of Pennsylvania, Hon. J. N. Gillett of California, and Hon. H. D. Clayton of Alabama.

Twelve specifications were presented to them as the basis of the investigation. They charged (1) non-residence; (2) improper appointment of B. C. Tunison as United States Commissioner; (3) refusal to appoint a United States Commissioner at Marianna; (4) partiality and favoritism to B. C. Tunison; (5) oppression and tyranny in the contempt cases of W. C. O'Neal, E. T. Davis, and Simeon Belden; (6) wilfully and corruptly maladministering bankruptcy cases; (7) oppression and tyranny in the case of Charles P. Hoskins, resulting in his suicide, and for the purpose of breaking down and injuring W. R. Hoskins, charged with involuntary bankruptcy; (8) corruptly purchasing a lot and house in litigation before him; (9) ignorance and incompetency; (11) failing to hold a term of court at Tallahassee in the fall of 1902; (12) procuring as endorsers on his notes attorneys and litigants having cases pending in his court; (13) maladministration by discharging people convicted of crime; (10) is missing from the printed record.

The impeachment proceedings were characterized by some very extraordinary, and it is believed, entirely unprecedented methods. Prior to March 25, 1904. when the Judiciary Committee had completed its work for the time being, the sub-committee reported to the whole committee, disagreeing vitally as to the facts, Mr. Palmer and Mr. Clayton favoring impeachment and Mr. Gillett, opposing. At this time not a word of the case had been printed, the statement of Judge Swayne in exculpation had not been transcribed, and beside the sub-committee no one on the committee had read the testimony. A motion to table the matter until the evidence could be printed and the committee could know what it was acting on was promptly voted down, and with

equal promptitude eight members of the committee voted to report a resolution recommending impeachment, six of whom could not have known by an examination of the case whether there was any justification for such action. It is written, and still true, that "He that answereth a matter before he heareth it, it is a folly and a shame unto him." The charges relating to the certificate of expenses and use of the private car had not then been made. The committee consisted of seventeen lawyers and there is good reason for believing, that as the case then stood, if all the committee had been present and had had an opportunity to read the case, the resolution of impeachment would not have been reported. Near the close of that session of Congress, the case was postponed until the next session and the Judiciary Committee were instructed to take additional testimony and report their conclusion thereon. The same subcommittee proceeded to take additional testimony, completing their work November 28, 1904. During this taking, the charges based upon the certificates of expenses and the use of the private car appeared for the first time. The same eight reported that the "testimony strengthens the case against the said Charles Swayne." Judge Swayne at the last taking made an elaborate statement explaining and answering all other charges against him, but did not answer or explain the charge of having made a false certificate of expenses. Minority views were filed in which it was stated, "As a witness he answered and explained every other charge. This charge he made no effort as a witness to answer or explain. The inference from the record on general principles is, that the charge is admitted to be true, and that he has no explanation or answer thereto. Whether a satisfactory answer can be made we do not say. We must take the record as it stands. Upon this record unanswered and unexplained, we are of the opinion that in this particular an impeachable offense has been made out." These views held that in other respects the case had been materially weakened. This was the condition of the case when the resolution of impeachment was adopted by the House without a division. Afterward and before the adoption of the articles of impeachment, controlling and significant facts relating to these certificates were ascertained.

In his original report in speaking of the Hoskins case, Mr. Palmer used this mild and conservative language: "The whole disgraceful perversion of law and justice was made possible by the complacency, stupidity or worse of Judge Swayne who lent himself to a conspiracy to ruin an honest man by aiding the conspirators in every way in his power." After making this report and while taking the additional testimony, Mr. Palmer said, November 28, 1904, as to the Hoskins case, "There was no allegation that Judge Swayne knew anything about this alleged conspiracy between Canhoun, Boone, and Tunison (the attorneys who were alleged to be pursuing Hoskins) at all. There is no testimony of that kind or finding based upon it." Yet on the 13th of December, 1904, he repeated the assertion made in the report in a speech on the floor of the House, urging the adoption of the resolution of impeachment.

It should be stated as to the suicide of young Hoskins that the physician who attended him testified that in his opinion he died of "acute alcoholism." Mr. Palmer was chairman of the committee to formulate the articles of impeachment and the fact that he reported no article on the Hoskins case is a demonstration that those charges had no valid foundation. They had probably served their purpose when they aided in the passage of the resolution of impeachment.

The articles of impeachment were twelve. The first three were based upon the certificates for expenses made by Swayne under the following statute, which has been contained in the several appropriation bills since 1896 and is not found in the general

statutes, although one of a like character relating to the circuit judge is in the general statutes, viz: "For reasonable expenses for travel and attendance of district judges directed to hold court outside of their districts, not to exceed ten dollars per day each, to be paid on written certificates of the judges and such payment shall be allowed the marshal in settlement of his account with the United States." Judge Swayne certified the maximum of ten dollars per day and the fact that in the instances relied on he had not disbursed that sum was not seriously contested. It was claimed that many other judges certified in the same manner, and that under the authority of United States *v.* Hill, 120 U. S. 169, the contemporaneous and continuous interpretation of a doubtful statute by judges, heads of departments and accounting officers would govern. In 1896 when this law first made its appearance in an appropriation bill, the attention of the Senate was expressly called to the fact that under a similar statute "Judges were certifying ten dollars a day regardless of the actual expenses to which they were put," and the Senate proposed to correct the practice by adding to the section after the word "Judges" the words, "which said certificate shall state in all cases that the judge had actually incurred or paid the expense therein stated." This amendment was disagreed to in conference and in lieu thereof the words "and such payment shall be allowed the marshal in settlement of his account with the United States" were added and by implication Congress thus recognized the propriety of that construction and practice.

It appeared that when this paragraph in the appropriation bill for 1898 was under consideration in the House, Mr. Cannon, the chairman of the Committee on Appropriations (Speaker of the last House), stated that the circuit judges certified their accounts for expenses "upon the basis of ten dollars per day." . . .

"Now the provision in this bill, as we have reported it will allow these district judges ten dollars a day upon their certificates in the same way that the circuit judges get their allowances (which we cannot prevent them from getting) at the rate of ten dollars per day."

Whatever the true construction of this statute may be it is very clear that Mr. Cannon understood it to authorize a certificate for ten dollars per day without reference to actual disbursements, and that acting upon that construction the House placed it in at least one appropriation bill. To hold that when Judge Swayne placed the same construction upon the statute he was beyond a reasonable doubt acting corruptly and dishonestly or that it is not fairly open to two constructions would impeach either the intelligence or candor of Mr. Cannon, either of which conclusions would be entirely inadmissible. The House sustained these articles by six majority. The Senate failed to sustain them by a vote of 33 to 49. Bard and Kittredge, Republicans, voting guilty, and Dubois and Gibson, Democrats, voting not guilty on the first article, being joined by Clarke of Montana, a Democrat, on the second and third articles, which were lost by a vote of 32 to 50.

Article 4 was based upon the use of a private car on a trip from Guyencourt to Florida belonging to a railroad, the receiver for which had been appointed by Judge Pardee and concurred in by Judge Swayne. The judge was charged with unlawfully appropriating the car to his own use without making compensation to the owner and with allowing as judge the credit claimed by the receiver for the expenses of said trip as a part of the necessary operating expenses of the road. The facts were, that the receiver on his own motion tendered the use of the private car to Judge Swayne and his family from Guyencourt to Florida, and that the accounts were never passed upon by Judge Swayne at all. It was not pretended that it in any way influenced his judicial action or was

intended to. It appeared that the car was only used by the receiver and when not in use by him was standing in the yard. It was passed over the connecting lines. After having specifically charged that Judge Swayne "acting as judge allowed the credit claimed by the said receiver for and on account of the said expenditure," the managers made special and strenuous effort to show that the "expense was not disclosed in any of the receiver's reports." They charged him with using the car without compensation "under a claim of right, for the reason that the same was in the hands of a receiver appointed by him" but produced nothing before the Senate to sustain the charge. They were apparently relying upon the testimony of Swayne before the sub-committee, which testimony the Senate promptly excluded under an act of Congress which provided that "no testimony given by a witness before either House or before any Committee of either House of Congress shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony" (R. S. U. S. Sec. 859). It should be said, however, that if the testimony had been admitted it would have been only by segregating a question and answer from the context that they could have proved any admission tending to establish that charge. The transcript would have shown that in answer to the question, *Q.* "You thought that the railroad being in the hands of the court, you had the right to use the property of the railroad without rendering the railroad any compensation for it?" he said, *A.* "Yes sir, I had ten railroads in my hands as judge in six years." That he did not claim that he had the right to use it without compensation appears from the answer to the next question which was propounded by Mr. Palmer, *Q.* "And you fancied you had the right to use the property of any of the railroads that were in the hands of the court whenever you pleased without rendering any compensation to the railroads for it?" He said: "I would not say that." There was practically no evidence offered to sustain the third article which related to the use of the private car for a trip to California. It is interesting to note that Mr. Manager Olmstead in an ineffective attempt to amend these articles in the House insisted that they did not "conform to the facts as disclosed by the record." He said, "He, (Swayne), never did appropriate the car and the provisions under the claim of right as charged in articles 4 and 5, but he did improperly use them." While this manager insisted before the Senate that these articles properly *charged* an impeachable offense, whether the charge had been made out he considerately left to the judgment of the Senate without any discussion or the expression of an inconsistent opinion on his part. Thirteen Senators were either not advised of the previously expressed opinion of the learned manager, or if advised thereof, did not give it determining weight as they voted guilty on both articles and 69 voted not guilty.

Article 6 charged non-residence in the Northern District of Florida from July 23, 1894, to October 1, 1900, and Article 7 non-residence from July 23, 1894, to January 1, 1903, in violation of an express statute providing that "Every judge shall reside in the district *for which he is appointed*, and for offending against this provision shall be deemed guilty of a misdemeanor" (R. S. U. S. Sec. 551). Undoubtedly the most satisfactory method of establishing the fact that he did not reside in the district would have been to have shown that he did actually reside elsewhere, but the managers were not of course confined to that. Substantially all of their testimony was directed to showing that from 1894 to 1900 he was not actually in the district except when he was holding court, arriving there on the day before and leaving the day or the day after court ended, and it was claimed that this averaged about

sixty days in a year. It appeared that during this period he boarded while in the district at a private house, or a hotel, and an effort was made to show that his real home was in Guyencourt, Del.

The evidence for the respondent clearly showed that he only spent his summer vacations at Guyencourt and that it was not his residence or home. In fact this contention was substantially abandoned in argument, one of the managers stating "Witnesses were called to show that the respondent did not live in Guyencourt. We do not care whether he lived in Guyencourt or whether he did not." He never registered and never voted in Pensacola during that time. Nor did he anywhere else. He paid no poll tax there or elsewhere. On account of his age he was exempt from a poll tax after 1897.

As cut down, his district contained in 1900 only about 176,337 inhabitants, less than an ordinary congressional district, and it is obvious that he had relatively very little to do. Under the law he was subject to being ordered to other districts to hold court, absences for which purpose were clearly consistent with a continued residence in his own district. He submitted certificates of days when he was holding court from January 1, 1895, to January 1, 1904, from which his counsel made a computation claiming that it showed that the number of days in which court was opened and adjourned by him outside of his district was 814, inside of his district 597. Intervening days during that time such as Sundays, holidays, etc., 192, and days used in traveling to courts outside 102, in all 1705 days employed in the discharge of his official duties and consistent with his residence in his district, or an average of about 189 days in each year. The managers claimed that the days outside of his district as shown by the certificates were only 570.

Shortly after the act of July 29, 1894, was passed, Judge Swayne left St. Augustine where he was then residing within the limits of the district for which he was "appointed," stating that he "would be compelled to make his residence within the boundaries of his district and that he was going to Pensacola, and with that declaration he left St. Augustine that summer in the month of July." His family continued to live in St. Augustine until 1896, when they broke up housekeeping and did not resume it until October, 1900, in Pensacola. Meanwhile he made numerous efforts to get a house in Pensacola. May 28, 1898, he registered at the hotel in Pensacola as of "St. Augustine, Fla." Until March 1899, he registered in Pensacola as of "Fla." but on that date and afterward as of "City." There was no serious question but that he resided in Pensacola after October, 1900. In 1903, a house was purchased in Pensacola into which he moved and where he has since resided.

The Judiciary Committee in its report relied upon the case of People *v.* Owers (29 Colo. 535) as an authority on the question of residence.

In that case the court held that the Constitution required the district judge to maintain his actual residence in his district, as distinguished from a legal or constructive residence or domicile. It was a *quo warranto*, and the court held that the burden of proof was upon the judge to clearly establish such a residence. The facts were as follows: — The judge's term began January 9, 1901. The information was filed September 9, 1901. "During that time, on account of the state of his health, the judge had not actually resided in his judicial district." He had served a six-year term, ending January, 1901, and until the spring of 1897 he had clearly resided in Leadville, in his district. At that time his health was impaired, resulting in nervous prostration. He was unable to sleep in such a high altitude, and was advised by his physician that his health and life depended upon his spending as much time as possible in a lower altitude. He was married in October, 1897, and from that time, with the exception of five months at

Santa Barbara, Cal., he spent most of his time in Denver, five thousand feet lower, during the last two and three-fourths years. He immediately returned to Denver upon the adjournment of his court, when there was no other business requiring his presence unless he stayed longer for the transaction of his private business, except in a few instances when he went to other parts of the state. From the time of his marriage he either kept house and lived with his wife or boarded with her in Denver, except when she was away on visits, when while in Denver he boarded alone. His wife and family were never in Leadville but once, and then for less than ten days, on a visit. For the last nineteen months he had an office in Denver with his name painted on the door, the room being rented by a company of which he was the secretary. His name appeared as a resident for 1900 and 1901 in the Denver directory, but, as he claimed, without his knowledge or direction. During this time when in Leadville he occupied as his sleeping room a room in the court house adjoining his chambers and had no other house or dwelling place in Leadville. The furniture, including bedstead, bedding, bureau, washstand, and carpet, was his property. He had in 1898 sold the furniture in the chamber to the county. He paid nothing for the use of his room. He had no other personal property in Leadville, made no tax return, and paid no poll or personal tax during this period. He took his meals at restaurants or hotels as might be convenient and had no regular boarding place. His wardrobe he kept in Denver, and took with him when he went to his district sufficient clothing to meet the necessities of a short stop, except that he had sufficient personal and bed linen for his use in Leadville. He was registered as residing at the "Court House."

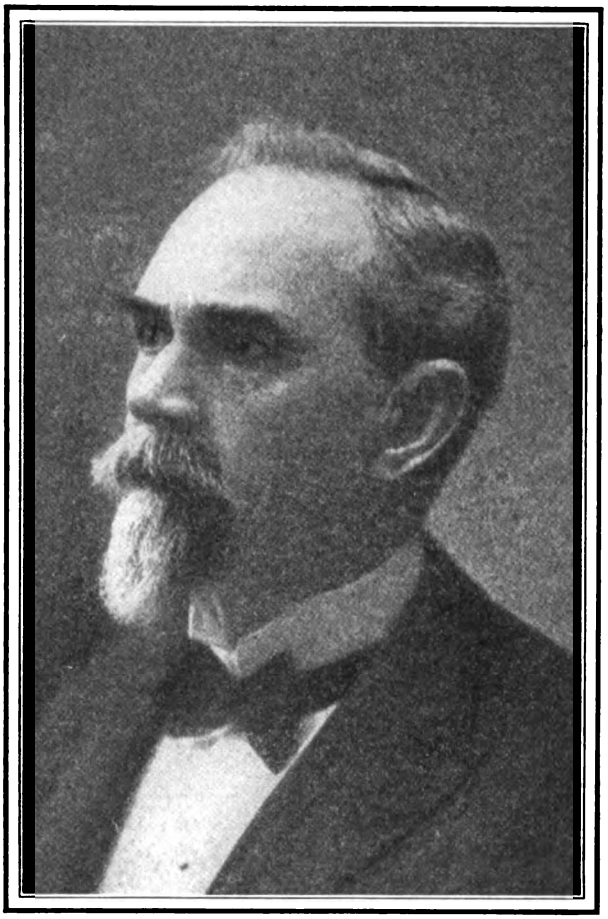
For nine years, with the exception of three elections, he voted in Leadville. During these two and three-fourths years he had not been personally present exceeding three hundred days, fifty of which were exclusively devoted to campaigning. In 1899, 1900, and 1901, two-thirds to three-fourths of his time was spent out of his district. In legal documents he had always described himself as of Leadville, so registered himself when traveling, had rented a box in its post-office and had had his personal envelopes marked for return to Leadville, and had claimed and still claimed it as his home domicile and residence.

Upon these facts the court held that the Constitution should be given "a reasonable and not a purely technical or literal interpretation" that "it is only a fair and reasonable construction, we think, of the admitted facts to say, and we shall so hold, that it is his bona fide intention as soon as his health will permit, which he hopes will soon be realized, to return to Leadville, in his district, for the purpose of there maintaining his actual residence." Again, "We think it would be a strained construction of the language and a harsh rule to enforce within eight months after the plaintiff's induction into office to say that because he had not during that time, on account of the state of his health, actually resided in his judicial district and because thus early in his term it is not entirely certain that at some definite future date he would return there, he should therefore be ousted from office." And again, "and although the rule, as we have said, requires him clearly to show a continuing right to hold, this rule is in entire harmony with another of equal potency, which is that it is only for some substantial misconduct upon his part that the severe penalty of an ouster should be visited upon him."

In the Colorado case the judge had an actual and continuous abiding place for himself and family in Denver, out of his district, for four years before the hearing. Swayne has never had any such abiding place.

At the time of the hearing the Colorado judge was neither actually abiding or residing in his district. Swayne was. When

the decision was rendered it was not even certain that the Colorado judge would "return to Leadville, in his district, for the purpose of there maintaining his actual residence." The court said he had a "bona fide intention" to do so. Everybody concedes that Swayne is now a bona fide resident of his district. With the exception of voting, which was no doubt technically necessary in order to make the Colorado judge eligible for election, every fact and circumstance is much stronger in support of residence in Swayne's case. In that case the burden was upon the respondent to satisfy the court that he resided in Leadville. In Swayne's case the managers were bound to establish non-residence beyond a reasonable doubt and the facts were much more probative of residence than in the Colorado case. It may be safely inferred that the managers did not exert themselves to impress upon the Senate the authority of the Colorado case. On this article 31 voted guilty and 51 not guilty. On Article 7, 19 voted guilty and 63 not guilty.



JUDGE CHARLES SWAYNE

The 8th, 9th, 10th, and 11th articles were based upon an alleged unlawful conviction for contempt of E. T. Davis and Simeon Belden, and as they all depend upon substantially the same facts they can be considered together. These cases arose out of a suit in Judge Swayne's court known as the Florida McGuire case. It appeared that while this case was pending in June or July, 1901, he negotiated with J. J. Hooten for the purchase for his wife of block 91, a vacant unoccupied lot and a part of the land in controversy in the McGuire suit. Hooten testified before the Senate that the judge "stated if he bought it it would disqualify him in the case in case it came up before him." The judge was not a witness before the Senate and this statement therefore stood undenied. Hooten was a witness before the sub-committee and on this point then testified:

Q. "Did you go over the land with Judge Swayne and point it out to him?"

A. "Yes sir."

Q. "Do you know whether or not this land was in litigation in the United States Court at that time or not?"

A. "I don't remember, I know there has been litigation about that land before and since. I could not state whether or not there was at that time."

It is difficult to understand how the witness could have made that answer, if Swayne made the statement to which he last testified. He was not however confronted with his former statement before the Senate. Swayne was notified that a quit-claim deed had been made to Mrs. Swayne, Edgar the grantor declining to make a warranty on account of the "old Alberta Caro" or McGuire claim. He wrote the agents to omit block 91 and send the papers for other property for which he had been negotiating. There was no pretence that a deed was ever made or sought to be made to Judge Swayne. Sometime in August, Belden and Paquet, plaintiff's attorneys in the McGuire suit wrote Judge Swayne requesting him to recuse himself. To this he made no reply until he reached Pensacola to hold the November term. November 5, while the criminal docket was being disposed of, Mr. Paquet came into court and Judge Swayne suspended proceedings, called him up and in the presence of Mr. Blount, one of the defendants, and attorney for the defendants, in the McGuire suit, called attention to the letter stating that he had not answered it as he thought it should be disposed of in court when the other side was represented. He stated that he had negotiated in behalf of a relative for block 91, that during the negotiations a quit-claim deed had been forwarded, and on inquiry it was developed it was because the grantor would not warrant against the Caro claim, that thereupon the deed was returned and all negotiations terminated, that while the letter was not a formal application he would treat it as such, and thought under the circumstances he was qualified to try the case and felt in duty bound to go on. In argument he was vigorously assailed for failing to recuse himself, but a discussion of that phase of the case is clearly immaterial as he was not impeached for such failure. In fact, if his conduct in thus failing was a proper subject of adverse criticism it only furnished the stronger motive for the alleged improper and contemptuous conduct of Paquet, Belden, and Davis, and makes it more probable that they were guilty of such conduct, as it intensified the motive. Paquet was not a witness, and the testimony that he was informed by Judge Swayne on November 5, that the judge had terminated all connection with lot No. 91 was uncontradicted. The clerk testified that substantially the same statement was made by the Judge on Friday, the 8th of November in the presence of Paquet, Belden, and Davis.

It seems that Blount, Paquet, and Davis, (claimed by Blount, but denied by Davis), were conferring from time to time about the trial of the McGuire case up to Saturday. It had been set down for trial at the beginning of the term on the motion of both parties. About five o'clock Saturday afternoon the criminal docket having been disposed of, the parties endeavored to make a disposition of the McGuire case. Paquet, Belden, and Davis were in court. Davis it was claimed was sitting with and conferring with Paquet representing the plaintiff, W. A. Blount representing the defendants. Plaintiffs desired a postponement until the following Thursday. To this the judge was willing to agree if defense consented. Defendants insisted on immediate trial. The judge ordered the case to go over until Monday at 10 when it should be tried unless plaintiffs could show cause for continuance. Mr. Belden said he wanted to try the case, and was all ready except procuring the attendance of his witnesses. He claimed he needed forty witnesses, one of whom was out of the state, but he could not give his name. He afterwards tried the same suit in 1902, with full opportunity to get all the witnesses he wanted and only used sixteen witness all of whom lived within a mile or two of the Court House and could have been summoned if at home, in about two hours time. Paquet was the leading counsel. He left court and prepared a precipe for a suit in ejectment in the state court against Judge Swayne, claiming dam-

ages for rents and profits in the sum of one thousand dollars, though he knew that Swayne had never been in possession and did not claim any title. There never was any pretence that Judge Swayne had any title, as the only deed ever made was to his wife and that was rejected. Mr. Davis was then employed in that suit and testified that he knew nothing about the title. Mr. Belden, in answer to a question as to whether he was advised that Judge Swayne had made a statement from the bench and had declined to recuse himself said, "Oh, I was fully informed about that," though he afterwards in the same examination denied any knowledge of Judge Swayne's statement about the purchase. He made no examination of the record to see how the title stood. Mr. Hooten testified that neither Paquet, Belden, or Davis had ever made any inquiry of him as to the negotiations for the sale of lot 91. Apparently they were not looking for reliable information. Belden admitted that he had made no inquiries. It appeared in the contempt hearing that Paquet, Belden, and Davis, all signed the precipe in the State Court suit. The conference which resulted in the bringing of that suit was held in the store of Mr. Pryor, who seems to have been financing the McGuire litigation. At that conference it is claimed an understanding was entered into to dismiss the McGuire suit on Monday morning, and great stress was laid upon this understanding as conclusively demonstrating that the suit in the State Court, which was afterward brought could not have been intended to affect the McGuire suit inasmuch as it had already been agreed to discontinue it. But that understanding, if in fact, had proved to be entirely immaterial as affecting the propriety of Judge Swayne's conclusions on the facts in the contempt case, as it was conceded he was not informed of any such understanding or agreement. Testifying to it and exploiting it with a great flourish of trumpets, three years after it ought to have been communicated to the judge, if he was to be affected by it, while possibly characteristic, could hardly prejudice the judge before an intelligent tribunal. The writ was served on Swayne after eight o'clock Saturday night. Mr. Belden gave as reason for this extreme diligence, that it was hurried up and served that night so as to be in time for the rule day of the following month, and they wanted to have service on Charles Swayne before he left the state, but it appeared that the first Monday of December was the first rule day and that according to his understanding he needed only fifteen days for service and he had at least twenty-one, six more than the requisite number, and that he knew Swayne was to be in Pensacola until the following Monday at 10, so that from every point of view there was ample time and opportunity for service on Monday.

Later in the evening, apprehensive no doubt, that the bringing of the suit should not sufficiently embarrass the Judge and bring him into public contempt, Mr. Paquet wrote an article for the *Pensacola Press*, published Sunday, and sent it to the paper by Mr. Pryor. In this article he described the State Court suit as "A decided new move in the now celebrated case of Mrs. Florida McGuire," and in order that there might be no question as to identity and purpose, said it was to recover possession of lot 91 "and which is alleged that Judge Swayne purchased from a real estate agent in this city during the summer months and which is a part of the property now in litigation before him." Belden and Davis endeavored to break the force of this article by stating that they had nothing to do with writing it and testified that they so stated to Judge Swayne at the hearing. Judge Swayne's counsel claimed in argument before the Senate, that these attorneys conspired to bring a baseless suit for an unlawful purpose, and if the conspiracy was made out it might well have been held on familiar principles that they were re-

sponsible for all acts done in pursuance thereof, though they did not directly participate therein, and the fact that they all signed the precipe in the State Court suit, tended strongly to establish the conspiracy. Monday morning Belden and Davis went into court (Paquet having been called to New Orleans by sickness in his family). Davis had his name entered of record as counsel for the plaintiff, and discontinued the McGuire suit. W. A. Blount then, as *amicus curiae*, stated that in his opinion a contempt had been committed and suggested that an investigation be had for the purpose of determining whether a contempt had been committed or not, and afterward wrote out and signed a motion to that effect in the motion book. The motion was not on oath. Mr. Palmer in his speech on the impeachment resolution contended that in case of a contempt not committed in the presence of the court the proceeding "must be founded on an affidavit setting forth the facts and circumstances constituting the alleged contempt sworn to *by the aggrieved party* or some other person who witnessed the offense. W. A. Blount was certainly the "aggrieved party" and was therefore properly moving, yet, in his address before the Senate, Mr. Palmer bitterly complained that Blount acted in that capacity, using this choice collection of language, characteristic to some extent of the impeachment proceedings, to adequately express his feelings. "He selected the one man Blount whose grist he had insisted upon grinding in his judicial mill and who had been able, through Judge Swayne's refusal to recuse himself, to force a discontinuance of the case, and who might therefore be supposed to feel willing to do the dirty work of the judge to institute and prosecute the proceedings for contempt," evidently ignoring the right of "the aggrieved party" to intervene, which he had previously asserted. His law was evidently temporarily in eclipse. As to the necessity of an oath the "Encyclopaedia of Law and Procedure" states the law as follows: "As a rule the proceeding to punish for contempt committed out of the presence of the court should be instituted by a statement or some writing or affidavit presented to the court setting forth the facts" (Vol. ix, p. 38). So an oath is not an essential element in the motion.

The judge made a declaration on the 11th, Monday, relative to the facts, incorrect in some of its details, but in substance an accurate statement of his connection with lot 91, and this was made a matter of record. Tuesday, Belden and Davis appeared and filed an unverified answer. Neither of them testified, though they had every opportunity. Mr. Palmer in his report to the House stated in substance five times that they had purged themselves on oath and enlarged upon the iniquity of holding them for contempt after such purging, and although his attention had been called to the fact by Judge Swayne, that there had been no such purging, he afterward repeated in substance the same statement six times in his speech to the House. In their answer they did not deny bringing the suit in the State Court, but they did not claim it was in good faith or that they so believed. They denied being present on November 5, when Judge Swayne made the statement, but did not deny that it had been communicated to them, or that they had any knowledge thereof. For their reasons for believing that Judge Swayne or some member of his family was interested in lot 91, they referred to the declaration made November 11, the day before, in which declaration it was stated that "thereupon,and by his advice, the said deed was returned to the proposed grantors with the statement that no further negotiation whatever could be conducted by them in relation to this property, and they thereupon refused to purchase either at the present time or in the future any portion of said tract," *an express and unequivocal repudiation of the deed.* Yet having referred to this very

declaration as the source of their information, Belden and Davis went on to say in their answer that they "believe there is in existence a deed to Mrs. Charles Swayne uncanceled, and that they have *no knowledge of its repudiation.*"

That must have impressed Judge Swayne as a candid way of treating his own declaration, mildly informing him that he was not worthy of belief and constituting a new contempt. It indicates perhaps why the answer was not sworn to. Davis did not deny in the answer that he had been of counsel for the plaintiff in the McGuire case, he simply claimed the court had no jurisdiction over him until he requested the court on the 11th to mark his name as attorney for the plaintiff. He testified before the Senate that he was not of counsel in that suit, but he did not testify at all before Judge Swayne, and all Judge Swayne had was the evasive denial, not on oath, in the answer. There was testimony on the impeachment trial that Davis was conferring with and apparently making suggestions to Paquet when he was urging a postponement on Saturday, and at other times, which among other things properly led the judge to believe and hold in the absence of any express denial, as he held in his finding that "his acts in and about the court room had led the court to believe that he was the counsel in the case previous to that time" (Monday).

In answer to the question: "Then, Mr. Belden, these facts of what you did outside of that court and as to your notice and the honesty of your purpose in doing them were never brought to the attention of Judge Swayne on the hearing of the proceeding for contempt, were they?" Mr. Belden emphatically said, "Never, under no circumstances would I have gone to him."

The bringing of the suit in the State Court, the notice in the paper, were all proved. It was hardly necessary to call any one to prove to the judge his own declaration made to Paquet, and when Belden and Davis failed to deny that that information had been communicated to them, or that they had any such knowledge, but stood dumb and mute, he clearly had a right to infer, if he was not actually bound to do so, that it had been so communicated to them and that they knew the State suit was without foundation and clearly a contempt. Who can say that beyond a reasonable doubt he was wrong in so finding? Who can justify the professional ethics that for the purpose of convicting Judge Swayne of an infamous crime in rendering a judgment, insistently urged upon the Senate facts believed to be important and determining, which were not only not presented but were deliberately withheld from him when he rendered that judgment. 'It is to be regretted that the management were confronted with an exigency so great as to make such a course necessary.

In this connection it is important to note that after having failed in a writ of prohibition to prevent Judge Swayne from proceeding against him for the same contempt, Louis Paquet, the leading counsel for plaintiffs in the McGuire case, who drew the precipe in the State Court suit and wrote the newspaper article, and was fully informed of all the facts, came into court March 31, 1902, and filed a signed statement in which he admitted that "through excessive zeal in behalf of his clients he did so act that this honorable court was justified in believing the said actions were committed in contempt thereof, and as showing disrespect therefor" and apologized therefor, whereupon he was promptly excused by the judge. This was not in evidence before the court when the judgment was rendered against Belden and Davis, but the confession of one of the combination does not tend to impeach that judgment but confirms it.

It was urged that Judge Swayne had no jurisdiction of contempt proceedings in such a case. The case was carried before Circuit Judge Pardee and with Judges McCor-

mick and Shelby sitting and concurring with him he held: "The relator is an attorney and counsellor of the United States Circuit Court for the Northern District of Florida and as such one of the officers of the court within the intent and meaning of the above statute. As such officer he was and is charged with conduct *in and out of court*, which if accompanied *by malicious intent or* if it had the effect to *embarrass and obstruct the administration* of justice was such misbehaviour as amounted to a contempt of court. To hear and decide whether the relator was guilty of such contempt was *clearly within the jurisdiction* of the court" (112 F. R. 139).

When sustained by three disinterested judges, Judge Swayne could hardly be said beyond a reasonable doubt to have wrongfully asserted jurisdiction. He sentenced them to two years disbarment and imprisonment for ten days and one hundred dollars fine. Mr. Blount immediately called his attention to the erroneous disbarment and it was at once remitted. The statute only authorized fine *or* imprisonment. No one at the time consulted the statute and the respondents made no question as to the propriety of the sentence. No one seems to have known at the time that the sentence could not be cumulative. A petition for *habeas corpus* was made out and seventeen reasons alleged as the ground thereof, but the illegal sentence was not relied upon. Judge Pardee in his opinion called attention to it and gave the respondents the option of serving the time or paying the fine. They had both served three days. Belden elected to complete the time but Davis paid the fine, so that neither was injured by the erroneous sentence.

There was nothing to show that Judge Swayne knew the requirements of the statute in this respect, and constructive or inferred knowledge as distinguished from actual would hardly be sufficient upon which to predicate express malice. There was a good deal of conflicting testimony as to the language used by Judge Swayne in passing sentence. It was claimed and denied that he characterized their conduct as a "stench in the nostrils of the decent people." It was at least doubtful whether he used that expression and it was admitted that he expressed regret at being obliged to sentence Mr. Belden who was some seventy years of age and suffering from facial paralysis. On these articles the vote was uniform, 31 guilty and 51 not guilty.

The 12th article was based on the O'Neal contempt case. On this article the managers asserted in argument that the facts material to the issue were not in dispute. Nothing could be farther from the facts. On the material facts there was a direct and irreconcilable conflict of testimony. Mr. Greenhut was at one time a director in the American National Bank of Pensacola, of which Mr. O'Neal was president. While such a director the bank negotiated a loan to Scarritt Moreno of $13,000, and received security therefor. There was some question as to its value. The loan with the security was transferred to a director of the bank for $10,000. Meanwhile Greenhut had endorsed a note to the bank for Moreno, for $1,500. Greenhut refused to pay the note, claiming that the bank had security which should be applied thereto. Moreno became insolvent and Greenhut was appointed his trustee and under the advice of his counsel brought a suit in equity, claiming an interest for the bankrupt estate in the security, and made the bank a party thereto. The suit was brought on Saturday, and on the following Monday, as O'Neal states in his affidavit, as he was going to the bank he saw Greenhut standing in the door of his store "and it suddenly occurred to respondent to reproach the said Greenhut with having brought the suit mentioned in his affidavit against said bank." He entered Greenhut's store in which an altercation occurred, as the result of which O'Neal cut Greenhut with a knife "at a point behind the left ear, then across the left cheek, ending at the

left corner of the mouth and stabbed him on the left side, over lower ribs, upon the left hip, on the left elbow, and on the left hand."

O'Neal admitted in his affidavit that the conversation was "however *concerning chiefly* the bringing of the said suit against the said bank." The great question in the case was whether he made an assault with intent to kill upon Greenhut "*concerning chiefly* the bringing of said suit," or whether he was properly repelling an assault made upon him by Greenhut. Upon this point O'Neal and Greenhut were directly at issue. At the hearing Greenhut was impeached only by the opposing testimony of O'Neal, there being no other eye witness to the beginning of the affray.

On the other hand O'Neal having sworn in his affidavit made about fifteen days before the hearing, "that Greenhut in his answer to the suit on the $1,500 note had interposed a defense which this respondent believed and believes to be untrue, and known to the said Greenhut to be untrue" admitted on his cross examination at the hearing that he didn't know what the plea in that case was, an admission that did not tend to sustain his credibility as a witness. He admitted he had pleaded guilty to three criminal charges, one, shooting across a public street, and two, for carrying concealed weapons, neither of which were calculated to commend him as a keeper of the peace. A newspaper reporter testified that immediately after the assault O'Neal gave him his version of the facts and said Greenhut gave him the lie when he struck Greenhut and then Greenhut struck him, flatly contradicting O'Neal's subsequent version and proving him the aggressor. At the hearing O'Neal exhibited a small pocket knife as the weapon used by him. One witness who held O'Neal and tried to take the knife from his hand, with which he had been asserting his judicial rights against the trustee in bankruptcy, testified that the knife exhibited was not the knife used, and another witness not so positive, said he did not think it was the same. If he had any regard for the weight of evidence, how Judge Swayne could have done otherwise than accept Greenhut's version, it is difficult to see. How any intelligent, fair-minded man fully informed as to the facts, could have held otherwise is not perceived. *A fortiori* Swayne did not commit an impeachable crime in so doing. O'Neal was convicted, sentenced to sixty days imprisonment, a writ of error to the Supreme Court of the United States was sued out, a supersedeas of the sentence was granted and O'Neal was never imprisoned a moment for his murderous assault. That court held that "Jurisdiction over the person and jurisdiction over the subject matter of contempt was not challenged. The charge was the commission of an assault on an officer of the court for the purpose of preventing the discharge of his duties as such officer, and the contention was that on the facts no case of contempt was made out."

In other words the contention was addressed to the merits of the case, and not to the jurisdiction of the court. (190 U. S. 36.)

The judge's jurisdiction, his right to hear and determine the question of contempt, on such a state of facts was then challenged in a *habeas corpus* proceeding before Judge Pardee, Judges Shelby and McCormick sitting with him. They unhesitatingly and unanimously held:

"The question before the District Court in the contempt proceeding was whether or not an assault upon an officer of the court, to wit, a trustee in bankruptcy, for and on account of, and in resistance of, the performance of the duties of such trustee, had been committed by the relator; and if so, was it, under the facts proven, a contempt of the court whose officer the trustee was? *Unquestionably* the District Court had jurisdiction summarily to try and determine these questions, and, having such jurisdiction, said court was fully authorized to hear and decide and adjudge upon the merits." (125 F. R. 967.)

When three able and disinterested judges held that he "*unquestionably*" had jurisdiction, it is preposterous to contend that Judge Swayne committed a crime in asserting it. To be sure the learned managers vehemently contended in argument that, reproaching Greenhut with a lethal weapon "concerning chiefly" the bank suit, was an indictable offense, and if punished as for contempt, he would be twice punished, and therefore O'Neal could not be held for contempt. Unfortunately for this contention the Supreme Court of the United States in *In re* Savin (131 U. S. 275) had held the other way, saying "undoubtedly the offense charged is embraced by that section and is punishable by indictment. But the statute does not make that mode exclusive." Strange as it may seem, this article received the largest vote of any, 35 voting guilty and 47 not guilty. There was no division on party lines.

Thus ended the fifth impeachment of a United States Judge in our history. Judge Swayne was not a witness and at the conclusion of the evidence his counsel offered to submit the case without argument, which offer was declined by the managers.

Of all impeachments it was the most abject and humiliating failure as none was ever tried that did not come nearer a favorable result, in no case failing to get at least a majority in favor of conviction on at least one article, while here the most favorable result was a majority of 12 against conviction.

What there was in legitimate proof that would stand the test of impeachment proceedings, as indicated by the articles relied on, to justify the assertion of Mr. Palmer, made in the debate on the articles, January 19, 1905, that "The track of this man since the time he was appointed a judge in Florida down to this date, is spread all over with bankruptcies, scandals, and suicides," an intelligent and discriminating public must judge. The assertion, however, went broadcast throughout the country, as a summary of the charges against Judge Swayne.

It is reasonably safe to assume that hereafter Congressional lawyers having any desire for "the bubble reputation" will not be likely to seek it in impeachment proceedings, unless the facts are such as to compel a favorable result, unaided by passion or prejudice.

Hon. C. H. Grosvenor has something of a reputation as a political prognosticator, but he sometimes enters other fields. I conclude this article by quoting without comment, approving or otherwise, a prophecy with which he concluded a speech on this case in the House of Representatives. He said: "We shall see what we shall see, and when our managers come back from the Senate trailing the flag of partisanship and persecution in the dust of overwhelming defeat, we shall understand then better than we understand now the principles of law governing this case and the elements of hate that have entered into it."

ROCKLAND, MAINE, March, 1905.

THE TALE OF "34 FEDERAL"

By Donald Richberg

I AM "34 Federal," a book with a past. Once I was innocent and beautiful, yet withal wise. Now I am still wiser, but my innocence, my beauty, and my pride have fled. Listen to my story.

My master is a very poor lawyer. He is not poor in money, because he has managed to conceal his faults under a great bluster of manner, but he is poor in legal wisdom, very careless, and never brilliant in tactics. Not long ago master took me down and thumbed my pages, saying as he did so: "152 or 252 — or — what was that number? I don't suppose the case applies, because no case will apply, but Griswold said it was right in point. — Ah, here it is!" He then ran down the syllabus and before he had read the opinion began to whistle and slap his thighs. This is a thing which only a careless lawyer does: counts his chickens on the eggs in the syllabus (which only too often turn out bad). Next he read the case through carefully, all the time stroking my leather back affectionately. Finally he turned down a corner of two of my leaves and then laid me carefully down at the side of his desk. Just then a client entered the outer office.

"Ah!" said master, "come right in, Mr. Brown."

Mr. Brown came in looking very sad. He sat down slowly, with a long sigh, and began to tell master how hard times were. Finally he asked if master felt as doubtful about his case as he had before. Master looked at me and then drew his lips tight together and said:

"Well, Mr. Brown, all things are uncertain in this profession. I think we have a chance to win."

Then Mr. Brown went on and talked about how his bills worried him, till finally master interrupted.

"Look here, Mr. Brown," he said, "you mean you'd like to drop this case and not have to pay me any more fees." Then he bellowed out a mirthless sort of guffaw and continued, over-talking Mr. Brown's protests:

"I'll tell you what I'll do. I'll do this: I don't advise my clients to fight a case unless they have a good chance. Now I'll prove it. I'll carry this litigation through without a cent of further cost to you, not a cent — if I lose. If I win, you give me a third — no, hang it! if this is all my game we'll share alike. I'll do it for half."

"I'll take you up," said Mr. Brown eagerly, "I'll take you up."

"All right," said master, "we'll just call that settled; and we'll put it down in writing, so we will neither of us forget."

After Mr. Brown had gone, master sat for a long time, staring at the blank wall. Then he turned and patted me softly and said to me: "You're worth just half of ten thousand to me, old boy, and I can make pretty good use of that amount right now."

For some time after that day I lay on master's desk, and master was so kind in his glances toward me that I began to feel I had hitherto misjudged this man, and I took keen pleasure in this growing friendship between us. At last one morning he gathered a lot of papers together, with many grunts and much "cussing" of the stenographer, and went over to the court room, where he sat holding me in his arms for a short time. Then the clerk called, "Brown against" something or other. I could not quite hear all he said, as master jumped up and hurried forward to where the judge sat.

Now came the proudest hour of my life. After a great deal of talk and many disagreements between the lawyers and the judge, master finally came over to the table where he had left me and opened me to the place where the corners were turned

down. Then master read from me four solid pages in a big, emphatic voice, pausing now and then to inflate his chest and glower at his opponent. Sometimes he would read a sentence over slowly and quietly and then roar it out again, all the time thumping my pages with his heavy hand. Of course I knew this was not anger on his part, so I didn't mind it, though it cracked the glue in my back very badly.

Master's opponent didn't seem to mind this either, for he sat and smiled throughout master's recital. The more noise master made, the more steadily the other man smiled. Finally master said:

"I think, if your honor please, that this case is quite decisive as to the present controversy. Perhaps your honor would like to see the case yourself."

Master passed me over to the judge, who placed me before him on his high desk. Pride filled every thread in my binding. Before the judge had adjusted his glasses, however, the opposing attorney rose.

"If your honor please," he began, in a sort of whimsical drawl, "the attorney representing Mr. Brown has unfortunately neglected to examine the last volume of the Supreme Court Reporter which has just come to my hands. The case of Notman *v.* Northern Consolidated, etc., Co., p. 225, is worthy of attention. Allow me to read the final words of the decision:

"The 'pig-iron' case, as it is commonly called in the '34th Federal,' has been so persistently brought to the attention of the court in this cause, that a final word is necessary as to that decision. There can be but little doubt that the opinion in the 'pig-iron' case proceeded from a mistaken view of the facts, or else was predicated upon facts not appearing in the record. Certain it is that that decision is to-day without following in any of the courts of the United States and England, and cannot be regarded as having any weight in the decision of the cause at present before this court."

There was a dead silence in the court room after this, and I could just see over the edge of the judge's desk that my master turned very red. Then the wrangling broke out again, but it did not last much longer, and soon my master gathered together his papers and started to leave. The judge called him back and returned me to him. To my surprise he seized me quite roughly and carried me back to the office, held under his arm so I feared I would fall to the muddy pavement at any moment. Arrived at the office, my master flung his papers on the desk and then held me in his left hand while he struck me several hard blows with his right hand, all the time growling out the most unprintable sort of words.

After many minutes of this sort of abuse, which bruised me both within and without, he seized me with his right hand and flung me in the far corner, where I landed between the safe and a waste-basket in a very battered state — my front cover almost torn off and my leaves all open. There I have lain for days — weeks I think it is now. Once in a while my master, in passing by, kicks me with his heavy boot. This pains me greatly, but I feel that I shall soon be beyond all pain. The next time the scrubbing-man picks me up and lays me on master's desk, will probably mark my end. The scrubbing-man has done that three times, meaning to be kind, but each time my master pounces on me in the morning with a savage growl and throws me back in the corner, more ragged and wounded than before.

I hear Mr. Brown joking master in the outer office, something about a contingent fee. Last week when Mr. Brown left master swore he had a mind to throw me out of the window, but he finally said: "No, I won't," and flung me back in this corner.

The door has slammed. Mr. Brown has gone. Master is coming into his office.

CHICAGO, ILL., March, 1905.

THE PERPETUATION OF THE OPEN MARKET

By Bruce Wyman

Of the Faculty of Law in Harvard University

I

EVEN to the most superficial observers of current events it is clear that the competitive system is much threatened from many quarters. Undoubtedly the industrial order in the first half of the twentieth century is going to be a different thing from the business organization of the first half of the nineteenth century; but whether this change is to be one in kind or one merely in degree remains to be seen. At the present moment despite adverse movements the substance of competition is still to be found in the general course of most of industrial activities for the greater part of the time. This condition can be maintained if all of the conservative forces of society are exerted; and among these one of the most potent is the law.

The courts are manifesting the greatest activity at the present time at various points where the disturbing force of the predatory combination is making itself felt. And there is now much law by which outrageous action by a combination may be stopped. There are, however, many questions of law in relation to such action that are in dispute. One of these problems it is proposed to discuss in this article, as it is one of the most pressing of those that are undetermined. The issue involved is whether there is a difference between the methods in competition which may be employed by an individual and the course of action that may be taken by a combination in competition. More precisely the question is whether a combination engaged in competition may refuse to have any business dealings with those who continue to have commercial relations with its rivals. For it is obvious that if the combination be permitted to compete in this way, the ruin of the rival, thus cut off from his sources of supply, will result in numberless instances. As to this, the combinations at the present day defy the courts to declare such a course of action to be illegal, however oppressive it may be.

II

The general legal theory of the most accurate observers of these current industrial phenomena is that every person engaged in business has a legal right to his trade; consequently those who interpose themselves between a trader and the persons who would deal with him commit a *prima facie* tort by this very interference. By this theory every one who intermeddles with the business relations of another is put to his justification; among the initiated, therefore, the problem of legality has become a question of justification. A man who urges his friends to stop dealing with his enemy by this theory is liable for the damage caused by his intermeddling, since his motive is bad; but a tradesman who persuades a customer to stop buying of his rival has a justification by obvious policy, for by general principle fair competition is a complete justification, since its operation is held to be for the best interests of society. This general theory is already established by the weight of modern authority, although there persists a respectable dissent.

The nature of this business right is excellently stated in a recent case, Jersey City Printing Company *v.* Cassidy, 63 N. J. Eq. 759. In that case the court was challenged to define its right to issue an injunction at the prayer of an employer to restrain the defendants, former employees then on strike, from unlawful interference with scabs who were seeking to take the places of the strikers.

Vice-Chancellor Stevenson stated the right of the complainant substantially as follows:

"A large part of what is most valuable in modern life seems to depend more or less directly upon 'probable expectancies.' When they fail, civilization, as at present organized, may go down. As social and industrial life develops and grows more complex these 'probable expectancies' are bound to increase. It would seem to be inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing wants of an increasingly complex social order, will discover, define, and protect from undue interference more of these 'probable expectancies.' It will probably be found in the end, I think, that the natural expectancy of employers in relation to the labor market and the natural expectancy of merchants in respect to the merchandise market must be recognized to the same extent by courts of law and courts of equity and protected by substantially the same rules. It is freedom in the market, freedom in the purchase and sale of all things, including both goods and labor, that our modern law is endeavoring to insure to every dealer on either side of the market. The merchant, with his fortune invested in goods and with perfect freedom to sell, might be ruined if his customers were deprived of their freedom to buy."

As to the grounds upon which justification may rest, they are many. For the present purpose it is enough that fair competition is an accepted excuse. But if the motive or the method be bad, the justification properly fails. All this is shown in Doremus *v.* Hennessy, 176 Ill. 608, 52. This action was on the case for damages upon the ground that the members of an organization known as the Chicago Laundrymen's Association had fixed a scale of prices for laundry work, and had conspired to injure the plaintiff in her good name and credit, and to destroy her business, because she would not charge prices in accordance with such scale, and they were proceeding to carry out the conspiracy. It was held actionable.

The court by Mr. Justice Phillips said: "A combination by them to induce others not to deal with appellee or enter into contracts with her, or to do any further work for her, was an actionable wrong. Every man has a right, under the law, as between himself and others, to full and free disposition of his own labor and capital according to his own free will, and any one who invades that right without lawful cause or justification commits a legal wrong, and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done, to the detriment of the right of another, it is malicious; and an act maliciously done with the intent and purpose of injuring another is not lawful competition."

The principal point to carry forward from this is the idea that to compete as one wills is not an absolute right in our law, but that competition is only a permission granted by the law when its operation is upon the whole for the best interests of established society, forbidden if it is carried on in a way prejudicial to the industrial order. It cannot be said, therefore, at the outset of a discussion of competition by combinations such as this is to be, that as one man has an absolute right to compete as he chooses, therefore fifty men acting together have the same right to compete as they choose. The theory that has just been developed cuts in back of all this by denying even to single men the justification of competition whenever their actions seem opposed to sound policy; and by the same law, whenever the operations of a combination in the course of competition are proved to be detrimental to the best interests of society, its members may be held to be tort-feasors by reason of what they have done. For what is to be held fair in competition, and what unfair, is by this analysis all a question of public policy, which may well be different in the case of concerted action and in the case of indivdual action.

III

Still we are confronted at the outset with the established law for freedom in competition and the undoubted desire for its maintenance. Competition is firmly believed by the mass of men to be worth more to society than it costs; and therefore, so long as competition by a combination has no different effect upon the course of trade than competition by an individual has, it must be allowed to go on however ruinous it may be to rivals in business. Not until we have a plain case where combined effort can be shown to be altogether different in its operation from individual action can the competition of a combination be held unfair while similar methods are held fair enough for an individual.

Perhaps the most noteworthy case in this connection is Mogul Steamship Company *v.* McGregor, because of the great opinion of Lord Justice Bowen, L. R. 23 Q. B. D. 598. The actual facts of that case also make it a crucial one. The defendants were a number of ship-owners who formed themselves into a league or conference for the purpose of ultimately keeping in their own hands the control of the tea carriage from certain Chinese ports, and for the purpose of driving the plaintiffs and other competitors from the field. In order to succeed in this object, and to discourage the plaintiffs' vessels from resorting to those ports, the defendants during the "tea harvest" of 1885 combined to offer to the local shippers very low freights, with a view of generally reducing or "smashing" rates, and thus rendering it unprofitable for the plaintiffs to send their ships thither. Moreover, they offered a rebate of five per cent to all local shippers and agents who would deal exclusively with vessels belonging to the conference — a rebate which would be forfeited if at any time outside ships were used.

It is impossible to give a fair impression of Lord Bowen's opinion by extracts from it; but his points may be shown. Considered as mere competition he found, of course, no cause of action; on that point he said in one place: "The offering of reduced rates by the defendants in the present case is said to have been 'unfair.' This seems to assume that, apart from fraud, intimidation, molestation, or obstruction of some other personal right *in rem* or *in personam*, there is some natural standard of 'fairness' or 'reasonableness' (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason, for such a proposition. It would impose a novel fetter upon trade. The defendants, we are told by the plaintiffs' counsel, might lawfully lower rates provided they did not lower them beyond a 'fair freight,' whatever that may mean. To attempt to limit English competition in this way would probably be as hopeless an endeavor as the experiment of King Canute." On the point of combination as an element in the case, he could not see that this made any difference: "But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible — would be only another method of attempting to set boundaries to the tides."

As to the first point, it would seem that the same policy which permits an individual trader to cut prices to any extent although his rival is thereby damaged would allow a combination to lower rates in competition against its rivals. Indeed, the public is benefited when many lower prices as it is when a single man does; and a rival must meet the low price made by his combined rivals as he must the reduced rate of a single opponent. But as to the second point — query: Shall a combination be permitted to take the attitude that they will

charge a higher price to those who deal with a rival — may a rival who is thus driven out of business say that this is unfair competition? This issue must again be decided upon the balance of social advantage.

A rather similar case is John D. Park & Sons Company *v.* National Wholesale Druggists' Association et al., 175 N. Y. 1. The facts in brief were these: The manufacturers of certain proprietary medicines and an association of wholesale dealers therein entered into an agreement to sell the goods at a uniform jobbing price for fixed quantities only to such dealers as would conform to the manufacturers' price list in making sales of goods. All wholesale dealers had the right to purchase the goods from the manufacturers upon the same terms as members of the association, on agreeing to maintain the prices established by the manufacturers. Plaintiffs were unwilling to maintain the trade prices upon the medicines they purchased, but brought this complaint for being charged the "long" price, alleging that it is by reason of the conspiracy of the defendants that they were unable to get the discount rate.

The case was finally dismissed in the Court of Appeals upon demurrer. Some extracts from the opinion of Mr. Justice Haight will show the course of the reasoning: "Is this plan against public policy? An active competition and rivalry in business is undoubtedly conducive to the public welfare, but we must not shut our eyes to the fact that competition may be carried to such an extent as to accomplish the financial ruin of those engaged therein, and thus result in a derangement of the business, an inconvenience to consumers, and in public harm. I do not understand that the complaint charges that the manufacturers were compelled to adopt the plan by reason of threats or intimidation on the part of the members of the association. The proprietors might well deem it to be for their best interests to act in accord with the wishes of the druggists, rather than those of the plaintiff. I do not understand that it was intended to charge that the plan adopted prohibited druggists from dealing with proprietors or manufacturers who did not adopt the contract plan with reference to the sale of proprietary goods. I am not here going to question the right of the big fish to eat up the little fish — the big storekeeper to undersell and drive out of business the little storekeeper — but I do believe that the little fellows have the right to protect their lives and their business, and if they can, by force of argument and persuasion, induce manufacturers to establish a uniform price."

In this last case the argument for the validity of special favors by a combination is stated most attractively for the defendants when it is said that there is no real pressure exerted by the combination upon any one, simply those outside the combination get an advantage if they accept the terms, while they do not get the benefit of the concession unless they conform to the rules. And yet there is in the situation something of the coercion which always exists whenever there is anything of monopolization; but for the declaration of the combination of the retailers, the manufacturers of proprietary medicines would probably have sold to rate-cutters who sent in heavy orders at large discounts, whereas now they fear to sell to them at all, except at the retail price. It is therefore a close question as to these cases in this subsection, for although there is a danger in allowing discrimination where there is monopoly, there is in this case no obvious coercion exerted by the combination. These are cases upon the border line therefore, and the competition may perhaps be held not unfair without sacrifice of fundamental principle.

IV

Cases now engage our attention where the disturbance of the industrial peace by the coercion exerted by a combination in its competition is much more serious. What unfortunately is a typical case is seen in

Jackson *v.* Stanfield, 137 Ind. 592. Jackson was a broker engaged in buying and selling lumber. Stanfield was a member of a retail lumber dealers' association. The rules of this association provided that if any wholesale dealer should sell lumber direct instead of through retailers who owned lumber yards, all the members of the association of the retailers should upon notice refuse to have further dealings with such a wholesaler. In this particular case Jackson was the person injured by the enforcement of this rule by the association.

In holding this a conspiracy, Dailey, J., said: "The great weight of authority supports the doctrine, that where the policy pursued against a trade or business is calculated to destroy or injure the business of the person so engaged either by threats or by intimidation, it becomes unlawful, and the person inflicting the wrong is amenable to the injured party in a civil suit for damages therefor. It is not a mere passive, let-alone policy, a withdrawal of all business relations, intercourse, and fellowship, that creates the liability, but the threats and intimidation involved in it."

A more recent phase of the same problem is seen in the late case of Brown & Allen *v.* Jacobs Pharmacy Company, 115 Ga. 429. The record in this case disclosed that there existed in the United States three organizations, the Proprietary Association of America, the National Wholesale Druggists' Association, and the National Association of Retail Druggists. These three associations, acting together, had, among other things, the purpose of keeping up the prices of proprietary medicines, drugs, and other articles usually dealt in by those in the trade. Jacobs the plaintiff had formerly been a member of the local branch of the retail association in Atlanta, but he had withdrawn from it upon charges being preferred against him for violation of its rules. Thereupon the association sent the following letter to wholesalers throughout the country: — "*Gentlemen:* Inclosed please find a copy of a resolution recently adopted by the Atlanta Druggists' Association. There are fifty-eight retail druggists and three wholesale druggists in this city, and among this number only one, a retailer, is designated as an aggressive cutter. Believing that, from a business standpoint, you would prefer the aid and support of fifty-eight (two of the wholesalers are also retailers) legitimate druggists, rather than that of one cutter, we feel sure that it will afford you pleasure to sign the inclosed agreement. Awaiting an early reply, I am yours very truly, [signed]." By force of this representation that no retailer in the association would buy of any wholesaler who sold to the rate cutter, plaintiff was greatly damaged in his business because he could not get any supplies from the manufacturers, and brings this suit against members of the association.

Mr. Justice Fish promptly granted an injunction upon these grounds, thus stated: "Courts and text writers have not infrequently asserted that, as a general rule, a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action. But if this be advanced as a rule of universal application, it does not stand unchallenged. In the first instance, each member of the association had a perfect legal right to buy material and supplies exclusively from any dealer or dealers he might choose, and each dealer had an equal right to select members for his customers, and to confine his sales to them only. These were inherent rights, which no competitor was authorized to dispute, no court empowered to control or curtail. But in our opinion, it does not follow from this undoubted freedom of individual member and of individual dealer that all of the members may, as ruled in those cases, lawfully enter into a general and unlimited agreement, in the form of by-laws, that they and all of them will make their purchases from only such dealers as will sell to members exclu-

sively. The premise does not justify the conclusion. The individual right is radically different from the combined action. The combination has hurtful powers and influences not possessed by the individual. It threatens and impairs rivalry in trade, covets control in prices, seeks and obtains its own advancement at the expense and in the oppression of the public. The difference, in legal contemplation, between individual right and combined action in trade, is seen in numerous cases. To protect the individual against encroachments upon his rights by greater power is one of the most sacred duties of courts."

The force of the combination in these cases is so overwhelming that it is almost certain that the dealer against whom their efforts are directed will be crushed out. The reality of this oppression carries with it the conviction of the wrongfulness of this dictation by the combination. Even if it were in the face of the logic of the law, most men would call this competition unfair. For most men wish to see the perpetuation of the open market; and if a combination may work its will in this way, the end of industrial liberty is indeed at hand. The result of all this is that a combination which forces a rival out of business by concerted refusal to have any dealings with those who continue relations with their rivals, is put to its justification, so that it must show by what warrant in public policy it should be allowed to take such measures to strike at a rival, even in the course of competition.

V

To be quite accurate, it must be admitted that there is conflict of authority upon these matters. There are courts which hold that a combination can use its force to drive the customers of a rival away; and these should be given a hearing if this investigation is to be conducted impartially. One of the strongest of these cases is Macauley Bros. *v.* Tierney, 19 R. I. 255. The complainants were master plumbers, engaged in business in Providence. The respondents were officers of the Providence Master Plumbers' Association, a body affiliated with a National Association. This general association had adopted resolutions that they would withdraw their patronage from any firm manufacturing or dealing in plumbing material which sold to others than members of the affiliated associations. The enforcement of this resolution by the officers was so strict that complainants were almost driven out of business after they had refused to join the local association and be bound by its rules.

Chief Justice Matteson refused to grant an injunction. He said in part: "The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members of the association to rid themselves of the competition of those not members, with a view to increasing the profits of their own business. The question, then, resolves itself into this: Was the desire to free themselves from competition a sufficient excuse in legal contemplation for the sending of the notices? We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival and attracting it to himself is an act intentionally done and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or workmen, and the procurement of violation of contractual relations, are instances."

A more recent case with more complica-

tion in the facts is Scottish Coöperative Wholesale Society *v.* Glasgow Fleshers' Trade Defence Association, 35 Scottish Law Reporter, 645. Certain butchers of Glasgow were the members of the defendant association. A system of coöperative stores formed the constituency of the plaintiff association. The fleshers set about it to drive the stores out of the meat business. It appeared that the imported meat market was carried on at only one place in Scotland, — at the Yorkhill Wharf in Glasgow, — where the meats were sold by the importers at auction. The association considered that they would attain their object if they could induce the cattle salesmen who were used to sell the cattle at Yorkhill to refuse to sell to the coöperative stores, and with that view they approached those cattle salesmen and intimated that they would not buy at their auction sales unless they declined to sell to the coöperative stores. The cattle salesmen yielded to the pressure, and the defendants thereby forced the plaintiffs out of that line of business.

Lord Kincairney, who heard the case, did not see that anything could be done about it. His course of reasoning is shown by the following extracts: "It would be absurd to shut one's eyes to the obvious fact that the ultimate aim of these defenders was, at least in part and probably wholly, the furtherance of their own interests by disabling or putting an end to the competition of the coöperative society fleshers firstly as bidders and secondly as retailers. It cannot, I think, be doubted that if A informs B that he will not deal with him unless he ceases to deal with C, and C thereby loses the custom of B, C has no action against A, alalthough he may in fact have suffered loss through his interference. Any single Glasgow butcher might resolve not to bid at the auctions of salesmen who received the bids of the coöperative societies. He would, of course, be free to bid or not as he pleased — nobody could compel him. Clearly, also, he might inform the salesmen of his resolution, and he might go the length of asking them to exclude the coöperative store bidders. Such a man would, of course, be laughed at for his pains. But the case would be widely different if a number of the butchers took that course; and here the question of conspiracy comes in, assuming that there was conspiracy. After all, the name does not signify. A conspiracy, combination, or association, is, after all, nothing but a kind of contract. But, assuming conspiracy, it is not easy to see what the first defenders did which could subject them in damages. They were entitled to resolve to abstain from bidding at sales at which coöperative bids were received. It was entirely at their option to do that or not. It appears to me that the fleshers acted within their legal rights. It may be regrettable that they happened to have so much in their power. That is the accident of their position, and of the peculiar character of the foreign cattle market."

The reasoning of these cases, and of the others that are like them, is obvious — too simple in view of the complexity of the problem. It is said that A has a right to refuse to deal with B, therefore A has a right to refuse to deal with B unless B will refuse to deal with C, and therefore A and others with him have a right to refuse to deal with B unless B will refuse to deal with C. So it is said, however outrageous the result, the logic of the law must not be set aside. Underneath affirmation of this sort lurks doubt; for if the result is wrong, the course of reasoning must be. There is an intermediate assumption that the individual refusal by a single man is of the same character as a concerted refusal by many men. This may well be challenged as law, since it is contrary to fact.

VI

The true method of approaching this problem, it should be reiterated, is by way of justification — we are not examining absolute rights, but relative rights. This is well

put in Delz *v.* Winfree, 80 Tex. 400, where the cause of action stated in the petition was that several had induced others not to sell to the petitioner live animals for cash, whereby he was greatly injured in his business as butcher.

Associate Justice Henry said in part: "The appellee also asserts the following proposition, which may be conceded to be correct: 'A person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice, or malice, and there is no law which forces a man to part with his title to his property.' The privilege here asserted must be limited, however, to the individual action of the party who asserts the right. It is not equally true that one person may from such motives influence another person to do the same thing."

Granted that we have under discussion a case of pure business motive, not of personal spite, it becomes a question, therefore, what course of action shall be justified, and what methods shall be held to be opposed to public policy. An excellent recent case attacks the problem upon that basis — Bailey *v.* Master Plumbers' Association, 103 Tenn. 99. This was one of the typical cases: the defendants, members of an association with by-laws forbidding its members to purchase from dealers who sold to outsiders, the plaintiff, one forced out of business by this sort of competition. And whether this is fair or unfair competition is the question. So that the relation of the particular legal problem to general industrial policy is again involved.

The court — Mr. Justice Caldwell writing the opinion — say in one place: "It is entirely true that, in the first instance, each member of the association had a perfect legal right to buy material and supplies exclusively from any dealer or dealers he might choose, and each dealer had an equal right to select members for his customers, and to confine his sales to them only. These were inherent rights, which no competitor was authorized to dispute, no court empowered to control or curtail. But in our opinion, it does not follow from this undoubted freedom of individual member and individual dealer that all of the members may, as ruled in those cases, lawfully enter into a general and unlimited agreement, in the form of by-laws, that they and all of them will make their purchases from only such dealers as will sell to members exclusively. The premise does not justify the conclusion. The individual right is radically different from the combined action. The combination had hurtful powers and influences not possessed by the individual. It threatens and impairs rivalry in trade, covets control in prices, seeks and obtains its own advancement at the expense and in the oppression of the public."

If, then, this is all a matter of justification, the existing law may be explained to those who dissent from the distinctions that are made, by saying that perhaps an individual in competition may be allowed to refuse to deal with those who deal with his rival, while certainly a great combination may not be allowed to use the same method without disturbance of the industrial peace. But is the method the same when there is concerted action and when there is refusal by an individual? It seems the real truth that the very concert gives combined action a higher potentiality for harm than individual action ever can have. Formal logic does not now support the minority view that the combination is as free to act in this way as an individual is. And public policy seems to be with the majority view that the individual trader should be protected against the pressure of the combination which is directed against his business relations with those who would deal with him.

VII

By some observers of these cases a difference is attempted between the situation just under examination where the coercion of the combination is exercised upon third

parties outside of the combination, and what seems to them another state of things where an outside party is injured solely by the pressure of the members of an association upon each other. It is urged here for the last time that what one may do alone, he may join with others to do. But this is not a safe course of reasoning, as has already been seen. Therefore the cases that present this difference should be scrutinized to see if there really is any such distinction as that which has been attempted.

The leading case of this sort that is decided for the combination is Bohn Manufacturing Company *v.* Hollis, 54 Minn. 223. A large number of retail lumber dealers formed a voluntary association, by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers not dealers, at any point where a member of the association was carrying on a retail yard; and they provided in their by-laws that, whenever any wholesaler dealer or manufacturer made any such sale, the secretary should notify all the members of the fact. The plaintiff, a wholesaler, having made such a sale directly to a customer, the secretary threatened to send notice of the fact, as provided in the by-laws, to all the members of the association.

The opinion of Mr. Justice Mitchell is such interesting reading that a long extract may be pardoned: "The case presents one phase of a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century. This is the age of associations and unions, in all departments of labor and business for purposes of mutual benefit and protection. Confined to proper limits, both as to end and means, they are not only lawful, but laudable. Carried beyond those limits, they are liable to become dangerous agencies for wrong and oppression. Beyond what limits these associations or combinations cannot go, without interfering with the legal rights of others, is the problem which, in various phases, the courts will doubtless be called frequently to pass upon. There is, perhaps, danger that, influenced by such terms of illusive meaning as 'monopolies,' 'trusts,' 'boycotts,' 'strikes,' and the like, they may be led to transcend the limits of their jurisdiction, assume that, on general principles, they have authority to correct or reform everything which they may deem wrong, or, to manage the State. Now, when reduced to its ultimate analysis, all that the retail lumber dealers, in this case, have done, is to form an association to protect themselves from sales by wholesale dealers or manufacturers, directly to consumers or other non-dealers, at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of defendant's offense. It will be observed that defendants were not proposing to send notices to any one but members of the association. There was no element of fraud, coercion, or intimidation, either towards plaintiff or members of the association."

Another rather extraordinary case to the same effect is Brewster *v.* Miller's Sons Company, 101 Ky. 368. This was a suit against the members of the Funeral Directors' Association of Louisville. On the tenth of December, 1893, the wife of the plaintiff Brewster died. He went to the defendants, C. Miller's Sons, to engage their services and to buy articles necessary for her burial. They refused to accept employment or furnish the articles necessary for that purpose, because, as they claimed, the plaintiff was indebted to them in the sum of $52 for burying his father. The other defendants

refused to perform the necessary services and furnish the necessary articles for the burial of plaintiff's wife. This refusal was made because of this claim of C. Miller's Sons that Brewster was indebted to them for previous services, as stated. It was alleged in the suit which was brought for this refusal that the Funeral Directors' Association was a confederation, and by reason of the terms and purposes of the combination the defendants refused to furnish any of the materials or render services necessary for the burial of the plaintiff's wife, and that the defendants refused for the purpose of enforcing by duress and oppression the collection of the debt due C. Miller's Sons.

The court — Mr. Justice Paynter wrote the opinion — could find nothing wrong in this; they say: "A party may engage in the grocery business, selling necessaries of life, and a hungry, starving man might call at his place of business and seek to buy such articles of food as he needs, and whilst we would say it was inhuman for the grocerman to refuse to sell him, yet it could not be said that his refusal was unlawful, and that a cause of action could be maintained against him for such refusal. When one desires to bury his dead, it may be an unfeeling act for an undertaker to refuse to furnish necessary material and necessary services to accomplish it, still his refusal to do so does not impose any legal liability upon him. Undertakers are approached by those in great bereavement who desire their services to inter the dead. Under such circumstances they do not feel disposed to demand in advance compensation. Regard for the feelings of those so bereaved forbids that they do so. However, if one has on a previous occasion received the services of the undertaker, and his material, and has refused or failed to pay the bill, it is certainly not unreasonable to refuse to permit him to increase his indebtedness or to render him services. To afford mutual protection against such persons it is not unlawful for the undertakers of the community to associate themselves together and agree to refuse to render a like service to one who has refused or failed to pay such expenses in the past to some member of the association."

What one really wants to know as to these last two cases is whether the question is essentially different from the cases discussed before these were brought up. Is there any essential difference in fact? Is not the interference equally plain? Is not the oppression of the combination as great? Are not competitive conditions disturbed just as much? It seems that an affirmative answer must be returned to all of these questions; and if so the exertion of such pressure by such combinations seems to be opposed to the same public policy which would protect the individual as before.

VIII

A formidable case of this class where the members of the association do not go outside of their own organization in conducting their operations is Barr *v.* the Essex Trades Council, 53 N. J. Eq. 101 (1894). The Trades Council was made up by the affiliation of eighteen trades unions for the purpose of using the great purchasing power of their combined membership to their advantage. The plan of operation was to refuse to deal with any but dealers who handled "fair" goods exclusively made under union condition. Publicity was given the movement by a publication called "The Union Buyer," the first announcement of which was as follows: "Our mission — To support the supporters and boycott the boycotters of organized fair labor. To promote the public welfare by the diffusion of common cents, urging all to carry these in trade only to those who will return them to the people in the shape of living wages." Barr, the plaintiff, got into a controversy with his employees, and the Trades Council took up their cause, calling on its members not to have anything to do with his newspaper.

The opinion of Vice-Chancellor Green against the combination has this significant paragraph: "This freedom of business action lies at the foundation of all commercial and industrial enterprises — men are willing to embark capital, time, and experience therein, because they can confidently assume that they will be able to control their affairs according to their own ideas, when the same are not in conflict with law. If this privilege is denied them, if the courts cannot protect them from interference by those who are not interested with them, if the management of business is to be taken from the owner and assumed by, it may be, irresponsible strangers, then we will have come to the time when capital will seek other than industrial channels for investments, when enterprise and development will be crippled, when interstate railroads, canals, and means of transportation will become dependent on the paternalism of the national government, and the factory and the workshop subject to the uncertain chances of coöperative systems."

The best reasoned case upon this whole general problem remains to be stated — Martelle *v.* White, 185 Mass. 255. It plainly appeared in this case that the Granite Manufacturers' Association, of which defendants were members, had a by-law that prohibited under penalty any member from having business transactions with non-members. Acting under the by-laws, the association investigated charges which were made against several of its members that they had purchased granite from a party "not a member" of the association. The charges were proved, and under the section above quoted it was voted that the offending parties "should respectively contribute to the funds of the association" the sums named in the votes. These sums ranged from $10 to $100. The party "not a member" was the present plaintiff, and the members of the association knew it. Most of the customers of the plaintiff were members of the association, and after these proceedings they declined to deal with him. This action on their part was due to the course of the association in compelling them to contribute as above stated, and to their fear that a similar vote for contribution would be passed should they continue to trade with the plaintiff.

The opinion of Mr. Justice Hammond in this case is so excellent in its grasp of the general situation as it stands at the present moment, that it would be well if all of it could be printed here; but perhaps this extract will show the advance in the reasoning upon this problem: "The case presents one phase of a general subject which gravely concerns the interests of the business world and indeed those of all organized society, and which in recent years has demanded and received great consideration in the courts and elsewhere. Much remains to be done to clear the atmosphere, but some things at least appear to have been settled, and certainly at this stage of the judicial inquiry it cannot be necessary to enter upon a course of reasoning or to cite authorities in support of the proposition that while a person must submit to competition he has the right to be protected from wrongful interference with his business." "The next question is whether there is anything unlawful or wrongful in the means used as applied to the acts in question. Nothing need be said in support of the general right to compete. To what extent combination may be allowed in competition is a matter about which there is as yet much conflict, but it is possible that in a more advanced stage of the discussion the day may come when it will be more clearly seen and will more distinctly appear in the adjudication of the courts than as yet has been the case, that the proposition that what one man lawfully can do any number of men acting together by combined agreement lawfully may do, is to be received with newly disclosed qualifications arising out of the changed conditions of civilized life and of the increased facility and power of organized combination, and that the difference between the

power of individuals acting each according to his own preference and that of an organized and extensive combination may be so great in its effect upon public and private interests as to cease to be simply one of degree and to reach the dignity of a difference in kind. Of the general proposition that certain kinds of conduct not criminal in one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights."

We have seen that the law as declared by the majority of courts is to the effect that when a combination exerts its force upon outside dealers to prevent them from having any relations with rivals of the combination, the rivals have an action for the damages caused by the interference. This law is by the majority of courts applied, as it seems consistently, when the power of the combination is brought to bear upon its own members to prevent them from having any dealings with those outside the combination. The same elements of wrong exist whether the attack of the conspirators upon their victim is indirect or direct. And the key to the general problem under discussion seems to be this, that coercion of the sort discussed here is tortious in itself, like fraud, and therefore, like fraud, an unfair method to use in competition. And conspiracy will continue to be a wrong of which the law will take notice so long as is it true that an organized force has the power to overwhelm unorganized individuals. This principle of law that we have under discussion has therefore this foundation of fact, that a concerted refusal to deal disturbs the industrial order in a way in which an individual refusal never can do.

IX

Underlying this refusal to justify the sort of competition which is now under discussion is the general public policy against monopolization. It is opposed to present ideals that a combination should be given the power to use methods which will enable it to gain control of its market. It is then explicable that the courts by a considerable majority have declared that a combination cannot bring its organized force to bear upon an individual rival so as to cut him off from his source of supplies. When it is more or less true that any man may enter any business upon his merits, the perpetuation of the open market is assured; but if the law left the situation alone so that any man were subject to the risk of such unfair competition that none would dare to have dealings with him, the combinations would in effect have a permanent hold upon the industries. It is in the fear of this that we have seen the enactment in so many jurisdictions of anti-trust laws to settle the common-law dispute once for all in favor of the industrial trader against the dictation of the combination. For to the majority of men an end of competitive conditions in the ordinary businesses would seem the final catastrophe beyond which there could be nothing but the horror of anarchy or the hopelessness of socialism. It is because of these perils to society that we are finding to-day such agreement in the propriety of regulation of the industrial situation by law. A very great change this is from the doctrines of *laissez faire* of the early nineteenth century to the principles of state control in this early twentieth century. The interference of the law to protect against the encroachments of monopoly is welcomed now; the conservatives are few to-day who cry out against such interposition of the law as an interference with economic liberty. For at last it is recognized that such police of the monopolies is necessary for the maintenance of industrial freedom.

CAMBRIDGE, MASS., March, 1905.

NOTE

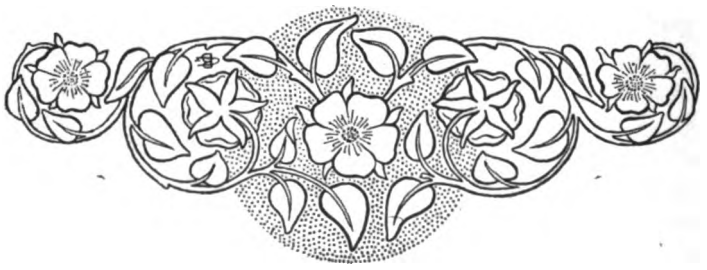
So far as the present search has gone, the state of the authorities upon the principal point under discussion is here summarized by jurisdictions for the convenience of the reader. The problem is whether it is unfair competition for a combination to insist that there shall be no dealings with its rivals.

The plaintiff thus injured in his business was given a remedy in:— GEORGIA: Brown & Allen *v.* Jacobs Pharmacy Co., 115 Ga. 429; INDIANA: Jackson *v.* Stanfield, 137 Ind. 592; MASSACHUSETTS: Martelle *v.* White, 185 Mass. 255; MISSOURI: Walsh *v.* Ass'n of Master Plumbers, 97 Mo. App. 280; NEW JERSEY: Barr *v.* Essex Trades Council, 53 N. J. Eq. 101; OHIO: Matteson *v.* L. S. & M. S. Ry., 3 Ohio Dec. 524; TENNESSEE: Bailey *v.* Master Plumbers' Ass'n, 103 Tenn. 99; TEXAS: Olive *v.* Van Patten, 7 Tex. Civ. App. 630; VERMONT: Boutwell *v.* Marr, 71 Vt. 1; WISCONSIN: Harwarden *v.* Youghiogheny Coal Co., 111 Wis. 545.

The defendants were not held liable in:— COLORADO: Master Builders' Ass'n *v.* Domascio, 16 Col. App. 25; KENTUCKY: Brewster *v.* Miller's Sons Co., 101 Ky. 368 (but see Standard Oil Co., *v.* Doyle, 82 S. W. 271); MINNESOTA: Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223; RHODE ISLAND: McCauley Bros. *v.* Tierney, 19 R. I. 255; WEST VIRGINIA: Transportation Co. *v.* Standard Oil Co., 50 W. Va. 611.

In certain jurisdictions the decisions are hard to reconcile: — ENGLAND, up to the time of Quinn *v.* Leatham, 1901 A. C. 495, was not opposed to such action by a combination (*cf.* Boots Co. *v.* Grundy, 82 L. T. 769); but it now seems that the particular issue here involved would fall under the rule of this latest case and be decided against the combination. SCOTLAND: The same observations apply to Scottish Coöperative Soc. *v.* Glasgow Fleshers' Ass'n, 35 Sc. Law Reporter 645, which was decided for the defendants, while Allen *v.* Flood, 1898 A. C. 1, was still good law. NEW YORK: The courts, upon the whole, have favored the combination in late years (see Park *v.* Wholesale Druggists' Ass'n, 175 N.Y. 1); but the latest decision is for the individual thus injured Strauss *v.* American Publishers' Ass'n, 177 N.Y. 473. ILLINOIS: Doremus *v.* Hennessy, 176 Ill. 608, would seem to cover the issue now under discussion; but in a case now pending, Platt *v.* National Druggists' Ass'n, in which the action of the combination was apparently of the most outrageous sort, an injunction was refused in Cir. Ct., Cook Co. reported Ch. L. News, Feb. 4th, 1905.

It should also be mentioned that general clauses in anti-trust statutes giving an individual special remedies for injuries caused by a combination are being interpreted to cover just the sort of case now under discussion; this, for example, is true in the four cases from the federal courts subjoined, in which the wrong to the plaintiff was recognized: Montague *v.* Lowry, 193 U. S. 38; Aiken *v.* Wisconsin, 25 Sup. Ct. Rep. 1; Atlanta *v.* Chattanooga Pipe Co., 101 Fed. 900; Ellis *v.* Inman, Poulsen & Co., 131 Fed. Rep. 182.



NEWSPAPERS AND THE JURY

The Influence of Modern Journalism on Criminal Trials

By Clarence Bishop Smith

STABLE as the jury system seems to us to-day, linked as it is with our traditions of English and American liberty, it is common knowledge that in the course of its history it has been subject to many modifications. It is familiar certainly to the legal profession that for centuries members of the jury were required to have knowledge of the facts as a qualification for service. Brunner writing of the jury in the Carlovingian period says (Schw. 84): "The characteristic of it is that the judge summons a number of the members of the community, selected by him as having presumably a knowledge of the facts in question, and takes of them a promise to declare the truth on the questions to be put by him." This custom prevailed three centuries later in the time of Henry II. Glanvill writes (cc 17, 18): "When once the twelve knights have assembled, it is first ascertained by their oath whether any of them are ignorant of the fact. If there be any such they are rejected and others chosen."

As time went on and communities grew larger, although the juries were required to be drawn from the neighborhood, it became impossible for all of the jurors to be witnesses in respect to the matters in issue, and therefore the jurors who were cognizant of the facts of the case informed those who were not. This was the first step toward our present jury system. In an important trial in 1374, Belnap C. J. said (Year Book 48, Edward III, 30): "In an assize in a county, if the court does not see six or at least five men of the hundreds where the tenements are, to inform the others who are farther away, I say that the assize will not be taken."

Gradually the parties were also allowed to give information to the jurors, through the medium of witnesses. The jurors continued, however, to decide the case upon their own knowledge however obtained, even when the facts might not be known to the judge or the parties. A striking example of this was given in Bushels case, 1670 (Vaughan, 135, 149). It was not until 1816 that the courts laid down the principle that juries in reaching their verdicts must not go upon their own knowledge of the facts (Rex *v.* Sutton, 4 M. & S. 532; Pike, *History of Crime*, II 368–9). Thus the custom which had prevailed for more than one thousand years was done away with, and the existing doctrine introduced. The latter has prevailed less than one hundred years. Long before 1816, however, it was true as a practical matter that very few juries did have an actual knowledge of the facts. The growth of communities prevented it.

It is a curious feature of our civilization of to-day, that in regard to some cases, chiefly important criminal cases, the situation is gradually changing, so that the average juror knows something about the case before the evidence is taken in court. This is brought about by the newspaper which sets forth at length details of the crime, often illustrating by imaginary pictures. Unfortunately such material cannot from any point of view be held satisfactory for a jury to consider. The juries have a knowledge of the facts, but it is not of that accurate character which the juries of early days possessed, and consequently the only question which invites discussion is how far we shall restrict juries in such cases from the use of newspapers, and how far knowledge obtained from such sources disqualifies them to serve.

This question recently arose in Virginia, January 26, 1905, in the case of McCue *v.* Commonwealth, 49 S. E. Reporter, p. 623, p. 630, in which a former mayor of Char-

lottesville was tried for murder of his wife, convicted and ultimately hung. In this case "before the jury was sworn, and in response to a request of one of the jurors, the court stated to the members of the jury that they might be permitted to read such portions of the daily newspapers as in no way related to the trial." No exception was taken to this instruction, and it did not appear that any of the jurors had disregarded it. On appeal, counsel for defendant urged that a new trial ought to be granted on the ground that this instruction was an improper one. On this subject the court said (p. 631): "We think it is the safer and better practice to exclude newspapers from the jury. They are called upon to exercise the most sacred duty which can devolve upon a citizen, and in its discharge they must make such personal sacrifice as is necessary to its due performance; but under the circumstances of this case no reversible error is disclosed in this respect."

In the case of Bullinger *v.* The People, 95 Ill. 395, 400, counsel for plaintiff handed one of the jurymen a newspaper. Subsequently it appeared that one of the jury was reading another newspaper containing an article prejudicial to the defendant. To this the counsel for the defendant objected and called the judge's attention to the matter. The judge then privately suggested to the counsel that as the paper was already before one of the jurymen it would perhaps be best not to over-emphasize the importance of the matter by calling the attention of the jury generally to it. No exception was taken. Held that defendant by the course pursued waived all objection to the reading of the newspaper.

In the United States Courts it is held that where jurors have seen newspapers during the trial containing accounts of the trial, the question is whether they have read anything prejudicial to the defendant. If they did not there is no ground for a new trial. United States *v.* Reid, 12 How. 361. United States *v.* Gilbert, 2 Sumn. 19.

The same rule prevails in New York, People *v.* Gaffney, 12 Abb. Pr. U. S. 36, affirmed, 50 N. Y 416. In the McCue case, *supra*, these further facts appeared. One of the jurors when impaneled was asked if he had formed an opinion on the case, to which he replied, "I formed an opinion on the newspaper evidence." He was then asked, "In your present state of mind could you go on that jury starting out with the presumption of innocence on your mind?" *A.* "I could not say that I could sir, for the reason that I have read this evidence. Naturally there is some impression on my mind but I cannot say that it is biassed or prejudiced." The juror was challenged by defendant, but accepted by the court.

In regard to this matter the court said on appeal: "The cases upon this subject are almost without number and are not to be reconciled . . . If the courts take an extreme position upon this subject, and hold that every opinion shall work a disqualification for service as a juror, the administration of justice will be confided not to the most intelligent but to the most ignorant of our citizens." The court held the juror properly admitted.

The same rule prevails in New York. Although a witness may have read the newspapers and formed an opinion as to defendant's guilt, it is not a ground for challenge if the juror's mind is still open to render a verdict on the evidence presented to him. People *v.* Hayes, 1 Edm. Sel. cases 582; People *v.* Thompson, 41 N. Y. 1; People *v.* Welsh, 1 Cr. Rep. 486. This is the general trend of authority. Contra McHugh *v.* State, 38 Ohio St. 153.

In Pennsylvania the law is to the same effect unless the opinion of the venireman is based upon his reading of the testimony of a former trial in which case he is disqualified even if his opinion on the case is not definite. Allison *v.* Com., 99 Pa. St. 17, 32, 33. In Ohio the law is the same as that of Pennsylvania by statutory provision. Fra-

zier *v.* State, 23 Ohio State 551, Ohio Laws, 1872, p. 11.

This is not the only way in which the modern newspaper is affecting our criminal jury trials. To obtain the necessary information for lurid articles, enterprising reporters seek interviews at the homes of the jurors. In a recent murder case in New York County, The State *v.* Nan Patterson, one of the New York journals of large circulation published what purported to be an interview with the wives of the various jurors on the panel, giving their opinions as to the guilt or innocence of the accused. There can be little doubt that those wives discussed with their husbands what the newspaper reporters had said. The whole proceeding was undignified and tended to introduce into the case an emotional and sensational element which should always, as far as possible, be eliminated. The remedy would seem to be contempt proceedings against the newspapers for which legislation might be necessary. As the law stands at present, perhaps the only solution of the difficulty would be the impaneling of bachelors only.

Another feature of the important criminal trials in our large cities is their tendency to take each year a longer time to try. This seems also to be due largely to the sensational newspaper which spreads in great detail before the public the whole conduct of the case. Even the most conservative newspapers will often devote more columns to the report of a murder trial than they do to any other matter of news. This inevitably makes the case seem more important than it would otherwise. Counsel for the State and for the defense have the whole city and its suburbs for their audience. They naturally strain every nerve to put in their case with the greatest regard for details. The evidence is voluminous. Sometimes it takes several days to draw the jury. Consequently the chance of a mistrial through the sickness of a juror is greatly increased, and such a mistrial did take place in the Patterson case above referred to. This is most unfortunate from every point of view. These trials are now made so long that the expense to the parties is tremendous. When a jury has disagreed, or a criminal case has been reversed on appeal, it is sometimes a practical question whether the State can afford another trial. All the funds at the disposal of a District Attorney's office should not be spent in trying to convict one person. It should certainly be the aim of the law to make our criminal trials as certain and swift as possible. To avoid mistrials in such cases would therefore be a great gain.

Is there any reason why it is not as satisfactory to have a man tried by eleven jurors as by twelve? The history of the jury shows that its numbers have varied greatly from time to time. In the reign of Henry VI a judge remarked that the number was discretionary with the court. Not until 1367 does 12 seem to have become the fixed number. In 1665 we read in Duncomb's Trials *per pais* (8th Ed. p. 92), this account of the sanctity and foreordained character of the jury's number: "And first as to their number twelve; and this number is no less esteemed by our law than by Holy Writ. If the twelve apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number of twelve to try our temporal. The tribes of Israel were twelve. The patriarchs were twelve, and Solomon's officers were twelve. (I Kings, IV, 7.) . . . Therefore not only matters of fact were tried by twelve, but of ancient times twelve judges were to try matters of law in the Exchequer Chamber, and there were twelve Councillors of State for matters of State. And he that wageth his law must have eleven others with him who believe he says true."

In the present day we probably do not feel much bound by the precedent of the Apostles, and we see from the early cases, that convenience might well have fixed upon any other number between sixty-six and

four, the historical limits. But twelve was fixed upon more than five centuries ago, and to compel parties in interest to accept the verdict at the hands of eleven men certainly gives our legal minds a shock. If the parties consent to it, of course that alters the situation, and in civil cases it is probably sufficiently satisfactory to leave the matter in their hands. If they are willing to go on with eleven jurors they can do so. It is ordinarily as fair to one party as it is to the other.

In criminal trials, however, we meet with a real difficulty. The jurors generally prefer to acquit, and this is particularly true of those graver crimes, murders and the like, which are usually the subject of long trials. The more jurors there are, the less chance there is that the verdict will result in a conviction. There seems little doubt that those on trial for crime would seldom, if ever, consent to the continuance of the trial with eleven jurors, and if the matter is to be dealt with at all, it must therefore be dealt with by some statute which shall provide a compulsory rule or leave the matter in the discretion of the presiding judge.

The writer suggests that it would be advisable to pass a law that in cases where it seemed probable that the trial of a criminal case was to occupy a long space of time, the presiding judge should be given power to require that one or more reserve jurors should be impaneled and sworn with the regular jury. These jurors should be treated like the other jurors up to the time that the jury retired. At that time if the first twelve impaneled remained intact, the extra juror or jurors should be excused. If, however, any juror during the trial became incapacitated the first reserve juror would be directed by the judge to serve in his stead. It is true that this method of correcting the present unsatisfactory condition of affairs would be a certain charge upon the community, through the extra jurors fees and the loss of his time. But when we consider the great loss in case of a mistrial, the loss of time suffered by the District Attorney's office, the counsel for the defense, the judge, jurors, witnesses, court attendants, etc., and the loss of money thereby occasioned, the time and fees of the substitute juror seem certainly small in comparison. In the great majority of cases no extra juryman would be needed, for where trials are short there is little likelihood that any of the twelve will give out. As the requiring of substitute jurors to serve would always be a matter in the court's discretion the practice would not be abused.

It needs no argument to prove that the newspaper is an unqualified evil, in so far as it affects the trial of crime. Since the abolition of public executions, it has been the policy of the law to hide all sensational details connected with the punishment of criminals. The object of most newspapers is just the reverse of this. By picturesque methods they seek to make their readers see every incident, from the conception of the crime in the brain of the man on trial, down to the jury's verdict, and the crime's punishment, if there be punishment. Consequently newspapers must always come in conflict with the courts. They are, however, here to stay and we must meet the situation. We cannot curb the freedom of the press or prevent the public from reading accounts of crime which ought not to be published, but we should recognize these various dangers arising from changing social conditions and study to minimize them. While the influence of the newspaper is subtle, it is very strong, and may easily impair our trial system almost without our knowing it. For this reason the subject deserves the consideration of the Bench and Bar.

New York, N.Y., March, 1905.

CONCERNING GREAT DANES

By H. W.

IT was in a small town in Massachusetts. The mail had just come in and the usual crowd of village worthies was collected in the store. Suddenly from the recesses of the inner store emerged a figure waving a blue volume.

"There, Hiram," it said; "I told yer so. That Baxter feller can't keep that Great Dane of his. It's against the law."

"What ye got there?" asked Hiram.

"This here volume," answered the figure impressively, "is the Acts and Resolves passed by the Legislature of this here Commonwealth of Massachusetts durin' the session of 1904, and chapter 105 says as how Baxter ain't got any right to keep a Great Dane."

"Let's see," said Hiram.

What Hiram saw was this:

"AN ACT RELATIVE TO GREAT DANES AND CERTAIN OTHER DOGS.

Be it enacted, etc., as follows:

SECTION 1. No person shall keep or have in his care or possession any bloodhound, excepting an English bloodhound of pure blood whose pedigree is recorded or would be entitled to record in the English bloodhound herd book, or any dog classed by dog fanciers or breeders as Cuban bloodhound or Siberian bloodhound, whether such dog is in whole or in part of such species, unless such dog is kept solely for exhibition. In such case he[1] shall at all times be kept securely enclosed or chained, and shall not be allowed at large even though in charge of a keeper, unless properly and securely muzzled.

SECTION 2. Sections one hundred and thirty-eight and one hundred and forty-one of chapter one hundred and two of the Revised Laws are hereby repealed.

SECTION 3. This act shall take effect upon its passage."

[1] Who? — ED.

Hiram thought a minute.

"Jonas," he said; "whar does that say anythin' abaout a Great Dane?"

"Why, the whole thing is about Great Danes and them other dogs. It says so. See, 'An Act relative to Great Danes.' Ef it ain't about Great Danes, why does it say so?" and with this poser Jonas sat back on the counter.

"Howsumever," retorted Hiram, "I'd jest like you to p'int out whar it says that a feller can't keep a Great Dane."

Jonas looked at the act again. "Waal," he concluded, "I calc'late a Great Dane must be one of them dogs classed by dog fanciers as a Cuban bloodhound or Siberian bloodhound."

"It may be a Siberian bloodhound, for all I know," said Hiram; "but who's goin' to tell whether it is or it ain't?"

"Dog fanciers," came the ready response from Jonas.

"Then you mean," said Hiram, "that ef we folks up here in Worcester Caounty want ter know whether we've got any right to keep Great Danes, we can't go to the law ter see what's what, but we've got ter hunt up one of your dog fanciers from Boston and ask him please does he class a Great Dane as a Cuban or Siberian bloodhound?"

"Waal, it looks that way," admitted Jonas, dubiously. Suddenly he brightened up. "No; see here," he said; "this act says it's about Great Danes, so it must include 'em in them Cuban or Siberian bloodhounds. Otherwise it wouldn't say it was about Great Danes."

"Are you sure," interrupted Uncle Ebenezer, who had been reading the statute, "that a Great Dane ain't some kind of a bloodhound *diff'ent* from a Cuban or Siberian bloodhound?"

"We ain't none of us dog fanciers enough to answer ye that, Uncle," replied Hiram.

"Looks like they didn't mean you and me should know what this law meant, no how."

"Because," continued Ebenezer, "this act lets you keep an English bloodhound and a Cuban or Siberian bloodhound, but you can't keep any other kind. It says you can't keep any bloodhound except an English, Cuban, or Siberian bloodhound, but it lets you keep your Cuban and Siberian bloodhounds, don't it, Jonas?"

"Waal," said Jonas, reading the act again, "I hadn't read it that way, but perhaps it does. What d'ye think, Hiram?"

"Mebbe," was all the answer the disgusted Hiram would vouchsafe.

By that time the mail was sorted and among those who dropped in for letters was the lawyer of the neighborhood. He had represented the district for several years in the lower branch of the legislature. As he appeared in the doorway, Uncle Ebenezer hailed him.

"Come here, John," he said, "and straighten us out. We're all snarled up over the meanin' of some of your handiwork."

John saw the blue book and smiled. "What's the trouble?" he said.

"Has Baxter any right to keep his Great Dane?" said Jonas. "Here's yer law."

"Why, certainly," said John; "we changed the law last year so as to allow persons to keep Great Danes. I was on the committee myself that reported the bill."

"Can't say yer did a pertickerlerly tidy job," remarked Hiram.

John looked at the statute and his face took on a puzzled expression. "This isn't the same bill we reported," he said. "Wait a minute, till I get my papers," and he went over to his office, soon returning with a copy of the House Journal and the bill (House 361) reported by the committee.

"I thought so," he said, as he brought from the inner store a volume of the Revised Laws, and opened to the provisions about dogs. "See here, Uncle. Section 138 of chapter 102 of the Revised Laws says that a person shan't keep 'any bloodhound, or any dog classed by dog fanciers or breeders as Cuban bloodhound, Siberian bloodhound, German mastiff or Great Dane, boarhound or Ulmer dog.' Our bill provided for amending this section by striking out the words 'German mastiff or Great Dane, boarhound or Ulmer dog,' so as to leave a person free to keep dogs of that kind."

"Now ye'r talkin'," broke in Hiram, "that's language all of us kin understand, without goin' to dog fanciers. Why didn't they leave it that way?"

"Our bill went along all right," said John, "till it fell into the clutches of the Committee on Bills in the Third Reading, who are supposed to correct the language of a bill, if it is necessary. They in their sublime wisdom substituted the present conglomeration and sent it to the Senate. I wonder," he added, with a laugh, "how many of the Senators knew whether they were voting to permit or to prohibit Great Danes. Of course, if they looked at the sections of the Revised Laws which this new act repeals, they would see what the new act was trying to accomplish; but I must say that, on the face of it, it is pretty blind."

It was Jonas who spoke up. "As I understand it, then," he said, "this act is about Great Danes because it don't mention 'em."

"Well, yes," assented the legislator.

BOSTON, MASS., March, 1905.

AGREEMENTS OF THE UNITED STATES OTHER THAN TREATIES

By Charles Cheney Hyde

Associate Professor of Law in Northwestern University

FREEDOM from any violation of a requirement of the Constitution is a condition essential to the validity of every international contract to which the United States may be a party. The Constitution provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur." [1] It is the purpose of the writer to show under what circumstances our government has deemed it not unconstitutional, and therefore lawful, to enter into international compacts which have not been submitted to the Senate for approval, and to ascertain what has been the actual scope of the exercise of the agreement-making power of the President as distinct from the treaty-making power which is shared by the Senate.

The Tariff Act of 1890 [2] authorized the President to remit certain duties on articles brought from such foreign countries as gave certain privileges to American products. In sustaining the constitutionality of the law, Mr. Justice Harlan, in delivering the opinion of the United States Supreme Court,[3] said:

"What the President was required to do was simply in execution of the Act of Congress. . . . He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress, that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea, and hides, from particular countries, should be suspended in a given contingency, and that in case of such suspension, certain duties should be imposed."

By virtue of that Act, reciprocity agreements were entered into by the President with certain states.[1] By the Tariff Act of 1894 these agreements were terminated.[2] Again, in 1897, the Tariff Act of July 24 authorized the President to enter into commercial agreements with countries producing and exporting specified articles, in order to secure concessions in favor of American products and manufactures, and empowering the President, during the period of such concessions, to suspend the duties named in the Act according to a given schedule of rates.[3] In pursuance of this authority the President entered into a reciprocity agreement with France, signed by the Hon. John A. Kasson and the French Ambassador, May 28, 1898.[4] In 1902 an amendatory and additional agreement was entered into extending the arrangement to Porto Rico and Algeria.[5] It is to be observed that these reciprocity arrangements, although expressed in the form of contract, imposed no restriction on the United States or other parties thereto to alter their tariff schedules and thus terminate their obligations to exact reduced or limited duties on articles brought into their territory.

By an act of Congress of 1872 the Post-

[1] Constitution of the United States, Article II, Sec. 2, Par. 2.

[2] 26 U. S. Stat. at L. p. 567, p. 612

[3] 143 U. S. 649.

[1] U. S. For. Rel. 1891, p. 47 contains text of arrangement with Brazil.

[2] U. S. For. Rel. 1894, p. 619.

[3] XXX, U. S. Stat. at L. Sec. 3, p. 203.

[4] U. S. For. Rel. 1898, p. 292. Proclamations as to the reduction of duties on certain articles imported from Germany and Italy, under the Act of 1897, are contained in XXXI, U. S. Stat. at L. pp. 1978 and 1979.

[5] U. S. For. Rel. 1902, p. 418.

master General was authorized to conclude "by and with the advice of the President" postal "treaties and conventions" with other states.[1] By virtue of this authority postal conventions have frequently been negotiated with various nations. In 1897 our government became a party to the Universal Postal Union to which almost all civilized countries have adhered.[2] It is a significant fact that agreements of this character to which the United States has become a party are not contained in the published collections of treaties of the United States.[3] It has been pointed out by the Hon. Simeon E. Baldwin that the term "treaties," employed in the Act of 1872, was an inapt expression of the declared purposes of Congress in authorizing the executive department to enter into such conventions. His comment as to their character deserves attention:

"There may be," he says, "a bargain between independent states which is something less than a treaty, and postal conventions are in the nature of commercial transactions without any direct political significance." [4]

The reciprocity agreements and postal conventions negotiated by the President with other nations do not appear to be exceptions to or violations of the constitutional requirement as to the mode of making treaties; they rather serve as illustrations of the exercise of a different power incidental to the executive control of the intercourse of our government with friendly states.[1]

In 1844 a treaty providing for the annexation of Texas was signed and on the 8th of the following June was rejected by the Senate. On March 1, 1845, by joint resolution Texas was incorporated into the United States.[2] The comment of the late Professor von Holst on the propriety of this procedure is of interest:

"The provision," he says, "that treaties should be concluded by the President, with the co-operation of two thirds of the senators, had no reasonable purpose if even the utmost which could be accomplished by the treaty-making power could be effected likewise in the most informal and most unguaranteed manner, in which any action whatever of Congress could be taken." [3]

Hawaii was annexed to the United States by joint resolution approved July 7, 1899, which purported to accept the existing offer duly made by the Republic of Hawaii to cede "absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind," together with all rights of property in control.[4]

The agreements of the United States thus far considered, whether of political or commercial aspect, have been entered into by the Executive by the authorization of both Houses of Congress. Attention is called to

[1] XVII, U. S. Stat. at L. p. 304. An act of Congress authorizing postal arrangements with Canada and countries adjoining the United States is contained in XVII, U. S. Stat. at L. p. 316.

[2] XXX, U. S. Stat. at L. p. 1629.

[3] In a note on page 531, Vol. ii, in his admirable work on the Treaty-Making Power of The United States, the author, Mr. C. H. Butler, states that he has purposely omitted from his compilation of the treaties and conventions of the United States all postal agreements.

[4] The Entry of the United States into World Politics as One of the Great Powers, IX, *Yale Review* (Feb. 1901), p. 399.

[1] "It is perhaps pertinent to state here that the regular method of making a treaty is departed from by the United States only in regard to postal, money-order, and parcels-post conventions. . . . In these cases an Act of Congress is, once and for all, substituted for the advice and consent of the Senate in each separate case." Hon. Francois Stewart Jones. XII, Pol. Sc. Q. p. 420.

See also "Du rôle des Chambres dans l'approbation or l'exécution des traités internationaux é après la Constitution des Etats Unis de L'Amérique du Nord," by Professor Gaston Jèze of the University of Lille. XXI. Revue du Droit Public et de la Science Politique, No. 3, p. 455.

[2] U. S. Stat. at L. for the year 1845.

[3] von Holst's "Constitutional History of U.S." Vol. ii, p. 704.

[4] XXX, U. S. Stat. at L. p. 750.

certain instances where the President has been impliedly or expressly authorized by the Senate, in its executive capacity, to contract with foreign states, and to cases where at the present time it is maintained by publicists that such authority has been given. The Secretary of State and the Mexican minister in Washington on June 4, 1896, signed an agreement for the reciprocal right to pursue savage Indians across the boundary line by troops of their respective governments. Article X stated, "the Senate of the United States having authorized the President to conclude this agreement, it shall take effect immediately." [1] By the terms of Article XXI of the treaty of Guadaloupe Hidalgo with Mexico, signed February 2, 1848, and ratified by the Senate — a contract which is still in force — a permanent agreement was made for the settlement of future differences between the two nations, incapable of adjustment through diplomatic channels "by the arbitration of Commissioners appointed on each side, or by that of a friendly nation." [2] It was further agreed that in case "such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case." The agreement did not attempt to provide machinery to facilitate the settlement of future disputes, but simply to bind the parties to arbitrate future disputes, subject to certain reservations. The treaty contains no statement as to any preliminary agreement to be entered into providing for the submission of a dispute which might arise. It did not indicate who, in behalf of the United States, should determine what particular controversy might be properly submitted to arbitration, or who should limit the scope of the reference, or who specify the procedure to be followed. Can it be reasonably maintained that the Senate, by failing to reserve the right to share in the determination of these matters, surrendered them wholly to the control of the President? "A treaty," writes Judge Baldwin, "which leaves any matters to the future determination of the President, vests him with the power to determine them as effectually as an act of Congress could do." [1] May it be fairly said that the reference of the Pious Fund Claim in 1902 to The Hague Tribunal by the terms of a protocol not submitted to the Senate was a reasonable exercise of a right conferred upon the President by the treaty of 1848?

By the ratification of The Hague Convention of 1899, establishing the Permanent Court of Arbitration, the United States became a party to an agreement of lasting significance. That convention fulfils a two-fold function.[2] It is first, a declaration respecting the legal value of means adapted to the peaceful solution of international differences, together with a recommendation for their employment whenever occasion may arise; secondly, it embodies an agreement for the establishment of a Permanent Court of Arbitration, and a system of procedure whereby the signatory states may avail themselves of any of the measures devised or suggested in the convention. It is not a compact to refer differences to arbitration, or to employ commissions of inquiry. With the exception of the agreement in Article II, to have recourse to the good offices or mediation of one or more friendly Powers, in case of serious disagreement or conflict, the executory undertakings of the high contracting parties relate to the establishment of the Court, or to matters of procedure. For example, arrangements are made for the creation of an Administration Council composed of the diplomatic representatives of the signatory powers at The Hague (Article XXVIII), as well as for the

[1] U.S. For. Rel. 1896, p. 438.

[2] Treaties of the United States in Force 1899, p. 389 at p. 400.

[1] IX, *Yale Review*, p. 399 at p. 415.

[2] The text of the Hague Convention is contained in United States For. Rel. 1902, Appendix No. II, p. 169.

establishment of an International Bureau at The Hague to conduct the administrative business of the Court (Article XXII). Agreement is made for the appointment of judges by the several Powers (Article XXIII) and for payment of the expenses of the International Bureau (Article XXIX). Article XXXI contains the statement that "The Powers which resort to arbitration shall sign a special act (*compromis*) in which the subject of the difference shall be precisely defined as well as the extent of the powers of the arbitrators."

There has been much discussion in this country of the question whether ratification of The Hague Convention by the Senate authorized the President at his discretion to enter into agreements with other states to refer pending or unknown disputes of the United States to the Permanent Court, or to employ other means of procedure set forth in the Convention. The Hon. John W. Foster, in the course of a learned article in the *Yale Law Journal* for December, 1901,[1] said:

"But I apprehend that should our government decide to refer any dispute with a foreign government to The Hague Tribunal, President Roosevelt, or whoever should succeed him, would enter into a convention with the foreign government, very carefully setting forth the question to be arbitrated, and submit that convention to the Senate for its advice and consent. If I read the Constitution of the United States and The Hague Convention aright, such would be the only course permissible by those instruments."

The late Frederick W. Holls, Secretary of the American delegation to The Hague Conference, expressed the view that —

"The appointment of a Commission of Inquiry, having no further necessary consequences than the providing for each party's share of necessary expenses, would seem to be within the ordinary diplomatic functions of the President and the Department of State by memorandum or protocol, whereas an agreement to submit any question to a court of arbitration, the decision to be binding upon the parties, must necessarily take the form of a treaty requiring the constitutional coöperation of the Senate." [1]

On the other hand, Judge Baldwin has said:

"The Hague Convention, when ratified by the Senate, became thus a standing warrant, or, so to speak, a power of attorney, from the United States to the President to submit such international controversies as he might think fit to the ultimate decision of the International Court of Arbitration." [2]

When it is considered that The Hague Convention contained no agreement to resort to arbitration, but rather purported to facilitate the means for the adjustment of international differences by providing and suggesting appropriate methods of procedure, it is difficult to see how ratification by the Senate gave to the President a special power to enter into agreements to have recourse to the Permanent Court or to other tribunals. Undoubtedly the Senate did authorize the President to coöperate with the other signatory powers in taking the necessary steps for the establishment and maintenance of the Permanent Court. But the adherence of the United States to the Convention sheds no light on the general question whether or not the President may, at his discretion, submit causes to arbitration. If he has such a right, it must be derived from a power, incidental to the management of the diplomatic intercourse of the nation, to adjust and settle disputes. It must be obvious that the existence and scope of that right are matters wholly distinct from and unrelated to the methods of procedure which he may employ in its exercise.

[1] The Treaty-Making Power Under The Constitution, XI, *Yale Law Journal*, p. 69.

[1] The Peace Conference at The Hague. New York: 1900, p. 216.

[2] IX, *Yale Review*, p. 399 at p. 415.

There have been many instances where the executive without the expressed or implied consent of Congress or of the Senate has entered into agreements for the settlement by arbitration of claims of American citizens against foreign governments.[1] By the terms of an agreement concluded at Madrid in February, 1871, by an exchange of notes between General D. E. Sickles, the American Minister, and Señor Don Christino Martos, the Spanish Minister of State, there was established at Washington a court of arbitration known as the Spanish Claims Commission, to which were referred claims of citizens of the United States on account of wrongs and injuries committed by authorities of Spain in Cuba. The commission was organized at Washington, May 31, 1871, and adjourned *sine die*, December 27, 1882. Out of one hundred and thirty original cases which were filed, thirty-five were allowed. The whole amount claimed was $30,313,581.32, exclusive of interest, of which $1,293,450.55 was awarded. Appropriations made by Congress from time to time in payment of the share of the United States in the expenses of the Commission amounted in all to $126,324.59.[2]

By virtue of a protocol signed May 22, 1902, the claims relating to the Pious Fund of the Californias against Mexico was referred to The Hague Court for adjustment.[3] Still more recently, by a protocol signed February 17, 1903, all unsettled claims of citizens of the United States against Venezuela were submitted to arbitration.[4]

In no case which the Executive by protocol or otherwise, without consent of the Senate, has referred to arbitration, has a claim against the United States been the subject of adjustment. According to the terms of two agreements, claims of foreign governments against American citizens have been submitted to the consideration of arbitral tribunals. In both of these, however, the arbitration agreement has distinctly provided that an award in favor of such governments should not be a ground for claim against the United States, and that satisfaction thereof should be derived solely from the estates of American citizens whose claims were the subject of adjustment before the same tribunals. In no case has the United States been interested pecuniarily in the indemnities claimed or awarded.

A type of agreement other than a treaty, frequently employed by sovereign states in their diplomatic intercourse and constantly made use of by our own executives, is the *modus vivendi*. It has been defined as —

> "An agreement between two or more nations as to their conduct in regard to matters in dispute pending the adjustment thereof. That is to say, it is a temporary treaty or convention limited to a period which as a general rule is very brief." [1]

Pending the settlement of an international difference relating to the daily occupations of citizens of opposing states, it is oftentimes of vital importance that a tentative arrangement should be made to afford protection to persons directly interested in the subject-matter of the controversy. It must be apparent that the President, charged with the duty of conducting the foreign relations of the state, ought to be able to negotiate temporary agreements of such a character. As a matter of fact, the President, through the Department of the State, has not been reluctant to make use of the *modus vivendi* when occasion has required. Such an agreement was entered into between the Secretary of State and the British minister in 1885 with respect to the Northeastern Fisheries, giving American fishermen permission to fish in British waters during the summer of 1885.[2] Another relating to the

[1] See note at the end of this article.

[2] II, Moore's "International Arbitrations," pp. 1045, 1046, 1049, 1051, 1052.

[3] U. S. For. Rel. 1902, Appendix II, p. 157.

[4] U. S. For. Rel. 1903, p. 804.

[1] C. H. Butler. The Treaty-Making Power of the United States, Vol. ii, note p. 369.

[2] U. S. For. Rel. 1885, pp. 460 *et seq.*

fisheries was agreed upon in 1888, securing certain privileges for American citizens, pending the ratification of a treaty between the United States and Great Britain calculated to settle the long-standing Fishery Dispute.[1] The treaty was not ratified.

On June 15, 1891, the United States and Great Britain by a *modus vivendi* agreed to prohibit the killing of seals in certain parts of Behring Sea, pending negotiations for the submission of the Behring Sea Dispute for arbitration.[2] Prior to the settlement of the Alaskan Boundary dispute, two agreements were made by *modus vivendi*, relating to the boundary between American and British territory; the first, in 1878,[3] relating to the location of the line at a point on the Stikine River; the second, in 1899,[4] concerning the location of the line in the region about the head of Lynn Canal.

"There are certain compacts between nations which are concluded," writes Wheaton, "not in virtue of any special authority, but in the exercise of a general implied power, confided to certain public agents, as incidental to their official stations. Such are the official acts of generals and admirals, suspending or limiting the exercise of hostilities within the sphere of their respective military or naval commands, by means of special licenses to trade, of cartels for the exchange of prisoners, of truces for the suspension of arms, or capitulations for the surrender of a fortress, city, or province. These conventions do not, in general, require the ratification of the supreme power of the State, unless such ratification be expressly reserved in the act itself." [5]

In its non-hostile relations with the enemy, the United States when at war must of necessity enter into agreements relating to a variety of matters incidental to the conducting of hostilities. These agreements of a national character and of varying importance may be entered into by the President. As Commander-in-Chief of the army and navy, he alone has the power to conclude such contracts.[1] The agreement of the subordinate military commander may be in excess of the powers impliedly conferred on him by the Commander-in-Chief. In such case the compact is called a *sponsion*,[2] and of course has no legal value. If the President assents to the terms of an arrangement entered into by an officer in the field, or if he himself personally directs the contractual negotiations, the agreement is in most cases a binding one upon the nation.

There may be, however, agreements in the form of capitulations, of a political character, and of such far-reaching consequence as to properly require the approval of the treaty-making power of the state in order to bind the country. Such compacts are in reality not of a military character, although the occasion for them may arise from a condition of war.[3] The protocol, for example, entered into by the Secretary of State in behalf of the President, and the French Ambassador, representing the Span-

[1] Senate Ex. Doc. 113, 50th Cong. 1st Sess. pp. 125, 141. Also Snow's "American Diplomacy," p. 467.

[2] Senate Ex. Doc. No. 55, 52d Cong. 1st, Sess. p. 46.

[3] U. S. For. Rel. 1878, under title Great Britain.

[4] U. S. For. Rel. 1899, p. 330.

[5] Dana's edition of Wheaton's "International Law," 8th Edition, Sec. 254.

[1] Snow's "Lectures on International Law," 2d Edition, p. 65:

"A cartel is not a treaty in the sense of the Constitution, and the cartel for the exchange of prisoners between the United States and Great Britain, in 1813, was ratified by the Secretary of State, not the Senate (May 14), 2 Halleck, 326; but when concluded it is of such force that the sovereign power may not annul it." *Henderson's Case*, 1863, 2 Pittsburg R. 440. Scott's "Cases on International Law," note p. 585.

[2] An example of such a compact is the capitulation entered into between General Sherman April, 1865, and General Johnston, Commander of the Confederate forces. Wm. T. Sherman's *Memoirs*, II, ch. xxxiii.

[3] Hall's "International Law," 5th Edition, p. 552.

ish Crown, August 12, 1898, arranging for a termination of hostilities in the war between the United States and Spain, provided a basis for the terms of the treaty subsequently negotiated by commissioners of the two countries at Paris. Among its stipulations were provisions for the relinquishment of Cuba, the cession of Porto Rico, and the control of the Philippines. According to the fifth article it was agreed that the treaty, embodying the terms agreed upon in the protocol, should be "subject to ratification according to the respective constitutional forms of the two countries." [1] Whatever be the limits of the power of the Executive in time of war to bind the nation by agreements entered into with the enemy, his right to do so as Commander-in-Chief of the military and naval forces is clear, and its proper exercise concerns matters within a wide range, the adjustment of which involves the use of a broad discretion.

Without attempting their classification, attention is called to certain other agreements entered into in behalf of the United States, which have not been submitted to the Senate for ratification. By the terms of a protocol signed at London, December 9, 1850, Great Britain ceded to the United States the Horse-Shoe Reef in Lake Erie in order to enable the grantee to build a lighthouse thereon, and "provided the Government of the United States will engage to erect such lighthouse, and to maintain a light therein; and provided no fortification be erected on said Reef." The last paragraph of the protocol contains the statement that "Mr. Lawrence and Viscount Palmerston, on the part of their respective governments, accordingly agreed that the British Crown should make the cession, and that the United States should accept it, on the above-mentioned conditions." Shortly thereafter, Mr. Webster, as Secretary of State, instructed Mr. Lawrence, as the American Minister at London, to inform the British Government that the arrangement was "approved by this Government." [1]

A conditional agreement was entered into by Brigadier-General John C. Bates, subject to the approval of the Governor of the Philippine Islands, and confirmation of the President, and the Sultan of Jolo, August 20, 1899, by the terms of which the sovereignty of the United States over the archipelago of Jolo and its dependencies was acknowledged and declared.[2]

There have been some agreements in the form of protocols, or concluded by an exchange of notes, explanatory of the meaning of treaties previously ratified by the Senate. Upon the exchange of ratifications of a treaty negotiated in 1830 with the Ottoman Porte,[3] David Porter, who had been appointed American *Chargé d'Affaires*, signed at Constantinople a paper in Turkish, by the terms of which it was agreed by himself and the Turkish Government, that the United States accepted without reserve the Turkish text of the treaty, and —

"Therefore, on every occasion the above instrument shall be strictly observed, and if, hereafter, any discussion should arise between the contracting parties, the said instrument shall be consulted by me and my successors to remove doubts." [4]

This agreement was duly received by the Department of State, and the act of Porter does not appear to have been disapproved.

An agreement by protocol was entered into by the Hon. Caleb Cushing when American Minister at Madrid, and the Spanish

[1] U. S. For. Rel. 1898, p. 828.

[1] Treaties and Conventions of the United States, 1776–1887, pp. 444, 445. A lighthouse was duly erected on the Reef by means of Congressional appropriations. 9 Stat. at L. pp. 380, and 627. 10 Stat. at L., p. 343.

[2] House Doc. 56th Cong., 1st Sess. No. 1, part 2 (Attached as an appendix to U. S. For. Rel. 1899).

[3] Treaties and Conventions of the United States, 1776–1887, notes by J. C. B. Davis, p. 1370.

[4] Porter's No. 22, Sept. 26, 1831, MS. Dept. of State.

Minister of State, January 12, 1877, relating to judicial procedure with respect to the trial of American citizens residing in Spanish territory, charged with the violation of Spanish laws, and concerning the trial of Spanish subjects in the United States, charged with criminal offenses. In its preamble, the protocol stated the desire of the two governments "to terminate amicably all controversy as to the effect of existing treaties in certain matters of judicial procedure," and it purported therefore "to make declaration on both sides as to the understanding of the two Governments in the premises, and respecting the true application of said treaties." [1]

After the ratification of the treaty of Guadaloupe Hidalgo, signed in 1848, President Polk sent Messrs. Sevier and Clifford to Mexico to explain certain amendments which had been made by the Senate. Before the arrival of those gentlemen at their destination the treaty had been ratified by Mexico. Before the exchange of ratifications, however, they concluded with the Mexican Minister of Foreign Affairs a protocol purporting to be an explanation of the meaning of the treaty. In a message dated February 8, 1849,[2] the President stated, "Had the protocol varied the treaty as amended by the Senate, it would have no binding effect." [3]

An agreement of great importance other than a treaty was the "Final Protocol," signed by the Hon. W. W. Rockhill, Special Commissioner, representing the United States, together with representatives of Germany, Austria-Hungary, Belgium, Spain, France, Great Britain, Italy, Japan, The Netherlands, and Russia, on the one side, and representatives of China on the other, on September 9, 1901. The agreement contained the foundation for re-establishment of relations between China and the Powers and set forth the method of their readjustment. Undertakings of far-reaching character were imposed upon China. The protocol declared the formal compliance with the previous demands of the Powers which have been classified under four heads:

"(1) Adequate punishment for the authors of and those guilty of actual participation in the anti-foreign massacres and riots; (2) the adoption of measures necessary to prevent their recurrence; (3) the indemnification for losses sustained by states and foreigners through these riots; and (4) the improvement of our relations, both official and commercial, with the Chinese Government and with China generally." [1]

It is impossible to summarize the results of this examination of the practice of our government. It must be assumed that in each case where an agreement other than a treaty has been negotiated with a friendly state there has been a sincere belief on the part of the Executive that the Constitution has not been violated, and that a valid international compact has been negotiated. If the President in many instances, such as have been cited, may lawfully contract with foreign nations, without the advice and consent of the Senate, no constitutional declaration is needed in order to attach a legal consequence to a compact so concluded, and render it binding upon the United States. As a result of its membership in the family of civilized states, this country of necessity recognizes as a part of its local law, the law of nations. According to that law, agreements of the United States, not in violation of the Constitution or of the accepted public

[1] Treaties and Conventions of the United States, 1776–1887, p. 1030.

[2] Treaties and Conventions of the United States, 1776–1887, p. 692.

[3] IV, Richardson's "Messages and Papers of the Presidents," p. 679 at p. 682. In 1887 the American Minister to France asked permission to sign a protocol, explanatory of the meaning of the Cables Convention of March 4, 1884. Secretary Bayard replied, "You may sign ——, subject to Senate's approval." His instructions to the Minister are contained in U. S. For. Rel. 1887. p. 276.

[1] Report of Hon. W. W. Rockhill to the Secretary of State, Nov. 30, 1901. Appendix, U. S. For. Rel. 1901, "Affairs in China," p. 3, at p. 4.

policy of the civilized world, whether treaties or agreements other than treaties, in whatever form expressed, are a part of the supreme law of the land.

CHICAGO, ILL., March, 1905.

NOTE.

The international arbitration agreements, other than treaties negotiated in behalf of the United States, down to and including those published in United States Foreign Relations for 1903, are the following:

Claim of the owners of the steamer *Colonel Lloyd Aspinwall* against Spain, concluded by exchange of notes, May 25 and June 16, 1870. II, Moore's "International Arbitrations," p. 1013.

Claim of Henry Savage against Salvador, concluded by agreement, May 4, 1864. II, Moore's "International Arbitrations," p. 1855.

Claims of certain American citizens on account of wrongs and injuries committed by authorities of Spain in the island of Cuba, concluded by exchange of notes, February 11 and 12, 1871. V, Moore's "International Arbitrations," pp. 4802 4803.

Termination of Claims Commission formed under agreement of Feb 12, 1871, concluded by exchange of notes, Feb. 23, 1881. V, Moore's "International Arbitrations," pp. 4804, 4805.

Extension of time for the termination of Claims Commission under agreement of Feb. 12, 1871, concluded by exchange of notes, May 6, and Dec. 14, 1882. V, Moore's "International Arbitrations," p. 4806.

Closing of the business of the Claims Commission under the agreement of Feb. 12, 1871, disposition of its records, etc., concluded by protocol, June 2, 1883. V, Moore's "International Arbitrations," p. 4807.

Amount of indemnity to be paid by the Spanish Government to the owner of the bark *Masonic*, concluded at Madrid, 1885, by the American minister and the Spanish minister of State. II, Moore's "International Arbitrations," p. 1060.

Claims against Colombia, arising from the seizure and detention of the steamer *Montijo*, concluded by convention, August 17, 1874. V, Moore's "International Arbitrations," p. 4698.

Claim against Chili on account of seizure of the whaling vessel *Good Return*, concluded by protocol signed 1873. (The case was settled the following year by an agreement through diplomatic channels for the payment of $20,000 Chilean gold.) II, Moore's "International Arbitrations," Note 1, p. 1466.

Claims of the owners of the whale-ship *Canada* against Brazil, concluded by protocol, March 14, 1870. V, Moore's "International Arbitrations," p. 4687.

Claims of Antonio Pelletier and A. H. Lazarre against Hayti for indemnity for acts against person and property, concluded by protocol, May 28, 1884. V, Moore's "International Arbitrations," p. 4768.

Extension of the term for the arbitration of the Lazarre and Pelletier claims against Hayti, concluded by protocol, March 20, 1885. V, Moore's "International Arbitrations," p. 4769.

Claims of Chas. A. Van Bokkelen against Hayti, arising from his imprisonment by that Government, concluded by protocol, May 24, 1888. V, Moore's "International Arbitrations," p. 4770.

The Ashmore Fishery Claim against China, concluded by agreement at Swatow, 1884. II, Moore's "International Arbitrations," p. 1857.

Claims of American citizens against Hayti, resulting from riots at Port Au Prince, concluded by agreement by correspondence, 1885. II, Moore's "International Arbitrations," pp. 1859–1861.

Delagoa Bay Railway claim against Portugal, concluded by protocol, June 13, 1891. V, Moore's "International Arbitrations," p. 4795.

The case of E. V. Kellett against Siam, concluded by informal agreement, 1897. II, Moore's "International Arbitrations," p. 1862.

Claims of Dr. M. A. Cheek against Siam, and of Siam against Dr. Cheek, concluded by protocol, July 26, 1897. U. S. For. Rel. 1897, p. 479.

Claims of Chas. Oberlander and Barbara M. Messenger against Mexico, concluded by protocol, 1897. U. S. For. Rel. 1897, p. 378.

Amount of damages to be awarded by Nicaragua on claims of Orr and Laubenheimer, and Post Glover Electric Company, concluded by protocol, March 22, 1900. U. S. For. Rel. 1900, p. 824.

Admission of French and other citizens to Samoan Arbitration (provided for by treaty between United States, Germany, and Great Britain of Nov. 7th, 1899, U. S. For. Rel. 1899, p. 671), concluded by exchange of notes, 1900. U. S. For. Rel. 1900, pp. 473, 522, 625.

Claims of Robert H. May against Guatemala, and of Guatemala against Robert H. May, concluded by protocol, Feb. 20, 1900. U. S. For. Rel. 1900, p. 656.

Supplementary arrangement respecting the arbitration of the claims of Robert H. May and Guatemala, concluded by protocol, May 10, 1900. U. S. For. Rel. 1900, p. 658.

Claims of the owners of the American vessels *Cape Horn Pigeon*, *James Hamilton Lewis*, *C. H. White*, and *Kate and Anna*, against Russia, con-

cluded by protocol, Sept. 8, 1900. U. S. For. Rel. 1900, p. 883.

Claims of the beneficiaries of the Pious Fund of the Californias against Mexico, concluded by protocol, May 22, 1902. U. S. For. Rel. 1902, Appen. II, p. 157.

Claims of citizens of the United States against Venezuela, concluded by protocol, Feb. 17, 1903. U. S. For. Rel. 1903, p. 804.

Adhesion by the United States to a protocol between Germany and Venezuela of May 7, 1903, respecting the reference of the preferential treatment of claims to the Tribunal at the Hague, concluded by protocol, May 27, 1903. U. S. For. Rel 1903, p. 439.

To the foregoing list there may be added an agreement by protocol, January 31, 1903, with San Domingo, for settlement of claims of San Domingo Improvement Company and other American citizens. Associated Press Despatches of February 15, 1905.

Attention is called to the published letter of Professor John Bassett Moore (contained in Press Despatches of February 15, 1905), in which he comments at length on the practice of our government in entering into agreements other than treaties for the adjustment of international differences by arbitration. He says:

"The action of the government in such cases rested upon an undoubted principle, which has been assumed and observed since the foundation of the government, that it is within the power of the President in the conduct of foreign intercourse with this country, to settle a claim of an American citizen against another government, at any rate with the claimant's consent, without entering into a treaty. If, in such a case, it becomes necessary or expedient to call in arbitrators to adjust the terms of settlement, this has been conceived to be only a question of procedure, a question of the method in which the admitted power was to be exercised."

The Green Bag

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE event of recent weeks of most interest to the Bar has undoubtedly been the impeachment of a federal judge before the Senate of the United States. The elaborate machinery of impeachment and the infrequency of its occurrence would alone serve to attract the general public, but the importance of maintaining the highest standard of integrity on the federal bench commands our attention. As evidence, moreover, of the unwisdom of appointing as federal judges men who are really alien to the districts over which they preside, the case has been, we think, of permanent value. A decline in the respect for the judiciary is lamented as a sign of the times by one of our correspondents, a former judge of Chicago. If this tendency exists it emphasizes the necessity of selecting as judges men who have the confidence of their communities. It is to be noted that Judge Swayne's residence in the South prior to his elevation to the bench, had been very brief. This was doubtless the real cause of his troubles, for the appointment of northern men as southern judges must eventually breed hostility. For the broader policy of President Roosevelt rising above all party considerations and appointing able southern democrats in regions where republicans are social outcasts, the Bar owes a debt of gratitude that it should be glad to acknowledge. It is to be hoped that he has established a policy from which his successors will not dare to depart.

The long delays after the Swayne case was first called to public notice and the somewhat perfunctory character of the Senate's proceedings have detracted from the public interest. The newspaper comment has ranged from disgust at the comparative insignificance of the charges to insistence upon the importance to the judiciary of avoiding even the appearance of evil, and the hope is expressed that, if there have been lax practices in the matter of charging expenses on the part of other judges, the ventilation of this case will compel improvement. Judge Swayne has had, however, few vindicators. Though it was known to the press that Mr. Littlefield had opposed the resolution of impeachment, his reasons had not been widely published nor fully set forth, and his elaborate analysis of the evidence will doubtless surprise the reader as it did the editor.

Congressman Littlefield whose portrait is our frontispiece, has been too conspicuous a figure in recent years in the National House of Representatives for us to add anything to the reader's information regarding his public career. One is likely to forget, however, in the prominence of the politician his real ability as a lawyer and his position as one of the leaders of the Bar of Maine. From 1889 to 1892 he served as Attorney General of the State. In the National House of Representatives he has served upon the Judiciary Committee, and it is of especial interest in connection with his contribution to note that he was a dissenting member of the sub-committee which reported the Swayne Impeachment.

THE so-called Beef Trust report of Commissioner Garfield, the more important criminal investigation by the Attorney General, and the picturesque Kansas oil war are the most recent phases of the battle against the greatest economic development of our time, the elimination of individual competition. One might almost say the elimination of the individual, did not the names at once arise of the few individuals who in the public eye personify these larger units of modern commerce and labor. The doctrine of Professor Bigelow in our January issue of the duty of the law to follow business, bids all thoughtful lawyers study this conflict of the new and the old, in the confidence that in the courts will ulti-

mately be determined the bounds we may set to this change. The law has always avoided the determination of questions of public policy which the courts deemed in their nature political, but it has often had to base decisions upon its conception of accepted public opinion upon moral issues. Some may regret that it is destined in new fields to lay down the law upon its conception of such a variable as public opinion upon economic policy. Professor Wyman of the Harvard Law School continues in this number the series of studies of this question which have appeared in these pages. In the January number he explained the legal rights of the labor unions to end competition. In this issue he discusses the rights of the combinations of capital in their process of eliminating the small trader.

BRUCE WYMAN

MODERN journalism is one of the giants of our time of which the public is wont to stand much in awe. One of its characteristics is an *esprit de corps* which causes united opposition to criticism of its methods by the uninitiated. Journalism seems to be afflicted with a malady from which the Law cannot claim exemption, and what we are accustomed to call the commercial spirit has shrivelled its ideals with consequences to our moral development as much more far-reaching as its influence is wider than that of the Bar. When the press comes in conflict with the courts, however, it finds a master to which it yields, though often with a bad grace. The most familiar instances of this have been contempt proceedings arising out of reports of pending trials, usually impelled by the court's desire to shield the jury from even the possibility of improper influence. Mr. Smith's contribution to this number makes some novel suggestions as to the effect of the sensational press upon the trial of criminal cases.

CLARENCE BISHOP SMITH

Mr. Smith graduated from Columbia College in 1894 and from the Harvard Law School in 1897, where he was an editor of the *Harvard Law Review*. He is a member of the firm of Wheeler, Cortis & Haight of New York, and has taken an active part in the legal and legislative work of many reform movements in that city.

WITH the recent public discussion of the San Domingo treaty in mind, we are glad to present in this issue Mr. Hyde's careful explanation of the practice of our government in international agreements like that under which Dr. Abbott has been administering customs in San Domingo for nearly a year. With the evidence of the power of the Senate over treaties vividly impressed upon us, as it has been during the last session, the idea that there still remain some rights of international agreement inherent in sovereignty, seems to have come as a surprise to those who had only a superficial knowledge of international law and practice, and to have awakened a new terror for those who deplore the activity of our President in foreign affairs. It is hoped that the contribution which we publish will serve to clarify ideas upon this ill-defined field of executive activity.

CHARLES CHENEY HYDE

Mr. Hyde is a native of Chicago, who graduated from Yale College in 1895 and from Harvard Law School in 1898, since which time he has been in practice in Chicago. He is Associate Professor at Law at Northwestern University, and has been a contributor on topics concerning international law and diplomacy to our most important legal and other magazines.

CURRENT LEGAL ARTICLES

This department represents a selection of the most important leading articles in all the English and American legal periodicals of the preceding month. The space devoted to a summary does not always represent the relative importance of the article, for essays of the most permanent value are usually so condensed in style that further abbreviation is impracticable.

CONFLICT OF LAWS (Jurisdiction Between Aliens)

An article entitled "Jurisdiction in Actions Between Foreigners" by the distinguished French authority on international law, A. Pillet, translated by William C. Gray, appears in the March *Harvard Law Review* (V. xviii, p. 325). The author first considers whether the courts of a country should take jurisdiction of suits between foreigners just as they would cases of the same nature arising between their own citizens. He explains that there is "apparently irreconcilable conflict regarding this subject between French and English-American decisions." Under our law such jurisdiction is always assumed, but it is refused under the French Code which does not expressly confer it. Since this rule, however, was contrary to the needs of society it has been much narrowed by exceptions and by treaties. The author concedes that the English rule is unquestionably preferable, and shows that two reasons usually given by the French courts, that they were not established to dispense justice to foreigners, and that this extension of their jurisdiction would have the inconvenience of requiring them to apply foreign laws, are unsound. "For the maintenance of the peace of society, it is not enough that exact justice be done to a certain number of men; it must be done to all under penalty of rendering social relations insecure. This security, this order, this peace, the state owes to foreigners as well as to its own citizens." Moreover, foreigners are now permitted to acquire rights, and these are worthless unless they can be protected.

The author then considers what law should be administered when jurisdiction has been taken. He contends that it is necessary that there should be but one competent tribunal for a case, otherwise conflicts of decision and confusion as to rights result. Hence states should adopt the same principles as to jurisdiction. In this part of his discussion he contends that the French Law which gives jurisdiction to the tribunal of the domicile is the one which best regards the security of the defendant and secures the judge best fitted to decide the suit, and in the greatest number of cases insures the effectiveness of the judgment. He thinks that the jurisdiction of the court of the situs over movables and of that of the domicile over personal actions and movables is the principle on which nations might come to an agreement. Exceptions should be reduced to indispensable cases, and the cases in which courts recognize the jurisdiction of others should be exactly the same as the ones in which they claim it themselves. It is a failing common to all judges, however, that they are more positive in asserting their own jurisdiction than in recognizing that of others, and the author shows that English judges have had this failing in common with others. In conclusion he says:

"Until the world can be brought to accept a single system of private international law — and in spite of the progress in that direction of late years it seems that a very long time will pass before that ideal will be attained — the laws applied to any subject will vary with the tribunal before which it comes. The establishment of clear-cut laws in regard to jurisdiction, easily understood and universally respected, would allow everyone to know by what law he will be judged. The lack of certainty in the law would be so much diminished. Is not lessening the uncertainty of law one of the most signal services we can render to private interests?"

CONSTITUTIONAL LAW (Corporations. Reserved Power to Amend Charters. Obligation of Contracts)

The article on "The Limitations of the Power of a State to Amend or Repeal Charters of Incorporation," by Horace Stern, is continued in the February *American Law Register* (V. liii, p. 73). The author emphasizes the distinction between the charter as a contract

with the state and as a contract between the shareholders, and holds that it was the violation of the latter contract which should have been the ground for the decision in the Dartmouth College case. The decision, however, was put on the other ground. Since the adoption of the reserved power to amend was admittedly for the purpose of avoiding that decision it should be construed as authorizing only amendments affecting the contract between the state and the company just as any contracting party might reserve such a right in his contract. The contract between the shareholders exists independently of and is not created by the state and should not be altered either directly or by permission to a majority of stockholders.

He admits that this contention is not supported by the cases.

"Whatever may have been the *intention* of the reserved power clauses, the state has not the constitutional *power* to reserve to itself a right to alter or repeal the contract of the corporators any more than it could reserve such a power over the contracts of partners, of unincorporated associations, or of private contracts in general. Although it may be admitted that the state, without thereby releasing dissenting stockholders, can make immaterial changes, yet this power derives no additional force from the reserved power clauses, but exists independently of them. The state cannot gain power over a contract over which it otherwise would have none merely because such contract is, by an accident of history and legal procedure, formally embodied in an instrument over which, in a different aspect, the state can legally reserve rights of amendment or repeal.

"If these contentions be correct, almost the entire law on the subject of the control of the states over corporations must be rewritten. It is of importance that it should be so rewritten, for it is submitted that the law, as it now stands, is illogical and historically incorrect, and, further, that under it no investments in the stock of any corporations can safely be made, for the entire organization and purpose of a corporation may at any time be changed by legislative enactment notwithstanding the protests of minority stockholders. Even policy, therefore, does not dictate in this case the necessity of fallacious reasoning. There is no apparent reason why the states should have any more power to annul or alter corporators' contracts *inter se* than to revoke or amend any other contracts. If the people of the United States think differently, they may find means to accomplish their desire, but it is submitted that those means are to be found only in an amendment to the Federal Constitution limiting in this respect the impotence of the states to impair the obligation of contracts. It is not believed that any such amendment would be desirable, but that, on the contrary, it would be in the highest degree impolitic."

CONSTITUTIONAL LAW (Limitations. Jury Trial, Philippines)

"THE Attorney-General for the Philippine Archipelago," Lebbeus R. Wilpley, contributes to the March *Yale Law Journal* (V. xiv, p. 266) an article on "The Legal Status of the Philippines — As Fixed by the Recent Decision of the Supreme Court in the Jury Trial Cases."

"It was manifest from the beginning that all of the guaranties of the Constitution could not be extended to these peoples, at least for some time to come, and that, according to traditional standards, they were and would for a long period be unfitted for statehood. The cold fact was that we had come into possession of territory unfitted for statehood which had to be administered by governmental machinery unequipped for colonization. Two questions arose: one of a purely political character to be determined by the people — the other involving a proposition of law to be determined by the Supreme Court. The general public, who were interested mainly in the political aspect of the matter, included in their considerations many questions of law. And it is correct to say that the question of political expediency obtruded itself upon the attention of the courts and the lawyers in the consideration of the purely legal phase. Nor was this strange.

"The case presented the question whether in the absence of a statute of Congress expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the

Philippine Islands. The court decided that the right to acquire territory carries with it the power and obligation to govern it; and that Congress while acting under Article 4, Section 3, of the Constitution, which gives it power to dispose of and make all needful rules and regulations respecting the territory of the United States, is not bound to extend the right of trial by jury to such territory as the Philippine Islands. It also held that the Constitution does not of its own force and without legislation carry such right to territory so situated."

The only constitutional point decided in these cases was the right to trial by jury, but the decision is given a wider significance by the rule of interpretation upon which it must rest, viz: "that there are certain prohibitions and restrictions contained in the Constitution relating to fundamental rights which go to the very root of the power of Congress to act at all, in all places, at all times, and under all circumstances, in the territories as well as in the states. On the other hand, there are other constitutional limitations, not absolute in their nature, which relate to such matters as methods of procedure and forms of judicial trials that do not restrict Congress in the exercise of its power to create local governments and make needful rules and regulations respecting the territories of the United States.

"Generally speaking, those guaranties are fundamental which are essential to the very existence of free government. Those expressed and implied restrictions relating to individual rights without which our form of government could not exist, and which are respected by all modern governments worthy of the name, are undoubtedly fundamental. The genius, nature and spirit of free government forbid the violation of such rights at all times, in all places, and under all circumstances, and hence those restrictions relating to them go to the very competency of Congress to act at all. Such rights are guaranteed by the Constitution itself, and the first eight amendments. I would go farther, and say that the general principles of law, reason and justice would guarantee these rights to the people independent of their existence in the amendments of the Constitution known as the 'Bill of Rights.' If the government, or any branch of it, should undertake to violate these rights it would subvert the principles on which it is based. The artificial or remedial rights are those which relate to methods and forms of judicial trial and modes of taxation, the extension of suffrage, etc., which can be varied with the needs of the people without withholding from them those elemental rights, the enjoyment of which is the essence of free government."

The author then classifies these two kinds of rights and concludes: "A casual analysis of these decisions, in the light of the character of our people and of the position our country now holds among the nations of the world, produces the conviction that the principle here enforced is bound to play a large part in the development of the nation. If the view of the minority of the court had prevailed, it would have been tantamount to saying that this government shall not go to war because it would be unable, by reason of its structure, to meet the obligations that may result from war. When nations go to war, as all are likely to do some time in their history, they are likely to either cede or acquire territory. Hitherto the results of our wars have been the acquisition of territory.

"It is clear that when our forefathers threw off their allegiance to Great Britain and established a republican government, they meant to call into being a nation endowed with those powers to acquire and govern territory which all independent governments, by virtue of their sovereignty, enjoy. In the light of these facts, it is not strange or unreasonable that the Supreme Court should declare that the Philippine Archipelago, being territory belonging to the United States, legitimately acquired, may be governed by Congress with a view to the needs, usages, customs and conditions of the inhabitants of such territory, and to that end may be adopted all appropriate means not in violation of those natural and fundamental rights guaranteed by the Constitution, which form the basis of all free government."

CONSTITUTIONAL LAW (Regulation of Primaries)

"Constitutional Limitations on Primary Election Legislation" is discussed by Floyd R. Mechem in the March *Michigan Law Re-*

view (V. iii, p. 364). He submits that the right to vote involves the right to nominate, and that "any law which denies to the voter the right to determine for whom he shall vote must be void." On the other hand, our "whole system recognizes that voters will act in groups, and while parties are not expressly provided for, the fact that the majorities are to control clearly presupposes the division of the people into groups or parties. Concerted action and assembly to consult naturally give rise to parties." If such an existence is to be maintained, the right of membership must be voluntary and controlled by the party. They are, however, subject to police regulations like individuals. Thus we regulate nominations. For the purpose of printing the official ballot, parties may be classified on any reasonable basis, such as voting strength, but this must not abridge the voter's right to vote for others. Participation in a caucus is essentially a partisan affair, and the voter is not entitled to secrecy, nor is anyone entitled to nominate except a member of the party. Decisions are not agreed as to what tests, if any, of party membership may be applied by the state. A convenient reference list of the different state primary laws is appended.

CONSTITUTIONAL LAW (Statutes. Public Officers)

ALONZO H. TUTTLE concludes in the March *Michigan Law Review* (V. iii, p. 341) his article on "Removal of Public Officers from Office for Cause," begun in the previous number. He sums up the law as follows:

"1. The courts differ as to whether power 'to remove' grants an arbitrary power, but the weight of authority is to the effect that it does.

"2. Courts differ as to whether power to remove 'for cause' or for cause specified, is a grant of an arbitrary power of removal, but the weight of authority and the better reasoning is to the effect that it is not. Those courts that hold that it is not, differ as to whether the power is executive or judicial. Those holding that the power is executive but not arbitrary, differ as to the extent of the limitation — some, like Wisconsin, holding that notice and hearing are not necessary but filing of charges is, while courts like those of Nebraska, Ohio, Utah, hold that charges, notice and hearing are necessary.

"3. With no exception it is held to be constitutional to confer upon local administrative officers the power to remove for cause. Courts differ as to their reasons for so holding, some declaring that the power exercised is executive, not judicial, while others hold that the power is judicial in nature, but not in the sense used in the constitution when it speaks of 'judicial power.' It is believed the latter position is the correct one.

"4. With the exception of Michigan (overruled in later decisions) it is held to be constitutional to impose this power upon the governor. Most courts justify it on the ground that the power is executive, not judicial, while others justify it on the ground that though judicial in nature it does not violate the principle of the separation of powers. This is believed to be the true position.

"5. The weight of authority and sound reasoning is to the effect that *certiorari* will issue to review proceedings of local administrative officers in removing for cause.

"6. Courts differ as to what will be reviewed on a common law writ of *certiorari*. Some holding that the record only is brought up and the question of jurisdiction determined, while others hold that the evidence will be examined to see if errors of law affecting the party have been made or if the evidence be such as to warrant the decision.

"7. On principle *certiorari* should issue to the governor to review his removals for cause. Such an act of removal is judicial in nature whether exercised by local executive officers or by the governor."

CONTRACTS (Action by Beneficiary)

THE article entitled "Limitations of the Action of Assumpsit as Affecting the Right of Action of the Beneficiary," by Crawford D. Hening, is continued in the February *American Law Register* (V. liii, p. 112). In the December issue he presented a number of ancient cases of debt and of account in which a beneficiary not a party to the transaction was allowed to recover upon the obligation. In this number he concludes the discussion of the cases of debt and continues as to account, concluding as follows:

"Debt and accountability were therefore primary common law obligations enforceable by the beneficiary, not because he was a 'privy to the contract, or a 'promisee' or a '*cestui que trust*,' or had furnished that 'mystery' of the eighteenth and nineteenth centuries — 'the consideration.' We err in attempting to analyze into constituent elements a substantive right which is itself primary and elemental. The beneficiary recovered because the judicial instinct recognized that he ought to recover, and the courts held that by common law he had a substantive right. This common law right was the expression of a public sense of justice, and a firmer foundation for a positive rule of law need not be sought."

CORPORATIONS (Federal Regulation. Watered Stock)

A NOVEL view of the problem of "Regulation of Corporations by Federal Law," is presented by Robert L. Cutting in the February *Albany Law Journal* (V. lxvii, p. 39). He starts with the premise that over-capitalization is the great trust evil and that it may be regulated in the same way that lotteries and other forms of gambling are regulated by the Federal government, viz: by forbidding the interstate transportation of certificates of stock not approved by a Federal official as representing fair valuation. It is founded on the doctrine of Champion *v.* Ames, which held it sufficient that lottery tickets might become the subject of interstate traffic.

INSURANCE (Waiver)

AN instructive essay on a subject of great importance to the practitioner entitled "Waiver in Insurance Cases," by John S. Ewart, is printed in the March *Harvard Law Review* (V. xviii, p. 364). From a series of definitions and interpretations of waiver in the cases the author deduces six different views of its nature:

"Irrespective of the disagreement as to whether waiver must be based upon intention, there are six different views presented in these extracts, and for each of them plenty of authority can be cited:

"Policies are crowded with numerous fine-type conditions, breach of any one of which 'renders this policy void.' And when a loss takes place the company frequently pleads (1) the existence, and (2) the breach, of one of these conditions. This is supposed to be a perfectly good plea, and the plaintiff replies, and tries to prove some waiver by the company of either the condition or the breach of it. If he fails to prove waiver he is beaten.

"All the cases proceed in this way, and it is my contention that they are all wrong. Demonstration of this assertion, moreover, I conceive to be an extremely simple task."

It is generally agreed that a breach of condition makes the policy not void but voidable at the election of the company :

"The company may do as it likes, subject to this: that being given a choice between two things it cannot take both. But as a matter of practice, aided by current notions of law, it does take both. For example, default is made in payment of a premium, and the company has consequently a right to terminate the contract. But that is the very last thing it wants to do and will do. On the contrary, it will dun and humor the chap, and take something on account and notes for the balance, and threaten and sue, and attach, and worry, in order to get the premium and keep the assured as a future subscriber. And if a loss happens meanwhile? Well, that of course is a different thing. The policy says that if the premium is not paid 'this policy shall be void'; and the premium was not paid; and is not that a good defense? According to present ideas it is, unless you can prove waiver.

"It is not right even to say that the landlord or insurer waived his *right* to forfeit; for he did not. He had the right to choose between terminating the contract and continuing it; and he *exercised* that right of choice; he did not waive it, or give it up. If he had elected to determine the contract, no one would think of affirming that, by so doing, he had waived his right to continue it. And it is not more correct, when the election is to continue the contract, to say that he waived his right to determine it. If you have a choice between an apple and an orange, and you choose the orange, it would be rather absurd to say, either that you waived the apple, or your right to the apple (for you had none), or even your right to choose the apple (for you exercised your right by not choosing it)."

"I object to the substitution of waiver for election, for it fixes attention, not upon the act that it pretends to describe, but upon a mere consequence of that act. Election is the choice of the orange, and the consequence is that you do not get the apple. But there is no abandonment, or cession, or surrender, or waiver, of the apple, for you never had it, or any right to it. You had a right to choose; you exercised that right; you gave up, or threw away, or waived nothing. The point of the act is the choice, and attention ought to be drawn to the thing chosen, and not exclusively fixed upon the effect of that choice."

Three consequences will follow from the proposed change. The company can no longer win by silence. If it wants to cancel it must do so affirmatively. The assured will be relieved of the difficult burden of proof of waiver and of the authority of the agent to waive. These facts are in the knowledge of the company, and it should sustain the burden of proof. A possible fourth result would be to entitle the assured to a return of a proportionate part of advance premiums.

HISTORY (Ecclesiastical Jurisdiction)

An interesting sketch of the history of "The Ecclesiastical Jurisdiction in England," by Edwin Maxey, appears in the *Michigan Law Review* for March (V. iii, p. 360).

INTERNATIONAL LAW (War. Wireless Telegraphy)

In the March *Yale Law Journal* (V. xiv, p. 247) Professor Theodore S. Woolsey, under the title of "Wireless Telegraphy in War," treats of a novel condition of modern warfare which presents interesting problems of international law. He explains that in the present war in the East, wireless telegraphy has been used in two ways which are of questionable legality — "to maintain intercourse between belligerent Port Arthur and Russia and to send war news to a London paper rapidly and independent of military control, by the paper's own steamer rigged for the purpose." As to the first problem arising out of the erection on Chinese soil of a mast to receive wireless messages from Port Arthur the author cites the analogy of sub-marine cables and says that there seems to be a tendency to impose on neutrals the duty of preventing the use by a belligerent of a cable landed on the neutral's territory. He contends that the true test in both cases should be whether the communication was originally set up for commercial or military purposes. If the former, the mere fact that it is made use of for military purposes should not oblige the neutral to stop all communication, but the neutral should prevent establishment of such an exclusively military communication as was maintained between Chee Foo and Port Arthur.

"The distinction between making use of means of communication already existing, and establishing new ones during war and for war purposes, is the same in kind as the distinction between the use of the regular mails and hiring a dispatch boat. A case can hardly be imagined where the privilege would be valu able to both belligerents alike. Being within neutral jurisdiction, the other belligerent has no power of prevention. No commercial interests are affected. To suffer it, is an unneutral act or service."

The danger with respect to the press boat is that essential military information may be conveyed to the other belligerent intentionally or unintentionally, so that of necessity a belligerent should have the right to control such transmission of information from any waters within the war zone.

"Our only question here, as it seems to me, should be as to the nature of this control. It might be prohibition; it might be censorship; it might be restriction as to locality; it might be a license system. But that control of some sort is proper, I believe is beyond question."

The defects of different suggested methods of restriction are then discussed, and the author concludes:

"By process of exclusion, we reason, therefore, that news-gathering by sea, with the aid of the wireless, is of such a nature as to be inadmissible in warfare, and to require entire prohibition under penalty of confiscation. It is a service bearing an analogy to the dispatch boat, the submarine cable and the war correspondent, in peculiar combination. The dispatch boat is guilty of unneutral service in behalf of one combatant and can be confiscated by the other; the submarine cable can

be cut or worked at the belligerent end under censorship; the war correspondent, by universal usage, is only allowed to accompany an army subject to strict regulations. The wireless news-gatherer, combining the dangerous qualities of all three, should not be permitted at all."

MASTER AND SERVANT (Independent Contractor)

THE elaborate treatise on the "Liability of an Employer for the Torts of an Independent Contractor," by C. B. Labatt, is continued in the *Canada Law Review* for February (V. xli, p. 49).

NEGLIGENCE (Theory of)

THE March *Canada Law Journal* (V. xli, p. 233) contains a thoughtful analysis of "The Psychology of Negligence" by Charles Morse, of which he says that "it must be admitted that there is a regrettable amount of confusion in the books as to whether the element of *intention* on the part of the wrong-doer has aught or nothing to do with the theory of liability." He contends that in many of the cases the element of intention does not manifest itself in relation to the result of the breach of duty, but is confined wholly to the breach itself, which may or may not be followed by an injurious result; and it is only the result which makes the conduct of the wrong-doer a subject of juridical enquiry. He further criticises the theory of some writers that negligence is a form of *mens rea*. He traces the history of the maxim from the canonists and submits that it "had a special place and meaning in the criminal law; and, that being so, any unnecessary dislodgment of it therefrom for the purpose of making it do duty as a part of the technics of another and distinct branch of legal science is to be deprecated under any circumstances, but where the new setting for the old maxim is incongruous and subversive of its original meaning, such a use, or rather abuse, ought not to be allowed to become general."

Civil wrongs in English law are of three classes, each having a different theory of responsibility.

(1) Personal wrongs, in which intent is an element.

(2) Wrongs to property, in which liability is imposed for the technical violation of a legal right without contemplating its cause or effect.

(3) Wrongs arising through negligence, in which a standard of conduct is the test of the wrongful character of the act done. "If there can be said to be any *subjective* side to the legal doctrine of negligence, it consists in a purely passive state of mind on the part of the wrong-doer toward the consequences of his carelessness, such a state of mind as negatives the presumption of intention to produce the injury suffered."

From an examination of the authorities the author concludes that, "in formulating its theory of liability for negligence in civil cases, the law has not regarded the mental attitude of the wrong-doer, but has contented itself with fixing an external standard of conduct as the criterion of blameworthiness. To attempt to overlay this purely objective theory with subjective refinements is not such an experiment as could be expected to commend itself either to hard-headed practitioners or to the more academic members of the legal profession who are jealous to keep intact such symmetry as the philosophy of the common law has up to the present time been able to achieve."

PROCEDURE (Law's Delay)

"Individualism and Legal Procedure," is the title of a brief but suggestive article by Walter Storrs Clark in the March *Yale Law Journal* (V. xiv, p. 263), which treats of the old but ever-pressing problem of the "law's delay." This is the constant and grievous complaint of the layman who ceases his criticism only in the belief that remedy is hopeless and that the wickedness of lawyers conspires for selfish interests to prevent reform. It is our hope to present in our next issue a discussion of this subject by a number of eminent judges and practitioners from all parts of the country, and it is with especial interest, therefore, that we read that:

"Of the political 'whips of time' which Hamlet enumerated, three centuries ago, he would, if he should visit America to-day, miss two — the oppressor's wrong and the insolence of office; but he would still recog-

nize the third — the law's delay. Witness: the twenty days to file answer, which practitioner uses by writing in his diary for the nineteenth day ahead, 'Draw answer, Jones case,' dismissing the subject until then; the wait of months for trial, when witnesses may be gone, and certainly have forgotten; the excessive length of important trials; the excessive right of appeal, both civil and criminal, etc. The railroad, the factory, the department store, the physician, the newspaper, responding to the spirit of the age, all do their work on modern schedule time; but the administration of justice, in larger cases, sticks to its mediaeval time-table.

"But it is not, perhaps, so generally recognized that individualism is, in large part, the reason why we are unprogressive in legal procedure. There is the feeling that the individual should have all the rope he wants, both as to time and testimony, although the result usually is a bulk of evidence which obscures the weight of evidence and buries those decisive points upon which every case must turn in the end. We allow appeals from court to court in all cases, encouraging the litigious spirit and discouraging that submissive spirit which elections must have, or democracy will go to pieces; grant new trials, though substantial justice has been reached; are satisfied to allow ten guilty to escape, to save one innocent; insist strenuously upon the resolving of every doubt—all because the individual good appeals to us more strongly than the general good. Probably a suggestion that we might safely substitute for indictment by grand jury the accusation of the coroner's jury, or accusation by some elected official, ready to act at any moment; or that we might, with advantage to justice, compel the accused to testify, would be generally considered an attack on American freedom.

"But does the safeguarding of individualism, in reality, require us to block the development of legal procedure? Should we still be so afraid of our judicial machine as to fear speeding it a little? We are speeding it in minor cases, both civil and criminal, where various causes have combined to put a practical time limit both to preparation and to trial, thus excluding all but the decisive points; and it is standing the strain very well. We are speeding it, to the limit, too, in that element of criminal justice, that part of the punishment which is as important as the final sentence — viz: arrest. There are no ifs nor ands about the officer's 'Come along with me'; and yet we find practically no abuse of the power."

PROPERTY (Riparian Rights. Seashore)

In the *Harvard Law Review* for March (V. xviii, p. 341) William R. Tillinghast, under the title of "Tide-flowed Lands and Riparian Rights in the United States," calls attention to the fact that there exist in the United States two distinct theories of shore rights and titles, and explains the historical reasons for their existence. The Connecticut theory gives the riparian owner the exclusive right to wharf and fill out in front of his upland. This right is in the nature of a franchise, since they hold the technical fee below high water mark to be in the state. The New York theory holds that the "State owns the soil below high-water mark, in such a sense that it can be granted away at pleasure to either the upland owner or to any stranger." Though it is generally stated that at common law the Crown owned the fee between high and low-water mark, the author shows that this was a usurpation of the Crown in the time of the Stuarts, and that, at the time of the founding of our colonies, the owners of the shore were entitled to the land between highand low-water mark. The doctrine that title is *prima facie* in the Crown has received its greatest support from the works of Lord Hale, but the author contends that "an unprejudiced examination will show that the *prima facie* theory was, in fact as well as in name, a mere theory at the time Lord Hale wrote, and that the entire shores of England were in fact held in private ownership, as well as the rights and franchises of the ports."

The reason for the distinction in New York and Massachusetts is that New York was upon acquisition from the Dutch a Crown colony, and that "the titles to all lands in the Massachusetts Bay Colony were first public in a much more complete sense than were the lands in England when William the Conqueror and his immediate successors made their grants." In New York very early grants were made

by the state and the theory of state ownership has been confirmed by later constitutions and in Massachusetts similar early grants of shore placed a contemporaneous construction upon the grants of upland which could not be ignored when the Massachusetts courts were called upon to determine what was the law of the state.

SURETYSHIP (Notice of Acceptance)

AN interesting criticism of the doctrine which requires "Notice of Acceptance in Contracts of Guaranty," by W. P. Rogers, appears in the *Columbia Law Review* for March (V. v, p. 214).

Since most unilateral contracts are completed by the doing of the act without further ceremony he insists that there is no sufficient reason for departing from a well-established rule sustained by reason and logic by requiring notice of acceptance.

"The cases which have departed from the common law rule of contracts have apparently established at least two distinct rules on this subject of notice of acceptance: (1) that all guaranties for future advancements or credits require notice of acceptance within a reasonable time thereafter: (2) when the guaranty is collateral, that is, when the amount of the debt is uncertain and variable, and the knowledge concerning the amount and time of payment will not or may not come promptly to the guarantor, the creditor is bound to give him notice of his acceptance within a reasonable time after doing that which amounts to an acceptance. There is a third group of cases, representing a very small minority of the states, wherein it is insistently claimed that the common law rule of contracts, in reference to notice of acceptance, should be applied to contracts of guaranty. The judges who have written these opinions criticise the courts for the departure they have admittedly made in this branch of the law, and insist with apparent justification that it is unwarranted. They deny that a proposition to stand as guarantor always carries with it an implied condition that notice of acceptance will be given the guarantor."

TORTS (Damage, Mental or Nervous)

PROFESSOR FRANCIS M. BURDICK, in the March *Columbia Law Review* (V. v, p. 179), summarizes the cases relating to "Tort Liability for Mental Disturbance and Nervous Shock," as follows:

"Where the consequences of the defendant's wrong-doing are limited to the mental disturbance of the plaintiff, and the wrong-doing is not actionable in behalf of the plaintiff, apart from such consequences, any harm sustained by the plaintiff is deemed *damnum absque injuria*. Thus far there is entire unanimity of decision. When, however, worry or fright, occasioned by defendant's wrongful conduct, causes physical derangement, differences of opinion immediately develop, and it becomes impossible to reconcile the various judicial views of the wrong-doer's liability.

"Courts which deny all remedy for fright, or like disturbances of the mind and nerves, assign one or both of the following reasons for their holding: First, that physical suffering, sickness or permanent harm is not the probable or natural consequence of fright or nervous shock, in the case of a person of ordinary physical and mental vigor. Hence, plaintiff's injury is declared to be, as a matter of law, not the proximate, but a remote result of defendant's wrong-doing. Second, that damages sustained by fright or nervous shock must be refused, because of the impracticability of satisfactorily administering any other rule.

"That serious physical disorder is the everyday consequence of fright or nervous shock is a fact, not only established by modern science, but one which has long been accepted by the ordinary man. It would seem, therefore, to fall within the category of natural and probable consequences. The second reason assigned for denying recovery in the cases now under consideration does not appear to be entirely satisfactory, even to the courts which continue to apply it.

"Moreover, all courts agree that when the defendant's misconduct causes a physical injury to plaintiff, however slight, or, without physical harm, wrongfully invades his right of personal security or liberty or reputation, he is entitled to have the jury estimate and assess the damages which he has sustained by reason of injured feelings."

CORRESPONDENCE

Modern Interest in the Pandects of Justinian

Found by Hon. Eugene F. Ware

Topeka, Kan., Feb. 28, 1905.

Editor Green Bag:

We of the present do not give full credit to the past. In the days of Rome they had great lawyers and great judges, lawyers and judges who were the equals of lawyers and judges now; men who wanted to do that which was right and did it. It is true that matters of personal status, of voting and privilege, were not then the same as now, but as to questions of property and as to private rights between man and man, the lawyers and judges of Rome had met about every proposition and decided it rightly.

Having been obliged recently in some irrigation matters to look hurriedly through the Civil Law which was derived from the law of ancient Rome, it became necessary to make some translations from the Corpus Juris. Be it known that the Pandects of Justinian have never been translated into English and that they contain a mine of most useful information and law. As the river Po was something like the Missouri River, constantly making changes in its bed, and as litigation is constant along the line of the Missouri, I take the liberty to send you two translations, one concerning irrigation and one concerning rivers, which have never appeared in English before, and which are interesting as showing how questions arose during the days of old Rome similar to those arising to-day, and the translations show what was the origin of our present laws.

Yours very truly,

E. F. Ware.

(Opinion by Proculus.) "In the river fronting me, an island formed in such a manner that it did not extend beyond the boundaries of my estate; afterwards the island grew little by little until it fronted the estates of my neighbors above and below. I seek to know whether the accretion from end to end belongs to me because it has joined itself to mine, or whether it belongs to him to whom it would have belonged if the whole length of the island had appeared at the same time."

Proculus responded: "If this river of yours, about which you write, and in which an island is formed opposite your field, is a river in which the right of alluvion is recognized, and if the island so formed does not exceed your field in length, and if the island in the beginning was nearer your estate than his estate across the river, the island is wholly yours, and whatever of alluvion afterwards attaches to the island is also yours, even if it is so added that the island extends in front of your neighbors above and below, or even if it had grown closer to the estate across the river than to yours."

(Opinion by Proculus.) "Several persons were accustomed by right to bring through the same channel, water from a neighboring source, in such a way that each had his own day of taking the water; first, by the same channel common to each, thence by a smaller channel which was the separate property of each. One of these persons did not take water during the statutory period prescribed for its loss.

"I think he lost his right to the water by non-user, and that the right was not maintained through the use of water by the others, because the right of each was separate and could not be upheld by the use which the others made. If, however, the water right pertained to an estate owned by several in common, the use by one of these would maintain the right as to all. Also, if one of these referred to who owned a water right, employing a common channel to convey the water, had lost the right by non-user, the right would not go to the others who used the channel in common with him. The benefit is his who owns the land through which the canal passes, conveying the water which by non-user has been lost as to one. Such owner of the land enjoys the benefit of freedom from that portion of the servitude."

THE LIGHTER SIDE

THE following incident occurred in an Ohio court.

Two neighbors—both well-known men—were settling a difficulty by a rather vigorous law-suit. The jury retired and spent much time in deliberation without reaching an agreement. In their room one of the members finally approached Farmer Smith, who had taken but little part in the discussion and asked him his opinion. "Well, to tell you the truth," said he, "I'm sort o' stumped as to how this thing ort to go. I know both these fellers purty well, and I can't say as I have anything particular against either one of 'em."

FAIR LITIGANT.—I shall appeal my case to the Heavenly Court.

JUDGE.—Will you tell me how to draw the motion. I may want to report my own case.

VERBATIM copy from the acknowledgment on a deed, State of Texas, County of Denton:—

Be it known that this day in person afore before the undersigned authority Francis Dickinson and lady, that is well known to me and acknowledged that they executed and delivered the foregoing deed of conveyance for all the concedintion therein set forthauny export and the said Anartia being by me privily and apart from said wasband examined and sayses that it is an act of her own accord we with—fear or compulsion on the part of said husband.

Given under my hand and legal of office this Sept. 19, 1860.

YOUNG LAWYER.—"If your honor please, I wish to take judgment by default."

JUDGE.—"But you cannot take it in that way."

YOUNG LAWYER.—"Well, your honor, what would you advise me to do?"

JUDGE.—"I would advise you, young man, to go back to your office and advise your client to hire another lawyer."

AT one of the recent lectures by Professor George Kirchwey, Dean of Columbia Law College, New York, the students were uneasy. There was something wrong in the air. Books were dropped, chairs were pushed along the floor. There were various interruptions. The nerves of all were on edge. The members of the class kept their eyes on the clock and awaited the conclusion of the hour of the lecture. The clock beat Professor Kirchwey by perhaps a minute, but at the expiration of the schedule time the students started to their feet and prepared to leave. "Wait a minute," objected Professor Kirchwey; "don't go just yet. I have a few more pearls to cast." — *Argonaut.*

GEORGE WASHINGTON THOMAS, an able-bodied negro of Sleepy Hollow, appeared before Magistrate Nussbaum charged with stealing chickens. The negro was accompanied by his lawyer, Colonel Simmons, a rising young white attorney. The old judge sauntered into the dingy court-room where he had reigned for more than twenty years, and after calling for order he looked around on the little company there assembled. Seeing George Washington Thomas, he pointed to him and said:

"Be you the defendant in this case?"

Quick as a flash George was on his feet, and, not understanding legal terms, he exclaimed politely:

"No, sah; no, sah; I ain't de 'fen'ant: dar's de 'fen'ant ovah dar." And saying which, he pointed to his lawyer. There was a general laugh about the room, in which the queer old judge joined heartily. The darkey felt abashed. He was visibly embarrassed, and, thinking to correct the mistake, if mistake it were, he said again, pointing at his lawyer, "Yas, sah; he's de 'fen'ant," and, pointing to himself, he said, "I's de gent'man what stole de chickens." — *Lippincott's.*

IN a certain Illinois town a teamster had been arrested and tried before a justice of the peace on a charge of cruelty to animals. It was alleged in the complaint that the teamster had brutally kicked and otherwise abused the horse driven by him. The evidence failed to show that the teamster had maltreated the horse as charged in the complaint, but it developed that the defendant was unusually

gifted in the use of a florid and picturesque profanity — a profanity that left nothing to be desired in the choice of expletives or force of delivery. It appeared from the evidence that what the teamster had really done was to give the horse one of his most artistic and terrific "cussings." After hearing the evidence and the arguments of counsel, and being fully advised in the premises, the court found "among other things that said defendant swore at and used profane language to the horse mentioned in said complaint, but that from the present imperfect state of knowledge of the psychology of the horse or of the workings of the equine mind it does not appear to the court that said horse has suffered any physical pain, mental anguish or humiliation by reason of the profanity heaped upon him; or that said horse in any manner 'kicked' because said defendant swore at him; that under the statute such swearing at said horse did not constitute cruelty to animals; and it further appearing to the court that the said horse had no 'kick' coming by reason of his treatment by said defendant, it is thereupon ordered by the court that said defendant be discharged."

"I haven't seen your cashier for several days."

"No; he's gone out of town."

"Gone for a rest, I suppose."

"We haven't found out yet whether he's gone for a rest or to escape it." — *Philadelphia Record.*

THE LAWYER. — "Do you want a divorce without publicity?"

THE LADY. — "Sir, you seem to have forgotten that I am an actress!" — *Chicago Daily News.*

A JANITRESS at work in the office of a young attorney, came into his private room to ask advice, saying that she would pay whatever it was worth. After hearing her story of how she had been buying her household furniture on the instalment plan, how she had learned, when too late, that the range would not bake, and how the dealer, refusing to make it "good," threatened to seize everything under his contracts, the young attorney advised her what to do, and explained the course she had to follow. The next day her small son came in with the message, — "Maw says yous owes hern forty cents for 'scrubben out,' 'nd says to take what she owes yous for what yous told hern, out o' it, 'nd to guve me the rest."

IN Racine's highly amusing comedy, "The Pleaders," a trial scene opens in court — in which, by the way, the prisoner at the bar was a dog that had run off with a roast chicken. Of this especial scene the playwright wittily avails himself to satirize the tedious prolixity of the arguments indulged in by the lawyers of his day. With a view, no doubt, to imparting, alike to his canine client and himself, the highest impression of dignity, the defender of the dog rose slowly and solemnly, oracularly to open his plea with the words: "Before the creation of the world," whereupon the yawning judge cried out imploringly: "Oh, advocate, in God's name, let us skip over to the deluge!" — *The Boston Herald.*

A WITNESS who had given his evidence in such a way as satisfied everybody in court that he was committing perjury, being cautioned by the judge, said at last:

"My lord, you may believe me or not, but I have not stated a word that is false, for I have been wedded to truth from my infancy."

"Yes, sir," said Sir William Maule; "but the question is, how long you have been a widower!" — *Chicago Legal News.*

VAN BUREN was calling upon Kent one day, and found a young man applying for admission as a solicitor in Chancery, who was manifestly not "within the rules," but who cited the case of another applicant who had recently been admitted. "I deny it, sir!" cried the Chancellor. "It is not true. I did not *admit* him. He *broke* in!"

"IF yoh husban' beats you, mebbe you kin hab him sent to de whippin'-pos'," said Mrs. Potomac Jackson.

"If my husban' ever beats me," said Mrs. Tolliver-Grapevine, "dey kin send him to de whippin'-pos' if dey wants to. But dey'll have to wait till he gits out'n de hospital." — *Washington Star.*

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM

(Copies of the pamphlet Reporters containing full reports of any of these decisions may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.)

ALIEN HEIRS. (ADMINISTRATION — SURVIVAL OF ACTION)

IOWA SUPREME COURT.

The defense interposed in Roano *v.* Capitol City Brick & Pipe Co., 101 Northwestern Reporter, 437, which was an action to recover damages for the wrongful death of plaintiff's intestate, was that the latter was unmarried and without issue, and that his next of kin was his mother, an alien, residing in Italy, and that he left no estate to be administered upon. The question presented for review was whether an administrator appointed in Iowa could maintain an action in that state for an injury resulting in the death of a resident alien when it affirmatively appeared that intestate's sole heir was and still is a non-resident alien. The Iowa Code provides that all causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same, and the court states the contention to be that a non-resident alien is not to be regarded as a person entitled to the benefits of the Iowa statute, stating further that this argument recalls the theory of the old Roman law that laws are personal rather than territorial in their application. The rule of this country has always been the reverse, however, and upon the point that a non-resident alien may maintain suits in our courts without any special statutory authority, the court cites Knight *v.* R. Co., 108 Pa. 250, Kellyville Coal Co. *v.* Petraytis, 195 Ill. 215, 63 N. E. 94, and Betaloro *v.* Perkins, 101 Fed. 393. It appears, nevertheless, that the misconception arising from the assumption of a general rule that statutes conferring benefits are to be construed as not extending to non-resident aliens, has in some jurisdictions been applied in solving the identical question which is being considered in this case Deni *v.* Pa. R. Co., 181 Pa. 525, 37 Atl. 558; Brannigan *v.* Union Gold Mining Co., 94 Fed. 164; McMillan *v.* Spider Lake Saw Mill Co., 103 Wis. 332, 91 N. W. 979; and Adam *v.* British & Foreign S. S. Co., 2 Q. B. D. 430. The Adams case apparently is overruled, however, in the recent English case of Davidson *v.* Hill, 2 K. B. D. 606. The decided weight of authority in this country, however, is against the proposition that non-resident alien relatives of a deceased person are not entitled to recover under statutes similar to Lord Campbell's act relating to fatal accidents. The court cites as a leading case that of Mullhall *v.* Fallon, 176 Mass. 266, 57 N. E. 386. The following cases cited in Judge Holmes' opinion in that case are approved by the Iowa court: Luke *v.* Calhoon Co., 52 Ala. 115; Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406; Philpott *v.* Missouri Pac. R. Co., 85 Mo. 164; Bruce's Adm'r *v.* Cincinnati R. Co., 83 Ky. 174. A number of other authorities holding the same view are discussed at some length. In conclusion the court says that the Iowa statutes do not provide that the recovery shall be for the benefit of certain relatives, but expressly says that it shall be for the benefit of the estate. It will be soon enough to be concerned about whether the decedent's mother, a non-resident alien, is entitled to the proceeds of the recovery when the administrator is called upon to make distribution of the estate of the deceased. Upon this last point the court disapproves the case of Cleveland C. C. & St. L. R. Co. *v.* Osgood (Ind. App.), 70 N. E. 839, where it was held that no right of action arises under a statute similar to the Iowa statute in behalf of the administrator where the next of kin who will be entitled to recover are non-resident aliens.

AUTOMATIC COUPLERS. (INTERSTATE COMMERCE — STATUTORY CONSTRUCTIONS)

UNITED STATES SUPREME COURT.

The law prohibiting common carriers from using any car not equipped with automatic couplers in moving interstate commerce was considered in Johnson *v.* Southern Pacific Co., 25 Supreme Court Reporter, 159. Three important points are decided. It is first held that locomotives are embraced by the words "any car" as used in the act, and that therefore the law is not complied with unless locomotives are also equipped with automatic couplers. It is also held that the law is not complied with where a locomotive and a dining car are both equipped with automatic couplers but of such different types as will not couple with each other automatically. Third, it is held that a dining car is engaged in interstate commerce where it is in constant use between two interstate points, and where it is brought a part of the distance on one train and is then sidetracked until the arrival of the train going in the opposite direction, the particular use under consideration being the manœuvers which were necessary in sidetracking the car for the purpose above referred to. On these three points the

majority opinion of the Circuit Court of Appeals is reversed, and the Supreme Court squarely upholds the doctrine laid down in the dissenting opinion of Judge Thayer upon the first and third points. In support of the holding that a locomotive is a car, the court cites with approval Winkler *v.* Philadelphia & R. R. Co., 4 Penn. (Del.) 387, 53 Atl. 90; Fleming *v.* Southern R. Co., 31 N. C. 476, 42 S. E. 905; East St. Louis Connecting R. Co. *v.* O'Hara, 150 Ill. 580, 37 N. E. 917; Kansas City M. & B. R. Co. *v.* Crocker, 95 Ala. 412, 11 South. 262; Thomas *v.* Georgia R. & Banking Co., 38 Ga. 222; New York *v.* Third Ave. R. Co., 117 N. Y. 404, 22 N. E. 755; Benson *v.* Chicago, St. P., M. & O. R. Co., 75 Minn. 163, 77 N. W. 798, 74 Am. St. Rep. 444. The opinions of the Circuit Court of Appeals are found in 117 Fed. 462.

AUTOMOBILES. (Definition of Driving)

Massachusetts Supreme Judicial Court.

A park regulation to the effect that no person shall ride or drive at a rate of speed exceeding eight miles an hour is held by the Massachusetts Court in Commonweatlh *v.* Crowninshield, 72 Northeastern Reporter, 963, to be sufficiently definite to support a criminal prosecution for operating an automobile at an excessive rate of speed on the ground that the person who is controlling the motive power of the machine must be said to be "driving" it.

CARRIERS. (Person Accompanying Passenger on Board Train — Measure of Care Required of Carrier)

New York Supreme Court, App. Div., 2d Dept.

That so common a practice as seeing one's friends safely aboard a train should not have been more fruitful of litigation is one of the first ideas that suggests itself upon consideration of the facts involved in Dunne *v.* New York N. H. & H. R. R. Co., 91 New York Supplement 145. Plaintiff in that case had gone aboard the train with a friend and was injured by the starting of the train as he was about to dismount. It is held that under these circumstances no such relation as that of passenger and carrier existed between plaintiff and defendant and that the only obligation of the railroad was to exercise ordinary care to avoid injuring plaintiff from the time he entered the train until he left it. There is no obligation upon a railroad to hold its train until every person not a passenger leaves the same, and this is true irrespective of the duration of the stop made at the station. It appeared in the case under consideration that the servants of the defendant saw plaintiff walking down the aisle of the car towards the platform, but the court decides that this did not require them to forbear from giving the signal that the train could proproceed inasmuch as walking in the aisle of the car or even going out on the platform are common practices of passengers who have no intention of leaving the train, and even though it be at a standstill in the station, the obligation of defendant's servants to refrain from starting the train came into existence only after they had received or should in the exercise of due care have received actual notice of the intention of plaintiff to leave the car. It is also concluded that the mere fact that the plaintiff had descended on to the step of the car before the train was set in motion was not sufficient to render the conduct of defendant's servants in starting the train negligent. Plaintiff also sought to recover on the ground that defendant had no brakeman stationed at the foot of the steps to hold the train until persons not passengers should alight therefrom, but it is concluded by the court that defendant was not required, as a matter of law, to have persons so stationed when the intention of plaintiff to leave the car was signified only by his act of alighting. It is however held that if it was the custom of defendant railroad to station a brakeman at the foot of the steps who was to signal the train to proceed only after all persons, including those in the act of alighting, had reached the ground in safety, plaintiff had the right if he knew of such custom to rely on its observance, but if he did not know it, he took the consequences of his act in alighting from the car.

CONTRACTS. (Labor Unions — Interference with Freedom of Employment)

New York Supreme Court, App. Div., 2d Dept.

The power of labor unions to maintain control of the employer's business, and dictate what persons he may employ, and the conditions under which he may employ them, is given a serious setback in Jacobs *v.* Cohen, 90 New York Supplement 854. There a contract between an employer and a labor union, providing that the employer should not employ any help other than those who were members of the union, conforming to its rules, and providing that the employer should cease to employ persons not in good standing, on being notified of that fact, and that the employer should abide by the rules of the union, is void as against public policy, because attempting to restrict the freedom of employment. The court cites and quotes at length from Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297, in support of this holding, and also maintains that the Curran case was not overruled by the later case of Nat.

Protective Ass'n *v.* Cumming, 170 N. Y. 315, 63 N. E. 369.

CRIMINAL LAW. (PLACE OF PAYMENT — BURTON CASE)

UNITED STATES SUPREME COURT.

The charges against Senator Burton of rendering services in a case in which the United States was a party in violation of section 1782 of the Revised Statutes are reviewed by the Supreme Court in Burton *v.* United States, 25 Supreme Court Reporter, 243. The facts showed that checks in payment for these services were drawn on a St. Louis trust company and sent to Senator Burton in Washington, and were there indorsed and deposited by him in a local bank and were afterwards paid at St. Louis, and that the amount of these checks was immediately, upon deposit, credited by the Washington bank to the account of the Senator, who then had the right to draw against the account, without waiting for payment at St. Louis. The indictment alleged the payment at St. Louis, and the Supreme Court grants a new trial on the ground that the evidence above referred to did not support the indictment. Judge Harlan dissents on the ground that the Washington bank upon receiving the checks became in every substantial sense the Senator's agent and representative to present the checks, in which case the offense of receiving by means of these checks the compensation for services rendered in violation of the statute was committed at St. Louis and not at Washington. The Judge further argues that in a strict sense no title or ownership in the checks passed to the Washington bank, and states that if the St. Louis bank had refused to accept or honor them no action could have been maintained against it by the Washington bank. In support of this proposition he cites a number of authorities. He concludes by stating that in reversing the judgment upon the grounds stated in the majority opinion, the court has sacrificed substance to mere form.

DEAD BODIES. (RIGHTS OF PROPERTY — WHO MAY SUE)

WISCONSIN SUPREME COURT.

A very interesting discussion as to property rights in dead bodies is found in the case of Koerber *v.* Patek, 102 Northwestern Reporter, 41. It seems that the plaintiff's mother died in a hospital, and her son, to whom instructions had been given to take charge of her body, consented to the hospital authorities making a post mortem examination of her stomach. The stomach was removed, and the authorities refused to return it. An action was therefore brought for mental suffering, and damages were assessed at $5,000. The court first holds that the sense of outrage and mental suffering directly resulting from these acts on the part of the hospital authorities were properly considered as independent elements of compensatory damages, and then holds further that in the absence of a living spouse a son is the lawful custodian of the body of a deceased parent, and may bring such an action as that outlined above. The discussion as to property in dead bodies arises in connection with this latter holding. The point has never arisen before in Wisconsin. Chapman *v.* Western Union Tel. Co., 88 Ga. 763, 15 S. E. 901, is referred to in support of the proposition that the law protects only the person and the purse. To the proposition that there can be no property in a dead body the court cites the following American cases: Guthrie *v.* Weaver, 1 Mo. App. 136, and Keyes *v.* Konkel, 119 Mich. 550, 78 N. W. 649, and the English cases of Foster *v.* Dodd, L. R. 3 Q. B. 67; Queen *v.* Fox, 42 Eng. Com. Law, 658; *In re* Church, 3 Edw. Ch. 153, 168; and also 2 Blackstone's Commentaries, page 429. The doctrine arose from the dictum of Lord Coke in Hayn's Case, 3 Inst. 110, 2 East's P. C. 652, where, in deciding that the ownership of the shroud remained in those who had purchased it, he gives as a reason, among others, that the dead body was not capable of ownership. This remark has been perverted or misunderstood as asserting that the dead body itself is not capable of being property. The court quotes from Bogert *v.* Indianapolis, 13 Ind. 134, and also the holding of the Supreme Court of Rhode Island in which that court gives an historical review of the rights of relatives over the burial of their dead under several systems of laws. All of the cases in which this point has been passed upon in one form or another are set out in the opinion on page 42.

GUARDIANSHIP. (WELFARE OF INFANT — RIGHT TO CUSTODY)

ARIZONA SUPREME COURT.

The case of New York Foundling Hospital *v.* Gatti, 79 Pacific Reporter, 231, is of more than usual interest because of the peculiar facts involved and because of the unqualified support which the court gives to the doctrine that the court will determine that the welfare of the infant is of first importance in deciding the custody of children, and that custody will be awarded irrespective of any legal claims which may be presented. It seems that the Foundling Hospital, upon representations made by a Spanish priest in Arizona, sent over 40 children, between the ages of eighteen months and five years, in charge

of certain sisters of charity and an agent of the hospital, to Arizona for the purpose of having them adopted by citizens of the territory. Upon their arrival the children were given in charge of Mexican half-breeds and Indians, who were wholly unfit to be intrusted with them, and who were of the lowest classes, illiterate, unacquainted with the English language, vicious, and in several instances persons of notoriously bad character. Upon ascertaining the situation, the white residents were highly indignant, and forcibly took the children from the persons with whom they had been left, and adopted them into their own families. It seems that the hosiptal acted in good faith, and had been misled by the representations made by the priest. The proceedings to recover the children were brought by the hospital in an effort to undo the wrong which had been done, and to place the children in other homes in the east, where they would be far removed from the knowledge of their antecedents and the events which had made their arrival in Arizona notorious. In refusing to order the children to be surrendered to the hospital authorities, the court feelingly said: "We feel that it is for their best interests that no change be made in their custody, and that, if anywhere, here in the changing west, the land of opportunity and hope, these children, as they grow to manhood and womanhood, will have the fullest opportunity that it is possible for them to have to be judged, not upon the unfortunate condition of birth, but upon the record which they themselves shall make and the character they shall develop."

IMMIGRATION LAW. (REPEAL — CONSTRUCTION OF SAVING CLAUSE)

U. S. C. C. A. 6TH CIRCUIT.

The opinions of the various members of the court in the case of Lang et al *v.* United States, 133 Federal Reporter, 201, are a somewhat luminous example of how different minds may reach very different conclusions from the same premises, depending on which component fact of the hypothesis appears to be the controlling one.

The case turns upon the construction of the saving clause of the Immigration Act of March 3, 1903 (U. S. Comp. St. Supp. 1903, p. 183) which repealed Act March 3, 1875, c. 141 (U. S. Comp. St. 1901, p. 1286), and re-enacted it so as to make it apply to girls as well as women, and to attempts as well as completed acts. Section 28 of the Act of 1903 provided "that nothing contained in this act shall affect any prosecution, or other proceeding, criminal or civil, begun under any existing act, or any acts hereby amended, but such prosecutions and other proceedings, criminal or civil, shall proceed as if this act had not been passed."

Grosscup, circuit judge, founding his construction of the saving clause largely on a technical grammatical consideration of the meaning of the word "begun," concludes that it refers not only to prosecutions which had *actually been commenced* under the Act of 1875, before the Act of 1903 was passed, but to prosecutions which *might have been begun* under the Act of 1875, or in other words, to prosecutions actually begun under the former act, after its amendment for crimes committed before the amendment. To quote the language of the judge in this regard: "The word 'begun,' as here employed, is not the preterit of 'begin,' expressing that verb in its past tense. It is, in our judgment, the past participle, performing solely the function of a connective — the verbal adjective qualifying any prosecutions in mind, pending or future, its sole purpose being to show that such prosecution is one under the Act of 1875."

Baker, circuit judge, specially concurring, is impressed with the controlling importance of a different phase of the case, and bases his opinion upon the general provision of Act February 25, 1871, c. 71 (U. S. Comp. St. 1901, p. 6), that the repeal of any statute shall not have effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide. The act is construed as constituting a rule of construction for the courts in obedience to which the statute of 1875 must be regarded as still in operation for the purpose of all prosecutions for violations of it, inasmuch as the Act of 1903 does not expressly provide otherwise.

Jenkins, circuit judge, dissenting, sees the saving clause of the Act of 1903 in an entirely different light when considered with respect to the same statute on which Judge Baker rests his opinion. The rule of construction prescribed by the statute of 1871 would, says Judge Jenkins, have operated to continue the Act of 1875 in force for the purpose of prosecutions under it after the Act of 1903, hence, if the saving clause was intended merely to accomplish the same result, it was wholly useless — and in deference to the legal fiction that Congress must have meant something by what it said, he concludes that it meant what it said, and that the saving clause, instead of being regarded as a useless bit of circumlocution to enact a rule which would have existed just the same without any enactment, should be construed as modifying the general provisions of the Act of 1871 and limiting prosecutions under the Act of 1875 to such as had been actually commenced before the enactment of the statute of 1903.

INNKEEPERS. (Safety of Guests — Acts of Servants — Degree of Care)

Circuit Court of Appeals, 8th Circuit.

Suit was brought in the case of Clancy *v.* Baker, 131 Federal, 161, for damages because of the accidental shooting of the son of a guest of the hotel by one of the bell boys while the latter was off duty but within the hotel building. It seems that the little boy went down the elevator into the basement to get some ice water. He passed by a room where some one was playing a harmonica, and passing in found the bell boy and a companion. The boy who was playing the instrument playfully pointed a pistol at him, telling him that he must not touch anything. The pistol was accidentally discharged and the boy injured. The majority of the court hold that the rule which obtains in regard to common carriers cannot be extended in a case like this to apply to innkeepers, and the distinction which is pointed out between the two classes is that the innkeeper is not an insurer of the safety of the person of his guest, but his obligation is limited to the exercise of reasonable care. The court states that this rule has been so applied by every court which has ever passed upon the question, and a large number of cases are cited. The case of Bass *v.* Chicago & Northwestern R. Co., 36 Wis. 450, 17 Am. Rep. 495, is quoted from at length as to the duty which railroads and palace car companies in particular owe to their guests and passengers. It is pointed out that in this class of cases the carrier takes and the passenger surrenders to him a complete control and dominion of his person, and the chief and in fact only occupation of both parties is the performance of the contract of carriage. The carrier regulates the movements of the passenger, assigns him to a seat or berth, and determines when and how and where he shall ride, eat and sleep, while the passenger submits to the rules, regulations and directions of the carrier, and is transported in the manner the latter directs. The logical and necessary result of this relation of the parties is that every servant of the carrier who is employed in assisting to transport the passenger safely, every conductor, brakeman, and porter who assists in the transportation, is constantly acting within the scope and course of his employment while he is upon the train or boat. Any negligence or willful act of such a servant which inflicts injury upon the passenger is necessarily a breach of the master's contract of safe carriage, and for it the latter must respond. But the contract of an innkeeper with his guest and their relations to each other are not of this character. The innkeeper does not take, nor does the guest surrender, the control or dominion of the latter's person. The performance of the contract of entertainment is not the chief occupation of the parties, but it is subordinate to the ordinary business or pleasure of the guest. Judge Thayer dissents and holds to the theory that the same degree of care is required of innkeepers and common carriers, and quotes from the Indiana case of Dickson *v.* Waldron, 34 N. E. 506, 24 L. R. A. 483, 41 Am. St. Rep. 440, as follows: "But common carriers, innkeepers, managers of theatres, and others who invite the public to become their patrons and guests, and thus submit personal safety and comfort to their keeping, owe a more special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury while present on such invitation, and particularly that they shall not suffer wrong from the agents and servants of those who have invited them." Pinkerton *v.* Woodward, 33 Cal. 557, 91 Am. Dec. 657, is also cited. Judge Thayer denies that common carriers are the insurers of the personal safety of passengers, and holds that they only exercise a very high degree of care.

INTOXICATING LIQUORS. (Retailing without a License — Gifts)

Kentucky Court of Appeals.

A case of importance because of the attention which the courts have recently paid to gift enterprizes and evasions of the liquor laws is that of Friedman *v.* Commonwealth, 83 Southwestern Reporter, 1040. An indictment was brought against the plaintiff for retailing spirituous liquors without a license. The evidence disclosed the fact that a contract was made with a salesman to the effect that he would be given one quart of whiskey for each sale he made of five gallons of liquor, and an arrangement was made by which a dozen or more friends of the salesman were to purchase the five gallons required to secure the premium, and the whiskey was delivered at the designated place and divided among the purchasers. The court holds that the one quart given to the salesman under these circumstances was a sale, as much so as it would have been if the appellant had sold it to some one else and received money for it. Instead of paying money for the liquor, the salesman performed services to pay for it. The conviction was, therefore, sustained.

LIBEL. (Newspaper Articles — Public Scorn and Contempt)

New York Supreme Court, App. Div., 1st Dept.

Taking its cue from the Triggs case, 179 N. Y. 153, 71 N. E. 742, recently reviewed in this de-

partment, the court in the case of Woolworth *v.* Star Co., 90 New York Supplement, 147, holds that a newspaper article is libelous per se which consisted of an article devoted to an account of the plaintiff and his business, and to his great success in establishing the latter and evolving interests of great magnitude from very small beginnings, after which it goes on to refer to his complete absorption in the pursuit of money-making, and concludes as follows: "A sensation was created recently by the announcement made by Mrs. W. that her life had been made unhappy because her husband neglected everything, herself included, in his absorbing pursuit of millions. . . . Mrs. W. and her husband are now separated, which she ascribes is due to the incompatibility of the artistic and money-making temperaments." The court states that the parts of the article quoted above indicate that upon the declaration of the plaintiff's own wife, he is so base and sordid that he neglected everything, herself included, in his absorbing pursuit of money. One of the meanest of all vices is the mere love of money, and when a man is accused of being affected by that vice so far as to lose sight of the duty he owes to his wife or to his family, he is made at once contemptible. The contention is sustained, therefore, that the article complained of holds the plaintiff up to public contempt and scorn and to shame.

MARRIED WOMEN. (Separate Estate — Liability for Funeral Expenses)
Georgia Supreme Court.

The unique question was raised in the case of Kenyon *v.* Brightwell, 49 Southeastern Reporter, 124, as to whether the husband or the administrator of the deceased wife was liable for the funeral expenses. The administrator in this instance took the position that the estate of a married woman who dies, leaving a husband surviving her, is not liable for her funeral expenses. Under the common law, of course, the husband is bound to bury his deceased wife in a manner suitable to his station in life. The court gives an interesting summary of the husband's rights and duties at this time, from which it appears that it has been held that the husband has supreme authority to direct where the wife shall be buried, that it is his duty to care for her grave, that in selecting a place for burial he may act regardless of the wishes of her family, and even that he may remove a gravestone placed at the wife's grave by her family and substitute another more in keeping with his taste. Passing, then, to the question before the court, it is pointed out that the Georgia code provides that the debts of a decedent shall rank in priority in the following order: first, year's support for the family; second, funeral expenses to correspond with the circumstances of the deceased in life, including the physician's bill, expenses of the last sickness, etc. The husband contended that under this section the common law rule as to the husband's duty had been abrogated in Georgia, and that the estate of every decedent was liable for the payment of funeral expenses. The court states, however, that this contention is not sound. To the extent that the statute is in derogation of the common law it must, of course, be strictly construed. It merely provides for the priority to be observed in the payment of debts due by the estate. Unless especially made so by statute, it is the opinion of the court that the funeral expenses of a married woman who leaves a husband surviving her are not a debt of her estate, and quoting from the case of Smyley *v.* Reese, 53 Ala. 97, 25 Am. Rep. 598, it is stated that statutes creating separate estates of married women, while they deprive the husband of rights which would otherwise accrue and could have been asserted at common law, do not absolve him from the duties which the common law imposes. An examination clearly shows that this decision is in accordance with the weight of authority. In those states where the contrary doctrine has been announced, it appears that the rulings were based upon special statutes.

ORIGINAL PACKAGE DOCTRINE. (Iowa Cigarette Cases — Interstate Commerce)
United States Supreme Court.

The court again applies the original package doctrine in the cases of Cook *v.* County of Marshall, 25 Supreme Court Reporter, 233, and Hodge *v.* Muscatine County, 25 Supreme Court Reporter, 237. These cases affirm the prior case of Austin *v.* Tennessee, 179 U. S. 343, 45 L. Ed. 244, 21 Sup. Ct. Rep. 132, and the facts are similar, except that in the Austin case the packages of cigarettes were thrown loosely into baskets in which they were shipped to the retailer, while in the present case they were simply dumped loose into the car. As the court held in the first case that the baskets might be considered as the original package, the contention was made in the present case that each of the small boxes holding ten cigarettes each should be considered as the original package. The original package doctrine was first laid down by Chief Justice Marshall in Brown *v.* Maryland, where it was said: "It is sufficient for the present to say generally that when the importer so acted upon the thing imported that it became incorporated and mixed up

with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer in his warehouse in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." In the Austin case the Supreme Court said: "Whether the decision would have been the same if the original packages in that case, instead of being bales of dry goods or hogsheads, barrels, or tierces of liquors, had been so minute in size as to permit of their sale directly to consumers, may admit of considerable doubt. Obviously the doctrine of the case is directly applicable only to those large packages in which from time immemorial it has been customary to import goods from foreign countries. It is safe to assume that it did not occur to the Chief Justice that by a skillful alteration of the size of the packages the decision might be used to force upon a reluctant people the use of articles denounced as noxious by the legislature of the several states." The court holds that the small packages of cigarettes shipped loose to the retailer, not being separably or otherwise addressed, can in no sense be considered an original package, and says whatever the form or size employed, there must be a recognition of the fact that the transaction is a bona fide one, and that the usual methods of interstate shipment have not been departed from for the purpose of evading the police laws of the state. The court refers to the Austin case, and the following decisions in which the original package doctrine has been affirmed: Brown *v.* Maryland; Leisy *v.* Hardin, 134 U. S. 100, 10 Sup. Ct. Rep. 681, 6 L. Ed. 678; and Schollenberger *v.* Pennsylvania, 171 U. S. 1, 18 Sup. Ct. Rep. 757, 43 L. Ed. 49.

PUBLIC NUISANCE. (Liability for Joint and Several Acts)

Indiana Supreme Court.
Montana Supreme Court.

The Indiana and Montana Supreme Courts have both recently passed upon the question as to whether the injury arising from the individual acts of different companies in discharging poisonous matter into the waters of a stream, is a joint one for which damages can be recovered without proving the particular acts or the resulting damage which was occasioned by the acts of each or any of the companies. In the Indiana case of West Muncie Strawboard Co. *v.* Slack, 72 Northeastern Reporter, 796, it is held that the pollution of streams is a public nuisance, and that each party thereto may be answerable upon a joint and several action not only for what he himself does but likewise for the acts of those who with him violate public as well as private rights. In the Montana case of Watson *v.* Colusa-Parrot Mining & Smelting Co., 79 Pacific Reporter, 15, the defendant was held liable only for whatever damage had been caused by its own particular wrongful acts, the court maintaining that this rule must obtain regardless of the difficulty of determining what part of the damage was occasioned by the acts of each of the wrongdoers. Many authorities are cited in support of this latter proposition, and among them Chipman *v.* Palmer, 77 N. Y. 51, Sellick *v.* Hall, 47 Conn. 260, Martinowsky *v.* City of Hannibal, 35 Mo. App. 70, Little Schuylkill Co. *v.* Richard's Adm'r, 57 Pa. 142, 98 Am. Dec. 209, Miller *v.* Highland Ditch Co., 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254, Sloggy *v.* Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656, are also cited by the Indiana court and distinguished on the ground that they are cases at law for the recovery of money damages only. In both of the cases being reviewed the action was for damages and for an injunction.

TELEGRAPHS AND TELEPHONES. (Use for Unlawful Purpose — Mandamus)

North Carolina Supreme Court.

Mandamus was sought in the case of Godwin *v.* Carolina Telephone & Telegraph Company, 48 Southeastern Reporter, 636, to compel the defendant to install a telephone with the necessary fixtures and appliances, in the dwelling house of the plaintiff and to admit her to all the privileges accorded to other subscribers. It was admitted by the plaintiff that she kept an immoral house within the corporate limits of the town and that she desired to have the telephone in this house. The court holds that mandamus will lie to compel a telephone company to furnish facilities without discrimination for those who will pay for the same and abide the reasonable regulations of the company, citing State *v.* Nebraska Telephone Company, 22 Northwestern Reporter 237; Telephone Company *v.* Telegraph Company, 66 Md. 399, 7 Atlantic 811, and several text books. It was held in Telegraph Company *v.* Telephone Company, 61 Vt. 241, 17 Atlantic 1071 that a telephonic system is simply one for the transmission of intelligence and news and is, in a limited, but strict sense, a common carrier. This case cites many authorities which are uniform to the effect that the telephone business must be operated without discrimination, affording "equal rights to all and special privileges to none."

The court further says, however, "but while it is true there can be no discrimination where the business is lawful, no one can be compelled or is justified to aid any unlawful undertakings. A telegraph company should refuse to send libellous or obscene messages or those which clearly indicate the furtherance of an illegal act. But recently in New York the telephone and telegraph instruments were taken out of pool rooms which were used for the purpose of selling bets on horse races. Keeping such a house is an indictable offense in this state. State *v.* Calley, 104 N. C. 858, 10 S. E. 455; State *v.* Webber, 107 N. C. 962, 12 S. E. 598. A mandamus will never issue to compel a respondent to do any acts which are unlawful. Wiedwald *v.* Dodson, 95 Cal. 450, 30 Pac. 580; Gruner *v.* Moore, 6 Colo. 526; Chicot County *v.* Kruse, 47 Ark. 80, 14 S. W. 469; People *v.* Hyde Park, 117 Ill. 462, 6 N. E. 33."

TREATMENT BY PRAYER. (FAILURE TO PROCURE MEDICAL ATTENDANCE — MANSLAUGHTER)

MAINE SUPREME COURT.

The respondent in the case of State *v.* Sandford, 59 Atlantic Reporter, 597, was tried and convicted upon an indictment charging him with manslaughter. The contention of the government was that the deceased as a member of a community or religious sect was under the control and dominion of the respondent, that the situation was such that the respondent owed him the duty of supplying him with proper and sufficient food and with proper medical attendance and medical remedies when sick, and that the deceased became seriously sick with diphtheria and was in great need of medical attendance, but that respondent, although having full knowledge of the facts, willfully neglected to provide or to allow others to provide such attendance. The above facts are not disputed, but the respondent relied upon an alleged conscientious disbelief in the efficacy of medical remedies and upon a belief that the proper treatment of the sick was by prayer. The court instructed, as requested, that failure to provide medical aid, etc., in the absence of a statute requiring that medical aid should be furnished, would not be manslaughter if it was the bona fide belief that medical aid was not required, but that the proper method of healing was by prayer, and added the following qualifications: "It must be a conscientious disbelief in medicine, and if a person having that disbelief had some other belief or other practice which he honestly believed, it would then be his duty to apply that other method, and so if he believed in the prayer of faith, he ought to apply that; but if he failed to use the prayer of faith, unless you believe that the lack of it hastened the death of the patient, the omission to use the prayer of faith would not be criminal negligence. On the other hand, if you believe that the omission to use the prayer of faith hastened the death of the deceased, and that the respondent, knowing the circumstances and knowing his duty, failed to pray, this would constitute a basis for manslaughter, and would be evidence of negligence." The court holds that this instruction was erroneous, because under it the conviction or acquittal of the respondent would depend, not upon the jury's finding as to the truth of some fact, or as to the truth of some scientific theory, but upon the belief of the individual members of the jury upon the question of the efficacy of prayer as a means for cure. The extent of one's legal responsibilities, both civil and criminal, must be governed by general rules of law which will apply to all alike and which will control the action of juries, so that one result only can follow from their findings of fact upon the issues of fact involved.

NEW BOOKS RECEIVED

THE LAW AND PRACTICE IN BANKRUPTCY UNDER THE NATIONAL BANKRUPTCY ACT OF 1898. By *William Miller Collier*. Fifth and revised edition, by *Frank B. Gilbert*. Albany, N. Y.: Matthew Bender & Company, 1905. Price $6.30, delivered.

A TREATISE ON THE LAW OF EXTRAORDINARY, INDUSTRIAL, AND INTERSTATE CONTRACTS. By *Darius H. Pingrey, LL.D.* Albany, N. Y.: Matthew Bender & Company, 1905. Price, $6.30, delivered.

THE AMERICAN CONSTITUTIONAL SYSTEM. An Introduction to the Study of the American State. By *Westel Woodbury Willoughby*, Professor of Political Science at Johns Hopkins University. New York: The Century Co., 1904.

YEAR BOOK OF LEGISLATION, 1903. A valuable summary of comparative legislation. Edited by *Robert H. Whitten*, Sociology Librarian of the New York State Library, New York State Education Department, Albany, N. Y., 1904. Price $1.

JUSTICE.

Drawing for the west window of New College Chapel, Oxford, England,
by Sir Joshua Reynolds.

The Green Bag

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THE LAW'S DELAYS
CAN THEY BE OBVIATED?

A Collection of Information and Opinions upon the Oldest and Most Persistent Complaint Against the Administration of Justice

A SUMMARY OF CONDITIONS IN THE UNITED STATES

By William Lambert Barnard

In order to form a just estimate of the applicability to our courts of methods of procedure elsewhere successful, a summary of the condition of the dockets of the trial courts of the country may be of assistance. To obtain this information letters were addressed to the secretaries of bar associations throughout the United States. Their aid was sought in ascertaining present conditions in the different states as to congestion of business in the *nisi prius* courts, the average length of time consumed in reaching trial, the causes of delay and any suggested remedies. Similar questions were asked concerning the Appellate Courts. A few secretaries answered by stating the facts, others referred to prominent lawyers who could do so and others, unfortunately, did nothing. I have not had, therefore, as much data from which to compile this article as had been expected. Despite its lessened scope it may be of some interest, and, if so, all praise is due to the kindness of many busy, talented men and to the pains which they took in furnishing information.

On examining the subject there soon developed a distinction between congestion and delay which it is well to note. The business of the courts in many states was found to be uncongested, yet in several of these delay existed. Congestion was found in the vicinity of nearly all large cities and seldom in the sparsely settled states. While congestion always results in delay, the latter, owing to antiquated systems of procedure and infrequent terms of court, may be found in little congested districts — as in New Jersey and Georgia.

In giving an account of the present conditions no attention has been paid to such delays as are caused by dilatory pleas, procrastinating counsel, or defendants reluctant to face the certain day of reckoning. Where time consumed in obtaining a trial is mentioned, reference is to the period between the joining of issue and the date of trial.

The Probate and Equity Courts throughout the country are reasonably prompt.

In the common law courts, in Florida, Kentucky, Maine, Minnesota, New Hampshire, North Carolina, and the territory of Arizona, there is little or no congestion or delay. The average time consumed in reaching trial is, in Kentucky sixty days, in North Carolina three months, and in the others, cases are sometimes reached for trial at the term when issue is joined, almost certainly at the first term thereafter.

In Colorado, Michigan, Montana, and Nebraska there is no appreciable congestion

or delay in the courts of first instance. The Supreme or Appellate courts of those states are, however, more or less behindhand.

In Colorado the docket of the Supreme Court is so congested as to cause two years' delay, while in the Court of Appeals nearly four years pass before an opinion is rendered. Recent constitutional amendments consolidating these courts, and increasing the number of the justices of the Supreme Court, went into effect in April of this year and, it is hoped, will work an improvement.

The Michigan Supreme Court has been flooded with appeals and considerable matter of original jurisdiction, but long agitation has secured three additional judges. This and a contemplated intermediate Appellate Court should result in improvement.

Until recently Montana's Supreme Court was about two years behind its docket. With the aid of three commissioners it is now catching up with the work.

The Supreme Court of Nebraska was, in 1901, about five years behindhand, but the addition in that year of nine commissioners brought the work up to date in January, 1904. At that time the number of commissioners was reduced to three, and by January, 1905, the court was about one hundred cases behind and continually losing ground.

In Georgia, New Jersey, North Dakota, Pennsylvania, South Carolina, and Wisconsin there is little or no delay or congestion in the Appellate courts. In Georgia the Supreme Court cannot get far behind its docket. Although the number of cases annually heard there range from 900 to 1000, the Constitution provides that all shall be disposed of at the first or second term. If a plaintiff in error is not ready at the first term, unless for Providential cause, his case is stricken from the docket. Judgment can be withheld until the first term after argument, and if not then handed down the case stands affirmed. The average time from decision in the lower to a hearing in the higher court is six months. There are but two terms yearly. There is no acute congestion in the trial courts of Georgia, and none at all outside of Atlanta. But in the Superior Courts there is some delay because of infrequent terms and because, no matter how plain or undisputed the demand, judgment cannot be entered until the second term, and this may involve a year's delay.

The New Jersey Supreme Court and Court of Errors and Appeals are each but one term (four months) behind their work. An opinion is rendered in from twelve to fifteen months after decision in the lower court. The only congestion in New Jersey's trial courts occurs in Essex County in which Newark is situated. In that county it takes approximately eight months to secure a trial.

The Supreme Court of North Dakota is two months behindhand, due largely to temporary and personal causes, so that there cannot be said to be any real congestion or delay. There is, however, one unusual and peculiar source of possible delay — the right to except to instructions after verdict given and jury discharged. The courts of first instance are, as a rule, free from congestion or delay, but in a few districts there is six months' delay, and in one court eighteen months elapse before trial is had.

In Pennsylvania, particularly in Philadelphia, the trial courts are somewhat congested, but there it is not the congestion or delay from which the Bar and litigants suffer so much as the uncertainty. Not infrequently a case in the Common Pleas courts is reached within six months. In all the courts, except one, there is a trial list of fifteen cases made up for each of the first four days in the week. There are no jury trials on Saturdays, and it is manifestly impossible for any court to try sixty cases in five days. As there is no preliminary call of the list it is impossible to foretell when a case will be reached. If not reached on the day after that for which it was set

down, a case goes over to the next term. In some of the courts cases are arranged without reference to seniority so that one at issue but a few months may be tried before others which have been on the lists for several years.

In South Carolina a decision in the Supreme Court may be expected within eight months of trial in the *nisi prius* courts. In the latter, however, a lack of judicial machinery and infrequent terms of court cause a delay of eighteen months in reaching trial.

In Wisconsin the only congestion occurs in the trial courts in Milwaukee, where it results in considerable delay. There, on a recent calendar of 1085 cases there were three with issue joined in 1893, two in 1896, and ninety-eight in 1897. Of these, however, a number were awaiting the result of test cases that had been up to, and had come back from, the Supreme Court three or four times.

Maryland, outside of Baltimore, is free from congestion or delay. In the Equity courts of that city there was a slight but actual decrease in litigation from 1903 to 1904. Of the 1655 causes, instituted in 1904, 221 were subsequently dismissed by the complainants' solicitors and not over 700 involved anything other than the purely formal action of the court. Of these 700 a large number were solely for the fixing of temporary alimony. So that while at times there has been an apparent congestion, it has been due largely to the fact that many causes matured for hearing at the same moment, and congestion in these courts has at such times existed, but was temporary, rather than permanent, in nature. In the Baltimore common law courts there were on the trial calendars at the beginning of the year 1904, 2485 cases, and during 1904 there were instituted 2618 new cases. During the year 2350 cases were disposed of, leaving upon the trial calendars at the commencement of 1905 2753 cases, or a total increase, as between 1904 and 1905, of 268. But it should be borne in mind that while 2618 cases were begun in 1904 there were but 2193 instituted in 1903, or an increase of 425 cases as between 1903 and 1904. It will be apparent from the above facts that about a year would elapse from joining issue to trial, and that is about the extent of the delay. It is interesting to note that of the 2753 cases on the calendar for January, 1905, about 75 per cent were damage cases, and of these from 70 per cent to 75 per cent were for personal injuries.

In Kansas there is no appreciable delay outside of Leavenworth County. A few years ago the trial court there was nearly five years behind its docket, but considerable improvement has been made since then. The Kansas Supreme Court has also been congested, but is catching up with its work. About eight months elapse from the filing of a case to a decision.

Indiana is another state whose trial courts are free from marked delay outside of the largest city. But in Indianapolis, in the court of first instance, a case may wait about twelve months before trial. There is no delay in the Supreme Court, but there is an Appellate Court, which is one of last resort for minor matters, and there a delay exists of from eighteen months to two years.

In Massachusetts there is considerable congestion and delay in the Superior Court. These conditions are most marked in Suffolk County in which Boston is situated. Suffolk has a very small area containing only the cities of Boston and Chelsea, and the towns of Winthrop and Revere. Contiguous to Suffolk, however, are the cities of Cambridge, Somerville, Newton, and Quincy, and the towns of Brookline, Dedham, Hyde Park, Milton, and Belmont. The provisions of the practice act make it possible to sue in Suffolk though neither party resides there and, where a trustee (in many states called garnishee) can be found in Suffolk, it is not necessary that

either plaintiff or the defendant should live or do business in Suffolk to give that county's courts jurisdiction. The result is that many cases are brought there which by rights do not actually belong there. For instance, a plaintiff, living in Newburyport and injured in Nantucket by the negligence of a defendant living in Springfield, may sue in Suffolk if the defendant has a place of business or merely a bank account in Boston, Chelsea, Revere, or Winthrop. Attorneys practising in Suffolk take advantage of this to sue where they can most easily keep an eye on their cases and where the juries are most accustomed to giving verdicts for large sums.

The practice acts permit causes originally brought in district, municipal, or police courts to be appealed to the Superior Court where they are tried *de novo*. In Suffolk such cases are entitled to go on a special, speedy trial list and thus reach trial much sooner than the average case brought originally in the Superior Court.

Until recently the clerk's office of the Suffolk Superior Court has kept no statistics as to the number of cases brought each year or the manner of their disposition. It is, therefore, impossible to speak in other than indefinite terms. A casual inspection of the docket shows jury cases brought originally in that court during October, November, and December of 1902, and in which the docket discloses no dilatory pleas or other evidence of a desire for delay. In these cases verdicts were rendered in March, 1905, or a lapse of over two years from the joining of issue. And this may fairly be taken as the time consumed in reaching trial.

Recent additions to the numbers of the justices of the Superior Court and to the number of sessions held in Suffolk (nine judges sit almost continuously from early October to late in June) and the adoption of a new system of assigning cases for trial (almost identical with the Ohio system described in another article in this issue by Mr. Westenhaver) have bettered the conditions of a few years ago. On January 1, 1904, there were 10,016 law cases pending in Suffolk. During 1904, 4878 cases were disposed of by trial, agreement, or discontinuance, and there were instituted 5036 new cases, so that 10,174 were pending on January 1, 1905. The equity sessions of both Superior and Supreme Courts handle their business expeditiously. The Supreme Court, while somewhat embarrassed of late by an increase in matters of original jurisdiction, is not so far behind the work as to occasion genuine complaint.

Further information regarding Massachusetts is rendered unnecessary by Mr. Elder's valuable contribution.

In Rhode Island the trial courts have been badly congested with consequent delay. The Constitution has been recently amended, however, so as to permit of the adoption of an entirely new judicial system. This will probably go into effect in July next, and as it seems admirably adapted for the needs of that state, discussion of present conditions becomes superfluous.

Detailed information regarding California has not been received, but I am informed that there is delay of from six months to a year in obtaining trial in San Francisco.

The reasonably satisfactory conditions in Ohio are explained by Mr. Westenhaver, the congestion in Chicago by Mr. Gwin, and that in New York by Mr. Fiero and Mr. Hayes in other contributions to this number.

BOSTON, MASS., April, 1905.

DELAY IN CIVIL PROCEDURE IN CHICAGO

Where the Situation has been Most Recently Acute

By James M. Gwin

THE courts sitting in the city of Chicago are about three years behind in their work, and the judges, the Bar of the city of Chicago, and the legislature of the state are actively seeking for a remedy for this condition.

There are two courts of concurrent common law and equity jurisdiction — the Circuit and Superior Courts. In the Circuit Court there are fourteen judges, and in the Superior Court, eleven. Six of these taken from both courts sit in the Appellate and Branch Appellate Courts, and devote no time to their respective trial courts. Five of the judges of the Circuit and Superior Courts are assigned to and devote a large part of their time to the Criminal Court. Judges are called in from other circuits to hold court in the Circuit and Superior Courts. From four to six of these outside judges sit almost constantly. The state of the docket shows, however, that under the present system this large number of judges is unable to cope with the pending litigation.

There are about 16,000 law and about 4000 chancery cases, and 9195 law cases and 2609 chancery cases pending in the Circuit and Superior Courts respectively. There are begun annually an average of 11.563 suits in the Circuit Court, and 7341 in the Superior Court. These are apportioned between law and equity.

In 1904, 3862 chancery cases and 7700 law cases were begun in the Circuit Court; in the Superior Court 4118 law suits, and 2815 chancery suits were begun. The Circuit Court disposes annually of 5872 law cases and 4386 chancery cases. The Superior Court disposes of 4123 law cases and 2576 chancery cases.

Cases on appeal from justice courts, which involve less than $200, and actions for personal injuries against the various railroads, street railroads, and the city, constitute a large portion of the cases on the dockets. The clogging of the court dockets by personal injury cases is, of course, common in all large cities. That due to appeals from the justice courts is peculiar to Chicago and is due to the abuses present in the justice courts in the city. The justice court system will probably be abolished at an early date.

The cost of litigation is too small. The docket fee on the starting of a suit is $10.00; the defendant's appearance fee is $3.00. No other costs are taxed except witness fees and costs for taking depositions. An increase in the cost of litigation would undoubtedly decrease its volume and diminish the delay now a part of the overcrowding of the dockets.

The common law system of pleading obtains in Illinois. There has been a movement on foot which has resulted in the appointment of a commission by the governor, by the authority of the legislature, to report upon modifications in pleading and practice. Although this commission has made a report there seems to be little chance of any changes which will result in eliminating the present delays caused by the present system of pleading and procedure in force in this state.

Much delay is caused by the lack of cooperation among the various judges. Each judge conducts the business that comes before him without reference to the other judges, with the result that one judge may be overcrowded with work on certain days, when many of the others have very little to do. With such a large number of judges holding court, there should be some one executive head who should direct the assignment of the various matters to the various

judges, and there would be a great reduction of the loss of working time on the part of the individual judges.

Until September, 1904, upon the filing of a common law suit both in the Circuit and Superior Courts, the case was assigned to some particular judge and remained on his calendar until its disposal. A new system was instituted under which all cases were placed on one calendar in each court, and as they were reached for trial were assigned by an assignment clerk to some judge who might be ready to try it. This system did not give universal satisfaction and has been abandoned by the Superior Court, which has returned to the old system. The Circuit Court, however, retains it.

In chancery matters there is no such delay as in common law suits. There are two judges in each court who devote their exclusive time to hearing chancery matters. Upon the arrival of a case at issue a hearing may ordinarily be had, even before the chancellor himself, within three months. The number of chancellors seems adequate, and the apparent large number of undisposed chancery cases is due not so much to the inability to have them reached for trial and disposal, as to the failure of the lawyers properly to press the suits to an end.

The County and Probate Courts may be said to be fairly up with their respective dockets. The work of these two courts however is largely administrative, and except in cases of special assessments, which are large in number, there are few litigated matters.

In the United States Circuit Court there are pending 729 cases, both law and chancery. The Circuit Court is held by a circuit and a district judge sitting in the Circuit Court. It disposes of about 354 law cases and 176 chancery cases annually. An additional judge has been provided for by Congress recently. This court is behind in the trial of its law calendar, but the addition of one judge will enable it to adequately care for litigation before it.

The legislature of the state is now considering a bill for the establishment of a Municipal Court. A bill has passed the state senate providing for it; the House of Representatives has passed a bill providing for one Municipal Court, called the Common Pleas Court, and five other courts, called city courts.

While the constitution and jurisdiction of the courts as contemplated by these two bills is different, the general features are the same, and the bill that is ultimately passed will probably be a combination of the most desirable features of both bills. The bill passed by the Senate may be considered as fairly typical.

This bill gives to the court thereby created jurisdiction of action on contracts; also of all suits, civil or criminal, at law or in equity, transferred to it by change of venue from the Circuit, Superior, or Criminal Courts of Cook County; of all criminal cases in which the punishment is by fine or imprisonment otherwise than the penitentiary; all classes of suits and proceedings of which a justice of the peace is now given jurisdiction; all those suits at law for the recovery of money only if the amount does not exceed $1000. The bill divides the city into five districts, and branch courts will be held in each of these districts. Twenty-five judges are provided for, at a salary of $7500 per annum for the chief justice, and $6000 per annum for the associate justices. The administration of the court is assigned to the care of the chief justice.

All actions involving $1000 or less shall be prosecuted without written pleadings. Cases involving over $1000 shall be prosecuted with written pleadings. Applications must be made to the Supreme Court of the state by the chief justice of the Municipal Court in the first instance, for the approval of rules of court adopted by the Municipal Court judges. Appeals will be prosecuted from the Municipal Court to the Appellate and Supreme Courts. There are no stated terms of court, and judgments,

decrees, and orders may be vacated, set aside or modified at any time within thirty days after the entry thereof.

All offices of the court are to have fixed salaries, and no officers are allowed to receive any compensation from any one except the salary fixed by law. This feature is inspired by the abuse in the justice courts due to the fact that justices are paid on the fee system and receive no fixed salaries. It is intended to make the Municipal Court a court of dignity, and it is hoped it will be free from the abuses of the present justice court system.

Its establishment will greatly reduce the number of pending cases in the Circuit and Superior Courts, and it is believed in time the judges of the three courts will be able to dispose of their calendars without the present long delay to litigants.

CHICAGO, ILL., April, 1905.

There was on both sides much to say:
He'd hear the cause another day.
And so he did; and then a third,
He heard it — there, he kept his word;
But with rejoinders or replies,
Long bills and answers stuffed with lies,
Demur, imparlance and essoign
The parties ne'er could issue join.
For sixteen years the cause was spun
And then stood where it first begun.

SWIFT'S *Cademus and Vanessa.*

THE MODERN ENGLISH PROCEDURE

Which has Greatly Expedited Business

By R. Newton Crane

THAT it is possible to administer justice in the law courts with a reasonable decree of celerity is proved by the results of the procedure in England. In this country a litigant has, within certain limits, the right to have his cause heard in either the County Court or the High Court of Justice.

I. The County Courts are courts of record whose procedure, orders and judgments are issued under seal. The whole of the country is divided, roughly speaking, into 500 districts, and with the exception of September there must be a court held in each district once at least in every calendar month. Exclusive of the city of London there are 59 County Court circuits and the same number of judges, who receive a salary of £1,500 each (the equivalent of $7,500), and whose appointment, by the Lord Chancellor, is for life. These courts have, since 1888, had jurisdiction in all personal actions where the debt, demand, or damage claimed, does not exceed £50. Since the amended County Court Act of 1903 came into effect on the 1st of January last, some of these courts have jurisdiction in like actions up to £100. All the County Courts have also jurisdiction in ejectment where the value of the lands or the rent does not exceed £50, and in remitted interpleader actions where the amount in dispute does not exceed £500. They also have equity jurisdiction in administration proceedings, the execution of trusts, foreclosure, specific performance, maintenance of infants under settlements or other trusts, dissolution and winding-up of partnerships, and actions for relief against fraud or mistake, where the sum involved does not exceed £500; and in cases of bankruptcy arising within their district.

These courts are essentially the people's courts, and the whole trend of legislation relating to them has been to make them popular, not only that the populace may have an easily accessible and speedy tribunal for the collection of debts and the settlement of disputes, but that the High Court may be relieved of an unnecessary burden of litigious business. In fact, the act creating the County Courts provides a severe penalty for suing in the High Court upon an action which might have been brought in the County Court.

No pleadings are permitted in the County Courts. The plaint, with which an action is begun, is simply endorsed with the nature and particulars of the demand, while the defendant makes no answer unless he intends to rely upon some special defence, such as infancy, coverture, set-off, or counter-claim, or some equitable plea, or upon a statutory defence such as the statutes of limitations, in all of which cases he must give the plaintiff notice in writing of the particular defence he intends to set up at the trial. Generally speaking, a case is heard and finally disposed of in the County Court within a month from the time of the service of the plaint. In cases where the action is simply upon a promissory note, the creditor may obtain his judgment in twelve days, unless the defendant obtains leave to defend by filing affidavit evidence.

An appeal lies from the County Court to the High Court, but only upon a point of law, and as a large majority of the cases are tried by the court without a jury the findings of the court, so far as the facts are concerned, cannot be disturbed, and the number of appeals is therefore inconsequent.

The practical working of these courts may best be gathered from the following figures. For five years from 1898 to 1902 there was an average of no less than 1,213,253 plaints

issued, or 3,931 to each 100,000 of the population. These plaints were disposed of as follows:—

Determined without hearing, by default or confession		349,204
On hearing by judge	45,542	
By judge and jury	1,084	
By the Registrar (as assistant judge)	377,111	
		423,737
Struck out		440,314

The large number of cases in which judgment was obtained by default or confession and the still larger number which were "struck out," show plainly the utility of the court as a medium for debt collecting, the plaints being almost entirely for tradesmen's debts against those who were in arrears with their tailors' and household bills and their rent. The "struck out" cases were doubtless those where the debtor effected some settlement which the plaintiff was induced to accede to and thus saved the cost of further proceedings. Most significant of all is the fact that out of more than 46,000 cases disposed of in the County Courts by a judge, or a judge and jury, there were only 140 appeals in 1902.

II. The High Court has, of course, jurisdiction and is the court of first instance in all cases, although in cases within the jurisdiction of the County Courts the plaintiff goes to the High Court at his own risk as to costs. Its work is divided into divisions as follows: Chancery, King's Bench (which in addition to all common-law matters includes bankruptcy and company winding-up) and Probate, Divorce and Admiralty. Over these courts the Lord Chief Justice and twenty-two other judges preside, all of whom are appointed by the Lord Chancellor, all receive £5,000 (or the equivalent of $25,000 a year, with the exception of the Lord Chief Justice who receives £8,000), all serve for life or until resignation, and all are entitled after fifteen years' service to retire on a pension of two-thirds their salary. The judges of the King's Bench division not only sit in London but travel on circuit over the whole of England, thus covering a wide area and losing much time from their judicial work in travel.

Considering first the volume of business transacted in the High Court and next the celerity with which it is despatched, the following table will show the number of proceedings begun as the average of five years ending 1902; and in order that a comparison may be made with the business of a commercial city in America of 100,000 population, or any multiple of that number, the number of actions per 100,000 of the population of England is given:—

	Annual Average.	Per 100,000 Population.
Chancery Division	7,674	23.
King's Bench	73,332	218.65
Probate Actions	197	.52
Divorce and Matrimonial	853	3.18
Admiralty Actions	580	1.49

As to despatch, it may be stated, generally speaking, that in more than one-fourth of these proceedings the plaintiff may obtain a summary and final judgment in thirty days; that the average time between the date of the issue of the writ and the trial by a jury, if the plaintiff vigorously presses, is about four months; that in the Chancery division a case is heard and judgment rendered within a month after the action is set down by the plaintiff for trial, and that in the Divorce, Probate and Admiralty division a case is finally determined in practically three months after issue is joined.

While these may be considered the average times, it is only fair to the working of the procedure to mention that it is capable of much greater celerity. In one notable case in the court reserved for commercial cases a judgment was rendered in four days after writ issued. In this instance there was a dispute as to the construction of the

terms of a bill of lading. The ship was about to sail for a foreign port, and both the owner and the freighter apprehended difficulties if their rights were not determined. It was agreed that an application should be made to the court concurrently with the issue of the writ for a date for a hearing. The court, appreciating the importance of the question, agreed to take the case during the week, and it was accordingly argued and judgment was delivered within six days from the institution of the proceedings. In another case in the Admiralty Court judgment fixing the liability for a collision in the German Ocean was delivered within a month of the date of the collision. Within the year past at the Manchester assizes there was a verdict by a jury and judgment on the 29th of the month, the writ having been issued on the 3d day of the same month. In the Divorce Court a decree was recently granted on a petition on the ground of adultery committed five weeks previously. Generally speaking, the despatch depends upon the vigor with which the plaintiff presses his action and frames his issue so as to avoid interlocutory proceedings.

III. An appeal lies from the courts above named to the Appeal Court. The latter court consists of the Master of the Rolls and five Lord Justices. They sit in two divisions of three judges each, one for Chancery and the other for King's Bench appeals. In addition to these judges the Lord Chancellor, the Lord Chief Justice and the President of the Divorce, Probate and Admiralty division and any ex-Lord Chancellor may sit as appeal judges. It is thus possible to have, and very recently there have been, three Appellate Courts of three judges each sitting at the same time. Compared with the practice in America the number of appeals is very small. On an average there are six or seven thousand final judgments and orders entered during the year in the High Court, including actions tried and orders made on the hearing of special motions, or otherwise, by judges and masters, and yet the total number of appeals, including final and interlocutory appeals and motions for new trial, does not average more than one thousand annually. The time occupied in hearing and finally determining these appeals, from the date of setting the appeal down to the date of its disposal, is suggestive. The average of all the cases in 1902, the latest year for which the official statistics are available, was 174.76 days, or a little less than six months. But of the 689 cases argued in that year no less than 106 were finally disposed of by the Appeal Court in two weeks from the date they were entered for hearing, 101 in four weeks and 60 in less than two months.

Granted that there is some degree of celerity in dealing with litigation in England, the question arises, to what peculiarities of procedure, if any, is it due? In my opinion they are the following:—

(1) Summary Judgment. Order III, Rule 6, of the Rules of Procedure of the High Court provides that in all actions where the plaintiff seeks only to recover a debt or liquidated demand in money, arising (*a*) upon a contract express or implied (as, for instance, on a bill of exchange, a promissory note or check or other simple contract debt); or (*b*) on a bond or contract under seal for the payment of a liquidated amount of money; or (*c*) on a statute where the sum to be recovered is a fixed sum; or (*d*) on a guaranty where the claim against the principal is in respect of a liquidated demand only; or (*e*) on a trust; or (*f*) in actions for the recovery of land by a landlord against a tenant whose term has expired or been determined by notice to quit or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant, the writ may, at the option of the plaintiff, be specially endorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled.

If the plaintiff does so endorse his writ and the defendant appears to such writ the plaintiff may, under Order XIV of the Rules

of Procedure, on affidavit by himself, or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed, and stating in his belief there is no defence to the action, apply to a Master for liberty to enter judgment for the amount so endorsed. The Master may thereupon, unless the defendant by affidavit, or by his own viva voce evidence, or otherwise shall satisfy him that he has a good defence to the action on its merits, or disclose such facts as may be deemed sufficient to enable him to defend, make an order empowering the plaintiff to enter judgment accordingly.

Under these simple rules, and in the way in which they are administered, a plaintiff may obtain a judgment upon a promissory note for thousands of pounds, or for a bill for goods sold and delivered, or for the possession of premises, or for any cause of action above stated, in three weeks from the time the writ was issued.

If the judge upon reading the affidavit of the defendant in opposition to the application for summary judgment, is not disposed to direct judgment to be entered forthwith, he may give the defendant leave to defend upon bringing the money in dispute into court, or he may, either upon such terms or without any terms, direct that the case be put into a "short cause" list and be tried with or without pleadings. How well the system works in practice, and to what an extent the labors of the trial judge are relieved and the time of the court is saved, is evident from the fact that about a fourth of the total judgments obtained by plaintiffs are signed under Order XIV, and that they are three or four times the value in money of the judgments signed after trial in the usual way. Nor do these figures fully represent the efficacy of Order XIV. Judgment is not entered in many cases in which an order for it is made; the parties agree to a compromise, or enter into an arrangement to pay by instalments.

(2) Summons for Directions. If the writ is not specially endorsed as provided by Order III, Rule 6, the plaintiff must in every action, except an Admiralty action, take out a summons for directions, that is, a summons or application asking the judge to give directions as to the future conduct of the proceedings. This application must be taken out after appearance and before the plaintiff takes any fresh step in the action. On the hearing of the application either party may ask for such directions as he desires, but the judge is not bound to give the directions asked for but has the fullest discretion to make such order as may be just with respect to all the interlocutory proceedings. If, for example, both parties ask for pleadings the Master may nevertheless send the action to trial without pleadings. He has also power to alter the time fixed by rule for either pleading or trial and, generally, may decide whether the parties shall furnish each other with particulars, whether interrogatories shall be delivered and answered, whether documents shall be inspected or commissions to examine witnesses shall be issued, as well as any other interlocutory matter or thing, and as to the mode and place of trial.

(3) A Competent Staff of Masters. It will be observed by the last two paragraphs that to a staff of judicial officers known as Masters in Chambers great power is given. A Master at Chambers is an officer of the Court who has power to decide, in the first instance, subject to an appeal to a judge, all or nearly all the preliminary questions which arise in an action pending trial, and to enter judgment, as under Order XIV, and in other cases. By the Despatch of Business Act, 1867, a majority of the judges were authorized to make rules from time to time empowering the Masters to transact any such business and to exercise any such authority and jurisdiction as by statute or the rules and practice of the courts were transacted and exercised by a judge sitting at Chambers. The office is one of dignity and honor. The incumbent who receives a salary of

£1,500, and who holds his office for life, must be a member of the bar of some years' standing, and in several cases barristers have sacrificed a lucrative practice to accept a mastership. Six Masters are selected to attend as Masters in Chambers during the terms of the court, and three sit every day of the week. Each has his own room and his own list of causes. The procedure is most simple, as the Master gives audience to counsel and solicitors and their clients only as their cases are called. There are no chairs or benches in the room, except that occupied by the Master, and expedition and business promptness are rigorously insisted upon. Whatever order is made is endorsed by the Master upon the summons or application. In this way each Master is able to get through a large number of cases in the day, to the general satisfaction of all parties. In case of an appeal from a Master to a Judge in Chambers (and in the King's Bench Division one judge constantly sits in Chambers), notice thereof must be given within four days, and the appeal is heard within a week. The system works admirably, and relieves the judges who sit in court from all work of whatsoever nature except that which directly pertains to the trial of the causes in the day's list.

(4) Absolute Control of the Judge over the Cause List. The moment a case is set down for trial it is absolutely under the control of the trial judge, and counsel have no power to delay it as of right or simply for their convenience. Applications to have causes "stand over" or to "postpone to next term," or to take some other place in the list, by agreement of counsel, which are so frequent in the American courts, and which are there generally granted as a matter of course, are seldom heard in the English Courts. In cases of requests for delay on account of illness the physician's certificate is carefully scrutinized, and if in the opinion of the court the evidence of the absent witness is essential his testimony is taken on commission rather than delay the trial. Occasionally a day is specially set, upon application by counsel, for the trial of an important cause where there are a large number of witnesses from the country, or abroad, when it would be inconvenient or burdensome to the litigants to keep the witnesses in attendance. But any application for delay, no matter upon what ground, is frowned upon and very rarely granted.

(5) No Bill of Exceptions. Any party who is dissatisfied with the verdict of the jury or with the finding or directions of the judge on any issue of law or fact, may apply to the Appeal Court for a new trial or to have the judgment of the trial court set aside and some other judgment entered instead. His application must be by notice in writing served upon the other party in eight days from the time the judgment is entered. He prepares no bill of exceptions and submits no record to the trial judge for his approval. When the case is called in the Appeal Court counsel for the appellant simply explains the case to the judges and states what he complains of in the way in which the trial was conducted below or what he alleges the error is in the ruling of the judge or the verdict of the jury. The Appellate judges have been previously furnished with copies of the pleadings, and of the evidence (either as taken down by shorthand writers or as it appears in the notes of the judge) and of any exhibits or documents of material importance. The result is that objections to evidence and requests for rulings by the judge are rarely heard. Some years ago a well-known Federal judge from the West was asked to occupy a place upon the bench with an English judge upon circuit, and nothing made so lasting an impression upon him as the fact that the judge rebuked counsel for interposing an objection to a question his opponent put to a witness. Upon the second offence the judge remarked that his duty was to see that the trial was properly conducted and that he was competent to discharge that duty. When counsel ventured

the third time to object, the judge sharply directed him to take his seat and informed him that if he was guilty of again interfering with the business of the Court he would commit him for contempt. This was a particularly arbitrary judge and is an extreme case, but counsel do not wilfully put improper questions to witnesses or seek to elicit palpably inadmissible evidence. An offence of this kind would injuriously affect standing of counsel. As there is no bill of exceptions there is no temptation to cast a fine-mesh drag-net in the hope of catching a sprat which may stick in the maw of a judge.

(6) IMMEDIATE JUDGMENT. In quite 90 per cent of the causes heard by a judge without a jury, judgment is given the moment the evidence is closed and counsel have finished their arguments. In the comparatively few cases where judgment is reserved it is delivered within a few days.

(7) PRINTED BRIEFS NOT RECEIVED. Neither in the court of first instance or in the Appeal Court when judgment is reserved are counsel permitted to supplement their oral arguments by filing a printed brief of argument and authorities. This practice is absolutely unknown in England. If counsel cannot, while upon his feet, argue his points so as to convince the court his case is hopeless. Great patience is shown to him, and the authorities he cites are carefully examined by the court in his presence. If they are not in point the court does not hesitate to tell him so, or if he is arguing an irrelevant or otherwise untenable position he is quickly invited to abandon it and seek another and if possible better one in support of his contention, but in no case is he permitted to express himself in print. This relief should be appreciated in America not only by busy counsel who under the present system must necessarily spend a large part of their valuable time in the compilation of voluminous treatises on abstract propositions of law supported by bewildering authorities culled from a boundless area, but by conscientious judges who after a hard day's work on the bench are compelled to sit up half the night in working their way through these so-called "briefs." An English judge whether *puisne* or appellate generally finds his duties done when he rises for the day.

(8) INFREQUENT REMANDS FOR NEW TRIAL. The Appeal Court has, over any action or matter brought before it on appeal, all the powers, authority and jurisdiction conferred by law on the trial judge. It can amend the pleadings, enlarge time, receive fresh evidence, draw inferences of fact, direct issues to be tried or accounts and inquiries to be taken, and generally it has power to give any judgment and make any order which ought to have been made in the court below. Even if there was error at the trial the court will not grant a new trial unless in the opinion of the court substantial wrong or miscarriage of justice has thereby been occasioned in the trial. If by reason of error a wrong judgment was entered below, the Appeal Court will not in reversing that judgment remand the case for a new trial, but it will enter such judgment as in its opinion meets the justice of the case. How this practically works may be demonstrated by the fact that in 1904 the Appeal Court heard 555 appeals. Of these 182 were allowed, 339 were dismissed, and in 34 the judgment or order of the court below was varied. But of the 182 allowed, including applications for new trials and appeals from final judgments, only seven were remanded for new trial before a jury or for the trial judge's further consideration.

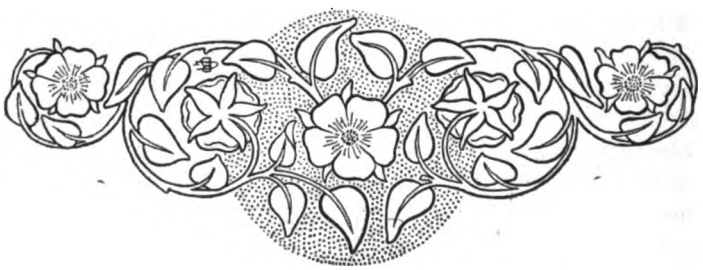
Reference has been made to the fact that no briefs are received and that judgment is delivered the moment the oral arguments have been submitted. Of the 555 cases argued last year in only 50 was the judgment of the court reserved. No figures are immediately available to show how long these cases were so reserved, but it will be within the mark to say that the average was not more than seven days.

(9) TAXING COSTS AGAINST THE LOSING

PARTY. In this country the costs follow the event, and the unsuccessful litigant is obliged to compensate his adversary for the expenses which the latter has incurred in the litigation. This includes not merely what in America may be called the "court costs," but the expense of employing counsel and solicitors. The judge at the trial and the Master in all interlocutory proceedings, award or withhold costs as seem just in their discretion. When the case is finally determined the successful litigant presents his bill of costs which, as stated, embraces the solicitor's costs and the fees of counsel. The costs are usually taxed by a master who sits for that purpose. He allows in his discretion the various items, sometimes granting fees for three counsel, but usually the amount is hardly sufficient to compensate the victor for all of the expense he has been put to. The fact that if defeated he will have to pay his opponent's costs undoubtedly deters many persons from recklessly bringing frivolous, vexatious and speculative actions.

The English system of procedure and the practice that has grown up under it would be impossible here or anywhere if it were not for the character and quality of the judges who enforce it. The County Court judges are selected from the active workers at the bar. The High Court judges are, with but few exceptions, taken from those who are the acknowledged leaders among the advocates. Most of them have had from twenty to twenty-five years of active, busy practice which required them to be proficient in the drawing of pleadings, familiar with the varied details of procedure, always ready with precedents and authorities and daily upon their feet in argument or addressing juries. The Appeal judges are promoted from the best of the trial judges, and therefore they, as well as the whole body of the judiciary, command the respect and willing deference of counsel, solicitors and clients.

LONDON, ENG., March, 1905.



THE APPLICABILITY OF ENGLISH METHODS TO CONDITIONS IN THE UNITED STATES

With incidental discussion of local conditions by

J. NEWTON FIERO
JOHN F. DILLON
MOORFIELD STOREY
HENRY STOCKBRIDGE
HORACE G. LUNT
AMOS C. MILLER
HUNTER A. GIBBES
FRANCIS J. SWAYZE
PHILIP STEIN
PLATT ROGERS
WM. HEPBURN RUSSELL
D. C. WESTENHAVER
SAMUEL J. ELDER
PETER S. GROSSCUP
J. NOBLE HAYES

(NEW YORK)

THE question, "What shall be done to relieve our courts?" is always with us. I am very forcibly reminded, in taking up the discussion of Mr. Crane's letter with reference to Procedure in the High Court of Justice, that at the annual meeting of the New York State Bar Association fifteen years ago, I presented a paper under the above title, discussing the situation as it then existed in the state of New York, and that as the result of its consideration by the Association, a bill was drafted, introduced, and passed by the legislature, providing a commission to propose amendments to the Judiciary Article of the Constitution. This commission, as appointed, consisted of thirty-eight of the leading lawyers of the state, among others, James C Carter, Joseph H. Choate, and William B. Hornblower. Following, and to some extent growing out of this commission, which thoroughly investigated the conditions as to litigated business in all the courts, came the Constitutional Convention of 1894. The action of that body, adopted by the people in the same year, largely increased the number of justices of the Supreme Court, made important changes in the manner in which the Appellate Tribunal of that court is constituted, and authorized the limitation of appeals to the Court of Appeals.

Less than ten years have elapsed since this Constitution took effect, and we are again confronted with the consideration of the same problem. The question, however, to consider in this connection, is whether the general complaint as to the law's delays has adequate reason for its existence. An examination of the facts must result in the conclusion that aside from the city of New York, and the exceptional conditions arising from transfers of judges to New York from the Eighth Judicial District, there is no reasonable ground for criticism on the part of lawyers or litigants.

In the larger cities of New York, outside of those mentioned, consisting of a group designated as of the "second class," namely, Rochester, Syracuse, Troy, and Albany, a cause can be brought to trial, under ordinary circumstances within six months or less, after service of pleadings. This is subject to the exception that if a cause should be at issue just before the long vacation, two or three months may possibly be added to this time.

For the purpose of testing the constitutionality of an amendment to the charter of the city of Albany, an action was commenced by service of summons and complaint on May 4, answer served May 14. The cause was brought to trial May 15, and on that day findings were made by the court; judgment entered on the 16th; on the 20th cause was argued in the Appellate Division and decided on June 2d; June 10th final argument was had in the Court of Appeals. This was, of course, entirely

exceptional, but indicates the *possibilities* under our present system, of more speedy trial and decision even than shown by the case cited by Mr. Crane, illustrating conditions in England.

In the other counties of the state, with probably a sufficient number of exceptions to prove the rule, the courts are well abreast of the business, allowance being made for the length of time intervening between Trial Terms in the smaller counties, which is not infrequently a period of six months, resulting from lack of sufficient business in those counties to authorize the expense of more frequent courts. The calendars in the Eighth District are much congested, owing to the designation of a large proportion of its judicial force to New York and Brooklyn, leaving the district with an entirely inadequate number of judges. Relief for New York City would avoid this difficulty, which is temporary, and due to exceptional causes, to some extent political in their character.

The average length of time under normal conditions between the date of issue and trial, where the cause is reasonably pressed, may fairly be said not to exceed six months in any of the counties, outside of New York City, including the counties of New York and Kings. This seems also to be substantially true with regard to the more important commercial centers in other states, The report of a committee on the laws delays, authorized by legislative action and made in 1904, shows that in the cities of Chicago, Philadelphia, Baltimore, and St. Louis, a jury cause may be reached in from two to nine months from the date of issue; the shorter time given being in St. Louis, the longer in Chicago. The time in which a new issue will be reached in Baltimore is stated at from three to four months, and in Philadelphia about six months. It would appear, therefore, that the grievance, outside of Greater New York, is not of a serious character, and that measures for relief and questions of reform, looking toward speedier trials, are mainly applicable to that city. This is certainly true as to the state of New York, only approximately so as to the other states, since the facts at hand do not furnish sufficient data to generalize with any degree of certainty.

There are, however, very many respects in which some of the admirable suggestions made by Mr. Crane may be carried into effect with very great benefit to both lawyers and litigants. I speak as to some of those suggestions from actual knowledge gained through the kindness of Mr. Crane in presenting me to the masters and judges holding Chambers and Trial Terms in London in 1902. Through their courtesy in inviting me to sit with them, and in fully explaining the method of procedure in its details, I was enabled to see, to the very best advantage, the practical workings and beneficial results of the English system.

Before considering the useful and convenient features of the English procedure, however, it is desirable to note that in some respects the methods suggested by Mr. Crane as tending to the speedy disposition of litigated causes do not commend themselves for adoption in our home jurisdictions.

First.— The refusal to postpone on account of engagements of counsel would doubtless —where the engagements of counsel on either side are so numerous as to require postponement from time to time — enable parties in many instances to bring on causes with less delay than is now usual and necessary. It is a patent fact, however, that no greater number of causes could be tried by the court in the time at its disposal under such a rule, although individual causes might be progressed more rapidly, while it would occasion very great inconvenience to suitors. Under the English system, it is necessary to employ a solicitor and junior and senior counsel, the cause being prepared by the solicitor, after consultation with counsel, and the junior counsel always being in a position to take

the place of his leader, no great injustice is likely to be done, in case the leader is engaged in another cause and not able to take part in the trial, still less so if engagements of junior counsel alone prevent his attendance. This system involves the employment of three men for the work which with us is usually done by one, since in every important case, there, as here, counsel is likely to have clerical assistance. With us, the refusal to postpone a trial on account of engagements of counsel would ordinarily result, except in cases where, by reason of the importance of the subject matter more than one counsel is retained, in forced and hurried preparation on the part of another attorney for the trial. Such preparation could not be adequate to enable counsel to do justice either to himself, to the court, or the client.

Second. — Arguments of counsel in Banc without briefs or reference to authorities, and oral decision by the court at the close of argument, would necessarily result in hasty decisions, not well considered as to either the law or the facts. It is difficult to understand how a court can do justice to an argument involving the citation of numerous precedents, which must be discussed and distinguished without opportunity for examination of the authorities relied upon. Nor is it quite clear how adequate consideration can be given by the court to the legal points involved on appeal, where no opportuntiy is had for deliberation and discussion as to the law and the facts. That this method is possible in England is a high tribute to the learning of the Bench and the Bar, and can only be successful where the members of the Bar have been trained specially in the trial and argument of causes, and the Bench has been selected from lawyers who have spent their lives as barristers, devoting their entire time and attention to this branch of legal work.

Third. — The opinion of leading lawyers in this country seems to be against the allowance of any costs, other than a small docket fee, as in the United States Supreme Court, or as allowed by the practice in some of the states, rather than to favor the allowance of costs as full indemnity to the defeated litigant Much opposition has grown up, and very reasonably so, in New York, to the power of the court to award an allowance of a percentage upon the recovery or amount claimed as the case may be by way of costs to the successful party. Many questions litigated are so exceedingly close, and the final determination so uncertain, that it seems unfair and unreasonable to charge a defeated party with the entire expenses of the litigation, where possibly he may have succeeded in both lower courts, and only been reversed by a majority of a single vote in the court of last resort, as occasionally happens. No degree of human foresight could possibly have anticipated with any degree of certainty the final outcome, and in such cases large allowance of costs operates as a penalty. While the imposition of large sums as costs may discourage litigation, it certainly tends to injustice by preventing parties, who have fair cause for contention, from taking the judgment of the court, by reason of the enormous expense entailed. It is said that in a commercial case recently tried in the High Court of Justice, where recovery was for £4000, an award of £6000 costs was made against the defeated party. The theory of the English practice being that a party should be substantially indemnified for the expense of the litigation. The outcome of this state of affairs is that a prudent business man in England dare not enter upon litigation, no matter how strongly he may feel that his rights are being infringed upon, since defeat means in many cases financial ruin.

I must necessarily limit myself to what seem to be the more important and practical considerations in connection with reforms likely to facilitate the disposition of litigated business.

First. — Very much of the difficulty experienced in the trial of causes, by which the time of the court is unnecessarily consumed, and litigants put to great trouble and expense, arises from the fact that there is no division of labor between the solicitor and the barrister. In England the barristers are a trained body of men whose business it is to try causes. The number is small, as compared with the number of solicitors, or the number of lawyers attempting to try causes in our tribunals.

In this country nearly every student admitted to the bar is under the impression that there is in him the more than possibility of a great trial lawyer. Having read accounts of brilliant cross-examinations, and successful addresses to juries, he has in mind that he is entirely competent, at the outset, to try the most complicated and difficult cause. Unfortunately as to many who are not qualified for that work, it is only after very many years, and after considerable experience at the expense of litigants and the public, if at all, that they ascertain that they have not the peculiar aptitude necessary to the successful trial lawyer. In the meantime not only have clients suffered, but the business of the courts has been retarded to a very serious extent, by the lack of adaptability on the part of the practitioner, as well as by lack of experience, since it is impossible that every man admitted to the Bar shall have the opportunity to try a sufficient number of causes to give him the degree of experience requisite in order to obtain the best results.

On the other hand, in England, the barrister, whose specialty is the trial of causes, and who is engaged in that work substantially to the exclusion of everything else, must necessarily obtain a facility which can be gained only by wide experience, and the selection of the fittest. The division of our Bar into barrister and solicitor is practically impossible, and, therefore, need not be considered, but it is entirely clear that a body of men, specially trained along certain lines for special work, will do that work much better and more quickly than it can be done by men who are not specialists in that line.

Sooner or later in the interest of the clients, and to save the time and patience of the courts, there must be in this country a natural division between the labor of the solicitor and the duty of the barrister, not artificial or conventional, but one which shall grow up from the nature of the case, by which certain men who are best qualified for the trial of causes will carry on that work to the practical exclusion of those without special adaptability for that class of business. In this, as in every other direction, the specialist must find his place.

Second. — The statement of Judge Ingraham before the commission on the law's delays, to the effect that the practice, under the present New York code, is largely responsible for the delay and difficulty in the despatch of business by the courts, commends itself as thoroughly sound and practical, and is to a lesser degree applicable to the condition of affairs in other jurisdictions. The infinite amount of detail which has been injected into the present code procedure, is a source of embarrassment both in matters leading up to the trial, and upon the trial. Especially is it difficult to obtain the deposition of a party or witness, or the discovery and inspection of a document. The theory of the code seems to be that each party should be kept in ignorance, so far as possible, of the claim made by the other, and applications of the character suggested are hedged about with so many technicalities, that parties must frequently go to trial without opportunity for adequate preparation, and are only able to first ascertain the real nature of the claim made by the opposing party upon the examination of his witnesses. This, necessarily, greatly lengthens the trial. There can be little doubt but that the summons for directions, provided for by Order XXX of the

High Court of Justice, is exceedingly valuable, and affords a practical way to avoid a very large amount of unnecessary labor and delay.

Third. — Strict application of technical rules by Appellate tribunals, and granting of new trials for comparatively trivial errors upon questions of evidence, when the merits are in no wise involved, add greatly to the expense of litigation. The rule in equity causes tends much more to advance the interests of litigants in that class of cases. It is well settled on the trial of equity causes that where the court is of opinion that the evidence improperly admitted or excluded, would not, or should not, have changed the result, a new trial will not be granted. In trials before a jury, however, the tendency is to set aside a verdict, and allow a new trial by reason of comparatively trivial or immaterial errors in the admission or exclusion of evidence. It would not be wise, were it possible, to take from the Appellate tribunals the authority to grant new trials for error in receiving or rejecting evidence, but it certainly would be reasonable to enact by statute, and for the courts to follow in letter and spirit, a rule to the effect that a new trial should not be granted, unless in the opinion of the Appellate Tribunal, the evidence received or rejected would, if proper ruling were made, probably bring about a different result. While errors, with reference to the admission of evidence, are the most frequent source of new trials granted for reasons not involving the merits, many cases arise where a new trial is allowed upon purely formal grounds, or for technical reasons, when the court is abundantly satisfied that substantial justice has been done. In such cases the court should be authorized, if the power is lacking under the present methods of procedure, to affirm the judgment, or modify it to such an extent as the Appellate Tribunal may deem proper.

These considerations by no means cover the entire field in which reform in procedure should be had with a view to facilitating the administration of justice, but they appear to be remedies which can be most readily applied. If the practice should grow up, by reason of a well-settled sentiment on the part of the Bench and the Bar, that causes be tried by lawyers specially trained and adapted to that line of business; if the procedure should be so revised as to furnish litigants before trial such information as is most necessary and desirable to fairly enable them to meet the questions raised by their opponents; and if new trials were granted only when deemed necessary by the Appellate tribunals, in the interests of justice; substantially little reason would remain for complaint with regard to the law's delays in those jurisdictions where a sufficient number of judges is provided for the despatch of legal business.

J. Newton Fiero.

Albany, N. Y., April, 1905.

NEW YORK

I have read with interest and instruction Mr. Crane's article on Judicial Procedure in England. Observation, experience, and actual practice peculiarly qualify Mr. Crane to discuss the subject, and I know of no man more competent to do so. The subject of arrearages in our courts in many parts of the country, and especially in New York, is a live one and of very great and pressing importance. The data contained in Mr. Crane's article cannot fail to be useful to whoever has to consider the subject.

The actual adoption *en bloc* of the English system is not practicable, and perhaps not legally possible in this country. With us three important considerations must be borne in mind: First, certain constitutional provisions in all the states preserving the right of trial by jury. No such constitutional limitations, of course, exist in England: Second, like constitutional provisions in all the states in this country as to the mode of selecting judges and the constitution of judicial courts, vesting these courts with the exercise of all judicial power. These provisions last mentioned, as well as the opinions and usage of the bar in this country, will probably prevent clothing any other officers than judges with the final exercise of any judicial power, in short, constituting masters, referees, or commissioners, or whatever else they may be called, judges. But within these limits the English experience shows that much may be accomplished by well-considered and judicial legislation.

JOHN F. DILLON.

NEW YORK, N. Y., April, 1905.

MASSACHUSETTS

I have read the article on Speedy Trials in England with great interest. The writer makes it clear that justice in England is much more speedy than it is here, and I think if the judicial force employed in England is compared with that employed in Massachusetts it would be found that, considering the population of each, the force in England is much smaller than it is in Massachusetts.

The author makes the result clear, but he does not point out how the courts are able to accomplish this result. I believe as a matter of fact, that fewer juries are sitting in London during the winter than are sitting in Boston, although the population served by the London courts must be very much greater than that whose business is done in Boston. It is also true that there are very many fewer cases on the list for a day than are found on the list in Boston.

I think that the English judges deal very much more summarily with matters that come before them, and interfere much more constantly with the conduct of a case than is the practice here. This perhaps may account in some part for the speed with which the work is done, but certainly the difference to which Mr. Crane calls attention is one which invites careful study of the English system. If we can learn anything from their experience which will help us to abridge the delays in our courts it would be a most desirable result.

M. STOREY.

BOSTON, MASS., April, 1905.

MARYLAND

The complaint of the law's delay is no new one. Shakespeare comments on it, and history affords instances of it of far earlier date. The subject is one which naturally separates itself into two divisions, that which has to do with appellate bodies, and that which concerns the courts of first instance.

As regards the first of these, the reason for delay is not everywhere the same, therefore no one universal cause can be assigned which is everywhere operative. But there are three reasons, one of which is almost always present, and the statement of them will in part if not wholly suggest the nature of the remedy required. When the judges of Appellate Courts are likewise required to do circuit work, as is frequently the case, it must often result that one branch or the other of their work will be deferred as less pressing, and that is naturally the appellate work. Of the whole number of cases tried in any jurisdiction, by far the larger part never go beyond the court of first instance, and many a judge will feel that the duty on him is more imperative to accord one trial to as large a number of causes as possible, than to delay the many in order that the few may have another trial or a second opportunity. Wherever this ground exists it is easily obviated by relieving appellate judges from the performance of local or circuit work.

A second cause of delay in Appellate Courts is the manner in which the dockets are made up. Most courts of this character have but a small number of terms a year, the docket is made up to the beginning of the term, and then the gate is abruptly shut. A record comes up on the day following, delayed possibly in the transmission, and that must then find a place on the docket of the ensuing term, distant anywhere from three months to a year, and the fabled laws of the Medes and Persians were not less rigid than are the rules which govern the make-up and closing of the docket of the term of court. A little more elasticity right at this point would accomplish much.

A third reason, more debatable than the other two, is whether we are not too generous under our statutes in the allowance of appeals. Will any one who has closely watched the courts of last resort question the proposition that many appeals are taken only for the purpose of delay? Do not the "unreported cases" listed in the volumes of the various state reports bear strong evidence of this fact? Why are they unreported? Can it be for any reason save that there was no principle involved which had not been already settled by previous adjudications? And if so, that fact should have been known to and recognized by the attorney taking the appeal. Do we not hear every short while of an unsuccessful litigant saying, "Oh! it will not be very expensive to take this case up, there is a chance that I may win out, and if I do not, the additional time I shall gain before the day of final reckoning will be worth more to me than the cost of the appeal." Ought such appeals to be possible? When the parties have had one fair trial before a competent judge and jury, have they not had all they are entitled to except in rare instances? The difficult question is, If appeals are to be more strictly limited, along what lines shall the limitation be made, or who is to determine whether such appeal shall be allowed? A number of answers are possible, none entirely free from objection. But this only shows that the solution is difficult. It does not show that it is impossible.

When we turn to the "law's delays," in courts of first instance, the difficulty will be found to be confined for the most part to the larger cities. It results in no small degree from the fact that in this country we have assumed that, in order to preserve

the equality of the citizen before the law, a rule like that which obtains in the barber shop must be preserved. This is to a considerable degree fallacious. A delay which will amount to a denial of justice in some cases, will be essential to the securing of justice in others. In some, time, in the sense of speedy determination, is the essence of the action, in others, it plays little or no part. Therefore the rule of "first come first heard," instead of an evidence of the equality of all citizens in the eye of the law, frequently becomes an engine of injustice, if not oppression.

Now since the greater danger of congestion, with its attendant evils, is in the cities where there are several courts in session most of the time, a division of labor among them, based on the character of the causes and their urgency, if it does not actually relieve the situation tends to minimize the evils now felt. Specialization is the order of the day in nearly every business and profession, and it is done in the interest of efficiency, of work, or of results. Why should our courts not be specialized in the work they perform? And will not this function of government be thereby more effectively performed both in the economy of time, the diminution of reversible errors, and the increased confidence of the people in the correctness of the administration of justice? It seems so to me.

HENRY STOCKBRIDGE.

BALTIMORE, MD., April, 1905.

COLORADO

I confess a great deal of surprise and humiliation in reading Mr. Crane's article, at the great progress made by our brethren of England as compared with the retrogression shown by us American lawyers in tackling this vital matter. The heroic remedy applied in England would not be endured by our people generally, I fear, because of our different ideas in regard to the rights of the individual, and the freedom of action in all matters which has almost degenerated into license. In other words, English people, accepting an aristocracy, accept an aristocracy of the judiciary, wisely, it is true, but an almost impossible action upon the part of the American people, at least for the present.

The unlimited power granted by the English acts to the judges and the administrative departments of the courts is abhorrent to the average American as an infringement upon the rights of the people, and I fear it will be a long time before we can induce the Bar and the laymen to trust the rights of litigants so completely to the power of the Bench. Moreover, there would have to be, with us, a change of the appointive power of the judges from the people to the governors, for instance, and the people will cling for a long time, to what they consider their birthright in that respect. Perhaps when the Bench and the Bar of our country has advanced greatly in its personnel, when the salaries of the judges are somewhat commensurate with their work and the importance of their position, when the intelligence of the Bar has been increased by increased requirements for admission, and when the Bench is recruited from the best of the Bar, we may hope that the delay in obtaining justice by litigants will force us into the position of obtaining some such concerted action upon the part of the states, which will produce a change in the law similar to that now existing in England. Concerted action upon the part of the members of the bar in every state of the Union, with a continual presentation of the injustice of the law's delay, can alone hurry the good time when such changes will be brought about.

HORACE G. LUNT.

COLORADO SPRINGS, COL., April, 1905.

ILLINOIS

In the law courts of Chicago it requires from a year and one-half to two years to get a trial in the ordinary case. If the case follows the ordinary course of appeal through two courts it requires a year and a half to two years more to get a final judgment, if there has been no reversible error committed in the trial court. The evils of this system are manifest. The man who has a legitimate claim against a fellow-citizen, growing out of a business transaction, will forego the whole or a substantial part of his demand rather than engage in a law suit. The dishonest debtor will use this certain delay to force a reduction of his debt. Some lawyers encourage their clients to bring baseless actions in order to force a settlement, which action would never have been begun if a prompt trial were assured. In many suits baseless defenses are interposed which would never be interposed were prompt trials assured. But one of the worst results of this delay is the perjury which is thereby encouraged in that class of litigation which occupies about four-fifths of the time of our law courts, viz: personal injury litigation.

From statistics it would appear that in this city seventeen judges in our Circuit and Superior Courts dispose of nearly one thousand cases per year each on the average, whereas in England (according to the article by Mr. R. Newton Crane) twenty-three judges dispose of more than three thousand five hundred cases per year each. But certain conditions favorable to the disposition of business exist in England which do not, and perhaps never will or can, exist in this city. In the first place, there all judges of the High Court are appointed for life by the Lord Chancellor from the most active and experienced practitioners and the most eminent men at the bar. All trials are conducted too, by barristers of long and special training. With such experts on the bench, and such experts at the bar, no lawyer can wonder that business is dispatched more rapidly there than here. Our system of choosing judges by popular election does not always result in the selection of judges of eminent ability, with extensive experience. But that system will stay with us; for the other system of life appointments by the executive has not uniformly resulted in such preëminently fit appointments as to serve as an impressive object lesson. But if some of our elective judges lack experience, so also did the majority of the practitioners before them, and in a more marked degree. That much time is wasted by these conditions is manifest; but the conditions are in a large degree permanent.

The first and most obvious remedy to be applied in order to cut down our long delays in litigation would appear to be, to cut down the time necessary for an appeal, from two and one-half years to about six weeks. This could be readily done by permitting but one appeal instead of two, and by supplying enough judges to hear these appeals. This one thing would reduce the necessary time from the beginning of a suit to the final judgment more than one-half, and would discourage the filing of many baseless suits, and the interposition of many baseless defenses.

Another simple method of reducing and shortening illegitimate litigation would be to require the plaintiff to swear to his complaint, and the defendant to make a specific answer under oath; and to permit each to require the other to answer under oath pertinent interrogatories, without thereby binding the party calling for such answers. If in addition to these innovations a plaintiff were permitted to at once have judgment for the amount admitted or shown by the answer to be due, and to litigate the balance of his claim if so desired, another lot of unjustifiable litigation would be done away with.

A peculiar condition exists here in this county. About four-fifths of the time of all the common law judges is consumed in listening to personal injury litigation. It is clear that the improvements above suggested (except perhaps the shortening of the appeals) would not materially affect that personal injury litigation. It is my belief, however, that with a few simple improvements in our practice such as are above suggested, our present judges could, with some additional help, soon dispose of the present large accumulation of business and keep up with their common law dockets. My belief is also that after our judges shall have been for a time promptly trying personal injury cases as they are brought, the number of these brought will decrease rather than increase. It is the belief of many persons interested in the defense of that class of cases that delay in trials works for the advantage of the defendant. My own belief is that it has a contrary effect, by encouraging perjury and rendering its detection less easy; and by giving the memories of interested parties an opportunity to shape themselves according to the demands of the occasion, until they actually believe what in the beginning they knew to be untrue. If we had reached that stage of progress, so alluring to think upon, where none but barristers especially trained for that career were allowed to practise in our courts, and where judges were chosen solely from that class, perhaps we in this county might not need more judges. As conditions are we do. Two-thirds of the litigation in courts of record in the state of Illinois is conducted in the Circuit and Superior Courts of Cook County. This fact can be sufficiently verified by examining the cases in our Supreme Court. The judges of the Superior and Circuit Courts of Cook County constitute less than one-third of the judges of courts of record in this state. Four times as much work, therefore, is required of the Cook County judge as of the judge outside of Cook County. Either we have too few judges, or the rest of the state has too many. If our present condition, under which the man with a legitimate claim growing out of a commercial transaction, is crowded out of court by the personal injury litigation, and denied all justice, is not to continue indefinitely we must have some more judges. With such help, and with the help of a very few simple changes in our practice such as are above suggested, it is my belief that the present intolerable condition of delay can be remedied.

AMOS C. MILLER.

CHICAGO, ILL., April, 1905.

SOUTH CAROLINA

Mr. R. Newton Crane's interesting article on "Speedy Trials in England" gives us an outline of a compact and effective system of jurisprudence which should command our thoughtful and earnest admiration. To one accustomed to the slothful and grinding process of the trial of causes in the courts of the various states, this English system seems indeed marvelous. And yet the essential elements of the system in England are both simple and practical; and there is no apparent reason why they could not be applied with conspicuous success in America. The provisions of law in England for speedy trials seem to be the outgrowth of careful attention to detail. The whole scheme for litigation is well knit together; it is compact and elastic. On the contrary in the various states the rights of litigants are regulated by rather loosely framed and disconnected statutes and rules, which form an essentially crude and ineffective system. It is disjointed and unelastic. In the states little or no attention is paid to the prime necessity for promptness in the despatch of legal business. In the

march of events, as population and business increase, more and more litigation naturally results. But the increased demands of the people in the matter of trial of causes have not resulted in correspondingly enlarged facilities for the speedy disposition of legal business. The crude system of twenty-five or fifty years ago still prevails to-day in most of the United States.

The County Court, described by Mr. Crane, is evidently a distinct success in England. This court has been adopted in some of the United States, and with partial success. In South Carolina the state constitution provides that any county of the state, upon a favorable vote on the question by the people, may provide for a county court. The constitutional limitations as to the jurisdiction of this court, however, are such that the County Court is not regarded with favor in this state, and not a single county has provided itself with such a court. Furthermore, the salary provided for the county judge is only $800, and is too small to enable a county to obtain the services of the best talent. Contrast the salaries paid in England to the county judge, £1500 (the equivalent of about $7,500). The effectiveness of the County Court in other states is doubtless greatly impaired by the same difficulties prevailing in South Carolina.

Summary Judgment. — The provision for a summary judgment under Order III, Rule 6, of the Rules of Procedure of the High Court of England, is novel and interesting. Upon first consideration one is inclined to disfavor this device for a speedy recovery of a judgment, on the ground that the defendant's interests might be summarily disregarded. And yet there is ample provision in the rule for the protection of the defendant. If he is in earnest in a righteous defense every opportuntiy is given for a full hearing. The effect of the rule is merely to eliminate sham defenses intended for delay. The dilatory process of our courts is often a powerful and effective weapon of offense and defense for the defendant. By this scheme the recovery of judgment on notes, accounts, and other ordinary money demands is greatly facilitated. Of course this rule for summary judgment can be applied only to a limited class of cases; but still it is effective for a great deal of ordinary litigation. This rule of the High Court is a simple one. It is practical and businesslike. I am inclined to consider it one of the most powerful agencies that can be devised for the acceleration of the trial of causes. A similar provision should be adopted in every state.

Summons for Directions. — From Mr. Crane's article it appears that under the rules of the High Court of England, "the plaintiff must in every action, except an admiralty action, take out a summons for direction, that is, a summons or application asking the judge to give directions as to the future conduct of the proceedings. On the hearing of the application either party may ask for such directions as he desires, but the judge is not bound to give the directions asked for, but has the fullest discretion to make such order as may be just with respect to all the interlocutory proceedings." Upon such application the judge determines all questions of pleading, mode, and place of trial, and in fact all interlocutory matters connected with the cause. Such a practice is no doubt conducive to speed in the trial of causes. The evils of exasperating delays sometimes resulting from interlocutory proceedings in a cause could be, to some extent at least, cured by a "Summons for Directions." In our practice these summons could be directed to a judge at Chambers, and all incidental matters having been settled by the judge, the trial of the cause on its merits would proceed without delay.

Absolute Control of the Judge over the Cause List. — "The moment a case is set down for trial it is absolutely under the control of the trial judge, and counsel have no power to delay it as of right or simply

for their convenience. Applications to have causes 'stand over' or to 'postpone to next term,' or to take some other place in the list, by agreement of counsel, which are so frequent in the American courts, and which are there generally granted as a matter of course, are seldom heard in the English courts." The easy-going delays from continuance of causes are so frequent in American courts that we are inclined to regard them as necessary evils which we will have with us always. And yet our kinsmen across the sea seem to have demonstrated to us that it is possible to require the prompt trial of causes, and to place court business upon a strictly business basis. And why should it not be so? There is no reason other than the fact that defendant's counsel proverbially wishes to postpone the evil day as long as possible. Crowded dockets should be thinned out, and causes stricken off without ceremony or else tried promptly. The evil of continuances seems to be strictly an American institution. It is deep rooted, and clings to our judicial system like a barnacle to the hull of a ship. But unlike the barnacle this evil seems never destined to be scraped off.

No Bill of Exceptions. — From Mr. Crane's article it appears that in England in case of an appeal no bill of exceptions is allowed to be submitted in the Appellate Court. "As there is no bill of exceptions," says Mr. Crane, "there is no temptation to cast a fine mesh drag-net in the hope of catching a sprat which may stick in the maw of a judge." I must confess that I cannot conceive how such a practice would be beneficial to our system. In this state, and possibly in every state of the Union, the exceptions are the backbone of the appeal. Without exceptions there is no appeal. These exceptions are intended to eliminate all immaterial questions and tend to simplify the trial in the Appellate Court. It seems to me that the exceptions could not be dispensed with advantageously.

Infrequent Remands for New Trial. — One of the most radical differences between the English and American systems perhaps lies in the power of the Appellate Courts. "In England," says Mr. Crane, "the Appeal Court has, over any action or matter brought before it on appeal, all the powers, authority and jurisdiction conferred by law on the trial judge. It can amend the pleadings, enlarge time, receive fresh evidence, draw inferences of fact, direct issues to be tried or accounts and inquiries to be taken, and generally it has power to give any judgment and make any order which ought to have been made in the court below. Even if there was error at the trial the court will not grant a new trial unless, in the opinion of the court, substantial wrong or miscarriage of justice has thereby been occasioned in the trial. If by reason of error a wrong judgment was entered below, the Appeal Court will not in reversing that judgment remand the case for a new trial, but it will enter such judgment as in its opinion meets the justice of the case. How this practically works may be demonstrated by the fact that in 1904 the Appeal Court heard 555 appeals. Of these 182 were allowed, 339 were dismissed, and in 34 the judgment or order of the court below was varied. But of the 182 allowed, including applications for new trials and appeals from final judgment, only seven were remanded for new trial before a jury or for the trial judge's further consideration."

In the American states the jurisdiction of the Appellate Court is generally limited merely to the correction of errors in the proceedings of the court below. The cause is remanded for a new trial, or for further proceedings, or dismissed as the case may be. Except in equity causes the court will not review the facts. In England the Appellate Court may review the facts in any cause, whether in law or equity. In many states the verdict of the jury settles finally the questions of fact in a law case. There is no good reason why it should be so.

There is too much of the element of chance in the verdict of a jury. The facts are the most important elements in the trial of a cause, and to allow these facts to be determined finally by twelve men not versed in the law, and who are sometimes actually incapable of understanding the testimony, is a grave mistake. By allowing the Appellate Court to correct unjust verdicts as well as errors of law, the speedy disposition of causes would not only be promoted, but a greater degree of justice would be insured and more confidence reposed in the determinations of our tribunals.

The failure of our courts to dispose of business promptly is certainly a grave evil. It is one which can be corrected. The success of England in this particular should encourage us to renewed effort. When we do accomplish some satisfactory results in the "Speedy Trial of Causes," then may we appeal with greater confidence and respect to the,

"Sovereign Law, that State's collected will,
O'er throne and globes elate sits Empress,
Crowning good, repressing ill."

HUNTER A. GIBBES.

COLUMBIA, S. C., April, 1905.

NEW JERSEY

The rapid despatch of business in the English courts seems from Mr. Crane's account to be due chiefly to the excellence of the judges and the excellence of the Bar. The judges appear to be selected without regard to local geographical considerations, or to political exigencies, which so often in this country debars the best lawyers from promotion to the Bench. The Bar is composed of more thoroughly trained men than has hitherto been the case in this country, speaking generally. Everyone is aware of the fact that with a skilled judge to direct the trial, and skilled lawyers to conduct it, much time is saved, and the evidence and arguments are directed to the real point in dispute. The system of pleading at common law had this great merit — that counsel had to understand their case before going into court, the question to be decided was narrowed, and time thereby saved. The objections to this system are obviated in our practice in New Jersey by the great liberty of amendments and the control over the pleadings permitted to the court. Apparently the English system approximates to oral pleading under the direction of a master. Either system prevents vexatious delays growing out of appeals on questions not vital to the case. The fact that there are no bills of exceptions doubtless prevents many appeals on the admission or rejection of evidence, where this ruling is not really injurious; this same result can be substantially reached under our practice in the conduct of the trial by competent judges. Reversals for error in the admission or rejection of evidence ought to be, and I think are, infrequent.

The practice of oral argument and prompt decision is also admirable. Much time is wasted in the preparation of long "briefs," and the citation of numberless cases which no judge can possibly examine, most of which are either not authoritative or are irrelevant to the real point involved; and much time is wasted by counsel in reading to the court briefs, when a mere statement of the legal point involved is sufficient.

FRANCIS J. SWAYZE.

NEWARK, N. J., April, 1905.

ILLINOIS

Mr. Crane's article shows in a striking manner the superiority of the English rules and methods of practice over our own. It shows also that our brethren across the seas are much more "practical" and successful in bringing about desired results than we

are, and that our boasts in that regard, at least so far as the administration of justice is concerned, have but little foundation.

It is doubtful, however, whether their methods would ever be adopted here even if the attempt were made. The tendency with us has long been to open the door as wide as possible for "getting error into the record" and the allowance of appeals based thereon. The same tendency is manifested in the change of the mode of selection of our judges from appointive to elective, and in making their terms of office for a term, sometimes quite short, instead of for life. We are much more alive to the increase and assertion of our supposed rights than to the performance of our obligations. Whether this is due to our form of government is a question worth discussing, but this is not the place for it.

Mr. Crane is quite right in saying that "the English system of procedure and the practice that has grown up under it would be impossible here or anywhere if it were not for the character and quality of the judges who enforce it." He might have added (although it is implied) that there is a respect for the authority vested in them for which there is no parallel in this country. On the contrary, the respect here for judicial office and the holder of it is steadily declining, not only because our judges are as a rule inferior to their English brethren, but because with us "one man is just as good as another."

PHILIP STEIN.

CHICAGO, ILL., April, 1905.

COLORADO

A very brief experience some years ago as judge at *nisi prius*, gave me an insight into the character of this portentous mass of business. I determined to prick every case on the calendar and learn how many contained real blood. I found that in many of them the circulation had entirely ceased, the veins and arteries had dried up, and there was nothing left to do but toss the mumified mass into the receptacle for the dead. Now, there are cases that can wait — in fact to let them wait is often the best way to administer justice, but then again there are cases which in their very nature call for immediate disposition, without which the denial of justice is obvious.

In this state there are many questions of an original character which we would like to have settled, but they are questions in which the principle and not the parties is the important feature. Again there are cases associated with the ordinary and usual conduct of commercial business in w' ich no one is concerned but the litigants. They present no obscure or complicated questions, and they should be disposed of as rapidly as is the current business of which they are an incident.

This celerity of disposition of cases described by Mr. Crane is doubtless attributable in a large degree to the attitude each to the other of the Bench and Bar of England. Counsel do not expect to take the time of the court discussing non-essentials, nor, as I have seen in our courts, attempting to bullyrag and browbeat the court, and what is more to the point, the courts of England will not permit it. Counsel are expected to honestly and conscientiously aid the court in settling the facts and in discussing the vital legal questions involved.

I do not wish to be understood as referring to the High Court of Justice as a literal exampler for an American court. The former has far less than the latter to engage its serious and protracted consideration. It has no written constitution to construe, nor is it required to pass upon the validity of acts of Parliament. That great

body of constitutional law as applied to public and private controversies, which occupies so much space in our text books and reports, is practically unknown in English jurisprudence. And herein is the marked distinction in the exercise of the judicial function by the courts of England and the courts of this country. The nature of the federal government and the government of the several states is such, that the courts, both federal and state, have performed an enormous work in ascertaining and establishing the objects and limitations of the federal system and of its component states. The long and laborious councils of the United States Supreme Court, in the early days of the Republic, are as much responsible for the perpetuated and strengthened Union as the force of arms which made the opinions of that court the verities of the federal system. The state courts in turn, and following the analogy of the United States Supreme Court, have been called upon from time to time to expound the constitutions of the several states and to give to the government of the state a reality which insures it against internal weakness or destruction.

Every fresh manifestation of the obvious and natural essentials of government is for a time at least decried as an act in violation of the Constitution. It sometimes seems as though the growth of the nation, or of a state, had no purpose but to fracture the Constitution. At least we are always hearing from those who are chronically against doing things, that the Constitution is in danger. To settle the controversies incident to every stretch which the country takes in growing, the courts are compelled to deny to private litigants the time required for a speedy determination of their cases. In addition to this the courts are called upon each year for a larger and fuller expression of their judicial functions, particularly in connection with public affairs. That they have power to prevent the violation of the law, as well as to punish its infraction, is gradually being accepted as a necessary part of their functions.

PLATT ROGERS.

DENVER, COLORADO, April, 1905.

NEW YORK

I have read with interest Mr. Crane's article on "Speedy Trials in England."

An unusually wide experience in connection with the system of procedure prevailing in the Federal Courts and in a number of states of the Union has produced certain impressions upon my mind regarding the law's delays and the possible remedies therefor which, perhaps, are not quite in accord with those often expressed by the makers of codes, who regard them as cure-alls for the delays in legal procedure.

I am familiar with the procedure in the Federal Courts in nearly all branches, and particularly with the system of equity practice established by the equity rules promulgated by the Supreme Court of the United States for the guidance of the Circuit Courts in cases of equity jurisdiction. I am also familiar with such modified systems of common law and equity procedure as prevail in Tennessee, Virginia, Illinois, and Massachusetts. I was initiated in the practice under the Practice Act of Missouri which, as it then stood, was substantially the old Field Code of New York. Later I became well acquainted with the code of Indiana, and somewhat familiar with the so-called complete codification both of substantive law and procedure in the state of Georgia.

As the result of my experience, I think that the best systems of procedure in this country to-day are those prevailing in the Federal Courts upon the equity side and in the courts of Massachusetts. The very

worst system of procedure of which I have any knowledge is that established in the state of New York by the present "Code of Civil Procedure." This Code, undertaking to provide for every conceivable contingency of practice and procedure, has come to be a procrustian bed to which litigants or litigated questions are fitted in the most arbitrary fashion. Appeals from every kind and class of interlocutory ruling are provided for, and, in a recent case, with which I am personally familiar, what ought to have been a simple complaint or declaration in an action for deceit, has been in controversy in the courts upon one technical question or another for something like three years, and the end is not yet. This would have been impossible under the Federal system in equity or in the courts of Massachusetts or of England.

The law's delays in the state of New York are mainly due to the provisions of the Code of Civil Procedure and the technical construction of those provisions which has now become habitual to the judicial mind in this state. The remedy, to a large extent, might be found, I think, in the virtual repeal of the present Code of Civil Procedure, the enactment of a general practice act in the shortest and simplest terms with provisions for the establishment of rules of practice from time to time as they may be required, such rules to be promulgated by the Court of Appeals or such other judicial body as might be selected for the purpose. Incidentally, all appeals from interlocutory orders and from rulings upon technical questions of pleading and practice should be abolished except in cases where a certificate of judicial doubt can be obtained. Trials should be enforced by the provisions of law when cases are reached upon the calendars, except in such instances as would make it too plain for argument that an adjournment or a continuance was right and equitable.

I regret that personal illness (I am dictating this brief commentary from a sick-bed) prevents me from further reviewing the very interesting question which you have submitted.

WM. HEPBURN RUSSELL.

NEW YORK, N. Y., April, 1905.

OHIO

The law's delays were, in the time of Shakespeare, a cause adequate to drive a litigant to suicide. They still continue to be a live subject for the consideration of statesmen and jurists. That they are so, is sufficient proof that no remedy can be made to order; for otherwise the time and thought given the subject of celerity in civil procedure would long ago have solved the difficulites, and removed all ground for complaint.

Mr. Crane thinks the problem of securing celerity in civil procedure has been solved in England to the satisfaction of lawyers and laymen. I doubt it, notwithstanding the admirable showing in his article. And I am sure, the rules to which he calls attention would be of slight service in preventing the congested trial dockets in the large cities of the United States.

A brief glance at conditions in Cuyahoga County, Ohio, in which is situated the large city of Cleveland, and the general civil procedure of the state, will indicate why I think those rules have no vital message for American conditions.

Mr. Crane's article shows that the High Court of England, corresponding roughly with our Court of Common Pleas, has to do annually with less than two hundred and fifty cases for each one hundred thousand of population.

The Court of Common Pleas of Cuyahoga County, even without probate, admiralty,

and patent jurisdiction, has to do with an average annually of approximately thirteen hundred cases for each one hundred thousand of population.

At the present time a case is reached for trial in the Court of Common Pleas in a year to fifteen months. The Circuit Court, which is an intermediate appellate court, keeps up promptly with its work. The Supreme Court is about fifteen months in arrears. So that if a suit is brought, tried, taken on error to the Supreme Court, not less than three years will be used up.

So far as this delay is concerned, very little of it is due to defective rules for maturing cases; and, in my opinion, the rules for summary judgment, or summons for direction, or dispensing with printed records and briefs in the reviewing courts on which Mr. Crane dwells, would obviate little or none of the delay in contested cases. The real cause lies deeper.

The jurisdiction of county courts as described in Mr. Crane's article is substantially those of a justice of the peace of Ohio, and their organization seems to be admirable, and a vast improvement on anything known to me in the United States. An appeal lies from them to the High Court only for error of law, and appeals are infrequent; only one hundred and forty for all England in 1902.

An appeal from a justice to the Court of Common Pleas lies as a matter of right in Ohio in all cases except those involving less than twenty dollars, tried by a jury. In the absence of exact statistics, I can only say that the general opinion is that the larger part of the contested cases tried by a justice are appealed, thereby tending to congest the dockets of the trial courts. Appeals lie from the Probate Court to the Court of Common Pleas as to nearly every final order that it can make, without any serious restrictions or deterrents, still further congesting the docket of the trial court.

The Common Pleas Court has concurrent jurisdiction with the justice's court in civil actions in which the amount in controversy exceeds $100 and exclusive jurisdiction where it exceeds $300. It has also a general jurisdiction as extensive as the High Court in other directions except as to probate and admiralty and patents. A case once tried, the defeated litigant, if it is an equity case, may appeal as of right on giving an appeal bond to the Circuit Court and have it retried *de novo*. If it is a law case, he may prosecute a proceeding in error; and have the judgment reviewed for errors of law committed by the trial court. He is not required even to have a copy made of the original pleadings, or of the bill of exceptions; he makes use of the original papers, the costs in the event of defeat are an item of no consequence.

There is no pecuniary limit to this right to go to the Circuit Court by appeal of error. It may be done in any case that can be brought or appealed to the Court of Common Pleas, except in divorce cases, in which the judgment granting or refusing a divorce is final, but is appealable so far only as involves the custody of children or alimony and property rights.

In the Supreme Court, any judgment of the Circuit Court may be reviewed for errors of law, if the amount in controversy exceeds $300, and in many classes of cases without regard to the amount. The person taking the case up must print enough of the record to show the errors complained of; but the consequences of a failure are not serious enough to deter litigation. The Supreme Court may, on affirming judgments for the payment of money, impose as a penalty additional interest not exceeding five per cent per annum, and in affirming other judgments may tax an attorney fee not less than $25 nor exceeding $300, and damages not exceeding $500. If, however, the court certify that there was reasonable cause for the proceeding in error, neither fee nor damage shall be allowed. Costs, outside of printing charges, are insignificant, whether the party wins or loses.

In actual practice, the Supreme Court always certifies that there was reasonable cause.

From this review, it will appear that the organization of the courts and these rules of law are designed to favor litigation; to keep it going, instead of putting an end to it. In many cases, there may be two trials of the same questions of fact, and in all cases, unless there is less than $300 involved, two reviews for errors of law. The losing party pays no attorney's fees, except his own; and runs no risk of serious financial loss in costs, penalties, or damages.

Contrast it with the conditions disclosed in Mr. Crane's article, and it will explain much of the congestion in business. Proceedings in all English courts are notoriously expensive; the costs and fees of solicitor and counsel (as many as three) which are taxed against the losing party, does "undoubtedly deter persons from recklessly bringing frivolous, vexatious, and speculative actions." It has precisely the same effect upon the honest litigant with a meritorious cause of action; and if he is poor, the fear of it amounts to a denial of justice. To this cause, above all others, is due the smaller number of suits brought and of appeals taken.

A client of mine had patents in Germany and in England, and they were being infringed in both countries. He made inquiry of a solicitor in Hamburg and in London, as to what it would cost to bring a suit and obtain a judgment in a court of first instance testing the validity of his patent. The German solicitor answered $500; the English solicitor answered £2500! My client thought he had a meritorious case and a valid patent; but he decided that it was less expensive to protect himself by competition in the market than in an English court of justice.

Whether it is wise to give every man whose case has once been tried in a justice's court, either with or without a jury, the right to have it tried *de novo* in another forum; whether it is wise to give one who has had an equity case tried in the Court of Common Pleas a right to have it tried *de novo* in a higher court; whether it is wise to permit one whose action at law has been reviewed on error in the Circuit Court, to have another right of review in the Supreme Court, are questions about which opinions will differ. It is, however, easily possible so to restrict the right to have a second trial of the same case, or a second review for errors of law, that the congestion in the Court of Common Pleas, and in the Supreme Court would be much reduced. In this state, the remedy must be sought primarily by depriving litigants of rights they now have rather than in a reform of the rules of civil procedure.

The practice outlined in Mr. Crane's article under the sub-heading "Summons for Directions" seems to me less expeditious and more burdensome to the courts than the practice in Ohio. Instead of taking out a writ first, and then asking a judge to give directions about future pleadings and practice, the pleader files his petition first, and then takes out his writ. This may be done at any time and without previous leave. The defendant must answer or demur on or before the third Saturday thereafter. The plaintiff must reply or demur to the answer within two weeks thereafter. Granted that each party is in earnest, and has a lawyer who knows how to state his case, it is possible to get an issue within six weeks. If the demurrer is overruled, the time to answer or reply is in the discretion of the court. And with four terms of the Common Pleas Court a year, unlimited as to the length of the terms, whether a party gets prompt justice, would seem to depend, not on rules of practice, but on the personal efficiency of those administering the law.

As to the filing of interrogatories, the inspection of documents, and the taking out of commissions to examine witnesses, these may all be done without delay, and without troubling any judge or master.

The practice described in Mr. Crane's article under sub-heading: "Summary Judgment" points attention to one of the worst effects of a congested trial docket, and would do much to alleviate its hardships. Persons without a just defense will interpose formal defenses in order that they may obtain delay, expecting to force a more favorable settlement before the case is reached for trial, feeling sure they will be no worse off if they fail. This is a result of the congestion of business, not a cause of it, for such cases are disposed of in some way before trial, without taking up the time of the court. The congestion is due to cases really litigated.

In Ohio, and I presume in other states, the right to file a general denial lies at the root of this evil. Abolish the general denial and adopt order XIV of the English Rules of Procedure, and sham defenses to secure delay would be greatly diminished, if not wholly abolished. This rule is the only one referred to in Mr. Crane's article which, it seems to me, would greatly help in solving our troubles.

In a large local unit of government, like the county, of which I have been speaking, the difficulty of getting cases heard and tried are very much greater than in smaller and less populous districts. The working hours in court must, of necessity, be shorter; for lawyers and judges live longer distances, at least in time, from the court house. The number of cases tried by judges seems to decrease in proportion to the number of judges who have control of the business.

The methods of handling and getting tried cases which are ready for hearing is found the potent cause of a congested docket. The conditions in this county I doubt not, is typical of all large and growing cities that have tried to manage business by methods developed under simpler conditions. Previous to 1901, the system of assigning cases by each individual judge was in operation. Under it blocks of cases were set off to each judge, and from five to ten cases were set for each day, for a week in advance. At the opening of the court cases were called, beginning at the head of the assignment, and the call continued until a case was put on trial. Those which were not ready went to the foot of the list, were continued, or reset for another day. If a case on trial was carried into the next day's assignment, the cases for that day were also obliged to be called and reset, or continued. The same order prevailed in each of the several rooms, in which judges were trying cases. The result was that no one knew to a certainty when his case would be reached; and it was difficult for counsel to arrange conflicting engagements, or to procure the attendance of witnesses. As the trial work is done by a small percentage of the members of the bar, the loss of time was enormous, and the despatch of business seemingly impossible. Oftentimes judges and juries would be out of work, notwithstanding the large number of cases fixed for that day. These conditions are the inevitable incident of a number of judges having control of a specific number of cases, and of setting a large batch for a day certain. The evils are beyond the reach of rules of procedure.

To remedy this condition a system was devised which has worked admirably, and promises to become a solution of the problem. The duty of assigning cases for trial is taken from the judges, and placed under the control of the assignment clerk. He performs the functions of a train despatcher, as it were, for the business of the courts; he keeps a case always ready for each judge and jury, and sends it to the first vacant room. After a case is sent to a room, it must be tried, or dismissed, or continued, only on a showing of good cause. Continuances are quite rare after a case goes to a room. A case is not sent to a room while any of the counsel in it are engaged in another court, but is held without losing its position, until counsel are disengaged. Engagements of counsel, or absence of wit-

nesses, or convenience of parties are taken care of by agreement of counsel to pass a case subject to call, to a day certain, the stipulation for which must be filed the day before a case is reached for trial.

The rules and system are quite simple, but space forbids a more detailed description of it.[1] In actual practice it is found that no serious difficulty is experienced in keeping in touch with cases, and learning when they will be reached, in avoiding conflict of engagements, of preventing continuances for the term, or of keeping judges and juries fully supplied with cases at a minimum of expense and delay to parties and witnesses. It is simply a question thereafter of how much work a judge and a jury can do or is willing to do during the term of court.

Its merit is best shown by the results it has accomplished. In the year before it was adopted, 7610 cases were called, of which 1218 were continued for the term, 5553 were set for another day, and the bulk of those not tried. There were then only five trial judges; and the average number of cases tried or disposed of by each during a term was about fifty. The trial of causes was three years in arrears; and growing rapidly worse.

The first term after the system was inaugurated showed an increase of forty per cent in the cases disposed of. The number of cases disposed of by each individual judge averaged for the next seven consecutive terms seventy per cent greater, and at no time has fallen below forty per cent.

The population and business has increased greatly in the county since, and the number of judges has also been increased; but it is estimated that the addition in judges alone, granting what is improbable, that with each added judge the percentage of cases disposed of by each would not have diminished, would not have taken care of the new business. But under this system, notwithstanding the increasing business, the arrearages are being gradually reduced until a cause in the usual course can be tried in a year, and the assignment clerk estimates that in two to three years more, without new judges, the courts will be up with the work.

The feasible remedies for the law's delays, it seems to me, consist in the following suggestions.

1. The right to try a case *de novo* on the facts more than once, and to have more than one review of the same case for errors of law, may be limited and restricted; but I do not think it ought to be done until the state provides a court of first instance, in either case, that is capable and efficient.

2. The practical immunity of the losing party from expense by reason of his false clamor which now exists, would, if changed and the English system put in force, reduce the number of suits brought and appeals taken.

Personally, I look with little favor on any reform which restricts the freedom of the individual in having his grievance tried out, and tried right by a capable court; for it must be remembered that poverty has enough handicaps already in a law suit, and that the average citizen has probably no more than one case in a lifetime, and that one is to him always a matter of vital importance.

3. The general denial and sham defenses to gain time might profitably be denied; and to accomplish this remedy the rules of English Civil Procedure to which Mr. Crane calls attention, would, I think, be efficient.

4. The system for handling business which has been adopted in this county, and partly explained in this article, will ensure in large cities the hearing and trial of as many cases as the judges are able

[1] This system is the invention of A. C. Dustin, now Assignment Clerk of the Courts. It has been put in operation in several other cities, and with like results. He will cheerfully furnish detailed information to any one wishing to try it.

or willing to hear, and determine in a given time with a minimum of friction and inconvenience to counsel, and of expense and delay to parties and witnesses.

In the last analysis, the personal efficiency of those who are to administer laws and rules is of the greatest importance. Judges selected from the leaders of the bar would have a riper experience, a wider field of knowledge, greater skill in handling trials, and would command greater respect for their rulings than those taken from the lower ranks. Some judges, like some lawyers, can do many times as much work as another, and do it as well or better. But to secure the services of such men is beyond the power of any rules of procedure, it calls for an overhauling of the entire body politic.

D. C. WESTENHAVER.

CLEVELAND, OHIO, April, 1905.

MASSACHUSETTS

No one will deny that there is urgent necessity for expediting the business of the courts and for earlier trial of certain classes of actions. In Massachusetts, especially in the county of Suffolk, the question has been sharply brought home to the taxpayers by Mayor Collins' objection to the enlargement of the Court House, and by his insistence that Boston is put to very great expense for providing means for the trial of causes which ought to be tried in other counties. But it is not probable that many, if any, of the provisions for expediting business in England can be adopted here until the exigency is even more acute than at present.

To take up the items of Mr. Crane's admirable statement in their order, the following considerations occur to me:

I. Our Police, District and Municipal Courts give speedy trials in the classes of actions which come within their jurisdiction. The collection of notes and tradesmen's accounts are promptly dealt with, as well as matters of ejectment, and the like.

Appeals, however, may be taken from these courts to the Superior Court, and cases so appealed come upon what is known as the Special Trial List. If no jury is claimed, a trial can be had within a month after the parties are before the Superior Court, but if jury trial has been claimed, the cause, in Suffolk, will be delayed for nearly a year, owing to the pressure of business.

I have not before me the figures with regard to the despatch of business in the lower courts, but there is certainly no ground for complaint with reference to it. There is, however, serious difficulty resulting from the frequency of appeals to the Superior Court, and a part of the congestion in that court is due to this cause.

If it were provided that the party taking the appeal, if defeated again, should in any event pay double costs, and if the Superior Court had power to award treble or quadruple costs, much of this difficulty would be obviated. Parties would scrutinize their chances of success very much more carefully if there were any real penalty for ill-considered appeals. The present provision for requiring a bond for costs in case of an appeal tends to relieve the Superior Court of this class of cases.

II. The Superior Court is the great trial court in this commonwealth. The judges are appointed for life and sit by assignment of the Chief Justice throughout the state. Its work is divided into Equity and Law. The Equity work is speedily despatched in all the counties. In counties where the court is not constantly in session, cases may be heard in some other county. Hearings can be had on matters of injunction, or others requiring haste, without delay, and

hearings upon the merits, unless there is a complexity of accounts requiring a Rule to a Master, are had within a month of application therefor.

The counties other than Suffolk and Middlesex have from one to four terms for the trial of law cases in a year, and litigants desiring a hearing experience little difficulty except for the engagements of counsel in getting it at the term following the completion of the pleadings.

Cases are practically never delayed by complexity of pleadings. Demurrers, when filed, are heard and disposed of promptly, and the time for answer over, where demurrers are over-ruled, is strictly limited.

In Suffolk and Middlesex cases entitled to go upon the Special Trial List, viz: cases appealed from the lower courts, cases of contracts where the amount sued for is less than two thousand dollars, cases which have been referred to an Auditor, and a report made, cases where verdicts have been set aside or where exceptions at a previous trial have been sustained, are tried promptly unless a jury has been claimed. In Suffolk where a jury has been claimed, a year will ordinarily elapse between the marking and trial of the case. Where no jury has been claimed, the case is tried and decided ordinarily without delay.

The principal trouble comes from cases on the General List in Suffolk and Middlesex and results from the large number of personal injury cases brought. These cases usually consume from two days to a week in trial before a jury, and delay the entire list. In Suffolk substantially two years must elapse between the bringing of a suit and a trial, and in Middlesex one year.

It would seem to be entirely reasonable that one or two of the Suffolk Jury sessions should be employed upon contract, fraud, land damage, and commercial cases. This would undoubtedly result in some additional delay in the trial of personal injury cases, unless additional sessions are provided. But the despatch of business concerning property rights ought not to be hampered by any single line of cases.

III. No appeal lies from the verdict of a jury in this commonwealth.

Motions for new trial are heard by the justice who presided at the trial and are summarily dealt with. It is rare that the determination of such a motion is delayed beyond the sitting at which the trial takes place.

IV. We have a provision in this state similar to the English procedure for summary judgment. In an action to recover a debt or liquidated demand the plaintiff may, within twenty days after the time for filing an answer, file an affidavit verifying his cause of action and stating that in his belief there is no defense thereto. If the defendant does not, within seven days after notice of this affidavit, disclose, by affidavit, or as the court shall otherwise order, such facts as the court finds entitle him to defend, the case shall be advanced for speedy trial.

The defendant is required to disclose specifically and clearly the facts on which he relies, and this provision is generally effective in bringing about a speedy determination of cases where there is no real defense.

V. We have no provision similar to the summons for directions explained by Mr. Crane. Pleadings are so simple that the justice presiding at the motion session can deal with all questions arising under the pleadings and all interlocutory matters without delay. Either party, after a suit is brought, may interrogate his opponent, but the right of inquiry is strictly limited to inquiries essential to his case or defense, and he may not inquire with regard to his opponent's witnesses or matters tending to sustain his opponent's case. The result is that when cases are reached for trial each side is to a considerable extent in the dark as to what his opponent will prove and his methods of proof.

Probably a great deal of time would be saved in the courts if we had a provision similar to that in New Hampshire, enabling

either side to interrogate orally the opposite party and ascertain the real scope of the controversy. This, on the whole, works in the interest of justice; fastens testimony when it is fresh in the minds of witnesses and prevents amplification of causes as an actual trial approaches.

Of course this procedure is open to the objection that unscrupulous litigants will secure evidence to bolster up weaknesses ascertained by the preliminary investigation but there is this difficulty in all cases and the good would seem to entirely outweigh the evil, in fact, it would have the advantage of terminating a great deal of litigation without actual trial in court. Both parties would discover exactly where they stood and be unwilling to go to the expense of trial in weak cases.

VI. The English provision for a staff of masters might, with some modifications, be advantageously adopted and much freer reference of cases be made. There is serious objection to further increasing the size of the Superior Court, which already consists of twenty-three justices.

The present system in Suffolk of placing cases upon the trial list at a calling of the docket on Wednesday of each week seems to work as well as any system which can be devised. There is a general trial list of all jury cases and from this list cases when reached in numerical order may be put upon the short list for the ensuing week, upon application of either side, unless good cause is shown. The short list is considered practically as an assignment of cases and nothing short of the actual engagement of counsel in another court is an excuse for delay when the case is reached.

VII. Bills of Exceptions.

One of the most vexatious causes of delay in the administration of justice in this state is the present system with regard to bills of exception. Within twenty days after the verdict of a jury, or decision by a single justice sitting without jury, the defeated party may present, in writing, a bill of exceptions for allowance by the court. The practice is for counsel to attempt to agree upon disputed points, and hearings are had before the trial justice only upon points of final disagreement. The engagements of counsel, the examination of shorthand reports, and the framing of a final draft often cause interminable delay.

The summary method adopted in England of hearing questions of law without printed bills of exceptions, and without printed briefs, strikes an American practitioner at first with dismay. The system certainly tends to the rapid disposition of causes and probably results in substantial justice. Counsel with the case fresh in their minds can undoubtedly present the matters in which they conceive they are aggrieved within a month of the trial as clearly and fully as after months of delay on the exceptions themselves, and in preparing printed briefs.

VIII. Considerable relief would result from increasing very materially the taxable costs in cases taken to the Supreme Court and requiring a bond for their payment. At present the costs are trivial, and all sorts of questions are carried up without much examination of the law till the actual preparation of briefs is begun.

IX. The present congestion in our courts seems to me to be due in part to two causes peculiar to our conditions. Owing to the public jealousy of the judiciary in the early part of the last century the power of judges in the control of trials was very much limited, and under our statute judges may not charge upon facts, or indicate in any way their opinion of cases or of testimony. This has resulted in the judges taking very little control of the course of a trial, intervening seldom except when asked by counsel for a ruling.

It is a common expression among lawyers that the best judge is one who keeps quiet and lets counsel try their case. This results in unnecessarily protracted trials. The court permits counsel to go into a vast

amount of detail which has little bearing upon the main issue and does not check incompetent inquiry unless asked to do so by opposing counsel. Counsel fear to prejudice their case by too frequent objections and the trial runs off into unnecessary by-paths. I believe that the rule prohibiting the court from charging upon facts and commenting upon evidence should be repealed. It is a common saying among business men that they would prefer the decision of a single judge to that of twelve men, and yet under our system the judge is prevented from even rendering proper assistance to the jury.

The opposite practice exists in England. The presiding judge takes a strong and vigorous hold of the case from the first by inquiries of counsel and of witnesses, brings sharply to the attention of the jury the main issues, and counsel hesitate to ask incompetent questions because they may immediately be checked by the court.

Our trials are good natured, patient, and painstaking, but sometimes diffuse. As the evils of the over-crowded lists become more apparent to the community it will undoubtedly result in greater power being given to the judges, and in their exercising a more direct influence on the course and result of trials.

Another cause for the congestion in our courts is the smallness of the fee bills taxed at the close of litigation, and from the fact that no bond is required from the plaintiff for costs when his action is begun. Whether anything should or can be done in this regard it is difficult to determine. It would be contended that many poor people would be unable to give security for costs and be prevented from prosecuting righteous causes. This is perhaps a sufficient answer to any suggestion of change. It may, however, be doubted whether many, if any meritorious causes would fail of prosecution because of inability to give security. Ordinarily speaking, a plaintiff with a meritorious cause which had been carefully analyzed by competent counsel would find it possible among his acquaintances to give security. The result certainly would be to prevent the exploiting of all sorts and kinds of claims with very little consideration of the probable outcome. Suits in the hope of settlement would be pretty effectively discouraged.

It is entirely apparent that our judicial system must before many years be reconsidered and some measure of relief given to the courts, and I venture the prediction that it will be found not in the enlargement of court houses or the increase in the number of judges but in providing effective means of examining cases at their inception and in making costs for mistaken judgment more severe.

SAMUEL J. ELDER.

BOSTON, MASS., April, 1905.

ILLINOIS

Generally speaking, the congestion of business in the trial courts, in my judgment, is due to the fact that, under the laws of some of the states, the judges practically are not allowed to take part in the trial of a case. In Illinois, for instance, he may not speak to the jury, except in writing. This is, of course, not true of the Federal courts in Illinois.

It would be very interesting to trace the origin of these two attitudes of the public toward the judiciary. One is the outcome of the Virginia jealousy of judicial power, as far back as Jefferson's time. Many of the western states are under the influence of that early attitude, because of the fact that their civil institutions were set up by the people who came from Virginia and Kentucky.

PETER S. GROSSCUP.

CHICAGO, ILL., April, 1905.

NEW YORK

The recent state "Commission on Law's Delay," of the state of New York, found, at the commencement of its investigation in 1902, that the greatest diversity of opinion existed among learned judges and lawyers as to the comparative efficiency of the courts of the city of New York and those of other great cities in England and America in the despatch of judicial business, and as to the volume of such business dealt with in the various jurisdictions.

This diversity of opinion proceeded almost entirely from the general ignorance which prevailed (in the absence of judicial statistics) regarding the actual conditions existing in the New York courts, as well as in those of other cities, and the entire lack of anything like definite knowledge as to nearly all of the facts necessary to the formation of a sound judgment upon the subject.

There was, however, a general agreement between business men and merchants who appeared before the commission that the administration of justice had so far broken down in the city of New York, in consequence of the over-crowded condition of the calendars and the abuses of the referee system, that recourse to the courts for the adjustment of commercial controversies was impracticable, in the great majority of cases. It was upon the initiative of the Chamber of Commerce of the state of New York that the law authorizing the creation of the State Commission on Law's Delay was passed and the Commission appointed.

The first work of the Commission was to collect the judicial statistics of the state, which it did, covering a period of fourteen years, and those of other great American cities, as well as those of London, that it might be enabled to form a proper estimate of the effectiveness of the New York courts as compared with those of other jurisdictions, operated under similar conditions, and to form a reliable estimate of the degree of efficiency that it is practicable to attain.

It found that the keeping of judicial statistics in England had reached a high state of perfection, under the able directorship of Sir John Macdonnell, C.B., LL.D., a master of the Supreme Court, and these statistics were easily available.

A comparison between the New York Supreme Court of the First Department (Manhattan), the High Court of Justice in London, and the Court of Common Pleas in the city of Philadelphia, discloses many interesting facts, among which the following are the most important to the subject under discussion.

A jury case may be reached and tried in the King's Bench Division, sitting in London, in from *three* to *four months* after issue joined; in the Philadelphia Common Pleas Courts, *six months;* and in the New York Supreme Court, First Department, *three years;* and in Brooklyn (Second Department) a little less than *two years*.

The equity branch of the New York Supreme Court, First Department, has had on its calendar for a number of years, and now has about 2000 cases. It is able to dispose of these, in all ways, at the rate of about 750 a year. Although the effort is frequently made to run through this calendar by a peremptory call at which three or four hundred cases are put on a call calendar on one day (which invariably results in a great majority of the cases so called being marked "off calendar" or reserved), and by this means the calendar is turned over in several months, the calendar is, nevertheless, about two years behind its work. In London the equity calendar is up to date, as it is in Philadelphia, and also in the Brooklyn Special Term of the Second Department — the volume of equity business there being much smaller than in the First Department.

Sir John Macdonnell, compiler of the

English Judicial Statistics, in reply to an inquiry addressed to him by Ambassador Choate on behalf of the Law's Delay Commission, stated that in 1900 and 1901 the average number of cases heard and determined each year in the High Court was 5592. This work was performed by twenty-three judges.

The average number of cases tried in the New York Supreme Court, First Department, including cases marked "off calendar" is 2035: excluding cases marked "off calendar" the average number tried is 1329. Ten parts of the court are employed for nine months in doing the work. The average number of cases tried and otherwise disposed of in the Second Department is 1690 per year with an average of 3½ parts. The average annual work of the New York Special Term of cases tried and otherwise disposed of is 713, with an average of 5 equity parts, and of the Brooklyn Special Term 387, with one and sometimes two parts. The total of cases tried and otherwise disposed of in the New York and Brooklyn Trial and Special Term is, therefore, 4825, of which quite a large proportion are disposed of by merely marking "off calendar."

The judicial force employed in disposing of this work in New York City in the First and Second Departments consisted in 1903, of 33 resident judges of the city of New York and an average of 10 judges drawn from other departments of the state, or 43 judges in all. That is, 23 civil judges in England dispose of 5592 cases a year, and 43 judges in New York City dispose of 4825, including cases marked "off calendar" when reached. Considering that the English judges are obliged to spend a good deal of time in traveling upon their circuits, and holding court in all the large cities of England, the great disparity in the output of the two courts is most significant, and the conclusion is irresistible, that the English courts of first instance are far more effective than the New York Supreme Court.

The reasons for this are not to be ascribed entirely to the superiority of the English Bench, as it is sometimes claimed, but is unquestionably due to a great extent to the superiority of English methods of procedure, and particularly to the practice which requires all suits to be brought in the first instance before an officer of the court known as a Master, who makes a preliminary examination of the case in the presence of counsel, and makes direction for all the preliminary relief required to put the case in proper condition for trial. The case cannot be put upon the calendar until this is done, under the rules of the English High Court, and the result seems to be, that when cases are actually brought on for trial they have undergone an amount of preparation at the hands of an officer of the court which insures a clear presentation of the issue involved, so that a prompt and scientific trial is assured. This practice is known in England as the "Summons for Direction."

Scarcely less efficacious in keeping down the calendars in England is the procedure under what is known as Order XIV, which is an application supported by an affidavit to a Master in Chambers for summary judgment in liquidated claims, and in actions for recovery of land. If satisfied after hearing the defendant that there is no defense, the master may then and there order judgment for the plaintiff, or he may give leave to the defendant to defend unconditionally, or he may give such leave subject to conditions of payment of amounts claimed to the court, or giving security. Under such a procedure the practice of putting in sham defenses and answers cannot prevail to any extent, as they do in New York, where the crowded calendars are an invitation to an unscrupulous defendant to retard the plaintiff in the collection of his claim for three years, and thereby force him to an unjust compromise. Sham defenses cannot be stricken out on motion in New York because of the rule which the courts have

established, that they will not inquire into the merits of a defense upon affidavits. The Civil Judicial Statistics of England for 1903, just published, show the number of judgments entered in the High Court under Order XIV as follows:

Judgments:—

Entered summarily	5662
Entered after trial by jury . . .	503
Entered without trial by jury .	698
Total	6863

A somewhat similar procedure is in force in the Common Pleas Courts in Philadelphia.

In the discharge of its business the High Court in England has the assistance of seventeen masters, who do all the preliminary work above described, and try other matters especially referred to them. The New York Supreme Court has the assistance each year in the discharge of its business of 588 referees, that being the average number appointed each year, over a period of seven years, to dispose of the average number of 2272 references a year, of all sorts. It is estimated that these references cost the litigants between seven hundred and eight hundred thousand dollars a year; months of sittings being consumed in many cases. The system has become scandalously and notoriously unfit as a whole, and has met with the severest censure by the higher court. The reports are filled with its scandals, and it has become intolerable to the business community, and to those who most desire the welfare of the court. The Chamber of Commerce of the state of New York in asking for the appointment of a State Commission to inquire into the Law's Delays presented resolutions at its annual meeting, to the legislature, which contained the following:

"Whereas grave abuses have been found to exist in the system of compulsory references as administered by the courts in the city of New York, as being both costly and dilatory and otherwise detrimental to the administration of justice, and as denying equal protection of the law to certain classes of litigants, particularly those suing upon commercial accounts, etc."

The Judicial Statistics of England for 1903 shows that the number of sittings of official referees in London for that year was 376, and outside of London, 30. The total amount of fees received was £1001, 12*s*, 6*d*, or approximately $5000.

The English system of appeals, which differs so radically from our own, seems better adapted to the conditions existing in England than in New York. The first reason is, the greater authority of the judgments of courts of first instance in England, which is in marked distinction to our own. While but about 10 per cent of the cases tried in England are appealed, it is estimated that about 30 per cent are appealed from in New York County, and while the proportion of reversals and modifications in England on appeals to the Intermediate Court is about 29 per cent of the whole number, it is in the First Department in the city of New York 41 per cent. That the volume of appeal business is much greater in New York is shown by the fact that in 1903 there were but 1272 appeals all told in England which were divided up as follows: To the Judiciary Committee of the Privy Council, 113; to the House of Lords, 80; to the Court of Appeal, 681; to the High Court of Justice from inferior courts, 398. While the Appellate Division of the First Department (one of the four departments of the state), in the year 1902 heard 1050 appeals, in which it wrote 850 opinions.

The Law's Delay Commission of the state of New York in its report to the legislature assigned the following "Causes of Delay, in the administration of Justice:"

First, the increase of litigation resulting from increase of population and business activity; second, the inadequacy of the judicial force and the constitutional restric-

tions upon its increase by the legislature; third, the arrangement of the judicial force, which has resulted in strengthening the appellate branch of the court at the expense of the trial branches; fourth, defective methods of procedure; fifth, the practice which has grown up as the result of the congested condition of the calendars of interposing sham defenses to secure a delay which is often equivalent to victory; sixth, an incompetent and costly referee system; seventh, defective calendar practice and the failure to classify cases for the purpose of trial; eighth, multiplicity of appeals; ninth, the failure to keep and publish annually judicial statistics by means of which the people could be definitely informed as to the condition of their courts; tenth, the aggressions of politicians upon the courts and the baleful practice of political contributions by judicial candidates which tend to deteriorate the quality of the Bench.

The remedies which this Commission proposed for the relief of the New York Judicial System both by legislation and constitutional amendment related, first, to the increase of the judicial force; second, to a direct appeal from the trial courts, on questions of law purely, to the Court of Appeals, the court of last resort of this state; third, the adoption of the practice prevailing in the English High Court of Justice known as the "Summons for Direction;" fourth, the adoption of the practice prevailing in the English Court known as "Order XIV;" fifth, more scientific classification of cases for purposes of trial; seventh, the creation of a body of Supreme Court Commissioners in counties having a population of upwards of 500,000 to be appointed by the Appellate Divisions of the District in which such county is situated, such Commissioners to be salaried officials and to have all the functions of English masters in hearing application for direction and motions on sham defenses, also to constitute a permanent body of standing referees from whom the judges should appoint referees in particular cases, and Commissioners in condemnation proceedings; such Commissioners also to perform the important function of presiding at jury trials; eighth, the diversion of cases involving small amounts from the Supreme Court in New York and Kings County into the City Court, a local court of limited jurisdiction, as well as into the County Court of Kings County and the Municipal Courts, by providing that no costs shall be recovered in actions brought in the Supreme Court of which the inferior courts have jurisdiction, if the judgment recovered is below a certain amount; ninth, the keeping and publication of the judicial statistics of the state of New York; tenth, the prohibition under severe penalties of the payment of any sum of money by a person who is a candidate for a judicial office, either in advance of his nomination, or thereafter.

In summing the whole matter up, it may be said in a general way that the most noticeable defect in the judicial system in force in the city of New York is that it is antiquated, and not suited to the requirements of the modern business and industrial life of a great city whose courts are called upon to determine not only controversies arising within the limits of such city, but which grow out of business operations carried on in all parts of the country which focus in New York as the great business clearing house of the nation. The increase in the volume of business throughout the country tends at once, and inevitably, to multiply the number of controversies and litigations which find their way into the courts of the city for adjustment, and if such business is to be handled by the courts, the state must not only provide adequate judicial force to handle the business with expedition, but methods of procedure which work for efficiency and despatch; and must at the same time see to it that justice is administered cheaply as well as expeditiously.

The serious ground of complaint against the courts in New York City is that they are no longer able to administer that justice

which Magna Charta and the constitutions of nearly all the states guarantee to all men, *justice without delay*. A juridical system which denies a party his first hearing for *three years*, and then starts him in a series of appeals and new trials, with almost even chances of several in each appeal, whatever may be said of it, is not, properly speaking, a system of justice.

For the conditions which prevail in New York the lawyers of the city and state are responsible and no one else. Timidity and indifference, and the habit of never speaking for any cause except under the stimulus of fee are, alas! the common vices of our noble profession. There is no other calling that does not protect its own interests with jealous care: labor men starve for their unions; scientists brave every peril and die oftentimes unostentatiously in an effort to lift their science to some higher plane, and add some troph y of discovery to its hoard of knowledge; medicine, engineering, and the church have their unnumbered martyrs. The law alone is left by its votaries in this commercial age to work out its own salvation. This is the cause of causes. It is useless to talk of legal reforms until the profession is thoroughly aroused to a sense of its responsibilities in the matter. Our over-worked judges cannot do it: the Press cannot do it; its writers are brave and enlightened, but the counting-room has its policy of commercialism and hesitates to offend the courts by suggesting innovations which may not be acceptable to the judges who try the libel cases and dispense the valuable newspaper patronage: the business men cannot because they have not sufficient legal knowledge and have to depend upon the lawyers: the politicians would like to, but in their own way.

The "Law's Delay Bills" pending to-day in the state legislature are by far the most important and far-reaching measures that have been before that body for many years, and still they are the least regarded, and their passage is imperiled by the apathy of the members of that great profession to whom the cause of justice has been entrusted.

It was Alexander Hamilton who said, "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit."

J. Noble Hayes.

New York, N. Y., April, 1905.

CELERITY IN COMMERCIAL CASES IN FRANCE

By B. H. Conner

Of the New York City Bar

THE chief commercial court of France is the *Tribunal de Commerce*. Its organization is controlled by the *Conseil d'Etat* (Council of State), the highest administrative court of France, having a jurisdiction similar to that of a fiscal court or Court of Claims in the United States. This court regulates by its decree (Réglement d'Administration publique), not only the number of *Tribunaux de Commerce* which shall be established in the country, and the number of judges and deputies of which each shall be constituted, but also selects the towns in which such courts shall be located. In designating the latter the *Conseil d'Etat* is guided by the relative commercial importance of the respective towns; so that the promptness and facility with which commercial cases are disposed of in the business centers of France may be said to depend directly upon the despatch with which the *Tribunaux de Commerce* deal with the cases coming within their jurisdiction.

That jurisdiction is very broad. It embraces the functions of a court of admiralty and a court of bankruptcy. It has jurisdiction of disputes growing out of ordinary commercial transactions; and, in addition, it has appellate jurisdiction of causes in which the amount in litigation does not exceed 200 francs, tried at first instance before the *Conseil de Prud'hommes* (Council of prudent men). The latter is a local board appointed by authority of the government upon the recommendation of municipal councils or boards of trade. Every such *Conseil* consists of not less than five members, selected for their knowledge of a particular trade. These boards have jurisdiction of disputes between employers and employes in the trade for which they were chosen, the employers being represented by the *Prud'hommes patrons* and the employed by the *Prud'hommes ouvriers*. They act as conciliatory committees in labor disputes and seek to bring to the knowledge of the authorities flagrant violations of the labor and factory regulations.

The *Tribunaux de Commerce* are each composed of not less than two nor more than fourteen judges, in addition to a president.[1] They are under the supervision of the Minister of Justice. Perhaps the most striking feature of the *Tribunaux de Commerce* is that they are composed, not of lawyers, but of laymen, chosen from the commercial men of the community. The members are named at a meeting of electors, "chosen from merchants esteemed for their honesty, sense of order and economy," who elect the judges from the ranks of experienced financiers, directors of manufacturing and trading companies, masters of ships, etc. The number of electors must be not less than 50 nor more than 1000. No salary is received by these judges.[2]

The commercial transactions coming within their jurisdiction are termed "Actes de Commerce." Mr. H. C. Coxe, in his work entitled "Manual of French Law and Commercial Information" (p. 232) has given the following excellent translation of the two important sections of the Code de Commerce defining this term.[3]

"Every purchase of produce or merchandise, raw or manufactured, for resale or even simply to hire out; every manufacturing enterprise on commission for transport by land or water; all enterprises for supplying goods' agencies, business offices, establishments for sales by auction and establishments for public amusement; all operations

[1] Code de Commerce, Arts. 615–618.

[2] As to their election, see Code de Commerce, Arts. 618, 619.

[3] Code de Commerce, Arts. 632, 633.

of exchange, banking or commission; all operations of public banks; all obligations between business men and tradesmen and bankers; all operations between persons in relation to bills of exchange.

"And so are considered also *Actes de Commerce* all operations in connection with the construction, purchase, sale, and resale of vessels for foreign and inland navigation, maritime transport of all kinds, all purchase and sale of rigging apparatus and stores, the chartering of vessels and bottomry and *respondentia* bonds; all insurance and contracts concerning maritime commerce; all agreements and arrangements for paying for the crew; all contracts for service of seamen for the merchant service."

The question of what is a commercial transaction within the meaning of the Commercial Code gives rise to considerable difficulty. Many cases which might appear to come within this class are held not to do so and many are expressly excepted. For example, an action brought against a trader for goods purchased for his private use is excepted; and a suit on a promissory note, signed by a person not a trader and not given for purposes of exchange, banking or commission, may be referred to the Tribunal Civil at the option of the defendant.[1]

Judgment of the *Tribunal de Commerce* is final:

1. When the parties have expressly stipulated that it shall be final.

2. When the principal claim or any counter-claim does not exceed the sum of 1500 francs. A proper case, however, even though the amount in controversy, as above, does not exceed the sum of 1500 francs, may be reviewed by the Court of Cassation, which has no power to reverse or revise the judgment, but can only direct that it be heard by another tribunal of commerce.

PROCEDURE

The rapidity with which cases are disposed of in the *Tribunaux de Commerce* is due primarily to the simplicity of their procedure. The advantages of the system, in economy of time, may be summarized as follows:

1. The pleadings are exceedingly simple. The cause is brought before the court by means of an *Assignation*, a sort of combination of Summons or Writ and Declaration or Complaint. This *Assignation* is prepared and served at the request of the plaintiff, by a *Huissier* (a court official or constable). It contains a statement of the amount and nature of the plaintiff's claim. In the absence of an affirmative defense a general denial is presumed and the complaint may be said to be traversed of record. If the defendant alleges a counter-claim, a process, similar to the *Assignation* must be served. This may be said to serve as a bill of particulars of the counter-claim. At least one day must elapse between the return-day of the *Assignation* and the trial of the action. The Tribunal has power, in important cases, to order the trial to proceed from day to day until concluded. There are no vacations in the Tribunal of Commerce. In the Department of the Seine the Tribunal is divided into twelve sections, one of which sits every day and each of which sits every fortnight. Adjournments are consequently usually made for a period of two weeks, and *Remise à Quinzaine* is a familiar disposition to the Paris lawyer.

2. There are no juries, and the delays of taking testimony and lengthy arguments, as well as the strategies of calendar practice, as understood by the English and American lawyer, are little known to their French *confrères*.

3. The judges, being laymen, have little regard for technical claims or defenses. The *Tribunaux*, being open to all persons who wish to appear before them, are largely frequented by men whose professional skill is not of the highest order. There is a semi-professional or quasi-official class who specialize in the practice of the Tribunal,

[1] Code de Commerce, Arts. 636–638.

called "*Agrées*," but, except for their experience and prestige, they have no claim on the litigant such as have the members of the bars pleading before the other courts of France. Under the system of the Tribunal, the inexperience of a large portion of those practising before it may be said to hasten rather than to retard a decision in their respective cases.

4. The French law of evidence differs widely from the English system. The French code knows nothing of the rules of materiality, relevancy, and competency, so dear to the heart of the English or American trial-lawyer. Any evidence offered is received and considered according to the weight to which it is entitled in the opinion of the judge. As a result the delays incident to the introduction of evidence under the English system, the laying of proper foundations, the hearing and weighing of objections, cross-examination, etc., are obviated. And whatever may be said of the effect on the system as a science or the results from the standpoint of logic and justice, it cannot be denied that the French rules of evidence, which, to the American lawyer, appear conspicuous chiefly by reason of their absence, greatly expedite the work of the courts in disposing of the causes on their dockets. Moreover, excepting in criminal cases, cases in which the amount in controversy does not exceed 150 francs and where directed by the court in special cases, there is in the French courts no oral evidence. Letters and other documentary evidence are received and considered without being sworn and ordinarily without any form of legalization. Here again the only test of materiality is the view of their worth existing in the mind of the judge.

5. The doctrine of *Stare decisis* is unknown to French law. To render judgment by way of general and settled decisions is expressly forbidden by law.[1]

While decisions may be and frequently are cited for their logic and persuasive force, yet needless to say much of the time which would otherwise be consumed in the perusal of briefs and the consideration of precedents is saved to the courts by this provision. A trial in a French court usually consists, therefore, merely in a reading of the correspondence and other documents submitted by the parties and the hearing of the arguments of counsel, directed chiefly to the elucidation of the facts in evidence. In difficult cases, and cases involving accounts, an expert may be asked for his advice (*avis*) or one or three *Arbitres* nominated by the court, either upon its own initiative or at the request of the parties. The office of an *Arbitre* is analogous to that of a referee "to hear and determine the issues" under the American system. The *Arbitre*, however, is an official of the court, from a list of which selections are made by the judges upon occasion. The *Arbitre* first attempts to effect a compromise between the parties, failing in which he examines the evidence and files a report with the *Greffier* or clerk of the court. His report is not binding on the judge. An argument is usually had by the parties or their representatives before a *Juge en Delibéré* upon the question of confirming the report, after which judgment is rendered. A party considering himself aggrieved may appeal to the *Tribunal Civil*, provided the amount in question exceeds the sum of 1500 francs. In case of judgment by default a notice may be served stating that the losing party makes *Opposition* to the judgment. The effect of such *Opposition* is to bring the case again before the same judge for trial. Before execution the judgment must be registered and notified or "signified" to the debtor by the *Huissier;* registration fees must be paid, varying according to the amount and nature of the judgment. By a proper application in the *Assignation* the plaintiff may obtain an *Execution provisoire*, which means that there shall be no stay of execution by reason of appeal.[1] In such case the

[1] Code Civile, Art. 5.

[1] Code de Procédure Civile, Art. 439.

money or property in question must be held by the *Huissier* after execution until final judgment.

In bankruptcy a *Déclaration de Faillite* (Declaration of Insolvency) may be issued at any time at the request of one or more creditors or upon the court's own motion. In this *Declaration* a member of the Tribunal is named as *Juge-Commissaire* to supervise and facilitate the proceeding. An appeal will lie in a proper case from an order of the *Juge-Commissaire* to the *Tribunal de Commerce*. The insolvent must file a balance-sheet or schedule showing his assets and liabilities. The law and practice in bankruptcy matters are quite similar to those under the American system. All debts, whether due or not, are discharged by the bankruptcy.

The *Tribunal de Commerce* is not exempt from the blame that attaches to the courts of all lands. But it may fairly be said that the dissatisfaction with its workings, in the minds of the members of the Bar, has its foundation chiefly in the fact that its members, not being educated in the science of law, do not always grasp the questions presented to them in their legal aspect, and their decisions bear the stamp of the commercial training of the judges; savoring, perhaps too frequently, of compromise and giving rise to great uncertainty. In point of celerity, promptness and vigor they are exceptionally satisfactory and worthy of the emulation of the courts of a rival system.

PARIS, FRANCE, April, 1905.

THE SITUATION IN ITALY

BY HENRY BURNHAM BOONE

Of the Virginia Bar

THE situation here in legal matters offers perhaps little that can be compared easily with our own. The construction of the judiciary is totally different and the practice of civil law is so widely at variance with the practice of common law that it is not plain to see how one can borrow anything of definite use from the other.

The rapidity with which cases are tried in Italy depends in a measure of course upon the wishes of the lawyers who conduct the cases. Under the practice act of 1901, distinction is made between suits commercial and suits not commercial. In commercial suits the defendant may be cited to appear in six days. If he does not appear he must be cited again. If at the second citation he does not appear, the case is heard without him and judgment given. After judgment he has only one month to appeal. If the defendant appears there are allowed five continuances and no more. After those have been granted the case must be tried or the judge cancels it. The length of time allowed for a continuance depends upon the judge, but, if one of the parties represents that the affair is urgent or merely the settlement of a debt, he is bound to make it short. In all such cases judgment can always be had in six months, but it is usually had in two. The proportion between the cases and the number of courts open to hear them is such that if the parties are ready they may be heard at the first presentation of the issue. There is never the long list of cases awaiting trial that we have. In the practice of law in Italy the process is much more summary, but this has been true only since 1901 when the practice act referred to went into effect. Before that a continuance could be had for cause shown and the trial of cases was postponed often fifteen or twenty times. The rapidity with which suits are conducted in Italy is

due perhaps in a great degree to the construction of the civil courts under the Legge Civile. There are no juries. Instead the court is composed of a president and two associate judges. In courts where the issue is the settlement of long and intricate accounts there are commissioners whose office and duties are of a permanent nature.

The office of judge is not a chance honor depending upon his popularity among voters, or his pull with the party in power, or his acquaintance with the governor of a state. The judiciary of Italy is open to all on the basis of qualification and fitness. A man becomes a judge through a systematic course of training. Examinations are held every year for the positions at the foot of the ladder, and the young man, once entered upon this line of work, finds that his promotion is steady and dependent upon his qualifications. It is a separate department of the civil service. The young judge begins his career as a petty justice in the lowest civil court with a jurisdiction of suits up to twenty dollars, or as associate justice in a criminal court with jurisdiction over minor offenses. The next step is to the Pretura with a jurisdiction up to three hundred dollars and also appellate power over the cases sent up from the lower court. After a certain period of years he then becomes one of the judges of the Tribunale or highest civil court of first resort. From this he may be appointed to the Court of Appeals or the Court of Cassatione, the highest court in Italy. In the Italian system a judge has always been on the bench from his youth, and as he probably entered the service from the university he has probably never practised as an advocate.

The number of courts sitting in an Italian city is dependent upon the amount of business usually conducted, and with an increase of business the Minister of Internal Affairs must create new courts. A representative to the chamber told me to-day that any civil suit could be begun to-morrow and unless something extraordinary happened he could have judgment, appeal, and new judgment in six months or less. I believe that the absence of juries and the greater experience of the judges is after all the reason why an Italian court gets through so much more business than our own.

ROME, ITALY, April, 1905.

The Green Bag

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Communications in regard to the contents of the Magazine should be addressed to the Editor,
S. R. WRIGHTINGTON, 31 State Street, Boston, Mass.

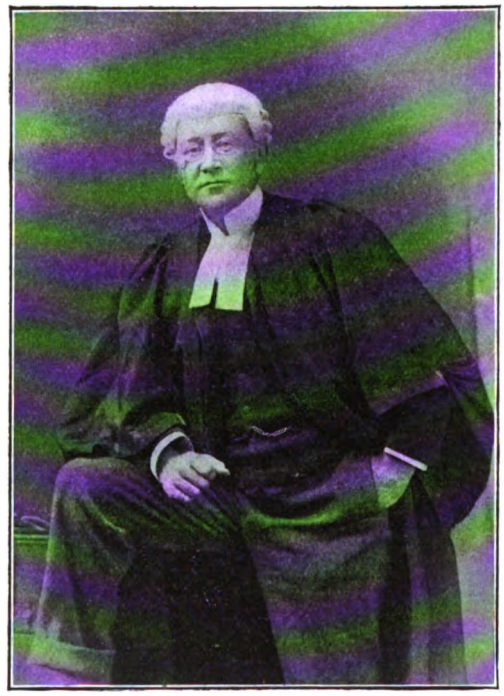
The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

BY the recent public discussion in Chicago of the causes of and remedies for the extreme congestion of business in its trial courts, coming at a time when the Bar of Colorado had been devoting much time to the problem of remedying the arrears of business in their Appellate Courts, and when Rhode Island was revising its entire judicial system, and Baltimore was experimenting with new methods designed to avoid the difficulties experienced by Chicago, and Boston was again compelled to face the problem of increased court facilities, public attention has been brought more widely and forcibly than for many years to the ever old and ever new problem of the "Law's delay." In view of all this public interest and the necessity which it imposes upon lawyers everywhere to form an intelligent opinion upon the subject — since the remedy, if remedy there be, must ultimately be found by the lawyers themselves — it has seemed that it might be not without interest to our readers to have a comprehensive discussion of the subject from different points of view, and to this purpose we have devoted the whole of our present issue. Recently a commission in New York studied the local problem with special reference to improved conditions elsewhere. The publication of the results of their researches called to our attention the surprising fact that England, the historic home of legal delay, had been quietly mending its procedure during recent years until it had attained a celerity with which, in this country, there seemed little to compare. We, therefore, requested a description of the English methods from R. Newton Crane, Esq., and submitted proofs of his article to eminent judges and lawyers throughout the country, requesting an expression of their opinions upon the applicability of English methods to local conditions and also their suggestions upon the general subject. As might be expected, in many instances our efforts to obtain such contributions were unavailing. Pressure of other business and, perhaps, fear of the consequences of hasty expression of opinion deterred many. We have been favored, however, with contributions from different parts of our country by men whose standing in the profession gives weight to their word upon any discussion of its problems, and on behalf of our readers we wish to take this opportunity of thanking them for their kindness in taking time from their practice, often at great personal inconvenience, to assist in forming an opinion upon this very important subject.

Although it seems unnecessary to give any extended account of the experience and ability of these men, some of the names of our contributors may be unfamiliar to some of our readers, and for their benefit we will pursue the custom adopted in previous numbers of a brief editorial note. Mr. Fiero, Mr. Russell, and Mr. Hayes are among the leading trial lawyers of New York. Mr. Fiero is dean of the Albany Law School and chairman of the committee on law reform of the New York State Bar Association. He took an active part in the investigation of this subject by a New York Commission ten years ago. Mr. Hayes was counsel for the Commission of 1903, whose report is above referred to. Mr. Miller, Mr. Rogers, Mr. Westenhaver, and Mr. Gibbes are eminent trial lawyers of Chicago, Denver, Cleveland, and Columbia respectively. Mr. Rogers was selected to deliver the address for the Bar at the installation of the new Supreme Court Judges of Colorado, from which the contribution we publish is an extract. Mr. Elder is one of the leading jury lawyers of Boston, and his time is constantly spent in the trial of cases. He was one of a committee of the Bar selected by the late Chief Justice of the Superior Court to advise with the judges regarding methods of expediting

their business. Mr. Storey is generally regarded as the leader of the Boston Bar, and though he now devotes comparatively little of his time to trial work his early reputation was made as a jury lawyer. Our other contributors represent the point of view of the Bench. Judge Dillon, though best known as an authority upon municipal corporations, was for many years United States Circuit Judge for Iowa. Mr. Stockbridge is Judge of the Supreme Bench of Baltimore. Mr. Lunt was formerly a *nisi prius* judge of Colorado, and Mr. Stein, until the last state election, held a similar position in Chicago, where he was generally regarded as the ablest of his associates. Mr. Swayze is a member of the Supreme Court of New Jersey. Judge Grosscup is United States Circuit Judge for the district of Illinois.

Mr. R. Newton Crane whose contribution is the feature of this issue was for many years in practice in St. Louis, and is a member of the New York Bar, but for the past eleven years he has been in practice as a barrister in London, has had an extensive practice in all the courts, and has advised and appeared for the American Embassy and United States Government in all legal business and litigation.



R. NEWTON CRANE

One fact that has been forcibly impressed upon us in our preparation of this issue, is the almost entire absence in this country of accurate knowledge as to the efficiency of various tribunals. New York, as a result of the work of the Commission of 1903, now has some statistics to work from, and Chicago has recently attempted, in the face of some judicial opposition, to provide such information for the future. In these days of multiplied statistics it would seem that the results of the work of the courts might be calculated upon some scientific basis from which reasonably accurate deductions might be made. Our English brethren have maintained such a system so long that valuable averages and comparisons are now available.

A summary of the different comments upon Mr. Crane's article may be of interest to distinguish the points upon which there seems to me some uniformity of opinion from those upon which there is more doubt. There seems to be general commendation of any change which will reduce the number of new trials granted in a single case. This is especially commended by Messrs. Fiero, Gibbes, and Westenhaver. There is also a general desire for improvement of the lowest courts of record and the limitation of appeals therefrom. This is mentioned by Messrs. Gibbes, Westenhaver, and Elder. The need of better judges as well as lawyers for the trial of cases, and the increase in their compensation is favored by Messrs. Stein, Miller, Swayze, and Lunt, and closely connected with this the English custom of a special class of trial lawyers is particularly approved by Messrs. Fiero and Miller. The summary judgment in cases in which there is no defense appeals to Messrs. Gibbes, Hayes, and Westenhaver, and Mr. Elder calls to mind the similar but little used privilege in Massachusetts. The increased interference of judges in the trial of facts is approved by Messrs. Elder, Storey, and Lunt, though the latter doubts the possibility of adopting it in this country. Mr. Elder and Mr. Hayes ap-

prove of the increase in number and quality of special masters to relieve judges. The limitation of continuances is approved by Mr. Gibbes, and opposed by Mr. Fiero. The elimination of bills of exceptions is approved by Judge Swayze and Mr. Elder, and objected to by Mr. Gibbes. The abolition of briefs is approved by Judge Swayze, but opposed by Mr. Fiero. An increase in costs is regarded as essential by Mr. Elder, but though its efficacy is admitted, it is not favored by Messrs. Fiero and Westenhaver. The summons for directions is regarded as an improvement by Messrs. Fiero, Hayes, Gibbes, and Elder, but under the Ohio practice seems unnecessary to Mr. Westenhaver. There are differences in American practice which English judges do not have to contend with, such as the constitutional right of trial by jury mentioned by Judge Dillon, and the general increase in constitutional questions referred to by Mr. Rogers. The excessive detail and the great opportunity for appeals on technicalities in practice under the New York Code are emphasized by all of the New York contributors. Segregation of different classes of common law actions in separate courts is commended by Messrs. Stockbridge and Elder.

On the whole it would seem that many of the details of the English procedure can be wisely adopted in different localities without serious change in present systems. The most important of these would seem to be the summons for directions. Though the importance of this would be diminished if the trial of cases could be effectively limited to experts, in this country that development seems a product of the remote future. However certain it may be that the important trials in future must be conducted by trained specialists, it seems unlikely that we shall for many years establish a professional sentiment so strong that a strict division of barristers and solicitors can be maintained. As long as inexperienced and ill-trained lawyers must take up the time of the courts it seems of importance that they should be forced to hammer their cases into proper shape for trial under the direction of competent subordinates of the judges, and it is submitted that the tendency to settle cases would be greatly increased if parties were forced to promptly prepare them, and issues were distinctly marked out at an early stage of their development. Our modern pleadings avoid the injustice of the older technicalities, but we should recognize their weaknesses and strive to remedy thein.

One other suggestion which calls for comparatively little change under our established methods in proportion to the results obtainable, is the assignment of special classes of cases to special judges. Commercial cases where time is of the essence need opportunities for speedy hearing which may well be refused to that class of cases which lawyers and their clients to-day regard with most disfavor, and the multiplication of which on our jury lists is the greatest cause of congestion. Opinions may well differ as to the effect upon these cases of speedy or delayed hearing. Mr. Miller thinks that prompt hearings would discourage much of this litigation which is generally deemed dishonest, but a former counsel for the Boston & Maine Railroad once said that if prompt hearing were given to their cases of this nature they would occupy the trial courts of Massachusetts to the exclusion of everything else for a year. He believed that delay afforded greater opportunities for settlement. At least there would be general agreement that promptness is less important for these cases than for commercial cases, and the results of the establishment of the separate Commercial Court in Baltimore will be awaited with interest. It is submitted that it is along these lines of specialization that improvement in the rapidity with which cases can be handled must be looked for. Much is said in these commentaries of the desirability of specialization of counsel for these purposes, but only Judge Stockbridge has called attention to the equal importance of specialization on the part of trial judges.

And finally we must admit that the crux of the difficulty is exposed by Mr. Hayes when he puts the blame on ourselves. Among all professions the law alone deliberately divides its forces, so that one half, of varying components, is ever striving to perpetuate its historic defects and take advantage of every device to prolong the process of justice. This to be sure is the will of the immediate client, but are we as a body, blameless in cultivating this code of ethics?

CURRENT LEGAL ARTICLES

This department represents a selection of the most important leading articles in all the English and American legal periodicals of the preceding month. The space devoted to a summary does not always represent the relative importance of the article, for essays of the most permanent value are usually so condensed in style that further abbreviation is impracticable.

AGENCY (Estoppel)

THADDEUS D. KENNESON in the April *Columbia Law Review* (V. v, p. 261) contends that the New York doctrine of the liability of a principal for the issue of fraudulent receipts by his agent is "A Misapplication of the Doctrine of Estoppel."

"The doctrine of these cases may be stated thus: Where the right of an agent to exercise his authority depends upon the existence of extrinsic facts, and the exercise of the authority is itself an express or implied representation by the agent that such extrinsic facts exist, and the agent exercises his authority where such extrinsic facts do not exist, the principal is estopped to deny the truth of the agent's representation that such facts do exist, and is, therefore, bound by such representation, to any person who has parted with value in reliance upon the agent's representation and has acted in good faith. Where, however, it appears that the agent has acted for his principal in a transaction with himself individually, good faith, according to the Court of Appeals of New York, calls for no inquiry to ascertain whether the agent has in fact been impelled by his individual interests to abuse the authority conferred upon him by his principal." . . .

"Surely if the plaintiff can deny the truth of the agent's representation and make its very want of truth the basis of recovery, the principal cannot be refused the right to assert its falsity. The principal in such a case is bound, if at all, not because of the assumed truth of the representation, but just because it is false, and the plaintiff has, assuming it to be true, acted on such assumption to his detriment. The action is one of deceit, and the falsity of the agent's representation is an essential element in such an action."

The author commends the distinction drawn in other states which imposes a duty of inquiry on those dealing with an agent who issues such receipts to himself.

BIOGRAPHY (Brougham)

AN able *critique* of Lord Brougham by J. A. Lovat-Fraser appears in the *Juridical Review* for March (V. xvii, p. 17).

BIOGRAPHY (Kinross)

Two brief estimates of Lord Kinross, late Lord Justice General of Scotland, by Rt. Hon. Lord Davey and Thomas Shaw are published in the March *Juridical Review* (V. xvii, p. 1).

CONSTITUTIONAL LAW (Insular Tariffs)

"The Final Phase of the Insular Tariff Controversy," as presented in a recent case before the Supreme Court is discussed by Solicitor-General Henry M. Hoyt in the April *Yale Law Journal* (V. xiv, p. 333). As might be expected he upholds the broad imperialistic view which he calls the "public side" of the argument. In the cases in question the validity of the military tariff of the Philippines is involved and sustained by the author under the war power on the ground of paramount war necessities.

CONSTITUTIONAL LAW (Interstate Commerce)

"The Concurrent Power of the States to Regulate Inter-State and Foreign Commerce" is discussed by David Walter Brown in the April *Columbia Law Review* (V. v, p. 298). He submits as the test for determining when the power is exclusive and when it admits of state regulation the following:

"Congress has exclusive power to directly regulate inter-state and foreign commerce, but the several states have power concurrently with Congress to indirectly affect that commerce by regulation of its incidents. This power of the state is, however, subject to the limitation that the law of the state must not conflict with a law of Congress on the same subject, must not impose a tax upon an incident of commerce in its capacity as such nor

by discriminating nor exceeding the reasonable requirements of the case." . . .

"It is now well settled that, subject to the limitations above noticed, the state may exercise general control over the incidents of interstate and foreign commerce in the interest of public health and order. And the distinction between the plenary power of the state to control the incidents of that commerce and its lack of power to directly regulate the commerce is clearly indicated and sharply defined in the well settled contrasting principles that from the absence of Congressional legislation a presumption arises against the power of the state to legislate for the direct regulation of commerce, but in favor of its power to legislate for the indirect regulation thereof by regulation of its incidents."

From a summary of decided cases he shows that "at the passage of the Sherman Anti-Trust Act in 1890 the difference between the direct and the indirect regulation of interstate and foreign commerce by the states had been well worked out by the Supreme Court, and it had been settled by decision upon decision, from Marshall's time down, that the indirect effect upon that commerce proceeding from the regulation of its incidents by the states was not obnoxious to the Constitution, provided the regulation was reasonable and not discriminative, however great that effect might be. It was not the degree of the effect, but the nature of the regulation which determined whether the state law was valid or invalid. After the passage of the Sherman Act the Supreme Court at once perceived the relation of this principle to the analogous question, whether only direct or also indirect and incidental restraint of that commerce was obnoxious to the act; and it was decided upon reference to the cases which had sustained the power of the states to indirectly regulate commerce, and was settled as decisively as the Supreme Court can settle anything, that only such contracts and combinations as directly, and not such as indirectly, restrained commerce were obnoxious to the act. In these cases the Supreme Court nowhere indicates that it gives any peculiar, or technical, or constructive meaning to the terms 'direct restraint' and 'indirect restraint.' On the contrary, it is evident that these terms are used in their ordinary sense. That is direct or indirect restraint in law which is the one or the other in fact, according to the practical understanding and experience of men. In this state of the law the Northern Securities case reached the Supreme Court. It presented a clear example of restraint which was not direct in fact, a case wherein there was absence of any restraint and the presence only of a power to restrain, not exercised or threatened to be exercised. And the court, departing from the principles of eighty years, held the mere power to restrain to be actual direct restraint, — by some singular process of reasoning, not logical, holding that which was indirect restraint in fact to be direct restraint in law. Whether a decision so at variance with the court's past holdings will prove of permanent importance in the development of the law or will be rather distinguished and whittled down until it is found to settle nothing, cannot yet be told. But it was a grave departure from the long line of prior decisions which uphold as well local autonomy as national power and justify the alarm with which it was received."

CONSTITUTIONAL LAW (Obligation of Contracts. Corporations)

THE treatise by Horace Stern on "The Limitations of the Power of a State under a Reserved Right to Amend or Repeal Charters of Incorporation" is concluded in the March *American Law Register* (V. liii, p. 145). This chapter treats of "the corporation and third persons" of whose relations he says:

"Two propositions have been advanced by the courts with general uniformity:

"*First.* The mere fact that the state has reserved the right to revoke or alter a charter of incorporation granted by it gives to it no direct power to alter or impair the contracts entered into between the corporation and third persons.

"*Second.* A corporation which is subject to the reserved power of the state cannot limit the exercise of that power by entering into contracts with third persons. If the state, where no such contract exist, can enact changes in the corporate charter, it can enforce such changes notwithstanding the fact that it may

thereby indirectly be impairing the obligation of such contracts.

"The result of the combination of these two propositions is simply that the state can exercise no greater and no less power over corporations because of the existence of outstanding corporate contracts. These contracts are themselves beyond the power of the state to impair, unless it be as an indirect and remote consequence of the state's revocation or amendment of the charter of the corporation in accordance with the power which it had reserved for that purpose."

The author then shows many decisions in which these principles have been ignored and concludes as follows:

"This completes our survey of the extent of the power of states over corporations whose charters are granted under a reserved power of revocation or amendment. Whether these reservation clauses would have come into existence had the doctrine of the police power and the other limitations upon the Dartmouth College decision originated earlier in our constitutional history cannot, of course, be predicated. That, properly construed, they form a helpful part of our constitutional and statute laws, by rendering corporations subject to state and therefore to popular control, is undoubted. But it is just as clear that, improperly extended in their scope, they have been construed to give to the legislatures of the states in many cases an amount of power over corporations which is dangerously inconsistent with American theories of the sanctity of property and of contract rights — a power which renders investments in the stock of corporations unsafe because subject to legislative whims and tyranny, and calling, therefore, it is submitted, for a careful revision of prevailing judicial tendencies in this important subject of state and federal jurisprudence."

Appended is a collection of the forms of the reserved power clauses in the different state constitutions.

CONSTITUTIONAL LAW (Treaties, Amendments of)

An important supplement to Mr. Hyde's article on "international agreements" in our April number is an article by B. M. Thompson entitled, "Power of the Senate to Amend a Treaty" in the April *Michigan Law Review* (V. iii, p. 427). It treats of the recent action of the Senate in the matter of the Arbitration and San Domingo treaties. As to the former he contends that in their original form they authorized the President to submit to arbitration only questions which he had authority to settle by diplomatic means. He calls attention to the important fact which Mr. Hyde elaborately discussed that the President has authority to enter into international agreements which are not treaties. Assuming, however, the propriety of the Senate's interpretation of these treaties he contends that its treatment of them was wholly unauthorized.

"The authority, power, or prerogative to advise the President and to concur is given to the Senate. The implied powers conferred upon the President and upon the Senate are limited to those which are necessary and essential to enable each to exercise the power specifically granted. The power to advise and concur does not include the power to negotiate a treaty since the Senate cannot take the first step in that direction. It has no authority to communicate with, or to receive any communication from, any foreign government." Not until after the treaty is concluded does it come before the Senate for action. Amendment is then impossible, for that requires the assent of the other party thereto. Any such attempt on the part of the Senate "is futile and an inexcusable attempt to exercise a power expressly conferred by the United States upon the President."

He cites the analogy of the power of confirming appointments under which no one has claimed that the Senate might originally nominate office holders, though in practice it has practically usurped that power. In case of a treaty there are objections to such usurpation not arising in the case of appointments since it involves the rights of other nations. He contends that if the Senate has a right to amend a treaty the President, under his veto power, has the right to amend any bill. He insists that there are serious dangers in the usurpation of power by the Senate and, in conclusion he says:

"It is natural that a body composed of able and ambitious men, not responsible for its official conduct, either to the people, or to any other department of the government,

should steadily and persistently endeavor to increase its power and importance. The result is that a power given the Senate to prevent the President from overturning the government and destroying the liberties of the people threatens now to seriously hamper the President in the exercise of his executive powers to the detriment of the people's interests at home and to the imminent peril of the rights of American citizens abroad."

CONSTITUTIONAL LAW (Corporations, Federal Control)

THE discussion aroused by Mr. Garfield's proposal of "Federal Control of Corporations" is continued by Thomas Thatcher in the April *Yale Law Journal* (V. xiv p. 301). He insists that the proposal to regulate incorporation under the guise of regulating commerce is a stretch of the real limitations of the Constitution, and he calls attention to the important fact that while the courts may be unable to question the motives of Congress and for that reason the legislation may be held constitutional, the duty of Congressmen themselves to act within the Constitution must not be forgotten. Assuming, however, the propriety of legislation by Congress under the cloak of a constitutional power for a purpose outside of its jurisdiction for an end which is desirable, he contends that the evils of over-capitalization and dishonesty in management are completely remediable by state legislation and afford no reason for federal control. He submits that the only reason by which it can be justified is the desire to curb the great corporations because of evils relating to competition, but he contends that this evil is not limited to the corporate form and that no practicable scheme of regulation has yet been proposed.

CONTRACTS (Reasonable Time)

IN the *Canada Law Journal* for April (V. xli, p. 305), Frank E. Hodgkins discusses "The Basis of Reasonable Time," as concerned in the performance of contracts.

"Many elements will enter into the settling of the exact limits of such a time. But they are all worked out, not to demonstrate the manufacturer's good faith *per se*, but to show that he is in the position of having so performed his obligation, according to the contract, as to enable him to compel performance of the latter by the purchaser. The proof is idle except for that purpose. Hence it is really reasonable time principally from the standpoint of the obligee, but modified by the situation of the obligor and always having regard to the requirements of the contract. For, while it may be reasonable under all the circumstances of the one, it may not be so viewed from the situation of the other. Both sides must be considered, but it is obvious that the ultimate test is that which, subject to the expressed terms of the contract, satisfies the requirements of the person to be obligated, otherwise it must fail of proof." . . .

"It was at one time thought that the actual or supposed circumstances present to the minds of the contracting parties were those which must alone be considered in determining whether the time occupied was reasonable, i.e., reasonable under those particular circumstances. That meant the exclusion of those actually arising, but not contemplated. This led to strange results, enabling one party to hold the other by reason of fictitious and not actual occurrences, and reasonable time became therefore easily calculable. The modern view is that the actual conditions of the moment, and the real difficulties to be then encountered, are the real factors for consideration." . . .

"Whether time is fixed or left to be determined by the court, it is only one element in the contract. It may or may not be essential. If it is not vital, then the limit of reasonable time, when fixed by the court, is as if it had been mentioned in set terms in the contract. When, however, from the nature of the subject matter, or the surrounding circumstances, or the commercial object of the undertaking, the court determines that the time of performance must necessarily be of supreme importance, it either holds the parties explicitly to the time as named in the contract, or in defining unspecified time adopts the strict standard which requires a high regard for the prompt and business-like performance of the obligation. This is what is meant by time being of the essence of the agreement."

CORPORATIONS (See Constitutional Law)

JURISPRUDENCE (Analysis of Law)

A. A. MITCHELL contributes to the *Juridical Review* for March (V. xvii, p. 30) a criticism of Holland's division of law into "public" and "private" which makes the state in the former the possessor of a right correlative to the duty of the individual, which right the state itself enforces.

"We think that there is no department of law which answers to Professor Holland's description of public law as a law where the same person, the state, is both party and judge; and, further, that Professor Holland's three branches of public law can be without difficulty placed in the *corpus juris* on other principles." In the modern developed state the legal person who confronts the private individual in so-called public law is in no case a true legal sovereign, but in every case a person as fully subject to law as the private individual himself. Or, looked at from the other end, judges and Courts of Law are not identified with the state as it appears in suits before them, but are, on the contrary, set by the law as arbiters between the state and private persons. Instead of a violation of a right in the state, a crime is simply an act which the legislator, in his wisdom, regards as objectionable and thinks fit to prohibit, that is, to make the perpetration of it the occasion of the infliction of something positively or negatively disagreeable to the perpetrator."

The author suggests as a demarkation of the whole field of law, the distinction of absolute and relative duties, " absolute duties being such as are not only, in common with all legal duties, commanded and enforced by the state, but enforced by the state at the state's own instance, not at that of a private person. The breach of an absolute duty is a crime, and we think that the law of absolute duties or crimes should be made the first great branch of law. From it we pass to the more complex and difficult, as well as more extensive, branch of relative duties or rights, a relative duty being a duty to which corresponds a right, defined by Professor Holland as a power in one person to control the actions of another person with the assistance of the state."

LITERATURE OF THE LAW

THOSE who enjoy the shafts that the unlegal have ever driven at our profession, will find an interesting collection of such quotations gathered by A. E. Wilkinson in an address before the Texas Bar Association entitled "Law and Literature" which appears in the March *American Law Review* (V. xxxix, p. 204).

NEGLIGENCE (Assumption of Risks)

THE English cases on assumption of risks are analyzed in the March *Juridical Review* (V. xvii, p. 43) by N. G. L. Child under the title "Volenti Non Fit Injuria."

"The application of the principle involved in the maxim presents no difficulties in the class of cases where a man needlessly exposes himself to a risk, and places himself in a position where there is no duty on the part of another to protect him from the risk." Where the defendant owed a duty of care "the measure of this duty varies greatly. Though the maxim says *volenti*, not *scienti*, yet mere knowledge on the part of the plaintiff of the danger causing the injury, if under such circumstances as to lead necessarily to the conclusion that the whole risk was voluntarily incurred, would disentitle him from bringing an action." This was formerly deemed a question for the court, but the tendency now is to leave it to the jury.

"In cases in which there is a qualified duty to take care — cases, *e.g.*, between master and servant, and cases of the *invitation* class — the question which most often arises is, not whether the plaintiff voluntarily and rashly exposed himself to injury, but whether he agreed that if injury should befall him the risk was to be his and not the other party's, and unless the defendant can get an affirmative answer to such a question the plaintiff will not be held disentitled to recover. There are, however, cases where the duty on the defendant is of a higher nature, where the plaintiff has a right to expect the place where he is to be free from danger. If the defendant is under a statutory duty to fence machinery, and omits this duty, no question of *volenti non fit injuria* arises.

"A person never is *volens* that he should be injured by negligence," but where a person is

put by the defendant in a situation where he is only suffering inconvenience and to avoid that he voluntarily runs into danger, he cannot recover, though if the situation had been one of alternative dangers he may recover.

PRACTICE (District Attorney)

AN entertaining and instructive account of the work "In the District Attorney's Office" in New York, by Charles C. Nott, Jr., appears in the *Atlantic Monthly* for April.

PRACTICE (Judicial Legislation)

THE impossibility of continuing indefinitely our present system of case law with the modern multiplication of authorities is the inspiration of an article on "Judicial Legislation in New York" in the April *Yale Law Review* (V. xiv, p. 312) by Wilbur Larremore. After quoting extensively from Mr. Whitney's article on the subject, reviewed in our January number, he submits that "We are not living under a system of scientific exposition and development of abstract principles, but, to a large degree, under one of judicial arbitration in which the courts do what is just in the case at bar and cite the nearest favorable previous decisions as pretexts." He calls attention to the recent startling decision of the New York Court of Appeals in the "Transfer Cases" where the court expressly disregarded the intent of the Legislature in interpreting a plain statute.

"While none of the attempted definitions of judicial law-making power may be satisfactory, its general nature is well understood. The courts constantly are required to make new law, but in so doing they should proceed by development and extension of settled principles. Radical departures from existing rules, abrupt changes of law, arbitrary discrimination between substantially analogous states of facts, should be made only by a legislature; and constitutions forbid special legislation even by the representatives of the people unless some legitimate basis of class distinction is made to appear. When — as has been shown to have been done in New York — a court lays down broad rules of public policy; applies one principle to one class of litigants and the opposite principle to another class, though the circumstances are the same; formulates affirmative rules of right and remedy for special kinds of property or business; changes the statute law radically because in its judgment the legislature has been ill-advised, or tardy in heeding the voice of reform; then certainly it may be said that the province of the legislature has been usurped. The disposition of the respective departments of an American government to self-aggrandizement by encroachment upon the rightful domain of other departments is well recognized, and, on the whole, the legislative department has been the chief aggressor. But in the broad field of boundless opportunity afforded by the litigation of New York, its judiciary may be seen to have manifested the same tendency on quite an elaborate scale."

TORTS (Insanity. Negligence)

WILLIAM B. HORNBLOWER contributes an article on "Insanity and the Law of Negligence" to the April *Columbia Law Review* (V. v, p. 278). He submits that though text-writers have declared the lunatic liable for his torts just as a sane person, "it may be questioned whether there is any sufficient authority in the reported cases for the proposition."

"The reasons assigned by the text-writers for the rule that an insane person can be held liable civilly for damages for tort, although not liable criminally for the same act, are based entirely on expediency." "It is questionable whether any one of these reasons is logically satisfactory. The analogy between an infant and a lunatic is only partially correct." "The other reasons assigned for holding a lunatic responsible in tort are also open to serious question."

"Without, however, going into a discussion of the general proposition that an action will lie against a lunatic in tort, and assuming that this is the rule of law, whether rightly or wrongly so, it is, nevertheless, subject to certain qualifications. Thus, it is well established that where actual malice is an essential ingredient in the tort, the defendant, if insane, cannot be held liable, and even in cases where he may be held liable without

proof of malice, or where the law presumes malice, he cannot be held liable in punitive damages. So also, where intent is an inherent ingredient in the offense, and where intent is not, in itself, conclusively presumed from the facts, the defendant will not be liable.

"When we come to the subject of negligence, we find the law to be in a most unsettled condition. It seems to have been assumed, in the earlier *dicta* in the books, that a lunatic would be liable for negligence in like manner as a sane person." "But, if a man be *non compos mentis*, it would seem that he should be no more liable for negligence than if he were blind or paralyzed and thereby physically incapacitated from doing or refraining from doing what an ordinarily prudent man should do or refrain from doing." "That a man should be responsible in damages for failing to do what he was physically or mentally unable to do, is certainly shocking to the commonsense of the average individual." "What difference is there between the case of physical obscuration of the senses and the total obscuration of the mental faculties?"

"The truth is that there seems to be absolutely no case where the liability of a lunatic for culpable negligence has been passed on judicially; at least, none has come to the notice of the writer, except the case of Williams *v.* Hays, with which the courts played battledore and shuttlecock, and which finally resulted in favor of the defendant."

"It seems, indeed, most extraordinary that the question of the liability of a lunatic for negligence should be, at this late date, still an open question in this state. One would suppose that the question would have arisen frequently and would have been frequently the subject of adjudication. Similar instances, however, are constantly recurring, in the experience of every practitioner, where questions which lie at the very threshold of our jurisprudence seem never to have come before the courts for consideration, or, at any rate, have never received adjudication by the courts of last resort. The true rule and the only rule consistent with justice and reason, and the rule towards which the authorities are evidently tending, is that a person who is *non compos mentis* cannot be held liable for negligence."

TORTS (Motive in Torts)

In the *Harvard Law Review* for April (V. xviii, p. 411), Dean Ames, under the title "How Far an Act May be a Tort because of the Wrongful Motive of the Actor," criticises the dictum in Allen *v.* Flood that the law does not "take into account motive as constituting an element of civil wrong." The author collects and considers instances in which the courts have passed on the question of wilful damage animated by wrongful motive which he divides into three groups. "(1) Cases in which the wrongful motive has no legal significance, the actor, by general judicial opinion, being subject to no liability at law, however severe the judgment against him in the forum of morals; (2) Cases which have divided judicial opinion, some courts deciding that the actor should be charged because of his wrongful motive, others ruling that he should not be charged, notwithstanding his wrongful motive; (3) Cases in which it is generally agreed that the actor should be charged because of his wrongful motive."

In the first group he includes cases where the plaintiff himself has violated a legal duty and is only suffering the consequences and certain instances of privilege in defamation. In the second group he includes the use of one's own land not for the benefit of the owner but to the detriment of a neighbor. "That the conduct of the defendants in these cases is unconscionable no one will deny. That they should be forced to make reparation to their victims, unless paramount reasons of public policy forbid, would seem equally clear. But the absence of such reasons is evident from the fact that in France and Germany and so many of our states the courts have allowed reparation, and from the further fact that in at least six states statutes have been passed making the erection of spite fences a tort. Such legislation is likely to spread, so that ultimately the cases in this second group will belong in the third group."

In the third group he includes malicious prosecution and abuse of privilege in defamation and the inducing of breach of contract, including the familiar trade's union cases.

The author submits that the true rule is that "the wilful causing of damage to another by a positive act, whether by one man alone,

or by several acting in concert, and whether by direct action against him or indirectly by inducing a third person to exercise a lawful right, is a tort unless there was just cause for inflicting the damage; and the question whether there was or was not just cause will depend, in many cases, but not in all, upon the motive of the actor. The motive to an act being the ultimate purpose of the actor is rightful if that purpose be the benefit of others or of himself, wrongful if the purpose be damage to another."

In conclusion he says:

"The *dictum* that our law never regards motive as an element in a civil wrong is as far from the truth as would be the statement that malevolently to damage another is always a tort. The truth lies in the middle. In certain cases, in spite of the wrongful motive of the actor, malevolently to damage another is lawful, either because the act is merely the exercise of an absolute legal right, or because it is justified by paramount considerations of public policy. Except in such cases, however, wilfully to damage another by a positive act and from a spirit of malevolence is a tort, even though the same act, if induced by a rightful motive, would be lawful."

TORTS (Motive. Interference with Contracts)

"Interferences with Contracts and Business in New York" is the title of an article by E. W. Huffcut in the April *Harvard Law Review* (V. xviii, p. 423), in which he also discusses the element of motive in torts.

"Intentionally to produce any of the above results and consequent damages by the use of unlawful means, is itself unlawful whatever the motive. Intentionally to produce any of the above results and consequent damages by the use of lawful means, is probably unlawful if the motive be unjustifiable, but is certainly lawful if the motive be justifiable. In New York no distinction is to be made between contracts of service and other contracts, or between inducing the breach of contracts and inducing the termination or non-formation of them. The only doubt that may be said to exist in this respect is as to whether the enticement of servants stands on any different footing from the interference with the performance of other contracts."

It is unlawful to induce a breach of contract by unlawful means. "Assuming a justifiable motive (if that be necessary), it is not unlawful by persuasion, argument, and entreaty, accompanied by picketing, patrolling, or spying, to induce a breach of contract or the termination or non-formation of contract. Assuming a justifiable motive (if that be necessary), it is not unlawful to refuse to work with another, or to notify the common master of that fact, or to threaten to quit if that other is retained in the employment; and if as a consequence the obnoxious workman is discharged or fails to obtain employment, he has no action for the damages caused thereby. Nor is it unlawful to refuse to deal with one who refuses to join in a lawful agreement as to the conduct of a particular business or who fails to keep such agreement; nor is it unlawful to notify the other members of the association of such non-agreement or violation of agreement."

Of the importance of motive he says: "It is difficult to escape the conclusion that, while the matter is by no means settled, the trend of opinion, and especially in the appeal courts, is decidedly toward making the question of motive or purpose a material one. But it is probable that the doctrine that 'intentionally inflicting harm upon another is actionable, unless it is justified,' does not mean in New York that the actor is put to his justification where he has used no unlawful means, but that where only means not unlawful *per se* are used the result is presumably lawful, and this presumption can be overcome only by proof of an unjustifiable motive. In other words, there is presumptively a privilege to employ any lawful means in social or industrial relations; argument, persuasion, and entreaty are lawful means; and the general and common privilege to employ these can be overcome only by showing that they are employed for an unjustifiable end, that is, an end which intentionally inflicts a damage upon a particular individual without a corresponding and compensating advantage to the one who inflicts it or to those whom he represents."

"Motive, therefore, in the sense in which that term is here used, must continue to be an important element in the decision of cases dealing with the interference with contracts

and business by persuasion and its incidental aids."

TORTS (Unfair Competition)

An address by William Draper Lewis, delivered before the Congress of Arts and Sciences, entitled "The Closed Market, the Union Shop, and the Common Law," is printed in the April *Harvard Law Review* (V. xviii, p. 444). From a brief consideration of recent decisions the author declares:

"That our courts have met the question of private law raised by the latest form of 'boycott' in an uncertain manner. When the legality of attempts to close the market by economic pressure on those who deal with rivals has been called in question, the tendency has been to regard the acts of the defendants as lawful; when the legality of similar attempts to unionize a shop has been called in question, the tendency has been to regard such attempts as illegal. In both classes of cases, however, we have conflicting decisions."

This uncertainty he contends is due to an error in fixing the attention primarily on the right of the defendant rather than injury to the plaintiff. He protests against laying down as fundamental the right of the defendant to sell labor or to sell goods, and contends that this right is no more fundamental than any other, and that its existence depends upon surrounding circumstances. The author proceeds to contend for the principle which has been explained in detail in these pages in the recent articles by Professor Wyman on the "open market" and the "open shop," and closes as follows:

"It is inevitable that from time to time acts which heretofore have been performed under circumstances which either did not injure others or for which the actors had a valid excuse, come to be performed under circumstances which either produce injury or deprive the usual excuse of its validity. When this occurs, courts are confronted with a new question in the law of torts. This is what is now occurring in the industrial world. In the past the act of buying and selling has either been without resulting injury to anyone, or if injury has resulted, as in the case where sharp competition has driven one of the competitiors to the wall, the interest of the community in procuring cheaper goods has formed a sufficient legal excuse for the injury. To-day, however, owing to the greater power of combination, the act of granting or withholding one's goods or labor can be made under circumstances which produce injury to others, and deprive the actors of any legal excuse for that injury. The worst modern examples of this are the attempts, of which the acts of the defendants in the cases discussed are instances, of associations of capitalists and of associations of laborers to close the market to outsiders or the shop to the non-union man or member of a rival union. In all of them the act of the defendants in granting or withholding their goods or labor was an act oppressive to those who would deal with the plaintiff. Its intent was to drive the plaintiff out of the trade or business which the defendants desired to monopolize for themselves. However words sounding of 'inherent rights' may momentarily cloud the issue, in the long run I believe our courts will, without exception, declare this form of 'boycott' illegal, and, as in Pennsylvania and Massachusetts, hold those who institute it liable for the injury they inflict upon others. To right the wrong inflicted on particular individuals, legislation is not needed. What is needed is to get rid of the notion that there are some acts, such as buying and selling, which a man has an inherent right to do under all circumstances, and hold to the fundamental position of our common law — that he who injures his fellow-man is liable for that injury, unless he can show that the community regards his act as conducive to the public welfare."

CORRESPONDENCE

AN INSTANCE OF PROMPT ENGLISH PROCEDURE

TEMPLE, LONDON, ENG., April, 1905.

The celerity with which the procedure in England permits cases to be despatched is illustrated by an action which was recently tried in the King's Bench Division, in which commercial cases are heard. The writ in the action was issued on the 15th of March and judgment was rendered on the 27th, the whole proceedings thus occupying only 13 days. The judge offered to give judgment on the 25th, but postponed it in order to meet the convenience of counsel and the parties. On the 28th the Appeal Court gave leave to appeal and on the 31st this was argued and judgment was delivered affirming the judgment below sixteen days after the issue of the writ. The case which was of very great importance, involving a large sum of money, is noticeable as being the first arising out of the war that has come before the Commercial Court. Three vessels belonging to the Heath Line were chartered by them to take cargoes of coal out to Vladivostok. Charter parties and bills of lading were made out for neutral ports, so that if the vessels were stopped by the Japanese warships they would be able to produce apparently innocent papers. The real contracts, however, were that the vessels were to carry the coal to Vladivostok. The vessels started on their voyage, but as it is now practically impossible to get there without being captured by the Japanese, the Law Guarantee and Trust Society (Limited), who were mortgagees of the vessels, asked the court to declare that they were not bound by the contracts. Mr. Justice Channel made the declaration, upon the ground that as the contracts were calculated to impair the security of the mortgagees, they were not contracts within the ordinary business of a shipowner. Although the learned judge did not in his judgment expressly deal with the point, this is the first case in which the right of a mortgagee of a ship to repudiate her engagements has been upheld where the voyage, as in the present case, has been partially performed and a payment made on account of freight, and the decision is considered a strong one.

STUFF GOWN.

A SCOTCH LAWYER-POET

MONTREAL, CAN., April, 1905.

I send you herewith a note from the London Academy, which you may find interesting.

R. D. MCGIBBON.

George Outram, who was born one hundred years ago, was "probably the first in Scotland, since the days of Sir Richard Maitland, to turn the dry process of law to poetic account." The quality of his verse the English reader must take largely on trust, for Outram was a congener of Lord Glenlee, who, though a "philosophical and abstracted gentleman," never used an English word when a Scotch one could be got. This is to be regretted, in Outram's case, because in ingenuity and fecundity of rhyme he would not degrade the company of Calverley or Owen Seaman. His best known piece is "The Annuity," the woful tale of an old lady annuitant, whose persistence in life threatened to bring ruin to the astute lawyer who sold her the annuity. In despair he contemplates her removal:

"I'd try a shot — but whar's the mark?
Her vital parts are hid frae me;
Her backbone wanders through her sark
In an unkenn'd corkscrewity.
She's palsified, an' shakes her head
Sae fast about ye scarce can see't;
It's past the power o' steel or lead
To settle her annuity."

Outram was born at Glasgow, but was educated in Edinburgh and called to the Bar there in 1827. After two years' practice he became editor of the Glasgow *Herald*, a post which he retained till his death in 1856. By far the greater part of his verse is concerned with legal subjects, the terminology of Scots law seeming to have a perennial fascination for his peculiar dry humor. After the fashion of the time Outram's verses were handed round in manuscript among a circle of friends which included lawyers and men of letters in Glasgow and Edinburgh. His "Legal and other Lyrics" were first printed privately in 1851, and subsequently were published in 1874.

THE LIGHTER SIDE

"BUT, pa, what is an 'idle jest'?"

"There are no idle jests, my son; they are all working all the time." — *Brooklyn Life.*

"WHAT reason does he give for not paying his wife alimony?"

"He says that marriage is a lottery, and hence alimony is a gambling debt." — *Collier's Weekly.*

"POOR fellow! Isn't he cross-eyed?"

"Yes, but he's a lawyer and you know he's the finest cross-examiner in the state."

AN appeal case was called in the Circuit Court of Alabama, and the judge wishing to know whether or not it was to be tried by a jury asked the plaintiff's attorney if the amount involved was less than twenty dollars.

"If your honor please," he replied, "it originally involved a three-dollar heifer calf, now, however, it involves a yoke of steers and two milk cows."

A MESSENGER boy had a case against the Elevated Railroad a few months ago, and obtained a prompt settlement. In spite of all that is said about the law's delay and the slowness of great corporations, with their claim departments and law departments, this claim was honored, as one might say, at sight. He was passing under the elevated structure, when a pot of red paint fell from above and landed on his head and shoulders, running down all over his blue uniform. He grabbed the paint pot and went straight up to the claim agent's office, where dripping red paint on the door mat (they would let him come no further into the office) he collected the price of a new uniform in what is believed to be record time.

"I — I'VE bought a farm about ten miles out of town," said the man with the black eye, as he entered a lawyer's office.

"Exactly — exactly. You've bought a farm and you've discovered that one of the line fences takes in four or five feet of your land. You attempted to discuss the matter with the farmer, and he resorted to arms."

"Yes."

"Well, don't you worry. You can first sue him for assault. Then for battery. Then for personal damages. Then we'll take up the matter of the fence, and I promise you that even if we don't beat him we can keep the case in court for at least twenty-five years. Meanwhile, he'll probably hamstring your cows, poison your calves and set fire to your barn, and you can begin a new suit almost every week. My dear man, you've got what they call a pudding, and you can have fun from now on to the day you die of old age." — *Central Law Journal.*

JUST now, when the cry is going up in cities like Boston and New York for more judges, and complaints about the delays of jury cases are loud and emphatic, the following quotation is not without interest. It is from the second volume of the "Records of the Court of Assistants of the Massachusetts Bay," recently published.

"Att a Court, holden at Newe Towne, Octob^{r} 6th, 1634. It is ordered that Ensigne Jennison shalbe ffyned the some of xx^{s} for vpbraydeing the Court with Iniustice, vttering theis words I pray god deliver mee from this Court professing hee had wayted from Court to Court & could not have iustice done him — &c."

SPAIN boasts probably the longest law suit in the world's history. It began (says the *Globe*) in 1517, and is still *sub judice*. The case, which concerns a pension, is between the Marquis de Viana and the Count Torres de Cabrera, and the accumulated sum in dispute would have reached fabulous millions had not four centuries of attorneys, barristers, and court officials taken considerate measures of appropriation to prevent the sum becoming unwieldy. In 1872 the case was, in the deliberate mind of Spanish jurisprudence, deemed more or less ripe for a decision; but circumstances every year arose which necessitated its being set back to the year following. The judges, however, have now become apprehensive lest the suit should reach its fifth century, and as this might reflect upon

the promptitude of Spanish procedure, the customary despatch is to be still further stimulated to secure that judgment be given within a period not exceeding two years longer. — *The Law Journal.*

THERE has recently appeared in English, French and Swedish, a notable and substantial volume on Sweden, its people and its industry, compiled by order of the government of that country, which, dealing as it does with all departments of Swedish life, makes an appeal to lawyers as well as to other readers. Among other subjects embraced by the scope of the work are the civil and criminal statistics of the country, and to these attention may be drawn. As to the figures relating to litigation in civil matters, one noticeable feature is the extraordinary diminution in the number of contested cases in recent years. Thus, for the period 1831–1840, when Sweden had a population of slightly over three millions, the average number of cases annually per thousand inhabitants was 26.69; between 1841 and 1850 the figures had dropped to 21.42, and almost continuously since then there has been a constant diminution, so that for 1896–1900, with a population of over five millions, the average number of cases annually has dropped to 8.12. In commenting upon this remarkable decline in litigation, the compiler attributes it to a constantly extending educational improvement among the masses which has lessened the attractiveness of going to law, but probably the more effective cause is found in the hint as to the slowness of the procedure in the various courts. Something like 40 per cent of the cases initiated are, it is stated, compromised or allowed to lapse. — *The Law Times.*

SIR JOHN MACDONNELL, in his introduction to the Judicial Statistics for 1903, shows the chief movements of legal business during the last ten years. One of the most conspicuous facts to be gathered from the summary is that the business of the High Court has shrunk, while that of the County courts has expanded. In the King's Bench Division, the proceedings begun increased 1.42 per cent, but the population increased 5.90 per cent; while in the Chancery Division — the only section of the High Court in which an actual reduction took place — the proceedings begun decreased 4.24 per cent. In the County courts, on the other hand, the increase of business — it is 8.70 per cent — has been more rapid than the growth of the population. Between 1894 and 1903 the number of proceedings begun in the County courts rose from 1,175,340 to 1,342,911; while those commenced in the High Court fell from 83,947 to 83,167. Now that the jurisdiction of the County courts has been extended, this tendency is likely to be much more evident when another decade of litigation is reviewed. — *The Law Journal.*

FROM the earliest times the law's delay has been subject for denunciation. The pompous pretense that the machinery of the law must move at slow and dignified pace is strictly kept up to-day as in olden times.

The case of Harry Gagan, of Cleveland, injured by a railway train, which was begun through his guardian ten years ago, when he was a boy of eleven, and which went up through all the courts and was remanded to the original court for retrial, has now been held invalid because the boy has become of age, and must sue in his own name.

John Rudnik, of Chicago, was injured in 1885. In 1904 the Supreme Court of Illinois awarded him $10,000. If the person or firm in whose employ he was injured was prudent enough to put away a sum of $10,000 in 1885, the beneficent operation of the principle of compound interest at six per cent has, by this time, added $20,000 to the original deposit. The injurer gets the $20,000; the injured gets the $10,000 — evidently a wrong has been done. The man whose leg is crushed earns his money when the crushing happens. If appeals, demurrers, replies, rejoinders, and other jockeyings lead justice astray for nineteen years, it is not the innocent that ought to suffer. — *The Bar.*

MR. H. T. DARLING, the 'Father of the Ushers' at the Law Courts, has retired after forty years' service in the Chancery Courts. Interviewed by a representative of the *Daily News*, who questioned him as to the state of the Chancery Courts when he first knew them, he said: —

"We thought nothing in those days of rising for the Long Vacation with eight hundred or nine hundred witness cases undisposed of. Those were days when there was work, heaps of work; people seemed fonder of law then. And yet, though there were three 'sittings' in each year, as well as four 'terms', we got more holiday. Why, one year, I remember, I had no less than six months and two days' holiday. Yet no; I do not believe that we kept parties waiting so long, and kept cases dangling on so long as has been made out. Cases did accumulate a bit, perhaps. But those were great days. The judges would listen to every word. In the whole of my forty years I never knew a judge fall asleep during a case. But I often thought they were wonderful men to be able to resist the temptation so well."

"What was the oddest scene you remember?"

"I think it was the occasion when a disappointed suitor threw an egg at the judge's head. It was the funniest sight imaginable, his Honour took it so gravely. You will find it fully reported in the newspapers at the time, March, 1877. The suitor was an American named Robert Cosgrave. At the close of the court, just as his Honour was rising, Cosgrave, who was standing beside me, moved suddenly, and — splash went the egg all over the judge's head and neck. At the moment, a counsel happened to have risen to make an application, and so the Vice-Chancellor had resumed his seat. But for that he would have received the egg full in his face, so well was it aimed. It broke on the top of the back of the judge's chair. I had seized hold of Cosgrave; but his Honour was hardly in a punning mood, meting out punishment was more in his humour. 'What did you throw that egg at me for?' he asked, when I took Cosgrave forward. 'Because I do not agree with your ruling in my case,' Cosgrave replied. 'Well, now, I will give you another, and you will see how that will agree with you. You will go to prison for contempt of court.' 'For how long?' asked Cosgrave. 'Until I choose to let you out,' the judge retorted.

"When we searched him at Holloway, we found a loaded revolver on him."— *The Law Journal.*

"It is pretty hard," said the Czar, suddenly arousing himself from a brown study.

"What does your Majesty mean?" asked the courtier.

"It's pretty hard to think of suing for peace, when you feel as if you ought to be suing for damages." — *Washington Star.*

In connection with lawyers trying to confuse experts in the witness box in murder trials, a case is recalled where the lawyer looked quizzically at the doctor who was testifying, and said:

"Doctors sometimes make mistakes, don't they?"

"The same as lawyers," was the reply.

"But doctors' mistakes are buried six feet under ground," said the lawyer.

"Yes," said the doctor, "and lawyers' mistakes sometimes swing in the air." — *Boston Record.*

A subscriber sends us the following sample of the elaborate testimonium clause common in English documents:

"IN WITNESS WHEREOF these presents typewritten on this and the preceding page by Mary Jane Eliza Jones, Clerk to Bishop & Abbott, Writers, Glasgow, are subscribed by us as follows, viz.: — By me the said Archibald Bishop at Glasgow on the 9th day of February, 1904, before these witnesses John Alexander McArthur and Walter George Robinson, both Clerks to the said Bishop & Abbott; and by me the said Andrew Abbott at Dumbarton on the date last mentioned before these witnesses Angus Ferguson, Engineer, Lee Foundry, Alexandria, and the said Walter George Robinson."

This, it is needless to say, is from the solidly Republican State of Pennsylvania:

The Democrats of Berks County, Pa., in the old days held their annual county meeting at the Court House, on the second Monday of August, the first day of Court of Quarter Sessions, which would bring the constables, grand and petit jurors, as well as the prosecuted and prosecutors and their witnesses, to court, and assure a large audience.

These meetings were called at one o'clock promptly in the afternoon, and were expected

to be over by the time for the meeting of court. Joseph Ritter, the court crier in those days, had more concern about the dispatch of the business of the court than he had for that of the Democratic County meeting; and near the time appointed for the meeting of court, he would have the prisoners on the outside of the court-room to be brought in for trial immediately after the adjournment of the meeting of the Democrats.

At one of these meetings in the early '70's, the Committee on Resolutions was detained rather longer than usual, and a certain ex-judge was asked to speak. He was concluding in eloquent style:

"Now, my fellow Democrats, in conclusion permit me to assure you, that all the indications throughout the length and breadth of this grand old Commonwealth, point to an overwhelming majority; and on the morning of the day after the election, the women will throw open the windows, the men will open the doors, and the cry will be, 'Make room, the Democrats are coming.'" As he repeated, "the Democrats are coming," standing inside of the bar in front of the aisle, with his arms outstretched at full length, about twenty or more of the prisoners came marching through the aisle, double file, and halted within a few feet of the ex-judge. The meeting was immediately adjourned.

GEN. BENJAMIN F. BUTLER, in pleading a case before an inferior court in Massachusetts for a poor working-girl who was on his free list, caused the presiding judge to threaten to fine him for contempt of court, to which Mr. Butler replied, in apparent surprise: "I have expressed no contempt for the court; on the contrary, I have carefully concealed my feelings."

LAWYER. — What can I do for you, madam?

EXCITED CLIENT. — W'y, my man's ben in jail now fer two weeks. 'Is time's out an' they won't let him go. I want you t' gimme a writ o' "have 'is carcass." — *Chicago Journal.*

AGUR'S prayer is a suitable one for a young lawyer, not merely the request, "Give me neither poverty nor riches," but the other parts of it as well. The prayer begins, "Remove far from me vanity and lies." Upon reading this request the first time I thought that surely the prayer was intended especially for young lawyers, "Remove *far from me* vanity and lies." But when I read the last request of the prayer, "Feed me with food," etc., I knew it was a prayer intended especially for young lawyers. They should earnestly repeat the whole of it; they *will* earnestly repeat the last part of it, "Feed me with food." — EUGENE RAY in the *Albany Law Journal.*

THE city council of Cleveland has recently passed an ordinance to issue bonds for "erecting hospitals and pest houses and for securing a more complete enjoyment thereof."

AN English lawyer was cross-examining the plaintiff in a breach-of-promise case. "Was the defendant's air, when he promised to marry you, perfectly serious, or one of jocularity?" he inquired.

"If you please, sir," was the reply, "it was all ruffled with 'im a-runnin' 'is 'ands through it."

"You misapprehend my meaning," said the lawyer. "Was the promise made in utter sincerity?"

"No, sir, an' no place like it. It was made in the wash-'ouse an' me a-wringin' the clothes," replied the plaintiff.

A JUDGE in one of the New York municipal courts has his own quick way of getting into the heart of a case. The following is told as a true story: —

The lawyer for the plaintiff had just finished presenting his argument, and, as he mopped his brow and sat down, the judge stared at him admiringly with wide open eyes and open mouth. Then he turned to the other lawyer, who had risen to his feet.

"Defendant needn't plead, plaintiff wins," he shouted.

"But, your honor," protested the lawyer, "let me at least present my case."

The judge looked weary. "Well, go ahead," he grunted.

So the lawyer for the defendant went ahead. When he had finished, the judge looked at him, too, with wide open eyes and open mouth.

"Don't it beat the Dutch!" he exclaimed. "Defendant wins."

A VERY good story is told of Judge Sherman, before whom was tried the Tucker case at East Cambridge. He was walking through the Boston streets recently, returning a shabby cotton umbrella to its owner, looking for all the world like a countryman, when a bunco steerer stepped up to him and claimed acquaintance.

"I don't seem to remember you," said the judge.

Upon being urged to refresh his memory, the judge, seeing through the little game, calmly said: "Well, my friend, I have sent so many of you boys to jail I can't remember you all, you know."

COL. HAY, the handwriting expert for Tucker, was so tormented with questions by Atty.-Gen. Parker that he declared he must have a drink of water before he could say another word. Judge Sheldon, smiling, replied: "I guess we'll adjourn, for it looks, Mr. Parker, as if you have pumped him pretty dry."

LAWYER (*to office boy*). — Samuel, did I see you reading a law book this morning?

OFFICE BOY (*proudly*). — Yes, sir.

LAWYER. — Well, Samuel, that gives you the status of a law clerk. Your salary will be discontinued Saturday.

HE was undergoing a poor debtor examination, and it was a new experience for him. He had given his name and age and then came the question, "Where do you live?"

He named a hotel in the city.

"How much do you pay per week for your board?"

"Fifteen dollars."

"Don't you think that is too much for a man who is trying to take the poor debtor's oath?"

"I have told the proprietor *fifty times* that it was too much, but he won't take off a cent."

A BOSTON attorney with greater professional zeal than sense of humor recently carried to the Supreme Court exceptions to a refusal of his motion for a new trial on the ground that two of the jurors slept or were in a condition to sleep during the trial. One is tempted to suggest the defense of estoppel.

IT was several years ago when I was still a young lawyer, representing a negro, charged with murder, with only one witness for the state, whose testimony, if believed by the jury, however, would convict my client. I had pursued the usual course of asking for continuances and postponements, with the hope that the state's only witness might depart this life. But naturally there at last came a day when no further delay was tolerated by the court. On the day set for trial I and my client were in our places in court. One looking at the expressions on our faces might not have believed the defendant was the counsel, but, no doubt, would have thought that counsel was defendant. I had almost despaired. By a mere coincidence, my mother-in-law, who had been visiting her daughter for about two months, had set that day to leave for her home in another state. The moment the case was called it occurred to me, the first time, to make the announcement I did make.

"If your honor please, I cannot go into the trial of this case" ——

"Now, counsel will remember that when we had this case under consideration last it was understood that there should be no further delay," the court interrupted me to say.

"Your honor will hear me?" I inquired meekly, fearing that the court might not appreciate what I was about to say.

"Oh, certainly, go on," his honor answered.

"If your honor please, I am in this situation." I proceeded to tell the court that after a visit of several weeks my mother-in-law was making her arrangements to leave on the noon train that day, and I felt that I would like to see her off; that it was a duty I owed her, etc.

"How long did you say your mother-in-law has been at your house?" the court, again interrupting me, inquired.

"Seven weeks, to be accurate," I replied.

"Mr. Solicitor" — the court now addressed the state's representative — "I know you; I know that one of your kindly nature will not resist *this* motion to postpone this case."

"Certainly not, your honor," that official replied.

"Counsel is excused; we will try this case to-morrow." — EUGENE RAY in the *Albany Law Journal*.

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM

(Copies of the pamphlet Reporters containing full reports of any of these decisions may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.)

BREACH OF CONTRACT. (DAMAGES — REMOTENESS)

SUPREME COURT OF NEW YORK, APP. DIV., 2 DEPT.

A decision which, while grounded on a principle as old as the law of damages and indeed an indispensable part of that law, is interesting because of the peculiar nature of one of the grounds of damage alleged in the case, is that of Jenks, J., in Coppola *v.* Kraushaar, 92 New York Supplement, 436. Plaintiff complained that on January 3, 1902, he ordered of the defendant two gowns for his betrothed, to be made after a certain model; that the defendant was told at the time that plaintiff was to wed on January 19, and was incurring great expense for the wedding feast; that defendant agreed, in consideration of fifty dollars, of which he then received from the plaintiff ten dollars, to furnish the gowns to the woman on or before January 18; that on January 18 the plaintiff and his betrothed demanded the gowns, but that the defendant wholly failed in performance; that in consequence of such failure, the wedding appointed for January 19 "was broken off" by the lady, and the expenses "which the plaintiff went to in buying presents, wines clothes, and other expenses," to the extent of five hundred dollars, were "expended uselessly," wherefore he demanded damages in the sum stated. The decision of the question presented is brief, and cannot be more accurately or concisely stated than by quoting from the opinion: "The suit is novel in view of the damages laid — so novel, that one is almost tempted to conjecture that the pleader has lost sight of the distinction between breach of contract and breach of promise of marriage. It cannot be said that the damages alleged were the immediate and necessary result of the breach, or to have entered into the contemplation of the parties when they made the contract. Although the plaintiff impressed upon the defendant the necessity of performance by January 18, by stating the occasion of the need, he did not foretell the consequences now alleged. He does not allege that either of the 'two dresses' was the bridal gown. On the other hand, there is nothing alleged to show or permit the inference that the defendant could or should contemplate that his default would result in even a postponement of the wedding feast, much less that the wedding would 'be broken' whatever that term may import; and it must import more than a mere postponement, inasmuch as it is alleged that the expenses for presents, wines, and clothes were useless, while presents, wines, and clothes, bought in view of a wedding, are only useless when the wedding is not only postponed, but does not come to pass. Before the defendant can be held to these alleged damages for them, I think that the parties must have had in contemplation that the wedding would never occur if the defendant failed to furnish the two dresses on the day before the appointed time. While such a disappointment would naturally be keen to any prospective bride, it is hardly to be contemplated, in the absence of specific warning, that she would forever refuse to wed, if those 'two dresses' were not forthcoming before the day set for the ceremony. The damages are too remote. Hadley *v.* Baxendale, 9 Exch. 341; Rochester Lantern Co *v.* Stiles & Parker Press Co. 135 N. Y. 209, 31 N. E. 1018; Dodds *v.* Hakes, 114 N. Y. 261, 21 N. E. 398; Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718."

CIVIL RIGHTS. ("PLACE OF PUBLIC ACCOMMODATIONS" — BOOT-BLACKING STAND)

COURT OF APPEALS OF NEW YORK.

The decision of the New York Supreme Court, Appellate Division, 4th Dept., in Burks *v.* Bosso, 81 New York Supplement 384, which was that a boot-blacking stand in the corridor of a public building is a "place of public accommodation" within the meaning of New York Laws 1895, c. 1042, § 1, providing that all persons shall be entitled to equal accommodation and privileges of hotels, theaters and other places of public accommodation, is reversed. The Supreme Court decision was noted in a former number of this magazine, so that but brief reference to the facts need be made. The statute referred to provides a penalty for its violation, and plaintiff brought action for the penalty, alleging that he was refused accommodation at defendant's boot-blacking stand on account of his color. The Court of Appeals in a brief and unanimous opinion holds that in view of the well-settled rule that purely statutory offenses cannot be established by implication and that acts in and of themselves innocent and lawful cannot be held to be criminal, unless there is a clear and unequivocal intention of the legislature to make them such, the statute cannot be construed as including a boot-blacking establishment. The phrase "other places of public

accommodation," must be regarded as limited and qualified by the specific designation of "inns, restaurants, hotels, eating-houses, bathhouses, barber shops, theaters, music halls, and public conveyances on land and water," which precede it.

The cases of People *v.* Richards, 108 N. Y. 137, 15 N. E. 371, 2 Am. St. Rep. 373; People *v.* N. Y. & Manh. Beach Ry. Co., 103 N. Y. 472, 479, 9 N. Y. 605; Matter of Hermance, 71 N. Y. 481; Mangam *v.* City of Brooklyn, 98 N. Y. 585, 595, 50 Am. Rep. 705, are cited in support of this proposition. It is admitted that a boot-blacking stand may be said to be a place of public accommodation like the store of a dry-goods merchant, a grocer, or the proverbial "butcher, baker, and candlestickmaker," but that is very far from placing it in the same category with the places specifically named in the statute. "There is," says the court, "a superficial resemblance between the occupation of the barber and that of the boot-black, in the sense that both minister to the personal comfort and convenience of others, but the same argument could be extended far beyond the limits necessary to demonstrate that not all other places of public accommodation are included by relation within the category of the things specifically enumerated in the statute. The legislature seems to have had no difficulty in naming a variety of places and callings that have never been regarded as 'places of public accommodation' under the common law, and if boot-blacking stands are to be brought within the purview of the statute under the words, 'and all other places of public accommodation,' it will require no great stretch of the imagination to apply this statute to innumerable places and callings that have never been and probably never will be regarded as subject to legislative control or direction."

CRIMINAL LAW. (Evidence — Action of Bloodhounds)

Supreme Court of Kentucky.

Another contribution to the growing list of cases involving the question of the admissibility, in prosecutions for crime, of evidence of the actions of bloodhounds in tracking the supposed criminal, is the case of Denham *v.* Commonwealth, 84 Southwestern Reporter, 538. The Iowa case of McClurg *v.* Brenton, 98 Northwestern Reporter, 881, referred to in these notes some time ago, held that in a civil action for trespass by one whose premises had been searched at night by persons led there by bloodhounds, attempting to follow a chicken thief, testimony by one of the searchers as to what he had been informed as to the breeding and training of the dogs, and that an old schoolmate of his had highly indorsed them in a letter, as well as testimony of a witness that he had looked up the history of the dogs and believed them trained for great capacity for following and tracking, and testimony by him as to stories he had heard about the ability of the dogs, was erroneously admitted. In a nearly contemporaneous case from the Supreme Court of Nebraska (Brott *v.* State, 97 N. W. 593), that court holds that in a criminal prosecution, evidence that bloodhounds went from the scene of the crime to defendant's house, is not admissible. In the Kentucky case, it was shown that great care was taken to prevent anyone from going to or about the place of the crime until after the bloodhounds were brought there, and that the dogs went immediately to the house occupied by defendant, went up to him and stopped. The owner of the dogs testified as to their age, and that both were bloodhounds of good breeding, the sire of the older one being a pure bloodhound, and the grandsire an English bloodhound, trained in tracking men. It was further testified by their owner that both dogs had been carefully trained in tracking men, and that the older dog had tracked and aided in the capture of sixty-three criminals, in several of which cases the younger dog had assisted. On this evidence, the court holds that while the pedigrees of the dogs were not asked about or stated with particularity, the testimony was sufficient to show that they possessed the breeding, qualities, and training required by the rule formerly announced by the court in Pedigo *v.* Commonwealth, 103 Kentucky, 41, 44 Southwestern, 143.

EMINENT DOMAIN. (Value of Property)

Supreme Court of Illinois.

A novel ground for increase of damages in condemnation proceedings is put forward by defendant in Dowie *v.* Chicago, W. & N. S. Ry. Co., 73 Northeastern Reporter, 354. The railroad company commenced proceedings to obtain a right of way over land included within the limits of Zion City, and defendant Dowie claimed that the land sought to be taken comprised between seventeen and eighteen acres, worth $221,000, and that adjacent lands not taken would be damaged in the sum of $100,000. The land sought to be taken was unimproved, and similar land lying adjacent to it could be obtained in practically unlimited quantities for from $100 to $200 per acre. Defendant and his witnesses, who were members of his church, testified

that the city had in less than two years acquired a population of 10,000 or more, and that there were 100,000 members of the church, all of whom were desirous of residing in Zion City, and were coming to it as rapidly as they could dispose of their property interests elsewhere. It was shown that no one owned any land in the city except Dowie himself, and that leases for 1100 years were given. There was evidence that a corporation for the manufacture of lace had been organized, and it was expected that this industry would be very profitable and furnish employment for a large number of people. On these facts is based the contention of defendant's counsel; that though the market value of the property is the measure of defendant's damage, that market value cannot be calculated upon the same basis or theory as that of any other place or city in the world, as there is no other organized upon the same plan or which had made such growth or had such prospects; that this settlement and property of Dr. Dowie "were *sui generis*." "This latter statement," says the court, "may be readily admitted when it is said that a city is organized comprising a population of at least 10,000, with but a single freeholder in it. Dr. Dowie seems to be the only person of all his church that is the owner of a freehold estate in any of the land. It may well be doubted if that number of people could be brought together anywhere or under any conditions other than those that seem to surround them under Dr. Dowie's leadership, who would be willing to hold their properties under such a tenure." In disposing of the contention that the property is impressed with an additional value by reason of the peculiar conditions existing in Zion City, the court says: "The right to entertain any religious belief one or any number of people may see fit to adopt, so long as it does not lead to violation of law, is one that is guaranteed by the very spirit of our institutions. But that right does not bring to it or carry with it increased or additional property rights to those held by other people adopting other religious views or no religious views. The rule of law, as applied to the right of condemnation, is alike applicable to the property of Dr. Dowie as it is to that of any other citizen, and the fact that he may have in his mind, and may have formulated, a great plan for the upbuilding and salvation of people, cannot of itself impress his property with an increased value that must be recognized by the law when its use is demanded in the name of a state, but that property must be measured as other property owned by other people in the same vicinity and similarly situated."

MANSLAUGHTER. (Elements of Offense) Missouri Supreme Court.

That even the legislature, omnipotent as it seems to be, is circumscribed by some limitations not imposed by the organic law is illustrated by State *v.* Hartley, 88 South western Reporter, 910, where it is maintained that the legislature is governed by the logical principle inhibiting a contradiction in terms, and has no power to declare a state of facts to constitute a crime, which *ex vi termini* such facts cannot constitute.

The legislature of Missouri in Rev. St. 1899, sec. 1825, declared that any one who shall administer to any pregnant woman any medicine, drug, or substance, or shall use or employ any instrument or other means with intent thereby to destroy the foetus or child of said pregnant woman, shall be guilty of manslaughter in the second degree.

In considering the sufficiency of an indictment alleging defendant to have been guilty of the acts prohibited by this statute the court holds that it states no offense. "Manslaughter," says the court, "is distinguished from murder solely by the absence of malice as a constituent element of the crime. It is not the intent to kill or the character of the weapon used which determines the grade of the homicide, but simply the inquiry whether such intent or the use of such weapon proceeded premeditatedly from that wickedness of disposition and hardness of heart which the law denominates malice, or whether the intent was formed suddenly under the influence of some violent emotion, which for the instant overwhelmed the reason of the slayer. While all kinds of homicide not murder are declared to be manslaughter by our statute, and all grades of homicide classified by it, there can be no manslaughter when there is no homicide, no more than there can be murder when there is no homicide." In support of this conclusion the court cites State *v.* Young, 55 Kans. 349, 40 Pac. 659, in which the Supreme Court of Kansas in considering a statute in almost the exact language of the statute involved in the case at bar arrived at the same conclusion.

MARRIAGE. (Illegal Contract — Subsequent Removal of Impediment — Estoppel)

Chancery Court of New Jersey.

A case which is more than ordinarily instructive, especially in view of the paucity of cases involving the same question, is that of Chamberlain *v.* Chamberlain, 59 Atlantic Reporter, 813. The suit is for divorce, and one of the defenses

is that there was no marriage. Plaintiff (the wife) had been married prior to her marriage with defendant and had been abandoned by her husband, who had been absent some three years at the time of the latter marriage. This marriage was entered into by both parties under the belief that plaintiff's former husband was dead, and the parties thereafter cohabited as man and wife. Some time after this marriage, "in order to make assurance doubly sure," plaintiff obtained a divorce from her first husband and the marital cohabitation was continued as before, defendant at all times introducing plaintiff as his wife, and living with her as such for a period of over twenty years. After the commencement of plaintiff's proceedings for divorce it was discovered for the first time that plaintiff's first husband was still living, so that the marriage between plaintiff and defendant was, at the time it was celebrated, wholly void. In considering the question whether a legal marriage actually existed between plaintiff and defendant, and if not, whether defendant was entitled to avail himself of that fact, the court makes a clear and logical division of the adjudicated cases into three classes.

The case of Campbell *v.* Campbell, L. R. 1 H. L. sec. 182, commonly referred to as the "Breadalbane Case," is selected as typical of one of these classes. In that case a man eloped with a married woman. Subsequently the woman's husband died and this man and woman continued to cohabit as they had formerly done, holding themselves out to the world as they began to do at the time when they first lived together in adultery as husband and wife. Under these circumstances the House of Lords decided that a marriage existed between these people at the time when they first became capable of entering into such relation.

As typical of the second class the case of Collins *v.* Voorhees, 46 N. J. Eq. 411, 19 Atl. 172, is referred to. This case repudiates the doctrine of the Breadalbane case, although the facts are somewhat dissimilar. In this case one Voorhees obtained a fraudulent and void divorce in Connecticut from his wife, who resided in New Jersey, knowing at the time that the suit and decree were a fraud on his wife and on the court. Exhibiting this decree to a woman in Massachusetts she was publicly married to him under the belief that he was lawfully divorced. Sometime after this marriage Voorhees' wife heard of the fraudulent divorce obtained in Connecticut, appeared in that cause, had the decree opened, filed a cross-bill and obtained a decree of divorce. The second wife had no knowledge of this proceeding and continued to live with her supposed husband under the belief that they were legally married. On this state of facts the Court of Errors and Appeals held that the relations of Voorhees with the woman with whom the second marriage ceremony was performed were not matrimonial at the start, and that they continued to be meretricious after Voorhees' wife had obtained a divorce.

This case is rather strongly, and apparently justly, criticised by Stevenson, V. C., in the case under consideration, and it is suggested that the husband in that case should have been held to be estopped to question the validity of the second marriage.

The Chamberlain case, however, presents facts which are somewhat stronger in favor of the application of the doctrine of estoppel than were those involved in the Voorhees case. In the present case it will be remembered both parties to the ceremony believed that it was legal, and that both were competent to enter into the marriage relation, and that after all impediments to a legal marriage had been removed, they continued to act upon this assumption. There was evidence in the present case that defendant had persuaded plaintiff that no further marriage was necessary after she obtained the divorce from her former husband, and that she had acted upon his statements in this regard. Under all the facts it is held that defendant should be regarded as estopped to question the validity of the marriage. The decision is not, however, rested entirely upon this ground, but it is further held that a marriage actually existed between the parties, dating from the time plaintiff obtained her divorce, so that a lawful marriage might exist between them.

MARRIAGE BROKAGE CONTRACT.

SUPREME COURT OF IOWA.

So-called marriage brokage contracts have for many years been held invalid as contrary to public policy, a large number of cases containing such holdings being collected in the Century Edition of the American Digest, under the title "Contracts" in vol. ii, sec. 516. The Supreme Court of Iowa, however, in the case of *In re* Grobes' Estate, 102 Northwestern Reporter, 804, takes a position a little in advance of the majority of cases. In the Iowa case it was alleged that the claimant made a contract with deceased, whereby the latter agreed to pay to the former a certain sum, if she would go to Chicago and see a woman whom he was desirous of marrying, and give her information concerning him, and that claimant carried out the contract. All of the cases hold that no recovery can be had under

a contract for services to be rendered in promoting or bringing about a marriage, but in the Iowa case it did not appear whether the deceased already had a contract of marriage with the woman whom claimant was to interview or not, and the court holds that the rule which precludes a recovery on an ordinary marriage brokage contract, is as clearly applicable to advice or solicitation with reference to carrying out a marriage contract as it is with reference to the formation of such a contract.

MENTAL SUFFERING. (Elements of Damage — Evidence — Dreams)

Supreme Court of Kentucky.

A case apparently without precedent and well illustrating the necessary limits within which evidence of physical and mental suffering, as an element of damage, must be confined, is that of Louisville & N. R. Co. *v.* Smith, 84 Southwestern Reporter, 755. The action was for personal injuries alleged to have been caused by the negligence of defendant railroad company. Upon the question of the suffering resulting from the injury, plaintiff was allowed to testify that he dreamed one night that his hand was to be amputated, that it troubled him a great deal as to how he would get his hand back again, and that he told his wife to put it in ice to preserve it, so that all of his body could be buried together. The court holds that the admission of plaintiff's relation of his dream is not justifiable upon any ground, and says that while it was competent for him to testify fully as to the nature and extent of his suffering, all the rules of evidence were violated in allowing him to recite his dream, and this is so, even though certain writers maintain that dreams are due to the physical and mental condition of the dreamer. Without pretending to have made any study of the question which would justify the expression of an opinion, and expressly disclaiming any intent to do so, the writer wishes to append a query. If one injured through the negligence of another is entitled to recover for the mental as well as physical suffering, directly caused by the injury, and if it can be shown by expert or other evidence, that a dream, such as plaintiff had, was a natural, probable, or even possible, result of the injury, would it be true that plaintiff would be precluded from recovering for the mental suffering which the dream clearly caused during the time of its existence, merely because he was at that time asleep? That mental suffering may be experienced during sleep can scarcely admit of doubt, and certainly cannot be denied by anyone who has experienced the sensation known as nightmare, or observed another who is so afflicted. Eminent medical authorities agree that no mental suffering of the waking moments is more intense. If this be true, and this mental suffering is the result of the injury, why is it not an element of damage, and, consequently, why is not evidence of its existence admissible?

NEGLIGENCE. (Personal Injuries — Amusement Park — Injury to Patron — Measure of Care Required)

Supreme Court of Iowa.

A case which involves a state of facts which is perhaps not particularly unusual, but which has, nevertheless, not to our knowledge previously furnished foundation for litigation, is that of Williams *v.* National City Park Association, 102 Northwestern Reporter, 783. Defendant was the owner of an amusement park or field, in which it maintained a grand stand or amphitheater containing seats, and having erected over its central portion a platform for the use of a band. Plaintiff, who had paid her admission to the grounds, and also an additional fee for a seat in the amphitheater, was injured by the falling of a bottle from the band stand. On this state of facts it is held that the mere fact that a member of the band, whether he was an employee of defendant or of the band director, carelessly dropped the bottle upon the plaintiff would not sustain a charge of negligence against the defendant. Upon this point, Mr. Justice Weaver says: "The negligence of the servant for which the master must respond to a third person is negligence in some act or failure to act, within the scope of his employment. So far as this record shows, the employment of the band was for no other purpose than to provide music for the occasion, and, ordinarily at least, the relation of beer to harmony of sound is not so obviously necessary that the passing of bottles between members can be said to be within the scope of a musician's employment." A question of a somewhat broader scope, and more real practical importance, is that presented by plaintiff's contention that as she had placed herself in charge of defendant it created "a sort of bailment, just as if she had placed herself in a railroad's hands as passenger." The court, however, holds that defendant could only be required to exercise reasonable care, observing that it would require too much ingenuity to adjust the law of bailments to the implied contract which arises between the proprietor of a place of public amusement and a visitor who enters such place upon the proprietor's invitation, and that the undertaking of such a proprietor is not so similar to that of

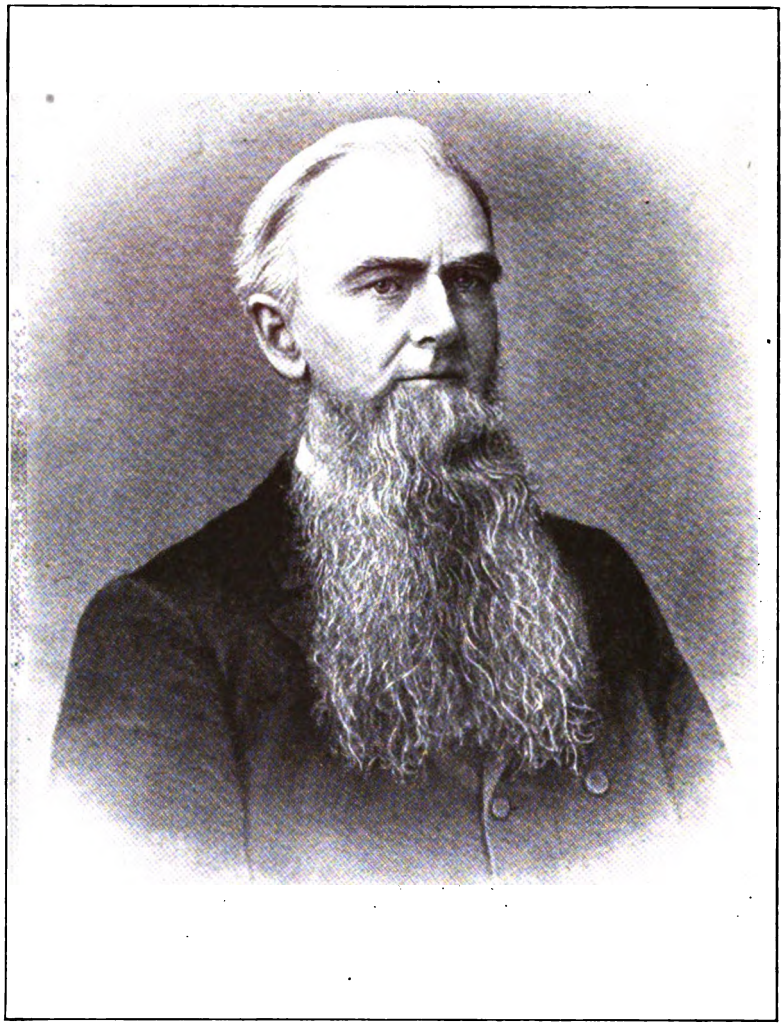
the common carrier of passengers as to call for an application of the same rule of responsibility. In support of this ruling the following list of authorities is cited: Hart *v.* Washington Park, 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 492, 48 Am. St. Rep. 298; Fox *v.* Buffalo Park, (Sup.) 47 N. Y. Supp. 788; Lane *v.* Society, 62 Minn. 175, 64 N. W. 382, 29 L. R. A. 708; Herrick *v.* Wixom, (Mich.) 80 N. W. 117; Scofield *v.* Wood, 170 Mass. 415, 49 N. E. 636; Dunn *v.* Society, 46 Ohio St. 93, 18 N. E. 496, 1 L. R. A. 754, 15 Am. St. Rep. 556; Mastad *v.* Brethren, 83 Minn. 40, 85 N. W. 913, 53 L. R. A. 803, 85 Am. St. Rep. 446; Railway Co. *v.* Moore's Adm'r, 94 Va. 403, 27 S. E. 70, 37 L. R. A. 258; Thompson *v.* R. R., 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep., 323; Sebeck *v.* P. V. Verein, 64 N. J. Law 624, 46 Atl. 631, 50 L. R. A. 199, 81 Am. St. Rep. 512.

POLICE POWER. (TRADING STAMP LEGISLATION — ARBITRARY DISCRIMINATION)

N. Y. SUPREME COURT — APP. DIV., 4th DEPT.

An apt illustration of the necessity of constitutional limitations to prevent the necessary but sometimes abused police power from exceeding its legitimate confines, as a beneficent instrument of protection, and becoming an aggressive engine of oppression, is the case of People *v.* Zimmerman, 92 New York Supplement, 497. It is a trading stamp case. New York Laws, p. 1651, c. 657, prohibited dealing in trading stamps or coupon tickets unless the stamp or device should have legibly printed or written on the face thereof, the redeemable value thereof in money, required the ticket or stamp to be redeemed in goods or money at the option of the holder, subjected the person charged with its redemption to liability for its face value, and made the violation of the act a misdemeanor, but excepted from its provisions tickets or coupons issued by a manufacturer or merchant in its own name, and redeemable by him. It is obvious that the statute was designed to, and would put an end to the trading stamp business, since if the stamps were redeemable in cash at their face value, the giving of them would be a useless act of circumlocution, the same result being attainable with less expense and inconvenience by reducing the price of the article sold by the amount of the face value of the stamps given. As the court observes, "The rock on which the system is built, is the redemption of the stamps in merchandise. The enormous quantities of merchandise thus disposed of enables the company of redemption, acting for a multitude of business concerns, to purchase very close to the actual cost, so that each person or firm in trade is not called upon to contribute the full sum with which it will be chargeable upon a cash redemption."

In answer to the contention that the statute was within the range of the police power, on the ground that it was in support of good morals, it is said that it is no more against good morals to issue a ticket redeemable in merchandise than to redeem in money or merchandise at the election of the holder. The pith of each transaction is a gift to the purchaser, and as an inducement to secure trade, and generally for cash, for in most instances payment for the goods is a prerequisite to the delivery of the trading stamp or coupon ticket. It may be that the trading stamp business tends to demoralize trade. It may be that people in moderate or straitened circumstances are prone to purchase beyond their means by the incitement of a gift after a stated amount has been expended. The farmer who attends an auction sale is often disposed to buy what he does not need, led along by the competition of bidding, or by the fact that time is allowed on the purchase. If a grocer should reduce the price of flour or coffee below cost, it might tend to the demoralization of the grocery trade, and would certainly be exasperating to his competitors. These slight derelictions may be imprudent, but they are not the subject of legislative control. It is argued that in any event the moral question is eliminated by the provision of the act which excludes from its operation, tickets or coupons issued by a merchant or manufacturer in his own name, and redeemable by him, and it is submitted that it cannot be so reprehensible as to be a crime to issue a coupon ticket redeemable by a third person, and still be without sin to issue one redeemable by the seller of the goods. It is also held that the statute is unconstitutional on the further ground that by allowing merchants or manufacturers to deal in trading stamps issued by themselves, it creates a preferential class. Upon this point it is said, "The vice, it seems, is not in alluring one to buy by promise of a gift, but in permitting the promise to be fulfilled by another than the seller. It is a narrow ledge for the distinction to rest upon, when in one instance the transaction is subject to legislative control to the extent of confiscation, while in the other it goes without let or hindrance. If the seller, by arrangement with a responsible company, secures the performance of the agreement, and the arrangement is satisfactory to the buyer, it would seem that such a plan ought not to be made a crime, while redemption by the merchant is deemed an honest transaction. The statute is not founded on the moral claim pretended.



Jonathan Rass

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JONATHAN ROSS

By Russell Wales Taft

SINCE Nathaniel Chipman, in 1793, published the most unique and one of the earliest volumes of state reports, many eminent jurists have graced the Supreme Bench of the state of Vermont. Charles K. Williams, Stephen Royce, Royall Tyler, Samuel S. Phelps, Jacob Collamer, Isaac Redfield, Milo F. Bennett, and Luke P. Poland, among others, have had a share in molding the body of law comprised in the Vermont Reports, and among these Jonathan Ross, the subject of this sketch, may worthily rank.

Jonathan Ross was born April 30, 1826, in the town of Waterford, one of the easterly tier of towns in Caledonia County, Vt., on the Connecticut River. He was descended from Roger Ross, held by family tradition to have been a Scotchman, who was born September 20, 1740, and died in Phillipston, Mass., October 6, 1817. Roger Ross enlisted for service August 21, 1777, in the colonial army and marched to Bennington, but arrived too late to take part in the battle. September 27, of the same year, he again enlisted under the same commanders, Captain Josiah Wilder and Colonel Nathan Sparhawk, and served twenty-nine days, participating in the battle of Saratoga.

February 14, 1771, Molly Rugg, wife of Roger Ross, bore him a son who was named Jonathan. When Jonathan was but a child his mother died. Before attaining his majority he purchased his time and subsequently spent some time at Chesterfield, N. H., where he married Lucy Stoddard. In 1793 Jonathan bought one hundred acres of wild land in what is now the town of Waterford, and there in February, 1795, brought his bride to make a home. Here he cleared up a farm and on November 11, 1820, died of typhus fever, the same malady having in the previous year robbed him of two of his four sons and one of his two daughters. Royal, son of Jonathan and Lucy Ross, was born on the homestead in Waterford, July 22, 1799, and there passed his entire life, dying November 2, 1856. He married in 1821, Eliza, daughter of Rev. Reuben Mason, a pioneer Congregational clergyman. Reuben Mason was a lineal descendant of Pelatiah Mason, one of the nine sons of Sampson Mason, who came from England and settled, in 1649, in Dorchester, Mass. He had served under Cromwell, and his descendants have included many men of distinction.

When Jonathan Ross, the elder, came with his wife to Waterford, in 1795, an ox sled carried all his movable possessions except the cow, which was led behind. In the remaining twenty-five years of his life he added one hundred acres to his estate, fenced it all, mostly with stone walls (probably the procurement of the building materials necessitated no very extended journey), and built two frame barns and a frame house, all of which were well stocked and furnished. Royal Ross succeeded to this estate at the age of twenty-one, upon his father's death, the only other surviving son being but seven years of age.

Into the primitive life consistent with his father's circumstances, Jonathan Ross, the subject of this sketch, was born in 1826, being the eldest son and third of twelve children, of whom all but one lived to maturity. The industry, sobriety and

sound morality of his father's household had no small share in molding the character of the future jurist. In the rude school of his native district Jonathan sought and received instruction until he was eleven years of age, after which his services were in demand upon the paternal acres during the outdoor season. Nevertheless, until he was seventeen years old he continued to attend the district school in winter. At the age of eighteen, through the energetic application of an active mind, he had become qualified to take up the teacher's ferule and lead others in the way of knowledge, and for seven successive winters he taught in the schools of Vermont, Massachusetts, and New Hampshire. Assisted by his earnings he was enabled to attend parts of two fall terms in a select school in Waterford, and part of a term in Phillips Academy, in Danville, Vt. In the autumns of 1844, 1845, and 1846 he was under the tutelage of James K. Colby, at St. Johnsbury Academy, St. Johnsbury, Vt. The spring and early summer of 1847 were spent at the same institution and in the following autumn he matriculated at Dartmouth College.

During the youthful days of Jonathan Ross, great changes occurred in the conditions of country life — changes which did much to stimulate curiosity, comment, and thought. Friction matches displaced flint and steel; stoves took the place of the large brick fireplaces; kerosene oil relegated tallow dips to obscurity; steam and electricity wrought the annihilation of time and distance, and manufactured goods came in to replace the toilsome products of the wayside forge and the hand loom. These manifold forces were at work, revolutionizing the habits of thought and enlarging the field of vision of the rising generation.

With a mind well trained by close and systematic study, ever on the alert, and with a determination to succeed, young Ross entered upon his college course. Though ill prepared, as compared with some of his college mates, his diligence and ready grasp of knowledge enabled him to remove all his entrance conditions during his freshman year.

The expenses of his tuition were defrayed largely by his own earnings, though when, in 1851, he obtained his coveted degree, he owed his father two hundred and seventy-four dollars, which had been loaned to him. In 1885 his Alma Mater conferred upon him the well-merited degree of LL.D.

During the first year after his graduation the future jurist taught in the academy at Craftsbury, Vt., and the four succeeding years in the academy at Chelsea, Vt. During the last two years of his residence in Chelsea he read law in the office of William Hebard, whose three years' service as judge of the Supreme Court were marked by faithful and efficient service. The future lawmaker was admitted to the Vermont Bar in Orange County Court, at Chelsea, at the December term, 1855, and in the spring of 1856, took up his residence in St. Johnsbury, Caledonia County, Vt., which was to be his home for the remainder of his life. He was assistant at St. Johnsbury Academy until the summer of 1856. In May, 1856, he formed a partnership for the practice of the law with A. J. Willard, and this connection continued until 1858, after which he was in practice alone until 1865, when he was associated with G. A. Burbank. This connection lasted twelve months and was succeeded, in 1869, by partnership with Walter P. Smith, at present Judge of Probate for Caledonia County.

Early in his professional life, which covered the years between 1856 and 1870, Jonathan Ross demonstrated the possession of the qualities that make for success. The scanty stock of learning acquired after a bitter struggle and therefore the more tenaciously retained, growing in due course to gain momentum of its own weight, coupled with a discrimination well nigh infallible and a determined adherence to the right, clearly called public attention to

the fact that he was a man to be implicitly trusted, clever, incorruptible, well balanced and gifted with professional acumen, sound common sense, and religious principle. He was a man to whom people, especially women, went in trouble, for counsel and advice not strictly professional. They felt sure that no hope of gain or personal advantage would control his action. They had such confidence in his integrity and judgment that they trusted him as a friend without fear that he would betray their confidence. The confidence of the community led to many positions of public trust; from 1858 to 1868, he was treasurer of the Passumpsic Savings Bank, and it is worthy of note that during his fiduciary control the corporation never lost a dollar. In 1862 and 1863 he was state's attorney of Caledonia County. In 1865, 1866, and 1867 he represented St. Johnsbury in the General Assembly, serving effectively on the Judiciary and other committees. For four years before 1870, he was an active and influential member of the State Board of Education, and in the latter year was returned by Caledonia County to the State Senate, while in 1869 he was a member of the last Council of Censors.

As an advocate Jonathan Ross was clear and convincing; there was nothing ornate or flowery in his style, but his overpowering earnestness carried conviction to court and jury alike. Many things which younger attorneys, and perhaps a majority of the public, are prone to consider the crowning glory of an advocate, were no part of his professional creed. Pettifoggery and chicanery were to him odious, and if causes were not to be won by careful preparation and straight-forward trial upon their true merits, in the light of the law, as he interpreted it, they were to be lost regardless of the effect upon his professional reputation or the wishes of his clients. Honesty of purpose was the keynote of his career, in whatever capacity he might be serving; no false notions of duty to his client ever caused him to swerve from his higher allegiance to the eternal principles of right and justice, and he ever exemplified the fact that one may be at one and the same time a successful lawyer and a consistent Christian gentleman.

December 1, 1870, while serving as senator from Caledonia County, Jonathan Ross was elected sixth Associate Judge of the Vermont Supreme Court, in place of William C. Wilson, who removed to Minnesota. While the judges of the Vermont Supreme Court are elected biennially by the legislature, political considerations never enter into their choice, and since 1880, death and resignation have been the only causes of removal. The majority of the members of the Bench are appointed by the Governor, to take the place of predecessors who have died or resigned, and the legislature never fails to reëlect the appointees of the Governor, who usually takes into consideration the wishes of the Bench and Bar in filling vacancies. The court consists of a chief judge and six associate judges who rank in order of seniority. Judge Ross was gradually advanced until 1890, when he was elected chief judge upon the retirement of Judge Royce, and this position he held until his resignation in January, 1899. His term of service, therefore, covered well nigh a generation.

The judge of the Vermont Supreme Court has no sinecure. All judicial work in the state, except probate business and the petty cases brought in justice courts, must be done by the seven judges. In each of the fourteen counties of the state, two terms of county court must be held annually and in the more important counties often last upwards of two months. The same seven judges are the Court of Error, which now meets thrice annually in Montpelier, and are also collectively the Court of Chancery, each judge being also a chancellor.

Into this round of hurried activities Judge Ross was plunged at the age of

forty-four. He was not brilliant, in the usual acceptation of the term, he was something of a plodder, but he squared his every word, his every act, with the right as he saw it, and he enjoyed the full confidence of his associates, to whom, in the council chamber, owing to his honesty, candor, and common sense, he was a tower of strength, while in him the Bar recognized a painstaking and impartial judge. If deliberate, there was in him nothing of procrastination. His Supreme Court work was done with the least possible delay. His written opinions, which bore evidence of careful study, were clear and scholarly and were based more on principles than precedents. His first printed opinion is in Woodward *et al. v.* Barnes, 43 Vt. 330, and his last is in Holt *v.* Ladd *et als.*, 71 Vt. 204.

As in deeper channels the water moves quietly but with added power, so the influence of Judge Ross was unostentatious but abiding. His life was one of continual growth. Although an uncompromising foe of social evils, he was always charitable to the erring, slow to censure and ever ready to extend the helping hand. Especially to the younger members of the legal profession he was considerate and kind, and to no member of the Bench could a young attorney in perplexity go with greater confidence of receiving consideration and helpful suggestion. No sword of Damocles hung over the head of the youngster at the Bar. Having positive opinions he expressed them fearlessly yet accorded to others the right of individual opinion and never took offense when differed from. Notwithstanding his studious habits he was fond of companionship and he was always delighted, when not engaged with business matters, to sit down with members of the Bar, as he chanced to meet them, and discuss legal problems.

It was only in some exigency, or upon the trial of some cause of great importance or public interest, that Judge Ross showed his full strength and fertility of mind. As an instance, the Bar will long remember his charge to the jury in the celebrated Way murder trial. So clear and exhaustive was his exposition of the law applicable to that and like causes, that it commanded the attention, not only of the members of the legal profession of our own state, but of lawyers and judges of other states as well.

Judge Ross grew to the very end. When asked to what he attributed his success he answered, "It is simply hard work, guided by a conscientious endeavor to understand and faithfully discharge present duty, without reference to the effect upon my personal prospects in the future." He was never idle. Few indeed are the men who could have done as he did when, at the age of seventy-three, he was called to new fields. In February of that year, unsolicited and unexpected, came the message of Governor Edward C. Smith, requesting him to accept the appointment to fill the unexpired term of the late Justin S. Morrill, Vermont's venerable senior member of the United States Senate. The call was heeded; so systematic were his habits of work that it was a matter of hours instead of days to close all unfinished court work, and within forty-eight hours Judge Ross was on his way to the national capital. He entered the Senate just before the ratification of the peace treaty with Spain, which passed the Senate by a majority of one vote. His vote was in the affirmative.

Webster, when asked how long he was in preparing his reply to Hayne, said, "Forty years." No great or lasting work is done without preparation. Preparation is power. Judge Ross was prepared. He was never idle; his reserve power was enormous.

He was a member of the Committee on Territories and in his spare moments had thought out the problems that he so ably discussed on January 23, 1901, in a speech in the Senate, on "The Constitutional Relations of Porto Rico to the United States."

This effort made a sensation throughout the country and marked Judge Ross as a man of national fame, and beyond question shaped the policy of the nation with reference to our Island possessions. McKinley characterized it as the most enlightening treatment of the subject he had yet seen, and stated that it led him to a complete change of mind as to national policy in regard to the annexation of territory. At the expiration of his term in the Senate Judge Ross was appointed chairman of the Vermont State Railroad Commission and served in this capacity until 1902, when he resumed the active practice of the law.

Judge Ross was twice married; first, in 1852, to Eliza Ann Carpenter, daughter of Isaiah Carpenter, Chief Justice of New Hampshire, who died in 1886. His second wife was Miss Helen Daggett. Of the eight children by his first marriage five are now living.

The close of Judge Ross's life was tragic in the extreme. On February 21, 1905, as he was driving with his wife, the horse ran against a railway train in Concord, Vt., and turning suddenly threw both Judge and Mrs. Ross against the moving cars. Mrs. Ross was instantly killed but Judge Ross lingered until February 23. He did not regain consciousness, nor did he know of his wife's death. Thus ended the earthly career of an eminent jurist, an able statesman, and above all, an honest, incorruptible man, who has left an abiding monument to his ability in the law of his native state and a lasting influence for good in the hearts of those who knew him.

BURLINGTON, VT., May, 1905.

THE LAWYER IN PUBLIC AFFAIRS

By Hon. Alton B. Parker

IN studying, however casually, or with whatever care, the modern development of the law, and the scope of the men who follow it as a profession, it is impossible to escape from a knowledge of the close relations which the latter bear, almost as a direct result of their professional life, to our politics. It is seen all along the line of public effort whether in village, town, city, county, state, or nation. Its existence, therefore, cannot be overlooked nor can its importance as a feature in the history and development of the law, or of politics, be exaggerated. It is not a new tendency, having manifested itself even in our earliest days when, owing to the simplicity of conditions, the need for the lawyer and the recognition of his place in our social fabric became only slowly apparent. Yet, it is a tendency which has grown with the growth of the country and with the enlarged facilities for the study of politics and also with the added dignity of the legal profession itself.

In the earlier days in the history of the thirteen colonies, the questions discussed were those relating to rights, then popularly denominated natural, most of which, in their practical assertion, have since become legal, or recognized as a part of our institutions. It was almost a necessity that the few members of the Bar whose services were then called for should become at once the assertors of these rights before the courts. It was even still more imperative that they should come to the front in the discussion of them in the forum, in those bodies where hearings must be held, and also in the respective assemblies of the people. This was in the declining days of a theocratic age, when every profession other than that of the clergyman had to struggle for a position.

IN THE REVOLUTIONARY AND CONSTITUTIONAL PERIODS

It was, therefore, only natural, that when the Revolution came up for discussion the services of the lawyer should everywhere be in demand. Even Samuel Adams, in spite of the fact that his mother's conscientious scruples drove him away from the study of the law into the honorable trade of maltster, had as his principal and active coadjutors, James Otis and John Adams. No arguments more distinctively legal could have been made at that time. Looking back, we are perhaps inclined to think of them as largely academic and as having some flavor of the pedantic. Patrick Henry's great speech, although delivered in a political assembly, was distinctively the product of the legal mind and the legal training of his day, while the Declaration of Independence is filled throughout with legal as well as with popular terms. Although the Revolution itself was, therefore, started by lawyers it was soon removed from the venue of the legal profession into those of the soldier, the diplomatist, and the financier. But even the diplomacy of this period, during the life of the Confederation and its successor, the Constitution, was distinctly that of the lawyer in public life.

Coming down then to the period of Constitution-making which began at the very conclusion of peace, the lawyer at once dominated the scene. The names of Alexander Hamilton, John Jay, George Mason, James Wilson, John Marshall, John Rutledge, James Madison, George Wythe — these are only a few of the men as the result of whose labors, in state and federal bodies, came the perfecting of that great experiment, a written Constitution, which incorporated into itself all the principles for which our race had been contending

through peace and war, through evolution and revolution, since the year 1215.

Passing to the period of Constitutional interpretation, especially during the life of John Marshall, its great master, we find that practically every one of the commanding lawyers who practised in the Supreme Court from the days of Marbury *v.* Madison, the Dartmouth College case, and onward, shone as bright illuminating stars in one or other branch of Congress or in state legislative bodies. It often happened that the man who, in the morning, had made a great argument on constitutional lines in the court, passed into one or other house of Congress to repeat, or to emphasize, or to enforce, on the same day, in the real life of politics, the opinion he had expressed or illustrated as an advocate. The precedents thus established have always been maintained, because the same thing may and does happen to-day although, in spite of the growth of the country, this particular phase of legal work does not have the same relative importance that was attached to it in the earlier days of our history.

RELATION OF JUDGES TO PARTY DIVISION

It is interesting and valuable, then, to examine briefly the relations which our courts, both original and appellate, federal as well as state, have borne to partisan politics. In doing so we find that, from our earliest history as a people, long before our national system had developed its character, our courts had begun to draw to the Bench, and into the legal profession, not only men who were strong partisans of some idea, but those who had taken a prominent part in the political activities of the time. It was not always the political partisan, because it must be borne in mind that politics have not always been the striking line of division. In our earliest days, dogma and theological divisions, out of which from the beginnings of the modern history of our Western peoples, their political divisions have finally grown, were the most potent agencies in attracting men to one side or the other of some problem, whether it related to this world or was supposed to belong to the affairs of the next.

Beginning, however, with our formal national life, when we had attained our majority as a people, differences of political opinion have been the basis of party alignment. Since that time it has been the rule to draw from the respective political parties, now from one and again from the other. And, always taking the country as a whole and over periods of reasonable length, the result has been a fairly equal distribution among the representatives of differing opinions, whether as to number, ability, or resulting influence.

Nor have the men thus chosen to fill our judicial offices been the mere formal adherents of parties. They have, in general, been devoted, during their political careers, to the organization as well as to the principles of their parties. They have, in fact, been the advocates of what one of the greatest of our modern leaders has defined as a "sturdy partisanship." This has been distinctive of that culminating judicial body of our own history and of the world: the Supreme Court of the United States. In our earliest days its chief justices were partisans of the then dominant idea in our politics. The period of struggle had originally united them so that lines of division had almost disappeared. But, when this period was over, all the uncertainty of the past, aided, perhaps, by the absence of precedents, lined them up more strongly on opposite sides of the great questions than even at later periods. As their scope was narrower their outlook on the horizon about them was naturally sharper, keener, more intense. Perhaps their partisanship meant even more for them than it does for us, when the necessity has arisen for every intelligent man to take in a wider range of thought and conditions.

However, this very fact so demonstrated,

in itself, their interest in the ideas upon which our institutions were founded, that the first impulse which moved them, when they found themselves upon the Bench, was to assert with the utmost force all the dignity, all the power, all the accumulated traditions of their time in favor of their country's interest. In order to do this, the partisan was at once and from the very necessity of the situation merged in the patriot and the jurist.

OUR SUPREME COURT JUDGES AS POLITICIANS

The example thus early set has since been followed. Every chief justice has come to that high distinction after passing through the lanes, alleys, streets, or highways of a party. As a rule, they have gone through many grades of political effort, humble as well as high. And, in no instance, has this system brought to the Bench a man who could be called, or thought of as, a political chief justice. In most cases, they have been of such strong characteristics that they have either dominated the court or have largely contributed toward decisions involving great principles and that, too, oftentimes against the contentions of the extreme element of the party from which they had originally been drawn. No more striking illustration of this independence can be cited than that of Chief Justice Chase. In politics, he was the strong advocate of the principles of his party. In executive office he thought it among the necessities of his career to suggest, to pass, and to execute a law making paper money legal tender. But, when the question came up before him as a member of the Supreme Court of the United States not only were all his party training, ideas, and attachments thrown to the winds, but his own action as Secretary of the Treasury was reversed by the Supreme Court of the United States, a result which could not have been accomplished without his vote.

The policy which has thus commended itself, in filling the office of chief justice, has been followed, almost without exception, in the appointment of associate justices and the same results have been manifest — that is, a fairness and determination to be judicial that would not have been expected when the effect of partisanship had been studied in the same men when they were in politics alone. All down through the Federal courts, this same policy has been followed almost without exception, every President having made it a part of his policy in judicial, as in other offices, to fill them with the adherents of his own party ideas and doctrines. But the same general result has been uniformly apparent, the partisan quite uniformly disappearing in the judge.

This is not to say that all Presidents have equally made the best use of their offices in the appointment of judges. But, whether a President has done ill or has done well, whether he has appointed the man most acceptable to the Bar, its natural leader in any given district, the effect has still been the same. The court might have been improved by better selection, but so far as the intrusion of partisanship is concerned, neither carelessness, nor oversight, nor lack of interest on the part of Presidents, has affected the principle under discussion or qualified its success.

THE SYSTEM IN STATE COURTS AND IMPEACHMENT BODIES

If this rule had not been found to operate also in elective state and local courts, it might have been attributed to appointment with a life tenure, but the truth is, that all through our system, even to the smallest courts, county or even police, the same general trend has been apparent. It is, therefore, safe to maintain that in no country in all the world may suitors approach the courts with stronger assurance that justice will not be turned one way or the other because of the previous public

career, the partisan opinions, or the unfairness of the judge on the bench.

The effect may still further be seen, even in legislative bodies, when impeachment or other political or semi-political questions have been raised, and where, in order to decide them, those bodies had to assume for the time a judicial relation. In few instances, indeed, have partisan passion or public clamor been permitted, even in the remotest way, to influence such action with obvious unfairness. This has been true in hundreds of cases where the man who was sitting in judgment was partisan before he had been judge and remained partisan after he had retired from the Bench or from the exercise of a judicial function.

In my own somewhat extended judicial experience I have naturally come into close relations with a large number of judges of courts, of both original and appellate jurisdiction, and into personal contact with many more, but after all these years I can say that, in no case, have I ever known a single judge who, writing or concurring in a majority opinion, or, either by himself or in connection with his associates, dissenting in a minority opinion, has been moved by personal reasons, or by attachment to a political party.

These considerations ought to give us pause before we consent to think that our life, society, and system of government are growing worse, or before we permit any revolutionary theories to drive us to the conclusion that old customs, manners, or methods should be abandoned simply because they are old or because other governments, or forms, or systems, have not adopted our simple and effective way of dealing with great and difficult human problems.

The application of this non-partisan interpretation to judicial questions has exercised a profound influence upon our foreign service. This is illustrated by the names of the ambassadors and consuls, many of them without legal training, who, before their departure from our shores, had been appointed and had gone forth as severe and unbending partisans, in spite of which they have become at once representative of their country. Among men of this type, we, of the American Bar, can confidently pride ourselves upon the example set by our profession in all the capitals of the world. Nothing could better illustrate this than the fact that, within less than forty years, the government of the United States has sent to the one great diplomatic post, which so greatly affects the interests and the affections of our people and the peace of the world, four men, all of them trained as partisans, and not one of whom had had a judicial career. Yet each one illustrated at its highest point the non-partisan influence which I have claimed as governing the judges of our land. It is scarcely necessary for me to say that I refer to Reverdy Johnson, Edward J. Phelps, Thomas F. Bayard, and Joseph H. Choate, all of whom have, within the period mentioned, represented the United States at the Court of St. James.

Even the disputed Presidential electoral contest of 1877, unfortunate though it must have been in many of its legal aspects, carried with it, after all, in its results, direct or remote, the highest possible tribute that could be paid both to the American judiciary and to the American people. If the same result, or perhaps any other, had been reached solely by legislative and executive action, that is, if it had been wholly political in its ending as it was in its beginnings — it is impossible to predict what the effect might have been. The extra judicial, super-legal if not illegal, forced intervention of the Supreme Court, as an element in the settlement, certainly induced final acceptance of the result by the whole country. So strong was and is the respect shown by the people for even the quasi-judicial determination of a dispute which held in solution a great peril.

The two powers or functions of govern-

ment, the executive and the legislative, shade into each other, and under our national system they must work in harmony to put the judicial department into operation; but the moment the latter is chosen it is independent of either. Pressure from the executive or interference from the legislative are as powerless to move this common creation as is that public clamor from which neither of the others can possibly escape.

THE LAWYER IN EXECUTIVE OFFICE

Although it could not have been foreseen that in the practical working of a system of government, truly democratic, the lawyer would come to have such a dominating position in the law-making department of both the nation and the states, the fact is that the same preponderance has manifested itself in the executive department. So that of the twenty-four Presidents of the United States who have followed George Washington in that exalted office, whether by election or succession, one was without trade or profession, four have been chosen for military service, more or less prolonged, and more or less distinguished, eighteen had devoted themselves exclusively to the study and the practice of the law and another had divided his activities between the Bar and the Bench with an incidental, or rather an accidental, diversion into the career of the soldier. If the same process were applied to the men who have been preferred by their party, temporarily in the minority at succeeding Presidential elections, the same general tendency to draw upon the legal profession for the higher places of our politics would be none the less apparent.

Nor is this preponderating position of the lawyer in the executive affairs of our national life singular to itself. Analysis of the history of the various states, whether of the original thirteen or of the thirty-two since admitted, would, in general, reveal the same general tendency to draw lawyers away from their practice into posts requiring administrative qualities. Without pressing this division of my question upon my fellow lawyers, it is no more than fair to say that all executive offices, both state and national, are continually making drafts upon the Bar, not always to the individual advantage of its members, in order to man the commissions and the many administrative posts, either existent or created from time to time.

WHAT THE OPEN DOOR HAS DONE FOR THE PROFESSION

While we inherit from the mother country the great rights and functions which have inhered to the Bar, we have in this, as in many other respects, bettered upon the original teaching. In England, even at the present time, division between barrister and solicitor is so sharp that only the former is eligible to any judicial offices other than those of the most insignificant character. But, in practice, the distinction is carried still further. All the great offices of the British Cabinet — administrative as well as legal — have, until the last few years, been looked upon as the special privilege of the barrister. It was a great surprise, almost a shock, when, a few years ago, a single solicitor was able, by reason of great ability and conspicuous service, both to his profession and to politics, to attain cabinet rank. Even this experiment has not since been repeated. So that, in British politics, the barrister still retains the dominant position that tradition and long wont had conferred upon him. But, in this country, every post, not only that which is the incident of his profession, but that belonging to his country, is open to the lawyer. The door of opportunity is so wide open to all, that the obligation has been as widely distributed as is the authority which created it.

As a natural corollary of this freedom, so careful has been the preparation of men for the Bar, so effective has been their training and the discipline after they have entered upon the practice, so keen and intelligent has been their interest in public questions,

and so high the character that if, upon a given day, the President of the United States should receive the resignation of every judge of all the Federal courts, of every member of his cabinet and all other officials the performance of whose duties required a legal training, he could fill their places with full regard to the interests of the public service, and with popular acceptance, without drawing a single appointee from any one of the great centers of population.

In other words, what is sometimes known as the country lawyer, is so well grounded in his profession, so completely a student of his country, so deeply interested and so well instructed in its politics, and of such high character, that, by intelligent selection, it would be possible to carry out such a plan in its completeness and with safety. Nothing could speak better for the modesty and reserve of the lawyer, or show more thoroughly how sound are the foundations of our legal training or the safety of the conditions which inhere in our life and society.

NEITHER THE BOSS NOR THE DEMAGOGUE

While the lawyer is almost a dominant force upon the higher table lands of our politics and in congressional and state legislative bodies, while he has fairly adapted himself to the change of methods, it may with truth be claimed of him that he has never yet become what is known as the great boss, that peculiar character incident to the later development of our practical politics. In many instances, he has been able to command leadership, but it has never in a single instance involved dependence on politics for livelihood or fortune, or the use of power for personal or improper ends. Nor have prominent lawyers been found, in public life or out, who were willing to stand behind men who bore this relation to our politics and to share with them the spoils which are supposed to be the incidents of their position.

In like manner, thus far in our history, no really great lawyer, whose reputation was both made and earned in the practice of his profession, or by experience on the Bench, has attached himself to dangerous or demagogic movements. It is the very essence of the man well grounded in the law that he shall stand in his vicarious relation to his client and hence to public life and to society for stability, for certainty, and for assured protection to life, liberty, and property. The lawyer belongs so essentially to a profession which has been a gradual growth and evolution that even revolution, to be acceptable to him or to attract his support, has been compelled to conserve those interests and policies which commend themselves to the average man as safe and as making certain the absence of any possibility of assault upon the earnings of industry.

HOW PRIVILEGES HAVE CREATED OBLIGATIONS

As great privileges amounting almost to monopoly have been granted to the lawyer, it has been only natural, only human, only Christian, that he should render conspicuous public service in return, and that he should have looked upon this as making it incumbent upon him to accept responsibilities commensurate with the powers conferred upon him. His duties and obligations are the incident of progress and as this cannot go on without stability in the laws, respect for the great work already done by man, so the lawyer stands now as ever, and he must so stand in the future, for everything that promotes these great objects.

As no lawyer ever attains a position so commanding that he may not be assigned by the court, whose servant he is, to defend the prisoner of the lowest grade and of most probable guilt, so he carries with him through life the obligation to do all that lies in his power to save the institutions of his country from the harm that may be done by the reckless agitator who would destroy what is, merely because it exists,

who would raze the old structure merely because it is old, not because it is ugly, but, perhaps, for the very reason that it has in it some of the elements of that beauty the consciousness of which has never so much as entered into the mind of such a man.

This was most fittingly emphasized by the late Chief Justice Cooley, in his address, as President of the American Bar Association at Saratoga, in August, 1894, when he said:

"What I desire to impres sat this time upon members of the legal profession is that every one of them is or should be, from his very position and from the license which gives him special privileges in the determination of legal questions and controversies, a public leader and teacher, whose obligation to support the Constitution and laws and to act with all due fidelity to the courts is not fully performed when the fundamental organization of society is assailed or threatened, or the laws defied or likely to be in the community in which he lives, as a result of revolutionary purpose, or of ignorance, or unreasoning passion, unless he comes to the front as a supporter of settled institutions and of public order, and does what he properly and lawfully can to correct any sentiment, general or local, that would in itself be a public danger, or be likely to lead to disorder or unlawful violence.

"It is a low and very unworthy view anyone takes of his office when he assumes that he has nothing to do with public ignorance of the duty of subordination to the institutions of organized society, or with breaches of law existing or threatened, except as he may be called upon to prosecute or defend in the courts for a compensation to be paid him."

In closing, I would emphasize anew the thought that, as the lawyer finds himself the beneficiary and the heir of great privileges which yield commanding opportunities, it is more incumbent upon him than upon any other to recognize that these privileges and powers impose obligations from which there can be no escape, as, indeed, there ought not to be, except by meeting and welcoming them in the completest sense possible. If, at any time it shall become apparent that the sanctity of the ballot is either threatened or assailed; if the administration of the law, whether civil or criminal, becomes either lax or careless; if the evils in any industrial movement manifest such power that they threaten monopoly or put popular rights in peril; if the executive, the legislative, or the judicial branches of our system shall, either by design or accident, tend to trench unduly or dangerously upon the rights of any of the others — the one man who should resent and resist the dangers thus threatened, is the American lawyer. The traditions of his profession, the execution of the high trust confided to him, the example set him by great leaders through many generations, all demand that he should exercise the greatest watchfulness and show the highest courage.

New York, N.Y., May, 1905.

LEGAL RIGHTS IN THE REMAINS OF THE DEAD

By Frank W. Grinnell

THE writer recently had occasion to prepare an opinion for the Massachusetts Cremation Society upon the subject indicated by the title of this article. It appeared that, although the subject had been discussed from time to time in various books and periodicals as well as in judicial opinions,[1] there was still much confusion arising, to a considerable extent, from reasoning based on misleading technicalities and dicta. It has seemed worth while, therefore, to write an article, using the opinion referred to as a basis, but covering a somewhat broader field.

It is, of course, to be understood that this examination has had especial reference to the cause of the cremation of the dead as advocated by the society above mentioned, and also that the writer does not discuss the statutory rules of different localities.

The inquiry seems naturally to divide itself into three parts or questions:

I. What is the right of a person to control the disposition of his own body?

II. What are the relative rights of members of the family of a dead person and others interested as among themselves?

III. In what form and substance should instructions be given by one desiring to control the disposition of his own body?

I

The Right of a Person to Control the Disposition of his Own Body

It has long been the common practice for persons to give directions in their wills for the disposition of their bodies, and from time immemorial these directions have been respected. See an interesting article in Vol. xvii of the *Law Journal* (London), p. 149.

The following are instances of this practice:

Jeremy Bentham, whose learning and research in the law gives his example peculiar weight, bequeathed his body for dissection. William Pelham, Kt., in 1532, bequeathed his body "to be buried in the chauncel of Laughton." John of Gaunt, in 1397, directed his body to be buried in the cathedral church of St. Paul, "and that it be not buried for forty days during which I charge my executors that there be no cering or embalming of my corpse." Other references are given, in the article above cited, to old forms of wills in conveyancing books; and the author tells us of the interesting fact that on September 26, 1769, a Mrs. Pratt's body was burned "in the new burying-ground adjoining Tyburn turnpike," according to direction in her will. These instances of the early English practice are similar to the early Massachusetts practice, and undoubtedly to the early practice in other parts of this country, to illustrate which the following clauses in wills are chosen at random from local Probate Records. Moses Paine of Braintree, in 1643, by his will (see Suffolk Records, vol. i, p. 26 orig. vol.) provided as follows: "My bodie to be buried wheresoever it shall please God to call me, at the discretion of my sonne Moses whom I make mine executor." Comfort Starr, in 1659, by his will (see Suffolk Records, vol. i, p. 353) directs and provides, "I commend and comit my soule into the hands of Almighty God . . . my body to ye earth fro whence it came to be burryed, within ye usuall place of buriall in Boston, so neere my Late wife as may be possible with conveniency." So in the will of John Kingsbury, in 1660 (Suffolk Records, vol. i,

[1] For bibliography of the subject see note to Johnston *v.* Marinus, 18 Abbott's New Cases (N.Y.) at p. 75; Pettigrew *v.* Pettigrew, 207 Pa. St., 313; Perley "Mortuary Law," Am. and Eng. Encyc. 2d ed., Title, "Dead Body."

p. 379), we find, "and my body I comitt to the earth from whence it was taken after my death to bee decently buried in Christian buriall by the care and discretion of my executors." And in the will of William H. Sumner of West Roxbury (1860): "Item Second. I will and direct that my body shall be interred in my Tomb, on lot number Eight Hundred and Forty-three, on Sumner Hill, Mount Warren Avenue, in the Forest Hills Cemetery, in West Roxbury." The writer ventures the assertion that no one who may read this article can examine three or four old family wills without finding evidence of this custom.

The effect of this is well stated in the English article above referred to, where it is said: "It is difficult to suppose that these directions, often accompanied with the minutest details as to the manner and cost of burial and by legacies dependent on their observance, should have been mere vain words of no binding force. At all events, though hundreds of wills contain such directions, it is strange, if they were of no binding force, that none out of the large number which are extravagant or absurd should ever have been called in question in a court of law. It is true that without such directions a duty would be implied in the executors to bury becomingly, and that in most cases where it is expressed the duty is laid on the executors. But the same is true of many other parts of an executor's office, and there is no reason why this duty as well as the others should not be deputed to some one who is not an executor."

This right, therefore, of directing the disposition of one's body has been exercised and respected here and elsewhere for centuries, although happily without frequent resort to the courts. And this has been appreciated by the courts, as is shown by the opinion in the leading case of Pierce *v* Swan Point Cemetery,[1] that "the right of a person to provide by will for the disposition of his body has been generally recognized."

[1] 10 R. I. 227.

There appear to be few expressions of legal opinion which qualify or contradict the general rule and custom. One English judge, in 1882, in the case of Williams *v.* Williams,[1] expressed an opinion that a man cannot dispose of his body by will because there is no property in a dead body. This opinion was not, however, called for by the facts of the case before him, and, as will be shown later, does not prevent the courts from carrying out the testator's wishes, even in England.

This English opinion, although ably criticised in England (see 17 *Law Journal*, above referred to), was quoted with approval by the California court in the case of Enos *v.* Snyder.[2] But these opinions were based largely on an old common law maxim that "there is no property in a dead body," the origin, and even the existence, of which have been disputed.[3]

Whatever its origin, the statement that a body is not property is neither useful nor helpful in the present discussion, and the question is merely one of phraseology. It is certain that rights in the bodies of the dead are not property in the sense of merchandise. It is equally certain that one cannot draw from the premise that there is no such property the conclusion that there are no enforceable rights. Accordingly, in the recent Pennsylvania case of Pettigrew *v.* Pettigrew,[4] the opinions in Williams *v.* Williams and Enos *v.* Snyder, that a man cannot control the disposition of his body, which have just been criticised as *obiter*, are stated to be opposed to the weight of authority in this country. In this same Penn-

[1] L. R. 20 ch. D. 659.

[2] 131 Cal. 68. The actual decision in Enos *v.* Snyder turned on the local statutes. The views of the California court on the general subject have been curiously vacillating. See O'Donnell *v.* Slack, 123 Cal. 285 at 288.

[3] See report of Hon. Samuel R. Ruggles, *in re* Beekman St., 4 Bradford's Surrogate Rep. at pp. 520–521 (N. Y.); *cf.* 10 *Central Law Journal* at p. 304.

[4] 207 Pa. St. at p. 317 (1904).

sylvania case the court expressed a doubt as to how far the desires of the decedent should prevail against those of a surviving husband or wife, but it was a doubt by a court which fully recognizes and agrees with the general line of argument adopted in this article.

Even in England, in spite of Williams *v.* Williams, the present practice of the ecclesiastical courts is to respect the wishes of the deceased, for, in 1892, Dr. Tristram of the Consistory Court of London, said:

"Where the deceased has himself expressed a wish to be buried in that or in any other church yard, the invariable practice of the court is by a faculty to give effect to such wish."[1] And later, in 1894, he shows that they carry out the wish of the deceased to be cremated.[2]

The matter may be summed up by an apt quotation from an opinion of the Supreme Court of Iowa: "It always has been and will ever continue to be the duty of courts to see to it that the expressed wishes of one as to his final resting-place shall, so far as it is possible, be carried out."[3]

II

What are the Relative Rights of Members of the Family of a Dead Person and Others Interested, as among Themselves?

In the opinion of the writer as above stated, the directions of the decedent in a will or other appropriate writing are of binding force and effect. This second question, therefore, arises where the deceased has expressed no opinion upon the whole matter, and when the family differ among themselves. In such cases there are no absolute rights. There are, however, definite rules of precedence which may, and which practically always do, govern the matter; but, in the last resort, the courts may give weight to special circumstances and establish a rule of fitness and decency in the particular case which does not precisely conform to these rules of precedence.

In Massachusetts the court decided in the case of Burney *v.* Children's Hospital,[1] that the father of a deceased minor child may maintain an action for damages for mutilating the child's body by an unauthorized autopsy. The grounds of the decision were that in the Massachusetts decisions "a right of possession" (of a dead body) " is recognized, which is vested" (primarily) "in the husband or wife or next of kin, and not in the executors." The court then held that the father, as the natural guardian of the child, was entitled to the possession of its body for burial in the condition in which it was at time of death, and, therefore, was entitled to sue for mutilation of it.

From the opinion in this and other cases it may be laid down as the general rule of law in this country that, in the absence of special circumstances of unfitness and in the absence of expressed wishes of the deceased:

1. The husband has the right to control the disposition of his wife's body.[2]

2. The wife has the same right as to her husband's body.[3]

3. If there is no surviving husband or wife, the living children have the right, as they naturally come next.[4]

4. Next would come probably the living grandchildren.

5. If there were no children or other descendants, then first the father;[5] second, the mother, as she is the natural guardian after the father. (A court might regard the

[1] *In re* Dixon, 1892, P. 386 at p. 391.
[2] *In re* Kerr, 1894, P. 284 at p. 293.
[3] Thompson *v.* Deeds, 93 Ia., 228.
See also O'Donnell *v.* Slack, 123 Cal. 285.

[1] 169 Mass. 57.
[2] Smyley *v.* Reese, 53 Ala. 89; Weld *v.* Walker, 130 Mass. 422.
[3] Hackett *v.* Hackett, 18 R. I. 155; Larson *v.* Chase, 47 Minn. 307.
[4] See Lowry *v.* Plitt, 16 Am. Law Reg. N. S. 155 (Pa.).
[5] Burney *v.* Childrens' Hospital *supra.* See also The Queen *v.* Price *infra.*

father and mother as having equal rights, especially if the deceased child was of age.)

6. After them, the living brothers and sisters, and so on through the living next of kin.[1]

7. That the rights of these persons interested will be protected by a court of equity.[2]

8. That the estate is liable for the reasonable expenses of disposing of the body.[3]

9. That, in the absence of directions from those entitled to give them, the executor or administrator has the right and duty of providing decent burial.[4]

It has been argued, even by judges whose conclusions agree substantially with those herein expressed, that all of these rights spring from legal *duties*; for instance, that a husband has the right to his wife's body because he has a right to administer her estate and because the office of administrator carries the duty to bury and, therefore, the right to the body.[5] Such reasoning seems fallacious and unnecessarily complex. It overlooks the distinction between the various rights. Some are public rights connected with public duties, such as the old common law duty of a householder to bury a person dying under his roof, if there was no one else to do it.[6] The duty and corresponding right of the executor or administrator to bury may also fairly be considered to be public in their nature, because some one must do it. Other rights, however, are not of the same class. Some who have rights may under some circumstances have duties in the same matter, as in the case of the husband or wife or father or mother where there is no estate of the deceased.[1] But it does not follow and is not the fact that such duties and rights are always correlative. There is no public con-

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[1] See Lowry *v.* Plitt, *supra*; *cf.* Bogert *v.* City of Indianapolis, 13 Ind. 134 and 10 *Central Law Journal* at p. 327.

[2] Weld *v.* Walker, *supra.*

[3] Constantinides *v.* Walsh, 146 Mass. 281; Perley, "Mortuary Law," 78 and note.

[4] 2 Blackstone's Com. 508; Pettigrew *v.* Pettigrew, *supra.*

[5] See Pettigrew *v.* Pettigrew, *supra.*

[6] See Reg. *v.* Stewart, 12 Ad. and E. at pp. 778, 779. This positive *duty* of the householder seems to rest on the negative legal duty to refrain from keeping a nuisance on his premises or from doing other offensive things, see Lord Denman's language in the case referred to at p. 778.

"It should seem that the individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial; he cannot keep him unburied, nor do anything which prevents Christian burial; he cannot therefore cast him out, so as to expose the body to violation or to offend the feelings or endanger the health of the living, and for the same reason he cannot carry him uncovered to the grave." *Cf.* Reg. *v.* Vann, 2 Den. C. C. 325.

[1] See Constantinides *v.* Walsh, 146 Mass. 281, Perley, "Mortuary Law," pp. 36–39. On page 38 of Mr. Perley's book it is said that "when a person upon whom the duty of burial rests is incapable of acting, . . . the duty falls upon the next one having it. . . ." The meaning of this remark is not quite clear, but, if it means that there is a legal duty for the performance of which (in the absence of statute) the next of kin, who were not bound to support the deceased, can be held responsible, the statement may well be doubted. The case of Jenkins *v.* Tucker, I. H. Bl. 90, cited by Mr. Perley, does not support such a statement, and there seems to be no reason why a relative, who is not bound to support the deceased before death, should be bound to bury him. Of course, if the deceased died in the house of the relative and no one else would bury him, the relative would have to do it; but that duty is imposed on the householder as such (see Reg. *v.* Stewart, *supra*) and not on the ground of relationship, and the fact that the relative is given a *right* to bury is no reason why the *duty* should be imposed if he does not wish to exercise the *right*. It is said that this duty was imposed under "the civil law of Ancient Rome," see Pierce *v.* Swan Point Cemetery, 10 R. I. 227; but that is hardly sufficient authority under our modern conditions and laws of independence.

In the case of a husband and father the situation is different. His *duty* both to support and to bury is a duty not only to his wife and child, but to the public (see Reg. *v.* Vann, 2 Den. C. C. 325), whereas his *right* to control, as against others, is founded on private feelings. It seems probable from Mr. Perley's text on p. 78, that this note is merely explanatory and not inconsistent with his views.

cern in the disposal of the body except to see that it is decently done. The *rights* of persons in such matters as are here considered are, therefore, essentially private, and rest on the law's respect for private feelings, and the law, so stated, does not require technical and misleading analogies to support it.[1]

It is suggested in the Rhode Island case of Pierce *v.* Swan Point Cemetery, already referred to, that all the rights in a dead body are subject to regulation by a court of equity similar to the control which a court exercises as to the custody of children, the ground being that the custody of a dead body is a "trust" for friends and others feeling a natural interest; and this suggestion was repeated by the court in Hackett *v.* Hackett,[2] with the additional remark, that "in no case is it" (the right to control) "an absolute right."

It is to be regretted that the word "trust" has been introduced into the discussion, for the word has such technical significance in the law of property that it is likely to create confusion. It is clear that all that is meant by the word "trust," as used by the Rhode Island court and other courts that have used it, is that *after* the burial of a body the courts will protect the repose of the dead, and will settle disputes by some common-sense rule of respect for the feelings of those interested; and *before burial*, if disputes arise between next of kin of the same degree who have equal rights, or even between relatives of different degrees under special circumstances, the courts will regulate the matter as well as they can on the ground that rights in this class of cases are not absolute, like property rights, but are subject, not only to the rules of public health and decency, but also, to some extent, to considerations of fitness and respect. For instance, it is not uncommon for persons desiring cremation to direct that their ashes be given to the winds. The jurisdiction over such a case does not rest on any theory of a "trust," as the word is used in the law of property. It exists, and has always existed in this country, because common sense and decency demand it and it is limited by the ordinary limitations of common sense and decency. There is no reason why a court should thwart such wishes.

So far this discussion of the rights of relatives has been confined to the law of this country. In England there has been a curious conflict of law between the ecclesiastical and the civil courts as to the right to cremate a body in the absence of the express wish of the deceased. It has been pointed out by Hon. Samuel R. Ruggles, in a well-known report,[1] that the English ecclesiastical courts exercise over the burial of the dead "a legal, secular authority which they had gradually abstracted from the ancient civil courts to which it originally belonged," and that the separate existence and authority of the English ecclesiastical courts, therefore, has helped to prevent the civil courts from developing the law of individual rights in the matter.

Notwithstanding the ecclesiastical jurisdiction, however, the subject occasionally comes into the English civil courts and in 1884, in Queen *v.* Price,[2] a man was indicted for cremating, under somewhat irreverent conditions, the dead body of his minor child. Sir James Stephen decided, after a careful analysis of the authorities, that, at common law, it was the right and duty of the father to dispose of the body "by burying or in any other manner not in itself illegal," and that he committed no offense by cremating it, if he did not do it in such a way as to create a nuisance, or to avoid an inquest.

On the other hand, Dr. Tristram in 1892,[3] and again in 1894,[4] stated the opinion of

[1] See O'Donnell *v.* Slack, 123 Cal. 285 at p. 289.
[2] 18 R. I., 159.

[1] *In re* Beekman Street, 4 Bradf. Surr. at pp. 520–521 *supra*.
[2] 12 Q. B. D. 247.
[3] *In re* Dixon, 1892, P. 386 at p. 393.
[4] *In re* Kerr, 1894, P. 284 at p. 293.

the ecclesiastical court to be, that cremation was improper, except by expressed wish of the deceased, because it deprived the deceased of his right "to Christian burial in the accustomed form in a consecrated burial ground." He cited the opinion of Lord Stowell in Gilbert *v.* Buzzard,[1] and of Lord Denman in the common law case of Reg. *v.* Stewart,[2] to show that this right existed "by ecclesiastical *as well as by common law*" for every person dying in England (with certain exceptions), and then says that a person should not be deprived of this right "unless he has left written directions or expressed in his life a wish to be cremated."

In England, therefore, up to 1902, when the "Cremation Act" hereinafter mentioned was passed, it was not a criminal offense by cremation to deprive a child of its so-called right to "Christian burial in the accustomed form," if a person having the rightful custody of the body did it without the assistance of the ecclesiastical court; but that court would not assist in the operation if such assistance was needed.

It is submitted that Dr. Tristram's rule is sound to the extent that the court will not assist executors or others to cremate a body, in opposition to the wishes of the surviving husband or wife or next of kin, unless the deceased has expressly requested cremation; but, that the court should refuse to allow cremation when those nearest the deceased desire it, seems to be a rule not warranted by authority, even in English law. In the opinions, in which he lays down his rule, Dr. Tristram admits that cremation "though not contemplated, is not prohibited either by ecclesiastical or by statute law nor yet by common law."[3] He further shows that cremation does not prevent subsequent "Christian burial" of the ashes, and, if the remains have been cremated by the testator's directions, he sees no objection to the use of the "Burial Service," just as it is customary to use it in the burial of the ashes of a person who has been burnt to death.[1] Having gone thus far, Dr. Tristram stops short and requires "the directions of the deceased." He therefore interprets the right of "burial" as a right to decay "in the accustomed form" for the customary length of time and no longer and no less. This is illustrated in a most striking way by the passages from Lord Stowell's opinion in Gilbert *v.* Buzzard, which are given in a foot-note and which Dr. Tristram professes to follow.[2] The authorities

[1] 2 Hagg. Consist. 333, S. C. 3 Phill. 335.

[2] 12 Ad. and E. 773.

[3] 1894 P. at p. 287.

[1] 1892 P. at p. 394.

[2] In Gilbert *v.* Buzzard, 2 Hagg Consist 333, Gilbert claimed the right to bury his wife in the parish churchyard in an iron chest at the ordinary charge for a wooden coffin. The parish objected and the court ruled that Gilbert must pay extra. Lord Stowell said, at p. 348, as to the right to burial: "That right strictly taken is to be returned to his parent earth for dissolution and to be carried thither in a decent and inoffensive manner; when these purposes are answered, his rights are, perhaps, fully satisfied in the strict sense in which any claim in the nature of an absolute right can be deemed to extend," and, on pp. 353–354, he limited the right as follows:

"The legal doctrine certainly is and has remained unaffected — that the common cemetery is not *res unius ætatis* the property of one generation, now departed, but is likewise the common property of the living and of generations yet unborn, and is subject only to temporary appropriations.

"If this view of the matter be just, all contrivances that, whether intentionally or not, prolong the time of dissolution beyond the period at which the common local understanding and usage have fixed it, is an act of injustice unless compensated in some way or other." . . .

"In country parishes . . . more ground can be spared . . . but in populous parishes, in . . . cities, the indulgence of an exclusive possession is unavoidably limited; . . . the period of decay and dissolution does not arrive fast enough, in the accustomed method of depositing bodies in the earth, to evacuate the ground for the use of succeeding claimants."

So Gilbert had to pay extra.

In The King *v.* Coleridge, 2 B. & A. 806 S. C. 1 Chitty 588, the Court of Kings Bench had refused a mandamus to compel burial in an iron

cited by Dr. Tristram were discussed, with other cases, by Sir James Stephen in Queen *v.* Price, already referred to, in which case they were cited to show that cremation was a crime. He criticized the authority of those opinions on the ground that the courts said nothing whatever about cremation; that the question had not been raised; that the courts went on the assumption that a man wished Christian burial in the accustomed form and did not consider the possibility of a man's entertaining or acting upon any other view. Continuing, he said:[1] "If it is a duty to give every corpse Christian burial the duty must be violated by burning it. I do not think, however, that the cases really mean to lay down any such rule. The question was not before the court in either case." The opinions are not to be taken too literally, for "the expression 'Christian burial' is used, which is obviously inapplicable to persons who are not Christians, Jews for instance, Mahommedans, or Hindus."[2]

This opinion seems to dispose of the authority cited by Dr. Tristram for the ecclesiastical practice, and the practical reasoning of Lord Stowell is so secular in character that one would expect it to startle a spiritual court out of the doctrine that the existence of the right to "Christian burial" forbids cremation unless by the wishes of the deceased.

Lord Stowell's reasoning certainly illustrates the truth of Mr. Ruggles' characterization of the ecclesiastical authority in such matters as "legal" and "secular," and it is obvious that the English precedents on the subject are entitled to little weight in this country, where all secular authority is vested in the civil courts.[1]

To sum up this branch of the subject, in spite of such differences as have been pointed out, of reasoning and phraseology in different cases, the rules of precedence and of rights of relatives throughout this country are, in the absence of statute, substantially those herein stated; and in England, although at present the doctrine of "Christian burial" and the rights of relatives are limited, as above stated, it seems probable that in the near future, when the public becomes more accustomed to the idea of cremation and its advantages and the courts have more thoroughly digested the opinion of Sir James Stephen in Queen *v.* Price, the law will gradually develop along the lines of the American cases. That this is the natural development demanded by modern conditions and its accomplishment seems to be merely a question of time and of overcoming conservative ideas. The gradual progress in this direction is reflected in the English "Cremation Act, 1902,"[2] a legislative recognition of the practice of cremation, which provides that burial authorities may construct crematories, and the Secretary of State may regulate the cases and conditions under which cremation may take place.[3]

coffin, on the ground that, although the right of sepulture may be a common law right, "the mode of burial is a subject of ecclesiastical cognizance alone." This seems inconsistent with Dr. Tristram's statement of the common law.

[1] 12 Q. B. D. at p. 253.

[2] *Cf.* Sir John Nicoll's opinion in Kemp *v.* Wickes, 3 Phill. 264 at pp. 269, 272 and 300, in which he discusses the duty of the incumbent of a parish as to the burial of Dissenters.

[1] *Cf.* statement by Sir John Nicoll in Kemp *v.* Wickes, 3 Phill. 264 at p. 276. Stephen, J. in Reg. *v.* Price, 12 Q. B. D. 247 at p. 249; Reports of Commissioners on the Ecclesiastical Courts of England and Wales of 1832, pp. 19–22.

[2] 2 Edw. 7, Chap. 8.

[3] See Section 7 of the act. In this connection the following provision of the act is interesting:

§ 11. "The incumbent of any ecclesiastical parish shall not, with respect to his parishioners or persons dying in his parish, be under any obligation to perform a funeral service before, at, or after the cremation of their remains, within the ground of a burial authority, but, on his refusal so to do, any clerk in Holy Orders of the Established Church, not being prohibited under ecclesiastical censure, may, with the permission of the bishop and at the request of the executor of the deceased person, or of the burial authority, or other person having charge of the cremation, or

III

In What Form and Substance should Instructions be given by one desiring to control the Disposition of his Body.

1. Such instructions should be contained in the will, in order that they may have the benefit of the special sanction and force of that instrument.

2. As wills are often not opened until after funeral and burial have taken place, such instructions should also be made known in writing to the person or persons likely to have charge of matters immediately after death, such as an immediate relative, the head of the house in which one lives, or an executor named in a will and known to the family to be so named. A clearly expressed oral request is probably sufficient; but it has neither the sanction nor the freedom from mistake and error of directions written and signed.

Conclusion

To sum up, then, the authorities generally in this country, except where the law has been changed by statute, show ordinarily that:

First, a person may control the disposition of his or her body, and direct it to be cremated.

Second, if no such directions are left, the matter is in the control of the survivors in the order above stated; but, where disputes arise between persons of the same degree of kinship or in any unusual circumstances, the court will take control, and exercise a wise discretion in the matter.

Third, the mode of control by the decedent is that which has just been indicated.

Boston, Mass., May, 1905.

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interment of the cremated remains, perform such service within such ground." This section reflects the feeling of some members of the Established Church.

The writer understands the precise attitude of the Roman Catholic Church at present to be as follows:

"1. The Church is opposed to cremation.

"2. If a dying person declares his resolve to have his body cremated, priests will not give him the sacraments, nor bury him with Catholic rites.

"3. But if the body *is to be cremated against* the will of the deceased, the body may be brought to the church for mass and blessing, or blessed at the house (where deceased died), and after the cremation the ashes (without any religious service) may be deposited in consecrated ground.

"4. The priest, however, may *not* accompany the body to the crematory for any rites, nor even for social or civil reasons." For a fuller statement see the answers by the Congregation of the Inquisition, approved and ratified by Pope Leo XIII, to questions of the Archbishop of Friburg in 1892, published in the American Ecclesiastical Review, vol. XII, p. 499 and (in a translation) in the Third Annual Report of the Board of Directors of the Massachusetts Cremation Society.

It seems clear that the rules above stated were not strictly adhered to in the Case of General von Xylander, a distinguished Roman Catholic, whose body was recently cremated in Germany, and who was known to have been a member of a Cremation Union for several years before his death. This has caused considerable discussion in the press, both in Germany and elsewhere, as to whether the Church was changing, its attitude.

The writer understands that the case is not regarded as a precedent by the church; but it is said that at least one similar instance has recently occurred. Such cases are probably to be explained by the following clause from the decree of Dec. 15, 1886, referred to by the Inquisition in its answer to the fourth inquiry of the Archbishop above referred to.

"In particular cases, however, in which doubts or difficulties may arise, the ecclesiastical superior of the place must be consulted, who, after due consideration of all the details, will decide upon that course of action which he shall judge in the Lord to be the most conformable to the teachings of the Church."

SOME LEGAL ASPECTS OF THE EQUITABLE SITUATION

ANONYMOUS

EVER since the early part of February the newspapers have been filled almost daily with accounts of the struggle which is being waged for the control of the management of the Equitable Life Assurance Society. The situation presents some interesting and, in some respects, novel questions of law, and it has been thought that an examination of these, accompanied with a somewhat clearer review of the history of the controversy and of the questions now at issue than it would be possible to glean from the contradictory and oftentimes confused articles contained in the daily press, may prove of interest to the readers of *The Green Bag*.

The Equitable Life Assurance Society of the United States was organized in 1859, under the Life Insurance Law of the State of New York. This statute (Laws 1853, Chapter 463), which has been incorporated into the present Insurance Law of that state, took the place, so far as life insurance companies were concerned, of an earlier act (Laws 1849, Chapter 308), which was the first general statute enacted by the New York Legislature regulating the incorporation of insurance companies. Previous to the enactment of the law of 1853, there had been numerous life, fire, and marine insurance companies doing business in New York. The business of life insurance was then comparatively a new thing, and the principles which must be observed in order that it may be safely and successfully transacted were not fully understood. Small companies, organized without adequate financial backing, or any proper appreciation of the principles of the business, had come to grief with dire results to their policy-holders. These companies were almost all so-called "Mutual Companies," that is, companies which had no capital stock and of which the members were the policy-holders. Only two of these so-called mutual corporations survive to-day, the New York Life and the Mutual, both of which were organized under special acts of the New York Legislature prior to the enactment of the general laws. The statute of 1849 permitted the organization of both stock and non-stock companies to engage in the business of life insurance, but four years later, on the enactment of the law under which the Equitable was organized, the legislature evidently decided that past experience rendered it advisable that companies authorized to do a life insurance business should be put under stringent regulations and required to possess a certain amount of financial backing. The Act of 1853, therefore, permitted the organization of stock life insurance companies only, and required that upon organization such corporations should have a paid-in capital of $100,000 before beginning business. This requirement is contained in the New York statutes of to-day, and since 1853 there has, we think, been no attempt to organize anything but a stock corporation under the laws of New York for the purpose of transacting the ordinary business of life insurance. Although some of the stock corporations doing a life insurance business under New York laws give to certain classes of policy-holders a right to vote for directors of the company, the Mutual and the New York Life remain the sole representatives of the old type of "Mutual Companies."

In 1859 the business of life insurance was almost in its infancy, and $100,000 was regarded as a very large sum to invest in such a venture. In that year Mr. Henry B. Hyde, the founder of the Equitable Life, was employed as cashier by the Mutual Life Insurance Company. His father was one of the most successful insurance solicitors in the employ of that company. Mr. Hyde was a young man of brief business exper-

ience, but of great ambition, and, as the future proved, of great creative genius. He determined to organize a new life insurance company, and to make it the greatest institution of its kind in the world. Before his death in 1899, he had fully succeeded in accomplishing his ambition. Neither he nor his father possessed the requisite means for floating the new company. Young Mr. Hyde was a member of the Fifth Avenue Presbyterian Church, of which the Rev. James W. Alexander, D.D., was then pastor. Mr. Hyde interested his pastor in the new project, and, through the latter's aid, men of means who belonged to Dr. Alexander's congregation (which was then probably the most wealthy in New York), were induced to supply the means necessary to launch the new enterprise. Mr. William C. Alexander, a brother of Mr. Hyde's pastor, was made the first president of the Society, and held that office during its early years. Mr. Hyde was its original vice-president and manager. Subsequently Mr. Hyde gave two of Dr. Alexander's sons positions with the Society; these were Messrs. James W. Alexander, Jr., and William Alexander, of whom the former succeeded Mr. Hyde in the presidency of the Society in 1899, and the latter has for many years been treasurer of the corporation. It was thus that the Hydes and Alexanders first became associated with the Equitable Life Assurance Society. Mr. James H. Hyde, the present vice-president, succeeded to that office at the time of his father's death in 1899.

The charter adopted for the Equitable Life by its incorporators contained some peculiar provisions which have a bearing upon the controversy now prevailing. Article 3 of the charter provides:

"The holders of the said capital stock may receive a semi-annual dividend on the stock so held by them not to exceed 3½% of the same, such dividends to be paid at the times and in the manner designated by the directors of said company. The earnings and receipts of said company, over and above the dividends, losses, and expenses shall be accumulated."

Article 4 provides that the corporate powers are to be exercised by a board of 52 directors divided into four classes of 13 each, one-fourth of the number of directors to be elected annually and to hold office for four years, or until their successors are chosen.

"In the election of directors every stockholder in the company shall be entitled to one vote for every share of stock held by him, and such vote may be given in person or by proxy. At any time hereafter the board of directors, after giving notice at the two previous stated meetings may, by a vote of three-fourths of all the directors provide that each life policy-holder, who shall be insured in not less than $5,000 shall be entitled to one vote at the annual election of directors, but such vote shall be given personally and not by proxy."

Article 6 of the charter provides that "the insurance business of the company shall be conducted upon the mutual plan."

From small beginnings the Equitable Society has grown to very large proportions. At the end of the year 1904 it possessed total assets of over $413,000,000 including a surplus of over $80,000,000, and the total of its outstanding insurance amounted to the enormous sum of $1,495,542,892. Its policy-holders are scattered in every quarter of the world.

At the time of the origin of the Society its capital stock was divided among a considerable number of men, no one of whom held any large proportion of it. Before his death, however, the late Henry B. Hyde had acquired and brought into his own hands a majority of the company's capital stock, and in 1895 he transferred this stock to certain trustees, of whom the present survivors and representatives are James W. Alexander, James H. Hyde, and William H. McIntyre, one of the vice-presidents of the Society. This trust will expire by the terms of the trust deed in July 1906, when the

younger Mr. Hyde attains the age of thirty years, and the stock which makes up the trust fund will then become the latter's individual property. Meanwhile, by their control of a majority of the Society's capital stock, the election of the directors has been vested in the hands of these trustees.

The controversy now prevailing in the Equitable Society first arose early in February of the present year, a date subsequent to the annual election of directors, and just before the annual meeting of the board to elect officers for 1905. It was inaugurated by the president, Mr. Alexander, who at that time presented to Mr. Hyde two petitions signed by a large number of the officers of the Society, one of them demanding that immediate steps be taken to place the policy-holders of the Society in control of the corporation, and representing that the control of the company by its stock-holders was damaging to its business; the other expressing the opinion that the continued exercise by Mr. Hyde of the great powers which he had assumed to exercise as vice-president of the Society would be prejudicial to its interests. These petitions were laid before the board of directors, and with them was submitted an opinion signed by eminent counsel, to the effect that the board of directors of the Society had, under Sec. 52 of the Insurance Law of the State of New York, power by a mere majority vote, without consent of the stock-holders, to amend its charter so as to confer upon all policy-holders the right to vote in person or by proxy. A form of amended charter in accordance with this opinion was at the same time laid before the board.

From that beginning the controversy has developed and spread. Charges and countercharges have been made in the public press. The old officers of the Society were, however, all reëlected and a committee appointed to adopt a plan for giving policy-holders a right to vote in corporate meetings, and for indemnifying the stock-holders for their loss of control. This step, which it was supposed would furnish a solution of the controversy, proved in reality to be but the commencement of the real fight. The so-called committee on mutualization were advised by counsel that the Society was without power to purchase shares of its own capital stock, or to divert its funds to payments to stock-holders by way of compensation for loss of their voting power (see New York Insurance Law §16). Policy-holders' committees were organized to bring pressure to bear upon the Society to give to policy-holders the right to vote for directors. Compromises were proposed and rejected. Finally Mr. Hyde, as the principal stock-holder, at the request of the board of directors and a policy-holders' committee, agreed to a plan whereby the stock was to continue to elect 24 of the directors of the Society, and the remaining 28 were to be chosen by the policy-holders. An amended charter, containing these provisions, was adopted by the directors and submitted to the Superintendent of Insurance for his approval. Thereupon minority stock-holders began to make themselves heard. One of these, Mr. Franklin B. Lord, has instituted a suit, attacking the validity of the proposed amendments to the charter upon the ground that they deprive the stock-holders of property rights, and that this cannot be done without the consent of all the stock-holders of the Society. In this suit a large number of other stock-holders have intervened, and many of the questions of law will apparently be threshed out in the course of this litigation. Policy-holders' suits have been instituted, not only in New York, but in a large number of other jurisdictions. Attempts have been made to have receivers appointed for the Society and its assets. Investigations of the Society's affairs are being carried on by the Insurance Department of the State of New York, and by a committee of its own directors. Charges of malfeasance have been made against Mr. Hyde by Mr. Alexander or his partizans, and similar countercharges have been made

against the latter. Both parties have explicitly denied the truth of these charges. More recently Mr. Hyde and the other beneficiaries under the trust deed created by the late Henry B. Hyde, have instituted a suit for the removal of Mr. Alexander as one of the trustees of the estate.

Although the Society is admittedly in a strong and solvent condition, and abundantly able to discharge all its obligations, charges of financial wrong-doing have been made against some of its officers. The principal of these charges are that excessive salaries have been paid to its officers; that both Mr. Alexander and Mr. Hyde have been interested in underwriting portions of proposed issues of certain securities of the same kind and issue as securities subsequently purchased by the Society from the banking houses which issued them, and that the Society bore the expense of a large public dinner given to Monsieur Cambon, the former French Ambassador, in the names of Senator Depew and Mr. Hyde.

The main question raised by the proposed changes in the constitution of the Society relates to the power of the state, or of the board of directors of the corporation under authority delegated by the state (New York Insurance Law §52), to change the method of electing the directors of the Society, so as to vest in the policy-holders the right to nominate a majority of the board. It should be first observed that in the case of the Equitable, or any other purely stock insurance company, the relation of the policy-holders to the corporation is simply that of persons who have entered into contracts by which the company agrees, on the happening of some future event, to pay to them, or to the beneficiaries named in the policy, certain sums of money. These sums may or may not include dividends from the surplus profits of the corporation. If the agreement is to pay dividends, the person with whom the company has contracted is known as a "participating policy-holder," and the amount to be paid upon his policy will depend, to some extent, upon the success with which the company's business is carried on. If, on the other hand, the policy is a "non-participating policy," the agreement is to pay simply a fixed sum of money. In neither case, however, is the policy-holder in any sense a member of the corporation.[1]

Nor is there any relation of trustee and *cestui que trust* between the company and its policy-holders.[2]

The proposition made by the amended charter is to confer upon this class of persons, who until the maturity of their policies, conditioned upon their continuing to make regular payments of premiums, are not even creditors of the Society, the right of controlling, or at least electing persons who are to control the management of the Society and its business, and to take this right of election away from the members of the corporation, who now — as is customarily the case in all stock companies — are in the possession of and exercise it.

It is of course familiar that the charter of a corporation constitutes a contract between the state and the company;[3] between the state and the stock-holders;[4] and between the company and the stock-holders.[5]

Against the right to change the charter as against the dissent of any stock-holder are cited the provision of §10 of Article 1 of the Federal Constitution forbidding any state to "pass any . . . law impairing the obligation of contracts," and the provision of the Fourteenth Amendment: "Nor shall any state deprive any person of life, liberty,

[1] People *v.* Security Life Ins. Co., 78 N.Y., 114, 122.

[2] Bewley *v.* Equitable Life, 61 How. Pr., 344; Pierce *v.* Equitable Life, 145 Mass., 56; Hunton *v.* Equitable Life, 45 Fed. Rep., 661; Everson *v.* Equitable Life, 68 Fed. Rep., 258, affd. 71 Fed. Rep., 570.

[3] Dartmouth College *v.* Woodward, 4 Wheat. 518.

[4] Wilmington Railroad Co. *v.* Reid, 13 Wall., 264.

[5] Clearwater *v.* Meredith, 1 Wall., 25.

or property without due process of law." The second of these provisions is duplicated in the New York State Constitution.[1]

Since the decision in Dartmouth College *v.* Woodward established the rule that a corporate charter constituted a contract whose obligation was forbidden to be impaired by the state, it has been customary in granting charters to corporations, and in enacting general acts authorizing the formation of companies, for the state to reserve to itself power to amend or repeal all acts of incorporation at pleasure. The state of New York had reserved such power to itself at the time of the organization of the Equitable Society.[2]

The various courts which have had this reserved power of the state to amend or repeal corporate charters under consideration, have not agreed in the views which they have taken of the extent of the power possessed by the state under such reservations to change the corporate organization or enterprise against the will of the company or of minority stock-holders.

In New Jersey, and in some other jurisdictions, it has been held that while the state under such reserved power has the right at will to put an end to the corporate existence, it cannot as against the dissent of a single stock-holder so amend the charter as to make a new contract for him without his consent.[3] The courts of New York, and of the United States, however, do not lay down so strict a rule, and while the decisions are by no means harmonious or perfectly clear, the effect of them appears to be that under the reservation the state may impose upon the corporation, even against its will, or against the will of some of its members, any charter amendments which it pleases; provided, however, that thereby the second constitutional guaranty cited above is not violated, *i.e.*, that thereby no person is arbitrarily deprived of his property without his consent. The reserved power to amend or repeal charters does not relieve the state from the latter prohibition.[1]

In the present case the amendment to the charter of the Equitable Society is proposed to be made, not by the legislature of the state, but by the board of directors acting under a power claimed to be given to it by the legislature in general terms by the Insurance Law of the state.[2] In other words, the legislature has agreed in advance, within certain limits, to accept and ratify any change in the organization of the corporation which the corporation itself may make, so far, at least, as the rights of the state itself is concerned. But so far as concerns the rights of individual stock-holders, it is evident that the state cannot confer upon the corporation any greater power to amend its charter than the legislature itself would possess. The question then arises, assuming the amendment to have been validly made, so far as the state and the corporation are concerned, whether it deprives the stock-holders of their property. If this be the case the amendment is evidently invalid if any stock-holder promptly and actively dissent — as has been done in this case through the injunction suit instituted by minority stock-holders.

The amendment takes from the stock-holders the right to vote for a majority of the directors of the corporation, and confers this right upon the policy-holders. The question then is whether the right to vote for a majority of the directors of the corporation constitutes a property right. If it does, the amendment deprives the stock-holders of the Society of their property.

It is well settled, that to deprive the

[1] Article 1 §6.

[2] New York Constitution of 1846, Article 8, §1; New York Revised Statutes, Part I, Chapter 18, Title 3, §8.

[3] Zabriskie *v.* Hackensack R.R. Co. 18 N. J. Eq. 178.

[1] People *v.* O'Brien, 111 N. Y., 1, 47; Rochester Turnpike *v.* Joel, 41 App. Div., 43; Shields *v.* Ohio, 95 U. S. 319; Close *v.* Glenwood Cemetery, 107 U. S. 466.

[2] New York Insurance Law, §52.

owner of property of one of its essential attributes, is to deprive him of his property.[1]

It would seem to be evident, as was said by the Appellate Division of the New York Supreme Court in a recent case,[2] that the right of a stock-holder to vote upon his stock is "one of the essential rights of ownership" of the stock itself.

"A share of stock may be defined as a right which its owner has in the management, profits, and ultimate assets of the corporation."[3]

In a recent case, the highest court of the state of New York said,

"The stockholders are the equitable owners of the corporate property."[4]

This statement, while it is perhaps not technically correct, doubtless sets forth in substance the nature of their relation to the corporate assets. The stock-holders have a right, at any rate, upon a final winding up and dissolution, to receive everything which remains after the complete discharge of all the obligations of the corporation to third parties. This must evidently be the case with a stock life insurance company equally as with the ordinary trading company. Whatever the rights of the policy-holders may be, they depend upon the several contracts which the policy-holders have made with the Society. After those contracts shall have been discharged, whatever remains will be the property of the company itself, and upon a dissolution must be divided among its members.

It is further to be noted that the Insurance Law of the state of New York,[5] in case the capital stock of a company becomes impaired, imposes in certain events a liability upon the stock-holders to make it good. In view of these facts it would seem to follow that the voice given to the stock-holders by the original charter of the Equitable Society in the nomination of the board of directors who are to control and manage its business and property, is one of the elements which enters into and makes up the value of the shares, and that to take away from the stock this right to choose a majority of the board, will deprive them of a property right protected by the Constitution.

Counsel for the Society in the proceedings instituted by minority stock-holders to restrain the adoption of the proposed amended charter, have based their argument that the changes proposed do not violate any constitutional guaranty, largely upon the strength of two decisions of the Supreme Court of the United States.[1] These decisions dealt with changes in the manner in which directors of certain corporations were to be chosen by the stock-holders, but it is certainly very doubtful whether they are likely to be held to afford any authority for the proposition that the legislature, or a corporation under legislative authority, may validly take away from stock-holders, against their consent, the right to control the management of the company.

In Miller *v.* The State, a railroad company was organized under the laws of the state of New York, its charter providing that it was to have thirteen directors. The legislature authorized the city of Rochester to subscribe for its stock to the amount of $300,000, and provided that the city should have the right to nominate one director for every $75,000 of capital stock which it held, but should have no voice in the election of the remaining directors. At the time the act was passed and the city's subscription made, other parties had subscribed to the road's capital stock to the amount of $677,500. The city, therefore, subscribed for four-thirteenths of the total subscribed

[1] People *v.* Otis, 90 N.Y., 48; Matter of Jacobs, 98 N. Y., 98; People *v.* Hawkins, 157 N. Y. 1, 7; Long Island R.R. Co. *v.* Garvey, 159 N. Y., 334, 337; Pumpelly *v.* Green Bay Co. 13 Wall. 166, 177.

[2] Sullivan *v.* Parkes, 69 App. Div. 221, 229.

[3] Lamkin *v.* Palmer, 24 App. Div. 255, 260; Affd. 164 N. Y., 201.

[4] Martin *v.* Niagara Co., 122 N. Y., 165, 172.

[5] §§41, 42.

[1] Miller *v.* State, 15 Wall. 478; Looker *v.* Maynard, 179 U. S. 46.

capital stock, and was given the right to name four-thirteenths of the directors. Subsequent to the organization of the road, a number of the private individuals who had subscribed to its stock failed to pay their subscriptions, and as a result the city was left with its $300,000 of stock to but $255,200 held by other parties, instead of $677,500, as originally contemplated, and yet was restricted by the legislative act to the right to nominate but four-thirteenths of the directors, although it now held approximately seven-thirteenths of the stock. Subsequently, an act was passed granting the city the right to choose one director for every $42,855.71, three-sevenths of the capital stock of the railroad company held by the city, in other words, increasing its proportion of the board from four-thirteenths to seven-thirteenths. The question involved in the case was as to the constitutionality of the latter act, it being claimed that it deprived the individual subscribers of property rights given to them under their contract of subscription. The court held, however, that this was not the case, saying that the various statutes upon the subject "clearly give to the legislature the power to augment or diminish the number or to change the apportionment as the ends of justice or the best interest of all concerned may require.

"All parties supposed when the charter was formed and when the subscriptions to the stock were paid, that the capital stock would be $800,000 and that the right conceded to the city to elect four out of the thirteen directors would give the city a fair proportion of the whole number, but circumstances have changed in consequence of the failure of a large class of the subscribers to the stock to make good their subscriptions. Payments being refused, the corporation found it necessary to reduce the capital stock and to shorten the route as before explained.

"These changes from the original design made new legislation necessary to the ends of justice and the amendatory act was passed to effect that object, and the court is of the opinion that the amendatory act is a valid law."

Bradley and Field, JJ., dissented from this decision.

In Looker *v.* Maynard, *supra*, the Supreme Court sustained the validity of a statute of the state of Michigan providing for cumulative voting in the election of directors of corporations, holding in a brief opinion that the legislation amounted to a mere regulation of the mode by which directors were to be elected by the stock-holders, and concluding as follows:[1]

"Remembering that the Dartmouth College case (which was the cause of the general introduction into the legislation of the several states of a provision reserving the power to alter, amend, or repeal acts of incorporation) concerned the right of a legislature to make a change in the number and mode of appointment of the trustees or managers of a corporation, we cannot assent to the theory that an express reservation of the general power does not secure to the legislature the right to exercise it in this respect."

It will be seen that neither of these decisions touches very closely the situation presented by the Equitable case. Both were concerned with attempts by the legislature to regulate the mode in which directors were to be chosen by the stock-holders themselves. A parallel to the present case could only be presented by a legislative act taking away from the stock-holders the right to elect directors, and giving it to persons who were not members of the company. In the case of a railroad, would an act be sustained as valid which took away from the stock-holders the right to name the directors and gave it to the holders of season passenger tickets?

Another question which has arisen in the Equitable controversy relates to the pro-

[1] 179 U. S. p. 54.

priety of the expenditure of the Society's money for the giving of a public dinner by two of its directors to a recent French Ambassador. As to this matter, however, it is plain that the questions involved are of fact rather than of law. If officers of corporations appropriate the funds of the institution and use them to defray the expenses of personal entertainments which they give their friends, they commit gross breaches of trust. If, however, as is claimed to have been the case here, the object of the expenditure was to advance the efficiency of the Society in France, and to bring it favorably to the attention of the French Government and people, and particularly, if, as has been claimed, the result of the expenditure has been the favorable recognition of the Society by the French Government, and the building up of a large and profitable business among the French people, there would seem, upon an application of the ordinary business standards of to-day, to be little ground for just exception to the use made of the Society's money. It would doubtless be most desirable if life insurance companies spent nothing for advertising, and if the moneys thus saved could be applied to the reduction of premiums paid by their policy-holders; but these institutions have from the very beginning been in the habit of expending large sums in this manner to advance and increase their business, and if the desired result is attained, the necessary expense has been looked upon as well laid out.

Whether the course of the officers of the Equitable in engaging in the underwritings above mentioned has or has not been culpable seems to depend upon the facts in each instance. Newpapers have appeared in their discussion of the matter to assume that securities were sold directly by the officers concerned in the underwritings to the Society, and a good deal of ready-made law has been cited as to the effect of sales by directors or trustees to their companies, of property which they had purchased at a lower rate for the purpose of reselling. But the situation here is different from that. In the case now under consideration certain banking houses had undertaken to float certain issues of investment securities. As is customarily done in such cases, the bankers first organized underwriting syndicates, composed of persons who agreed to take the securities at a certain figure, provided the banking house did not succeed in disposing of them at a higher rate to the public. If any portion of the securities were not taken by the public, the underwriters agreed to take and pay for their proper proportion thereof. If, on the other hand, the securities were all sold on the public offering, the underwriters were to receive as profits the difference between the price at which they agreed to take the securities and the price at which the same were disposed of to the public. The Equitable bought some of such securities on the public offerings from the banking houses which offered them for sale. Some of its officers at different times were members of different syndicates which underwrote bonds subsequently so purchased by the Society. There was, therefore, no direct dealing between the Society and its own officers, and the question of the propriety of the transactions, so far as the latter are concerned, evidently depends upon the question of fact as to whether they knew that the Society would or could be persuaded subsequently to buy the bonds, and whether they were induced to bring influence to bear upon the Society to make such purchases by reason of their own interest in the underwriting. These are questions upon which the proof, if any, has not been made public.

New York, N. Y., May, 1905.

THE NORTH SEA INQUIRY

By B. H. Conner

On January 19, 1905, a unique assembly met in the official dining-room of the French Foreign Office, on the Quai d'Orsay, Paris, France. It was the first hearing of the first Commission of Inquiry held since the adoption of the Hague Convention, the treaty by which such commissions were established. The occasion of the assemblage was the alleged attack by the Russian fleet upon a fleet of British fishing-vessels, or "Trawlers," known as the "Gamecock fleet," off the North East Coast of England, during the night of October 21, 1904. The Commission was composed of five naval officers, namely: Vice-Admiral Doubassoff, Russia; Vice-Admiral Beaumont, Great Britain; Rear-Admiral Davis, United States of America; Admiral von Spaun, Austria-Hungary; Admiral Fournier, of the French Navy, who presided.

At the time of the alleged attack a great deal of comment was aroused and many papers declared openly that the act was a premeditated attempt on the part of Russia to force a war with Great Britain and thus mitigate the damage to her *prestige* which she would necessarily suffer if defeated at the hands of the Japanese alone. It may be said at the outset that this hypothesis is fairly disproved by the subsequent events; for the Russian Government made a prompt apology, through official channels, and expressed its willingness to pay an indemnity for the damage sustained.

Jurisdiction of the Commission

The portions of the Hague Convention which are material to the present discussion are as follows:

Note: — The writer desires to acknowledge the receipt of information and assistance from Sir Thomas Barclay; H. C. Coxe Esq., Deputy United States Consul, Paris; Messrs. Morton Fullerton and A. O'Neill of the *London Times*; and Mr. Arther Rook.

"Title III. On International Commissions of Inquiry

ARTICLE IX

"In differences of an international nature, involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the Signatory Powers recommend that the parties who have not been able to come to an agreement by means of diplomacy should, as far as circumstances allow, institute an International Commission of Inquiry to facilitate the solution of these differences by elucidating the facts by means of an impartial and conscientious investigation.

ARTICLE X

"The International Commissions of Inquiry are constituted by special agreement between the parties in conflict.

"The Convention for an inquiry defines the facts to be examined and the extent of the Commissioners' powers.

"It settles the procedure.

"On the inquiry both sides must be heard.

"The form and the periods to be observed, if not stated in the Inquiry Convention, are decided by the Commission itself.

ARTICLE XI

"The International Commissions are formed, unless otherwise stipulated, in the manner fixed by Article XXXII of the present Convention.

ARTICLE XII

"The Powers in dispute engage to supply the International Commissions of Inquiry, as fully as they may think possible, with all the means and facilities necessary to enable it to be completely acquainted with and to accurately understand the facts in dispute."

The Convention between Great Britain and Russia establishing the Commission of

Inquiry, was adopted November 25, 1904, and was, by agreement, termed a "Declaration." In accepting the final draft Declaration proposed by the Russian Government, Great Britain stipulated that, in the event of any inconsistency or conflict between the terms of the Declaration and the Hague Convention, the Declaration should override the Hague Convention.

Proceedings of the Commission

The proceedings of the Commission were distinctively in the nature of an inquest. It will be noted that Article XIV of the Hague Convention provides that the report of the Commissioners shall have in no sense the character of an arbitral award. At the hearing of February 13, 1905, M. Nekludoff, the Russian agent, entered an objection to the use by the British agent of the word "Tribunal" in referring to the Commission; upon which Mr. O'Beirne, British agent, promptly signified his willingness to substitute some other word for the objectionable term.

After eliminating statements of opinion and statements not contested, the issues, as presented by the "Cases," or pleadings, may be summarized as follows:

1. Were there any torpedo-boats in the vicinity of the Russian fleet at the time of the cannonade?

2. Was the firing continued for an unnecessary or unreasonable time?

3. Were the fishing-boats negligent in failing to show the proper signals, or otherwise, so as to contribute to the damage which they sustained?

4. Was there any obligation on the part of the Russian officers and crew to give assistance to the fishermen?

5. Was the action of the Admiral of the Russian fleet in firing on the fishing-boats justifiable under all the circumstances of the case?

After the reading of the "Cases" the hearings of the Commission were continued from day to day until completed. The testimony of the witnesses was taken, in each case, in the native tongue of the witness. French being the official language of the Commission, the questions were first put to the witness in his own language, the question, before being answered, being translated into French. The witness then answered and his reply was translated into French. After hearing the evidence (which will be discussed more fully hereafter) the agents of the two Governments summed up their respective cases as follows:

The British Conclusions

1. That on the night of the 21st-22d (8th-9th) October, 1904, there was in fact no torpedo-boat or destroyer present among the British trawlers or in the neighborhood of the Russian fleet, and that the Russian officers were mistaken in their belief that such vessels were present, or in the neighborhood, or attacked, or intended to attack, the Russian fleet.

2. (*a*) That there was no sufficient justification for opening fire at all.

(*b*) When opened, there was a failure to direct and control the fire, so as to avoid injury to the fishing fleet.

(*c*) The firing upon the fishing fleet was continued for an unreasonable time.

3. That those on board the Russian fleet ought to have rendered assistance to the injured men and damaged vessels.

4. That there was no fault of any kind in the conduct of those on the British trawlers or those connected with their management.

The Russian Conclusions

The conclusions drawn by the Russian Government from the evidence on both sides and from the facts established by the inquiry were thus summed up:

That the cannonade of the Russian squadron on the night of October 21-22, 1904, was ordered and executed in the legitimate accomplishment of the military duties of the chief of a squadron. That consequently no responsibility can possibly rest

upon Admiral Rojdestvensky or any of his subordinates. The Imperial Government sincerely deplores that there should have been innocent victims of the incident. The responsibility of the chief of the squadron being eliminated, the Imperial Government has, moreover, no intention whatever to evade material compensation (*réparation matérielle*), and would be prepared to indemnify the innocent victims of the fire of her squadron, and to repair the damage caused thereby. It proposes to submit the fixing and the allotment of these indemnities to a tribunal to be chosen from the permanent Court of Arbitration at The Hague.

It is plain that Russia concentrates her effort in her summary upon the justification of Admiral Rojdestvensky. However, she never abandoned the proposition that there were torpedo-boats approaching the squadron at the time of the firing and never conceded that these did not belong to a hostile fleet. In the observations or argument on behalf of Russia, the evidence was ably reviewed and a strong effort made to show the actual presence of the alleged torpedo-boats, as established by the weight of the evidence.

Briefly, then, it may be said that the four points set forth in the British summary were negatived by Russia and the issues finally submitted to the Commission were substantially those presented in the "Cases" at the outset.

Concerning the Evidence

1. As to the presence of torpedo-boats The officers of the Russian fleet were unanimous in their testimony that they saw two torpedo-boats approaching the flag-ship, one from either side, without lights or with lights covered. They thought they could not be mistaken, as they were observing the suspicious craft with the aid of glasses and search-lights. Lieutenant Ellis testified that the torpedo-boats were plainly visible by the light of the bursting shells. When fired upon, according to their testimony, the torpedo-boats retired and subsequently disappeared. This was the testimony of men trained in naval science and accustomed to all kinds of craft, some of whom, at least, had served on torpedo-boats, who stated that they recognized the craft by certain peculiarities of construction. Captain Klado, of the Russian fleet, stated that they had been warned of certain suspicious craft, resembling *trawlers*.

The British offered evidence tending to show that there were no torpedo-boats in the vicinity at the time. Russia objected to this, not without reason, as an attempt to prove a negative and not entitled to as great weight as the positive testimony of her experts. She also raised the objection that those on board the trawlers were at a great disadvantage in being at such a slight elevation as to render it impossible for them to see as far as could the Russian officers from the bridges of the war-ships. But it should also be borne in mind that the Russian officers were, one and all, to a greater or less degree, interested witnesses.

The British introduced a naval expert, who stated that it is impossible to recognize a torpedo-boat at a greater distance than one mile, even with the aid of a search-light. The Russians testified that they had fired on the supposed torpedo-boats at a distance of about two miles.

Costelloe, mate of the *Gull*, one of the trawlers, stated that he saw a boat which he at first thought was a torpedo-boat, but he afterwards concluded it was the Mission-ship, *Alpha*. G. K. Green, skipper of the *Gull*, testified that after the firing had continued for some little time he saw a boat headed toward the Russian ships. Her lights were out. On sighting her he said to the chief engineer, "That's a torpedo-boat"; but added immediately afterwards; "That is not a torpedo-boat. It is the vessel which has turned in the direction of the men-of-war." (The *Crane*.) He kept his eye on the boat and afterwards saw her

show a white light and then a red one. He went towards her and found it was the *Crane*, which sank after her dead and wounded had been removed.

It further appeared that two of the Russian ships, the *Aurora* and the *Dmitri Donskoi*, which were supposed to be fifteen miles in advance of the flag-ship, were injured by the fire.

There was no evidence of damage to the Russian ships by torpedoes or of any torpedoes having been fired or seen.

Official assurances were received by Great Britain from France, Germany, Denmark, Holland, Sweden, and Norway and *Japan* that no war vessels of any kind belonging to these countries were in the neighborhood of Dogger Bank on the night in question. These notes also generally denied any knowledge of Japanese torpedo-boats having been fitted out or equipped at the ports of the said countries. The reports of the British officials showed that there was no British torpedo-boat in the North Sea on that night and that no torpedo-boat of any description had set out from any British port for the scene of the occurrence. Copies of these reports and assurances were annexed to the British "Case" and submitted to the Commission.

It may be well to observe, at this point, that since Japanese torpedo-boats could not have reached the North Sea without supplies of food, coal, and water and since to supply same would, under the circumstances, have amounted to a breach of its obligations by any other Power, the Russian contention that there were Japanese torpedo-boats present amounts, in effect, to a charge that some unascertained third power had been guilty of a violation of neutrality. On October 27, 1904, Count Lamsdorff stated to Sir Charles Hardinge that the Russian Government had positive proof that 20 Japanese officers had landed at Hull a few days before the incident and that attacks of the kind had been planned by the Japanese. The official correspondence with reference to the appointment of the Commission of Inquiry shows that the British representatives regarded Russia's defense as impugning Great Britain's observance of neutrality.

2. As to the duration of the firing, the Russian witnesses testified that the presence of the trawlers was discovered about the time the firing began and that they were pointed out by appropriate signal, with the command not to fire on them; but that their presence in the firing-zone rendered it unavoidable that they should be struck by the Russian projectiles aimed at the torpedo-boats. The British fishermen stated that, notwithstanding the signals sent up from the boat of the *Admiral* of the fishing fleet and the display of lights by the other trawlers, the firing was continued for a period estimated by them at from 15 to 30 minutes. Captain Klado (Russian) stated that it lasted exactly 9 minutes. The Skipper of the *Mino* stated that his engineer had timed it and it lasted more than 20 minutes.

3. As to the alleged negligence of the fishermen, no fault was shown on the part of the fishermen, beyond the testimony of the Russian witnesses that they failed to show their regulation signals. William Smith, mate of the *Crane* (the boat which was sunk by the Russian fire) testified that she had her regulation lights burning and her *sail set;* that the search-lights of the men-of-war were turned on all the time the firing continued; that the lights of the *Crane* were shot away. Two men aboard her were killed and all the others wounded but one.

4. As to Admiral Rojdestvensky's failure to halt his ships and render aid to the fishermen or ascertain the extent of their injuries, Admiral Rojdestvensky's defense was that he saw, or thought he saw, hostile torpedo-boats engaged in an attack on his squadron. With the responsibility of such a command, few thinking men would contend that he was under the obligation to jeopardize his entire command for the reason, largely senti-

mental, of attending to the possible needs of the fishermen, provided he had sufficient grounds for his belief as to the danger to which his fleet was exposed. The answer to this question naturally depends, therefore, chiefly upon the principal issue of the controversy, namely, WAS ADMIRAL ROJDESTVENSKY'S CONDUCT IN OPENING FIRE REASONABLY JUSTIFIED BY THE CIRCUMSTANCES? This is the kernel of the entire matter.

Attention is called, in this connection, to the fifth paragraph of the Russian Case, showing that on the afternoon of October 21st. the "*Kamchatka*," one of the vessels of the Russian fleet, was obliged, by reason of a damaged engine, to fall behind the rest and was proceeding 17 miles in the rear of the flag-ship; and to the second paragraph of the British Case, stating that, between 8 and 9 o'clock, P. M., on that day, the *Kamchatka* fired on the Swedish merchantman, *Aldebaran*; also to the first and third sections of the Russian Case, as showing the nervousness in the minds of the Russian officers. These allegations were substantiated by the evidence; and the action of the *Kamchatka* in firing on the *Aldebaran*, as well as other similar instances reported, show that there was, on the part of Admiral Rojdestvensky and his officers, grave apprehension of danger.

As to this condition of mind, the following correspondence by wireless telegraphy was testified to by Lieutenant Valrond, the official telegraphist of the *Kamchatka*. At 8.40 o'clock, about the time that the firing at the *Aldebaran* began, he sent the following message to the Russian Admiral:

"We are pursued by torpedo-boats," to which Admiral Rojdestvensky replied:

"Is it you that are being attacked? How many torpedo-boats are there and in what quarter?"

Valrond — "I am steaming with all lights out. Am attacked from all sides. The torpedo-boats are less than two cable-lengths from us."

Admiral — "What is your course?"

Valrond — "We take different courses in order to get away from the torpedo-boats. For the last quarter of an hour our course has been south, 10 degrees, speed 12 knots."

Valrond (later) — "Indicate position of Squadron."

Admiral — "First get out of danger. Change your course to the west. Then give your latitude and longitude and you will be told what to do."

The last telegram was sent about 10 P.M., at which time the *Kamchatka* had ceased firing.

Admiral Rojdestvensky estimated, from the information given him, that the torpedo-boats reported to be in the rear of his squadron might reach him shortly after midnight. The soundness of this conclusion was not questioned by the board of naval experts constituting the Commission.[1] Therefore Admiral Rojdestvensky and his subalterns were expecting an attack about the time they encountered the fishing fleet.

The North Sea is not a part of the territorial waters of any state. No rule of International Law forbade its use as a fighting place by the belligerents. In the absence of any treaty fixing other limits, the territorial waters of a nation must still be regarded as extending only three miles from shore, with certain exceptions, none of which include the district of Dogger Bank. Even within this three-mile limit the right to prohibit hostilities may be regarded as doubtful. A friendly Power is reported to have warned Russia that the fleet was in danger of an attack in passing through the North Sea. Such warnings had come to Russia repeatedly and had been communicated to Admiral Rojdestvensky. Reports had also reached him of the actual presence of torpedo-boats in the neighborhood. He had had no opportunity to verify these reports, but had left Skagen twenty-four hours in advance of his schedule and had deployed

[1] See Paragraph 7 of the Report.

his fleet in anticipation of attack. By telegraphic communication he had been notified that a fleet of torpedo-boats was actually in pursuit, engaged with a ship under his command and he expected they would overtake him about midnight. At midnight he sighted the fishing-boats.

The situation argues eloquently for the British contention that the Russian officers were mistaken in the belief that they saw torpedo-boats. The action of the supposed torpedo-boats in making no demonstration beyond approaching the ships and in disappearing without being seen by any one but those concerned for the safety of the Russian ships would seem to confirm this view. The reason is therefore obvious why Russia concentrates her attention upon the effort to establish the obligation on the part of her officers to act as they did. The opinion of the Commission on this question is as follows:

"The majority of the Commissioners observe that they have not sufficiently precise details to determine what was the object fired on by the vessels; but the Commissioners recognize unanimously that the vessels of the fishing fleet did not commit any hostile act, and the majority of the Commissioners being of the opinion that there were no torpedo-boats either among the trawlers or anywhere near, the opening of fire by Admiral Rojdestvensky was not justifiable."[1] This statement obviously answers the first and fifth questions before the Commission.[2] In answer to the second, the Commission say:

"The time during which the firing lasted on the starboard side, even taking the point of view of the Russian version, seems to the majority of the Commissioners to have been longer than was necessary."[3]

Concerning the third point, the Commission say that the fishing vessels "carried their proper lights" and "did not commit any hostile act."[1]

As to the failure to give assistance to the fishermen:

"On this point the Commissioners recognize unanimously that after the circumstances which preceded the incident and those which produced it there was, at the cessation of fire, sufficient uncertainty with regard to the danger to which the division of vessels was exposed to *induce* the Admiral to proceed on his way."

Although this report has been described as a "Scotch verdict," it is indisputable that the British contentions are, in the main, clearly sustained. It is to be regretted, however, that the Commission did not express itself more clearly as to the duty of Admiral Rojdestvensky towards the wounded fishermen.

Admiral Rojdestvensky committed two acts for which he and his Government were put upon their defense, namely, (1) firing on the fishermen, and (2) failing to give them aid. The one act has been condemned; the other, growing out of the same circumstances and answered by the same plea, has been, by the same Commission, condoned. The "uncertainty" was as predicable of the firing as of the abandonment; and the question of the duty of a naval commander towards non-combatants injured by his wrongful act and in need, perhaps, of his assistance, appears to be squarely within the issue.

Was the uncertainty which "induced" Admiral Rojdestvensky to proceed sufficient to justify him in doing so? If so, was his action in doing so intrinsically wrong, by the law of war and justifiable only as a matter of expediency, by reason of circumstances which are held not to excuse the primary offense? The act of abandonment was more deliberate than the act of assault. Was it less flagrant? Or does the language of the Commission tend to shift a portion

[1] See Report, Art. 13, Sec. 4.
[2] See this Article page 362.
[3] See Report, Art. 15.

[1] Report, Art. 9, Sec. 3, Art. 13, Sec. 4.

of the responsibility for the failure to give assistance upon the Commander of the *Kamchatka*, who erroneously reported the presence of torpedo-boats in the rear of the squadron?

Admiral Rojdestvensky, in a telegram from Vigo, where he was detained by the order of the Russian Government and with the consent of the Spanish Government, to Captain Bostroem, Naval Attaché at the Russian Embassy, under date of October 27, 1905, used the following language:

"Our ships refrained from giving assistance to the trawlers on account of their apparent complicity, which they manifested by their persistence in attempting to pass through our line."

The results of the Inquiry will be watched with great interest in connection with the cause of Arbitration and the popularity of the Hague Convention. Certainly its primary object, to avert a threatened war, must be conceded to have been accomplished. A movement is already on foot, led by the Massachusetts State Board of Trade, to neutralize zones of commerce between important ports of North America, Great Britain, and Europe. Should the North Sea incident serve to augment this movement and to liberate commerce from an unnecessary risk and human life from an unnecessary peril; and should it serve to enhance the growing desire for an efficient International Court and the abolition of war, the mystery of the attack on October 21, 1904, upon a fleet of fishing vessels, engaged in a peaceful pursuit, and the death of its victims, if not explained, will at least have been utilized.

PARIS, FRANCE, April, 1905.

The Green Bag

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S. R. WRIGHTINGTON, 31 State Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE fame of departed lawyers, who are lawyers first and politicians or statesmen after, must be celebrated, if at all, by the lawyers themselves, and it has seemed that our pages are the appropriate vehicle for sketches of distinguished jurists whose lives may serve as worthy examples. Hardened as we are in this country to fatal railroad accidents, all were shocked by the story of the death of the venerable judge and senator, Jonathan Ross. To the necessarily brief and inadequate press notices which appeared at the time, we are glad to add the biographical sketch which opens this number. Although Judge Ross did not fill a large place in the annals of the nation, he seems a singularly effective example of the reserve power for acceptable public service that is awaiting demand in many a secluded portion of our country.

RUSSELL WALES TAFT

It is not inappropriate that the author of this sketch should be himself a descendant from another of the famous judges of Vermont.

Mr. Taft was born in 1878, at Burlington, the son of the late Russell S. Taft, Chief Judge of the Vermont Supreme Court. He was educated in the schools of Burlington and at the Univeristy of Vermont, was admitted to the Vermont Bar in 1899, and has since January 1, 1900, engaged in general practice of the law at Burlington.

THOUGH the close relation of the practice of the law to politics has been long appreciated and in its application to judicial service so often criticised, we are glad to find a lawyer as distinguished as Judge Parker and one who with singular success has combined the highest distinctions in both fields, express in his recent address before the Illinois State Bar Association, which we print in this issue, his mature conviction that political appointments are not a menace to the judiciary. Few will dispute the claims he makes of the impartiality of the elected or appointed judge; for the politician appointed to judicial office, with the prospect of indefinite service in a useful and interesting career, is withdrawn from the temptations which may have previously successfully assailed his reputation, if not his character. That we can reasonably expect that this impartiality will be indefinitely maintained, where the judge must look forward to a campaign for reëlection, however convincing the evidence of past propriety, will hardly be as readily accepted. A much more serious danger to the judiciary, and one which has excited more recent discussion, is the selection for political preferment of men who have been supposed to be definitely devoted to a judicial career. That Judge Parker is himself conspicuous for the success with which he faced this difficult situation is evidenced by the enthusiastic tribute to his judicial temperament at a banquet by his fellow lawyers, when the heat of the last Presidential campaign had passed away.

HON. ALTON B. PARKER

The danger that is deplored, however, is

not found in evidence of failures of the past so much as in the consequences that may reasonably be expected from such influences in the future, and, more especially, in the effects that may be produced on the popular mind by the inevitable suspicion of partiality in judges of known political ambitions in undermining the commanding influence which our courts now enjoy.

In fulfilment of our desire to broaden the scope of the contributions to our pages, we are glad to publish in this number a purely technical article upon a subject of so unique interest as the exact nature of the rights of the living to control the disposition of the remains of the dead. It may reasonably be expected that, with the gradual spread of appreciation of the merits of cremation, disputes of this nature may require the attention of the Bar more frequently in the future than in the past. Mr. Grinnell is a graduate of Harvard College and Harvard Law School, where he was one of the editors of the *Harvard Law Review*. Since 1899 he has been engaged in active practice in Boston, as a member of the firm of Hale & Grinnell, and it was in the preparation of an opinion as counsel for the Massachusetts Cremation Society that his attention was called to the study of the subject of his article.

Few controversies of a private and personal nature have aroused such wide-spread interest and have been of as much importance to individuals throughout this country, and even throughout the world, as the contest for control of the Equitable Life Assurance Society. What seemed at first to be merely a personal quarrel or, at most, an attempt by one financier to get rid of a rival, has grown to proportions of a national scandal. In the resources of this society, many small investors have a very vital interest, the nature of which perhaps does not confer upon them legal rights, and yet, the impropriety of this, under modern social conditions has produced a wide-spread feeling that these moral rights must have some legal sanction. Much has appeared in print upon this subject which will not bear the scrutiny of legal investigation. We are glad, therefore, to present in this issue an explanation of the real nature of these legal problems by a New York lawyer who has had an opportunity to become familiar with the facts of the case.

Every new instance of the successful application of legal methods of determination to international disputes deserves all the public attention which the magnitude of the interests involved and the picturesque character of the matter in dispute are sure to command. The lawyer, however, finds in the adaptation to the large uses of public peace of the familiar instruments of his daily work, an inspiration to loftier ambitions of professional usefulness. The most important of these efforts in recent years has been the investigation at Paris of the circumstances which surrounded the bombardment of the English fishermen of the Dogger Bank by the Russian fleet on its way to the war in the Far East.

B. H. Conner

The author of our account of the North Sea Inquiry is a native of Kentucky and a graduate of Central University. He was admitted to the Bar at Cynthiana, Kentucky, in 1900, but after one year of practice entered the Albany Law School, and where he received his degree and was admitted to the Bar of New York in 1902. After two years of general practice in New York City he has moved to Paris, where he is now engaged in the practice of law in the office of Sir Thomas Barclay, and in the study of Roman and civil law at the University of Paris. He has always been interested in questions of international law and has found a subject agreeable to his tastes in the examination of the proceedings of Court of Inquiry.

CURRENT LEGAL ARTICLES

This department represents a selection of the most important leading articles in all the English and American legal periodicals of the preceding month. The space devoted to a summary does not always represent the relative importance of the article, for essays of the most permanent value are usually so condensed in style that further abbreviation is impracticable.

AGENCY (Estoppel)

In the May *Columbia Law Review* (V. v, p. 354) John S. Ewart, in an article entitled, "Agency by Estoppel," replies to an article under the same title by Walter W. Cook in the January *Columbia Law Review*, reviewed in our February number. He especially criticises Mr. Cook's proposition "that it is fundamental in the law of contracts that a person is bound, not by his real, but by his manifested intention," contending that intentions manifested or otherwise are of no consequence in contract. He analyzes Professor Cook's article point by point, and endeavors to show that his theory that manifested as opposed to concealed intention is the test of liability is only another phraseology for misrepresentation of fact giving rise to an estoppel. In conclusion he says that "Professor Cook's error seems to lie in forcing a very peculiar meaning out of a very common assertion for the purpose of applying to it a very erroneous notion of the importance of intention in the law of contracts."

ASSOCIATIONS (Transfer of Shares. Corporations)

Prof. George Wharton Pepper's valuable paper on "The Transfer of Interests in Associations" is concluded in the April *American Law Register* (V. liii, p. 240). In the former paper (V. lii, p. 737), the transfer of a partner's interest was considered and the discussion of the transfer of shares made transferable by statute was begun. It was suggested that a transferable share in the common stock is property of such a kind that legal title to it passes only by transfer upon the books of the company. Delivery of the certificate, with an assignment and power of attorney duly executed, confers upon the holder an equitable right to effectuate a transfer and, upon surrender of the old certificate, to compel the issue of a new certificate to him. As the certificate is evidence of ownership of property, it is not regarded as a negotiable instrument. By putting it within the power of the holder of the certificate to induce belief that he has a right to the shares, the registered owner may estop himself from setting up the legal title. In the present paper is discussed the liability of the corporation for falsely or mistakenly certifying that the person named in the certificate is the owner of a share, and also its liability in case transfer is permitted without the surrender of the old certificate.

"Where A gives value on the faith of the representation by the corporation it seems clear that the corporation should be liable to A and should be compellable to issue stock to him or to respond in damages. The corporation is estopped from disputing the facts upon which A relied. Wherever specific relief can be given, the plaintiff would seem to be entitled to it. It often happens, however, that specific performance is impossible because the full amount of authorized stock is outstanding, in which case the plaintiff can obtain nothing but damages."

Authorities are in conflict as to the right of a purchaser of shares who accepts a transfer when the old certificate is not surrendered; but the author favors the New York rule, which puts him in the position of one to whom an original fraudulent issue is made and allows recovery against the corporation which did not compel the transferor to surrender his old certificate.

As between a purchaser from a defrauding trustee and his beneficiary, commercial convenience seems to require that the equity of the holder of the certificate prevail. "The English decisions on this point are, therefore, consistent only with the view that the legal title passes by transfer on the books. The American decisions have been influenced by the conception that title passes with the certificate; but they are consistent with the other view, provided it is supplemented by the theory that the equity of the certificate-holder

should prevail over the prior equity of the *cestui que trust.*"

BANKRUPTCY (Ancillary Receivers)

THE conflict of decisions in the different District Courts on "Ancillary Receiverships in Bankruptcy" is discussed by Lee Max Friedman in the May *Harvard Law Review* (V. xviii, p. 519). The practice of filing separate bankruptcy petitions in all jurisdictions where there are assets on the analogy of the practice in railroad receiverships is suggested, but it is admitted that the Act and the "general orders" contemplate proceedings in but a single jurisdiction.

"The receiver is regarded as the mere temporary custodian, chosen to take and retain possession of the visible property liable to waste, and to deliver it to the trustee. He is not invested with title, either by express statute or by general equity principles. It follows, therefore, that where the exigencies of the case require the receiver to travel beyond the jurisdiction of the appointing court, he comes into each foreign jurisdiction neither with authority to take the assets located therein, nor with power to ask the court to recognize, confirm, or extend his original appointment as of right. At most, his is merely the privilege of asking recognition on grounds of comity. It is within the discretion of the court to refuse such recognition, to append conditions, to insist on the appointment of a co-ancillary receiver, or to appoint a different person altogether. If he is appointed, he becomes an officer of the subsidiary court, and completely amenable to its control. His power and rights to the assets within its jurisdiction are derived from its decrees, and do not depend upon the decrees of the court of original jurisdiction extended or recognized on grounds of comity. There exist two distinct legal persons. The ancillary receiver owes obedience within the new jurisdiction only to the court that appoints him, and is to follow its directions irrespective of the orders of the court of original jurisdiction issued to him in his capacity of original receiver."

BANKRUPTCY (Partnership Assets, Distribution)

A CRITICISM of the provisions of the Bankruptcy Law relating to the "Distribution of Assets of Bankrupt Partnerships and Partners," by William J. Schroder, appears in the May *Harvard Law Review* (V. xviii, p. 495).

This statutory method perpetuates the English common law, which has been admitted to have been adopted only as a rule of convenience without logical basis, namely, that the firm creditors can go against the individual estates only after individual debts are satisfied. The author submits that where the entity theory of partnership prevails, the English decisions are of no authority. He contends that the various provisions of the act relating to bankruptcy of partnerships recognize this view.

"This view is new only in the frankness of its expression in our system of jurisprudence. It is the common-sense view, the mercantile view, and the juridical view in the Roman, Continental, and Scotch systems. It is the view which has been gaining followers in the United States, and recognition by the legislatures and the courts. Inasmuch as bankruptcy legislation usually declares the existent substantive law, the Act of 1898 has, even by its partial recognition of the 'entity' view, performed a valuable service in calling attention to the fact that the courts have already done the legislating, and that 'to admit the fact is all that remains for them to do.' That the recognized method of distribution of partnership and individual assets finds no support in principle, even under the common law view, renders doubly unfortunate the failure of the Act to apply the principles necessarily inherent in its view of the nature of a partnership."

Upon the entity view the liability of the individual estate is like that of a surety, and proof against both estates should be allowed. The equity of marshaling, and the lien of a partner to compel the application of the firm assets to the payment of the partnership debts, would prevent any injustice in the application of this view. The Bankruptcy Act in its present form confuses the two views of the nature of partnership and perpetuates the error of the early English decisions.

CONSTITUTIONAL LAW (See Trusts)

CONTRACTS (Parties. Public Service Companies)

An argument against the "Liability of Water Companies for Fire Loss," by Albert Martin Kales, is published in the May *Michigan Law Review* (V. iii, p. 501). He contends for a strict application of the law of contracts and shows that even under the common exceptions, known as the "Lawrence *v.* Fox" and the "sole beneficiary" rules, a property owner can claim no right to sue on the contract of a water company with the city to supply water for fire purposes. To the argument from hardship that if the citizen damaged cannot sue there is no real remedy, because the city cannot recover substantial damages, he says that there is sufficient protection in the right of the city to enforce specifically the performance of the contract, and to protect itself by forfeiture of the franchise.

CORPORATIONS (See Associations and Contracts)

CORPORATIONS (Federal Control)

Federal incorporation or regulation as the remedy for the present uncertainty and diversity of corporation laws is advocated in an article in the May *Yale Law Journal* (V. xiv, p. 385), entitled "Incorporation by the States," by Herbert Knox Smith, Deputy Commissioner of Corporations, Department of Commerce and Labor.

"For the legal theory of the corporation we are indebted largely to the Roman law, which, with the strict logic of that law, laid stress upon the wholly artificial nature of the corporate entity, regardless of the natural individuals composing its membership. This tendency in the treatment of the corporation was naturally predominant at the time when our corporate system was formed, at which time the corporation was more important as a theory than as a fact. Our courts accordingly developed the corporation on theoretical lines. Logic demanded that the relation of the individual stock-holder to the corporation, and as a part of the corporation, be minimized, and the result was that, when, in the latter half of the last century, the economic forces began to operate upon our corporate system, the corporation known to our law was a highly artificial entity." . . .

"Then came the swift progress of the country towards material prosperity, the accumulation in the hands of many individuals of small surpluses of capital, the development of great enterprises, the increase of the minimum 'unit of efficiency' in given businesses, and the accompanying concentration of capital in a few hands. To meet these conditions, the legal form of doing business known as the corporation was required, and into the old artificial framework of corporation law already constructed was turned the rush of these great economic forces, and the over-predominance of legal theory gave way to a corresponding over-predominance of practical necessity, until our present corporation system, in its distorted and disproportionate outline, shows the effect of these forces, as a geological formation shows the effect of overwhelming forces of disturbances.

"With these forces pressing upon the legislatures, the modern history of our corporate system opens. The results reflect the motive forces. Regardless of theory, or consistency, or permanence, or the proper and proportionate protection of the interests involved, legislation yielded to the new pressures, and a structure was built up which is a marvel and a monument of opportunist make-shift.

"At first, it is true, the states held back, retaining the old notion of the semi-sacredness of the corporate franchise as a special privilege and grant of sovereignty. Then the comity of the states began its logical work; the more accommodating states got the larger share of the revenue-bringing incorporation. The conservative states gained only empty credit for their caution, and their own citizens journeyed to other states for easy incorporation, and returned home a foreign corporation, paying taxes and owing allegiance elsewhere, but, through the comity of states, doing business freely in the practically helpless conservative state. Then as the century closed, the use of the corporation as a mere stock-jobbing tool became suddenly important. This process is as yet only partially complete, but what the final product will be under existing conditions is obvious now." . . .

"Since the earliest historic times, our race has been engaged in a continuous struggle to establish the liberty of the individual, and the one continuous method for this end, and the one toward which our struggles have been

consciously or unconsciously directed, has been the defining, with ever-increasing clearness, of the outlines and boundaries of this liberty, until to-day a citizen knows, with reasonable certainty, his personal rights, duties, and privileges.

"But in the last fifty years there have come into existence a large number of artificial entities — *i.e.*, corporations — which, by virtue of their character, have no inherent or original rights or duties. Their status depends substantially upon statute. The welfare of the country and the welfare of the vast majority of the citizens of the country are intimately connected with these artificial entities. Uncertainty as to their rights, privileges, and duties is uncertainty as to the essential things that go to make up the happiness of the individual citizen, and yet uncertainty is the one overshadowing fact that can be predicated of the status of the corporation of to-day. It is hardly necessary to develop this idea further, or to go into the details of the present diversity and practical anarchy that prevails as to corporate relations. The foregoing statements of general principles are sufficient to indicate the peculiar foundation upon which our industrial system largely rests."

CRIMINAL LAW (see Procedure)

EVIDENCE (see Witnesses)

HISTORY (Colonial Constitutional Law)

THE text of "An Early Decision on Intercolonial Rights," in the case of Governor Bass of New Jersey *v.* The Earl of Bellomont, Governor of New York, hitherto unpublished, is printed in the May *Harvard Law Review* (V. xviii, p. 483), with an introduction by Chauncey G. Parker. It was a test case tried in England before Lord Holt, to determine the right of the crown government of New York to legislate for the proprietary government of New Jersey, or rather whether New Jersey had any rightful proprietary government. It is said to be "the first discussion in a court of law of the constitutionality of a colonial statute."

INTERNATIONAL LAW (Arbitration)

SIR THOMAS BARCLAY writes in the April *Law Quarterly Review* (V. xxi, p. 109) of "The Hague Court and Vital Interests." After an explanation of the gradual growth of the conception of a practical international tribunal of permanent character and an account of the establishment and functions of the Hague Court, he describes the use that has so far been made of it and the possibilities of use that are expected to arise under the recently concluded treaties of international arbitration. He concludes with the following interesting commentary on the fate of those similar treaties negotiated by the United States and emasculated by our Senate.

"It is obvious that a Treaty of Arbitration to fulfil its purpose of avoiding any break in the amicable relations between states must be at the same time general, obligatory, and automatic.

"It must be general because its purpose would be defeated if, when the crisis came, one or the other party were driven to dispute the applicability of the treaty to the matter at issue.

"It must be obligatory, because if it is not, a treaty of submission must be negotiated at the worst moment for negotiations, viz.: at a moment when the state of feeling threatens to suspend negotiations altogether. This is why the action of the American Senate, in making it obligatory for the President to submit for senatorial ratification the *compromis* provided for in the Anglo-French form, a form which has now been universally adopted and which was that adopted by President Roosevelt, has wrecked the proposed arbitration treaties so far as the United States are concerned. For the same reasons it must also be automatic.

"In short, the operation of the treaty, if it is to serve the cause of peace in times of great emergency, must be instantaneous. The jurisdiction which has failed must *ipso facto* be succeeded by the new jurisdiction with its new men and its new methods.

"International Law is not backed up with a police force to carry out its fiats. It depends for its observance upon the reasonableness of its rules. Diplomacy, the chief agency by which, in time of peace, International Law is applied, on the other hand, like the procedure of our domestic courts of justice, is largely a congeries of devices which have grown up to provide for requirements shown to exist, owing

to the inherent intellectual shortcomings of the men who resort to law, or even of those who have to apply it. In our domestic courts we distrust leaving irrevocable decisions to the judgment of one man: we distrust decreeing finality either to arguments or to evidence. And, to a great extent, circumstances have already led to the employment of many different diplomatic forms to enable governments in a similar way to avoid the calamity of deadlocks. Yet deadlocks do occur, and recently we have been more than once brought to the verge of war with powerful neighbors by practical deadlocks. Our diplomatic machinery, in spite of its arsenal of forms, failed for want of a further jurisdiction, which, by operation of law, without further discussion, should become necessarily possessed of the question at issue. We cannot disregard the natural weaknesses of mankind in the relations of nations with one another. Patriotism, ignorance, 'bluff,' improvidence, thoughtlessness, courage, love of excitement, conceit, conviction (right or wrong), misunderstanding, exaggeration, all affect the course of international questions, when public opinion is appealed to or allowed to take any part in their decision. This is the danger, and it is on account of this danger that so many great statesmen are agreed that, successful as our diplomacy usually is and admirably as it is recruited, we can no longer rely, in the circumstances of the present age — with a vigilant and enterprising press ruthlessly day by day dissecting every international incident, and a nervous, overstrained democracy which, especially in overcrowded cities, claims its 'say' in all public matters — we can no longer rely on the quiet settlement of difficulties, which the accredited diplomatists have not solved, without the aid of some further dilatory amicable procedure by which governments can at least gain time.

"Whatever difference of opinion may exist as to the mode in which arbitration can be best adapted to cover such and all cases of international difficulty, we have that great, if only precedent of a general Arbitration Treaty between great powers, the unratified Anglo-American Treaty of 1897. It cannot be denied that that Treaty is based on a reasonable view of the difficulties which beset arbitration in the minds of statesmen, where national questions of vital importance are involved. It embodies, at any rate, as President Cleveland said of it, a 'practical working plan' for bringing these delicate matters within a general treaty. On the other hand, the Hague Convention has dealt with all matters but this very class, which was excluded from the purview of the Conference, and as regards all others but this class, reference to the Hague Court is fast being made compulsory. Then what is wanted, to complete the work done at the Hague, is to graft upon it some such provisions as those contained in the Anglo-American Treaty, confining the choice of arbitrators, where the question is of vital importance, to persons exclusively of the nationality of the states concerned."

JURISPRUDENCE (Codification)

THE problems arising from the multiplicity of modern case law are again under discussion in an article entitled "Certainty and Justice" by Frederic R. Coudert in the May *Yale Law Journal* (V. xiv, p. 361).

"There is in all modern states to-day a general conflict between certainty in the law and concrete justice in its application to particular cases; in other words, between the effort to have a general rule everywhere equally applicable to all cases at all times and the effort to reach what may seem to be concrete right dealing between the parties at Bar upon the particular facts in each case.

"In actual practice the pendulum swings first one way and then the other. The social necessity for stability in the law is unquestioned. Law is necessarily a rule of action, and unless a court decides cases according to some cohesive plan or rule, the justice administered is scarcely deserving of the name of *law*, however greatly it may fall in with the ethical notions of the community as regards any particular case. On the other hand, when rules become so fixed and rigid that they are difficult or impossible to change, the law is out of touch with prevailing moral ideas which like all other ideas are constantly pro gressing; the law thus necessarily becomes a clog upon national development, an incentive to revolutionary reform."

In pursuance of this thought, while admitting the dangers resulting from too strict an application of the doctrine of *stare decisis* and

the difficulties due to the increased volume of precedents, he shows that a code which is usually held out as the only remedy has not in other countries eliminated the necessity of interpretation or the multiplication of precedents or the growth of the doctrine of *stare decisis*.

"It is thus very doubtful whether the French law is any more certain than our own. If ours be more uncertain we are inclined to believe that it is because economic changes here have come faster than in other countries, and greater pressure has been put upon the courts to decide cases arising out of novel business situations." Comparing the European codes with our sad attempts he says:

"The foreign codes have the advantage of a fixed and settled terminology derived from the Roman law. They were made by experts and are little subject to legislative change. In addition it must be remembered that the making of the Code Napoleon, as well as that of the recent German Code, was due to a desire for uniformity rather than for certainty." . . .

"Another objection, and perhaps the main one, to a code, is that even a well-constructed code would help us little in making the law more certain. The general principles or rules on many subjects are pretty well settled and easily stated. The common law of tort or partnership and negotiable instruments is admirably summed up in various text-books and could without great difficulty be codified, but that would do little to help us out of our difficulties, for the question arising in these branches of the law is not generally what is the rule of law, but which of several rules apply to the facts of the case. The divisions that have taken place in our Supreme Court have not been due to common law questions, but to questions arising under various statutes and under the Constitution of the United States, one of the clearest and most admirable of written instruments. As the most familiar instance of this, it is only necessary to cite the insular cases, the legal tender cases, the income tax cases and the anti-trust law cases. In each one of these, the difficulty has been to ascertain whether the law applied to a particular state of facts and if it did apply, which portion of it was applicable. Did the Sherman Act intend to codify the common law? Was it merely declaratory or was it revolutionary? The answer must be sought in many opinions extending over a period of some ten years. Such cases cannot be avoided and constantly arise under statutes. And again, should we codify our law, the old decisions would be cited as an attempt to show what the law was intended to do and we would not get rid of the masses of case law, which now so sorely burden and perplex the practitioner." . . .

"For the present, reforms in the administration of the law, the selection of able men as judges, the leaving of procedural questions, as has been done in Massachusetts, largely to the regulation of the courts themselves by rules, are all desirable and immediate objects of attainment; but to make the law certain on subjects as to which the community itself is most uncertain, is a task that never has yet and never will be accomplished. If the Hindoo laws are unchanged and unchangeable, it is because the Hindoo himself has not changed, and does not wish to change his opinions and ideas nor the actions which flow from them. When we reach that stage of development the question may become academic."

JURISPRUDENCE (Legal Development. Education)

IN the May *Columbia Law Review* (V. v, p. 339) Roscoe Pound considers the question, "Do We Need a Philosophy of Law.' He calls attention at the start to the tenacity with which our common law has held its ground against the influences in succession of the canon law, the Roman law, the powers of the crown, the law merchant, the legislative reform movement of the nineteenth century, and the agitation in America for the spread of the Code Napoleon. Strictly in line with this history is the intrenchment of this doctrine in our constitutional law. In spite of its apparent triumph, however, many jurists discern dangers. The author does not, however, fear real danger from the abundance of new legislation, for legislatures imitate one another, and for the present he does not fear codification. But he does believe that our common law, which was formerly the bulwark of the people against

the crown, is to-day not on the popular side, but finds itself arrayed against the people. He refers especially to numerous decisions in opposition to the demands of labor.

"As the law stands, I do not doubt they were rightly determined. But they serve to show that the right of the individual to contract as he pleases is upheld by our legal system at the expense of the right of society to stand between our laboring population and oppression. This right of the individual and this exaggerated respect for his right are common law doctrines. And this means that a struggle is in progress between society and the common law; for the judicial power over unconstitutional legislation is in the right line of common law ideas. It is a plain consequence of the doctrine of the supremacy of law, and has developed from a line of precedents that run back to Magna Charta. Men have changed their views as to the relative importance of the individual and of society; but the common law has not. Indeed, the common law knows individuals only."

In this view he differs from that expressed by Professor Beale in his article on the "Development of Law," reviewed in our March number, who felt that the individualistic character of our law had changed with our doctrines of sociology. Mr. Pound, however, says, "Thus the common law in the interest of the individual is struggling with the prerogatives of the people represented by the police power as it struggled with a like prerogative of the crown from Henry VII to James II. But times have changed. The individual is secure and new interests must be guarded. The common law renders no service to-day by standing full-armored before individuals, natural or artificial, that need no defense, but sally from beneath its ægis to injure society."

He feels, however, that "the common law lawyer need not despair. He should only look about him to find within our law the means of bringing it once more abreast of the time and of ranging it where it belongs — on the side of the people. Indeed, the law has already discovered them, and is already moving in the right direction. The residuary power of the crown to do justice among his subjects has served to meet two crises in our legal history. When the old polity of local courts became impossible, it gave us the king's courts and the common law. When the common law was in danger of fossilizing, it gave us equity. To-day, when the sovereign people stands in the shoes of the sovereign king as *parens patriæ*, this residuary authority has given us the police power. Not yet one hundred years old, and scarcely mentioned in the books until the last twenty-five years, this doctrine has been worked out slowly at the same time that the common law has been gaining its firm foothold in our constitutional law. It is furnishing the antidote for the intense regard for the individual which our legal system exhibits."

To facilitate this readjustment to the policy of our law, he contends for a more thorough education of lawyers and a "broader and sounder philosophy of law than the average practitioner imbibes from Blackstone or from Coke by way of Story and Cooley and Miller."

LITERATURE OF THE LAW

A SOMEWHAT amusing though cutting criticism of "Legal Life in the American Far West" by A. Nerinck (a translation from the *Journal du Droit International Privé*), is published in the May *Yale Law Journal* (V. xiv, p. 380).

MARINE INSURANCE (Contribution to General Average)

IN the *Law Quarterly Review* for April (V. xxi, p. 125), is an interesting account of a problem in marine insurance entitled "Contribution to General Average" by H. Birch Sharpe. He considers the question how, under a policy of marine insurance, obligation to contribute to general average arises. He contends that the liability of an underwriter in respect to jettison of goods covered by his policy, is strictly limited to the amount he may be called on to pay as his share of contribution to the general sacrifice.

"If, then, the underwriter on a particular interest be liable to pay this amount, not as for a loss, but by way of contribution to a sacrifice, by which a loss of the whole adventure has been averted, it must follow that underwriters on other interests are similarly liable to pay their respective shares. In other words, jettison (in the 'Perils clause') means contribution to a loss by jettison, and nothing more."

He objects to the doctrine that the obligation is merely an implied term of the contract and finds in the common form of policy an express undertaking to contribute and "that this obligation if at any time implied was so only in so far as the other liabilities of the policy can be said to have arisen from a smaller implication." For the earliest forms of these policies were extremely simple and the various expressed clauses grow out of ancient litigation as to the meaning of the simpler form.

QUASI-CONTRACTS (Mistake of Law)

"Recovery of Money Paid under Mistake of Law" is discussed by Prof. Frederick C. Woodward, in the May *Columbia Law Review* (V. v, p. 366). He shows that the rule originated in an error of the courts and is founded upon an improper translation of the maxim, *Ignorantia juris non excusat.* He submits that there is no reason in justice, or public policy, which justifies the rule preventing recovery in case of mistake of law while it is allowed in case of mistake of fact. He shows that in Connecticut and Kentucky the original distinction has been persistently denied; that in England two comparatively recent cases in equity showed an inclination to disregard it; that in California, Missouri, and South Dakota and Georgia the rule has been modified by statute; that it has been frequently held not to apply to payments of public officers or agents; that it has sometimes been stated broadly not to apply to any mistakes of an agent; and that some courts have refused to apply it to mistakes of trustees or other officers of the court. Jurists have differed as to the true rule, and several of these suggestions are considered by the author. He favors the one advocated by Mr. Bigelow, namely, "that relief should be granted if neither at the time of the act nor in anticipation of it was there present in the mind of the actor a doubt as to the law." . . .

"It is submitted, then, that this test of the jurisdiction to relieve from mistake is the true one in principle, and is adequately supported by authority. It is submitted that, while not opening as wide a door as some of the tests previously examined and rejected, it would prove as satisfactory in its application to cases of *money paid* under mistake of law as it has already proved in its application to other cases of mistake of law, and to cases of mistake of fact.

Finally, it is respectfully urged upon our courts and legislatures that without abrogating the present rule denying the recovery of money paid under mistake of law, but by confining its application to cases in which the money appears to have been paid with the consciousness of a doubt as to the law, the hardship of the rule will be minimized if not entirely eliminated, and the whole law of relief from mistake placed upon a basis of sound and consistent policy."

PARTNERSHIP (see Bankruptcy)

PROCEDURE (Juries in India)

A DISCUSSION of the use of juries in the courts of British India, by Satya Chandra Mukerji, in the *Allahabad Law Journal* (V. ii, p. 113), entitled "Trial by Jury and with the Aid of Assessors in the United Provinces," may be of interest to those who study the legal problems in our eastern possessions. In certain provinces and in certain restricted cases the jury has been introduced and the author, a native, urges its extension, though he admits that there have been some surprising miscarriages of justice in cases where the injured party has been a native of India and the accused an European British subject, and the defendant has claimed his privilege to have a majority of the jurors Europeans. Where the jury is not permitted, two native assessors sit with the judge, but their opinion is not binding on him as is that of a jury. The author shows that while this system is theoretically good, it works very badly in practice, for the assessors are drawn from an ignorant class and usually simply follow the humor of the judge.

PROPERTY (Contingent Future Interests)

IN the *Law Quarterly Review* for April (v. xxi, p. 118) Albert Martin Kales publishes a thoughtful article entitled, "Contingent Future Interests After a Particular Estate of Freehold," in which he contends that "a recent line of English cases commencing with Letchmere *v.* Lloyd in 1881 and concluding with Battie-Wrightson

v. Thomas in 1904, go very far toward accomplishing without statute a large part, if not all, of what was actually effected by the Contingent Remainders Act of 1877." In those of the United States where statutes similar to the English Contingent Remainders Act have not been adopted, these cases are important authority "as furnishing a possible basis for the contention that the rule, which made certain contingent future interests destructible and thereby defeated the expressed intent of the testator or settlor, no longer exists." In explanation of his theory he gives a careful analysis of the different forms of contingent future interests and the history of the present technical rules as to their validity. He shows how the feudal rules regarding contingent remainders, as finally formulated by Lord Northington, defeated the intention of the testator, and how Jessel, M.R., finally overruled his doctrine. He regards the case of Letchmere *v.* Lloyd as, as notable an example "of law reform as was Lord Mansfield's in Perrin *v.* Blake. The two instances are not dissimilar. In each the reformer laid hold of a more than usually emphatic expression of intent to declare that a rule of law which defeated a settlor's or testator's intention should not prevail. Lord Mansfield's effort never became law and has been long since condemned. Jessel's has prevailed. The reason is twofold. Both Jessel's and Lord Mansfield's effort was to get rid of a feudal rule which defeated the settlor's intention. Jessel was a full century farther away from the feudal system than Lord Mansfield, and he was only supplying by judicial decision the defect which existed in the Contingent Remainders Act of 1845, and which prospectively had already been remedied by the Act of 1877. Furthermore, Lord Mansfield tried to break in upon a rule which had a continuous history of mathematical application since 1324, and of which it could only be said that it was illogical and without reason since the allowance of contingent remainders in 1430. Jessel, on the other hand, did no more than incline toward the rule which might and logically should have prevailed in conveyances to uses and devises under the Statutes of Uses and Wills, especially after it became well settled law that springing and shifting uses and executory devises were indestructible, but might be invalid upon the ground of remoteness."

The author then explains the effect of the decisions subsequent to and sustaining Letchmere *v.* Lloyd, and concludes as follows:

"It is submitted, then, that in any American jurisdiction, even though its land laws may be founded upon those of England, and though there may be no Contingent Remainders Act in force, yet, if neither actual decision nor the practice of conveyancers has settled the law to the contrary, it may fairly be contended that there is practically no such future interest as a contingent remainder, that is, there is no rule of law which says that a springing future interest after a particular estate of freehold which may be turned into a vested remainder, or take effect in possession *eo instanti* upon the termination of the particular estate, must fail entirely unless it does so. This position, it is believed, finds its chief support upon authority in the recent line of English cases beginning with Lechmere *v.* Lloyd and ending with Battie-Wrightson *v.* Thomas. It would be interesting for us on this side of the Atlantic to know whether English lawyers, in spite of the fact that they might not be, would regard us as justified in this deduction."

PROPERTY (Trade Secrets)

A COLLECTION of authorities on the law relating to "Trade Secrets" by Bernard C. Steiner is published in the May *Yale Law Journal* (V. xiv, p. 374).

TORTS (Illegality as Defense)

"The Plaintiff's Illegal Act as a Defense in Actions of Tort" is discussed by Harold S. Davis in the May *Harvard Law Review* (V. xviii, p. 505). "It is conceded by all that if the unlawful act was the cause, or a concurring cause, of the damage, the action is barred and not otherwise. The whole controversy is as to what acts are to be considered causes and what mere conditions." Though the author admits that the tendency is to reduce the defense almost to a nullity, he approves most of the Massachusetts cases giving it a wider scope. He submits that the distinction between immediate active cause and a cause for which liability is imposed is here important; thus in negligence "the only question is whether the defendant's negligent act was a part of the chain of causation and not unreasonably re-

mote from the result," but the active force may be set in motion by the plaintiff himself.

"The whole doctrine that recovery is to be denied if the plantiff's unlawful act was a part of the cause is simply a rule based on public policy." Being in the nature of punishment it should be restricted to close limits.

"It seems plain that if the illegal act is the immediate, active cause of the damage, recovery is rightly refused. But it is by no means so clear that public policy demands that, if the illegal act was simply a remote link in the chain of causation, the action shall be barred, and the almost unanimous opinion of the authorities is strong evidence that it does not."

In conclusion he says: "The defense of the plaintiff's wrongdoing may be set up in three classes of cases. In the first, the defendant's negligent act creates a dangerous antecedent condition; the plaintiff then does an unlawful act from which, by reason of this dangerous condition, damage results. It is contended that the unlawful act is the immediate cause of the damage and that the action should, therefore, be barred. In the second, the unlawful act creates a passive condition: the defendant then does a negligent act which, supervening upon the condition which has thus been created, results in damage. It is maintained that the unlawful act is a cause of the damage, but so remote a cause that it ought not to have the effect of preventing recovery. In the third, the direct cause of the damage is a combination of agencies operating simultaneously, one being the unlawful act of the plaintiff and the other the negligent act of the defendant. This case is more doubtful, but, on the whole, the decisions permitting recovery seem right."

TORTS (Theory of Duty of Care)

In the *American Law Register* for April (V. liii, p. 209), and for May (p. 273), Francis H. Bohlen discusses "The Basis of Affirmative Obligations in the Law of Tort." He deals especially with the affirmative duty of care in cases of negligence and criticises the famous rule of Brett in Heaven *v.* Pender. From an examination of the early English cases he traces the origin of the distinctions between the action on the case which became assumpsit and the similar action for negligent torts, and finds a striking analogy between the early doctrines of consideration in contract and the necessity of a benefit to the defendant, in the relation out of which the affirmative duty of care arises. He finds as the distinction between tort and contract that "the public has an interest that no man shall so act as to injure another, it has no concern that he shall benefit any one." In the early law, assumpsit was alleged for both contract and tort, but when there was an active misfeasance, the assumpsit soon became immaterial. "When, however, there was alleged an affirmative duty to act in some way to protect others, quite a different question was presented. Affirmative action could only be required when it was assumed or imposed as a duty; such duties were only assumed or imposed for a consideration, a benefit conferred, as their price." In its origin this duty was an incident of business carried on for gain. No duty arose out of mere passive ownership. In conclusion he says:

"The primary conception of the obligation in torts is to refrain from *injurious action*, unless the doing of the act, even with its attendant risk, is so beneficial to the public generally, the object of it so valuable to the general welfare, that even private injury must be borne to encourage it, the obligation and attendant liability extend to all who may be foreseen as within the radius of its effects. But the conception of a duty of protection owed to another against the consequences of his own actions is foreign to the law of torts.

"Such duties rest upon an assumption of them either by express consent or as inevitable legal incidents to certain actions, businesses, or uses of property. Such assumption can rest only on consideration. An express promise is void if gratuitous; no affirmative duty will be imposed without a corresponding benefit.

"Such obligations arise only when assumed, but they are not the creatures wholly of consent, they may be annexed to the performance of certain acts, the conduct of certain businesses, the use of property in certain ways the performance of these acts, the entering into such business, and the use of the property is wholly voluntary; but if done, the duties

follow as a matter resting wholly on the policy of law, that policy which protects the right of citizens from positive injury. Such duties, therefore, only arise when they are necessary to protect others from the consequences of acts, businesses, or uses of property beneficial to those who do them, engage in them, and use it. All affirmative duties may truly be termed assumptional and founded upon consideration, whether to protect from injury or to confer a benefit. All were, as has been seen, originally enforced by action on the case on the assumpsit. Damage being the basis of such action, the actual loss of a legal right had to be shown. Save in exceptional pursuits, where service must be rendered to all alike, as carriers, innkeepers, etc., there was no legal right to such benefit. Nor did the early common law recognize any interest in the public that an expected benefit should be conferred. So in such case to show damage, the loss of the consideration had to be shown. Only he who had paid it could lose it, so only he who was a party to the consideration could maintain the action. Such purely beneficial assumption, expressly assumed, came, too, probably by analogy to the action of covenant, the preëxisting remedy for similar obligations formally assumed, to be regarded as grants of the expected benefit. So the measure of damages was held to be the loss of the benefit to be derived from performance and not the value of the consideration paid. Such a grant, like that in a formal covenant, would be naturally held to extend only to the grantee and depend in its extent on the will and consent of the grantor. Such obligations thus came to be regarded as resting wholly on the consent of the parties who had undertaken them and limited to those to whom they were assumed and enforceable only by parties to the consideration. Such are the essential elements of purely contractual duties which separate and distinguish them into a distinct class of assumptional obligations. The natural tendency to overwork a new discovery led the courts to treat as contractual even those assumptional duties which were imposed by the policy of law towards those who had in fact furnished the consideration on which they were founded. It is very usual for courts to speak of such duties as are inevitably imposed for protection from injury as incidents to the conduct of a business as resting upon an implied term in contracts made in their exercise.

"This tendency has led to the unfortunate idea that when there is a contract between two persons, no one can be concerned with anything done in performance or breach thereof save the parties thereto, and that any action brought to recover, even for an actual injury by one not a party thereto, is an attempt to sue on the contract. However, notwithstanding the tendency of contract to usurp the place of tort even to-day, it will be found that *acts* probably injurious are regarded as solely tortious only; a failure to perform a duty voluntarily assumed, whereby a benefit is lost, is wholly a breach of contract. A failure to perform an obligation to avoid injury assumed as the price of action is regarded as either at the election of the party injured if he be a party to the consideration, as a tort solely if he be not."

The author then proceeds to apply these principles in analysis of the various actions of tort arising from the use or transfer of real or personal property. In regard to transfer of possession he says:

"It may be safely said that, 1st, one who furnishes an article or structure for use for a purpose in which he has an interest, direct or indirect, and from which he derives directly or indirectly a benefit, is bound to exercise care to have the structure or article fit for such use.

"2d. Such obligations can extend no further than the ability to satisfy them. Where the possession of the article or structure is transferred, if it be at the time of transfer fit for the use for which it is designed, the transferee is alone responsible for any defects arising subsequently, since with the possession and control passes the power to inspect and repair; he is alone able to observe and remedy such defects, and his alone is the duty of inspection and repair."

If one does attempt actively to deal with a chattel in the performance of his calling he is bound to use due care independently of contract. The author cites ancient cases to support this theory. The liability of a mere transferrer of title to property, however, is only for fraud or non-disclosure of known

defects, which makes the act of transfer itself a conscious leading of the transferee into a known danger.

TRUSTS (Spendthrift, Statute, Constitutionality of)

R. FLOYD CLARK, in the May *Columbia Law Review* (V. v, p. 380), describes "An Episode in the Law of Trusts." This is an interesting statement of the consequences to many trust estates of a change in the law in New York obtained by an enterprising attorney, to enable his client to break spendthrift trusts. The statute had to be made retroactive, and although in the case by which it was called forth, the trustee made no serious contest, it resulted in much litigation with respect to other trusts as to the constitutionality of the retroactive provision. The author argues in support of the constitutionality of the provision which, unfortunately, has been left open for decision in the leading cases in which it was involved, on the ground that a dead man is not a person who has rights under our conception of the constitutional provision, and that, therefore, the creator of the trust is not deprived of his property. Nor has a trustee a beneficial interest of which he can be deprived. The author also cites the case in question as an extreme example of judicial legislation since the justices to avoid constitutional questions held that the statute was not retroactive though it was plainly intended so to be.

WITNESSES (Expert Testimony)

A CAREFUL consideration of the law relating to the examination of experts entitled, "The Examination of the Medical Expert," by H. B. Hutchings, is begun in the May *Michigan Law Review* (V. iii, p. 520). It relates to the form and scope of the hypothetical questions permitted. He sums up his conclusions as to the topics treated in this number as follows:

"Although the authorities upon the subject are somewhat in conflict and very generally confused, they probably justify the following propositions: Ordinarily, in the examination of an expert whose opinion must be based upon facts with which he is not familiar, the facts upon which the opinion is to be based, should be stated clearly and logically in the question. This is the safe practice, and may properly be adopted in every case. If the facts are complicated, and, as given in the testimony, are in any way ambiguous or contradictory, this is the only safe practice. If, however, there is no controversy as to the facts, or if it is desired to base the opinion of the expert upon the testimony of a single witness or of several witnesses, and that testimony is in no way confused, complicated, ambiguous, or contradictory, then the examiner may properly ask the expert to base his opinion upon the undisputed facts or the indicated testimony, assumed for the purposes of the answer as having been established."

CORRESPONDENCE

CORPORATION CHARTERS

An English View of the Doctrine of Pinney *v.* Nelson

By our London Correspondent

Temple, London, Eng., April, 1905.

An action of very great importance to shareholders in English companies doing business in the United States, as well as to creditors in America of such companies, has recently been decided in the English Courts. The plaintiffs in the action were the Risdon Iron and Locomotive Works of San Francisco and the defendant was Sir Christopher Furness, who is a large shareholder in the Copper King (limited). The Copper King Company was incorporated in England under the English Companies' Acts, and according to its memorandum of association, or charter, its objects, *inter alia*, were to acquire mining rights and lands in the United States of America and elsewhere, to purchase or hire machinery, and to do all other things incidental or conducive thereto; and by its articles of association the company was empowered to appoint any person at its attorney for the transaction of business abroad, with such powers as it might deem necessary to enable the company's operations to be validly carried on abroad, and to do all such acts as might be necessary to comply with the law of any country where the company might carry on business.

As a matter of fact the company carried on business in California and incurred debts there in the purchase of machinery in that state. By the law of California each stockholder of a corporation is individually liable for debts contracted by the corporation during the time he is a stockholder, according to the proportion which his holding bears to the subscribed capital of the corporation, and no corporation organized outside the state is allowed to do business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of the state. The debts incurred by the company in California to the plaintiffs amounted to $10,404.96, for which the plaintiffs began an action in San Francisco, but before the trial was reached the company, upon the petition of certain creditors in California, was adjudicated bankrupt under the United States laws, and subsequently went into voluntary liquidation in England. The plaintiffs thereupon brought an action in England against Sir Christopher Furness for £456,17*s*. 8*d*., that being the proportion his holdings of the company's shares bore to the amount of the company's debt to the plaintiffs. They thus sought to enforce against him in this forum the provisions of the California Civil Code with respect to the liabilities of stockholders for the debts of insolvent companies.

The case attracted a good deal of interest and was very ably argued, counsel for the plaintiffs contending that the defendant as a shareholder had authorized the directors to pledge his personal credit, and that if a shareholder gave his directors power to do all things necessary to make the company a legal entity in California, he had thereby empowered them to bind himself as a surety for the company's debts in California. The defendant on the other hand submitted that as the Copper King was a company incorporated under the English Companies' Acts and by its memorandum of association the liability of its shares was limited, the defendant could be under no personal liability for any amount beyond anything which might be uncalled upon his shares, and as they were fully paid, he was exempt from further demands. They further argued that it would be contrary to the whole conception of a limited company that a person by buying a share in an open market, should be authorizing the directors to bind him by the law of a foreign country where the company whose shares he bought carried on business.

The case was heard by Mr. Justice Kennedy, one of our ablest judges, who has made several visits to America in which he has delivered addresses to American lawyers. He decided that the defendant was not liable, on the ground that his liability was limited under the English Companies' Acts to the amount of his shares, and an English court could not

recognize as a valid cause of action a claim in respect of debts of the company arising by virtue of the law of a foreign country which was inconsistent with the limitations of the shareholders' liability according to English law, and that any proceeding by the company to enlarge the liability of a shareholder beyond that fixed by the constitution or charter of the company must be held by an English Court to be *ultra vires*. He carefully considered Flash *v.* Conn (109 U. S. 371), and Pinney *v.* Nelson (183 U. S. 144), which were cited and relied upon by the plaintiffs. In both of these cases a shareholder of a foreign corporation had been held to be charged with the liability imposed by the California Code, but in the opinion of the learned judge they could be distinguished from the present case. In the former case the defendant was a shareholder in a company incorporated under an Act of the New York Legislature which expressly provided for the liability of individual stockholders in such a corporation in respect of the debts of the corporate body; and in the latter case it did not appear from Mr. Justice Brewer's judgment or the report of the case what were the provisions, if any, in the articles of incorporation (the defendant being a Colorado company) as to the limitations of liability. All that could be plainly inferred being that neither under their provisions nor under the law of Colorado was there anything expressly declaring the personal liability of stockholders for debts of the corporation. There was the further distinction, in the judge's opinion, that Pinney *v.* Nelson was an action brought in California against stockholders in the corporation who were residents in and citizens of that state, and therefore properly within the jurisdiction of the local courts.

STUFF GOWN.

THE LIGHTER SIDE

A LAWYER, now deceased, but formerly one of the best known in western Iowa, and for some time member of the Board of Bar Examiners for his state, and the youngest man said to have ever been admitted to practice in Iowa, related his experience in one of his first cases to a number of students before the Examining Board not long since.

He said, "It was one of my first cases and being for the plaintiff of course had the opening and closing argument to the jury. And being somewhat noted and conceited too, as to my oratorical abilities, sought with all the command of language, powers of Delsarte, and gestures I had at hand, to make an impression on the minds of the jury.

"Opposed to me, on the side of the defense, was an old Kentucky lawyer, who, not being able to withstand the strenuous times of that commonwealth, just preceding the Civil War, had removed to this state to practise law.

"When the old man arose to make his argument to the jury he said, 'Gentlemen of the jury, first let me answer the young man's argument.'

"He then went over all the motions and gestures I had made without uttering one word. 'There,' he said, 'is all there is to the young man's argument.' 'Now,' he says, 'the young man reminds me of an old mule I used to have on the farm down in Kentucky. Regularly every Sunday morning I used to turn the old mule out to graze, and as soon as he was turned out he would begin to kick. Every time he would kick, he would bray, and every time he would bray, he would kick, and I used to lean on the old rail fence watching that mule, wondering whether he was braying at the kick or whether he was kicking at the bray.'

"And the old man closed his argument by saying, 'Now, gentlemen of the jury, I would like for the young man to answer this question: Is he braying at the kick or is he kicking at the bray?'

"Of course I had felt the effects of the old man's argument, and in closing refrained from any attempt at oratorical display. 'Gentlemen,' I says, 'I am now done,' and sat down. Jumping hastily to my feet, I says, 'Just one moment, gentlemen, there is one point I overlooked. The old man wished to know whether I was braying at the kick or whether

I was kicking at the bray. Gentlemen, I wish the old man to understand I was simply kicking at the bray.'

"I won my case."

GOSHALL — As far as I can see, Mrs. Chadwick's whole trouble results from one mistake.

HEMLOCK — What is that?

GOSHALL — She neglected to get incorporated under the laws of New Jersey. — *Cleveland Leader.*

"MR. ATTORNEY," said the judge, after sending the defendant to jail for six months, "how does it happen that this man was only *fined* in the court below?"

"Your honor," he replied, with dignity, "I was not his counsel in the lower court."

And, somehow, the other lawyers present seemed to feel that he had explained it.

AMUSING stories are still told of the late Judge Bond of Baltimore. Once when returning from yachting with the famous Benjamin Butler, the general suggested that an eye opener would be appropriate before they landed. The judge didn't mind — he never did. So a bottle of Scotch was soon forthcoming.

"Good whiskey," remarked the judge.

"Yes," replied the general, "and the better that it never paid a duty."

"Oh, that's all right, General, it is going to be landed in Bond."

THE judge in the years when he ornamented a Circuit Bench in South Carolina is said to have bonded more of the mountain dew. One day after dinner he had evident difficulty in concentrating attention upon an argument by counsel who at length in desperation suggested that the case ought to be heard by the full court.

"I think you would have difficulty in finding a fuller court," beamed the justice.

GUILT EDGED

CHISTER. — "That case will prove a gilt-edged proposition."

ECKITTY. — Of course with "u" in it.

YEARS ago when the manufacture of lumber was the most important industry in western Wisconsin, one of the chief vexations of the lumberman was the log thief. The passage of statutes providing severe penalties for this species of theft and the strict enforcement of such laws soon put an end to the wholesale thefts which characterized the early years of the business, but petty thievery continued for many years. Farmers or villagers along the river would select fine, thoroughly-seasoned pine logs and haul them home for use in the construction of some outbuilding or for kindling wood. The lumbermen through their associations and the employment of special agents waged constant war against these depredators and many were the encounters between them both on the river and in the courts.

A well-known attorney of L. had at one time an experience which well illustrates the difficulties with which prosecutors of the log thieves sometimes had to contend. A special agent of one of his clients had caught a resident of a neighboring village red-handed, and the attorney went out to prosecute the wrongdoer before the village justice. The case was called and the witnesses for the prosecution established a clear case of theft against the defendant. He put in no defense except his own denial. The court, however, after a brief deliberation found the defendant not guilty and discharged him. The attorney and complaining witness were completely nonplussed and withdrew from the justice's office to relieve their feelings in the open air and to figure out if possible what had gone wrong. They sat down in the justice's yard and discussed the matter, but could reach no satisfactory conclusion until the special agent happened to glance at the end of the log on which they were sitting, and his eye fell upon a familiar mark. "Great Scott," he exclaimed, as he sprang to his feet, "we are sitting on one of our logs."

THE late Henry W. Paine was considered the best authority on all questions of law in New England in his day. At one time, when he was arguing a case in the Supreme Court before the late Judge Horace Gray, he was interrupted by Judge Gray, who said, with

some warmth: "That is not law, Mr. Paine; that is not law."

Mr. Paine quietly said: "It was law, your honor, before you spoke." — *Boston Herald.*

THE late Justice D. L. Follett, of the Supreme Court of New York, was a stern appearing judge who always demanded the utmost accuracy from lawyers. Woe betide the ignorant or careless attorney who handed up defective papers.

Judge Follett had one floor of his house at Norwich, N. Y., fitted up as offices where he held court at chambers. On such occasions there used to sit with him, *amicus curiæ*, his huge Danish hound, whose facial expression, like that of his master, was even more awe-inspiring than his real character warranted. There was a witty young Irish attorney in town, who stood in about equal terror of Judge and dog. One day he wished to get an *ex parte* order and telephoned to the Judge's house to find out if he could be heard. Judge Follett's son answered the call and after consulting his father, replied in the affirmative. "But, say," continued the attorney, "chain up that big dog, will you, I'm afraid of him." "Yes," responded the son and hung up the receiver. A few minutes later the bell rang again and this time Judge Follett himself went to the 'phone, when the following conversation took place: "This you, Follett?" "Yes, who is this?" "This is Sullivan; I'm coming up now for that order I spoke of." "Very well." "And say, old man, on second thought, er, — chain up the Judge and I'll risk the dog!"

It is only fair to Judge Follett's memory to say that Mr. Sullivan got his order.

JUDGE SYLVESTER DANA, who was for some years judge of the Police Court in Concord, N. H., always endeavored to smooth over any little differences between persons brought before him. On one occasion the charge was for a technical assault, and it came out in the course of the evidence that the parties were neighbors and had been on the best of terms for some years.

"It is a great pity," said the judge, "that old friends, as you seem to have been, should appear before me in such a way. Surely this is a case which might be settled out of court."

"It can't be done, Judge," answered the plaintiff, moodily. "I thought of that myself, but the cur won't fight." — *Boston Herald.*

The Coldwell Lumber Company was operating a saw mill on Coon Creek and this was a paper issued by the J. P. to restrain and inhibet the Company from putting the saw dust into the waters of Coon Creek.

"STATE OF TENNESSEE Perry county to the Sherff of Perry County to notify Colwell Loumber Compny not to Run Nomore Sawdust in warters of Coon Creek We the under Sind Pertishners Do Say that We Donot Want Eny more Saw Dust Put in the Warters Ar ner the warters of Coon Creek as We ar the Sitons of the Creek & We Bleve By it Being Put in the Warters it Creates Sickness to a great Big Xstent thre Has Bin more ar Less Sickness this Winter and We Had Drother it Bee Stopt at once & Never Have no more Put in the Warters of Coon Creek By the Colwell Loumber Compy nor No one Els Who Should Run a Sawmill on Sed Coon Creek nor Ner the Banks of the Creek feb, 24 1903

JOHN DOE J. p."

This paper was indorsed on back as follows: "Executed by Notifying Po Coldwell this the 8th, day of April 1903

RICHARD ROE D, Shff. Cost 50 cents"

CHIEF JUSTICE SAMUEL JONES of the New York Superior Court, contemporary with Judge Walworth, James T. Brady, and Charles O'Connor, once had an application before him for the adjournment of a case for trial to be put down for the next Friday. He expressed great surprise and said, "Gentlemen, are you aware that day is Good Friday? Do you know, gentlemen, who sat on Good Friday? I will not be the second judge. In New York City I have never known a trial to take place on Good Friday."

IN a recent Nebraska murder trial the counsel for the defense, Charles H. Sloan, gave a striking example of the effect on a jury of visual illustration. The theory of the defense was that the death was due to a kick from a horse when the deceased approached it to enter the wagon and that it all happened

during the short time a witness had taken to enter the house and return. The prosecution contended that the interval was too short for all the incidents to have happened as narrated by the defense. Mr. Sloan, in argument, took out his watch, paced the distance in the court room, went through the motions of untying the team, driving it, and retying it as testified to by the defendant, going about it slowly and methodically as the defendant might have done, and then stood still, watch in hand, while the remaining seconds ticked off monotonously to the alert and straining court room. The prisoner was acquitted.

DOWN in Dixie, in the old "Mother of States," which has given so many distinguished and learned legal lights to the Bar — of courts and cross-road stores — a band of thieves had infested a neighborhood until scarcely a "smoke-house" or chicken roost remained immune. At last a big, black, burly specimen of the genus negro was apprehended full handed, of said chickens, and as there seemed not the slightest hope of escape, he resolved to throw himself upon the "ignance of de cote," or, as they say down there, to "turn state's evidence," and plead for the mercy of the court. He made a full confession in which many others were implicated, and was the only witness for the prosecution in the trial which I had the pleasure of witnessing. The prisoner, a mulatto of rather more than average intelligence, had retained as his counsel a celebrated (among his race in that locality) negro lawyer who was of the same ebony shade, as the prosecuting witness who was as black as a pile of black cats. The witness gave a full, clear, and connected account of the theft, told how he and the prisoner had gone in the night time and broken into the chicken house and carried off the contents of the roost. It was a very probable and credible story and the prosecution rested. The negro lawyer put witnesses on the stand, friends and relatives of the prisoner, and established an absolute alibi, the prisoner testifying that on that night he was at home. The state had no more evidence and the Commonwealth's attorney in his address to the jury remarked that the case was too plain for argument, that they had heard the negro's story and must find a verdict of guilty. When the negro lawyer arose to address the jury he spoke, about as near as I can recollect, as follows:

"May it please de Cote and Gent'men ob de Jury: You has done heerd de evidence ob de prosecution, you has listened to de evidence of the defense; de eloquent gent'man, Colonel Carter, ob de prosecution has highly entertained you, and now I hab de honor ob addressin' you on behalf ob de prisoner at de Bah. Now, gent'men, what kind o' evidence has de prosecution got? How many witnesses dey got? One. And who is dat one? Dar he is, gent'men; look at him; a nigger as black as de hinges o' hell; a self-confessed thief; he done told you hisself how he done gone out and broke in folks' smoke house and stole deir meat, done rob white folks' chicken roos' while my client was at home in de bosom ob his famly. Gent'men, you can't blieve dat nigger; a nigger dat will steal will lie, and he done tol' you how he done steal, and now dey gwine sen' him to de penitenchy for de res' o' his life, I spec. But, gent'men, dat sure is a mean nigger; mean, dat ain't no name for him. I done search de pages o' histry to find a man as mean as dat nigger. I done gone back to the very olest times and come down thew all ages and I ain't find a man as mean as dat nigger. Gent'men, dat nigger is meaner dan any man I ever hear tell of. Gent'men, dat nigger is meaner dan Judas Iscariot, cause arter he done gone and betray his Lord and Marster, he was decent enough to go out and hang hisself, but dis nigger come up here as bold as a sheep wit' a grin on his face and want to send my client to jail."

DURING a session of the Supreme Court of Maine, at Augusta, a tedious and complicated real estate case had pretty nearly worn out the patience of the counsel on both sides. One of the lawyers engaged was F. A. Appleton, whose fame as a wit was wide-spread.

Opposing him was a lawyer of pompous mien and much avoirdupois, who kept making blunder after blunder, until even the judge became irritated. After making a particularly aggravating error, he said:

"I beg your honor's pardon, that was an-

other mistake. I seem to be inoculated with dullness to-day."

"Inoculated, brother?" said Mr. Appleton, "I thought you had it in the natural way."

'Squire W——, of undoubted German parentage, was for a number of years an Alderman of Allegheny City, Pa. His honesty and fair dealing were unquestioned, but his judgments were sometimes based more upon his own notions of justice than upon any recognized legal principles.

An action in trespass was once on trial before him, which the attorney for the defendant argued should properly have been trespass on the case, over which the Alderman would have no jurisdiction. Defendant's counsel made a strong speech to convince "the court" that the case must be dismissed, and in support of his position, produced a volume of Pennsylvania Supreme Court reports, from which he read at great length a decision of the state's highest court in a case on all fours with the case at issue.

'Squire W—— listened impatiently to the reading of the law. When the defendant's attorney closed, he rendered his decision:

"De Supreme Court iss one court, und dis is anodder court. Dey gifs *deir* decisions und I gifs *my* decisions. I gif judgment for de plaintiff."

THE VICARIOUS POTTER

If you had told William Potter when he came to the city one day that he was about to become the tool of a scheming lawyer and the means of freeing a possibly guilty man from the clutches of the law and well merited punishment, he would have scornfully scouted the idea, and, although not ordinarily a man of wrath and lurid words, would have undoubtedly poured upon your devoted head the choicest collection of Biblical and otherwise forceful phrases of which any of the most tongue-gifted of his cow-boys was capable.

Not that Mr. Potter was of habit a man of multitudinous words or mountainous passion. On the contrary, he was usually reserved, discreet of words and action, a cattleman of extensive means, respected and respectable, a believer in and observer of the laws of his country, a despiser of those that broke them. No cow-boys of his could "paint the town red" or "play horse" with him, much less a lawyer. So a suggestion that he could be used to defeat the law by any fee-thirsty lawyer that ever "piled precedent upon precedent," persuaded a judge, or cajoled a jury would have led to the use of a vocabulary enlarged by the most vivid examples of the cattle range and the gestures of a master of strenuosity.

But Mr. Potter did not thus comport himself, as he did not then know that he was soon to be used in that very identically objectionable way as will more fully presently appear. This was the way of it.

On the very day that William came to town his old friend and school-mate, Martin Dolbin, was, for a wonder, in a very serious dilemma, an unusual condition for a lawyer of his experience and expedients.

For what Dolbin didn't know about the "tricks of the trade" wasn't worth knowing. He had been mixed up in politics and was acquainted with all kinds of men and their methods. He had served as prosecuting or state's attorney of his county and appeared for and against municipal railroad and other corporations. He was at home in civil and criminal trial law and the ways thereof. He was an easy fellow to get acquainted with, but a difficult one to beat in a law suit.

He was "well-to-do" in worldly goods but hard "to do" when one endeavored to get the best of him.

But this was his present fix.

A certain client of his, defendant under indictment for a serious crime, now out under heavy bail was dead drunk down town and his case set for trial forthwith. He had run the gamut of motions and applications for continuances. He did not care to put his client's condition in evidence. What he should do under these peculiar circumstances was really worrying him and agitating his "gray matter" as never before. At this particular juncture, following his usual custom of calling upon his friend and former chum when in town, William Potter appeared upon the scene.

"Mighty glad to see you, old fellow," was Dolbin's greeting to him as he entered the lawyer's private office. There was nothing

particularly unusual or significant in this greeting. "Bill" Potter was always a welcome and privileged guest in that office. In fact, the possibilities of Potter's usefulness at that critical period did not at first dawn on Dolbin's mind.

But he was a man who readily recognized the "time and chance that happeneth to all men." A scheme formulated itself as he pursued the usual inquiries as to the health of Bill's family, individually and collectively, and the condition of things generally at the old town and on the ranch.

"Bill," he continued in pursuance of his scheme, "I haven't seen half enough of you. I have to go to court at once. I have a little case set for this morning. It won't take long. Come right along with me."

So they went to court and as they entered the court-room, the judge was just calling the case of the State *v.* Jones, Dolbin's case.

The lawyer very naturally, and in furtherance of his plan of action, invited Bill to come and sit down next to him inside the Bar, at the table alloted to counsel.

"Are you ready, Mr. Prosecuting Attorney," asked the court, and Mr. Prosecuting Attorney replied, "Yes."

To the same inquiry Mr. Dolbin made the same reply, and the court instructed the sheriff to call a jury, which was accordingly done.

It was a case of robbery, and after stating the general nature of it to the jury, Mr. Prosecuting Attorney asked the usual questions as to competency of the members of the jury to serve.

"Do you, any of you, gentlemen, know the defendant in this case?" he inquired. None of them knew Mr. William Potter whom they supposed to be the defendant. He was the only man at hand who might seem to fill the bill. Dolbin volunteered no information. He did not think it incumbent upon him at that time. Potter was then figuring in his mind his chance of profit on that last bunch of short-horn feeders for which he had paid four cents with corn at fifty cents, and scarce at that.

Jurymen did not then interest him any more than missionaries to Africa. His thoughts were afield.

The jurymen for the case were soon chosen. Dolbin wasn't particular.

The prosecuting attorney opened the case. His witnesses proved the fact that a store had been broken into and a strange man seen hanging around the night of the robbery.

"Was this the man?" he asked pointing to William Potter.

That gentleman was in the midst of an absorbing meditation on wind-mills, water-tanks, and pumps. Dolbin was perusing the Revised Statutes.

The witness looked at Potter, seemed puzzled.

"Can't say he is. Doesn't look much like the fellow I saw," he answered. He was excused. His testimony was not very satisfactory to the prosecution. Neither was that of the other witnesses.

They could not identify William Potter as the robber.

The prosecuting attorney looked surprised.

Dolbin looked out of the window, a suspicion of a smile on his face. Potter didn't look at all. He had now reached the consideration of the relative merits of alfalfa and buffalo grass.

The prosecuting attorney became tired and rested his case. Dolbin, in a nonchalant way, handed the court a written demurrer to the evidence and the court took the case from the jury saying to the prosecuting attorney:

"I do not see that you have connected this man with the larceny. I shall, accordingly, sustain the demurrer. The jury is discharged."

Dolbin's client was free. So was Potter. He had served his purpose, and followed Dolbin out of court.

It would be useless to attempt to describe the volcanic eruption that took place when Martin told William the extent and purpose of his vicariousness. Mont Pelée, wasn't a comparison. The bonds of friendship between the lawyer and the cattle-man were severely strained that day. A keen sense of humor and appreciation of strategy and triumph over difficulties, however, finally proved to be the necessary extinguisher of the consuming fire and William Potter to-day is firmly convinced that Martin Dolbin is the greatest lawyer west of the Mississippi.

FRANCIS A. LEACH.

KANSAS CITY, MO., May, 1905.

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM

(Copies of the pamphlet Reporters containing full reports of any of these decisions may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.)

CHINESE EXCLUSION. (RIGHT OF ENTRY — ADOPTED CHILDREN OF MERCHANT)

U. S. D. C. S. D. OF NEW YORK.

AND

U. S. D. C. E. D. OF PENNSYLVANIA.

Two cases, which are related in a general way and which present hitherto unadjudicated states of facts, are contained in No. 6, of Vol. 134 Federal Reporter. Both relate to the status of children of Chinese merchants. The first case is that of Ex parte Fong Yim and others, 134 Fed. Rep. 938. The question involved in this case was whether adopted children of a Chinese merchant were entitled to admission into this country. There appears to have been some slight contention as to whether under the same circumstances, natural children would have been entitled to admission, it being contended that as the children had never before entered this country, they stood on the same footing as ordinary Chinese persons who had acquired no right of domicile. This question, however, is disposed of very briefly by the observation that the father has a right of entry and that their right to enter is incident to his right. The real question in the case is, as the court observes, whether a domiciled merchant in this country has the same right to bring in his adopted children as he has to bring in his natural children. The inspector, in rendering his decision to the effect that the children were not entitled to enter, stated that it did not seem to him that the law contemplated covering such cases, as that would give all domiciled merchants an opportunity to adopt children at will and bring them into this country. The court concedes that if the question of fact as to whether the adoption was *bona fide* should be decided adversely to the persons claiming a right of entry, they should be excluded. It appeared in the case under consideration, however, that the adoptions occurred many years ago; that the children had ever since lived with and been supported by the adopting parents and that children could be adopted in China substantially without legal formalities, after which their rights and obligations were similar to those of natural children. Under these circumstances, it is held that there is no difference between the legal status of adopted children and of natural children.

The other case referred to is that of United States *v.* Joe Dick, 134 Fed. 988. Joe was born in China and was originally admitted to the country as a son of a domiciled Chinese merchant. Afterward, while Joe was still a minor, the father returned to China and on Joe's refusal to accompany him, he was, as the court puts it, "turned loose upon the world to shift for himself." Afterward, Joe became a laborer. Under these circumstances, Joe contended that the status which he originally acquired as the son of a resident Chinese merchant continued even after the severance of all relations between himself and his father. It is held, however, that the continuance of his original status depended upon the continuance of the family relation and ceased when that relation was ended. "It would," says the court, "be the merest fiction to look upon him as a minor son in the household of his merchant father when he was in fact no longer in the household, but was making his own livelihood and his father was no longer a merchant nor even a resident in the United States."

CONSTITUTIONAL LAW. (PEONAGE — PROHIBITORY STATUTE)

UNITED STATES SUPREME COURT.

The constitutionality of the Federal Legislation prohibiting peonage, and incidentally the elements of proof necessary to support a conviction under an indictment for violation of those statutes, is considered in Clyatt *v.* United States, 25 Supreme Court Reporter, 429. U. S. Rev. St. §§ 1990, 5526 (U. S. Comp. St. 1901, pp. 1266, 3715), declare that the holding of any person to service or labor under the system known as "peonage" is abolished and forever prohibited, and that every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than $1000 nor more than $5000, or by imprisonment for not less than one year nor more than five years, or by both. The defendant Clyatt was indicted for violation of these statutes. In considering the authority of Congress under the constitutional grants of power to enact this legislation, the court defines "peonage" "as the status or condition of compulsory service, based upon the indebtedness of the peon to the master," and quotes from the opinion of Judge Benedict in Jaremillo *v.* Romero, 1 N. M. 190, where it is said with respect to peonage: "One fact existed universally — all were indebted to their masters.

This was the cord by which they seemed bound to their master's service." The difference between voluntary and involuntary peonage is noted by the court, and it is said that this is simply a difference in the mode of origin and not in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service — involuntary servitude. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject, like any other contractor, to an action for damages for breach of that contract, can elect at any time to break it and no law or force compels performance or a continuance of the service. The operation and scope of the 13th Amendment to the Federal Constitution is considered and the statement of Mr. Justice Bradley, in the Civil Rights Cases, 109 U. S. 3, 20, 23, 3 Sup. Ct. Rep. 18, 28, 30, is quoted with approval: "This Amendment, as well as the 14th, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character, for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." Further quotation is made from the same opinion, wherein the distinction between the 13th and 14th Amendments is pointed out, and attention is called to the fact that legislation under the 14th Amendment must necessarily be corrective in its character, counteracting and affording relief against state regulations and proceedings, while legislation under the 13th Amendment may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not. Plessy *v.* Ferguson, 163 U. S. 537, 16 Sup. Ct. Rep. 1138, and the Slaughter House cases, are cited to the same point, and it is concluded that the statutes under consideration are directly authorized by the 13th Amendment and that the operation of the statutes is not limited to the territories or other parts of the strictly national domain, but extends to all the territory within the sovereignty of the United States. The decision in the case, however, turns upon a consideration of the wording of Section 5526, which it will be remembered punishes every person who holds, arrests, or returns, or causes to be held, arrested or returned, etc., and it is said that three distinct acts are thereby made illegal, to wit: holding, arresting, and returning. The indictment charged that defendant "did unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage," and it is held that a conviction under the indictment is not sustainable without proof of a prior condition of peonage.

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U. S. C. C. D. OF MASSACHUSETTS.

Sampson & Murdock Co. *v.* Seaver Radford Co., 134 Federal Reporter 890, is worthy of note as a contribution to the growing list of cases involving the right of compilers of reference works to make use of prior compilations dealing with the same subject or containing similar facts. In this case it appeared that plaintiff had published a city directory, and that in subsequently compiling its directory defendant had used complainant's directory for the purpose of obtaining information as to names, addresses, and occupations, which information it compared with information previously obtained by an original canvass, and, in cases where such proceeding was necessary, made further investigations. After comparison and the making of further investigation when the statements in complainant's directory did not coincide with the data previously obtained by defendant, the latter printed as its directory the net result of its investigations, which, of course, consisted of plaintiff's directory, with such additions and alterations as defendant's investigation had shown to be necessary. In answering in the negative plaintiff's contention that defendant had no right to do this, the court cites the recent cases of The Thompson Co. *v.* American Law Book Co., 122 Fed. 922, and Dun *v.* International Mercantile Agency, 127 Fed. 173, in the latter of which cases the ruling in the present case was to some extent foreshadowed. Cases dealing with the question involved in the instant case, and the two just cited, are of comparatively recent occurrence, owing, no doubt, to the fact that such quasi-literary publications, as well as the mechanical method of compilation are of oomparatively recent origin. The case under consideration seems to go a little in advance of any of the preceding cases.

EIGHT HOUR LAW. (CONSTITUTIONALITY — LABOR IN MINES — UNHEALTHFULNESS — JUDICIAL NOTICE — EVIDENCE)

SUPREME COURT OF NEVADA.

In the recent case of Ex parte Kair, the Supreme Court of Nevada upholds the constitutionality of an act (St. 1903, p. 33, c. 10) imposing a penalty upon any one working more than eight hours a day in any mine, smelter, or mill for the production of ores. The constitutionality of this statute was passed upon a little over one year before in the case of In re Boyce, 75 Pac. 1, which was decided only a few days before People v. Lochner, 177 N. Y. 145, 69 N. E. 373 and State v. Cantwell, 179 Mo. 245, 78 S. W. 569, both of which cases passed upon similar statutes and both of which reached the same conclusion. In the earlier case, it was held that the act in question is not in conflict with the 14th Amendment to the Federal Constitution, declaring that no state shall make any law which shall abridge the privileges or immunities of citizens of the United States nor deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws. In reaching this conclusion, it is conceded that the right to labor for the purpose of acquiring property is an inherent one, which is protected by the Federal Constitution, but it is said that individual rights, however great, are subject to certain limitations necessary for the good of others and of the community and that the public good and the health of a considerable portion of the population, must outweigh slight inconveniences and restrictions which individuals may suffer.

Judicial cognizance is taken of the fact that labor in mines, quartz mills, and smelters is unhealthful so that they may properly be the subject of legislative control. The cases of State v. Holden, 14 Utah 71, 46 Pac. 756; Holder v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383; Short v. Mining Co., 20 Utah 20, 57 Pac. 720; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, and Commonwealth v. Hamilton Mfg. Co., 120 Mass. 383, in which similar statutes were upheld, are cited and commented on with approval. The later case follows the former one and holds in addition that as the statute is sustainable as a valid health regulation within the police power, owing to the fact that prolonged labor in such places is injurious as a matter of common knowledge, evidence that the occupation of a person prosecuted for violation of the statute, was not injurious, is not admissible.

LICENSES. (PROHIBITIVE IMPOSITIONS)

SUPREME COURT OF WASHINGTON.

What would seem at first blush to be an almost self-contradictory decision is that involved in Garfinkle v. Sullivan, 80 Pac. Rep. 188. The case arose out of an attack upon the validity of a municipal ordinance requiring peddlers to obtain a license and to pay a license fee amounting to from $50 to $100. There was evidence which conclusively showed that the license was burdensome under the conditions existing and that peddlers could not afford to engage in the business of peddling and pay the tax required; but it was also shown that there were some eighty persons actually engaged in the business. On this evidence it was contended that the license was invalid because prohibitive. The court concedes that a municipality cannot, under the guise of a license or a regulation, place the license so high that it is prohibitive of the transaction of the business sought to be regulated; but it is held that the condition shown by the evidence did not necessarily indicate that the license fee was so high as to constitute a prohibition. Upon this point it is argued that a license cannot be said to be prohibitive in amount where it is shown that a hundred men could not pay the license and do the business profitably; and that the same might be said of fifty or twenty-five or any number of men greater than one. The doctrine must, it is said, be restricted to an individual or to the business under the most favorable circumstances divested of the elements of competition, inability, inexperience, and other qualities which might lead to the failure of any business with or without the payment of a license.

NUISANCE. (MAINTENANCE OF HEN-HOUSES)

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

The question whether an ordinary and apparently well ordered hen-house constitutes a private nuisance comes up for decision for the first time in Wade v. Miller, 73 N. E. Rep. 849. Plaintiff and defendant in that case occupied contiguous estates situated in a village. Plaintiff owned two houses, the one next to defendant's premises being occupied by a tenant. Defendant maintained two hen-houses in which were kept a number of fowls, and plaintiff claimed that the odor from the houses and yard occasionally became so pungent that, combined with the cackling of the hens and crowing of the roosters, the house occupied by the tenant was rendered uncomfortable as a place of residence. It was shown that the tenant and members of his family, particularly his wife, who was a nervous invalid, complained that they were disturbed and annoyed

by the odor and noise. The court, however, observes that where the question of a private nuisance is raised, the result produced by it upon persons of ordinary health and sensitiveness rather than upon those afflicted with disease or abnormal physical conditions is to be taken as the criterion. "In lawful use of property," says the court, "how far an annoyance may be caused to other persons without becoming a nuisance, becomes a question of degree. For what may amount to a serious injury to health or enjoyment of property in one locality may, under different circumstances, be deemed proper and unobjectionable." In view of these principles and under evidence showing that the hen-houses were maintained in a cleanly condition and cared for in such a manner as not to affect injuriously the health of any normal person living in the neighborhood, the court concludes that although the odor arising and the noise produced might have been unpleasant, yet as it did not appear to have been uncomfortable or unbearable the maintenance of the houses could not be regarded as a nuisance.

PHYSICIANS AND SURGEONS. (Incorrect Diagnosis — Expert Witnesses — Competency)

Supreme Court of Missouri.

A case of much interest, in which the chief question at issue is elaborately treated and nearly all the relevant authorities are cited, is that of Grainger *v.* Still, 85 S. W. Rep. 1114. The action was against an osteopathic physician and surgeon for malpractice, and while several questions are involved, the chief interest centers around defendant's contention that physicians of schools of medicine other than that to which he belonged were not competent to testify as experts as to the propriety of his diagnosis. Plaintiff was a child, who it appears was, as a matter of fact, suffering from incipient hip disease, the result of an inflamed and sometimes tuberculous condition of the hip joint. Defendant diagnosed the difficulty as a partial dislocation and treated it as such, using the "manipulations" characteristic of the osteopathic school and afterwards attempting by a somewhat violent operation to put the hip in position. The operation resulted in accomplishing precisely what defendant sought to remedy and dislocated the hip. Various allopathic physicians were called as experts to testify as to the propriety of the treatment as well as to the correctness of the diagnosis, and it was objected that these witnesses were incompetent because they belonged to a different school of medicine from that to which defendant belonged and that his treatment could only be judged by members of his own school. It was, however, shown that osteopaths used the same text-books as medical schools generally, and that hip disease is ascribed to the same cause and diagnosed in the same way by the osteopaths and physicians of every school of medicine. Many cases dealing with somewhat similar questions are cited and analyzed, including those of Force *v.* Gregory, 63 Conn. 167, 27 Atl. 1116, 22 L. R. A. 343, 36 Am. St. Rep. 371; Bowman *v.* Woods, 1 Greene (Iowa) 441; Patten *v.* Wiggin, 51 Me. 594, 81 Am. Dec. 593; Hesse *v.* Knipple, 1 Mich. N. P. 109; Martin *v.* Courtney, 75 Minn. 255, 77 N. W. 813; Corsi *v.* Maretsek, 4 E. D. Smith (N. Y.) 1; Williams *v.* Poppleton, 3 Or. 139; and Nelson *v.* Harrington, 72 Wis. 591, 40 N. W. 228, 1 L. R. A. 719, 7 Am. St. Rep. 900. Upon the question of the differences between the modes of treatment of the different schools of medicine and their effect upon the question under consideration, the court says: "The disease is the same no matter which school of medicine the attending physician belongs to. They may differ as to the proper treatment of the disease after its presence is ascertained, but there is no difference as to their diagnosis. This being so, there is no sound reason why a physician of any school should not be a competent witness to testify whether a patient has hip disease, dislocation, or as to any diagnosis of any disease." Another question which receives some consideration, although apparently regarded of secondary importance, arises on defendant's argument that as plaintiff was in fact suffering from hip disease, which, without the improper treatment to which she was subjected by defendant, would have resulted in the same shortening of the limb and curvature of the spine which was produced by the improper treatment, there was no damage shown. The court answers this contention briefly concluding its argument by suggesting that it could as well be argued that where a patient is improperly treated for a fracture of the limb and gangrene sets in and the patient dies, the physician would not be liable if the patient had consumption and would have died any way. "A patient however afflicted is entitled to let nature take its course and not have even natural consequences precipitated by the improper treatment of the physician or by an improper diagnosis resulting in the application of improper treatment."

POWER OF LEGISLATURE. (Expenditure of Public Money)

Supreme Court of Pennsylvania

On March 25, 1897, the Legislature of the

state of Pennsylvania passed a resolution as follows: "Whereas the dedication of a monument, erected in the memory of the late Gen. U. S. Grant in New York, occurs on April 27th and is a matter of national importance, which the Commonwealth of Pennsylvania should suitably recognize as commemorating the life and deeds of a hero whose memory we revere, therefore, be it resolved that the members of the Senate and House of Representatives attend said dedication in a body and that all matters pertaining to such attendance be referred to the committee of military affairs of the Senate and House." This resolution was vetoed by the Governor but was promptly passed over his veto. The committee to whom arrangements were referred made arrangements not only for transportation but for two meals to be furnished by a caterer on the day of the dedication, and an action in assumpsit by the caterer gave rise to the case of Russ *v.* Commonwealth, 60 Atl. 169. The majority of the court holds that under the delegation of authority to the committee of military affairs, that committee had power to make the contract under consideration and also that the legislature had power to enact a resolution. Justices Messterzat and Potter, dissenting, while readily concurring in the statement that the legislature had power to pass the resolution, deny the validity of the conclusion that the resolution as passed authorized the committee to make the contract into which they entered. The dissenting opinion sets out the itemized bill rendered, showing charges of $1,678.36 for table supplies, $3,026.60 for wines and liquors and $450.00 for cigars. A part of the testimony of the chairman of the committee, which made the arrangements, is also quoted, wherein that gentleman stated that "the plaintiff furnished an elegant dinner for us with wines and liquors and everything included with cigars." This witness also testified that he did not remember exactly what was furnished in the way of food; that it was so fine that he had forgotten exactly all the elegancies they had but that he remembered that they had White Seal champagne and that there was plenty of whiskey and plenty of beer and plenty of apollinaris, though he did not know how many drank apollinaris. In commenting upon this and other testimony of the same general effect, the dissenting opinion says that the character of the claim conclusively rebuts any implication that the legislature in passing the resolution intended to authorize the committee to make a contract for it. "Such interpretation of the resolution," say the dissenting justices "opens the door to raids upon the state treasury by the committees of the legislature, by which the tax payers of the state can be made to pay claims which, as in this instance, neither the General Assembly of the Commonwealth nor any other self-respecting legislative body would for one instant think of approving. Had the plaintiff's claim, the character of which is shown by the items thereof, and the testimony been presented to the Senate and House in open session at the time the joint resolution was passed we are satisfied that those bodies would not have authorized the committee to contract for or pay it. It would have shocked the legislative conscience as well as that of the people of the Commonwealth. The testimony leaves no doubt as to the purpose in view when the contract was made and what was expected and what was furnished in pursuance of it. About $1700 worth of food and $3000 worth of wines and liquors were consumed by 425 guests of the state in six and one-half hours. This tells the brief but comprehensive story of the manner in which the money claimed here was applied (in the language of the preamble to the joint resolution) 'In commemoration of the life and deeds of a hero, whose memory we revere'."

PROMISSORY NOTES. (INDORSEMENT — FRAUDULENT PROCUREMENT — EVIDENCE OF SIMILAR FRAUDS)

SUPREME COURT OF WASHINGTON.

In Yakima Valley Bank *v.* McAllister, 79 Pac. 1119, the Supreme Court of Washington is called upon to determine the question of the enforcibility in the hands of a *bona fide* holder of a note, the indorsement of which by the payee, who was also the maker, was procured by misrepresentation and fraud. An evidence point of considerable interest also arises in this case, to the comprehension of which a statement of facts involved is necessary. It appears that defendant was approached by persons claiming to be life insurance agents and was solicited to take out a policy in their company. An agreement was finally entered into between defendant and these persons, by the terms of which a policy for $10,000 was to be forwarded to defendant on the condition that he might examine it, submit it to his legal advisers and retain it if it corresponded with the representations made by the solicitors. Defendant was to have possession of the policy for some six weeks in order to make this examination, and it was represented to him that as an earnest of his intention to do business with the company it would be necessary for him to draw up a note payable to himself and signed by himself and also to sign a contract releasing

the company from liability in case he should die before he finally decided to accept the policy. It was explained to him that the note could not be collected until he indorsed it, so that he would be perfectly safe in giving it. The transaction occurred in a corral or barn-yard and defendant was instructed to sign the application for the policy and the release of liability mentioned and a book with several papers upon it was given him, the papers being placed there with the ostensible purpose of making the book smooth to write upon. A fountain pen was also furnished by the agents with the instruction to bear on hard as the pen was stiff. Afterwards, it transpired, that in signing the release of liability, the ink in some manner penetrated through the paper so as to cause defendant's name to appear as an indorsement on the note. Under these circumstances, it was contended that the allegations of fraud did not amount to a denial that the defendant indorsed the note and that if the note was indorsed through the physical act of the defendant, he was responsible for the payment of the note and for the results of that physical act to an innocent purchaser. It is however held that it is not the physical act which constitutes a transaction of this kind, but the intention of the parties to the contract, and that as the evidence showed that the indorsement was the effect of a fraudulent device and trick, for which the defendant was not responsible, he was not liable on the note even to a *bona fide* holder. The other question of importance in the case arose from the admission of the evidence of a number of other persons that during the same month in which the transaction with defendant took place, the same solicitors had obtained their indorsements of notes in the same manner and under the same circumstances. It was contended for plaintiff, that under the ruling of the case of McKay *v.* Russell, 3 Wash. State 378, 28 Pac. 908, this testimony was inadmissible. That case was an action to recover money paid upon a contract for the sale of real estate on the ground that the sale was procured by fraudulent representations, and it was held therein that it was inadmissible to show that in a similar transaction prior thereto defendant had made like misrepresentations to another person. That case is however distinguished from the case at Bar by the observation that there was there no testimony offered to show a general scheme connecting the transaction, which it was sought to prove, with the transaction in issue; and it is held that inasmuch as in this case the circumstances of each transaction were not only similar but peculiar, the evidence was admissible for the purpose of showing a general scheme or plan to defraud.

RIGHT OF PRIVACY. (UNAUTHORIZED PUBLICATION OF PICTURE)

SUPREME COURT OF GEORGIA.

A valuable contribution to the exceedingly limited number of judicial opinions involving the existence and scope of the much mooted "right of privacy" is the opinion of the Supreme Court of Georgia, in Pavesich *v.* New England Life Insurance Co. *et al.*, 50 Southeastern Reporter 68. The question of the existence of this right has given rise to a vast deal of discussion, most of which, however, has been purely academic, the only adjudicated case involving a direct decision as to its existence being the comparatively recent one of Roberson *v.* Rochester Folding Box Co., 64 Northeastern 442, heretofore noted in this magazine. In that case, the New York Court of Appeals, by a divided court, denied that any such right existed. The Georgia court expressly disapproves this case, and follows the dissenting opinion of Judge Gray. The opinion of the Georgia Court, by Cobb, J., contains a complete and scholarly argument in support of the court's conclusion and is supported by citations, both ancient and modern. The fact that no precedent for the decision exists, is admitted; but such absence, even for all time, is not conclusive of the question as to the existence of the right. The novelty of the complaint is no objection, when an injury cognizable by law is shown to have been inflicted on the plaintiff. In such a case, although there be no precedent, the common law will judge according to the law of nature and the public good.

The elemental concepts of individual liberty and security are called upon to witness the existence of the right of privacy, and it is said, "The right of privacy has its foundation in the instincts of nature." On this point, it is said, "The term 'liberty' embraces far more than freedom from physical restraint, and includes the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. 'Liberty,' in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. The right of one to exhibit himself to the public at all proper times, under proper circumstances is embraced within the right of personal

liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty. Publicity in one instance, and privacy in the other, are each guaranteed. If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy." The contention that the right of privacy cannot exist because it is in irreconcilable conflict with the liberty of speech and of the press guaranteed by the Constitution, is disposed of by the statement that liberty of speech and of the press, when exercised within the bounds of the constitutional guarantees, are limitations upon the exercise of the right of privacy, so that the law will not permit the right of privacy to be asserted in such a way as to curtail or restrain such liberties. The one may be used to keep the other within lawful bounds, but neither can be lawfully used to destroy the other. The cases of Chapman *v.* Telegraph Company, 88 Ga. 763, 15 S. E. 901; Mackenzie *v.* Mineral Springs Company, 18 N. Y. Supp. 240; Schuyler *v.* Curtis, 15 N. Y. Supp. 787 19 N. Y. Supp. 264, 24 N. Y. Supp. 509; Marks *v.* Jaffa, 26 N. Y. Supp. 908; Corliss *v.* Walker, 57 Fed. 434, 64 Fed. 280; Murray *v.* Lithographic Company, 28 N. Y. Supp. 271; Atkinson *v.* Doherty, 121 Mich. 372, 80 N. W. 285; Jacobus *v.* Children of Israel, 107 Ga. 518, 33 S. E. 853, are referred to and analyzed. These cases involve facts which might have given rise to a recognition of the right of privacy, but those of them in which a recovery is allowed were expressly based upon principles derived from the law of property, trust, and contract, any recognition of the existence of a right of privacy being studiously avoided. This fact is of course admitted, but is satisfactorily accounted for by the statement that the true lawyer, when called to the discharge of judicial functions, displays remarkable conservatism, and wherever it is legally possible to base a judgment upon principles which have been recognized by a long course of judicial decision, does so in preference to applying a principle which might be considered novel.

Referring to the decision in the Roberson case, the court says that with all due respect to Chief Judge Parker and his concurring associates, they think the conclusion reached was the result of an unconscious yielding to the feeling of conservatism naturally arising in the mind of a judge who faces a novel proposition. That the Georgia court is most thoroughly persuaded that the right exists is evidenced by the concluding paragraph of that portion of the opinion which deals with his question. "So thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American Bar will marvel that a contrary view was ever entertained by judges of eminence and ability, just as in the present day we stand amazed that Lord Coke should have combated with all the force of his vigorous nature the proposition that the Court of Chancery had jurisdiction to entertain an application for injunction to restrain the enforcement of a common law judgment which had been obtained by fraud, and that Lord Hale, with perfect composure, imposed the death penalty for witchcraft upon ignorant and harmless women."

STRIKES. (UNLAWFUL INTERFERENCE WITH BUSINESS — LIABILITY OF LABOR UNIONS)
SUPREME COURT OF VERMONT.

Although it contains no direct decision upon any substantive point, the case of F. R. Patch Mfg. Co. *v.* Protection Lodge No. 215, International Association of Machinists, 60 Atlantic Reporter, 74, is not without some interest, arising from the apparently conceded liability of an unincorporated labor union for a conspiracy to injure the business of the employer. The declaration alleged that defendant conspired with its members and other labor organizations to force the plaintiff to adopt a schedule of hours of labor and a rate of wages which would make it impossible for plaintiff to operate its business except at a loss; that its employes, by the direction of defendant, quit their work and conspired and confederated together to force plaintiff to accede to their illegal demands by threats, intimidations, and bribery, and sought by violence to intimidate and drive away the other workmen of the plaintiff, and detailed pickets, spies, and watchmen to stand guard about and near the plaintiff's works and prevent other workmen taking employment therein; that they intercepted and prevented other men whom plaintiff had employed from engaging in the plaintiff's service and by threats and intimidations caused a large number of workmen whom plaintiff had employed, to quit its service. Plaintiff had judgment in the trial court, and on appeal the only questions raised related to evidence and practice points, it being apparently conceded that the declaration stated a cause of action. The fact that but few other cases are reported where a recovery was obtained upon the same ground, makes the implied recognition of the existence of the cause of action in this case of importance, although it is not directly passed upon.

NEW BOOKS RECEIVED

JURISDICTION AND PROCEDURE OF THE UNITED STATES SUPREME COURT. By *Hannis Taylor, LL.D.* Price $6 net. The Lawyers' Co-operative Publishing Co., Rochester, N.Y., 1905.

INTERNATIONAL LAW, 2 vols.; vol. I, PEACE. By *L. Oppenheim.* Longmans, Green & Co., London, 1905. Price $6.50 net.

WHARTON & STILLE ON MEDICAL JURISPRUDENCE. New edition by *Dr. James H. Lloyd, Dr. Robert Amory, Dr. Robert L. Emerson, Prof. Truman Abbe* and *Frank H. Bowlby.* 3 vols. Price $18 net. The Lawyers' Co-operative Publishing Co., Rochester N.Y., 1905.

CONSTITUTIONAL LAW. By *Emlin McClain.* Longmans, Green & Co., New York, 1905. Price $2.50 net.

WHARTON ON CONFLICT OF LAWS. By *Geo. H. Parmele.* Lawyers' Co-operative Publishing Co., Rochester, N.Y., 1905.

COPYRIGHT IN CONGRESS, 1789–1904. Bibliography and Chronological Record. By *Thowald Solberg.* Government Printing Office, 1905.

THE NATIONAL ADMINISTRATION OF THE UNITED STATES OF AMERICA. By *John A. Fairlie, Ph.D.* Assistant Professor of Administrative Law in the University of Michigan. The MacMillan Co., New York, 1905. Price $2.50 net.

THE INFLUENCE OF THE BAR IN THE SELECTION OF JUDGES THROUGHOUT THE UNITED STATES. By *Simon Fleischmann.* Containing a valuable collection of data regarding the methods of selection of judges. An address delivered before the New York State Bar Association, January, 1905. Privately printed.

THE NEGOTIABLE INSTRUMENTS LAW. Its History and its Effect on the Law of Michigan. By *George William Bates.* Reprinted from American Law Review.

TABLE OF CASES ALPHABETICALLY ARRANGED AS TO THE SEVERAL STATES IN THE AMERICAN DECISIONS, AMERICAN REPORTS, AND AMERICAN STATE REPORTS. Bancroft-Whitney Co., San Francisco, 1905.

Charles J. Bonaparte.

The Green Bag

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CHARLES JOSEPH BONAPARTE AS A LAWYER

By William Reynolds

FOR obvious reasons it is always more or less embarrassing to attempt the biography of a person still living, and still more so when the person is one holding high public office and one with whom the writer is often brought into personal relations. In such cases the most judicious course is to confine one's sketch, so far as may be found possible, to a recital of facts concerning which the writer has personal knowledge, leaving all deductions and general inferences therefrom to be drawn by the readers. Inasmuch as the selection of myself by the editor of The Green Bag to give some account of Mr. Bonaparte's career as a lawyer has undoubtedly been made because circumstances had put me in a position to know more about it than any one else could now easily learn, I shall endeavor to give my account of him in the manner above stated.

Charles Joseph Bonaparte was born at Baltimore, on June 9, 1851, and was educated by tutors and in private schools in that city until the year 1869, when he entered the junior class at Harvard University. He was graduated number six in the class of 1871, which then had one hundred and fifty-seven members, and he delivered the Latin Salutatory at the Commencement on June 27, of that year. He afterwards entered the Harvard Law School and was one of the three graduates who, out of a class of fifty, received their diplomas *cum laude*, on June 22, 1874. He was admitted to the Bar of the Supreme Bench of Baltimore City on October 20, 1874.

When he first began the practice of law in the fall of 1874, he took an office adjoining mine in the Marshall Building. The two rooms had a communicating door between them, which generally stood open. Each of us used the other's library as freely as his own, and we had an office boy in common. Although we have moved our offices several times during the past thirty years, we have always had them together. We have never been in partnership, but each is apt to call upon the other when he desires assistance in the trial of any particular case, and I have, upon several occasions, represented him in cases which he was unwilling to try himself, because he was one of the parties litigant. I mention these facts in order to show how it is that I have been in a better position than perhaps any one else to know all the facts about Mr. Bonaparte's legal career.

The first case he ever tried was that of Garvey *v.* Wayson, which afterwards went to the Court of Appeals and is reported in 42 Md. 178. Dr. Wayson, a very respectable old gentleman of Baltimore City, suspected one Garvey of having stolen certain papers belonging to him, and thereupon, without taking advice of counsel, swore out a search warrant against Garvey and had the officers go through his house. The missing papers were not found, and thereupon Garvey brought his action for malicious prosecution. Dr. Wayson retained to defend him Thomas Donaldson, Esq., one of the leading members of our Bar, who had been acting as Mr. Bonaparte's legal adviser in the settlement of his father's estate, and he took young Bonaparte, who had just been admitted to the Bar, into the case with him as junior counsel. The case was

removed to Howard County and tried at Ellicott City, some twelve miles from Baltimore on the railroad. Instead of taking the cars, Mr. Bonaparte drove out to the Court House. His principal part in the trial was to make a speech to the jury, which, I was told the next day by a lawyer who heard it, impressed all present as displaying unusual ability and force. The verdict was in favor of the defendant, and the plaintiff appealed, but the rulings of the lower court were affirmed by the Court of Appeals. After the trial, Mr. Bonaparte's senior highly complimented his speech, and took the occasion to warn him that the chief obstacle to his success at the Bar would be the great difficulty he would have in convincing people that he was seriously intending to undertake the practice of law as the future work of his life — for not many would be easily persuaded that a young man with his independent means would voluntarily undergo the drudgery and unremitting toil required for success in his chosen profession. Perhaps the timeliness of some such warning was suggested by the unwonted sight of a young lawyer going to try his first case in his own carriage, with a pair of spirited horses and a liveried coachman, while almost every one else had relied upon the railroad cars and climbed up the Court House hill on foot!

Whatever difficulty young Bonaparte may have met in convincing others of his being thoroughly in earnest in undertaking to engage in the practice of law, his own course of conduct never justified any doubt upon the subject, for he at once threw himself into his work with a persistency and determination which have never been relaxed in the slightest degree since.

Some twenty years ago, I met at a seaside resort a prominent member of the Philadelphia Bar — then an old man — who told me how he had read for the Bar along with several companions in the office of the most distinguished Pennsylvania lawyer of his day, who was in the habit of frequently coming into the room where his students were reading and saying to them in his most impressive manner, "Young gentlemen, never practise law to make money."

Whether any such injunction was ever explicitly laid upon Mr. Bonaparte, I do not know, but I am quite certain that he has never disobeyed it. I must not be understood as meaning by this that he ever practised law gratuitously — for like others, he always expects his clients to pay fees proportioned to the importance and difficulty of the cases in which they retain him, whenever they are able to do so; but I do mean to say that he has always seemed to me to regard a faithful discharge of the duty to his client, imposed by his profession, as a far more important consideration than the amount of the pecuniary reward he expected to get for his services. I have never known him to refuse a case because the client was unable to pay him a retainer, or unlikely to be able to pay him a fee if he failed to win, nor has he ever to my knowledge, except once — and that was at my suggestion, because we both thought more favorably of our client's case than we did of him personally — contracted to undertake a case upon a contingent fee.

When he first came to the Bar, his habit was to undertake every case that was offered, no matter who the plaintiff or who the defendant might be, whenever he was first convinced that the suit was one the plaintiff had a moral right to bring, and that there existed reasonably fair legal grounds to sustain his contention. In regard to the acceptance of cases brought him, he has always appeared to me to act upon the theory that as the law owes to every man, however poor or humble he may be, the fullest protection in his rights of person and property, an obligation is thereby imposed upon the Bar as a body to see to it that such protection shall be brought within the means and power of every one who really needs and seeks it in good faith. Assuming such obligation to exist, it is plain that in many

cases it can only be discharged by the expenditure of considerable time, labor, and professional skill, for which little or no pecuniary compensation may be expected, and each member of the Bar ought, therefore, to feel himself morally bound to discharge his fair proportion of such unprofitable work. Mr. Bonaparte has always sought to do his full share, and in estimating what his share may be, he is careful not to give short measure.

From his youth upwards, Mr. Bonaparte has always seemed to possess a great fascination for "cranks" of various kinds, many of whom doubtless attracted by his historic family name, favor him from time to time with amusing epistolary communications, and some of them with personal visits. Indeed, for the last thirty years, his offices have been at intervals invaded by a series of queer, would-be clients, the like of whom are rarely to be found outside of Dickens' novels. They come so frequently and remain so long that for years Mr. Bonaparte has been obliged, in self-defense, to deny admittance to any one until he has first communicated his name and business to his secretary. Many of these "cranks" have law cases which they submit to Mr. Bonaparte and desire him to prosecute. Some of these cases are nothing more nor less than mere midsummer madness; but others appear upon their faces to be meritorious, and are sometimes supported by documents apparently genuine, which give them a presumptive plausibility. Mr. Bonaparte examines all such cases with much patience, and when they seem to have anything at all in them, he will either undertake them himself or perhaps send the would-be client with a letter of introduction to some other member of the Bar, eminent in the particular branch of the profession which appears most applicable to the case.

Mr. Bonaparte's first political case arose out of the State election held November 2, 1875, which was carried in Baltimore City by the Democratic "ring," then having full control of matters here, through the use of such an amount of violence, fraud, and ballot-box stuffing as to scandalize the entire community, Democrats as well as Republicans. After the returns had been made public, the several candidates for the legislature from the three legislative districts of Baltimore City, who had been counted out, gave notice to their opponents, who had been counted in, of their intention to contest their seats and to take testimony for that purpose before a justice of the peace, as provided by statute. Six counsel were retained, two to represent the contestants from each district, and Mr. Bonaparte, then as now a resident of Baltimore County, and who, although a Republican in politics, had from personal friendship cast his vote for the Democratic candidate for governor, was selected as one of them. Although a much younger man than any of the other counsel for the contestants — he was under twenty-five years of age and had been little more than a year at the Bar — he was by a sort of natural selection soon pushed forward as the leading counsel for the contestants and the greater part of the work and responsibility was cast upon his shoulders. The contestants' main reliance for the establishment of their case was upon an inspection of the ballots cast at the election, which had been kept in the custody of the clerk of the Superior Court of Baltimore City, and which they contended would show the number of "pudding" tickets in the boxes that had been counted, and the great difference between the number of ballots to be found in the boxes and the number of votes returned by the judges of election as having been cast. The clerk was summoned to produce these ballot boxes before the magistrates who were taking the testimony, but he refused to do it, and the contestants filed a petition in the Baltimore City Court for a *mandamus* requiring him to do so. The application was resisted by the clerk who was represented by Bernard Carter, Esq., then regarded as one of the ablest lawyers at our

Bar and who has for more than ten years past been its undisputed leader. Mr. Bonaparte prepared the petition for a *mandamus* and made the principal argument in support of it, and the case, which attracted much attention and interest at the time, was finally decided in his favor, and the court directed the *mandamus* to issue. The defendants, however, supended further proceedings by taking an appeal; and before this appeal could be heard, the legislative session had expired, and as there was nothing left for the contestants to contest for, the proceedings were discontinued.

From this time began the twenty-years' battle for fair elections in Maryland, which at length resulted victoriously in the enactment of the Reform League Election Law of 1896. During the last ten years of this period the struggle was carried on mainly in the courts, and in almost every case instituted or defended in the interest of fair elections, Mr. Bonaparte took a conspicuous part.

In the preparation of all his cases, Mr. Bonaparte has always been most laborious and thorough, giving as careful preparation to those involving comparatively small amounts and for poor clients, as he does to the largest and most important ones, for he makes it his rule to give to every client the best that is in him. When he first became my neighbor, he struck me at once as being unusually well equipped for the practice of our profession, and before long I was astonished at his thorough grasp of all the leading principles of law and his perfect familiarity with the methods by which these principles were applied in each particular branch of the law.

It is quite a common thing for prudent lawyers, before acting on their first impressions upon doubtful questions that may from time to time arise before them in their practice, to submit the point involved to a brother lawyer for his off-hand opinion, in order to observe how the matter appears to strike the unprejudiced mind of a person competent to understand it. The proximity of Mr. Bonaparte's office, to say nothing of his aimability and patience, soon marked him out as the most eligible victim for me to utilize in this manner, whenever occasions might arise, and I confess to have yielded often to the natural temptation to do so. I can not now recall a single instance in which I ever submitted to him a legal question in this way, when he did not seem to be perfectly at home in discussing it intelligently, without turning to authorities although oftener than not he has cited to me from memory the name of some Maryland decision that had a decided bearing upon the point in question.

In making his preparations for instituting or trying a case, Mr. Bonaparte does not pursue the methods of the mere "case hunter" who crams himself for the occasion by the use of Digests and the Encyclopædia of Law and Equity, but adopts one somewhat analogous to that of Chief Justice Marshall, who used to say that after a difficult or important case had been argued before him, his habit was to take a long walk by himself and think it over, until he had arrived at a decision, and afterwards to ask "brother Story" to look up the authorities — only Mr. Bonaparte does not turn over to another the looking up of the authorities but does it for himself, and in consequence his adversaries are rarely able to spring upon him at the trial table a Maryland decision, having any apparent bearing upon the case at bar, which he has not already considered.

In presenting an argument, whether before a court or jury, he is always strong and generally effective as well as interesting. He has an unusually subtle mind and takes a keen intellectual delight in sustaining his points by nice distinctions which, although logically sound, are not always at first plainly visible of the tribunal he may be addressing; and I have sometimes thought that he might perhaps occasionally obtain somewhat better results if the time and energy he at times consumes in making

these oblique approaches, by rather circuitous routes, were devoted to more direct assaults upon his opponents' front.

In the examination and cross-examination of witnesses he is very successful, as he seems to have the rare gift of intuitively knowing how far and upon what matters he can advantageously press an adversary's witness and at what point it is best to stop. He seems to have an unusual facility for getting out the truth from those whose interest it would be to keep it back. It was probably his success in this particular, in the investigation made by Mr. Roosevelt, in the spring of 1891, while Civil Service Commissioner, of the Federal Offices in Baltimore, at which Mr. Bonaparte assisted, that induced the former after he became President, to retain him with Mr. Conrad as special counsel to investigate and report upon the alleged abuses in the post-office department. A great mass of documentary evidence, consisting of reports of government officials, examinations of witnesses, and correspondence taken from the files of the departments, was placed in the hands of Messrs. Conrad and Bonaparte, who supplemented them by the replies to communications addressed by them to the various persons who seemed to be implicated, requesting their explanations of the facts alleged. This entire body of evidence was carefully examined and thoroughly sifted by the special counsel, who afterwards prepared and submitted to the President four reports fully covering the whole ground and setting forth their conclusions. The result was a number of prosecutions in the United States courts, followed in most cases by conviction of the parties indicted. It fell to the lot of Mr. Bonaparte, as junior counsel, to prepare the first drafts of all four of these reports, which, with the evidence upon which they were founded, he submitted to Mr. Conrad who then reviewed them critically, suggesting such additions and modifications as occurred to him. These were neither extensive nor numerous. The prosecutions which followed were conducted by the regular United States district attorneys for the respective courts in which the different cases were tried, Mr. Conrad assisting as senior counsel in the trials at Washington, and Mr. Bonaparte in the trials of the cases at Baltimore, and each of them following the cases in which he had taken part, to the courts of last resort when appeals were taken.

Mr. Bonaparte's services in these matters were so satisfactory to the government, that the Secretary of the Interior Department retained him to investigate and report upon certain alleged abuses in connection with the disposition of the public lands in the Indian Territory, which service he also performed in the same thorough and exhaustive manner.

Interest does not often flag for any length of time in the trial of the cases in which Mr. Bonaparte participates, for not only is whatever he says and does always to the point, but he has a very keen sense of humor and an abundant supply of spontaneous wit, which is continually bubbling up and keeps things lively, so that one is not often tempted to go to sleep. His relations with judge, jury, witnesses, and opposing counsel during the progress of a trial are invariably pleasant and amicable, for when he does employ his powers of ridicule to demolish an opponent's case, he does it in a good-humored way, and never forgets what is due from one gentleman to another. A member of the Bar, who went to school with him when they were boys, remarked to me the other day, *à propos* of an important case in which they represent opposing sides, that Bonaparte is one of the very few persons whom he has ever met, who, while extremely fond of poking fun at others, can always enjoy and heartily laugh at a good joke upon himself.

As to Mr. Bonaparte's proper rank at the Bar here, there is of course some difference of opinion, owing largely to a pretty wide divergence of views as to exactly what constitutes the best claim to eminence in the

profession. My own opinion is, that should each of the lawyers in this city, whose judgments are entitled to any considerable degree of weight, undertake to write down upon a piece of paper the ten best all-around trial lawyers at our Bar, Mr. Bonaparte's name would be found inscribed on a large majority of those papers. I am far from being alone in this estimate, for I have submitted it to other lawyers in whose judgment upon professional matters generally I place the highest confidence, and they consider it a very conservative statement of what they believe to be the fact.

And yet, although Mr. Bonaparte's standing at this Bar is as I have stated, and although he has been engaged in practice here for over thirty years, it is an undeniable fact that his practice is not now, and never has been, a lucrative one. For this there are several reasons.

In the first place, Mr. Bonaparte strongly entertains the old-fashioned and, as many in this so-called commercial age would doubtless consider it, antiquated view that there is a very broad distinction between a profession and a trade. He considers that the only legitimate and proper way in which a lawyer may actively seek new business, is by constantly devoting his very best efforts to the successful prosecution of that which has already been entrusted to him. He feels that the modern methods by which those engaged in mercantile pursuits are accustomed to increase the volume of their trade, such as advertising, traveling solicitors, rebates, special inducements, commissions, and division of profits, while perfectly legitimate in the way of trade, are not in accordance with the dignity of the learned professions, and can not be resorted to with propriety by the members of those professions. He has, therefore, always declined the invitations he has at various times received to invest capital in various business enterprises, with the understanding that as a consideration for so doing he would be retained as the regular counsel for the corporations. It is a well-known fact that by far the most lucrative practice now-a-days comes from the large corporations and those who own or control them. To get and retain this business ordinarily, two things are requisite—professional ability and influence.

In the hour of trial, knowledge and ability are all-important, but in order ever to arrive at the hour of trial in the cases which pay best, the lawyer who has nothing but ability must, in a majority of cases, share his profits with the man whose influence has brought him his job, whether that man be a partner who brings his influence into the firm as capital, or whether he be an outsider who receives his *quid pro quo* in some other form. Now Mr. Bonaparte has never been willing to purchase this influence, nor has he ever secured it in any other way. As a matter of fact, he has never been *persona grata* to organized capital, for various reasons. He has no special prejudice against it nor any controversy with it. He fully recognizes its mighty power and the great good which that power can accomplish, and often does accomplish, for the community, but he will not bow down to it nor serve it, as a deity. He maintains that neither it nor those who control it, are entitled to any special privileges beyond other men before the law, because of its great power. He has frequently been called a doctrinaire. This word is defined by Webster as, "one who rigidly applies to political and other practical concerns, the abstract doctrines or principles of his own political philosophy."

If in the above definition we should in place of the concluding words "his own philosophical system," substitute the words "the moral difference between right and wrong," it would be indeed, as far as it goes, a pretty accurate description of Mr. Bonaparte, for he is undoubtedly a doctrinaire in this sense. Now the so-called Captains of Industry, as a rule, are neither doctrinaires themselves of any kind, nor have they much use or liking for them. Judging from the recent disclosures con-

cerning the Equitable Assurance Society and some of the larger railway systems, they may very properly be classed as "opportunists." As we all know, doctrinaires and opportunists are not mutually attractive, but on the contrary are quite the reverse, and therefore, the fact that Mr. Bonaparte has never formed entangling alliances with organized capital any more than he has with organized labor, while it may have been somewhat bad for his pocket-book in the past, will undoubtedly strengthen his position in the cabinet in the future.

Those who are wont to speak disparagingly of so-called doctrinaires, generally do it upon the assumption that they are always unpractical and never can accomplish anything, because of their inability to act in harmony with other people.

Whatever else Mr. Bonaparte may be or may not be, he surely is eminently practical. No one who has had much to do with Mr. Bonaparte either in professional or business matters, would be any more likely to apply the term unpractical to him, than they would to Theodore Roosevelt — for both of them belong emphatically to the class of men "who do things." To illustrate how practical Mr. Bonaparte is, I need not refer to the fact that he has had personally the entire management during the past twenty-five years of two large estates of probably over a million dollars each, invested largely in realty, and that he has without any seeking on his part, within the past year, been chosen as trustee to manage another estate, equally large, for a long period of time; and that whenever he is present at a meeting called to invoke the action of the public authorities in any matter in which property holders and the general business community are supposed to be interested, he is almost invariably made chairman of the committee relied upon to formulate a definite plan of procedure and to put that plan into active operation. I shall not refer to what he has actually done as chairman of the Council of the National Civil Service Reform League, or as president of the National Municipal League. I shall confine myself to what I have actually seen him do while sitting with him on the executive committee of the Baltimore Reform League during the last eighteen years. This Reform League is a non-partisan organization, formed in the fall of 1885, its declared purpose being "to secure fair elections, promote honest and efficient government, and to expose and bring to punishment official misconduct in the State of Maryland and especially in the city of Baltimore." All the great reforms in state and municipal government which have been made in Maryland within the past twenty years, have been obtained largely through its instrumentality. Its governing body is an executive committee of fifteen members, including all its officers and eight other members. A majority of the committee has always been more or less in sympathy with the Democratic party upon national questions (excepting in the matter of free silver), and two-thirds of its members have generally been lawyers. All of these are men of independent character, who think for themselves and are usually quite tenacious of their opinions. Mr. Bonaparte has always been chairman of this committee, and I should say that at least six-sevenths of the resolutions passed have been drafted by his hand, and most of them started from his initiation. A resolution except as to matter of routine is rarely passed without discussion. These discussions frequently cover the points as to whether the proposed action, or indeed any action at all, is expedient at that particular time, or whether some action is not imperative in order to maintain the prestige and force of the League as a moral power in the community; and then, if it be decided to act, the further question arises as to exactly what action will be best. Upon every one of these points there are often decided differences of opinion, and most of the resolutions eventually agreed on are found to differ considerably

from what they were when originally introduced, as modifications were required in order to bring conflicting views into harmonious action. During all these eighteen years Mr. Bonaparte has, in the large majority of cases, been the person to devise a plan upon which everybody could agree. And this was no easy task, for I am sure that any one who could always get the executive committee of the Baltimore Reform League to work effectively and without appreciable friction during this long period of time, has fully earned the diploma of a past grand master of harmony.

Shortly after Mr. Bonaparte came to the Bar, he was brought into relations with Mr. Severn Teackle Wallis, who had then been for many years and continued to be until his death in 1894, one of the two acknowledged leaders of our Bar as well as the most brilliant orator, conspicuous reform leader, and best-known citizen of Maryland. Mr. Wallis said of him to me, and on more than one occasion to others in my hearing, that he presented a more remarkable combination of perfect self-confidence and naïve diffidence than he had ever met with in the same person. The result of thirty years' close observation of Mr. Bonaparte has convinced me that Mr. Wallis's diagnosis was correct. The self-confidence is always exhibited when he is advocating a cause or a principle that he believes to be just and of vital consequence, and when he is defending the rights of others which he considers unjustly assailed — in doing this he is absolutely fearless and never has been in any wise a respecter of persons.

The naïve diffidence is shown in his absolute lack of self-assertion in all matters relating to his personal advancement or profit.

In an oration on John Marshall as Lawyer and Judge, delivered before the Bar of Maryland on "John Marshall Day," Mr. Bonaparte quoted the following sentences from Horace Binney's eulogy on the great Chief Justice.

"Office, power, and public honors, he never sought. They sought him, and never found him prepared to welcome them, except as a sense of duty commanded."

The same words might be as truly spoken of himself.

BALTIMORE, MD., June, 1905.

THE REIGN OF LAW

By Hon. Joseph W. Folk

I AM indeed glad to meet the members of the Kentucky Bar, and congratulate you upon the splendid results accomplished by this Association in bringing the members together in the amicable relations so necessary to the highest conception of the ethics of the profession. It is well to meet occasionally in fraternal intercourse, forgetting the strenuous controversies of the day, and hear discussed the ideas which have guided the profession through all the years of civilization. These principles are summed up, in the language of Sidney Smith:

"Impress upon yourself the importance of your profession. Consider that some of the greatest and most important interests of the world are committed to your care. You are the preservers of freedom, the defenders of weakness, the unravelers of cunning, the investigators of artifice, the humblers of pride, and the scourgers of oppression. When you are silent, the sword leaps from its scabbard and the nations are given up to the madness of internal strife. In all difficulties men depend upon your exercised faculties and spotless integrity, and require of you an elevation above all that is mean, and a spirit which will never yield when it ought not to yield. As long as your profession retains its character for learning, the rights of mankind will be arranged; and as long as it retains its character for virtuous boldness, those rights will be well defended."

The idea of the practice of law which makes it a matter of quibbling and pettifogging is a low and perverted one; the highest honor and integrity must mark the calling which deals with the rights and liberties of the people. The lawyer is the medium through which the law reaches the people and that brings the public and the law into relations with each other. The commission is a sacred one, to be zealously guarded and exercised. Jack Cade in "King Henry VI" proposed to reform England, and cheerfully advocated as the first step that all the lawyers be killed. Such a state of society would hardly be desirable. Whereever there is liberty, there must be law, and wherever there is law, there must be lawyers.

Lawyers are necessary to civil liberty, as civil liberty rests upon law. The lawyer owes a duty to the public which is high and sacred. The license to practise carries with it obligations to society far above those of the layman. By reason of his training and his position he is looked to for guidance and advice and wields an influence for good or evil greater than other men. In the early history of our government, lawyers molded and shaped its destinies; they builded the foundation upon which the superstructure of states rests to-day; they bore the burdens of government, and were the pillars of the young republic. It may well be questioned if the lawyers of to-day, particularly in the large cities, as carefully fulfil their civic obligations as their forefathers. There was a time when the opinion of the upper thousand American lawyers would sooner or later become the opinion of the American people. This was so because they exercised their full duty in public affairs, regardless of private interests. The wave of commercialism has affected the legal profession along with other callings, and now would it be safe to permit the upper thousand American lawyers to dictate the policies of state? Some of the most brilliant minds in the profession are in the employ of interests antagonistic to the welfare of the people. Legitimate combinations of capital are perhaps a necessary incident of advanced civilization, and to these I do not refer, but to the pirates of the business seas that prey on the people, under the guise of corporate charters, in defiance of laws. Lawful corporations are beneficial to a community, but associations conceived in corruption and born in bribery are inimical to the public

good. Legitimate combinations are entitled to fair treatment the same as individuals — to equal and exact justice, no more, no less — but if a corporation cannot operate without bribery or surreptitious violations of law, it were better for the people that it be wiped out of existence. In the early days the lawyer sold his learning alone and retained his individuality, and be it said to the credit of the profession, that is the rule now. But many eminent attorneys of highest attainments dispose of not only their talents, but their freedom of thought and action. Instead of these being the bulwarks of liberty and the enforcers of laws, they are chiefly engaged in devising means and schemes for evading the laws; they are the advisers of the Captain Kidds of commerce in avoiding the consequences of laws intended to suppress them. It is no part of a lawyer's business to advise his client how to commit crime nor to become a partner in iniquity. The lawyer who does so ceases to act as such and becomes a co-conspirator. There is no sanctity in such relation and it lacks every essential professional element. If this were not the exception rather than the rule, it would account for the fact that lawyers seem to have lost their proud position of old as mentors of the public conscience. Business is a good thing, honors are better still, but patriotism excels them all, and without patriotism one is unworthy to be a member of the legal profession. He is a minister of the law that emanates from city, state, and nation, and can no more practise law in the true spirit without patriotism, than can a divine teach the doctrines of a Christ for whom he has no devotion.

One cannot be a good lawyer without being honest. Law and honesty go together, jests to the contrary notwithstanding. Dishonesty will undo a lawyer quicker than it will any one else. They see so much of it in other men they should learn to abhor it. There are fewer lawyers in the penitentiary than any other calling, not excepting ministers of the gospel. This should be a proof of their honesty, but some are unkind enough to say it is merely a tribute to their shrewdness. In a former House of Delegates in St. Louis, twenty-four out of twenty-eight members took bribes right and left. None of them were lawyers. Of the four who did not prostitute themselves, three were lawyers. Under the laws of most of the states, only two classes of men are required to be of good moral character — lawyers and saloon keepers. The laws go further and demand that the saloon keeper in addition be a law-abiding citizen, while nothing is said about the lawyer in this regard. That is taken for granted. If lawyers do not uphold the laws, it can hardly be expected that others will.

In a monarchy the government is sustained by the power of the crown; in a republic the government rests entirely upon the laws which a majority of the people make for themselves. If all the laws were ignored, anarchy would be the result — there would be no government at all. When any portion of the laws are not enforced, the government is weakened to that extent. Laws that are not observed add just as much to good government as sores do to the human body. Disregard of one law breeds contempt for all laws, and laws to be effective must be respected. There is entirely too little respect for the majesty of the laws in America. This inevitably leads to corruption, which will, if tolerated, eat into and destroy civic life. If a dramshop is allowed to remain open at a time the law demands it be closed, then the gambling laws cannot be consistently enforced, then other defenses denounced by the law must be tolerated, then comes grafting by officials for overlooking these violations, then legislators imbued by the same spirit sell their votes for bribe money, and a reign of corruption follows. The perpetuity of our government depends upon the manner in which our laws are carried out. Nearly every state has laws on the statute books to which no attention is paid, and they reap

the fruits by having all laws broken. I am not an alarmist when I say, if these conditions be tolerated the republic itself will sooner or later fall, by the props of the law on which it rests being weakened and decayed. Americans are accustomed to regard a republican form of government as a natural condition. That government is mortal and can die, is a thought so entirely foreign to our conditions that it is folly in the minds of some to discuss it. A glance at history does not lend encouragement to this cheerful view. Our republic, though the best, is not the first nor the oldest. We have lasted now one hundred and twenty-nine years. Venice had a republican form of government for 1100 years; Carthage, 700 years; Athens, with various intermissions, 900 years; Florence, 300, and Rome, 500 years. These governments have long ago passed from the stage of the world, and some of them are little remembered. If our government were to last three centuries longer and then die, it would go down into history as one of the most splendid and shortest lived among the wrecks with which the shores of time are strewn. What caused the downfall of these governments by the people? The people made laws until the laws became so many the people began to disregard their own laws. The laws of Rome were good; indeed, the Justinian code is said to be the most perfect system of laws ever devised by man, yet Rome rotted and fell, even while this code was in operation. The laws were all right, but the hearts of the people were not right, and the laws were not obeyed. When the laws ceased to reign, the government resting upon that foundation of law commenced to topple over.

The reign of law means the rule of the people, for a majority of the people make the laws. They register their will crystallized in the form of statutes. We need a revival of the rule of the people. Four years ago the law against bribery in all of the states was considered as practically a dead letter. Up to that time, for the fifty years preceding, there had only been about thirty-four cases of bribery reported in the books in all the United States. When the prosecutions were commenced in St. Louis, the members of the House of Delegates denounced the bribery law as a "blue law" and as a dead law because it had not been enforced before. They argued that members of the House of Delegates having been taking bribes from time immemorial, they had acquired a right to do so, and it was just as proper for them to sell their votes as for a merchant to sell his wares. Here was a crime worse than any other, for bribery strikes at the foundation of all law, yet the law denouncing it was not enforced. Men gave bribes and thought nothing of it; men took bribes and boasted of the fact; corrupt men feasted and fattened at the public expense; legislative halls became dens of thieves; laws became merchandise on the market, and all this time the public conscience was asleep. When the revelations came and the people saw how they had been plundered, and realized that a government by bribery was a government by the wealth of the few and not by the people, they saw the offense in all its enormity, and from one end of the land to the other there was a civic awakening.

Now everywhere officials are made to account at the bar of public opinion for all official acts, and those who prostitute their trusts and sell the powers that belong not to them but to the people, are being made to answer for their offenses. And yet, four years ago the bribery law was denounced as a "blue law," by those against whom it was sought to be enforced. Every law is a blue law if a man wants to break it. The non-enforcement of the bribery statute might be explained by the difficulty of securing evidence of its violation, though a prosecuting officer working at it seriously, and willing to incur the enmities such an investigation would bring about, can usually lay bare venality of that kind, if it exists. But there are other laws plainly made to please the

moral element, and then not enforced to please the immoral element. The difference between a "wide-open" town and a "closed" town is that in the former the laws are not enforced, while in the latter the laws are observed. The gambling laws in many places are permitted to be disregarded and the laws regulating dramshops nullified. It has been claimed these laws could not be enforced in large cities, but they are enforced and faithfully observed in the large cities of Missouri. In fact, Missouri is the most law-abiding state of the Union and in yielding obedience to law has set an example for other states to follow.

There is in practically all the states, a statute requiring dramshops to close on Sunday and election days. Yet in some states it is openly and flagrantly violated. When one enforces this law because it is the law, the same cry is made about "blue laws" and "dead laws." It is a law in the interest of good government to stop the enormous amount of crime that comes out of the dramshop on Sunday and election days. Those interested in having the law violated set up the specious plea that it is an interference with personal liberty. It is no more an interference with liberty than the law against gambling or other laws in the nature of police regulations which restrict the rights of one man when they interfere with the rights of another. Absolute liberty to do as one pleases would mean barbarism, for there would be no limit to the conduct of an individual except his whims. The liberty of one would be the unrestricted liberty of every other, and perpetual warfare would result as the wants and desires of men come in conflict, and every man would have equal right to take or hold what his strength or cunning could secure to him. Security can only come from fixed rules, which the people, as they become familiar with them, will habitually respect. Restrictions which seem to the individual to be hardships are but the will of the majority of the people operating through legislative acts. Where rights are defined and regulated by laws to which respect and obedience are given, any particular law is deprived of all seeming hardship. If each man were allowed to say what laws are good and what laws are bad, and to ignore laws he considered bad, there would be no laws at all. The dramshop keeper who violates the dramshop law, calls loudly for the enforcement of the law against the man who breaks the larceny statute by robbing his cash drawer. The trust magnate looks with abhorrence upon the burglar, yet thinks he has a right to break the statute against combinations and monopolies. The burglar detests the law breaking of the trusts and thinks they should observe the law, but considers the law against house breaking as an interference with his personal liberty. So it goes; men observe the laws they like and think they have a right to ignore those they do not like. The only safe rule is that if a law is on the statute books it must be observed. If a law is objectionable it should be repealed, not ignored. We need reform in the administration of the law more than anything else. Though perhaps the old Athenian law might be found beneficial, which subjected to fine and imprisonment the person who proposed a law that turned out to be bad or injurious to the public interests. We do not need new laws so much as the enforcement of the laws we have. There has been too much tampering with the laws in an effort to correct wrongs that do not arise from the infirmity of the laws, but rather from the feebleness of their execution. An imperfect law, well administered, is far preferable to a perfect law badly carried out. The law is merely a weapon in the hands of officials, for without officials laws would be as useless as cannon in war without men. Good government depends more upon the men behind the law than on the law itself. No official has the right to violate the oath that he takes to enforce the laws, simply because some people do not want the law enforced. He cannot excuse non-enforcement on the ground that

public sentiment is against the law. He does not swear to support public sentiment, he does take an oath to support the law. Public sentiment is a difficult thing to get at. Law-abiding people are quiet, while the lawless are so vociferous as to deceive some as to their number. The only correct way to determine public sentiment is by the expression of the people's will through the law-making body. If an official cannot obey the mandate of the law he should resign and give way to some one else who can. What seems public sentiment may be, and often is, the clamor of the lawless who have a selfish interest in violating law. The indifference of good citizens permitted bribery for a long time, but the public conscience was at last aroused to the necessity of stamping it out. This civic indifference has permitted officials to take a solemn oath to carry out the laws on the statute books, and then deliberately to violate that oath. But the time is coming when an active public sentiment will demand that every public official keep his oath inviolate.

There is no greater evil among us than the easy nullification of laws by executive officials who have sworn to enforce them. It is not for an executive official to say whether a law is good or bad, but to enforce it as it is. He should not ask, is it popular? or is it good politics? but is it right? In the end, if he remains steadfast, the right will win. The trouble has been that a privileged class have violated the law with impunity, and escaped its consequences. It is not hard to pursue with all the terrors of the law, the wretch who picks a pocket or steals a loaf of bread, but it is quite another matter when the law is sought to be put against those who have millions behind them, with political influence enough to affect an entire community. When bad men get a bad man in office they support him in all the evil that he does. Bad citizens are combined; good citizens are divided — that is the chief cause of lawbreaking. If good citizens would join hands in patriotic endeavor, the lawless could not control anything, for they constitute but a small proportion of the entire population. The effectiveness of law depends entirely upon how it is executed. When the prosecuting officer is attempting to enforce the law against those of power, he may find himself besieged on every side; close political friends may plead; inducements and hopes may be held out for lessened activity; annihilation may be threatened if he proceeds. Pursuing steadily the course that he has mapped out, with the good of the people alone in view, he may find himself hedged in at times by a wall of hostile influences; but now and then looking beyond to that great public that he is serving, a friendly glance or a kindly clasp of an outstretched hand will cheer and encourage him for further effort. He cannot expect the good opinion of those against whom he enforces the law. Their ill-will is the best evidence of his sincerity. Every pressure may be brought to bear to swerve him from his conception of honest effort. If once he falters, his usefulness as a public servant is gone. It may be far easier for him to allow some offense to go by unnoticed, but he should rather have the approval of his conscience than the plaudits of those who would profit by his neglect of duty. He should prefer to retire to private life conscious of having done his best, than by failing to do so receive the encomiums of law-breakers. If he halts, he will be applauded by those he should prosecute; if he goes ahead, he will encounter calumnies and attacks; but if he perseveres and remains steadfast, though the way may sometimes seem dark and the task hard, he will be sustained by the hearts and the consciences of the people. Corrupt men support a man for office and expect in return the privilege of licensed law-breaking. Officials are elected to enforce the law, and have no more right to permit lawlessness to repay personal obligations than they would have to use the public funds to pay a private debt. When all executive officials are ruled by law, no man could be above the law and

the law would reign over all. Such a condition would be the highest form of civilization. Civilization rests upon law, and law upon the citizen. No more important lesson can be brought home than of individual responsibility for the affairs of state and nation. The indifference of electors is the weakness of a republican form of government. To arouse them to action is a question of supreme importance. Those who would destroy the laws are always active and work while good citizens sleep, but once the latter are aroused, they are invincible. If the people want a reign of law they can get it, but they must fight for it. There is the same conflict between law and lawlessness as between the true and the false, the right and the wrong, the evil and the good. The people will uphold the laws when they understand the necessity of it, for the vast majority of the people will do right when they know right. There never was a time when unselfish teachers of the public were needed more than now. Lawyers more than any other class should be the teachers of the poeple. They can do much if they are true to their calling to remedy the things that dishonor. As they are ministers of the law, it is their duty to keep the fountains of law pure and undefiled. The person who in private life discharges the civic responsibilities resting upon him, may perform as great a public service as he who faithfully does his duty in public office. Indeed, the public official is a reflection of the private citizen, as the public life of a nation is a reflection of its private life. You as lawyers are in a position to wield a powerful influence by tongue and pen for the reign of law, so devoutly hoped for and so earnestly prayed for by all good citizens. Remember that the highest obligation of your calling is to your country; your duty is to the public above all. You are the sworn upholders of the law, and as you love freedom and defend weakness, adore the right and hate the wrong, as you revere the law because it is the law, make your influence known and felt.

JEFFERSON, MISSOURI, June, 1905.

LIMITATION OF HOURS OF LABOR AND THE FEDERAL SUPREME COURT

By Professor Ernst Freund

WHEN the provision of the Labor law of New York, limiting the hours of employment in bakeries to sixty in any one week or ten in any one day, came for enforcement before the courts of that state in the case of the People *v.* Lochner, the judicial decisions on the validity of legislation, fixing maximum numbers of hours of labor in industrial employments, stood as follows:

In 1876, the statutory restriction of women labor in factories to sixty hours per week had been sustained in Massachusetts (Com. *v.* Hamilton Mfg. Co., 120 Mass. 383). In 1880, an ordinance of San Francisco requiring the cessation of labor on the part of bakers from Saturday evening to Sunday morning, was held to be invalid as special legislation (ex. p. Westerfield, 556 Cal. 550). In 1894, an act of Nebraska of 1891, establishing an eight-hour day for all classes of mechanics, servants, and laborers, excepting those engaged in farm or domestic labor, was declared unconstitutional (Low *v.* Rees Printing Co., 41 Nebr. 127), while in 1902, a statute of that state similar to that of Massachusetts first mentioned (applying to women only), was sustained (Wenham *v.* State, 65 Nebr. 394). In 1895, an act of Illinois of 1893, forbidding the employment of females in factories for more than eight hours in any one day, or forty-eight hours in any one week, was held invalid (Ritchie *v.* People, 155 Ill. 98). In 1896, a statute of Utah, limiting the hours of labor in mines or underground workings or in smelting or refining establishments, to eight per day, was sustained (Holden *v.* Hardy, 14 Utah 71), and the decision affirmed by the Federal Supreme Court in 1898 (169 U. S. 366); notwithstanding this, in 1899, a similar act of Colorado was declared unconstitutional (Re Morgan, 26 Colo. 415). A law limiting the hours of employment by state or municipalities, or by contractors engaged on public or municipal works, to eight per day, had been upheld in Kansas in 1899 and 1902 (Re Dalton, 61 Kan. 275, State *v.* Atkin, 64 Kan. 174), while a similar law was held unconstitutional in Ohio in 1902 (Cleveland *v.* Construction Co., 67 O. 197); but in 1903 the Kansas decision was affirmed by the Supreme Court of the United States (Atkin *v.* Kansas, 191 U. S. 207).

While in many of the decisions that were adverse to the legislation, the argument of the equal protection of the laws had considerable, if not controlling weight with the courts, the constitutional right of liberty was in all of them emphasized; and even the courts, which supported the acts, were by no means inclined to surrender the right of the individual to contract for work and services to the unlimited discretion of the legislature; they merely conceded the power of the legislature to interfere by regulation of hours, where long continued work might be reasonably believed to be detrimental to the health of the employees. It was only with regard to public works and contracts that the Supreme Court of Kansas, and, following it, the Supreme Court of the U. S. had admitted the legislative power to be absolute.

In view of the decisions mentioned, it can not be said that the courts of New York, in pronouncing upon the validity of the baker's law, were confronted by a clear preponderance of authority. Even considering the decision in Holden *v.* Hardy to be directly in point, they were free to depart from the construction given by the Supreme Court of the United States to the Fourteenth Amendment, and to interpret the similar or identical provisions of the state Constitution less favorably to the claims of legislative power.

It was, thus, in the independent exercise of their judgment, that the Appellate Division, as well as the Court of Appeals (by bare majorities, it is true), sustained the validity of the law. They found in it a legitimate exercise of the police power, justified by the tendency of the act to reduce the risk of injury from excessive labor to the health of a class of employees working under conditions less sanitary than those of most other occupations (People *v.* Lochner, 73 App. Div. 120, 177 N. Y. 145).

By the narrow margin of one vote, to which we have become accustomed in important constitutional cases, the Federal Supreme Court has reversed the decisions of the New York courts of all resorts, and declared the limitation of hours of labor, sought to be imposed by the act in question, to be contrary to the Fourteenth Amendment.

The importance of the decision is obvious, for it is the first time that the Supreme Court, in a case not involving interstate relations, enforces a constitutional right of liberty of contract against the exercise of the police power on the part of the state, in opposition to the judgment of the courts of that state that such power was legitimately exercised.

The authority of the tribunal which has rendered the decision does not forbid an inquiry into its soundness, as tested either by precedent, by the force of its reasoning, or by the established principles of constitutional law. It is, moreover, necessary to determine the precise import of the case, and to attempt to estimate its bearing upon existing and future legislation.

I

Was there any precedent which should have controlled the decision of the court? The case of Holden *v.* Hardy was most nearly in point. The act there sustained by the Supreme Court agreed with the New York law in the number of hours limited (sixty per week, or ten per day), and in singling out for regulation a certain class of employees. The Utah act contained an emergency clause, which is not to be found in the New York statute, and some stress is laid upon this difference by the prevailing opinion. But the emergency clause was not in any way controlling in Holden *v.* Hardy, being barely mentioned in the opinions. Emergencies where life or property is in imminent danger are of not uncommon occurrence in mines, but almost unheard of in bakeries. If provisions for remote and improbable contingencies were to be held essential to the exercise of the police power, how many of our health and safety statutes could stand the test? If such cases can not be taken care of by construction of the law, may they not be left safely to the good sense of the prosecuting authorities, or to the power of the jury to acquit? The absence of the emergency clause can, therefore, not be seriously relied upon to distinguish Holden *v.* Hardy from Lochner *v.* New York.

In order to reconcile the two decisions, it is necessary to find a sufficient and controlling difference in the classes of employments to which the acts of Utah and New York respectively applied. The case of Holden *v.* Hardy concerned a miner; but the act applied also to smelting and refining works, and was sustained *in toto*. Smelting and bakery establishments have this in common, that they vitiate the air, the former by noxious gases and minute particles of metal, the latter by the dust of flour and excessive heat; in either case it is conceded that the respiratory organs are unfavorably affected. The decision in Holden *v.* Hardy did not require the existence of imminent and inevitable prejudice to health; the court deemed it sufficient to say that, "The legislature had adjudged that a limitation is necessary for the preservation of the health of the employees, and there are reasonable grounds for believing that such determination is supported by the facts." (169 U. S. 398.)

If, then, the cases are to be distinguished, it must be that in the New York case there

were no reasonable grounds for such belief. But assuming that there was reasonable ground to doubt, can we fairly speak of an absence of reasonable ground for belief, when, to the majority of the Court of Appeals of New York, the evidence of special risk of disease seemed sufficient? If, in view of the striking parallelism of the two cases, it is possible for Mr. Justice Peckham to say: "There is nothing in Holden *v.* Hardy which covers the case now before us," our confidence in the value of precedents must be seriously shaken.

When we compare the attitude of the judges who sat on both cases, we find that the two dissenting judges in Holden *v.* Hardy (Brewer and Peckham), now help to make up the majority in Lochner *v.* New York, and one of them (Peckham) writes the prevailing opinion; two of the judges now dissenting (Harlan and White) were with the majority in Holden *v.* Hardy, while two justices (Justice Brown who wrote the opinion in Holden *v.* Hardy, and the Chief Justice) are in both cases to be found on the majority side.[1] If it may be permitted to doubt whether the two dissenting judges in Holden *v.* Hardy were quite willing to accept the full consequences of that decision, attention must still be called to the fact that two of the justices of the court held the law of New York unconstitutional, after having sustained the act of Utah. Notwithstanding this, the writer of the present article feels bound to express the opinion that a faithful adherence to the doctrine of Holden *v.* Hardy should have led to a decision sustaining the law in Lochner *v.* New York.

II

Assuming, however, that Holden *v.* Hardy did not control the present case, we proceed to ask: Was there any established principle or practice that should have led the Supreme Court to yield its own judgment, as to the reasonableness of the legislation in question, either to that of the state courts, or to that of the legislature?

At this day, the power of a court of last resort to form an independent judgment upon the validity of legislation is not to be drawn in question; its exercise is, on the contrary, claimed to be a solemn duty; yet it is also true that at all times the courts have disclaimed the right or power to condemn a legislative policy on the ground of its being inexpedient, unwise, or even inequitable.

In the domain of the police power, however, it has been found extremely difficult to maintain with strictness the line between law and policy, between the wisdom and the validity of a measure, between individual liberty and governmental power — and there has been a marked tendency for courts to constitute themselves into censors of the legislative power, and to nullify statutes that were contrary to their own views of sound and free government. The result of this tendency has been a growing uncertainty as to the limits of legislative power in the control of economic and social interests.

The Supreme Court of the United States had hitherto done nothing to increase this uncertainty. It had uniformly stood by the decisions of the courts of last resort of the states in cases involving the constitutionality of labor legislation.

There had, of course, been no occasion to review state decisions declaring such laws to be contrary to the Fourteenth Amendment, since they are not reached by the appellate jurisdiction of the Supreme Court. It is thus all the more noteworthy that the decisions of the Supreme Court indorsed a construction of the Fourteenth Amendment, which allowed the maintenance of police regulations deemed wise or necessary by the states.

The cases are recent and well known: Holden *v.* Hardy (169 U. S. 366), sustaining the limitation of hours of labor; Petit *v.*

[1] Justices Day and Holmes were not on the bench when Holden *v.* Hardy was decided; Justice McKenna was on the bench when the case was decided, but not when it was argued.

Minnesota (177 U. S. 164), supporting the prohibition of the Sunday work of barbers; Knoxville Iron Co. *v.* Harbison (183 U. S. 13), affirming the validity of truck legislation; and Atkin *v.* Kansas (191 U. S. 207), upholding state control of the conditions of employment on public contracts.

This attitude of the Supreme Court has been influenced by an important and obvious consideration. A decision of a state court even of last resort, giving an unduly wide scope to the rights of liberty or of property as against the legislative power, is inconclusive in so far as it interprets the Fourteenth Amendment; and although its construction of the state constitution is conclusive, that constitution can be changed with comparative facility, so as to establish the legislative power which the court has denied. Thus the decision in Colorado, declaring the eight-hour law of that state invalid, has led to a constitutional amendment sanctioning such legislation; and an amendment is pending in New York, which is to give to the legislature the control over the rate of wages on public contracts that was denied to it by the Court of Appeals.

But a decision of the Supreme Court, interpreting the Fourteenth Amendment to the prejudice of legislative power, not only nullifies state constitutional amendments seeking to neutralize the effect of decisions of state courts, but, in its turn, would be practically irreversible were the Supreme Court in the future to consider itself bound by its own decisions, for the difficulties in the way of changing the Fourteenth Amendment are almost insuperable. That amendment ought, therefore, to be interpreted so as to enforce only that fundamental law *quod semper, quod ubique, quod ab omnibus*, which is uniformly recognized as binding by civilized nations — that justice which protects the vested rights of property and the essentials of remedial procedure.

And this had been the controlling consideration in the previous decisions of the Supreme Court. Nowhere has this been expressed more clearly than in Holden *v.* Hardy, where the court says ". . . while the cardinal principles of justice are immutable . . . the constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land. Of course, it is impossible to forecast the character or extent of the changes, but in view of the fact that, from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employees, as they arise."

Would it not have been in conformity to the views so well expressed, to sustain the legislation of New York, after it had been sustained by the judiciary of the state?

A decision which reads into the Fourteenth Amendment a vague and controverted concept of the liberty of contract, is a novel, and hardly a fortunate step in the development of our constitutional law.

III

If the Supreme Court felt called upon or bound to review the legislation of the state with all the freedom of a state court, it is still to be regretted that it should have deemed it proper to impugn the good faith of the state legislature. The prevailing opinion speaks of "at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare." Courts generally refrain from questioning the motives of legislatures; if it is done at all, there should at least be some reasonable ground

for such attitude. But Mr. Justice Peckham's attitude is aroused only by the supposed necessity of supporting the law as a health law, by the assertion that "if the man works ten hours a day it is all right, but if ten and a half or eleven, his health is in danger, and his bread may be unhealthy, and, therefore, he shall not be permitted to do it." "This," the opinion adds, "we think is unreasonable and entirely arbitrary." Apply this method of reasoning by analogy: a person twenty years and 364 days old has not sufficient discretion to make a binding contract, while a person twenty years and 366 days old has such discretion; this we think is unreasonable and entirely arbitrary, and so forth. In this way every positive legal limitation can be reduced to an absurdity. It is easy to demolish a law by advancing for its support unreasonable assertions which no one has really made, and then declaring it to be arbitrary by reason of such assertion.

Not quite so strongly, but still to a certain degree, this observation applies to the argument advanced in the opinion, that upon the assumption that any law must be valid which may be said to tend to make people healthy, conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. "Not only the hours of employees, but the hours of employers could be regulated and doctors, lawyers, scientists, all professional men as well as athletes and artisans could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired."

What police legislation can stand if it be contended that the admission of legislative power involves the admission of the right to exercise it in an arbitrary or absurd manner, and that the inadmissibility of such exercise conversely demands the denial of the power, even though moderately exercised? Mr. Justice Peckham himself, in another case, refuted this argument when he said: "A statute or a regulation provided for therein, is frequently valid, or the reverse, according as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject matter involved, and in many cases questions of degree are the controlling ones by which to determine the validity or the reverse, of legislative action" (179 U. S. 287, p. 301).

The court, it should be specially noted, does not intimate that the number of hours fixed upon is unreasonably small, so as to revolutionize existing arrangements, or to jeopardize the profits of the trade, or to leave the public short of the needed supply of bread.

IV

Perhaps the essential argument of the prevailing opinion may be reduced to the following propositions:

First, the mere fact that a measure claims to subserve the public welfare does not ensure its validity as a legitimate exercise of the police power. This proposition is true, but of little practical value.

Second, the fact that a measure tends remotely to promote health or safety is likewise not conclusive of its validity, since such effect in a very slight degree might be predicted of the most unwarrantable and oppressive interferences with private liberty and property. The truth of this proposition must likewise be conceded.

Third, the test of the reality of the danger to the public health or safety and of its sufficiency to warrant interference with individual liberty is common knowledge or understanding, of which the court may take judicial notice.

Fourth, according to common knowledge or understanding, the trade of bakers is not so unsanitary that a compulsory limitation of hours of labor can be looked upon as a measure reasonably necessary to preserve their health.

It is upon these propositions that the strength or the weakness of the decision must rest.

Is the test of common understanding

fairly applicable to conditions with which the public at large can have no real familiarity? Has not the progress of sanitary science shown that common understanding is often equivalent to popular ignorance and fallacy? And if common understanding is to be turned into judicial notice, is there any other case of judicial notice with regard to which respectable judicial opinion is evenly divided?

Moreover, what is it that common knowledge predicates in this case? not that the occupation is not in a special degree unsanitary — that is conceded; not that a reduction of hours would not tend to reduce the risk of injury to health — that, likewise, can not be fairly denied; but merely that the danger of the excessive work and the benefit of its reduction is not sufficient to warrant the interference with the liberty of contract. There is a constitutional right which is not absolute, but subject to limitation; it may be limited if the resulting gain warrants it, but the gain in this case is not considered sufficient.

The court says, "This is not a question of substituting the judgment of the court for that of the legislature"; it thereby seems to admit that if it were, the court should yield its judgment to that of the legislature. But there is really no escape from the conclusion that this is an issue of judgment. It is either that, or an issue of common sense, or of good faith. The dissent is based on the ground that there was an issue of judgment, and the New York courts had approved of the judgment of the legislature. And because it is believed that the choice between the comparative benefits of the public welfare and private liberty of action has, by the constitution, been committed to the legislature, it must also be believed that Lochner *v.* New York has been wrongly decided.

V

If the decision must be accepted as law, it becomes important to determine its value as an authority for future cases and as a guide to legislation. Where is the dividing line that will serve to distinguish Holden *v.* Hardy from Lochner *v.* New York? Is a limitation of hours of labor valid if applied to women? Is the decision of the Massachusetts Court in the case of the Hamilton Mfg. Co., which has stood for nearly thirty years, and which was recently followed in Nebraska, law to-day or not? No one can answer these questions.

But it will be remembered that the Supreme Court has not proclaimed an absolute right to contract for unlimited hours of labor under unsanitary conditions or to the prejudice of the health of the employee. It may be surmised that the existing statutory limitations of hours in cotton and woolen factories and in brickyards, can not stand, but with regard to every new employment brought under statutory restriction, the Supreme Court will have to exercise its judgment anew, and every other court will enjoy the like privilege. It may even be that a future court will allow itself to be convinced that the conditions in the bakers' trade are sufficiently unsanitary to justify a restriction of hours of employment; it may be remembered that the Supreme Court has been willing to receive new light as to the danger of infection from Texas cattle (compare 95 U. S. 465 with 129 U. S. 217), and as to the character of oleomargarine as an article of food (Compare 127 U. S. 678 with 171 U. S. 1).

Under these circumstances it need hardly be apprehended that the decision will be an obstacle to the progress of sanitary legislation. Perhaps it will be hailed by many as a salutary check to hasty, ill-advised, and meddlesome legislation. It can hardly be denied that there is a growing sentiment in this country that unwise legislation should be treated by the courts as unconstitutional; such a practice would heretofore have been regarded as contrary to established principles, but the present decision has certainly given it a powerful sanction. There is, of course, a gain in the defeat of bad

legislation, but it is paid for too highly at the price of the confusion of the landmarks between law and policy, and of the meritable diminution of the authority of precedents, nor is it to be lightly assumed that the legislation in the present case was hasty or ill advised.

The decision, moreover, involves far more than the validity of health laws. The act passed upon had not claimed to be a measure for the social or economic advancement of bakers' employees; as such, it would doubtless have been open to the objection of being partial or class legislation, contrary to the principle of the equal protection of the laws.

But the tenor of the prevailing opinion strongly implies that, irrespective of any discrimination, the liberty of contract may not be impaired by limitation of hours of labor, where health and safety are not in question.

The Supreme Court has upheld a compulsory eight-hour day for employees on public contracts, the purpose of which was clearly not sanitary, but social, *i.e.*, seeking to raise the general standard of life among workmen by increased leisure and opportunity for improvement. But as applied to industrial employees in general, a compulsory eight- or ten-hour day would, under the present decision, be almost certainly pronounced to be contrary to the Fourteenth Amendment. Even of those who believe such legislation to be unwise or premature, there will be many who will refuse to believe that it is opposed to immutable principles of justice or to any fundamental principle of law, and who will regard it as unfortunate that the highest tribunal should have sought to commit American jurisprudence to that view. Whatever may be true of ultimate developments — and it is safe to say that a change in public opinion sufficiently strong and wide-spread would eventually compel judicial acquiescence, even without a change of the Fourteenth Amendment—it can not be denied that agitation for labor or social legislation of an advanced type, has suffered a serious check through the decision in Lochner *v.* New York.

CHICAGO, ILL., June, 1905.

THE CIVIL AND THE COMMON LAW IN THE LOUISIANA PURCHASE

By Hon. Emlin McClain

PERHAPS it may be difficult to arouse any great enthusiasm over the results of a contest between two rival systems of law, but that the English law and the Roman law have been rival systems cannot have escaped the attention of even the most casual student of the course of legal events. The Roman, or, more generally speaking, the civil law, followed first the conquests of the Roman arms, and then the advancement of Roman civilization, not only through the countries conquered and possessed by the Latin races, but through the great regions of northern Europe, over which the Teutonic races have been dominant. The Code, the Digest, and the Institutes, compiled by Tribonian and his associates for the Roman Emperor Justinian, ruling, however, at Constantinople, while his dominions in Italy and the Roman city were in the possession of barbarians, are to-day the subject of study as furnishing the foundation of the system of jurisprudence not only in Italy and Spain and France and the Netherlands and Austria, which were once actually Roman provinces, but also in Prussia and Scandinavia and Russia, remote regions into which the Roman arms never actually were carried. Indeed, it would seem that the civil law might have achieved universal recognition as an essential element of civilization, as the very spirit of jurisprudence itself, had it not been for a circumstance, which may almost be called an historical accident.

At the beginning of the Christian era Roman legions were being led by Julius Cæsar into Gaul and into Britain, and by other successful generals into all the regions surrounding the immediate domain of the Roman state. While trophies and captives were being brought back from the East and the North and the West to grace the triumphs of generals in the Roman streets and rich revenues were being poured into the Roman city from these remote regions, it is but just to remember, Rome was giving to her conquered provinces a return in stable government, public works, good roads, civilized living, and some knowledge of literature and art. These Roman influences and institutions had become so established and fortified in the different parts of Europe that they survived the decline of the Roman military power in the third and fourth centuries, and remained as essential and dominant features of the barbarian governments set up like fragments, as it were, of the Roman Empire, which was crumbling to decay. Theodoric, among the Goths, made the principles of the civil law the basis of his code, when the spread of learning first enabled barbarian rulers to publish in a civilized tongue the laws of their people; so did Alaric, and a dozen other leaders of different tribes of barbarians, who had come within the reach of the Roman influence.

But in the remote northwestern corner of Europe, along the shores of the inhospitable and tempestuous North Sea, in regions rendered inaccessible to the Roman legions by interminable forests and impassable morasses, were those inconspicuous, and to the Romans unknown, Teutonic tribes which we have been in the habit of designating, in common parlance, as the Angles, the Saxons, and the Jutes, who, while yet untouched by any knowledge of Roman institutions, Roman learning, or the Christian religion, which was spreading in the wake of Roman civilization, migrated from their inhospitable shores to the southeastern coast of the island of Great Britain, and, driving back the Celtic occupants of the territory, set up little tribal governments, purely Teutonic in their institutions and religion. So typical

were the Anglo-Saxons, so called, who went to Great Britain, of the Teutons, and so characteristic were their institutions of those institutions which had prevailed throughout the North of Europe prior to the first invasion of Roman arms and influence, that modern German scholars have found in the earliest history of the people of England and the institutions which were developed there, the best illustrations of the characteristics of the German race. The Saxons who remained in Europe lost their individuality through subjection to Roman civilization, while the Saxons who went to England developed a civilization of their own. Had the Anglo-Saxons remained in Europe, they would have taken on the civilization which came from Rome. Had they come earlier to England, they would have been reached by the Roman invasion of the first century, and it cannot be doubted that, with their genius for government, they would have kept alive on the island of Great Britain, the learning and arts and institutions which the Britains, less capable of civilization, allowed to die when the Roman arms were withdrawn. Had the Anglo-Saxons instead of the Britains become Roman subjects, it cannot be doubted that the system of law under which Anglo-Saxon institutions were developed would have been the civil law instead of an indigenous system.

As it was, Teutonic institutions were preserved on the island of Great Britain by the Anglo-Saxons, were developed from within instead of being imposed from without, and the common law of England became a system of jurisprudence to be carried by the Anglo-Saxon race into the great North American continent, into Australia and India and South Africa.

It has not been without conscious pride that the Anglo-Saxons have maintained their independence of Roman influence, and persisted in regarding their system of law as a rival system to that of the Latin races. When the English barons were urged at one time to change a rule of the common law affecting the descent of property, so as to conform to the more civilized and enlightened policy of the civil law, as favored by the Church, whose learning emanated from Rome, the center at that time of Christianity, they stubbornly declared their unwillingness to change the laws of England. That this conscious resistance to the introduction of the principles of the civil law as a substitute for common law principles, was persistent throughout the development of Anglo-Saxon civilization in England, can easily be surmised from the steadfast and stubborn opposition of judges of England to the substitution of any doctrines of the civil law which seemed to be contrary to common law notions. And it is an interesting fact that few rules of law, consciously and avowedly taken from the more highly developed system of Roman jurisprudence, have been successfully introduced into the English system.

That the lawyers and judges of England have constantly and strenuously insisted that the common law was substantially indigenous and that it had neither been imported from foreign lands nor materially modified by foreign influences, is evident from the whole tenor of the writings of those whom we are accustomed to refer to as the sages of the common law. Coke and Blackstone speak on the subject in no uncertain terms, whatever may be said as to the historical soundness of their views, and Lord Hale declares that "The kingdom never admitted the civil or canon law to be the rule of the administration of common justice." In order to show that the common law was not imposed by the Norman Conquest, but antedated the Norman rule in England, Lord Hale announces in language startlingly modern in its vigor, that "he will rip up and lay open this whole business from the bottom." These men may speak with prejudice and partiality, but it is not to be denied that they speak with all the opportunities of knowledge possessed by those near to the formative period of the

common law and with authority which must not be lightly disregarded.

The champions of the civil law, who would have us believe that it is the source of all jurisprudence and that from it the common law has borrowed those principles which entitle it to be considered a system of law adequate for a civilized people, make an argument more specious than satisfactory. It is true that the earliest efforts at formal exposition of the common law, as a system, were made by borrowing the phraseology of the civil law, just as the learned men of that time in every department of knowledge borrowed Latin words to express conceptions for which the ruder native tongue furnished no vehicle; but those conceptions were original, and characteristic. They were not borrowed. Bracton, the first clear expositor of the law of England, preludes his great work with a synopsis of general principles taken from the civilians, but when he attempts to explain the rules of law as actually administered, he states what has been decided by the judges of England; and the decisions of those judges were not only ostensibly, but actually and demonstrably based on the customs prevailing among the people — the notions of personal and property rights which had grown up with the Anglo-Saxons and which had not been derived from foreign sources.

I would not pretend that English civilization owes no debts to Roman civilization, or that the common law has borrowed nothing from the civil law. No civilization is strictly indigenous. Learning and institutions spread from tribe to tribe and from race to race, and from country to country. England felt the stimulus of the revival of learning throughout Europe at the end of the dark ages. Scholars and priests and civil rulers in England imported learning and religious ideas and notions of government from across the channel. The Norman Conquest brought into England the Feudal system. The Church brought into England the canon law. The chancellors, who were at first ecclesiastics, had in mind the principles of the civil law in their attempts to ameliorate the rigorous rules of the common law by means of their equitable jurisdiction. Writers on jurisprudence found the language and the theoretical arrangement of the civil law convenient vehicles by which to attempt a statement of the rules of the common law in general terms. And yet it remains practically undisputed that, whatever the form of their exposition, the principles and characteristics of the common law are distinctly different from those of the civil law; not merely different because of their application to local conditions, as with the Germans, or the French, or the Russians, but distinctly different as to the spirit pervading the developed system. Even the principles of equity have been evolved by the decisions of the great English chancellors and show no indebtedness to the civil law save as to the terms in which they were expounded. And so I say it is that, as the result of what I have called an historical accident, a rival system of the civil law has been developed among the Anglo-Saxon peoples and carried wherever Anglo-Saxon power has been extended. And I venture to say further, that the principles of the common law are better suited to institutions which recognize the right of self-government and the direct responsibility of the ruler to his subjects, and the legal equality of all men, and the right of all men to participate in the benefits of government and social order, than are the fundamental principles on which the civil law is based.

Further on I shall try to indicate more in detail some of the characteristics of the common law as a rival system of the civil law, and shall urge that we bear them in mind as blessings to be zealously guarded and preserved, if our free institutions are to be protected against imminent dangers which even now seem to threaten them. But it is enough for the present to say that there are but two distinct systems of law in the whole civilized world, and that as civilization is

extended to unenlightened or barbarous peoples, they adopt the spirit and the characteristic features of the one or the other, as they are brought within the scope of the influence of European peoples, or of the Anglo-Saxon peoples; and that the development of civilization among any people will be materially affected by the question whether the principles of the civil law or those of the common law are thus introduced. I need not say that in my opinion the social organization which shall ultimately prevail among the various peoples which have recently been incorporated among the people of the United States, will be materially affected by the introduction among them of institutions recognizing the essential characteristics of the common law, in substitution for those molded under the civil law, even though the local customs and notions of personal and property rights, which have grown up under the civil law system, be recognized as continuing in force.

It is this fact which has given almost a dramatic interest to the rivalry between France and Spain on the one hand, and Great Britain and the United States on the other, with reference to the possession of the great Mississippi Valley and the regions westward to the Pacific coast. And certainly no historical drama has had more brilliant actors, a more startling or fascinating plot, or a more magnificent setting than that which has been played out on the North American continent during the last five centuries. The prelude was dramatic. Columbus, under Spanish patronage, reached the shores of a new world under the inspiration of a dim conception that the earth was round, and that, by going far enough, he might come to the known regions of the remote East. But the Norsemen, of Teutonic race, had already discovered it in its northern latitudes, without any such conception, merely venturing in their rude barks on unknown seas. Spain made the discovery the occasion for an unprecedented extension of her dominion by the conquest of regions supposed to be rich in the precious metals, while England, under claims founded on the discoveries of Cabot, who had crossed the Atlantic in search of a northwest passage to China, sent out settlers to occupy the newly discovered territory for purpose of agriculture and commerce, and France acquired rights which she still retains by taking possession for fishing purposes of the banks of Newfoundland. As the plot goes forward, England, France, and Spain are the three rivals in the struggle to acquire dominion and power in the new world, and each reaches out his arms for the shy maiden, the beautiful West beyond the Mississippi. First comes De Soto, toiling with his Spanish soldiers through the wilderness westward from Florida, hardy, treacherous, cruel, grasping, with the blind ambition of reaching some treasure-land of the Far East, and unmarked graves in Arkansas constitute the sole memorial of his struggle.

The French, during the reign of the Great Monarch, extend their explorations up the St. Lawrence, holding it against the English, cultivating friendly relations with the native, whose soul their priests would save while their traders traffic in his furs, on around the Great Lakes to Detroit, to Mackinac, to Chicago; and finally Marquette and Joliet, the priest and the trader, hand in hand, voyage up the Fox River and down the Wisconsin into the Mississippi, holding councils with the Indian tribes on either hand, and signalize the year 1673 as opening to the knowledge of civilization the greatest waterway in the world. Within less than ten years, La Salle, with his lieutenant, Tonty, has descended the river, almost to its mouth, discovering the Missouri, the Ohio, and the Arkansas, and within three years afterward La Salle has brought a colony from France into the Gulf of Mexico, has missed the mouth of the Mississippi and landed at Matagorda on the Texas coast, has left the little colony in a vain struggle to reach succor by making his way overland to the northern lakes, and has yielded up his life

to a miscreant subordinate, while Tonty, in pursuance of their prearranged plan, was bringing succor down the Great River. The Mississippi, thus opened to the voyageur, is frequently traversed from the north, while French colonists near its mouth maintain a precarious existence. Spain establishes her colonies in Florida, and, although her ambition for foreign conquest is waning, casts jealous eyes toward the regions through which run the Father of Waters. John Law exploits his stupendous financiering project in Paris, attempting to capitalize, as it were, the unexplored wealth of the Great Valley, until the "Mississippi Bubble" has burst, and France has learned a world-famous lesson in political economy. Then the zeal of the Frenchman dies out and he sells to Spain the whole vast and indefinitely bounded region west of the Mississippi, to take it back again under Napoleon Bonaparte and sell it to the United States to prevent its falling into the hands of his immediate enemy, the British.

But the permanent dominion of a system of law or institutions is not to be determined by moves on the international chessboard. Had France been actually able to colonize and govern the region west of the Mississippi, the civil law would have been imposed upon it for all time, as it was imposed on that portion of the region which was actually occupied by France, now included within the limits of the State of Louisiana, where the civil law still prevails. But beyond the region of actual French possession the dominion of the civil law was not extended. Into that region the common law was carried by pioneers from the east of the Mississippi who sought homes on the virgin soil of Missouri, Iowa, Kansas, and Nebraska; and, although the civil law no doubt had a temporary footing in St. Louis, as governing the transactions of the French traders who were carrying on their business at this frontier point, before the transfer of dominion to the United States, yet the first extended settlements in the Missouri territory were made by English-speaking people, bringing with them Anglo-Saxon institutions, and continuing to live and prosper under a recognition of the principles of the common law system. And there is no evidence that any established government ever recognized the civil law as having at any time been in force within the limits of the territory of Missouri. The exact facts seem to be, that by the Act of Congress of 1804, providing for the government of the newly acquired purchase, that portion of it north of the present southern boundary of Arkansas, designated as the District of Louisiana, was annexed for governmental purposes to the territory of Indiana, in which, of course, the common law was expressly recognized under the provisions of the ordinance of 1787; that in 1805 a separate government was provided for the same region, designated as the Territory of Louisiana, the name being changed in 1812 to that of the Territory of Missouri; and that the common law was virtually recognized in the Acts of Congress providing for the government of this territory; that in 1816 the legislature of the Territory of Missouri expressly declared the common law of England as in force there, and that this declaration was subsequently reiterated when the present state of Missouri was admitted to the Union.

The insistence on the introduction of the common law by the people of this region west of the Mississippi, over which theoretically the civil law had previously been extended by the sovereignty of France and Spain, and the like insistence on the part of the people of Texas on declaring their independence of Mexico, in which the civil law was also recognized, demonstrate a popular belief that the common law was more suitable to their conditions, and more consistent with a free government than the civil law. And, therefore, we have the result that, while the whole region of the United States west of the Mississippi, except that portion included in the states of Oregon and Washington, was acquired from

nations recognizing the civil law, that system of law was expressly abrogated save in the state of Louisiana, where, by permanent settlement under the French and Spanish rule, the principles of the civil law had become definitely established. And I may be permitted to say in passing that the recognition of the civil law in Louisiana is rather more theoretical than practical; for immediately on the establishment of the state government there, the common law procedure as to crimes and the right of trial by jury in civil cases was introduced; and that, notwithstanding the constant reiteration of the adherence in that state to the Roman system, the law as practically administered differs so little from the common law recognized in the other states of the Union, that cases decided in Louisiana are cited quite as effectually in the common law courts of the various states as are the decisions of other sister states in which the common law prevails. It is only as to a few subjects that the recognized law of Louisiana seems to be practically different from that of the other states.

This popular allegiance to the common law has been characteristic of the American people. The Continental Congress in the Declaration of Rights, made in 1774, before independence was resolved upon, announced the doctrine that the colonists had brought with them the common law, and were entitled to its protection. In what was, perhaps, the first theoretical discussion of the nature of our American system of government (Du Ponceau on Jurisdiction, p. 91), it is said: "We live in the midst of the common law; we inhale it at every breath, imbibe it at every pore; we meet with it when we wake and when we lie down to sleep, when we travel and when we stay at home. It is interwoven with the very idiom that we speak; and we cannot learn another system of laws without learning at the same time another language." John Adams announced the general belief that the common law belonged to the people of the United States, who formed the Federal government; and Story and Kent reiterated the same doctrine. At times there has been some expression of dissatisfaction with the recognition of the common law, as when it was attempted by the legislature of Kentucky to forbid the citation of English decisions in the courts of that state; but this discontent has arisen from a misapprehension as to the nature of the common law. It has been supposed to be an incident of the government of Great Britain, and therefore its preservation among us a relic of our subjection to that government; whereas, in fact, it is a characteristic of the free institution which the people of Great Britain, as well as of the colonies, preserved by a long struggle against the encroachments of the royal power.

We must not assume, then, that it was of little significance that the great West came under the jurisdiction of the common law. Had this region been colonized and retained by France until it was filled by a prosperous and homogeneous people, had the institutions of the civil law become the foundation of a system of government of such a people, then, although the people of this region might have finally asserted their independence of France or of Spain, as the case might be, and entered upon a career of self-government, yet if a spirit of rivalry had arisen between the great West and the United States, such as would have been almost inevitable, it might well have come about that the Code Napoleon, or Las Siete Partidas of Spain, rather than the principles of the law laid down by Coke and Hale and Blackstone and Kent and Story would have been the foundation of the jurisprudence of this great empire. We would thereby have missed much of which we are justly proud. That such result might have been of very practical significance is illustrated by a case decided so recently as April, 1905, in the Supreme Court of Kansas, in which the introduction of the common law into this region is relied upon for the purpose of sus-

taining the right of a riparian owner to the use of the waters of a stream as against the claim of a prior appropriation for irrigation purposes. (See Clark *v.* Allaman, 80 Pac. Rep. 571.) The same reasoning as pointed out in that case has been adopted in other agricultural states west of the Missouri (Crawford Company *v.* Hathaway, 67 Neb. —, 93 N. W. 781; 60 L.R.A. 889; Bigelow *v.* Draper, 6 N. Dak. 152).

But the question still remains, whether the system of government developed on the principles of the civil law would have conduced as effectually as our present system, founded on the common law, to the happiness and prosperity of our people. I cannot enter now into this field of speculation. Perhaps it is not controlling that the textbook universally referred to as stating the fundamental doctrines of the civil law system, the institutes promulgated by Justinian, contains among its maxims the statement that "what pleases the ruler, that has the force of law"; for it is true that republics have been established in countries where the civil law prevails. But we cannot justly close our eyes to the fact that thus far in the world's history there has been a marked preference for the peculiar institutions of the common law among all people who are striving for self-government. I cannot even stop to point out how essentially diverse are the systems of government permeated with the principles of the civil law, from those which are founded on the common law. I can only assume that you will rejoice with me in the good fortune which has kept us in the domain of English law, and ask your attention to a few practical considerations as to the real significance of this good fortune and the importance of preserving intact and in actual operation, not merely the letter, but the spirit, of the system which we have derived from our Anglo-Saxon ancestors, not so much by the descent of blood, but, what is of more importance, by the transmission from generation to generation, from country to country, and even from race to race, of the institutions having their source among the Anglo-Saxons.

It is safe to say that the most fundamentally important characteristic of the common law is that it recognizes, not merely theoretically, but practically, the doctrine that before the law all men are equal. It is a great conception, one which was not actually embodied in the constitution of any civilized people until it was announced in our Declaration of Independence. Mighty upheavals in government have resulted from its denial. It has been the watchword of the Christian religion, the most persuasive of its doctrines as missionaries have carried it to the oppressed and miserable in non-Christian lands. It is a doctrine which has appealed to philosophy, religion, and sentiment. And yet, it is as old as the beginning of the common law, and a characteristic of the institutions of the Saxons and other Teutonic tribes. With them, however, it was simply a fact, not a dogma. Their whole theory of government was founded on the participation of all freemen in public affairs; and the prevalence of the wishes of the greater number as against the smaller, not by reason of any theoretical right of majority rule, but because among men who are equal the majority is more powerful than the minority. I must not be understood as saying that there were no inferior classes among the Anglo-Saxons. There were such classes, but the law did not recognize their existence. It was a system for the government of freemen. The under classes gradually disappeared, elevated, as it must be believed, from the rank which the law did not recognize to the rank of those who were entitled to the equal protection of the law, until eventually it was the proud boast of Englishmen that slavery could not exist anywhere within the British dominions. It is worth while to insist that in its origin this notion represented actual, existing facts and was not the result of sentimental considerations, in order to emphasize its im-

portance as the actual working hypothesis of any system of government resting on the popular will. The will of the people is of no force or significance, and entitled to no consideration, unless it be the will of all the people who are subject to the law. The question as to how this will shall be ascertained and made effectual is not a question of law, but a question of statesmanship, of political science. The recognition of all persons as equal before the law is a fundamental principle of our jurisprudence, and a postulate to political liberty.

Now it is interesting to notice that this fundamental principle is not only not emphasized in the civil law, but that the Roman system of government did not assume it, nor embody it in existing institutions. In Rome the greater number of persons whom we would regard as free adult subjects, were under some sort of private dominion, some form of control and restraint other than that exercised by the officers of government. The power of the head of the family to rule its members and control its property was practically exercised by the assent of the law, and the head of the family was not simply, as the term would suggest under modern notions, that of the husband and father over his wife and minor children; but it was the power of a patriarch, asserting complete ownership of all the possessions and accumulations of his sons and their families, of those adopted into the family, of a great aggregation of persons so large that, in a small community, they might constitute a considerable proportion of the people, and whose subjection was the result of relationship, natural or by adoption, and not of any immediate community of interest. Many free Roman subjects passed an entire lifetime, during which they were married, labored in their callings, and died, without having any property which they could call their own, or transmit to their children, and without receiving any recognition whatever as individuals entitled to the protection of the law

In short, as it seems to me, the fundamental difference between the common law and the civil law is in the recognition under the one system of individual rights and individual accountability, as against collective family rights vested in one head, and accountability on the part of that head for the entire family aggregation. It will not do to generalize too widely on this distinction, nor to assume that the fundamental doctrine as to the power of the head of the family has remained practically the same wherever the civil law has been extended. But it is safe to say that this fundamental distinction runs through all the rules of law, and has affected all the institutions connected with the one system and the other.

The principles of government formulated by our forefathers in this country were conceived of as suitable to a homogeneous body of persons, related to each other on the basis of equality of rights and privileges. That body of people was much more like the body of freemen of early Anglo-Saxon times than the aggregation of persons ruled under the government and institutions of Great Britain. Between the time when Anglo-Saxon institutions had developed to their fullest perfection without interference from abroad, and the time when colonists from Great Britain set up independent governments in the new world, there had been a great change in the social and political organization of the English people. The Feudal system had been introduced. The people had been divided into classes. The subserviency of one individual to another and of one class to another had been established. There were earls and counts and lords and knights and freeholders and tenants; and the possession of the prerogatives and the burden of the obligations arising out of the existence of these various ranks and classes were not due to any selection on the basis of merit of efficiency, or even the acquisition of property. But the colonists who went out from England to the new world were substantially men of equal

rank in life, and the colonial governments recognized them as equal, save as authority might be conferred by appointment or election. There were no titles of distinction in the colonies. Primogeniture was practically not recognized. There was no considerable class of bondmen, although bondage did exist to a greater or less extent in all of the colonies. And such rights of suffrage as were conferred, while they were made dependent in many cases on property qualifications, were not beyond the possible reach of every male inhabitant. As a consequence the institutions of our government established during the colonial period and at the beginning of our national independence, much more nearly resembled the early type of English institutions than the type which existed in Great Britain at the time independence was declared. We may claim that in local self-government, in manhood representation, and in limitations upon the powers of those acting in an official capacity, our institutions are directly derived from, and strictly analogous to, those of the Anglo-Saxons before the Norman conquerors had brought with them the Feudal system in its most rigorous form, and had saddled upon England the whole category of titles and class distinctions to which the Feudal system led.

The dangers peculiarly threatening the stability of our institutions are dangers resulting from losing sight of the fundamental principle of equality of all men before the law; equal rights to all, equal duties upon all. A highly developed civilization brings about differences and distinctions, financial, social, and political, which are very great and strongly marked as compared with the distinctions found in a more primitive condition. We need not stop to argue whether mankind is happier under a complex civilization than in a simple, bucolic life. The desire to develop every faculty and every capacity, and to enjoy every power possible to the human being, is too deeply implanted in the constitution of mankind to be reasoned about, combated or condemned. It is simply a social and economic fact. We must recognize it and anticipate the consequences which may flow from it; and in the natural desire of the body of mankind to maintain a position of equilibrium, we must strive to counteract any evils likely to result. The tendency to maintain a position of equilibrium is a factor of the human constitution, the effect of a force of gravity, as it were, holding in check the erratic impulses of human activity, which would otherwise get beyond control and become destructive of the social fabric. That distinctions of rank or wealth or power need not interfere with the practical application of the principles of equality before the law, is demonstrated by the actual fact that, as a working principle, it has survived the political, social, and economic changes which have taken place among the English people from primitive times to the present. Our political economists who are constantly seeking to discover new remedies for supposed new dangers to the body politic, would do well to recognize the fact that none of the dangers which they assume to discover are either new or strange. Neither are they local nor peculiar. They are the common, ordinary dangers arising out of the constitution of the human individual, assuming new aspects under changed conditions, but avoidable, so far as social and political and economic dangers inherent in the very existence of humanity are avoidable, by a resort to restraints and remedies as old as the common law itself.

And the political economist would do well, before exploiting his peculiar theories and advertising his peculiar nostrums, to look into the remedies which have long been known and applied for these very same ills under other forms and manifestations. I venture the assertion that no remedy for the fashionable new diseases, called combinations, trusts, and unions will be found more effectual than the old and well-known remedy of holding every individual accountable under the ordinary rules regulating in-

dividual relations, which have been known to courts and lawyers for many centuries. If it be said by combinations of numbers and of wealth, power has been centralized in a few hands, creating a congestion which the ordinary administration of quinine is not effectual to reach, the answer must be that the concentration of power has its own natural limitations; that, after all, combinations are but aggregations of individuals, each of whom has the same self-conscious desire for his own welfare which nature implanted in him before he entered into a combination; that each combination depends after all upon the individual capacity and skill and exertion of those who compose it, on those into whose control it falls; and that, to change the illustration, the larger and deeper the sea, the less siginificant, as compared to the quiet under-currents which control the movements of its waters and tend to restore them to equilibrium, is the wave which is raised by the sudden unexpected hurricane. Let us still look after the rights of the individual. Let us still give to him the largest practical liberty for the exercise of his particular powers and functions, and the law of gravity will speedily restore to the natural condition those extraordinary manifestations which seem to us so alarming; not so much by reason of the damage which they actually do, as by reason of the terror and apprehension which they arouse through the creation of the imaginary danger that a multiplication of them may disintegrate the world. Human ills become unbearable in the imagination rather than by reason of any actual realization of their consequences. Combinations are not new in human history, nor are they necessarily harmful. Neither is the accumulation of large wealth in the hands of a few a thing unheard of in past times. The capacity to associate and to effect the ends which the human being naturally desires to bring about by coördinating his forces with those of others, is an inherent element in the constitution of man. The limitations on the power of association are also inherent in the constitution of man. The desire for law, order, and safety is inherent, and the dangers which we imagine, will become real only as we fail for the time being to make use of the corrective tendencies. Sanity, judgment, courageous assertion of individual rights, these are the protective remedies within our power. The continued development of strong individualism to keep pace with the natural development of the capacity to associate, will maintain the stability of the social fabric. Each individual remains subject to the law of his own creation and constitution. Government and religion, and sociology, must not forget the individual as the ultimate atom, and the natural forces inherent in that atom are the forces which determine the form and constitution of the whole human structure.

Going back to the comparison between the fundamental conceptions of the civil and of the common law, it is worthy of consideration that the entire conception of the nature of the courts and their proper functions under the two systems is radically different. The earliest courts in England were local and popular courts, and it was necessarily so, for there was no sovereign and supreme authority from which the power of a judge could proceed, or by which the judgments rendered under such authority could be enforced. Indeed, the laws to be observed and administered by the courts were of popular origin, and represented largely local usages and customs. When the kingship came eventually to be an established institution among the Anglo-Saxons, the king was regarded rather as the executive head of the state to enforce the law than as the source of the authority on which the law rested. King Alfred is said to have promulgated a collection of laws, but this promulgation seems to have been rather a publication of those rules established by usage, and also to some extent by legislation, which were already in existence, than a pronouncement of new laws.

Some time after the Norman Conquest, judges representing the royal power were sent into the various parts of the kingdom to administer the laws. But the nature of the common law as a body of rules and principles founded upon usage and custom, and developed by precedent, was already too well established to be radically affected by this change in the form of its administration. The lawyers introduced from the civil law the fiction that all law and all power proceed from the royal person, as the source of all right and all authority. But the popular conception of law, as resting on usage and precedent, was not thereby disturbed. On the continent, however, the law was administered, from the first organization of courts, so far as we can understand, by persons directly representing royal power, and administering the law as the royal will. On the continent the judge exercised, and still exercises, much administrative authority. Indeed, the whole tendency is to treat the courts as branches of the administrative department of government. This is peculiarly true as to the criminal law, and in countries where the civil law system prevails, notably in France, the greater part of the criminal code, if it may be called such, is simply administrative law, and the judge is a part of the machinery of police supervision.

This system has its practical advantages, and is by no means subject to the ridicule which English-speaking people are wont to heap upon it. I am inclined to think that criminals are punished in European countries more promptly and certainly, and that crime is repressed more effectively than under the common law systems, in accordance with the principles of which a person accused of crime is regarded as a man presumptively innocent, with whom the state has a lawsuit as to whether he is to be punished or not. The judge with us occupies the position of an impersonal arbitrator, bound to decide for the defendant unless the prosecution can make out an exceptionally strong case, such as ought undoubtedly to be made out if the defendant is justly entitled to the presumption of innocence, but taking no interest in the public welfare whatever, and indifferent as to whether crime is punished or not. As a practical fact, which we fully know unless we shut our eyes to the sources of common knowledge and have regard merely to a fictitious assumption, very few persons are actually brought to trial, accused of crime, who are not guilty, or at least so far wrong-doers as not to be fairly entitled to the presumption of innocence which is thrown around them. But on the other hand it may well be said that, in the administration of justice, even where the state is concerned, it is of vast importance that there shall exist a sense of personal security, an assurance that the mere charges of those who may wish to do an injury, or who may entertain a mere suspicion, shall not put one in peril, and that property and liberty, which the Anglo-Saxons especially have always so highly prized, shall not be made insecure by accusations of wrong-doing which are not clearly established by indisputable evidence. And I am inclined to think that the public sentiment which can be brought to bear in support of the punishments imposed by the common law when the criminal is convicted in such a proceeding, and the respect for the administration of law which this form of procedure inspires, and which is effective in restraint of crime often without resort to the courts, is more conducive to the public safety than is the general popular feeling of indifference to criminal conduct and lack of responsibility for that which the state assumes to regulate, which is found prevalent in the countries of Europe. At any rate, it does not appear that the criminal classes are any more effectively suppressed under the continental system than under the system prevailing among the English-speaking people. And it certainly does appear that there is a respect for law and its administration, and a just pride in the possession

of individual rights among the English-speaking peoples, which do not exist where the law is looked upon as the will of the ruler, and criminal proceedings are regarded as merely the vindication of his right to rule. It is not the mere form of government which is significant, for England has had, and still has, a monarchy, quite as potential theoretically as that to be found in any continental country; while, on the other hand, representative government has, from time to time, been established in various European countries, I think the difference exists in the conception of the nature of law and of the functions of the courts which administer it; and that the conception which is entertained by the one who is ruled under the system of the common law is far more conducive to the general public welfare and happiness than is the conception prevailing under the civil law system.

A notable feature of the administration of justice under the common law is the recognition and practical preservation of the right of trial by jury, a right which has its fundamental basis in the fact that men are equal before the law, and that the judgment of his fellow-men with reference to whether he has committed a wrong, is a better safeguard of the rights of the individual than the determination of some official, even though he be a judge, owing his allegiance to some superior and remote power. The anomalies of a jury trial, the absurd results sometimes reached, and the inefficiency in many cases of this method of determining the questions submitted, are often commented upon. And yet, it is a significant fact that those most familiar with the administration of law have continued to assert their confidence in the system of jury trial as the best system yet devised for reaching substantial justice in cases involving a controversy as to the facts. It must be remembered that jury trial was not developed as a theoretical system, but originated as a popular institution, adapted to the needs of the people among whom it sprang up; that it has been modified from time to time as necessity seemed to require; that the function of the judges in announcing the law and supervising the action of jurors to see that they do not transgress their proper sphere, is as much a part of the judicial system which involves jury trial as is the action of juries in passing upon facts, and that the continuity, stability, and publicity of the rules of law, as regulating the conduct of individual members of society, is maintained by the pronouncement of the judges whose decisions stand as expressions of the law, while the verdicts of juries have significance only in the particular cases in which they are rendered. Here again the sense of security of personal and property rights is quite as important as the theoretical perfection of the judicial system; and while on the continent, where, by the way, trial by jury has been to some extent introduced, the administration of law by the courts may be actually as effective in attaining the ends of justice, there is not the same feeling of security of each man in his rights, regardless of the interests of the abstract state, as there is in the common law countries. Were we now to sit down as philosophers and jurists to invent a system of law, we would perhaps not include jury trial as we now understand it. But systems are to be judged by their practical workings, rather than by their theoretical consistency or perfection, and I beg to express very grave doubt as to whether any radical modification of our judicial system, which would eliminate the feeling of security which comes from a realization that one's rights will be determined, as to matters of fact, by his peers, and not by his superiors, would be beneficial.

Another essential distinction between the common law system and that of civil law countries, is as to the force and effect to be given to the pronouncements of the law by the judges in particular cases. The common law system is notoriously a system built up on precedent, while the civil law

system is, on the other hand, notoriously a system of abstract rules and principles, preconceived and laid down regardless of the practical application made of them in particular cases. An attempt briefly to state the distinction would probably result in some such conclusion as this; that the common law is the aggregate or resultant of the decisions of the judges in many cases, while the civil law consists of rules which the governing power has prescribed, in the belief that they are the result of the highest wisdom, and which, by application in individual cases, will be found to effectuate justice.

Civil law principles are not formulated with reference to the facts in particular cases. The judges who administer the law have nothing to do with molding it. The jurisconsult who formulated rules for hypothetical cases was not the official charged with the duty of administering the law in a particular case, to the end that justice be done between the parties, and who had listened to the arguments of counsel learned in the law, jealously guarding the interests of their respective clients.

It is not to be denied that the doctrine of precedent in recent times has been amplified in such an extraordinary way that our whole judicial system seems to be imperiled. Facilities for the writing and publication of judicial opinions have been so far intended that we are suffering with a plethora of expositions of so-called rules of law. Not only are the courts of last resort, consisting each of numerous judges, working overtime in the effort to convince counsel that all the precedents cited have been examined and all the ingenious arguments urged have been fully considered in determining the rights of the parties to a particular controversy, which may be of no interest or consequence save to the parties themselves, but a great number of intermediate courts have been created whose judges seem ambitious to justify, by lengthy and laborious opinions, the conclusion that they too are worthily discharging the function of adding to the judicial fabric. Publishers are eager to print and sell to the legal profession everything which has the form or semblance of a judicial opinion, while the industrious digesters and indefatigable makers of cyclopedias vie with each other in bringing together the greatest number of citations, until the wearied lawyer, searching for a case exactly "on all fours," is driven well nigh to insanity lest he may overlook some judicial announcement in a controversy, the photographic reproduction of the facts of which makes it bear a familiar resemblance to the facts of the case which he is endeavoring to picture to the imagination of the judge before whom his case is being tried.

But I have faith to believe that the antidote to the disease exists somewhere in the judicial pharmacy, and that in time it may be discovered and its beneficial effects realized. May we not hope that some counteracting virus may be found which will render judges of courts of last resort immune to the ambition of creating new rules of law for cases which might just as satisfactorily be disposed of under rules long recognized and so well established that citations of multitudinous authorities in their support would be superfluous; and that lawyers will realize that although we live under a system of case law, cases are valuable only as illustrating principles, and that however important and useful the study of cases may be as a guide to principles, it is after all the principles and not the case which will furnish illumination for the satisfactory decision of the new case presented. The value of the doctrine of precedent consists in the fact that the rules evolved from many cases and gradually worked out by long experience are much more satisfactory than these laid down arbitrarily or theoretically by legislators or jurists. A doctrine thus established is the result not of the wisdom of one mind, but of the cumulative wisdom of many minds. It has in it not only the invention of genius, but also the solidity of

slow and consistent growth. "Time," says Lord Hale, "is the wisest thing under heaven. It is most certain that time and long experience is much more ingenious, subtle, and judicious than all the wisest and acutest wits coexisting in the world can be. It discovers such a variety of emergencies and cases, and such inconvenience in things, that no man would otherwise have imagined." And Judge Dillon has added to this his own suggestion that, "The value of our system of law, as we now have it, is that it embodies the wisdom of time and experience."

The last distinction which I shall have time to suggest between these two systems of law, pertains to the relation between the members of the legal profession and their clients on the one hand, and the courts on the other. In civil law countries the lawyer occupies an honorable, but an inconspicuous position. He is educated, as it were, for the government service. He may be reasonably sure, after completing the extended education required, that he will receive some official position which will keep him from starvation. He is eligible to be a notary's clerk, or have some other like office. If clients come to him, they come to him as they would to an official, and he treats them as the official would treat the ordinary citizen, in whom he takes no interest save that which his duty requires of him. The attorney is not regarded as the paid agent of his client, but rather as a functionary of the state, rendering a public service for the client, and not otherwise interested in his welfare.

Our own experience under the common law system illustrates the difference in the situation in Anglo-Saxon countries. As already indicated, the judge is an arbitrator between two contending equals, authorized, it is true, to decide, but having no public function save that of deciding. He is not an administrative officer, nor is he specially charged with any care as to the result, save that controversies should be settled. Now in this situation the parties come before him, waging their contest as to which is in the right. They no longer hire champions for wager of battle, but they hire attorneys who enter the field to espouse their respective causes, with all the ingenuity and skill which professional training can give, and all the persistence which the client could feel in his own personal case. Each side takes advantage of every misstep or false stroke of the other, and there is a point ready to pass under every guard that is not rigidly maintained. The attorney ceases to know the law, save so far as law is valuable to his client. He ceases to know the facts, save as those facts bear in his favor. He is the blind, prejudiced, unrelenting, and unreasonable champion of a cause which he has espoused for a money consideration.

True, there are certain rules of etiquette and propriety which, if he is going to play the game fairly, he will observe with the strictest fidelity. When he gives his word he will keep it, and none will be more scrupulous as to his absolute personal integrity. He will not lie about the law or the facts, but he will exhibit astonishing stupidity at times as to the one and be remarkably oblivious as to the other. In other words, he will stand in the position of one who with personal integrity and high regard for his character, is ready to espouse the cause of the client, right or wrong, and make that cause seem as plausible as possible before the judge and the jury, without any regard whatever as to whether ultimate justice is being achieved in the case or not. In other words, a lawsuit is a judicial combat in which, with observance of the rules of the game, the lawyers representing their respective clients are fighting for personal victory, regardless of the nature of the controversy.

I think I have fairly stated the facts as they might seem to one who, without any bias one way or the other, was trying to estimate the respective merits of the civil

and the common law systems, as illustrated by the attitude of the attorney toward the court. And yet, it must be borne in mind, that the controversy is carried on before a judge; that the judge will see to it, not only that the rules of the contest are observed, but that the party who fairly wins, according to the rules of the game, will get the decision; that the judge has no interest nor concern as to which way the decision shall go, save only that the prize shall be awarded to the one making the more meritorious showing; and, finally, and most important of all, that the rules of the contest are those which have, in the course of ages, and as the result of the experience of the ablest minds, been selected as the rules in accordance with which such contests may most righteously be decided and justice effectually administered. The judge is administering the rules of law. He is impartial between the parties. He is zealous only with reference to a right result in that particular case. The attorney has for his function the presentation in the strongest possible form of the case of his client. The duty of deciding is not with him, but the duty of presenting. His duty to his profession is his highest duty, and it is one not wholly mercenary. He feels toward it the devotion which any honest and ambitious man feels in regard to the discharge of an undertaking which involves his mental faculties, and the exercise of the greatest human gifts. His client is not his master, and yet, his business is to represent to his utmost ability the cause of the client, whoever he may happen to be. He is the real contestant, and his skill is the skill which will largely affect the result of the contest. The client is entitled to this kind of a champion, and, if he has confidence in his representative, will be satisfied in the end, if unsuccessful, that he has been legitimately beaten. He may have personal feelings with reference to his opponent, but he submits to the result of the wager. If this picture is not theoretically and practically drawn with the lines and painted with the colors which most strongly appeal to the sentiments, it at any rate has the merit of being true to life, that life with which human beings are endowed by their Creator and sent into the world. Human beings were not created simply to admire the clouds, and the trees, and the beautiful river. They have capacity for activity and for struggle, and somehow the life of the beautiful and the good survives and is strengthened by contact with the actual realities of the existence which is imposed upon them. And so it is with the law as it is administered. The intensity of contest is there, the exhilaration of victory, the bitterness of defeat. But out of it all grows a calm assurance of soul that God is in his world, and that the right will triumph. Not the right as you, or I, or any other may individually see it, but the right as it may result from the wisdom and the judgment and the struggle and the victories of all. And to this ultimate triumph none contribute more greatly than the members of the legal profession. And under no system of law are they more potent than under that system which we know as the common law. The judges and the lawyers who have assisted in the administration of justice under that system, have, by reason of the nature of their functions under the common law been men of greater stature, greater mental capacity, greater breadth and depth and earnestness than those developed under any other system; and the respect for and devotion to the law, which they have exhibited and inculcated, has done more to develop the self-restraint which is essential to successful self-government than any other influence which has been brought to bear in the history of the world.

Des Moines, Iowa, May, 1905.

THE LAW AND LAWYERS

By Hon. John F. Philips

EVERY student of history is impressed with the fact that the history of half the world is that of nomadic barbarism where

"No common weal the human tribe allied,
Bound by no law, by no fixed morals tied,
Each snatched the booty which his fortune brought,
And wise in instinct, each his welfare sought."

In the wanderings of thousands of years, like locusts, the hordes came, swarming, flying, singing, and dying; and again they came only to swarm, to sing, and to die. Nowhere did they dedicate a single mountain fastness to the freedom of individual man, or build one temple to justice. While in the other half, though begirt with the splendors of civilization, from Genesis to the Sermon on the Mount it was little more than the meretricious display of crowned heads, absolutism in government, and fetich ecclesiasticism. Man was little more in the panorama than the herds which Abraham divided into flocks and Aristotle classified. He sacrificed continually upon the altar of the kingdom and the empire. His flocks, his estates, and his person were at the caprice and behest of the potentate, of the anointed king and priest. In the concrete government stood for force, where, of supposed necessity, the ruler — the state — was of more consequence than the constituent.

It was a process of evolution, filtrating through centuries of cruel prerogative, the grossness of superstition, and the selfishness of power, by which the races learned that government without oppression was inseparable from the sense of justice to the individual subject, and that the state was magnified just in proportion as the citizen grew in consequence.

It was reserved for the classic age to give birth to the office of the advocate for the litigant; and it was reserved to our sturdy, rugged Anglo-Saxon ancestry, upon the meadows of Runnymede, to write into the very bonework of our political organism that the state must maintain the rule of justice that hears before it condemns, that proceeds upon inquiry, and renders judgment only after trial.

The world is given to the idea that the lawyer is the mere product of this civilization, the foam on the billows of its ocean. The truth of this history, however, is that no profession among men has been such an important factor in the vindication of human rights and the advancement of universal justice between the state and the subject, and between man and man, as the real lawyer. And just so long as the profession recalls and holds in sentimental devotion its ancient traditions, will it maintain its primacy in honorable achievement and popular respect, and no longer.

With all his advancements in learning, astuteness and craftiness, the advocate has never surpassed in nobility the conception the ancient Greek and Roman had of his office, that without price or retainer he should see to it that the strong should not despoil the weak, or the wrong triumph over the right; which conception, theoretically at least, has been sought to be perpetuated in English and American jurisprudence by regarding him as an adjunct to the courts in the administration of justice.

The underlying thought in all this was not based more on the idealism of the preferment of his envied office than the sense that his transcendent abilities and powers of speech might not become a mere article of purchase, to thwart the ends of public justice, and become a menace to social order.

It is not only a hurtful misconception,

but a deplorable perversion of a calling — that is "the pride of the human intellect" — that for mere hire the lawyer should lend himself to the advocacy of any cause however meretricious, or the promotion or defense of any scheme, however pregnant with danger to the state or to society.

There is no disguising the fact that the tendency of "the learned professions" is too much in the direction of money-getting, regarding their calling rather as "get-rich" opportunities than for honorable achievement and positive good. There are men of "the clerical cloth" who, if they did not answer when some other man was called, yet never fail to recognize in it the voice of God when the trumpet-sound comes from a vineyard proclaiming an increased salary. They "make broad their phylacteries and enlarge the borders of their garments to be seen of men," forgetting that he who was the forerunner of the great Master, whom they profess to serve, clothed in camel's hair, his loins girded with leather, his meat of locusts and wild honey, trod the waste-places and the flinty by-ways with bleeding feet in fulfilling his sublime mission. There are physicians skilled in the arts of materia medica and surgery, so tenacious of what they term "professional etiquet" that they would not sacrifice it to save life in a hovel, from the ravages of gangrene or the agonies of appendicitis; yet who, without standing on the order of their going, will brave reproach and the howling tempest of a midnight storm to reach the gilded home of a millionaire suffering with a gum-boil or the gout; or leave a Belshazzar's feast or a prayer-meeting to answer the call from a hysterical heiress complaining of insomnia, in dread of dying of a rose "in aromatic pain."

And now turning to you, doctors of law, who boast that "the sparks of all the sciences are raked up from the ashes of the law," are you paying devotion less to Mammon than at the shrine of Justice? Do you think more of the cause than the fee? Do you hold your profession as the merchant does his goods, for sale to any patron who has the money? Do you decline a case because you believe it to be dishonest, or does its acceptance depend upon the size of the fee? Do you question the integrity of the case presented and "turn it down," or do you suggest to the suspect how much and what evidence is necessary to win it, with the thought that he will supply it whether false or true? Do you promote strife or discourage and discountenance vexatious litigation notwithstanding the temptation of a large retainer? Do you hear the statement of facts, and then look up the law, and finding the case bad so inform the client, or do you first look up the law and, with a suggestive wink, tell him to get witnesses sufficient to enable you to get beyond the judge on the bench to the jury, who you believe from prejudice or ignorance may be cajoled into a favorable verdict? Do you retain in your service a hired pack of swift bicyclists to chase the ambulance conveying to the hospital some unfortunate injured man from a railroad wreck, to get the suit for damages before the surgeon chloroforms him for an amputation? Do you send your standing expert doctors to attend the autopsy and then hunt up the survivors entitled under the statute to maintain an action for damages?

Do you attend labor-union picnics, and with impassioned words harangue about "government by injunction," "the captains of industry," and the great octopus of capital and the aggressions of corporate power, and like old Cato, who with reiteration exclaimed, "*Carthagena delenda est*," proclaim eternal war between labor and capital; and then descending from the platform distribute your professional cards inscribed "Damage Suits a Specialty"? And when you get beyond the court to the jury, draw a pathetic picture of the squalid home of the one-legged or one-armed victim of an accident, with wife of the scanty dress, sallow cheek, and sunken eye, with skeleton baby pressed to

her desert bosom; and after you have obtained a very considerable verdict and collected the judgment, "cuss the court" for its charge to the jury, and then pocket one half of the proceeds for your fee? Do you go to the legislature and get the laws changed so as to promote pernicious litigation by abrogating long-established rules of law, crystallized by the learning and experience of the most erudite lawyers and the wisest jurists, so that the shyster and the charlatan may have "ample scope and verge enough" to win causes against the lawyer whose fame is the honest work and study of years — *vigilanti annorum lucubrationis?*

It can never be too often said or too earnestly urged that the profession of the lawyer is essentially an intellectual pursuit. It involves the noblest attributes of the mind and heart, and the richest endowments of education. As its practice should be inseparable from the idea that it is the servitor of justice, its pursuit should never cross the side lines of morality or deflect from the pathway hedged about with honor. There should be no place in it for the man who knows no ethics and affects no morality. It should be inhospitable to the charlatan and hostile to the pretender.

The American Bar and Bench are to-day confronted both with a condition and a theory. It is manifest to every observant, thoughtful person, that the body politic is possessed of a fever of unrest. Conditions here and there, inseparable from the energized activities of such a country and such a people as ours, afford occasion for the spasmodic doctrinaire, the agitator, and the pseudo-reformer. Nothing so demonstrates the necessity for stability of fundamental law, and the unyielding adherence to its settled rules of construction, in such times, because they hold in leash the demagogue, the time-server, and the revolutionist.

The shyster proclaims that the Bar Associations design to build up a professional aristocracy and a monopoly in practice. The political demagogue inveighs against constitutional restraints and limitation as impeding and obstructing the present wants and demands of certain classes of the people. The public press arraigns the judiciary for adherence to precedents instead of making "case law," to gratify the unreasoning and unappeasable appetite for sensational, drastic administration of what it calls "opportune justice."

College professors, who often recall what a publicist said, that if he desired to punish an organized community he would assign a philosopher to govern it, are constantly in their lectures hurling invectives against established rules of law and settled principles as false in theory; that they should be abolished in order to liken our system of jurisprudence and procedure to that of the French, to have no legal precedents, but let every case, like the heathen, be a law unto itself.

These idealists would have substituted eighteenth century sociology for our twentieth century notions of organized government. They contend for the social compact theory, that men should obey the government and the law merely because of the advantages they derive from it, and that, therefore, both should be laid aside, as frayed and worn-out garments, whenever the members of the compact conceive that they do not fully share in their beneficence.

Rousseau was the highest exponent of this doctrine, the infection of which caused the brilliant and volatile de Lamartine to assert that "the state takes upon itself the mission of enlightening, developing, spiritualizing and sanctifying the souls of the people," and consequently if it fail in any of these it should not claim either allegiance or service of the citizen.

In contradiction to this, at the dawn of the nineteenth century came Jeremy Bentham, with his clear demonstration of the unhistorical and unphilosophical social compact theory, substituting for it the saving doctrine that law is the common force organized for the composite whole to oppose

injustice, and that the people obey the law, as declared by the courts, because it comes from the source of expounded justice. Macaulay well said that Bentham found the system a gibberish and left it a science. Being invested with force to compel justice, the law can neither oppress any person nor despoil him of his property, liberty, or life, because its mission is to protect; or as Cato expresses it: "The very laws themselves wish that they should be ruled by right."

It is thus that the law gives stability to government, certainty, and assurance to the administration of justice. Under its genius business transactions are least trammeled, fewer artificial obstacles are interposed to individual pursuit, and the freest play is given to individual talent, because the law hedges them about with exact rules, founded on experience and rational science.

If I might be indulged the liberty of an apt term to designate it, I would call certain tendencies of the day spasmodical emotion. The public press has recently excoriated the judiciary for holding that the Federal Constitution means just what it says, that "no person shall be compelled in any criminal case to be a witness against himself." It so declared because mistaken popular opinion took advantage of the revulsion of popular feeling against corruption and bribery in high and low places, demanding that we should, in semblance, return to the epoch of trial by hue and cry, with its concomitants of the thumb-screw, the pillory, and the rack. And forthwith a headless legislature is swept from the pedestal of staid, conservative judgment by an enactment as if it could nullify or suspend the supreme law of the land, little reckoning of the pit from which the framers of our national organic law dug us, and the rock on which they sought to place our feet.

Akin to this ebullition of excitement that is stimulated into dangerous activity on successive temporary provocations, a clamor arises from the press and the hustings about "a millionaire Senate"; and every town and county convention passes resolutions demanding that the Federal Constitution be amended so as to enable some fellow to get into the Senate who is *vox, praeterea nihil.* The man who said that "money talks" did not realize how this would be discounted by the modern politician, who is "a verbal horror and a rhetorical nuisance." Some selfish, ambitious fellow, like a Saxon baron, is able to gather around him in his fortress of influence a band of super-serviceable admirers, whom he teaches to cry out "*Aut Cæsar, aut nihil,*" and thereby prevent the election of a senator by the legislature, and, forgetting the wholesome maxim that "it were better to endure the ills we have than fly to those we know not of" a popular clamor arises for direct election by the people.

Gentlemen of the Bar, I am an old-fashioned believer in the notion that the wisest, the most far-seeing and unselfish patriots the world ever produced were the men who made our federal form of government. They were not school men or pedants, much less were they mawkish philanthropists or "furious doctrinaires." They wasted not their oil in rude lamps over the profundities of Locke, the philosophy of Hume, or the metaphysics of Burke. But they were more heroic than Jason's crew, and they sought and grasped a prize more precious than the poet's fancy. No such state builders, or more cunning artificers of government the world ever saw. They had explored all lands of history, and garnered all that was valuable in statecraft, and all the rich treasures of the science of government. They had felt the keen edge of oppression. They stood at the cradle of republican liberty and witnessed the nation's baptism of blood. They drank from the very air about them the spirit of personal freedom and the abhorrence of despotic power. In the very creed they formulated lurks the spirit of the men who made it.

The framers of our Federal Constitution had, under the old articles of confederation,

experimented with a single popular representative body, as the Congress. They saw its vice, its weakness, and its failure. They realized that in a mere popular assembly like that, swept, as it inevitably was, by intermittent passion, urged by "illicit advantage," under the mastery, often of the impassioned reckless orator, moved by sinister motives, such a body was liable to be led into what Madison described as "the indelible reproach of decreeing . . . the hemlock one day and statues on the next."

They became profoundly impressed with the necessity of the interposition of some more staid, self-poised, independent body, to protect the people against the rashness and sudden passion of their own immediate delegates; for liberty sometimes needs to be protected against itself. After they had debated, deliberated, and sought divine guidance over the best solution, first, whether it should be a senate appointed by the executive from nominations made by the respective state legislatures; or, second, a senate elected by the people; or, third, elected by the respective state legislatures, they adopted the latter without a dissenting voice.

Faults, it may be conceded, the plan may have; but on the whole it has worked wonderfully well for more than a century. By the consensus of publicists and statesmen throughout the world the United States senate is recognized to be, in dignity, gravity and considerate action, second only to the national Supreme Court. It is the great conservative, protective force in national legislation. Let not the ax, swung by ruthless or thoughtless hands, be too eagerly laid at the root of the sheltering tree, planted by the men whose patriotism won, whose wisdom safeguarded, and whose blessings consecrated this largess of liberty and security we enjoy.

The instability and change in the laws is a growing evil in this country. Between one and two thousand statutes are being annually enacted by our state legislatures. The people are encouraged to believe that the remedy for every imaginary ill in state and society lies in legislation. Sumptuary laws, contrary to the genius and spirit of our governmental system, are multiplying in every direction. The personal habits and morals of the people are subjected to legislative regulation. Legislation is urged as a remedy for poverty. It takes supervisory guardianship of our avocations and industries. It trenches upon the office of the church, the schoolhouse, and the forces of personal morality and self-reliance. The state must keep the chinchbug out of the farmers' fields and the grasshopper from sitting on his fence. It must keep the drones and infection out of his bee-hives, and train the bees where to get the honey due. It must keep "the bloody murrain" out of his cattle, and the cholera out of his hogs. It must regulate the markets and the laws of supply and demand. The legislator lays deep and broad, as he thinks, his fame by boasting of the number of bills he introduces, ranging from amending the state and federal constitutions to describing the crook of the worm in the fence. Statutes are created one session to be repealed the next. No business man, or association of men, can venture upon any business enterprise under an existing statute, without apprehended danger of its early change or modification, or some new regulation or burden imposed upon it.

No lawyer can rely upon the garnered wealth of a life of study as to the rules of evidence and principles governing the rights of men, lest all may be changed by the legislature in session.

When the late Senator Vest and myself were practising law as partners, we were assigned by the court to examine a long sycamore fellow from the Wabash, Indiana, on his application for admission to the Bar. I took him over the perfunctory grounds of the text-books. He could not answer correctly a question. I said to him: "My friend, you do not appear to have read any law books at all." He answered that he

had been teaching school in the country, boarding with Squire A., a justice of the peace, who told him that all a man had to do to qualify himself for the practice of law was to study the statutes: "Try me on that, and I will answer you." Whereat Vest put in and said: "Young man, that won't do at all. The next fool legislature that meets at Jefferson City is liable to repeal all you know."

No greater service could be rendered to the state by the Bar Associations than to encourage representative lawyers now and then, prepossessed with no "fad," with no self-serving schemes to promote, but inspired with a lofty sense of duty to the commonwealth, to go to the legislature, even if they have to "stoop to conquer" to get there, and weed out as much as possible the tangled growth that chokes our statutes. He could at least challenge the attention of the lawmakers by reading to them the yet burning words of Madison, which have lost nothing of their virile force and applicability in the wear of 116 years: "What, indeed, are all the explaining and amending laws which fill and disgrace our voluminous codes but so many monuments of deficient wisdom — so many impeachments exhibited by each succeeding against each preceding legislature. . . . It is of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is to-day can guess what it will be to-morrow. The law is defined to be a rule of action, but how can that be a rule which is little known or less fixed?"

One of the greatest burdens of responsibility laid upon the judiciary, state and federal, results largely from inconsiderate, rash, and reckless legislation, to say nothing of confronting those malcontents that infest every community, like carrion birds of prey looking for putrescence, or stormy petrels fledged amid the waves and nurtured in the tempests of agitation and disorder. Legislators strive to meet the unreasonable demands of these interests and classes, growing out of our complex industries and stimulated enterprises. Any measure or policy, however drastic, visionary, or extreme, goes into enactment or resolution, under the fury of passion and the spur of momentary expediency. It is all-sufficient if it but meets the impulse of the hour.

Woe unto the judge who must pass upon their legality! Yet, he must keep faith with the law as the Mussulman keeps the faith of the Koran, and the Christian that of his Bible. In doing it the judge, at times, finds his Gethsemane; and he must bow his devoted head to the vials of wrath, poured from tongue and pen of the disappointed authors of illicit conception. "In all that tries men's souls how few withstand the test!" It requires a sublimer courage for the judge and the lawyer, under such conditions, to stand firm, and vindicate the supremacy of law than that of the soldier who confronts the cannon's mouth, or the fireman who mounts his ladder, wreathed in flames, to rescue human life from a burning building, or that of the life-saver who lashes himself to his boat, to beat the angry billows, to save the shipwrecked crew in the midnight storm. The unyielding proprieties of his office will not admit of either asking, and, perhaps, paying at advertising rates, for space in the public press, or to take the hustings, in his defense. He can only lift his beaming forehead to the heavens, and let the tempest expend its fury; trusting to that transmuting power "without which we are poor, give what you will; with it rich, take what you will away" — the consciousness of having done duty as an enlightened conscience gives him to see it.

There is, however, connected with such epochs of sporadic distemper the opportunity for the real lawyer and the true judge. They disclose the stuff he is made of, the

gold or the dross that may be in his mental or moral make-up.

It has been said of John Marshall that he found the Federal Constitution a skeleton and clothed it with flesh and blood, made it a breathing, living thing. But I question if any one act in his great life laid deeper and broader the pedestal of his enduring fame, in the reign of law, as when he displayed the intellectual honesty and moral courage, despite his personal inclination, to say to Thomas Jefferson and the aroused antagonism of an incensed public opinion that the law of the land, which he was sworn to respect and enforce, forbade the sacrifice of even Aaron Burr to appease the appetite of public clamor. When now and then the Jack Cades thunder at the gates of the citadel of our constitutional guaranties of liberty and property, proclaiming to their tatterdemalion followers: "The first thing we do let us kill all the lawyers," and the sentiment is echoed from the press and the hustings, we should never forget for the moment that it was the ineffaceable infamy of a Pontius Pilate who, after conceding that he found no evil thing in the humble Nazarene arraigned before him, yet released the culprit Barabbas, and surrendered to the mob for execution the purest man whose life ever gladdened the world with light and hope.

Unless it was written in the irrevocable chapter of destiny, or foreordained, that Jesus should thus be sacrificed, to quiet for the moment the mob, I have always felt that if "Judge" Pilate had before him such a lawyer as Cicero, or such lawyers as those who defended Aaron Burr, the vertebra of the judge might have been strengthened and the mob been talked down, and the infamy of the trial fallen to the lot of Judas Iscariot. For no matter how strong or how weak the man who sits on the bench, he must, after all, lean for support upon the bar. The brightest and sweetest flower that sheds its fragrance upon the air will choke and wither amid the overgrowth of noxious weeds. A platoon of pigmies can pull down a giant. A Thersites may confuse with ribald jest an Achilles. Evil communications not only corrupt good manners, but our environments often stifle our aspirations and stunt our mental and moral growth. The sun draws skyward the cedar tops; but the tramping of herds about the roots will cause it to decay and fall. The judge is often but the mirror that reflects the character of the bar around him. If he give back distorted images of justice and righteousness, it is much because the lawyers about him are crooked and warped. If the bar be inspired by high ideals, standing *rectus in curia*, exhibiting true nobility of character, intellectual greatness and rare culture, the tendency is to make the judge himself what Cicero lauded as *perfectus magister*. If there be any noble impulses throbbing in the breast, or any Promethean spark alive in the soul, the one will bear sweet fruit and the other will blaze out into generous light when the social atmosphere we breathe is pure, and the voices we hear come from the mountain elevations of Truth, Honor, and Justice.

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The Green Bag

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Communications in regard to the contents of the Magazine should be addressed to the Editor, S. R. WRIGHTINGTON, 31 State Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

WITH the approach of the summer vacations, and the gatherings of lawyers at the annual meetings of their associations, the profession grows introspective and scores its own faults or sings them down in praises as the mood of the orator dictates. In this number the ethics of the profession are touched upon from many points of view, and we trust that none will prove without interest or instruction. Although the man of solid business ability may have overshadowed the advocate in the law as well as in politics in the great commercial development of recent years, the fact remains that when the evils bred of prosperity have to be rooted out, the man who has been trained in the contests of the courts is the one to be called to public duty. Critics of our profession have recently been shocked by the revelations of the so-called venality of the Philadelphia Bar when Mayor Weaver had to seek in another city the legal advice which the leaders of his profession at home were bound by retainers to refuse. Whatever may be said of the practice of accepting retainers merely to preserve neutrality, one can hardly despair of the public spirit of the profession when one recalls that the cleansing of Philadelphia, as of St. Louis, has been the work of a lawyer. The conception of devotion to a client which is inbred in a lawyer can hardly fail to affect his attitude towards all other phases of the life of which he is a part, but it is this same spirit that makes him the fearless and devoted champion of the public, when once he conceives the call to public service as a trust imposed by the greater client.

Mr. Bonaparte has been best known as a reformer, yet his work has always been that of an advocate. He has been most recently conspicuous as the special counsel appointed to prosecute the cases against the delinquent postal officials. A biography by an impartial student of a later generation may inspire greater confidence in the correctness of its estimate than an appreciation by a contemporary; but in view of the inevitable limitations of a sketch of a man while in the midst of his activities, it is pleasant to find now and then in such a publication the ring of personal and intimate friendship, which at least must know and understand the inner life that distinguishes a man from his fellows.

Mr. Reynolds was born in Baltimore in 1842, and admitted to the Bar of that city in 1863. Though he has published two small law books, "A Digest of the Law of Evidence as Established in the United States," which was an adaptation of Mr. Justice Stephen's well-known work to our law, and "The Theory of the Law of Evidence" which, though originally published in 1883, is still a text-book in some of our leading law schools, Mr. Reynolds has been devoted to active practice, and only because of his relations to the subject of his sketch, which he so frankly explains, did he consent to take time from the busy ending of a trial term to write for us his recollections of the legal career of Mr. Bonaparte.

THE nation now listens eagerly for the word of Governor Folk, and his professional brethren are glad that he does not forget their needs amid his wider duties. We are permitted to publish his address delivered in June before the Kentucky State Bar Association. Those who read the sketch of his legal work in our February number, in which his portrait was our frontispiece, will appreciate, perhaps, his allusions to the difficulties of his task in St. Louis. No one, however, who has not experienced the personal pressure to which a public prosecutor is subjected, can fully understand the inner meaning of his words or the real greatness of his example.

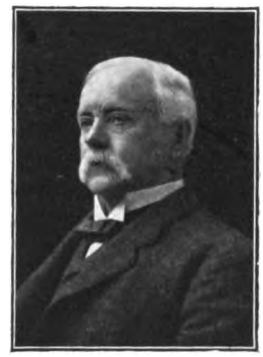
THE majority decisions of the Supreme Court of the United States continue to appear to settle for us questions of the gravest consequence, by placing limits to the progress of social and economic forces. The decision in People *v.* Lochner, in the estimate of one of the dissenting judges, is portentous of danger, and the discussion by Professor Freund, which we present, seems to bear out this estimate. The author is peculiarly qualified to pass upon this question, since his work at the Law School of Chicago University has included the teaching of this branch of constitutional law, and he has recently published a treatise on the Police Power. In connection with his article, the reader whose interest in the subject may lead him further, will find it valuable to compare the author's views in this book, written before the announcement of the decision which is the subject of his article.

HON. EMLIN MCCLAIN.

To the lawyer of the Middle West, the Roman law is still a subject of great interest, and at times even of practical importance. We recently published a letter from Hon. Eugene F. Ware of Topeka, which was inspired by study of the Pandects of Justinian in preparation for a trial, and other recent instances are referred to in Judge McClain's contribution to this number.

The author has been identified with the development of the law of Iowa for many years, formerly as a professor of law in the state university, and now as a judge of the State Supreme Court. He is the author of several well-known legal text-books, the most recent of which is "Constitutional Law," a work for non-technical study. The article we publish is in substance an address which he delivered before the Nebraska Bar Association last year, and again before the Missouri Bar Association in May.

THERE is a ring of the voice of the lawyer of the old school in the comments on some of the conspicuous and sometimes unpleasant features of modern practice, which we print from the pen of Judge Philips. In the sting of his criticisms should live a cleansing influence which many of us daily need. The article is in substance his address before the Minnesota State Bar Association in May.



HON. JOHN F. PHILIPS.

The author is a native of Missouri where he was born in 1834. He graduated from Center College, Kentucky, in 1855, and began the practice of the law at Georgetown, Missouri, in 1857. In 1861, he was a member of the Constitutional Convention to determine the relation of the state to the Union, and he organized and led a cavalry regiment in the Union Army. After the war, in partnership with the late Senator Vest, he resumed his practice until his election to Congress in 1875. From 1883-1885 he was a member of the State Supreme Court Commission, and for the next three years presided over the Kansas City Court of Appeals. Since 1888, he has been United States District Judge for the Western District of Missouri.

CURRENT LEGAL ARTICLES

This department represents a selection of the most important leading articles in all the English and American legal periodicals of the preceding month. The space devoted to a summary does not always represent the relative importance of the article, for essays of the most permanent value are usually so condensed in style that further abbreviation is impracticable.

ADMIRALTY (Australian Federal Jurisdiction)

THE resemblance of constitutional problems in Australia to our own appears from an article by F. L. Stow on "Maritime Law and Jurisdiction in Australia" in *The Commonwealth Law Review*, for May (V. ii, p. 157). He discusses the extent of admiralty and maritime jurisdiction conferred on the Federal Government, and concludes that it is limited to shipping concerned in interstate or external commerce. He advocates further extension similar to that of our admiralty courts.

AGENCY (Estoppel. Liability of Principal)

JOHN S. EWART in an article entitled "Estoppel by Assisted Representation" again returns to the defense of the doctrine of estoppel in the June *Columbia Law Review* (V. v, p. 456) in a reply to the article by Thaddeus E. Kenneson in the April number of the same review, which was reviewed in our May number. The issue he states as follows — "An agent having authority from a company to issue warehouse receipts for goods received, fraudulently issues one to a confederate without having received the goods mentioned in it; the confederate passes the receipt to a purchaser in due course; it is agreed that the purchaser is entitled to hold the company to its receipt and the question is, Upon what ground does he base his right?"

With reference to Mr. Kenneson's argument, he suggests: "(1) that the case in hand is not one in which it can be said that 'the principal has done nothing to induce' the purchaser of the receipt to believe in the existence of real authority; and (2) that the case belongs to a most extensive class of cases for which I have ventured to enunciate the principle of 'estoppel by assisted misrepresentation.'"

In explanation of this he quotes from his well-known work on Estoppel as follows: "One man may be estopped by a misrepresentation made by another, when the former, in breach of some duty to the deceived person, has supplied the defrauder with that which was necessary to make the representation credible. If the fraud was accomplished without assistance, there can, of course, be no estoppel (of any one but the defrauder). If, although there was assistance, yet the assistance was an immaterial factor in the accomplishment of the fraud, there ought likewise to be no estoppel — the assistance did not furnish the occasion or the opportunity for the fraud. But if the assistnce was in some way essential to the success of the fraud — furnished the occasion or opportunity for it; made credible a representation which without it could not have been successfully made — then, if there has been a breach of some duty in rendering that assistance, estoppel will ensue."

He further calls attention to his classification of these cases, in both of which classes he finds that the courts hold the principal estopped.

"A. If an agent acts within what appears to be his authority, the principal is bound.

"B. If an agent appears to be acting within his authority, the principal bound."

"There may be appearance as to the *extent* of real authority (A); and appearance as to the act being *within* the real authority (B) — appearance in relation to the authority (A), and appearance in relation to the act (B)."

Under one head or the other he believes all the cases may be grouped.

BIOGRAPHY (Thomas Jefferson)

AN interesting account of Thomas Jefferson as a lawyer by G. A. Finkelburg, suggested by the finding of Jefferson's copy of Mercer's Abridgement of the Laws of Virginia, is published in the *American Law Review* for May (V. xxxix, p. 321).

CONFLICT OF LAWS (Foreign Judgments)

JURISDICTION Over Non-Residents in Personal Actions is discussed by Edward Q. Keasbey, in the June *Columbia Law Review* (V. v, p. 436). Referring to the article by Sir William Kennedy on this same subject, in the *Journal of the Society of Comparative Legislation*, reviewed in our February number, he calls attention to the fact that in defining the "irreducible minimum of the requirements of a foreign judgment which the Courts of any country should give effect to" he purposely omitted the doctrine of Pennoyer *v.* Neff, *viz*: that to give jurisdiction *in personam* there must be service of the writ within the jurisdiction. The author then explains the distinction between the English and American law in that the former by statute in some cases permits service of the writ beyond the jurisdiction in actions *in personam*, which the author regards as of importance to us in view of "the tendency of our courts to apply the doctrine of Pennoyer and Neff to cases in which they are not bound under the Constitution to accept it as law, and in view of the great practical necessity there is for giving some effect to service of notice beyond the limits of several states within one country."

"The English courts recognize that they cannot pronounce a valid judgment when they have no jurisdiction, but under the orders of court permitting service to be made on a foreigner abroad in cases relating to contracts made in England or to be performed in England, they do not admit that the service of process within their own territory is essential to jurisdiction, nor that the service of a foreigner abroad in a suit on an English contract is not due process of law." The courts of the state of the former, therefore, will recognize the judgment. This the author thinks we should adopt as law.

CONSTITUTIONAL LAW (Federal Corporation Law)

To the June *Columbia Law Review* (V. v, p. 415) H. W. Chaplin contributes an illuminating discussion of the problem of "National Incorporation." He criticises at the start the habit that has been assumed of considering the question solely with reference to the power of Congress to regulate interstate and foreign commerce, and in his discussion he treats of a number of provisions of the Constitution of the United States, which bear upon this question.

First. The power of Congress as a local sovereign to authorize incorporation in the District of Columbia, or the territories, which corporations have power to compete with those of the states.

Second. Congress, in the enforcement of a national police power in the interest of public order, so far as its power of legislation extends, may establish a code of morality or propriety and may enforce it throughout the entire field of national activity.

"From the very infancy of formulated law among the English-speaking peoples, an assumption by any individual, without special dispensation, of more than what was considered, at a given time or place, his reasonable share of business or of work — an assumption, that is to say, of a share so great as to interfere with the free and natural flow of trade, or with the necessary or natural and proper opportunities of others — has, with or without legislation, been deemed dishonest, or immoral, as inconsistent with wholesome conditions in the community. 'Forestalling,' 're-grating,' 'engrossing,' general or local 'monopoly,' contracts 'in restraint' of 'trade' or of 'labor,' have, at various times and in different forms and in different degrees, been in conflict with the sense of fitness and propriety of the English-speaking peoples. For centuries, the record has been unbroken; differences and distinctions have been only in applications of the general rule. Congress, in the Sherman Act, has adopted the general principle into the body of Federal public policy; and, having adopted it, has — under the interpretation given to the Sherman Act by the Supreme Court — carried the principle to a degree of strictness and rigidity never before known, and has introduced it, as a compulsory standard, into the whole field of interstate and internation commerce. As with monopoly, so with combination. From time immemorial, the common law has drawn a distinction, not merely of degree, but of kind, between action of a single individual, and combined action, or even joint planning, of two or more persons." In fine — harsh and unfamiliar as the proposition is, when put nakedly — the mere fact

of a joining of forces between two or more individuals, is a matter raising directly the question of public policy, and giving jurisdiction to the courts and to the law-makers.

Congress has power to expand the limits of monopoly and combination as known at common law, as it has by the Sherman Act forbidding not merely unreasonable but all combinations in restraint of trade, omitting the element of degree, although that had always previously been an element in the application of the principle. "It is, therefore, competent to Congress — we are speaking here, in a purely academic way, of power, not of policy — to exclude from the national field, on the ground of public policy, not only corporations, but partnerships, boards of trustees of Trusts, and, in fact, any group of two or more persons; and there is no sacredness in state incorporated association, as against Federal power, above other forms of association. We do not need to undertake to draw from this national power of exclusion, in and of itself, the conclusion of the power of Congress to require a national charter; but the power of exclusion tends to make this conclusion more easy of domestication in the mind."

Third. From the incapacity of the states under Art. 1, Sec. 10, to make compacts or agreements with each other, without the consent of Congress, it may be inferred that Congress can legislate in the vast number of instances where corporate business is done under the joint power of two or more states.

"It may be said, in reply, that the present system works smoothly; that — in respect of railroads, for example — out of the very incapacity of the states to bind themselves to each other by compact, deft nature has, by a beneficent evolution, developed in the states a capacity to act in steady concert without binding compact; and that this pleasing result nullifies all *a priori* argument drawn from the incapacity to contract. 'Behold, how good and how pleasant it is for brethren to dwell together in unity!' Undoubtedly, there is a good deal of truth in the statement of actual harmony and concert; but, to complete the picture, it should be added that, in a large degree, nature has evolved the present harmony in railroad legislation, by putting the control of the state governments, in respect of railroad matters, largely into the hands of the railroads. It is not so much that the states have developed a golden age of harmony among themselves, as that they have been rolled flat by the railroads."

Fourth. The absence of power in a state to exclude a corporation of another state engaged in interstate commerce, rests not upon any affirmative constitutional or other provision, but upon the fact that the regulation of such commerce is exclusively for Congress, and that if Congress does not regulate it, it goes without regulation.

"The field of interstate commerce activity is, so far, a vacant region, where each man raises his Ishmael's-hand against his fellow-man, not because he has the right to do so, but because no one who has the power to stay him has interposed. It is not questioned that Congress has the right to put an end to this lawlessness; to substitute law for absence of law; to substitute government for anarchy. But, it is constantly said, Congress can do so only in the form of establishing rules for state-chartered corporations. But these rules, it seems clear, may go to the exclusion of such corporations altogether, on the ground of a federal policy of law to that effect. Or, without going so far, Congress could certainly fix uniform rules of capitalization, stock-issue, and all other internal affairs of state-chartered corporations as conditions precedent; for it has been solemnly adjudged that state corporation-charters do not override the Constitution and laws of the United States, and without the power to prescribe such symmetry and uniformity, there would be no effective power to regulate. The several states, therefore, in order to hold the field for their respective corporations, would, at the demand of Congress, at least have to enact corporation laws according to a form prescribed by Congress. A power to dictate legislation travels close to a power to legislate."

Fifth. "Much of the vagueness and uncertainty that pervades the discussion of this subject, arises out of a failure to recognize the fact that the field, except in so far as the national legislature has dealt with it, is unoccupied." "No intelligent settlement of this question can ever be had, until there is not merely a formal, lifeless, literal admission, but

a general familiar recognition of the fact that — with some slight qualifications not necessary to be dealt with here — this vast and all-important field is, and can be occupied and controlled by no government at all, except in so far as it is or shall be occupied by the national government."

Sixth. "Congress, when it adopts a rule of public policy, can apply it in any field of national action. Such is the only possible conclusion from the Lottery Case. It follows, that Congress, if it should adopt a public policy adverse to the present heterogeneous system of large rival state-chartered corporations, warring among themselves, could, without resort to the interstate commerce clause, exclude state-chartered corporations, or such types of them as it might deem obnoxious to public policy, from the mails, and from periodicals carried in the mails; from the holding of patent rights; from the national banks; from admiralty waters, including the great navigable rivers and the Great Lakes; and from the other agencies and fields of government influence or action."

Some of the difficulties urged by opponents of national incorporation the author meets as follows:

1. It would not be necessary to dissolve existing state corporations. The transformation of state into national banks suggests an appropriate method.

2. A national corporation could do local business as an incident to its interstate business.

3. If manufacturing is too important an element to be regarded as an incident of the power of sale, dual incorporation at the most would meet the difficulty.

4. Holding corporations are in their very essentials in conflict with the general law of corporations and should be abolished rather than perpetuated.

5. The existing property rights of state corporations need no more be disturbed than were those of the state banks in the sixties.

6. The right of way of railroads held under the state's power of eminent domain can, if necessary, be retaken under the national power incident to the power to establish post roads without further compensation to the original owners.

7. The federal license applied to corporations would be workable and, as a preventive, more efficient than the enactment of penalties for past wrong-doing.

CONSTITUTIONAL LAW (History. Right of Courts to Declare Legislation Unconstitutional)

IN the June *Yale Law Journal* (V. xiv, p. 431) Gordon E. Sherman, in an article entitled "The case of John Chandler *v.* The Secretary of War," discusses the early history of decisions by the courts that acts of the legislature are void because in conflict with the Constitution. The case which is the title of the article, though generally overlooked, is the earliest decision of the Supreme Court of the United States which passed upon this question, and it, rather than Marbury *v.* Madison, should be deemed the source of the modern doctrine. The author also considers the early English cases holding town by-laws invalid as in conflict with the charter, and collects interesting instances of analogous situations in other countries of ancient and modern Europe.

CONSTITUTIONAL LAW (Interstate Commerce. Rate Regulation)

A VERY important contribution to the discussion of the problem of railroad regulation is given by Victor Morawetz in the June *Harvard Law Review* (V. xviii, p. 572) in an article entitled "Congressional Railway Regulation." The author lays down at the outset the following propositions.

"1. Unreasonably high rates are illegal. A public carrier is prohibited by the common law from making any unreasonably high charge, and this common law prohibition has been reinforced by the Interstate Commerce Act as to all interstate rates of railway companies. Congress has also strictly prohibited interstate carriers from making any unjust discrimination of any kind. These statutory prohibitions undoubtedly are constitutional and valid."

"2. The states have power to regulate domestic rates."

"3. Congress has power to regulate interstate rates, but the power is not necessarily coextensive with the power of the states to regulate charges in respect of domestic transporta-

tion, for Congress cannot regulate rates except as a regulation of interstate commerce. It cannot, moreover, prefer the parts of one state over those of another, or deprive a company of liberty or property without due process of law."

"4. Neither Congress, nor a commission created by Congress, can fix the rates of a railway company solely on the basis of the value or of the cost of its property — rates can be fixed only on the basis of allowing the carrier to charge in each case reasonable compensation for the services rendered. In determining this the aggregate profits of the carrier undoubtedly may be considered; but there are also many other elements that must be taken into account."

"There are several reasons why the rates of a railway company cannot be fixed by Congress, or by a commission created by Congress, on the basis of the cost of the property of the company, or upon the basis of its income."

"(*a*) It is an axiom of railroad rate-making that rates between the same points must be alike on all competing lines, because if they are not alike, the business will go to that line which makes the lowest rate. Therefore, in case two competing lines would not be equally prosperous if both should charge the same rates, it would be impossible to fix their rates in such manner as to yield to each the same relative net return upon the cost of the property. If the rates charged by the more prosperous company upon competitive business should be reduced so as to cut down its net income, the less prosperous company would be compelled either to reduce its rates equally or to lose all the competitive business, and in either event might be ruined."

"(*b*) It would be impossible to fix the rates of a railway company on the basis of the net income upon its entire property, so long as the regulation of rates for transportation wholly within a state remains subject to state control and not to the control of Congress."

"(*c*) The owner cannot be deprived of the fruits of his skill, industry, or thrift."

"5. Railway rates, like the charges in any other business, are determined largely by considerations of business policy and cannot be fixed by the application of definite principles or hard and fast rules."

"In nearly every instance there is a wide range within which any rate would be just and reasonable, and it is wholly a question of business policy at what point the rate shall be fixed within that range."

"It would be utterly impracticable for a legislature, or a commission, to exercise intelligently the wide business discretion necessary to adjust railway rates to meet the varying conditions of trade. It would seem also that an act of Congress taking away from a railway company its business discretion in the adjustment of its rates, would be unconstitutional, because depriving the company of its liberty and property without due process of law. However, the decisions of the Supreme Court indicate that the legislature of a state, or a commission created by a state legislature, can, to some extent, substitute its own business judgment for that of the railway companies in fixing their rates."

"6. To fix the rates to be charged by a carrier in the future is a legislative, not a judicial act."

"7. Congress cannot confer judicial powers upon the Interstate Commerce Commission. It can confer judicial powers only upon courts established in the manner prescribed by the Constitution."

"8. Congress can confer upon a commission power to fix, subject to review by the courts, the maximum rates that would not be unreasonably high and extortionate as against shippers, but it is doubtful whether or not Congress can vest in a commission the purely discretionary power to fix rates as it sees fit. Congress can prescribe general rules for the regulation of the charges of railway companies, the function of a commission being 'merely administrative in carrying out the declared will of Congress to prohibit excessive or unjustly discriminatory rates.'"

"9. Congress cannot vest in the courts power to fix future rates, or to consider and pass upon the wisdom or policy of the commission in prescribing a particular rate which is neither confiscatory nor unreasonably high. It is well settled that Congress cannot constitutionally require the courts to perform any duties that are not of a judicial character. It cannot require the courts, directly or indirectly, to perform duties of an administrative

or of a quasi-legislative character. It follows, therefore, that Congress has no constitutional power to require the courts to exercise the legislative or quasi-legislative power of a commission in fixing the rates to be charged by a railway company. If Congress cannot give to the courts original power to prescribe what rates the railway carriers shall charge, it cannot require them to reconsider the whole case as it was considered by the commission, and to pass upon the wisdom and policy of the action of the commission in fixing a rate. The courts undoubtedly can pass upon the question whether a rate is unreasonably high, and therefore unlawful, or whether it is in violation of a legal order made by the commission. They can also pass upon the question whether the action of the commission in fixing a rate is constitutional, that is to say, whether it would in effect amount to confiscation of the property of the carrier. No constitutional statute can be drawn that will give to the courts power to hear the question *de novo*, as in case of an appeal of a cause in equity, and to reconsider the wisdom and policy of the commission in fixing any particular rate between the two extremes of legality referred to above. No statute would be necessary to give the railway companies power to resort to the courts, in order to restrain confiscatory action of the commission, and no additional protection through the courts can be conferred by Congress. It follows, therefore, that a grant of power to a commission to fix rates, in its discretion, would vest in it practically autocratic power, subject to no control by the executive or by the courts, to dictate the policy of the railways of the United States, and autocratic power to make or unmake the prosperity of different sections of the country so far as this would depend upon the rates of transportation."

"10. A grant of discretionary power to fix railway rates within the limits of legality, as heretofore defined, would necessarily include power, through an adjustment of rates, to affect the relative rates of different localities, and to aid one locality in the country at the expense of other localities by establishing a differential. Stated baldly, this would mean that Congress, or a commission, can take away from a particular port its natural advantages by granting a law-made advantage to other ports by means of a preferential regulation of commerce. The Constitution provides that no preference shall be given by *any* regulation of commerce to the ports of one state over those of another. To hold that Congress or a commission can by law give to the various ports such preferences as, in the judgment of Congress, or a commission, will equalize their natural advantages, would wholly destroy the value of the constitutional prohibition."

CONSTITUTIONAL LAW (Police Power. Contracts)

IN the June *Michigan Law Review* (V. iii, p. 617) is published an article entitled "Freedom of Contract," by Jerome C. Knowlton, which is interesting in connection with the article by Professor Freund in this issue. The author begins with a discussion of the definition of the word "liberty," as used in the fourteenth amendment, which he applies first to cases of contracts with municipalities, then to contracts between individuals. In his consideration of the true scope of the police power as affecting these, he agrees in most respects with the views of Professor Freund.

CONSTITUTIONAL LAW (Taxing Federal Agencies. Australia)

ANOTHER instance of the force as precedents in Australia of our constitutional decisions is discussed in the May *Harvard Law Review* (V. xviii, p. 559) by H. B. Higgins, K.C., late Attorney-general for Australia, in an article entitled "McCulloch *v.* Maryland in Australia." It appears that our doctrine that federal agents are not taxable by the states since "the power to tax is the power to destroy," has been held to be implied from the nature of the Australian Federal Constitution in a decision that a tax on salaries of federal officers is invalid, and that this distinction of federal from state officers has caused surprise and indignation.

He criticises Marshall's method of free interpretation as statesmanlike rather than lawyerlike, and due really to the difficulty of amendment of our Constitution. He also suggests that it was unnecessary, since Congress must have had power to protect its agencies by express legislation. Admitting the cor-

rectness of the doctrine for us, however, he contends that our decision is no precedent for their case, especially as the language of the two provisions is not the same.

CONTRACTS (Conditions)

A DISCUSSION of the law relating to the "Conditions in Contract," by Clarence D. Ashley, appears in the June *Yale Law Journal*, (V. xiv, p. 424). The author contends that the common classification of such conditions is erroneous, and that in reality there is no such thing as a condition subsequent in contracts; that conditions usually so-called are either in truth conditions precedent or in certain special cases "limitations attached to the procedure."

In answer to the contention that by drawing their conditions in the form called subsequent, parties "indicate their intention that the burden of establishing, in reference to such condition precedent, shall be shifted from the plaintiff to the defendant," he answers that "it is not at all probable that the parties had such intention and it does not appear that the courts have decided on that ground." "Where they have held that the burden was upon the defendant, it seems to have been solely upon the ground that they supposed they were dealing with a true condition subsequent and that, therefore, the burden was naturally upon the defendant. The fault was with their analysis."

COPYRIGHT (Duration of)

To the June *Yale Law Journal* (V. xiv, p. 417) Samuel J. Elder contributes an article on "Duration of Copyright." After showing some uncertainties and inequalities in the operation of the present law, he contends for more extended period of copyright than that now accorded in this country.

"There is," he says, "no abstract reason why men should not have the right to leave to their offspring the work of their brain. Everything that can be said in favor of absolute ownership of the work of a man's hands can be said of the product of his mind, and more. But society steps in at this point and says that the right of all is greater than the right of any one, and that it is necessary at some time that contributions to knowledge and literature should become public property. So that the question to be decided is, at what time does the public need require that private copyright shall cease? No help is to be had from the term of patents. The industrial world needs the right to use inventions speedily. Progress in mechanical and electrical arts is constantly stayed by prior patents, to which tribute must be paid. The daily life and work of the people is affected. And, besides, there is no such thing as "fair use" of a patent. An author's work may be quoted, criticised, made the basis of discussion up to the point of reducing its salability. No other writer is hampered by it. So that he does original work, he may reach, write, and publish the same result as the original author and may use the latter's work to help him do so. Not so the patent. It is an absolute barrier and its existence should be short."

HISTORY (Code of Hammurabi)

IN the *American Law Review* (V. xxxix, p. 330) Owen B. Jenkins describes "The Code of Hammurabi, Compared with American Law." From an examination of the recent translation of this ancient tablet, he finds that civil and criminal laws were not scientifically divided but interlaced each other, the punishment for a crime being mentioned when the crime was suggested, by the definition of a civil right which it would violate. Although in this sense rambling, the code develops certain principles of jurisprudence, foremost among which is that of restitution. The *lex talionis* is also given full sway. The doctrine of local responsibility resembles the early Anglo-Saxon responsibility of the "hundreds." There is also an apparent effort "to make the punishment fit the crime." There is very little superstition in the code, and many of its provisions agree with our law, and some of them anticipate its development, for example, in Babylonia, the husband was not liable for the wife's debts contracted before marriage. "All obligations of this kind ended in Pennsylvania in 1848 and in New York in 1853, which states are now on the footing of Hammurabi's code in this matter. After the young household was started all property jointly or severally held by it, was liable for debts contracted in its behalf, a more equitable arrangement than

the common law rule generally followed in America by which the wife's property escapes liability for household debts including the cost of her own food and clothing." Fines were levied in proportion to the wealth of the offender, and the fees of all occupations were similarly regulated.

In concluding, he says: "But one cannot review the entire code, section by section. A body of statute law that contains many enactments of the highest wisdom and equity only in part touched upon here; that distinguished through the lens of testamentary jurisprudence the difference between a gift and an advancement; that permitted the creation by will of a power of appointment; that adorned the law of evidence with statutes of frauds and perjuries; that softened the relation of landlord and tenant with an abatement of rent when storm or drouth destroyed the crop — a concession whose legal assurance is unknown in America; that would not suffer a distress for rent on warehoused goods; or on the means of livelihood; and that embodied its high jurisprudence in sure and permanent form at the dawn of history as a full precedent of civil justice for the guidance of innumerable generations of mankind, must excite our lasting admiration and gratitude."

MUNICIPAL CORPORATIONS (Constitutional Law. Special Legislation)

An interesting examination of the confusion in the law of municipal corporations, introduced by the modern constitutional prohibitions of special legislation, is published in the June *Harvard Law Review* (V. xviii, p. 588) entitled, "Special Legislation for Municipalities," by Harry Hubbard. The author describes the devices by which legislatures construct general classifications which will include only a special city. These are usually based on population.

Some states hold that, "A classification according to population is valid which treats alike all cities which now have or hereafter may have a certain population. The provision which makes such legislation apply to all cities which hereafter may have the prescribed population, is supposed to relieve it from any objection. It matters not that the cities may not actually grow to have such a population; the mere possibility of such growth is sufficient." He objects to this as "a classification of mere possibilities," and because any classification by population "is necessarily arbitrary."

"Some courts, in attempting to find a principle on which to ground their review of legislative classification, have announced the rule that this classification must be germane to the purpose of the legislation." . . . "The courts state that this is a rule which the legislature ought to follow and they will themselves look into the question of the necessity and propriety of a statute. There are at least two objections to this: First, it is not a proper function of a court to determine what legislation is necessary or proper; that is emphatically the function of the legislature; second, it is impossible as a matter of practice for the legislature to conform to any such rule."

After describing other devices to evade these restrictions which are productive of equal confusion, the author then pays his respects to "the idealists," who are responsible for these constitutional provisions and indorses a return to frank special legislation.

WILLS (Construction. Legacies to Servants)

In the *Canada Law Journal* (V. xvii, p. 425) C. B. Labatt publishes a brief treatise on the law of "Legacies to Servants."

THE LIGHTER SIDE

Music Hath Harms. — The case of a Polander for naturalization was being heard in our District Court, and on examination, as clerk, I asked the applicant as to whether he was affiliated with any secret organization which had for its principles the overthrow of the government, the killing of its officers, etc., trying to explain to him the requirement of the late section of the statute, which was enacted to refuse anarchists naturalization. The applicant answered, "No, except that I am a member of the Thorndike brass band."

A Carrying Voice. — A New York lawyer was famed for a stentorian voice. Once his clerk asked to adjourn a motion in New York on account of Mr. H——'s engagement in Brooklyn.

"Let him speak," said Judge B——. "I can hear him here."

Leaning on Liens. — In a mechanic's lien case, Mr. Kneeland often referred to his own book on the subject. During recess, Counsellor Malcolm Campbell wrote on the table paper:

"O Kneeland, dear Kneeland, pray what do you mean
By such a fat book on the subject of *lien?*
Was it for glory, or was it for pelf,
Or just for the pleasure of quoting yourself?"

Hairs at Law. — In an excise case in Brooklyn, one of the witnesses for the state said that on a second visit to a "hotel" on Sunday, the same sandwich was served that he had before. He recognized it by a hair.

"Oh!" said Judge Dickey, "it was old enough to have whiskers, was it?"

Dog Latin. — (Plaintiff's Atty. addressing Jury.) . . . "Falsis *in unum*, falsis in omnibus."

(Court, interrupting.) "*Uno*, Mr. B——."

(Plaintiff's Atty.) "I do know, your Honor, and this man will know before I am ended."

Circumstantial Evidence. — (Atty. in bank endeavoring to cash check.) "You say you do not know me: here are letters, here is my name in my hat and upon my linen, and also my initials upon my cigar case. I have already given you enough evidence to hang me."

(Cashier of Bank.) "But, my dear sir, we are not hanging people, we are paying out money."

Phonetic Spelling. — This note was received by an Illinois lawyer, whose membership in the state legislature kept him away from his office:

"I have ben hear to sea you ate times an cant find you hear never.

"I will give me case to some other liar if you dont sea me this weak."

Obiter Dictum. — Jones, an old theatrical manager, was sued before a justice of the peace, some twenty miles from his home, in a certain New Jersey town. This magistrate had the reputation of being a "plaintiff's justice." Jones and his lawyer proceeded to the justice's office on the day and hour for trial, having, as they thought, a good defense.

The case was about to be tried, when suddenly another theatrical man, an old friend of Jones, whom he had not seen in many years, and who happened to be in the court room, rushed across the room, grasped Jones warmly by the hand, and shouted, "Hello, Jones, old boy! haven't seen you in ten years. What are you doing here? Got a show here?"

Before Jones could make reply, the justice (with seriousness) retorted, "No, he's got no show here."

One Legal Pet. — Patrick was a pigeon fancier, and had been brought before the police magistrate charged with violation of a city ordinance against keeping live poultry within certain limits. Defendant was without counsel, and the evidence showed clearly that his feathered pets spent much time around the window-sills of an adjoining factory owned by complaining witness. It also developed that Patrick had other pets; and with the idea of showing he had too many, the city attorney said, "Now, Pat, how many pigeons do you keep?" "About sixty, all told," replied Pat. "Any dogs." "Yis, sor; two." "Any cats?" "An

auld wan, an' foive kittens," said Pat. "What else — any chickens?" "Oi have — tin hins an' wan rooster." "You seem well supplied," remarked the city attorney. "Have you any other pets?" "Oi have, sor," answered Pat; "a pet pony, a pet canary, and over there sets me *pet woman.*"

Jury of His Peers. — A North Carolina lawyer was trying a case before a jury, being counsel for the prisoner, a man charged with making "mountain dew." The judge was very hard on him, and the jury brought in a verdict of guilty. The lawyer moved for a new trial. The judge denied the motion, and remarked, "The court and the jury think the prisoner a knave and a fool." After a moment's silence the lawyer answered, "The prisoner wishes me to say that he is satisfied; he has been tried by a court and a jury of his peers."

A Constructive Recess. — A Missouri justice of the peace has devised a plan whereby judges may resent insult in an approved manner, and at the same time invoke the majesty of the law to defeat retaliation. "Judge" Green had laid aside the shoemaker's awl and was engaged in the trial of a civil suit that involved $3.25 and costs. In the course of argument, Marks, counsel for the defendant, made a statement reflecting upon the court's knowledge of the law. Whereupon the court, rapping upon the side of his bench and gazing fearlessly into the eyes of defendant's counsel, said, "We will now take a brief recess. Marks, you are a d——d liar." Marks' lips parted with a show of resentment, but before he could proceed, the court rapped for order with the injunction, "Shut up, Marks! Court is now in session."

A Mitigated Fine. — A Western justice of the peace, noted for his unwillingness to listen to argument, was recently engaged in the trial of a case of assault and battery, in which the defendant was an attorney. When the testimony was concluded, the state not being represented, the defendant slowly arose to make a speech, and before he was fairly on his feet the justice said, "I will fine you five dollars." "Why," said the attorney, "I wanted to argue this case before you decided it." "No need of argument," said the justice: "it is a very plain case, and I cannot avoid fining you."

"Yes," said the attorney, "but I wanted to be heard in mitigation."

"O Helena!" said the justice, "under the statute I could fine you as much as fifty dollars, but I have mitigated the fine down to five dollars, and that is mitigation enough."

His Law was Outlawed. — Judge Geo. G. Barnard, who quickly decided matters coming before him, once said to a young practitioner who closed his remarks thus, "Why, your Honor, that has been the rule ever since the stars first sang together."

"Counsellor, it will cost you ten dollars for being at that concert. I deny your motion."

Vocation or Avocation. — A leading Boston lawyer asked the witness, a young man of dissolute habits, whether he was not in the habit of loafing around bar-rooms and billiard-rooms. The witness pertly answered, "That is my business." "Yes, I know," the lawyer responded; "but is it your only business?"

Playing to the Gallery. — Lawyer Brown had a case involving land boundaries. The question was one of accretions to land; and Brown, to make perfectly clear his contentions, drew maps showing the situation. The judge hearing the case said, "But, Mr. Brown, I don't quite understand what you mean."

"Your Honor," replied Mr. Brown, "I did not suppose you would. I was just doing this for the benefit of the bystanders."

The Blessed Gift of Tears. — A lawyer, pleading the case of an infant plaintiff, took the child, suffused with tears, in his arms, and presented it to the jury. This had a great effect until the lawyer of the opposite side asked what made him cry.

"He pinched me," answered the little innocent. — *The Law Register.*

To Force a Fit. — The prosecuting attorney's office is a very busy place, but it is not nearly such a hive of industry as it would be if all the grievances brought to Mr. Mackintosh were allowed to ripen into law suits, says the Seattle *Post-Intelligencer.*

"Is this the prosecuting attorney?" It was

a high feminine voice late yesterday afternoon. "It is? Well, I wanted to see you about a garment."

"What kind of a garment?"

"Oh — er — ladies' garment."

"What's the matter with it?"

"Why, it doesn't fit. It's two whole sizes too large. My, I should look like a fright."

"Is there any way I can help you?"

"Why, yes. The man wouldn't take it back. I knew you could fix it." This confidence touched Mr. Mackintosh and drew forth this well-considered advice,

"Well, you see, we haven't any dressmaker here. Better see a dressmaker."

Told of Sir Frederick Pollock. — When a youth he was sent to school at St. Paul's, then under the charge of one Dr. Roberts, but thinking that he was wasting his time there, as he intended to go to the Bar, he intimated to the head master of the school that he should not stay; this so irritated the doctor that the youth wrote the master that he should not return.

A note was sent to Baron Pollock, Sir Frederick's father, who called at the school to express his regret at his son's determination, adding that he had advised the boy not to send the note, upon which Dr. Roberts broke out, "Ah! Sir, you'll live to see that boy hanged!"

Some time after, when young Pollock had attained the highest honors at Cambridge University, his mother met the doctor and spoke to him regarding her son. "Ah, madam," he replied, "I always said he would fill an elevated station."

Mr. Choate's First Fee. — "In England they often asked me how the Bench and Bar got along together, and they told me that America must be the paradise of the judges if not of lawyers, since in that country there are but thirty-eight judges of the first class, while in New York there are one hundred such judges, and the lawyers are eternally clamoring for more.

"Then they reminded me of the immense profits coming to American lawyers. I retorted by telling them the story of my first fee. It was when I was in a law office in Boston with Mr. Saltonstall.

"Two farmers from Vermont had had two carloads of potatoes frozen, and the question arose, was the loss of the potatoes the act of God or the act of the railroad company? It was too much for Saltonstall, and he said, 'Here's Choate; that case will be about right for him.'

"By some chance the jury decided that the railroad company was responsible, and I was then asked to name my fee. This was an entirely unknown realm to me, and accordingly I told them that three dollars would do. They said that they had talked it over on the way down to Boston and had come to the conclusion that one dollar a carload would be enough, and I took it with pleasure. I am delighted to say that this moderate measure of compensation I always afterward followed."

Professional Trustees. — A certain firm of attorneys had won for themselves a rather savory reputation for the wrecking and consuming of bankrupt estates entrusted to them. A suitor who had been advised to employ one of the members in a pending suit, met a friend who was formerly a client of the combine and inquired concerning their standing, and during the conversation remarked, "Mr. B. and Mr. C. are partners, are they not?" "Partners," indignantly replied his friend, "Partners! No sir, they're not, they're accomplices, sir, accomplices. Have nothing to do with them."

From China. — The Dowager Empress of China has just ordained that Chinese lawyers should be acquainted with law. It is understood that these gentlemen are protesting heartily against an unreasonable request. They say that the imperial order puts China behind the times. In other countries a knowledge of law is not required even of judges. — *Law Times.*

Jury Duty. — "What is your uncle doing now?"

"Sitting on juries."

"What? Why, I thought he was judge in one of the higher courts."

"He is."

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM

(Copies of the pamphlet Reporters containing full reports of any of these decisions may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.)

ALIEN HEIRS. (ADMINISTRATION — SURVIVAL OF ACTION)

INDIANA APPELLATE COURT.

The case of Cleveland, C. C. & St. L. R. Co. *v.* Osgood, 70 Northeastern Reporter, 839, was disapproved by the Iowa Supreme Court in the case of Romano *v.* Capital City Brick & Pipe Co., 101 Northwestern Reporter, 437, which was an action to recover damages for the wrongful death of one whose next of kin was an alien, as will appear from these notes in the April number. Since then the Indiana Court has granted a rehearing in the Osgood case, and now holds (see 73 Northeastern Reporter, 285) that an administrator appointed in the state may sue to recover for the death of a resident, although the ultimate distribution of the proceeds will go to a non-resident alien, provided the laws of the country in which such alien resides authorizes a similar recovery in favor of alien next of kin.

BILL TO PERPETUATE TESTIMONY. (DEPOSITION IN DIFFERENT SUIT)

KANSAS CITY COURT OF APPEALS.

The case of Morris *v.* Parry, 85 Southwestern Reporter, 620, is a first instance which has come to our notice of an attempt to enlarge the scope and application of a bill to perpetuate testimony. In that case it is sought to perpetuate the testimony not of a witness whom it was feared would die, but of a witness who was dead. The facts are briefly as follows:

A husband and wife conveyed land for a town site. The deed and record thereof were destroyed during the Civil War. The wife died and the husband remarried. The second wife refused to join in a deed executed by the husband in lieu of the lost deed, and stated that she would claim dower if she survived her husband. The owner of a part of the land sued the husband and wife to establish the lost deed and perpetuate such testimony as he might introduce and procured and filed a deposition proving the execution of the lost deed. The husband and wife disclaimed as to the plaintiff's land, thereby compelling the dismissal of the suit. After the death of the husband and the deponent, who was the only witness by whom execution of the lost deed could be proven, the wife sued the owner of another part of the land for dower. Under these circumstances it is held that the defendant in the dower suit could not maintain a bill to establish and perpetuate as testimony to establish the lost deed in the action for dower, the testimony of the dead witness as contained in the deposition on file.

Of this proceeding the court says: "Stripped of verbal embellishments and reduced to naked fact, it is an attempt to force the admission of incompetent testimony at the trial of the dower suit."

CONSTITUTIONAL LAW. (RIGHT TO DISCHARGE EMPLOYEE)

KANSAS SUPREME COURT.

An addition to the list of cases which hold that statutes making it unlawful to discharge an employee because he belongs to a labor union or for other similar reasons are unconstitutional, is the case of Coffeyville Vitrified Brick & Tile Co. *v.* Perry, 76 Pacific Reporter, 848. The decision follows much the same lines as prior decisions on the same point, holding in effect that the liberty to contract is a property right guaranteed by the Constitution and that it is interfered with by such legislation as that under consideration. Cases in which almost identical statutes have been held invalid are cited, among others the leading case of State *v.* Julow, 129 Mo. 163, 31 S. W. 781, and the later cases of Gillespie *v.* People, 188 Ill. 176, 58 N. E. 1007 and Zillmer *v.* Kreutzberg, 114 Wis. 530, 90 N. W. 1098.

DEFECTIVE RAILROAD TICKET. (ERROR IN STAMPING — EXPULSION OF PASSENGER)

KANSAS SUPREME COURT.

A railroad ticket was issued bearing upon its back the date of issue, and also punched in the margin with the last day on which the ticket would be good. By mistake, of which both the ticket seller and purchaser had notice, the ticket was punched so as to indicate that it would not be good after July 5th, while as a matter of fact it was issued on July 9th, and was good for thirty days. The person to whom the ticket was sold was ejected from the train, and sued for damages. In disposing of the case, the court holds (Gevons *v.* Union Pacific R. Co., 78 Pacific Reporter, 817), that under the circumstances recited above it cannot be said as a matter of law that the ticket was for this reason void, and that its holder may not recover damages for being expelled from the train when he presented the ticket for passage. The court cites a number of cases dealing with the

defective punching of railroad and street car tickets, distinguishing the case at bar from that of Rolfs *v.* Railway Co., 71 Pac. 526, where it was held that a ticket containing a full and unambiguous printed contract upon its back is conclusive evidence to the train conductor as to the rights of the passenger, and that no action for damages will lie for refusal to honor the ticket after its expiration, irrespective of any statements which may have been made by the company's agent at the time of sale, upon the ground that in the present case no contract whatever was expressed by the printed form which appeared on the ticket, because an undertaking made on July 9th to carry a passenger prior to July 5th cannot be called a contract. In Laird *v.* Traction Co., 31 Atl. 51, a street railroad's transfer slip recited that it was good for ten minutes after being punched. When offered for passage it bore two punch marks, and it was held that the conductor must recognize the later one. In Trice *v.* Chesapeake & Ohio R. Co., 21 S. E. 1032, a mileage ticket was sold on March 4th, 1903, but by mistake was dated 1902. It was recited that it was good for a year, and also that it expired on March 4, 1904. Upon being presented in April, 1903, it was refused, and the holder was ejected. It was held that the confusion as to the date resulted from the agent's error and without fault in the passenger, and did not make the ticket invalid.

DISCHARGE OF PRISONER ON HIS RECOGNIZANCE. (REVOCATION — RETRIAL — JURISDICTION OF COURT)

N. Y. SUPREME COURT, APP. DIV., 4TH DEPT.

The prisoner in People *v.* Harber, 91 New York Supplement, 571, had been arraigned before the Court of Special Sessions for picking pockets, and after pleading not guilty, was discharged on his own recognizance. Subsequently the law was changed so as to provide for the trial of children charged with crime, by a special division of the Court of Special Sessions, and three years after being discharged the defendant was again brought to trial before this court, and was convicted. The Appellate Division sustained this conviction by a divided court, holding that the discharge was nothing more than admission to bail without surety, and that it was not shown that there had been any investigation as to the guilt or innocence of the defendant at the previous trial, nor any adjudication that he should not be tried for the crime charged. Judge Laughlin vigorously dissents to this doctrine, and urges that the court did not have jurisdiction over the defendant, stating that the jurisdiction of an inferior court must not be presumed, and pointing out that the statutes nowhere confer jurisdiction upon the Court of Special Sessions, upon organizing for the arraignment of the prisoner, and after taking a plea, to discharge him upon his own recognizance, without any attempt to continue the case either by adjournment of the court or otherwise. Judge Laughlin cites a number of analogous cases, and also refers to People *v.* McPherson, 74 Hun, 336, 26 N. Y. Supp. 236, where it was held that where the trial of a case has once commenced, as by the arraignment of the defendant and taking of his plea in the Court of Special Sessions, it must proceed to the end before the same court. It should be remembered in this connection that the court which sentenced the prisoner had not been organized when he was first arraigned.

DIVERSE CITIZENSHIP. (SUFFICIENCY OF ALLEGATIONS — JURISDICTION OF FEDERAL COURT)

U. S. SUPREME COURT.

The Board of Trustees of the Ohio State University was created under certain laws of that state, with certain corporate powers, but the Supreme Court of Ohio held that it was not intended to make the board a corporation in the full sense of the term. In a suit by non-residents of the state against the board, the Circuit Court of Appeals for the Sixth Circuit certified certain questions as to citizenship to the Supreme Court of the United States. The latter court in Thomas *v* Board of Trustees, 25 Supreme Court Reporter, 24, answers that an allegation that the board is a citizen of and domiciled in the state and exists under certain laws of the state, with power to sue and be sued, will be held not sufficiently to aver that such board was an Ohio corporation, within the jurisdictional rule of the Federal courts imputing to the members of a corporation citizenship in the state creating it. The citizenship of the individual members of the board does not sufficiently appear, it is further held, from averments that show that the board, while not an Ohio corporation, was created by and exists as an organized body under the laws of that state, although under the Ohio constitution no person can be elected or appointed to any office in the state unless he is a citizen of the state. The Supreme Court further holds that the Circuit Court of Appeals should not take judicial notice of the Ohio law which requires members of boards to be citizens, and by legal intendments finds that the persons constituting the board were in fact citizens, but that leave to amend the bill so as to show this fact might be granted.

ESCAPED CONVICT. (CONTRACT OF EMPLOYMENT — VALIDITY)

U. S. DISTRICT COURT, DIST. OF MASS.

A point which is, so far as we know, entirely novel, and which, while it arose in a suit in admiralty, is not confined in its application to that branch of the law, is decided in McCarron *v.* Dominion Atlantic Ry. Co., 134 Federal Reporter 762. The suit was by a seaman for personal injuries as well as for wages. The libelant was injured before the term of his employment expired and claimed wages for the entire term. It was shown that at the time he shipped he was an escaped convict and that about a month after the accident he was recaptured and taken back to the house of correction where he served out his sentence during the rest of his term of shipment. The libelee contended that the libelant's whole contract of service was invalid because a convict cannot dispose of himself so that libelant could not recover except for service actually rendered. No authorities were cited on either side, the case being apparently one of first impression, but it was held that the fact that libelant was a convict did not deprive him of the rights ordinarily arising from the employment and consequently that he was entitled to wages up to the time of his recapture.

EXPRESS MESSENGERS. (CONTRACT FOR CARRIAGE — MASTER AND SERVANT)

U. S. C. C. A., 8TH CIRCUIT.

An express messenger, while riding in a car furnished by a railroad company to the express company by which he is employed, under a contract by which employees are to be carried free, is held in Chicago & Northwestern R. Co. *v.* O'Brien, 132 Federal Reporter, 593, to occupy a relation to the railroad company analogous to that of one of its own employees, and the care which the railroad company owes him in respect to the operation of the train and the condition of its track and equipment is held to be the same as that which it owes to those persons who are in its immediate service. The contention was made that the messenger sustained to the railroad company the relation of a passenger, but the court denies this contention, and holds that he was a mere licensee, citing the well-known case of Baltimore & Ohio Ry. Co. *v.* Voight, 20 Sup. Ct. Rep. 385, 176 U. S. 495. A relationship analogous to that of master and servant being established, it was held error on the part of the trial court to refuse to instruct that the fact of derailment of the train did not in itself raise a presumption of negligence for which the company was chargeable, the doctrine of *res ipsa loquitur* not being applicable.

FOREIGN CORPORATIONS. (SERVICE OF PROCESS — WITHDRAWAL FROM STATE)

SUPREME COURT, APPELLATE TERM.

In Johnson *v.* Mutual Reserve Life Ins. Co., 90 New York Supplement, 539, it is held that summons in an action against a foreign corporation on contracts which were made while such corporation was doing business within the state, may properly be served upon the person designated by statute to accept such service, even though the corporation before the suit was brought had withdrawn from the state and revoked the authority of the person who had been previously designated to accept service, citing Goldey *v.* Morning News, 15 Sup. Ct. Rep. 559, 156 U. S. 519.

FORMER JEOPARDY. (COLLUSIVE CONVICTION)

NORTH CAROLINA SUPREME COURT.

A person charged with assault plead former conviction and introduced evidence showing that, on the same day on which the assault was committed, he himself made an affidavit before a justice of the peace, charging himself with assault, and that the justice issued a warrant on which was an indorsement to the effect that defendant voluntarily came up to be tried and dealt with as the law directs. It was shown that defendant was examined, and upon his own evidence was adjudged to be guilty and fined one dollar. The statutes required that a complaint shall be made to a justice that an offense had been committed, and that the complainant and witnesses introduced by him shall be examined so as to make it appear that an offense had been committed before any warrant was issued. It was also provided that when one charged with crime was brought before a justice, complainant's witnesses should be examined in the presence of the defendant.

Under these statutes it was held that the proceeding against defendant was collusive and void, and insufficient to sustain a plea of former jeopardy. "It was," says the court, "nothing less than a sham and a mockery of justice and should never receive the countenance, and surely not the sanction, of the law. The state has in fact never been heard, the injured party was never notified, and no witnesses were examined to explain or contradict the defendant's testimony."

A number of cases, holding in a general way that there is no former jeopardy if the acquittal or conviction was procured by defendant, even indirectly, by fraud or collusion or for the purpose of forestalling a real prosecution by the state or the injured party, are cited, among them being Watkins *v.* State, 68 Ind. 427; Commonwealth *v.*

Dascom, 111 Mass. 404; McFarland *v.* State, 68 Wis. 400, 32 N. W. 226; Thomas *v.* State, 114 Ala. 31, 21 South. 784; Bulson *v.* People, 31 Ill. 409; Peters *v.* Koepke, 156 Ind. 35, 59 N. E. 333; State *v.* Green, 16 Iowa 239; 1 Wh. Cr. Law § 546; Archbold's Cr. Pl. & Pr. 352; State *v.* Roberts, 98 N. C. 756, 3 S. E. 682; State *v.* Moore, 48 Southeastern Reporter, 573.

FOUNDLING HOSPITALS. (RIGHT TO CUSTODY OF CHILD)

N. Y. SUPREME COURT, APP. DIV. FIRST DEPT.

Under the statutes of New York relative to the maintenance and government of foundling hospitals, it is held that the mother of a child committed to such an institution cannot recover the custody of the child after it has been indentured by the hospital, and that the hospital cannot be required to furnish extracts from its records to show what disposition has been made of the child. *In re* Shapiro, 92 New York Supplement, 1027. The first part of this holding would seem necessarily to follow from the provisions of the statutes on the subject. Laws 1872: C. 635 authorizes a foundling hospital to take under its care children intrusted to it by their mothers, and provides that such children shall be deemed to be in the lawful charge of the hospital and may be indentured as clerks, apprentices, or servants. Other sections provide for the cancellation of indentures and make the managers of the hospital guardians of such children, with power to see that the contract is faithfully performed. From these provisions it is plain that the argument of the court that the object of the statute would be defeated if the parents of children committed to the care of the hospital were at liberty to resume the custody of the child at any time. The argument in support of the other holding leads to a conclusion so harsh as to incline one to question its validity. The statute also provides that the institution may be required to furnish to the parents such extracts from its records relating to the child as the court may deem proper, and it is said that no good purpose could be accomplished by granting such an application, the only object of which would be to annoy or interfere with the child or those to whom its custody has been awarded.

FRAUDULENT USE OF MAILS. (MENTAL HEALING)

CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

The Circuit Court of Appeals of the Fifth Circuit has reversed the judgment of conviction in the case of United States *v.* Post. Defendant Post was prosecuted for using the mails to defraud and was convicted, the charge of the trial judge being published in 128 Federal Reporter, 950. One of the indictments charged that defendant advertised to practise mental healings, and received pay to treat patients, when she did not intend to administer any treatment; and it was held that the mere averment that she was engaged in the business of mental healing did not state a scheme or artifice to defraud, but that the gist of the offense was that she did not intend, when she so advertised and received money, to give the treatment for which she was paid, and that in order to obtain a conviction there must be affirmative evidence that she had no intention to give the treatment. The statute on which the prosecution is based (Rev. St. § 5480, as amended) is construed, and is held not to make any discrimination, with respect to the right to the use of the postal establishment of the United States by persons whose vocation is healing, between those who profess to cure by the use of mental science and those who use drugs, so that in a prosecution for such use of the mails, the question of defendant's good faith is the cardinal question. If the defendant practised in good faith, without the intention to defraud, there was no offense, although in fact the theory and practice followed were worthless. An instruction of the lower court that the jury should ignore evidence offered by defendant as to the possession by her of certain powers as mental healing, because it was contrary to well-established laws of nature, is condemned; and it is said that when a question of fact is tested, although it may involve the existence of a power not generally recognized, evidence bearing on the question must be considered as in other cases. On this point the court says: "Science has not yet drawn, and probably never will draw, a continuous and permanent line between the possible and impossible, the knowable and unknowable. Such line may appear to be drawn in one decade, but it is removed in the next, and encroaches on what was the domain of the impossible and unknowable. Advance in the use of electricity and experiments in telepathy, hypnotism, and clairvoyance warn us against dogmatism. The experience of the judiciary as shown by history should teach tolerance and humility, when we recall that the bench once accounted for familiar physical and mental conditions by witchcraft, and that, too, at the expense of the lives of innocent men and women. In that day it was said from the bench that to deny the existence of witchcraft was to deny the Christian religion. Juries would have done better. Then and now questions of fact were best tried by jury."

GAME LAWS. (Sales Out of Season — Wild Deer — Evidence)

Georgia Supreme Court.

In Crosby *v.* State, 48 Southeastern Reporter, 913, it is held that under the Georgia Game Law of 1896, prohibiting the sale of wild deer during the prohibited season, it is necessary for the prosecution to introduce affirmative evidence that deer, which it was alleged were sold in violation of the statute, were wild, and hence mere proof that deer meat was sold was insufficient to make out a *prima facie* case.

This holding seems to proceed very largely from the rule requiring criminal laws to be construed strictly, it being pointed out that the act in question, though making it an offense to offer for sale any gamebird or animal, does not make the mere possession of deer meat an offense, which it might be competent for the legislature to do if such had been its intention.

INDIRECT DAMAGES. (Negligence of Carrier — Proximate Cause)

Kansas City Court of Appeals.

A curious illustration of indirect damage resulting from the negligence of a carrier is contained in Estes *v.* Missouri Pacific Ry. Co., 85 Southwestern Reporter, 627. Plaintiff was a passenger on one of defendant's trains which became disabled between stations and which, while in this condition, was run into by another train, injuring a number of passengers. Some one stated in plaintiff's hearing that another train was approaching from the rear and that there was about to be another collision, whereupon plaintiff, although the car she was in had not been injured, left it, and went and sat down in the shade by the side of the track, where she was poisoned by poison ivy. She was held entitled to recover for the injuries resulting from the poisoning, the court holding that while the car in which she had been a passenger was fit for occupancy, she was nevertheless justified, under the circumstances, in leaving it, and impliedly holding that the negligence of the railroad company with respect to the collision was the proximate cause of the injuries resulting from the poisoning. The court admits its inability to find any authority directly in point, but states that if there is none, the principle is sound, and that the present case will afford the precedent.

INJUNCTION. (Inducing Violation of Contract)

U. S. Circuit Court, Dist. of Mass.

The case of Dr. Miles Medical Co. *v.* Goldthwaite, 133 Federal Reporter, 794, involves in its essential issue the same question as that decided in the two trading-stamp cases noted in the last issue of this magazine, to-wit: the rights which a vendor of personalty may acquire as against a remote vendee by virtue of the terms of a contract with the immediate vendee.

The Medical Company manufactured proprietary medicines put up in distinctive packages and sold only through wholesale and retail dealers in drugs, with whom the company had contracts providing that the medicines should be sold only at certain uniform prices and to no other dealers than such as became parties to the contract. A list of such persons was furnished by the Medical Company to each dealer. A retail dealer who had nó contract with the medical company procured the medicines through another who, in selling them, violated his contract. The purchaser then mutilated the packages so as to prevent identification, and in some cases emptied the original package into a plain package and also sold the medicines at prices below those fixed by the contract between the Medical Company and its regular patrons.

The Medical Company was held entitled to an injunction restraining the dealer from interfering with the contracts by inducing their violation by parties thereto, and also from selling the medicines as complainant's in other than the original packages and at the contract price.

INTERSTATE COMMERCE. (Excessive Charges — Recovery in State Court)

Texas Court of Civil Appeals.

The question of the extent to which state courts may regulate the rates charged by interstate commerce is considered at some length in Abilene Cotton Oil Co. *v.* Texas & Pacific Ry. Co., 85 Southwestern Reporter, 1052. Texas Rev. St. 1895, art. 3258, declares that the common law is in force, save as altered or repealed by statute. Interstate Commerce Act, sec. 1, 2, declares that all charges by carriers shall be reasonable and makes unreasonable charges unlawful. By section 8 any one injured by a violation of the Act is given the right to damages, and section 9 gives jurisdiction to the Federal courts of actions brought under section 8. Section 22 provides that nothing in the statute shall in any way abridge remedies existing at common law, but that the provisions of the statute are in addition thereto.

The Oil Company brought an action in the state court to recover for unreasonable freight charges exacted by the railroad, and the lower court, although finding that the charges were unreasonable, concluded as a matter of law, that as the rate charged had been duly filed with the Interstate Commerce Commission and published and posted

as required by the Interstate Commerce Act, it was the only lawful rate it could have demanded, and hence that a shipper could not recover because it was excessive. The Court of Civil Appeals, however, holds, basing its opinion to some extent on the case of Western Union Tel. Co. *v.* Call Publishing Co., 181 U. S. 92, 21 Supreme Court Reporter, 561, that the shipper might in the state court, under the common law, be afforded relief from the unreasonable rates, notwithstanding the fact that they had been filed and promulgated by the carrier.

LANDLORD AND TENANT. (Constructive Eviction — Remonstrances to Liquor License)

Washington Supreme Court.

The act of a landlord in joining with other property owners in a protest against the issuance of a liquor license to the tenant is held by the Supreme Court of Washington not to constitute a constructive eviction. An ordinance of the city where the property was situated, provided that no license should issue if the owners of certain adjacent lots should protest against its issuance, and after the execution of the lease the landlord as owner of lots other than that on which the saloon was located, joined with other lot owners in a remonstrance, which remonstrance would not have been sufficient to defeat the license without the cöoperation of the landlord.

The decision that this was not a constructive eviction is based upon the ground that the tenant acquired no interest in lots other than that included in the lease. This is made clear by the fact that if the landlord had sold the other lots, the buyer would have been under no obligation to refrain from joining in a protest. The cases of Brown *v.* Holyoke Water Power Co., 152 Mass. 463, 25 N. E. 966, and Grabenhorst *v.* Nicodemus, 42 Md. 236, which were relied on by the tenant, are distinguished. In the first of these cases the landlord leased a building including certain machinery and also agreed to provide power for the running of the machinery, and his subsequent refusal to supply the power was held an eviction. In the other case the property was leased for use as a distillery, and the tenant could not legally make use of the business until he had filed with the United States collector the written consent of the lessor, permitting the building to be used for a distillery, so that the refusal of the landlord to give such consent was very properly held an eviction. Kellogg *v.* Lowe, 80 Pacific Reporter, 458.

LICENSES (Discrimination — Trading Stamps)

Alabama Supreme Court.

The value of some of the somewhat general provisions of the ordinary Bill of Rights is illustrated by the case of City Council of Montgomery *v.* Kelly, 38 Southern Reporter 67, in which it is held that a city ordinance requiring merchants giving trading stamps to pay a license fee of $100, in addition to that required of merchants engaged in the same business but not giving trading stamps, is in contravention of the constitutional provision of Alabama that among the inalienable rights of citizens are life, liberty, and the pursuit of happiness, and that the sole object of government is to protect the citizen in the enjoyment of life, liberty, and property. The court argues that if it were permissible to place an additional burden upon a merchant who chooses to advertise his business by offering a small gratuity to customers in the shape of trading stamps, it would be equally lawful to place an extra burden on one who advertised in the papers or one who offered out of his own stock a certain gratuity to every one purchasing goods to a certain amount or one erecting a handsome sign in front of his store. The following list of cases is cited in support of the holdings: Young *v.* Commonwealth (Va.) 45 S. E. 327; State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818; People *ex rel.* Madden *v.* Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111; People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; Long *v.* State, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268; *Ex parte* McKenna, 126 Cal. 429, 58 Pac. 916.

LIFE INSURANCE (Premium Notes — Obligation of Insured)

Indiana Appellate Court.

In Union Mutual Life Insurance Company of Portland, Me. *v.* Adler, 73 Northeastern Reporter 835, the right of an insurance company to collect a note given for unearned premiums on a life insurance policy is denied. The holding proceeds upon the theory that a provision in the policy requiring insured to pay subsequent premiums is a mere option, the exercise of which is necessary to keep the insurance in effect, but does not constitute a debt. The result would naturally follow that since the insurer could not compel the continuance of the insurance, nor the payment of subsequent premiums, it could not collect a note given therefor. It is, however, important to observe that in this case the note was not a simple promissory note but that it provided that on failure to pay it when due, the policy should become void. Indeed, the court intimates that it is possible that had the note been an ordinary promissory note, the insurance company would have had an option either to surrender the note

upon nonpayment and avoid the policy, or to continue the policy and enforce payment of the note.

MASTER AND SERVANT (RESPONDEAT SUPERIOR)

TENNESSEE SUPREME COURT.

McGregor *v.* Gill, 86 Southwestern Reporter 318, is an interesting, if not an important case, more for what is omitted from the opinion than for what is contained therein. Defendant was a livery stable keeper, who furnished a vehicle, with a driver, and while plaintiff was a passenger in this vehicle, it was overturned by the carelessness of the driver, and plaintiff was injured. The court points out the fact that the records show that the driver was well known, and regarded as a safe and trusty driver, and then states that it knows of no principle which would authorize the maintenance of the action. The ensuing discussion is devoted entirely to the question as to whether or not the defendant was a common carrier, and it is properly enough held that he was not. No mention, however, is made of the principle of respondeat superior, and the reader is left to conjecture as to why, if the servant was negligent in the course of the master's business, as it seems to be conceded he was, and plaintiff was injured by reason of such negligence, the master was not liable, totally irrespective of the question as to whether or not he was a common carrier.

MUNICIPAL IMPROVEMENTS. (BLASTING FOR SUBWAY — TRESPASS)

N. Y. SUPREME COURT, APP. DIV., 1ST DEPT.

While building the New York subway, it was necessary to do considerable blasting, and the plaintiff in the case of Turner *v.* Degnon-McLean Contracting Co., 90 New York Supplement, 948, was injured by a stone ejected by a blast. The only question raised was whether the defendant contractor was liable upon the theory of trespass. The court approaches this question by considering analogous cases. In St. Peter *v.* Dennison, 58 N. Y. 416, where the plaintiff was on his own land, it was held that a contractor engaged in work upon the Erie Canal was guilty of trespass by blasting stone and earth upon plaintiff's land, although the work was being conducted without negligence. In Wheeler *v.* Norton, 86 N. Y. Supp. 1095, a subway contractor was held liable for trespass, without proof of negligence for breaking by force of a blast a water pipe in a street which caused the flooding of adjacent premises. In Sullivan *v.* Dunham, 55 N. E. 923, it was held that one who, for a lawful purpose and without negligence, explodes a blast upon his own land and causes a piece of wood to fall upon a person lawfully traveling upon the highway, is guilty as a trespasser for the injury thus inflicted. The court refers to the possible liability of the city had it been conducting the work, but dismisses the suggestion that the contractor stands in the same position as would the city, upon the authority of Mairs *v.* Manhattan Real Estate Ass'n, 89 N. Y. 506. Upon the consideration of the above cases, the court holds that the contractor had no right to use or intrude upon the public street outside the line of the public work, and for the act of throwing the stone upon the public highway and injuring the plaintiff, who was lawfully there, the contracting company was liable as trespasser. Judge Laughlin dissents in a lengthy opinion, in which he distinguishes the case of Wheeler *v.* Norton, and expresses the opinion that no trespass was committed, the public having knowledge that a public improvement was being made, and that both parties were charged with care to avoid accidents.

MURDER. (IMPROBABLE EVIDENCE — PLEA OF GUILTY — REASONABLE DOUBT)

TEXAS COURT OF CRIMINAL APPEALS.

In Sullivan *v.* State, 85 Southwestern Reporter, 810, the court is required to pass upon a question which seldom arises in a criminal case, and perhaps has never arisen upon such a remarkable state of facts. Defendant was prosecuted for the murder of his father and plead guilty. The Texas Code of Criminal Procedure provides that when defendant pleads guilty and the punishment is not absolutely fixed by law, a jury shall be impaneled to assess the punishment. The state introduced evidence of a confession and of a threat by defendant to kill his father. Defendant, in his own behalf, testified in effect that his father had threatened to kill him and that he was afraid; that when he went to bed on the night of the murder he dreamed that his father was trying to kill him, that he got up, went into his father's room, procured a gun from a shelf near his father's head, went around to the foot of the bed and shot his father. The court failed to give any charge as to reasonable doubt of defendant's guilt, and on appeal the question was presented as to whether this failure was reversible error. Such an instruction is held to have been unnecessary, the Appellate Court even going to the extent of saying that a charge which was given and which permitted the jury to acquit under defendant's testimony was undoubtedly favorable to him. It is a familiar rule that where the evidence is very weak, trivial, light, or improbable in its nature or character, or

the application is remote, it is not necessary that the court should charge upon it. It is not required to charge upon testimony which is unreasonable. Speaking of the reasonableness of the testimony, the court asks whether it is probable, or even possible, that any jury would have believed such statements as those detailed by appellant. That a dream to the effect that his father was killing him induced the prisoner to get out of his bed, asleep, and go through the actions detailed by him, is perhaps not the least remarkable part of his statement. The fact that he could tell exactly everything he did while asleep is more remarkable. The failure to give the charge upon reasonable doubt is also justified upon another ground, it being held that the question of reasonable doubt never arises where the defendant had pleaded guilty. A reasonable doubt is the product or corollary of a presumption of innocence which is not raised upon a plea of guilty.

PATENTS. (Designs — Effect of Previous Mechanical Patent)

U. S. C. C. A., Second Circuit.
U. S. C. C., M. D. Penn.

Two Federal courts have recently, without the knowledge of the existence of the other's opinion, decided a novel question in patent law. In Roberts *v.* Bennett, 136 Federal Reporter, 193, a mechanical patent had been issued for a basket, and the question arose as to the validity of a subsequent design patent to the same patentee. In Williams Calk Co. *v.* Neverslip Mfg. Co., 136 Federal Reporter, 210, a design patent had been issued for a horseshoe calk, and the validity of a mechanical patent for the same device was attacked upon the ground of double patenting. Both courts arrived at the same conclusion, viz: that a subsequent patent of another class is rendered void for anticipation by a prior patent issued to the same patentee. Cary Mfg. Co. *v.* Neal, 95 Fed. 725, is cited by the Circuit Court, and Collender *v.* Griffith, 2 Fed. 206, holding the contrary doctrine, is disapproved.

PRACTISING MEDICINE. (Ophthalmologist)

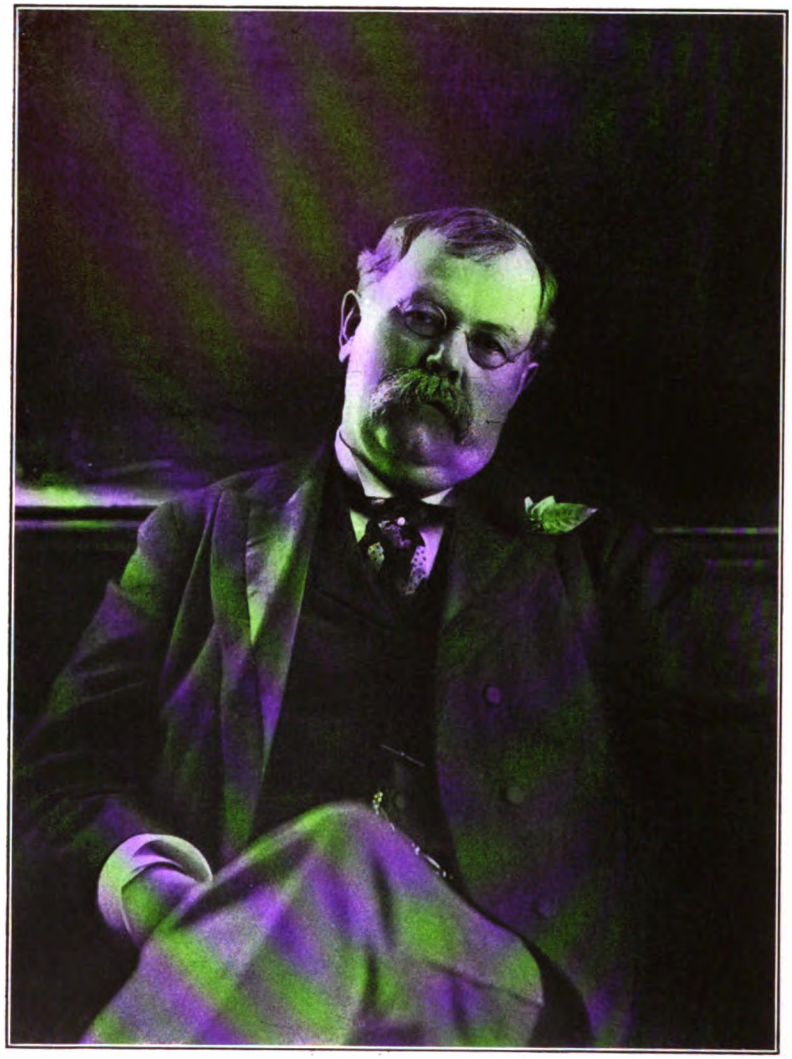
South Dakota Supreme Court.

The question whether one describing himself as an ophthalmologist and engaged in fitting glasses to the eye, is engaged in practising medicine, is decided in the affirmative in State *v.* Yegge, 103 Northwestern Reporter, 17. The statutes of South Dakota declare that when a person shall append or prefix the title "Dr." or any other sign or appellation in a medical sense to his name or profess publicly to be a physician or surgeon, or use, recommend, prescribe, or direct for the use of any person any drug, medicine, apparatus, or other agency for the cure or relief of any ailment or disease of the mind or body, or the cure or relief of any injury or deformity, he shall be regarded as practising medicine, within the meaning of the act which makes it an offense to practise medicine without a license. It was shown that defendant issued an advertisement stating that ophthalmology was a science for the analysis of the cause of human ills and how to abolish them, and that by its assistance many diseases were cured without the aid of drugs or surgical operations. He also had a sign in front of his office with the name "Dr. Yegge" thereon. There was also evidence tending to prove that ophthalmology is the science which treats of the physiology, anatomy, and diseases of the eye; that any deformity in the eye is considered a disease, and the fitting of glasses for the relief of defective eyesight is a branch of the practice of medicine. The defendant was engaged merely in the business of fitting glasses to the eye, but it was held that under the statute quoted, he was engaged in the practice of medicine.

WITNESS. (Subpœnaed to Attend Trial in Another State)

N. Y. Supreme Court.

The Code of Criminal Procedure of the State of New York provides that under certain conditions a citizen of the state of New York may be subpœnaed to appear and testify as a witness in a criminal action pending in another state. In the case entitled *In re* Commonwealth of Pennsylvania, 90 New York Supplement, 808, a proposed witness appeared and objected to the issuance of the subpœna, and submitted himself to the protection of the court. The court unqualifiedly holds the section of the Code to be unconstitutional, in that it proposes to compel a citizen to go into a locality over which the legislature and courts of New York have no jurisdiction; that the statute was not passed for any public purpose affecting any interest of the people of the state of New York; and that it deprived the proposed witness of his liberty without due process of law. The court further states that while the statute was probably passed to facilitate the administration of justice in adjoining states, that matter was not a proper field for the exercise of the powers and functions of the legislature. The question is referred to as a novel one, and no cases are cited.



JOHN KISSIG COWEN.

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JOHN KISSIG COWEN

By Hon. Judson Harmon

ONE of the most interesting and useful inquiries about a man who has won distinction, is: How do we account for him? No man develops great qualities by chance. No man gets them by mere inheritance, or is wholly the author of his own character. Heredity must help or hinder. So must the conditions which surround him during the period of growth and formation. The result, which we call his personality, falls then chiefly into his own hands for better or for worse.

When we see a man of undoubted eminence among a people whose standards are high and inflexible and who acknowledge rank but never confer it, we like to know the beginning and the course of his progress. And it is not mere curiosity, for every American sets his face toward the same promised land.

What makes our country great is first, the choice and vigorous stock of its composite people; second, the removal of caste and other obstructions to development and their replacement by both opportunity and encouragement of development. So when our need comes the man is produced to supply it, not springing up as by magic but put forth as the slowly matured fruitage of generations of wholesome men and women who, often all unknown to fame and fortune, have been gathering and combining the elements of character.

Mr. Cowen was Scotch-Irish on both father's and mother's side. From the North of Ireland to Pennsylvania, and thence to Ohio, was the course of the family. He sometimes referred to his father as a blacksmith, but the fact was that his father, a farmer, and merely learned blacksmithing before starting to Ohio, because it would be useful in that then new country. He took up and cleared the farm among the hills of Holmes County, where John was born and reared.

John had all the advantages which do so much for the development of the young in our land. His father was not rich and had a large family to raise. John had to help till the farm, and so developed the sturdiness of body and mind, which, with an upright nature, was his only inheritance, actual or prospective. Neither idleness nor ease spread its temptations before him. Attending the public school two miles away involved hardship, so its advantages came too dear to be neglected. When the love of knowledge thus awakened led him to the Academy at Fredericktown, he had to earn the money to pay his way. He had few books, but they were of the kind which makes mental fibre. Every day the family assembled for worship. Every Sunday found them in their pew in the distant church. Cardinal Gibbons tells me that Mr. Cowen, more than any public man he knew, was familiar with the Bible, and gave force and dignity to his speech by quotations and illustrations from it. And he was constant to the end in the faith of his fathers.

So, when by teaching school he was able to go to Princeton, he went as an earnest seeker after knowledge, with strength and steadiness for its pursuit and a wholesome nature to select and assimilate it. Pleasure and sport were to him only cup-bearers by the wayside. His eye was fixed on the heights beyond. To him the only fit and worthy laurels of a student were those of the intellect. He brought to his studies a thoughtful disposition, a mind eager for

learning, not for mere gratification or adornment but for useful power, and a spirit fearless to embrace the true and reject the false. Enriching his mind from the masters of human thought he imitated none because he early realized that that way lies mediocrity, while one's own individuality, developed, trained and chastened, is his most precious possession. And he never spared the systematic labor which, whatever one's natural talents, is the price of success.

It is no wonder that this sound, sincere, earnest, and wholly unspoiled young man finished his college course with a record which, I am told, remains unequaled.

Many young men who graduate with high honors win no more. Either they regard as an end what is only a beginning, or they have cultivated the memory at the expense of the higher faculties, or they lack the courage, the energy or the effectiveness required to add doing to knowing. They are like soldiers who shine on parade but fail in battle.

It was not so with young Cowen. He had simply taken his own measure, fitted on his armor and learned to use his powers. The world was before him, and there only lay failure or success.

But no easy way opened before him. He still had to force the door of opportunity. Again he was compelled to resort to teaching, while he studied law as best he could, until he had earned enough to permit him to give all his time to it. Finally, he walked a long distance to be examined and admitted to practice, one of the examiners being our late President McKinley, then a young lawyer but little older than himself.

His home county, being purely agricultural and largely inhabited by Amish people, a communal sect who are a law unto themselves, was not an attractive field for a young lawyer, so he commenced practice at Mansfield, a growing town not far away. There his industry and ability were fast laying the foundations of success when he was called to the work to which he devoted his life and by which, with his participation in the duties of citizenship among you, he made an enduring name.

Mr. Cowen's nature is revealed by the incident of his removal from Mansfield to Baltimore. Men have won admiration by their learning and their talents, confidence by their integrity and devotion to duty, gratitude by benefits conferred. But many of these have failed to gain the affection of their fellows because their hearts lacked the qualities which set others aglow.

Coke, the greatest common lawyer of his race, the champion of liberty and civil rights, seems never to have had a single friend among men or women. He was hostile to royal aggressions because they assailed the chartered rights of Englishmen. He maintained those rights because they were a constitutional heritage. But he was bitter and vindictive in the enforcement of the law. He had no sympathy for the weakness or misfortune of individuals. He dealt only with intellectual methods of precision. He lacked the trait which shows most plainly the touch of the Creator — charity. So he died, honored but unloved.

John Cowen would no doubt have wrought out a great career elsewhere, but he owed the opportunity for the one he had to a college friend. The affection between these two reached out and grew across differences in wealth, social position and destination in life. The big, frank, natural farmer boy won the heart of the great railroad president's son and kept it through all the years by the simple and unconscious attraction of a broad and noble nature. And so it was, throughout his life, with all who came in contact with him. Even those his duty led him to oppose found no venom in the wounds he gave. He had the Celtic fire, but it blazed and never smouldered. When he made war on what he believed to be wrong, he had no malice toward those who maintained the wrong. I think this quality alone will account for his nomination and election to Congress in a district where he

did not live, largely by the efforts of men he had often vigorously combatted.

It is given to few mere lawyers to serve other generations than their own. They can merely keep up the standards and form part of the line of transmission. Their names and the abstracts of their arguments in the reports, and nothing else survives the memory of their contemporaries. But who would not prefer the warm and tender recollection of these, brief as it is since they so soon must follow, to some cold though more enduring memorial from men to whom he is only a name?

After long and distinguished service as head of the Legal Department of the Baltimore and Ohio Railroad Company, which position he attained at an unusually early age, Mr. Cowen became its president. This was a tribute to the broadness of his faculties, though it was, perhaps, due in a measure to the difficulties which already beset the company and soon led to the receivership, in the conduct of which he achieved such striking success. It in no measure detracts from the credit due to his associates, great as that is, to award him the praise his acknowledged leadership deserves.

He devised the plan, which in about three years was accomplished, of reorganizing that great property and putting it in a permanently successful condition. This was done without a foreclosure, thus preserving the advantages of its original charter from Maryland and its rights elsewhere. Securities amounting to $200,000,000 of uncertain value, some of them involved in conflict, were transformed into harmonious and safe investments. And meanwhile, by a broad but true conception of the powers and duties of a court of equity dealing with property impressed with a public character, whose value and usefulness depend on its condition, amounts which then seemed enormous were raised and expended in betterments. That this was done with hardly a protest from the many parties in interest, and with the final full acquiescence of them all, shows the soundness of Mr. Cowen's views and his power of bringing men to adopt them. It was a task few men would at that time have had the genius to conceive or the force to accomplish.

While he was thus raising and expending millions and making the fortunes of many people, so absorbed was he in his duty that he passed by, if he even noticed, the opportunities afforded to enrich himself. Let this not be ascribed to lack of thrift or the contempt of wealth which some affect. I know he felt, when the matter was suggested to him, that his duty was to encourage the security holders to be steadfast and not lose the profits which should be theirs. He always declared his own faith in the outcome, and no man can blame his loss on Receiver Cowen.

It was entirely appropriate for Mr. Cowen to be at the head of that great enterprise while its destiny was being shaped and secured by means so largely legal. When that was done I was sorry to see him chosen president again, because it seemed to involve a permanent departure from his proper career. He was a great lawyer and had won universal recogntiion as such. I could not be sure, broad and varied as his talents were, that he would win equal rank as a railroad manager.

Besides, I realized the difference in tenure. Who is so truly independent as a lawyer of assured ability and reputation? No man, no combination of men, can reduce his rank, curtail his income, or interfere with his career. He is the master, and men will seek his counsel and service so long as he chooses to render them. No position which depends on the formal choice of others can be secure. I told him all this, but he thought the call one of duty to conduct what he had led in recreating. And no doubt there was a glamour about the position, and some sentiment for he was to fill the place of his friend and benefactor.

And when after a short while he returned to the law again, I wrote him a letter of

congratulation telling him how glad I was to see him back where he belonged and should always have remained. I feared in my heart that he was disappointed, but my letter was sincere and brought a generous response, though I knew later that he had spent his great strength in the labors and anxieties of the task which had taken him away from his profession. But for these we should still delight in looking up to him as one of the great living leaders of the American Bar.

We miss him, too, as a fearless and ready advocate of right thinking and right methods in public affairs. We might not all agree with his views on every subject. This is too much to exact of any man in times which bristle with new and difficult questions. But on all subjects which involve fairness, justice, right, and wrong, his instincts were unerring and his convictions were sped to the mark by all the force of the intellect and character behind them.

As he never sought position or personal advantage, his advocacy in public matters carried the greater weight with the people, though all who knew him well will agree with me that he was one of the few men with whom direct personal interest would have made no difference. He was always willing to advocate what he believed to be right at the risk of present defeat. He once said in a public address:

"There is more of a disposition to placate the vote than to reason with it. There is a more ready spirit to cater to its wishes than risk the power of its displeasure by removing the scales from its eyes."

One of the characteristic things he did while receiver was to appear before the Interstate Commerce Commission, without process or proceeding, when he discovered that rebates were being allowed on the Baltimore and Ohio Railroad, admit it and give assurance that it should cease. The railroad world rubbed its eyes and asked: What manner of man is this?

This assembly of lawyers would justly regard my address as incomplete, if it did not deal with Mr. Cowen's professional characteristics. He was a great lawyer. What made him one?

The first thing was his proper conception of the law as a practical science. Some lawyers seem to regard the law as a sort of game, in which victory is the reward of the closest knowledge of the rules and the greatest dexterity in taking advantage of them. Right and justice are mere incidents. To such the days of special pleading must appear as the golden age of the law.

To Mr. Cowen the law was a means of establishing rights and redressing wrongs. Not always moral rights and wrongs, because legal standards are necessarily sometimes arbitrary, though it can justly be said that the system of substantive law which the generations of our race have worked out is founded on good morals in all matters which have moral bearings.

The first duty of the lawyer was, therefore, in his view, to determine for himself the question of legal right. Some can bring all their learning, ability, and skill to the support of any cause. Lawyers of Mr. Cowen's class can never put forth their best powers unless they have first convinced themselves that their cause is just.

This is not always easy to determine. The facts may be disputed, the questions new or unsettled, the principles to be applied or the analogies to be drawn doubtful. But from his point of view he had to see the right on his side, or, if it were doubtful, to feel that his view might prevail without impairing any sound principle of the system which, though dealing always with particular cases, is intended for the guidance and protection of all men living and yet unborn. He had a legal conscience.

Then Mr. Cowen was a master in the practice of the law. This is sometimes called an art, but I dislike the word in that connection, and it does not fit his case. He was not an agile and dexterous contestant. He did not make much display on

the skirmish line, though he was too wise to neglect that part of the engagement. But he saw quickly and clearly the vital points of a case and massed his forces there, for attack or defense, with unerring skill and judgment.

He had the faculty of rapid but thorough preparation, with great forethought and resourcefulness. He would consider every statute, decision, or principle which might have a bearing for or against him, and cast it aside or array it in its proper place, with ready precision. He was so sure of hand that his work rarely required revision. He was fertile in suggestion, analogy and illustration. He could detect a false scent quickly and follow a true one surely.

In presentation he was earnest, forceful, accurate, and persuasive. He was fair, it seemed to me sometimes almost chivalrously fair, never claiming too much nor according too little. He wanted no victory unless, with every lawful consideration laid before it, he could convince his tribunal of the justice of his cause.

In the law, as well as in public and social life, he had the genius so well described by Emerson. "The secret of genius is to suffer no fiction to exist for us; to realize all that we know; in the high refinement of modern life, in arts, in sciences, in books, in men, to exact good faith, reality and a purpose; and first, last, midst, and without end, to honor every truth by use."

But what more need be said of him than this. He came, a stranger, to the Bar whose standards were set by Martin, Pinkney, Wallis, Steele, Whyte and others I need not name. He was welcomed. After thirty years he has gone to his rest. That Bar now mourns him as a brother and, adding his to the names which make its past secure, turns with hearts uplifted to the years to come.

CINCINNATI, OHIO, June, 1905.

APICES JURIS

By Charles Morse

LORD BRAMWELL once exclaimed with fine indignation: "*Law so dry? —I deny it!*" Whereupon he undertook to refute the slander by referring to a standard law-book, consisting of four volumes, whereof he said: "Three of them, to my mind, are most agreeable reading." It is interesting to reflect, in passing, that the aridity of any volume which would offend Lord Bramwell must needs be prodigious; but the chief value of his observations lies in the fact that they implicitly disclose what he would have explicitly denied, namely, that the ratio of dry to attractive or stimulating reading on the lawyer's shelves is fairly 1 to 3.

Ay! beyond peradventure, there are many desert places in the domain of legal science where the mind yearns for the genial waters, the flowers and fruit of that broad human interest with which most other spheres of intellectual endeavor are abundantly endowed. Hence to the lawyer of catholic tastes the maxim *Apices juris non sunt jura* (which is but another writing of the more familiar *Summum jus est summa injuria*) appeals for exploitation with no ordinary charm. For, after all, is it anything more than a technical rendering of the universal counsel of philosophy to "avoid extremes?"

With such a theme, then, what delightful vistas of licensed divagation from *la légalité nous tue* unfold themselves at the outset of our inquiry!

Let us agree, then, that our maxim *Apices juris non sunt jura* (which, if it has any meaning at all, is equivalent to saying that *subtleties of the law-principles carried to the extreme of refinement — are not the law*) is but the lawyer's way of affirming the philosophy of the μηδὲν ἄγαν of the Greeks, the *ne quid nimis* of the Romans, and the *juste milieu* of the French.

Perhaps there is no counsel of philosophy that has so intimate a bearing upon conduct and judgment as the one in question, yet in respect of both it requires constant iteration "lest we forget!" When it is quoted for our admonition in respect of behavior how prone we are to echo the petulent cry of Cressida to Pandarus —

"Why tell you me of moderation?"

How often, too, is it lost sight of in forming our opinions of things. "Opinion," says that fantastical prose-lyrist and genial sage, Sir Thomas Browne, "rides upon the neck of reason; and men are happy, wise, or learned, according as that empress shall set them down in the register of regulation. However, weigh not thyself in the scales of thy own opinion, but let the judgment of the judicious be the standard of thy merit. Self-estimation is a flatterer too readily entitling us unto knowledge and abilities, which others solicitously labor after, and doubtfully think they attain."

What is the trite exhortation of the advocate who would have the most potent, grave and reverend signiors of the Bench eschew niceties of interpretation, fine points, *apices*, in applying the law to his case? Surely this: "Avoid extremes, m' luds!" *Medio tutissimus ibis* was the burden of Phœbus's advice to Phæthon in guiding the chariot of the sun —

"Take this at least, this last advice, my son:
"Keep a stiff rein, and move but gently on;
"The coursers of themselves will run too fast,
"Your art must be to moderate their haste."

Unlike Phæthon, Mr. Pickwick was not externally warned to keep "the middle course," nor to exercise the art of moderating the pace of the extraordinary steed that "wouldn't shy if he wos to meet a vaggin-

load of monkeys with their tails burnt off" on the memorable excursion of the Pickwick Club to Dingley Dell. But had he heeded the dissuasive counsels of his native prudence he would never have suffered himself and his faithful friends to be led into a situation of extreme absurdity, and withal of bodily hazard.

The poise and moderation of the Greek character was proverbial; and Plato's axiom *Never too much* affords a ready proof of the justice of the following observation by Lessing in the preface to his *Laokoon*, an observation which we must accept as solely referable to the Hellenic race notwithstanding the generality of its terms: "It is the privilege of the ancients never to do too much or too little." Certes there were other peoples of old who had not that abiding charm of temperateness which characterized the Greeks. The very first article of the oldest collection of law in the world — the Code of Hammurabi, discovered at Susa in 1902 — points the moral that the Babylonian jurists were not careful to avoid extremes in punishing wrong-doers. "If a man bring an accusation against a man, and charge him with a [capital] crime, but cannot prove it, he, the accuser shall be put to death." This must have made the business of the slanderer in the dominions of Hammurabi, "who brought about plenty and abundance, who made everything for Nippur and Durilu complete," an exceedingly temerarious one.

And yet so dour a penalty would not seem to transcend the demands of "poetic justice." Plautus says:

"*Homines qui gestant, quique auscultant crimina,*
Si meo arbitratu liceat, omnes pendeant,
Gestores linguis, auditores auribus."

Whereof the following is ventured as a free translation:

Two would I hang: The man whose slander foul
Smirches a brother's fame, and wounds his soul;
Then him who joyfully the falsehood hears—
One by his tongue, the *other* by his ears.

Some of the English poets, too, look upon slander as a capital offense.[1] Ben Jonson and Sir Walter Scott denounce in almost the same words (oddly enough!) the defamer as

"Cutting honest throats by whispers."

Shakespeare and George Eliot concur in treating the slanderer as a thief and robber, which, it is to be admitted, is not tantamount to charging him with capital felony as the law stands to-day, although it would have been in those bygone days when "pleasant Willy" was writing himself into immortal fame.

What extremists upon occasion, too, are those who sit in the judgment-seat of the High Court of Letters. How sore a plague of decay would settle upon our libraries, "parliamentary," "ambulatory," "Carnegie" and what not, if we were to accept blindly the dictum of Pope's noble friend, the Duke of Buckingham, as authoritative —

"Read Homer once, and you can read no more;
For all books else appear so mean and poor,
Verse will seem prose. But still persist to read,
And Homer will be all the books you need."

Such an intemperate estimate of even so great a content of literature as is found in Homer is indeed a swift and heady flight into the teeth of the old saw *Cave hominem*

[1] It is interesting to note in this connection that Bracton declares that murder may be committed *lingua vel facto*. But this is an instance of the ecclesiastic getting the better of the lawyer in the mind of this ancient commentator — *sin* being confounded with *crime*. See Lord Coleridge's comment on the passage in *Reg. v. Dudley*, 14 Q. B. D. at p. 282.

unius libri; but if His Grace had, with prophetic vision, written this doom with reference to the literary out-put of the present day, possibly we should have had to consider the justice of quoting the aforesaid saw against him.

The avaricious and dishonest Verres, immortalized as an example of official corruption by the glowing rhetoric of Cicero, was also an unreasoning extremist. Before him all the protagonists of Tammany Hall ethics pale their insignificant fires. "There was no silver vessel," says his accuser, "no Corinthian or Delian plate, no jewel or pearl, nothing made of gold or ivory, no statue of marble or brass or ivory, no picture whether painted or embroidered, that he did not seek out, that he did not inspect, that, if he liked it, he did not take away." Punning upon his name, Cicero calls him "the drag-net (*everriculum*) of Sicily." It is his extremely ludicrous and abortive attempt to steal the colossal bronze statue of the most illustrious of the Greek heroes from his temple at Agrigentum that constitutes "the thirteenth labor of Hercules." If Archimedes could have furnished him with a sufficient fulcrum (ποῦ στῶ) to move it, Verres would have stolen the earth.

A moment ago, I mentioned a literary judgment which was not mindful of the vice of extremes. Here is another. In his *Table-Talk*, Hazlitt observes with much truth and point: "How much time and talents have been wasted in theological controversy, in law, in politics, in verbal criticism, in judicial astrology, and in finding out the art of making gold." But how far he falls from the plane of moderation and the judicial quality of the true critic, when he adds:

"What actual benefit do we reap from the writings of a Laud or a Whitgift, or of Bishop Bull or Bishop Waterland, or Prideaux' *Connections*, or Beausobre, or Calmet, or St. Augustine, or Puffendorf, or Vattel, or from the more literal, but equally learned and unprofitable, labors of Scaliger, Cardan and Scioppius? How many grains of sense are there in their thousand folio or quarto volumes? What would the world lose if they were committed to the flames tomorrow? Or are they not already 'gone to the vault of all the Capulets'?"

Let us take three of the best-known names in this group so airily dismissed as a prey to dumb forgetfulness. Think you, O gentle reader, that the *Confessions* of the great Bishop of Hippo will cease to be read so long as man's heart beats true to its primal sympathies? I trow not. And it is not Hazlitt, with his more or less precipitate, though undoubtedly brilliant, *Table-Talk*, that figuratively inhabits "the vaults of all the Capulets" to-day rather than the great publicists Puffendorf and Vattel, whose respective works *De Jure Naturae et Gentium*, and *Droit des gens, ou Principes de la loi naturelle*, are anatomical elements in the living body of International Law?

How instantaneously does Carlyle swim into our ken when we contemplate the lack of moderation of many of our great men, even though it be but a spot on the sun of genius. (In Carlyle's case, sad to say parenthetically, the spot is often more responsible for heat than the sun itself.) His "mostly fools" characterization of his British compatriots was bad enough; but the apex of his intemperate rhetoric is touched in his fling at their legal institutions in the essay from which the following "Pig propositions" are taken —

"8. '*Have you Law and Justice in Pigdom?*' Pigs of observation have discerned that there is, or was once supposed to be, a thing called justice. Undeniably at least there is a sentiment in Pig-nature called indignation, revenge, etc., which, if one Pig provoke another, comes out in a more or less destructive manner: hence laws are necessary, amazing quantities of laws. For quarreling is attended with loss of blood, of life, at any rate with frightful effusion of the general stock of Hog's wash, and ruin

(temporary ruin) to large sections of the universal Swine's trough: wherefore let justice be observed, that so quarreling be avoided."

"9. '*What is justice?*' Your own share of the general Swine's trough, not any portion of my share."

"10. '*But what is my share?*' Ah! there, in fact lies the grand difficulty; upon which Pig science, meditating this long while, can settle absolutely nothing. *My share* — humph! — my share is, on the whole, whatever I can contrive to get without being hanged or sent to the hulks."

What ineffable nonsense is this to come from "a person of talents" erstwhile inhabiting the mountain-peaks of philosophy in Craigenputtoch! Are these wild words the oracles of the guide and philosopher of his times, or are they but the "gibbering in falsetto" of the quondam Teufelsdröckh, wallowing the while in the "Devil's Dirt" of stark madness with all Bedlam let out?

It must be remembered that Carlyle is here writing of England in the "fifties" of the last century, when the country was well entered upon that period of social and political reform which has caused the publicists of Europe to laud her as the mother of liberty and justice — despite their national prejudices. It was of the England that had placed upon her statute-book Lord John Russell's Reform Bill — one of the greatest achievements of modern democracy; the Municipal Corporations Act of 1835 — which may in all appositeness be termed the magna charta of local self-government; the Act 3 & 4 Will. IV c. 73 "for the Abolition of Slavery throughout the British Colonies;" the Catholic Emancipation Act of 1829, and the subsidiary religious relief Acts of 1844 and 1846; Lord Campbell's Libel Act of 1843, ensuring the absolute liberty of the press with a just corollary of responsibility; the Poor Law Amendment Act of 1834, based on the principle that no one in England should perish for the want of care and the necessaries of life, and designed to prevent the poor rates from being exploited for the support of the malingerer and imposter; the Mining Act of 1842, which prohibited the employment of women, and children under ten years of age, in underground labor; as well as the cognate humanitarian legislation embodied in the Factory Act of 1844, and the Ten Hours Bill of 1847.

A most amazing title, truly, do we find in "Pigdom" for a community wherein such a quality of "Law and Justice" as this abounded; and in "Pigs" do we descry an epithet more than strange to be applied to such men as Lord John Russell and Lord Shaftesbury — for they were responsible for much of this legislation — whose splendid enthusiasm for right and righteousness has not yet ceased to energize the philanthropy of British civilization.

It is the lack of all the restraints of fairness and judgment, as manifest in such a diatribe as the above, that will exclude Carlyle from a place among the crowned heads of the leaders of men in the estimation of posterity; just as surely as it marred the influence of his counsels to the men of his time. No man can teach others to be great who lacks the first element of greatness himself, namely, moderation. Leslie Stephen said of Swift that "he scorned fools too heartily to treat them tenderly and do justice to the pathetic side of even human folly." But Carlyle, sad to say, scorned openly many who were neither fools nor imposters, but were only unfortunate enough to be in the public eye at the same time with himself. Who can vindicate his characterization of Lord Houghton as "the President of the Heaven and Hell Amalgamation Company;" or his playful (!) description of Tennyson (excogitating his idylls of medieval chivalry) as one "sitting on a dung-heap among innumerable dead dogs"? Surely, the literary firmament in which Carlyle described his perturbed orbit must have shuddered at such explosions of "playfulness."

Taine was right when he employed such

epithets as "violent," "savage," "abandoned to imaginative follies," "entirely without taste, order, or measure," to describe Carlyle's attitude toward a subject which excited his disfavor. He had a truly Gargantuan appetite for invective; and was all the more perfervid when his outbursts were undeserved. Restraint was an unknown quantity with him; and moderation he derided as the counsel of fools. He found in the writing of history his most abiding fame; and yet his histories live not because they are histories but because they are poems!

And yet let us not be rash in our judgment of Carlyle, he was neither an extremely bad historian nor an exceedingly great poet.

But if our essay on the mischief of extremes is to keep itself *sans reproche* in respect of such mischief it behooves us to remember that our observations are primarily addressed to lawyers, that life is short, and that it is high time for us to remove our theme to a more technical environment and "make an end on 't."

The poet Terence (*Heaut.* 4, 5, 48) tells us that "Extreme right is often extreme wrong;" and Cicero (*de Off.* 1, 10, 33) refers to the maxim *Summum jus summa injuria* as a "trite and proverbial expression." The philosophy of the Roman law concerning the matter is expressed in this wise (*D.* 17, 1, 29, 4): "*Non congruit de apicibus juris disputari*" — it is not becoming to debate legal subtleties. Lord Hobart enunciated the same idea when he said in *Sheffield v. Ratcliffe* (*Hob.* 343): "*Aucupia verborum sunt judice indigna* — catching at words is unworthy of a judge." And Lord Hobart's view is as robustly true to-day as it was when it was uttered, notwithstanding Chief Baron Pollock's vaunt that "Judges are philologists of the highest order" (*Exparte Davis*, 5 W. R. 523). Fancy, boasting of skill in φιλολογια — which originally meant "love of talk" and now signifies in English what the Germans understand by *Sprachenkunde* —as a feature of the judicial quality! And if it were, what a dead waste of logomachy the business of our courts long ago would have become! Apologies may be due to the memory of the distinguished Chief Baron for venturing to suggest that his hyperbolism must be interpreted to mean that the judges, as a whole, are fair grammarians; but we will risk displeasing the shade of so polished a gentleman, and so good a scholar, as Pollock was. The observation we have quoted, however, is not the only instance we have of his exploiting the vice of extremes. Sergeant Ballantine tells us that he had an inordinate admiration for his handsome legs encased in the judicial smalls and silken hose; and we cannot condone his hypercriticism of one of the old law reporters: "Espinasse! Oh, yes, he was that deaf old reporter, was he not, who heard one half of a case and reported the other half?" True, Espinasse hasn't the best reputation in the world for reportorial accuracy, but before he could merit the extreme terms of this condemnation he must needs descend into the nethermost abyss of fatuous uselessness.

It is reassuring to meet with the declaration that "common sense still lingers in Westminster Hall;" but that was uttered by a judge over fifty years ago in rebuking an advocate who was urging an *apex juris* upon the consideration of the court. (*Crosse* v. *Seaman*, 11 C. B. at p. 525.) It was only a dictum, moreover, and, peradventure, one to be lightly regarded by the Bench of our own times.

Lord Mansfield thought that the courts ought always to lean against niceties in matters of variance between the parties to a suit (*Rann* v. *Green*, 2 Camp. 476); and Wilmot, J once said: "If once we go upon niceties of construction, we shall not know where to stop. For one nicety is made a foundation for another, and that other for a third; and so on, without end." (*R.* v. *Inhabitants of Caverswall*, Burr. Settl. Cas. at p. 465.)

Lord Kenyon threw the weight of his great authority against the tendency of his time to cramp and confine the law by a

system of inflexible rules. In *Peaceable v. Read* (1 East. 573) he said: "No person is less disposed than I am to accomodate the law to the particular convenience of the case; but I am always glad when I find the strict law and the justice of the case going hand in hand together." Of the same mind was Lord Cottenham, who declared it to be right and proper for his court to adapt its practice and course of proceedings to the existing state of society, and not, by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice and to enforce rights for which there is no other remedy." (*Walworth* v. *Holt*, 4 My. & Cr. 635.) And Lord Eldon before him had said: "A general rule, established for the convenient administration of justice, must not be adhered to in cases in which, consistently with practical convenience, it is incapable of application. . . . The difficulty must be overcome upon this principle, that it is better to go as far as possible towards justice than to deny it altogether. (*Cockburn* v. *Thompson*, 16 Vesey at pp. 326, 329.)

Many other such expressions of judicial opinion concerning the matter in hand might be presented here, but I shall content myself without more than the following observations by Coleridge, C. J. (a man not given to extremes if Dizzy's tart epigram upon him — "silver tongued mediocrity" — is in any wise to be accepted) in *Reg.* v. *Labouchere*, 15 Cox C. C. 425: "However much men may honestly endeavor to limit the exercise of their discretion by definite rule, there must always be room for idiosyncrasy; and idiosyncrasy, as the word expresses, varies with the man. . . . The current of legal decision runs often to a point which is felt to be beyond the bounds of sound and sane control, and there is danger sometimes that the retrocession current should become itself extreme."

And thus we conclude that the law is greater than its medium of expression; greater than the rules of the grammarian, or the subtleties of the logomachist. "It is," says Vattel (*Law of Nations*, ii, xvii, 273) "a gross quibble to affix a particular sense to a word, in order to elude the true sense of the entire expression." And he illustrates the mischief he deprecates by reference to the conduct of Mahomet who justified his promise to a captive to spare his head by ordering him to be cut in two through the middle of the body; and that of Tamerlane, who after having induced the garrison of Sebastia to capitulate under the promise of shedding no blood, fulfilled his pledge by causing all the soldiers to be buried alive. Possibly this manifestation of quibbler's logic by these men of the sword will be quoted some day as a countenance for the German proverb that couples the lawyer and the soldier as *des Teufels Spielkamraden.*

Dante called Aristotle *Il maestro di color che sano* and undoubtedly he was raised to that proud eminence by the poet because of his "sweet reasonableness;" and, in sooth, no lesser man, of any sphere or calling in life, may hope to attain to his potential measure of wisdom unless he persistently threads the reasonable way that divides the extremes in all things mundane.

It is only these *apices juris* whereof we have spoken here that stand between the average lawyer and a full vision of that heavenly thing which Coke, in an unwonted — nay, his solitary — outburst of poetic fervor, calls "the gladsome light of Jurisprudence."

OTTAWA, CANADA, July, 1905.

COMMONWEALTH *v.* LAMB

By Henry Burnham Boone

MR. LAMB stands at the vanishing point of human importance, if at this moment he is still in existence. At the time when his actions were the subject of judicial investigation he was as inconsiderable as it is possible for a creature to be. His personality was hardly more palpable than thin air. He could almost be said not to exist at all. His life did not cast a shadow. Whether he lived or died could not have been of any importance to any one, could not have mattered much even to himself. Any broken-kneed cab-horse, any homeless, ownerless street dog had more individuality than he. His personality denied the existence of the Ego.

A philosophy that defines men as expressions of a will would be puzzled to account for his existence. He was charged with a deliberate attempt to commit murder. The charge itself reflected the man's futility. He had only attempted — and failed.

The lawyer who came to defend him before the trial justice, journeyed six hours in a buggy through the pine forests of South Florida, following a wagon-track. The yielding sand that gave way to his buggy-wheels flowed back over their rims. The shoeless horse sank up to his fet-locks at every step. Mr. Brown, the lawyer, had brought with him the Statutes of the State and a volume of criminal law. He had never heard of the man until a fellow-lawyer put a telegram into his hand the night before and told him he was welcome to the job if he wanted it.

The name of the hamlet near which the affair occurred is on the map. Unless every cross-road and store in South Florida is inscribed with an appropriate title upon the county maps, such maps would merely display blank parallelograms and rhombuses. The settlement lay between a virgin pine forest and a swamp where the ax had been employed by the settlers only to clear a spot for the town, and the sun, in revenge for the desecration of nature, concentrated her heat upon these criminals and made their town comparable to a seventh circle in the "Inferno of Dante." In the straggling orange groves, the trees had been killed by belting, and each threw its long ghostly shadow in the morning sun. There was a weedy, sickly crop of corn in a dip between the hamlet and the swamp. There were no fences anywhere. The town proper consisted of a few cabins, apparently deserted for the mud had fallen from the chinks, and two stores built of unplaned planks nailed up and down and cured to a gray color by the sun. In the curing the boards had drawn apart as if contact were too hot for comfort. Another store had been framed and was in the leisurely process of building. "I wonder why," thought Mr. Brown as his driver pulled up before one of the stores. In the shade a considerable number of men were sitting with their backs against the planks, expectorating the juices of tobacco at chips which they had stuck up in the sand or at stones which were within spittable distance. Their lean mounts tied to the store porches, full in the sun, were worn out with beating flies, but their owners had considerately tied their bridle-reins to posts and the animals contrived to use them as slings for the support of their heads. One had broken his rein but every now and then he would forget it and, just as he was dozing off, he would lurch forward and wake up. Naturally he was annoyed by these jerky awakenings and envious of his companions. His temper had suffered from the strain and occasionally he made as if to kick a neighbor, but somnolence always overcame him before he had come to the point of doing so.

Mr. Brown was new to South Florida and new to the law.

He walked over to the occupied strip of shade and asked, referring to his telegram, where he could find L. Lamb.

"He's somewhar about," one of the loungers said.

"He's at liberty then?" Mr. Brown said in surprise.

"Yas, suh."

No one offered to move. Mr. Brown had thought that men charged with crime were locked up. He found himself at the outset of his legal career confronted by a situation for which his studies had not prepared him. He began to reflect as to how much he knew of the proceedings in a justice's court. What was the first step for the attorney for the defense when everything was at loose ends, unhitched, so to speak, from the legal vehicle?

While he was reflecting, his driver joined the group.

"Here's Lamb," he said.

Brown blessed his driver in his heart. After all, common-sense was of use even in law. Here was the first step taken. What was next? What sort of a crime was attempt at murder? He could recall distinctly the doctrine of contingent remainders and their conveyance, the liabilities of common carriers with its various heads and subdivisions; he felt that he would know when and where an action of libel would lie — but an attempt at murder? He had certainly stored in his mind knowledge relating to this subject if he could but find it. It was certainly there somewhere.

Lamb wore a rusty black felt hat, a cotton shirt, overalls, and a pair of coarse, cheap brogans tied with cotton rags. His eyes were mild, apathetic, expressionless. His round-shouldered figure gave no indication of strength. His attitude expressed listless vacancy of mind.

"Shall we have a talk," the lawyer said briskly.

"I reckon," Lamb answered.

"Shall we go inside?" Brown asked.

He entered the store and glanced about to select a spot for the interview. He heard a shuffling of feet behind him and looked over his shoulder to see Lamb enter accompanied, apparently, by the entire community. No one uttered a word. They flowed in almost as noiselessly as the tide rises. Mr. Brown surveyed them in some embarrassment. His driver at this moment again proved equal to the occasion. He plucked the lawyer by the coat and whispered, "Why not take him in the drug store. See the sign at the end of the store? They say there ain't no good tryin' to get him off but I told 'em they didn't know how cute you was. I don't myself, but I let on you was up to any game goin'."

"Thanks," said Brown doubtfully. He had no great confidence in his own cuteness. Evidently the whole neighborhood had come in for entertainment.

"I tell you what," his driver said confidentially, leading Brown aside, "if you ain't got no case, sling all the long words in the dictionary and fan the air. They ain't nothin' but 'crackers.' They don't know anything. I've driv lawyers regular to these God-forsaken little towns and I've listened to 'em. Come election and all these God-forsaken idiots has got a vote, you know!"

"Yes, I know," Brown answered, grateful for any advice.

He called his client and led the way into the drug department.

In an ancient work on cookery, the recipe for the preparation of rabbits begins "first catch your hare." It would be well if treatises on the practice of law should suggest as the first leading principle "get your fee."

Mr. Brown reflected that he had paid for his buggy and that in the hours before night he might acquire an appetite for the mussy cheese, fly-blown soda crackers and alleged sardines offered for sale in the emporium.

"I must have my expenses," Mr. Brown said at last with deliberation.

"I ain't got nuthin'," Lamb answered.

Here was a contingency to which the attorney had not given previous consideration. He began a mental calculation as to the probable length of time he could practice law with his present fixed charges for board and washing, and a buggy, say twice a week. It occurred to him that he could pick oranges during one season for the expenses of practicing law the next.

"I reckon I kin try to borrow five dollars," Lamb said and went out.

A clerk, who came in to mix some powders, helped Brown to a better understanding of the case, before Lamb came back. The latter handed his defender five dollars and took his seat. The store outside was in view through the cracks between the planks. The tide of loungers had now flowed back to the shade. Some were whittling, some sat nursing their legs, and now and then there was a dull murmur as of feeble conversation.

Lamb folded his arms across his narrow chest and twisted himself into a limp boneless attitude so that it would be impossible to say what parts supported the others. He began after much urging in this fashion.

"It was this-a-way. My wife ain't much. We've had six children and buried four, and when the last baby came she didn't have no milk. That was in the beginning of comin'-on-winter. I hadn't made no crop worth talk-about and one day my mule dropped dead. There was a feller whar rented a piece of land with a cabin on it and he had two mules. He proposed we go shares. My wife was to do the cookin' and keep house. My wife's mother lives with us. She ain't much and her health ain't nuthin'. She has fever and ager when its comin'-on sun-down, not regular, but most always. The feller took a dislike to her from the start."

Lamb had a trying way of stopping between sentences. He seemed to lose his thread in these silences. Brown had often to recall to him what he had said to straighten him out on his road.

"We planted our crop," continued Lamb, "and it come time for first ploughing and the meat and meal, we had calculated to last us, give out. He was a tremenjous feller with middlin' but he said it give out because we was a feedin' so many. Now my wife can't eat middlin' and she ain't much for co'n-pone — stomach sorter turns against it, she says. The baby was fretful nights because she didn't have no milk much and she couldn't wean it on co'n-bread and bacon. These fellers here in this store fixed us up with stuff to cook until we could grind our co'n, but the feller would come in to eat and say it wasn't cooked fit for a dog. My wife tried to suit him but it wasn't no use. He told my wife's mother that she hadn't no busness living and taking the food outer people's mouth's who worked to make it. Told my wife it would have been a lucky thing if her mother had died instead of the mule."

Here Lamb stopped and it was a long time before he again got under way.

"I stood it a long time," said Lamb and, as he raised his hollow eyes, the lawyer fancied that a glimmer of expression was in them. "He'd come in and take off his coat and yell to my wife, 'Bring on the slop and the dog bread. I can't eat it but I want to see you doing some cursed thing.' Now she want in no fix to be talked to like that. She used to cry nights and wish she was dead. Well, one day he come in and said more'n that. He said —"

— What he said cannot be written down.

"Then he took the plate of meat and gravy and threw it out of the window. I went out and studied what I was goin' to do. Then I went back and I said — he was yellin' all the time — I said, 'you quit or git out.' Then I went in his room and got his gun. When I come back he didn't make no motion. He yelled, 'tain't loaded,' like 'twas all a joke. I pulled the trigger and it was loaded."

"And you missed him," said Brown, hoarsely. "Man, how could you miss him with a shot-gun in your hands."

"I missed him," continued Lamb in his deadly apathetic voice. "When he was a-goin' outen the door I fired again but I missed him again. 'Twa'n't no use. And — I recken that's all. I couldn't stand my women-folks bein' talked to that-a-way. 'Tain't decent!"

"No, 'tain't decent," echoed Brown, gravely unconscious that he was using the other's phrase. He felt a sudden dizziness of head. The awful nakedness of such lives as these stood out revealed in Lamb's meager story; the inhumanity to women in this Irresistible Force, the Unmerciful Will that keeps the Earth peopled! In the lawyer's mind there came a terribly distinct picture of the wife of this man. He had never seen her, but he had encountered many of her sisterhood in the scattered clearings under the pines. At the time he had merely glanced at them casually, but memory was now startled into a vivid presentment of one figure which had no individual existence but was the composite photograph, so to speak, of them all: A gaunt woman standing in a cabin doorway with a baby at her breast and another holding himself up by her dress. He could see the blue hollows under her eyes, the high lights on cheek-bones and jaw. The woman shaded her eyes with her free hand and stared at him dully. What useful purpose was served by all the suffering and misery to which her face testified!

When the lawyer raised his head he saw Lamb still sitting in the limp attitude. There was no smouldering fire in his eyes as of a mind working.

"Where can I find the justice," Brown asked.

"He's building that new store," his client answered. "It's his'n."

The store which Lamb indicated fronted that in which they were; between the two was a strip of sand without vegetation. The judge was busy. He was handling a jack-plane in a manner that showed familiarity with its use. He gave a casual nod in return for the lawyer's salute, sighted along a plank and continued his work.

"Can I have a few words with you," Brown said.

"Trial's set for three," said the judge. Out of the tail of his eye he gave the lawyer an up and down glance as if to take his measure.

"Trial?"

"That's what I said," answered the judge, sucking one of his teeth reflectively and squinting again at the plank.

"But I have no witnesses!" protested Brown. He repeated this because the judge was so occupied with his plank that he feared his remark had not been heard.

"Lamb ain't got nuthin'," said the other finally with attention still undistracted from his labors.

The lawyer had no false pride. He was sure that there was something in the statutes that bore upon this. He could not recall how the machinery was set in motion. He searched and the judge planed. At last he found his text and began to read.

"I know all that," the judge said, "perhaps," — he hung on the word a moment — "perhaps, as good as you do. But how are you goin' to get 'em."

"You will summons them."

"Not by a —— sight. The feller's goin' on to the grand jury."

He walked to the door. Brown followed with book open, expostulating. From the patches of shade, from the two other stores, and apparently in some cases as if they had sprung from the earth, the citizens grouped about the two, but at a respectful distance. The new store had a porch which served perfectly for a platform. Up to that moment, the potentate of the hamlet had seemed to be a man of few words and mild manners. But now he suddenly turned on the lawyer with a snarl which was so un-

expected that the young barrister fell back a step in amazement.

"You don't know nuthin'," the judge said. He waved his arm and every eye was on him. "This young feller's tryin' to teach me the Constitution of Florida! What does the Constitution say on this p'int?" His whole attitude demanded of his listeners that they must follow the argument closely. "It says this, gentlemen. It says every citizen has the right to Life, Liberty, and The Pursuit of Happiness! And further — No cruel or unusual punishments shall be allowed and," full arm gesture, slight pause — "and no excessive bail required."

A low murmur greeted the end of the period. Brown's jaw dropped and he looked from the speaker to the listeners in utter bewilderment. He reflected afterward that if he had immediately plunged into "Arma virumque cano" or even "'Twas Brillig and the Slithy Toaves" he might even then have snatched the victory, but instead he let the moment pass in a futile endeavor to put meaning into the justice's Sphynx-like utterance.

The orator made a slight inclination and retired into the shade of his store where none presumed to follow him. A boy brought him his dinner and he proceeded to carve a chicken on a shingle.

Mr. Brown popped his law-book into his buggy. If he was no match for this learned man in dialectics, he had a strong confidence in his ability to beat him to death. He had been spread-eagled before the settlement and he was ferociously angry. He cast aside Law and Statutes.

"If you don't summons my witnesses," he said, "I'll make it warm for you."

The judge was masticating a large mouthful of bread and chicken.

"The Constitution of Florida," he began with difficulty.

"Come, come," interruped Brown. "I'm no 'cracker'."

"He ain't got no money," said the judge with a suspicion of openness in his manner.

"I follow you," said Brown laying his five-dollar bill on a shingle. The judge looked at the bill for a moment, chewing contemplatively.

"Bribery and Corruption," he murmured. "There ain't nuthin' in it for you or for me. He ain't got no friends. In fact, he ain't nuthin'."

"All right. I'll give you an opportunity to blow off on the Constitution of Florida before Judge Early of the Circuit Court."

"What's the row, young feller? Course you can have your witnesses if you want 'em. I'm just tryin' to save the state expense. Lamb ain't got no show. You ain't heard the story rightly. Whose gun did Lamb use! 'Tother feller's! Now Lamb had been threatenin' to kill him for some time. There's witnesses to that. Do you think 'tother feller'd leave a loaded gun about? No, suh! He hid the shells and when Lamb picked up the gun 'tother feller knew it wasn't loaded. But he knew wrong. Lamb had found the shells since 'tother feller had looked at the gun in the morning and he had set the gun where he could get it handy. He'd fixed to kill 'tother feller. See? This court ain't open to Bribery and Corruption. If 'twas a case of finin' him, five dollars might go toward it, but — I'll tell you what, it might save you a lot a trouble if we was to proceed regular-like. I keep this five dollars for expenses of process. Your witnesses are summonsed regular."

Brown had been communing with himself for some moments. He awoke and acquiesced. The judge tucked the money in his overalls and called "Sam." Some loungers stirred on the store-porch across the way and one went inside. Presently "Sam" approached. The citizens flowed into the half-circle and gaped open-mouthed.

"Sam," said the judge assuming his official manner. "You must summons this gentleman's witnesses. Looks like you don't know your business."

"All his folks are down at Simeon's," Sam answered. "They could a-come if

the'd a-wanted to. I ain't goin' to walk way down thar."

"Who said walk?" demanded the judge. "Git your horse."

"My horse is ploughin' co'n. I'll be —— if I do."

"You're a sworn officer of this court. Git your horse."

"I'll tell you what! I'll ride yours."

"What do you think my horse is doin'?"

The officer replied that he didn't care — at all (not to inscribe language too literally). He reiterated a willingness to suffer the pains of Purgatory rather than take his horse out of the corn-field.

Here began a battle-royal between gods. Sam moved away, his shoulders humped. The judge followed, exploding at intervals. The crowd kept step with them.

Brown looked for Lamb and found him alone.

"What do they do with you nights," he asked.

"Lock me up in a cabin."

"Anything to hinder your getting out?"

"Naw, suh! Not as I knows of. Thar's a winder."

"How far is it to the Alabama line?"

"Tain't so very fer."

"Know anybody in Alabama?"

"Thar's my wife's brother. My wife come from Alabama."

"Mind you," Brown said. "I am not advising you to break jail."

"Naw, suh," answered the unmoved Lamb.

"But I do tell you this," continued Brown beginning to feel desperately afraid that he would not be able to hammer his suggestions into his client's skull, "Understand me! Two and two make four."

"I ain't never had no schoolin'!"

"You don't need no schoolin'," said Brown adopting the cracker negation for greater effectiveness. "You had his gun loaded and ready, didn't you?"

"I ain't never said so," answered Lamb. "He says so."

"Where did you find the shells?"

"Where I see him put 'em. Under a plank in the floor."

Brown regarded him hopelessly. "Don't you see you've told the whole story?"

Lamb raised his mild eyes and regarded his lawyer with wrinkled forehead. He shook his head. "I ain't never said so. He said so," he repeated. He gave up the puzzle and expectorated without predjudice.

"You will go on to the grand jury and they will send you up and you will end in a convict camp and mine phosphate," said Brown. "They will chain you nights in an open shed."

"I reckon," replied Lamb. "I couldn't stand his talkin' to my women-folks that-a-way. 'Tain't decent."

"What's to keep you here?"

"I dunno."

The judge approached the two. He looked at the sun and then at Brown.

"I have instructed my officer to summons your witnesses if you will hand him the list. But the sun is goin' down. We could hardly get started till to-morrow."

"Suppose you grant me a continuance until this day week," said Brown.

"The court will hear your argument," the judge answered. "Lamb, sun's droppin'. It's time you went to jail. You can wait until your attorney has spoke."

Brown made his first legal argument, and at its conclusion the judge assumed an attitude of deep thought and finally said, "The court grants the continuance asked by the defense."

Brown walked with Lamb to the tumble-down cabin.

"This yere's the jail," Lamb said.

"Good-day," said Brown offering his hand.

Lamb wiped his own on his overalls and allowed the lawyer to shake it.

"Like you said," he began, "this yere cabin ain't nuthin'."

"Shut up," ejaculated Brown quickly, seeing the court's officer approaching. Lamb

stepped inside and "Sam" locked the door.

"Say," Sam said, "that fellow thinks he is God-A-Mighty in this country." His reference was unmistakably to the justice. "But he ain't nuthin'. Some day I'll get mad and beat him to death."

"I'll come and help you," Brown offered.

"He had you when it come to argyment, didn't he? Oh, he's eddicated all right. But you just wait 'till I get mad."

Three days later Brown was passing down the street of the little town where he had his office when he met the justice supported on the arm of a friend. The justice sighted him and lurched toward him dragging his companion. Brown prepared to defend himself.

"Thar's the feller," cried the judge. "Thar's the slickest thing on two legs in the state of Florida. Thar's a feller that will get thar! Shake."

He shook Brown's hand with violence.

"I'm sorter drunk," he went on, "but I know what I'm talkin' about. I thought you was a fool because you looked like one." He turned to his friend. "Here's a feller what bamboozled me like I'd been born yesterday. You ain't botherin 'about comin' back to my town is you?"

Brown did not understand him. The judge hugged a post, so overcome was he with his mirth.

"How does he git his client's off? Fool with the law? Not much. He tells 'em to watch their chance and git for Alabama and they git. Mr. Simpkins, you is shaking the hand of Mr. Brown, the future governor of this state."

ROME, ITALY, April, 1905

TOBACCO LAWS OF THE OLD DOMINION

By Bushrod C. Washington

WHEN Rodrigo Triana, a seaman on the *Pinta*, peering through the darkness, cried, "Land ahoy!" — or words to that effect in Spanish lingo — America, at that outcry, was practically discovered; and what had before been vague conjecture as to the western hemisphere, then and there became a fact forever.

It is recorded, however, that the ever-vigilant Admiral Christopher Columbus, anxious in his own person to make the first find, was himself also on watch that night, and a moment before Triana espied the outlines of land, had observed some moving lights straight away in front, which indicated they were sailing down upon a shore.

When darkness lifted, the grey dawn of morning revealed the extensive beach of what turned out to be an island, alive with the natives — their figures in that primeval state in which beauty is said to be most adorned - - many of them holding between their teeth what appeared to be firebrands, and exhaling great jets of smoke through their puckered lips. The firebrands turned out to be rude wooden pipes in which were brightly glowing the leaves of an indigenous plant — a plant thenceforward to take great place in history, to be writ large as an article of manufacture and commerce, and to become an active factor in the sociology of men and nations. It was to become also an article of happy uses and of villainous abuses; and as such — a solace, boon, and benefaction, or a withering, degenerating curse and crime — and much else also, of either praise or condemnation, according to the view-point and the *animus* of the viewer.

The plant bears the jocular and provincial name of "The Virginia Weed," but is known world-wide as Tobacco. That the glowing pipes of those insular natives — the moving lights — were observed by Columbus just a little before Triana cried "land ahoy," is an incident of vast importance, if true; for it is upon this historic order of the happenings that eventful night, that Virginians, who delight to crown "The Mother of States" and all her belongings with the halo of antiquity, set up the claim, that their favorite weed was discovered just a little before America itself.

Whatever the merits of the claim, it will be futile to dispute it; because — as is said in law — "It has color of title," and the Virginians being in sole possession of the particular items of history thereunto relating, the whole burden of proof to the contrary will rest upon the disputant.

It is in no sense of disparagement, however, that they — the Virginians — were wont to think, if not to speak, of Columbus as "The discoverer of Tobacco — and some islands and continents called America"; for when it is reckoned how big a thing tobacco came to be in their ancient Commonwealth, it is plain that, to their minds, Columbus, in having found tobacco, was worthy to be classed an explorer and discoverer of first magnitude, even had the islands and continents been omitted from the catalogue of his discoveries.

Whatever measure of importance it attained in other parts of America, in Virginia, the planting, curing, and other dispositions of tobacco, in time assumed the dignity and importance of a dominant social and civil institution.

While it was smoked, chewed, and snuffed almost universally — these being its vulgar

Note. — The laws quoted in this article are taken from Hennings Statutes, the first codified laws of the Colonial Assembly of Virginia, published 1808, from manuscripts furnished by Thomas Jefferson, collected and preserved by him. The quaint orthography of the originals has been followed.

uses — it was in the Old Dominion only that the plant became possessed of those high and honorable functions that entitled it to be termed "The Virginia Weed." Being the only article of export, it was the product of all others most readily convertible into English money, and so became the representative of money in the colony, and as such, the standard in barter, the measure of values, and medium of exchange for all other articles — in fact, the currency of the people. The cultivation of it, therefore, became a privilege, and was hedged about with such restrictions and requirements by the law-making power, as to make it a most exclusive and aristocratic engagement. The General Assembly or House of Burgesses — the first law-making body in Virginia, as early as 1632 enacted that, "The necessitie of the present state of the country requiringe, Itt is thought fitt that all gunsmiths and nailors, brickmakers, carpenters, joiners, sawyers, and turners be compelled to work at their trades, *and not suffered to plant tobacco*."

It was in the direction of whatever affected its functions as the circulating medium, that most of the early enactments of the assembly were directed; the intention being to secure a sound and stable currency of the highest possible standard. Thus a system of laws gradually evolved, which provided for almost every imaginable phase in the cultivation, manipulation, and sale of tobacco, and thus also was secured an article of the very best quality for its ultimate uses to the consumer. The fact that the burgesses themselves, and all officers of the assembly, as well, the justices, sheriffs, bailiffs, and other officials, received their salaries and fees in tobacco, was in itself a guarantee that a high standard would be maintained for the currency. The Church of England being the established church of the colony, and the stipends of the clergy being payable in tithes of tobacco, the influence of the clergy also, was on the side of a sound and stable currency, and "The raisinge and curinge of good tobacco," was enjoined from the pulpit, not only as of the highest order of civic duty, but as a Christian privilege and religious obligation hardly second to observance of the decalogue and the partaking of the sacraments.

It was according, therefore, to the apparent scarcity or redundancy of the currency that the assembly enacted laws for the increase or decrease of the number of tobacco plants "per poll" to be planted, and the number of leaves from each plant to be gathered and cured. From the Acts of the Assembly, October, 1629, is the following — "It was put to the question whether for this yeare there should be an ordinance made and established for the stintinge of the planting of tobacco. To this the opinion of the most voices was that noe person working in the ground, which are all to be tithable, should plant above 3000 plants upon a head."

Act VIII of the same Assembly provided, "That noe person whatsoever shall plant or tende above two thousand plants of tobaccoe for any head within his family including woemen and children — and it is further ordered that if any man shall make any bad conditioned tobaccoe, and offer to pay away the same — either for debts or marchandise, it shall be lawful for the commander of any plantation, upon view thereof to burne the same; and the partie that shall be found delinquant in any part of this order shall be hereby barred from planting any tobaccoe until he be re-admitted by a general assembly."

The plantation, or "hundered," was the earliest civil and military district or jurisdiction. It had representation in the House of Burgesses, and the commander was clothed with great discretionary powers, and was held to corresponding accountability. The enforcing of the tobacco laws devolved upon him and his subordinates. Act XXI, Assembly of 1631, provided, "That no planter or mayster of a familie shall make or transfer this right of plantage

to any other." Also, "That the commander shall appoint persons to count the number of plants before the 10th day of July, and say in his conscience the just and true number of them, and if the number be found to exceed the proportion of 2000 per poll, then the commander is to present it to the next monthlie cort, and the commissioners thereof shall give present order to have the whole crop of tobaccoe cut down under payne of imprisonment and censure of the govonor and counsell and grand assembly yff they neglect the execution thereof. And upon neglect of the commander he shall be censured in like manner."

Act XXII provides, "That no person shall tend or cause to be tended above 14 leaves, nor gather or cause to be gathered above 9 leaves upon a plant of tobacco; and the several commanders shall hereby have power to examine the truth thereof, and if any offend, to punish the servants by whippinge, and bind over the maysters unto the next quarter cort at James Citty to be censured by the govonor and counsell."

For the better maintaining the quality of tobacco, it was later enacted, "That whereas it has been taken into serious consideration and debate for the bettering our — indeed — only commoditie tobacco, for the benefit both of the planter and marchant; both equally complaining of its low and contemptible rate, and noe expedient found butt lessening the quantity and mending the quality — finding all other stints inconsistent with the good of this colony. . . . Doe therefore hereby enact that what person or persons soever shall after publication of this act, tend, suffer, or cause to be tended any tobacco commonly called "seconds" and "slips," shall for soe doing pay 2000 pounds of tobacco, one half to the informer, and the other half to the militia to be disposed of for amunition for that county where the offense shall be committed."

All tobacco, after gathering and curing, was required to be deposited in stores or warehouses under government supervision, there to be "viewed, tried, and inspected" by sworn officials; and woe to the planter who undertook to deposit any "ill conditioned" leaves, for it was ordered the same were "Instantly to be burnt and the planters thereof disabled from plantinge any more of the commoditie of tobacco." . . . "And no person may neglect, withhold or deteyne any tobaccoes from bringinge the same to the said stores uppon penaltie of confiscation of soe much as shall be kept back on the last day of December; to which purpose alsoe every such person or persons shall be sworne . . . that he or they have kept back no tobacco except such as is reserved for his or their own spendage to use in his familie." Similar requirements and penalties applied to the established prices and weights in all tobacco transactions.

It would seem from these laws that tobacco was firmly intrenched in its unique position. Nevertheless it had its vicissitudes, and came near being dethroned from its place of exaltation as the medium of exchange, by some revolutionary, modernizing iconoclasts and reformers, who dominated the Assembly of 1634, which Assembly, by Act IV, entitled "An act for all Contracts, Bargains, Pleas, and Judgments to be paid in money and not in tobacco," did legally if not actually demonetize tobacco. It provided "That whereas it hath been the usual custom of marchants and others dealing intermutually in this colony to make all bargaines, contracts, and to keep all accounts in tobacco and not in money, contrary to the custome in England and other places within the King's dominion, which thing hath bread many inconveniencys in trade, . . . it is thought fitt by the Govonor and Counsell and Burgesses of the Grand Assembly; That all accounts and contracts be usually made in money and not in tobacco; and further that all Judgments, Decrees and Acts, made and ordered in any of the Corts within this colony, . . . shall be sett down in English money according to

the custome of all Pleas and Judgments in the Kingdom of England."

But those old "frenzied financiers" of 1634, in enacting the above, made two mistakes: first, it was the seventeenth instead of the nineteenth century in which they were trying to work the game of demonetization, and then they had run up against something a little different from that debased and contemptible thing, "free silver." It was the household god of the Old Dominion, tobacco, they had essayed to dethrone; and, though they had successfully worked the legislative end of the scheme, and passed the aforesaid law, tobacco refused to be demonetized, and the people took side with tobacco.

So, the law was still-born — a dead letter from its very inception. "The crime of 1873" could not be perpetrated in 1634 — at least not against tobacco. It was the home-made money of the people, and at that stage of the country's development, barter being more in vogue than the more complicated transactions of commerce, it was better suited to the needs of the people than actual money could possibly have been. It is true that about this time an act was passed for the coinage of "pieces of ten," but it was soon repealed on account of the facility with which the coin was counterfeited, and in 1642 it was enacted that debts thereafter contracted in money should not be recoverable by law. Thus, tobacco not only resumed its wonted monetary function, but about fifty years later, it came to such high estate as to partake of the very essence and sovereignty of the commonwealth; so that a conspiracy to dig up, burn, or otherwise destroy it was made high treason and punishable with death. This will appear from Act II, Assembly of 1684, as follows:

"An act for the better preservation of the peace of Virginia and preventing unlawful and treasonable association."

"Whereas many evil and ill-disposed persons, inhabitants of his majesties collony and dominion of Virginia, contrary to their duty and allegiance, on or about the first day of May in the thirty fourth year of his majesties reign — Charles II — and divers other days and times did tumultuously and mutinously assemble and gather together to cut and destroy all tobacco plants, and to perpetrate the same in a traterous and rebellious manner, with force and arms entered the plantations of many of his majesties good subjects, of this his colony, resolving by open force a general and total destruction of all tobacco plants within his majesties dominion to the hazarding the subversion of the whole government and ruin and destruction of his majesties good subjects, if by God's assistance the prudent care and conduct of the then lieutenant govonor and counsell, the mutineers had not been timely prevented for which treasons and rebellions some notorious actors have been indicted, convicted and some of them executed, and suffered such pains and punishments as for their treasons and rebellions they greatly deserved. . . . Now to the end and purpose that none of his majesties subjects may be seduced by the specious pretenses of any persons; that such tumultuous and mutinous assemblyes to cut and destroy tobacco plants . . . are riotts and trespasses, and to the end that his majesties subjects of this his dominion may be better secured in their estates and possessions. The burgesses of this present general assembly pray that it may be enacted, and be it enacted by the govonor, counsell and burgesses of this assembly, that if any person or persons to the number of eight or more, being assembled shall . . . intend goe about or put in use with force, unlawfully to cut, pull up, and destroy any tobacco plants, either in beds or in hills, growing within the said colony, or to destroy the same either curing or cured, either before the same is in hogsheads or afterwards, or to pull down, burn, or destroy the houses or other places where any such tobacco shall be; or to pull down the fences or other enclosures of any tobacco plants

with intent to cut or destroy the same . . . and being thereof lawfully convicted, shall be deemed, declared and adjudged to be traitors, and shall suffer pains of death, and also loose and forfeit as in case of high treason."

While the penalties for violating the tobacco laws may seem at first glance needlessly severe, they were in fact mild enough compared with the ordinary penology of the times, when it is remembered that the laws regulating and protecting tobacco were the equivalent of the laws regulating and protecting the money of a country; that to increase the legal quantity or decrease the legal quality of tobacco, was tantamount to making and passing counterfeit money; and that to break into an enclosure or building for the purpose of destroying it, was in reality as grave an offense as it would now be to break into the United States Mint or rob the Treasury.

The purchasing power of tobacco, in its monetary capacity, was put to its highest test at an early period in the history of the colony. In 1619, for the better contentment of the colonists, who were mostly young men without the ties of home and family, and to bind them more firmly to permanent settlement, there was sent out from England a cargo of assorted spinsters — "poor but respectable and incorrupt women" to furnish wives to such as would marry. They were sold to pay the expense of transportation at one hundred pounds of tobacco each. The experiment succeeded so well that the following year, another consignment was made of sixty young maids "of virtuous education, young, handsome, and well recommended." A wife out of this lot sold for one hundred and fifty pounds of tobacco. (Howes Hist. of Va., page 41.) Now Solomon had stated the price of a virtuous wife "as far above rubies," but how far above, and how many rubies not being stated, the valuation is vague. It has been shown, however, that her price was not *above* tobacco — that is, not above one hundred and fifty pounds of the "Virginia weed."

The planting of tobacco being a privilege, and intended to be, as far as legislation could make it, an employment of more than ordinary profit; the granting or withholding the privilege, was often of the nature of a reward or punishment. Some Frenchmen who were brought into the colony about 1631, for the purpose of planting vineyards and instructing the colonists in the cultivation of the grape, for reasons best known to themselves, thought best to teach them how *not* to plant vineyards, and succeeded so well in the effort, that the Assembly was constrained to pass the following punitive enactment:

"Upon a remonstrance preferred to the assembly complaininge that the ffrenchmen who were about two years since transported into this country for the plantinge and dressinge of vynes, and to instruct others in the same, have willingly concealed the skill, and not only neglected to plant any vynes themselves but have also spoyled and ruinated that vyneard which was with great cost, planted by the charge of the late Company here; and notwithstanding have received all favour and encouragement thereunto, which hath disheartened all the inhabitants here, It is therefore ordered that the said ffrenchmen, together with their families be restrained and prohibited from planting tobacco, upon penaltie to forfeit their leases and imprisonment until they depart out of this colony."

The office of clergyman, combining both civil and ecclesiastical duties, was doubly protected, both in the matter of support, and against animadversion in his ministerial capacity. It was enacted — 1624 — "That no man dispose of his tobacco before the minister be satisfied, upon paine of forfeiture double his part of the ministers' means, and one man of every plantation to collect his means out of the first and best tobacco and corn." The vulgar custom of "passing the hat" during the time of divine

service was unknown in Virginia under the good old régime of tobacco. The preacher was not to be paid in coppers and nickels, with the right to criticise his sermon a dollar's worth, thrown into the contract. On the contrary, it was a law "That whosoever shall disparage a minister without bringing sufficient proof to justify his reports, whereby the minds of his parishioners may be alienated from him, and his ministry prove the less effectual by their prejudication, shall pay 500 pounds waight of tobacco." If further proof is wanted that the "weed" was a moral and religious factor, it is to be found in the law which provided "That whosoever shall absent himself from divine services any Sunday without allowable excuse shall forfeit a pound of tobacco, and he that absenteth himself a month shall pay 50 pounds of tobacco." There is no mention of the empty pew and "non-attendance-of-men evil," now so much complained of in the churches, to be found in the annals of that era, when the tobacco patch and the church maintained the relations to one another provided for in the foregoing law.

Verily, the American plant which had the unique honor of being discovered before the country, was a plant of functions in the Old Dominion. Neither "King Cotton" of the Southland nor the sacred bean of Boston, nor any other in the vegetable kingdom hath ever attained such a dizzy height of legal exaltation and privilege. But its like will ne'er be known again; it has long since reached the parting of the ways where as an institution it was labelled "A relic of ye olden tyme," and tobacco, the article of common uses, came into possession.

The plant once so connected with a great Commonwealth, that to "dig up, burne, or otherwise destroy it" was a crime against the state, punishable with death, has been touched by the cold hand of latter-day commercialism, branded with the inevitable mark of the dollar, and its very name degraded with the vulgar prefixes — "short cut," "plug," and "stogie."

Yes, it has come upon the democratic days of "Equal rights to all and special privileges to none"; right enough in principle, but, it must be confessed, somewhat lowering to standards. The "bottom leaves," the "ill-conditioned," the "slips" and "seconds" now have their inning. Even the unlovely, weather-beaten quid, and the lowly, forsaken cigar stump — those cast-away relics of departed pleasure — now sing their *resurgam;* when gathered by gutter snipe and scavenger at twenty cents the bucket-full, they are "treated" to a new life in the nearest factory, and are made to glow again in carved meerschaum and naughty cigarette, as "Pipeman's Pride," "Golden Glory," and "High Low Jack and the Game." Tell it not in Gath, that they live again also as middle filling, in Havannas, Vegueras, Regalias, and other "smokes," foreign in name, and fabulous in price, of American structure.

Yes, the proud old plant, once the foster child of "The Govonor and Council and Burgesses of the Grand Assemblie of Virginia" has come to be only a common commodity, a proprietary chattel, stocked and controlled by a commercial octopus called the Tobacco Trust — Shades of the mighty!

CHARLES TOWN, W. VA., June, 1905.

THE CONVICTION OF A SENATOR

By Wallace McCamant

On the third of July, 1905, United States Senator John H. Mitchell was convicted in the Circuit Court of the United States for the District of Oregon of a violation of Section 1782 of the Revised Statutes. This statute, in so far as it is material in connection with the charge against Senator Mitchell, is as follows:

"No senator . . . after his election and during his continuance in office . . . shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding . . . in which the United States is a party or directly or indirectly interested before any department, court, court-martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor and shall be imprisoned not more than two years and fined not more than ten thousand dollars, and shall moreover by conviction therefor be rendered forever incapable of holding any office of honor, trust, or profit under the government of the United States."

The indictment of Senator Mitchell on this charge is the outgrowth of certain prosecutions which have been undertaken by the government in connection with land frauds perpetrated in the state of Oregon. On December 7, 1904, S. A. D. Puter and a number of other defendants were convicted of conspiracy to defraud the government out of certain lands in the state of Oregon, and these defendants thereupon made confessions implicating certain men in high official life. Puter, in his confession, alleged that he had paid Senator Mitchell two thousand dollars for securing Mitchell's influence in pushing through certain fraudulent entries in the land office.

On hearing of this charge, Senator Mitchell left Washington and reached Portland on December 24, 1904, for the purpose of testifying before the grand jury. He appeared before the grand jury on December 28, but notwithstanding the testimony which he gave before that body, on December 31, he was indicted for complicity in the Puter conspiracy.

The same grand jury found a second indictment against him on January 31, 1905, in connection with an additional alleged conspiracy to fraudently secure goverment lands. The indictment on which the senator has been convicted was found on February 1, 1905. It charges in seven different counts an unlawful agreement on the part of Senator Mitchell, in connection with his law partner, A. H. Tanner, to receive, and the unlawful receipt of, certain moneys from Frederick A. Kribs, for services rendered and to be rendered before Binger Hermann, as Commissioner of the General Land Office, in connection with certain land entries, chiefly timber claims, which were pending in the Department, and in which the United States was interested.

There was a fourth indictment found by the same grand jury against Senator Mitchell, in which he was charged with complicity in a conspiracy to create a new forest reserve in the Blue Mountains in Eastern Oregon, with a view to the profit of private individuals who were interested in utilizing lands already taken up within the contemplated reserve for the creation of scrip on which government lands could be located in other sections.

The indictment found on February 1, is the one which came on first to be tried, and is the indictment which has attracted the largest share of public attention. It was followed on February 8 by an indictment of Senator Mitchell's law partner, A. H. Tan-

ner, for the crime of perjury. It was charged, in the indictment of Tanner, that he had sworn falsely before the grand jury with reference to his partnership contract with Senator Mitchell. Three days later, on February 11, Judge Tanner plead guilty in open court to this indictment for perjury, and made a full confession which implicated Senator Mitchell in an attempt to fabricate a false contract in lieu of the genuine one for the purpose of concealing the receipt of moneys from Kribs for improper services to be rendered in the General Land Office. Tanner has not been sentenced.

On April 11, 1905, Senator Mitchell interposed a demurrer and a plea in abatement to the indictment found against him on February 1. His demurrer was based chiefly on the contention that the indictment did not charge him with knowledge of the receipt of any of the moneys which Kribs had paid, and also on the ground that it did not in terms state that Senator Mitchell was a United States Senator at the time named.

The indictment charged that Kribs, with intent to unlawfully influence Binger Hermann, Commissioner of the General Land Office, to expedite certain entries pending in the land office employed Senator Mitchell and his law partner, A. H. Tanner, to perform services for him in connection therewith. It charged that after Mitchell's election as senator, and during his continuance in office, Mitchell and Tanner, on February 13, 1902, unlawfully received from Frederick A. Kribs, five hundred dollars for services rendered and to be rendered before Binger Hermann, Commissioner of the General Land Office.

There were six additional counts in the indictment which did not differ materially from the first count.

Judge DeHaven, who presided at the trial and passed on the demurrer, held that the indictment was very inartificial, but that it sufficiently appeared from the indictment both that Mitchell had knowledge of the payment of the Kribs money and that he was United States Senator at the time in question.

The plea in abatement was passed on by Judge Charles B. Bellinger in the last opinion which he rendered before his death in the month of May. This plea in abatement was based in part on the fact that certain jurors who sat on the grand jury were not taxpayers in the state of Oregon; in part on the fact that Francis J. Heney, a citizen of California, was undertaking to fill the office of United States District Attorney for Oregon; that by reason of non-residence he was ineligible; that he had been in the jury-room and had induced the jury to bring in the indictment. These, and the other objections raised by the plea in abatement, were held insufficient by Judge Bellinger on objections thereto presented and argued by Mr. Heney.

Aside from these preliminary questions, by much the most interesting question of law developed by the trial was the question of Judge Tanner's qualification as a witness for the government. The case against Senator Mitchell was dependent very largely on the testimony of Judge Tanner, chiefly for the purpose of identifying the correspondence which had passed between himself and Senator Mitchell, all of which was secured by the government at the time Judge Tanner turned state's evidence.

When Judge Tanner was called as a witness, counsel for Senator Mitchell interposed an objection to his being sworn on the ground that he was disqualified under Section 5392 of the Revised Statutes, by reason of his having pleaded guilty to the crime of perjury committed before the grand jury, in January, 1905. This section reads as follows:

"Every person who, having taken an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered that he will testify . . . truly . . . , willfully and contrary to such oath

states or subscribes any material matter which he does not believe to be true is guilty of perjury and shall be punished by a fine of not more than two thousand dollars and by imprisonment at hard labor not more than five years; and shall moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

It will be noted that the language of this statute is not as clear as might be desired and the defendants raised the question as to whether the word "thereafter," found in the last clause of the section, referred to the commission of the perjury or to the judgment and punishment therefor. The court held that there was no disqualification in the absence of a judgment finding the witness guilty of the crime of perjury. Judge Tanner's evidence was therefore admitted, an exception being reserved by the defendants.

The testimony for the government tended to show that the moneys paid by Kribs were paid in the form of checks drawn in favor of the firm of Mitchell and Tanner; that in every case these checks were deposited by Judge Tanner to the firm credit, and a few days after the expiration of the month in which the money was paid the balance to the firm's credit in the bank was divided, Senator Mitchell receiving his share.

On this state of the record, it was contended in Senator Mitchell's behalf that he was not chargeable with knowledge of the source from which the moneys came until after the payment had been made. Authorities were cited to show that there must be a guilty knowledge at the time the money is received. This contention was overruled by the court, principally on the ground that there was evidence tending to show that Mitchell had constituted Tanner his representative and agent for the purpose of receiving these moneys, and that he was therefore chargeable with Tanner's knowledge at the time the moneys were paid.

On this evidence another contention was made in behalf of Senator Mitchell. The charge in the indictment was that the moneys in question had been paid by Kribs. The defendants contended that this evidence, if it tended to show that any money had been paid to Mitchell, did not show that Kribs had paid the money. Authorities were cited to show that a deposit of funds in bank creates the relation of debtor and creditor between the depositor and the bank, and not the relation of trustee and *cestui que trust*. It was contended in Senator Mitchell's behalf that the deposit of the Kribs check in each case in bank deprived the money, for which the check stood, of any Kribs ear-marks, and that a subsequent payment to Mitchell, or a subsequent deposit to his credit, did not prove the allegation of the indictment that the money had been paid by Kribs. This contention was also overruled by the court.

One of the strong points in the government's case against Senator Mitchell was the testimony of Judge Tanner, to the effect that when Mitchell came to Oregon in December, 1904, to appear before the grand jury, he and Tanner had entered into an arrangement to prepare a new firm contract, under the terms of which Judge Tanner should be permitted to hold for his own use all moneys received by the firm for services rendered in any of the departments at Washington. Such a contract was prepared and ante-dated to March, 1901, the beginning of Mitchell's senatorial term, and Judge Tanner appeared before the grand jury with testimony that the fabricated contract was genuine. Through shrewd work on the part of the detectives in the service of the government this transaction was run down, and Judge Tanner was confronted with such proofs of the fabrication of the contract as induced him to turn state's evidence.

Senator Mitchell's counsel endeavored to keep out of the record all of this testimony in regard to the fabricated contract, by

contending that Tanner was Mitchell's attorney at the time when the transaction took place, and that therefore he could not be permitted to disclose any communications which had passed between them. It appeared that Senator Mitchell, prior to that time, had telegraphed Judge Tanner to see the government attorneys and endeavor to prevent his indictment and that Tanner had interviewed both the United States District Attorney and his assistant in Mitchell's behalf. The defendants contended that this made Tanner Mitchell's attorney. Tanner said that he did not so consider it and the court therefore admitted the evidence. Senator Mitchell did not take the stand in his own behalf.

The case was closely and ably tried, Francis J. Heney, of San Francisco, representing the government, and Alfred S. Bennett of The Dalles, Ore., and John M. Thurston, of Washington, D. C., representing the defendant.

It is announced that Senator Mitchell's counsel will carry the case to the Supreme Court, and it will be noted from the foregoing that they have several interesting legal questions to present.

This is but the first of a long series of trials which are likely to consume the time of the Circuit Court of the United States for the District of Oregon for many weeks. As this article is written the court is entering on the trial of Congressman J. N. Williamson, who is charged with conspiracy to fraudulently secure government lands in Crook County, Ore., by inducing dummies to homestead these lands in the interest of Williamson and his associates. The trial of Binger Hermann, congressman from the first district in Oregon, and at one time commissioner of the General Land Office, on the several indictments found against him, is likely shortly to follow. Three of Oregon's state senators and a large number of men of prominence in the state are under indiciment in connection with these same prosecutions. The total number under indictment is about sixty.

PORTLAND, ORE., July, 1905.

The Green Bag

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Communications in regard to the contents of the Magazine should be addressed to the Editor,
S. R. WRIGHTINGTON, 31 State Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

FOR its midsummer number THE GREEN BAG offers to its readers an issue devoted mainly to the lighter side of the law, the side upon which it built its early reputation. To those of its readers who have feared from the more serious tone of some of its recent articles that its unique characteristics were to be abandoned, we hope this number will be evidence of our purpose to continue to offer from time to time a due proportion of matter which may afford recreation to the legal mind. If the reader scans these pages under condition of temperature and humidity like those which enveloped its preparation, he will feel that the lighter and briefer, the better.

OF the lawyers whose fame we have recently celebrated, all have been conspicuous for their work in litigation and for their participation in public affairs. Mr. Cowen is an excellent representative of that other department of modern practice which guards and controls the accumulated wealth of corporations. It is pleasant in these days of shocking disclosures of infidelity to their clients and their profession of some of those who have been regarded as good examples of this type of lawyer, to recall the career of one who bore even greater responsibilities with unselfish sagacity.

HON. JUDSON HARMON

The memorial address before the Maryland State Bar Association which we print was delivered by a lawyer who has also been recently in the public eye in a manner highly creditable to himself and to the Bar. Mr. Harmon was born in Ohio in 1846, graduated from Denison University in 1866, and from the Cincinnati Law School in 1869. From 1876 to 1887 he served as judge, first of the Common Pleas Court and later of the Superior Court of Cincinnati. Since his resignation from the Bench he has continued in active practice, interrupted only by his acceptance of the office of Attorney General of the United States under President Cleveland. He has shown his interest in the learning of the law by his work as a member of the faculty of the Cincinnati Law School. His appointment by the President as one of the special attorneys to investigate the alleged giving of rebates by the Santa Fé railroad, was hailed with satisfaction as proof of a determination to deal fearlessly and fairly with a distressing situation. His report in favor of action against the officers of the road, however, was rejected by the Administration, apparently to the regret of all impartial citizens.

AGREEABLE essays into the border land of law, literature, and philosophy, are hard to extract from a busy profession though the talent, we are sure, and the inclination, we trust, still survive the breathless pursuit of wealth. We were glad therefore to obtain the result of Mr. Morse's meditations upon a portion of the philosophy of the law.

CHARLES MORSE

Mr. Charles Morse, D.C.L., was called to the Bar of Nova Scotia in 1885, and appointed Deputy-Registrar and Reporter of the Ex-

chequer Court of Canada by the Dominion Government in 1888. He is a graduate (LL.B.) of Dalhousie University, Halifax, and (D.C.L.) of Toronto University. Mr. Morse is a law examiner in the latter institution. He is an associate editor of the *Canada Law Journal*, and has been a frequent contributor in prose and verse to THE GREEN BAG and other legal periodicals. In conjunction with Charles H. Masters, K.C., he founded the *Canadian Annual Digest* in 1896, of which he is still one of the editors.

EVEN a law magazine is entitled to indulge in fiction in midsummer though the narrative of Florida practice which we publish is, we are told, a true story. We suspect, moreover, that the author could identify his hero. If the strictness of any of our brothers beclouds his sense of humor and he is disposed to criticise the ethics of the alleged Mr. Brown, be it known that the author, though trained at the Bar and a former practitioner, has, like so many other lawyers of literary talent, deserted the field that even Lord Bramwell found three-quarters dry, for the more joyful land of romance.

HENRY BURNHAM BOONE

Mr. Boone is a graduate of Williams College and of the Law School of the University of Virginia. His early practice was in Florida and Charlottesville, Virginia, where he now makes his home. The success of his stories of Virginia life has led him to take up a temporary residence in Italy, and to devote his entire time to literature. We are promised, however, some studies of modern Italian theories of jurisprudence.

THAT there are veins of undeveloped humor in the statutes and reports is disclosed now and then by such merry stories as Mr. Washington has written for us. We were glad to find the light of originality in one of the many attempts in this field which we are permitted to pass upon.

Mr. Bushrod C. Washington, who is a descendant of John Augustine, a brother of Gen. George Washington, was born near Charles Town, Virginia, in 1839, and received an academic education at St. Timothy's Hall, Maryland. Upon the secession of Virginia he entered the Confederate army, serving under Jackson in the "Stonewall" brigade. He was wounded and captured at the battle of Kernstown, and detained five months as a prisoner in Fort Delaware. Being exchanged, he was transferred to the cavalry service under Gen. J. E. B. Stuart, was promoted to a lieutenancy for gallant services in the battles of "The Wilderness," was again wounded, captured, escaped, was wounded again and disabled till the close of the war. After the war he resumed for a time the cultivation of his farm. He is the author of a biographical sketch of "The Late Justice Bushrod Washington"; "Mt. Vernon, the American Mecca"; "Was Washington Author of his Farewell Address?" etc.

IN pursuance of our policy of publishing legal expositions of trials of national importance we offer in this issue an account of the first and most important of the Oregon Land Frauds cases. Though the disgrace of United States Senators is almost ceasing to be surprising, there is an element of interest in the magnitude of the alleged land frauds and the importance to the great states of the West of wiping out these outrages.

WALLACE MCCAMANT

Mr. McCamant is a native of Pennsylvania and is a graduate of LaFayette College. After reading law in the office of J. Hay Brown, now justice of the Pennsylvania Supreme Court, he moved to Portland, Oregon, in 1890, where he has since engaged in practice. Since 1894, he has been one of the masters in chancery of the United States Circuit Court for the district of Oregon.

CURRENT LEGAL ARTICLES

This department represents a selection of the most important leading articles in all the English and American legal periodicals of the preceding month. The space devoted to a summary does not always represent the relative importance of the article, for essays of the most permanent value are usually so condensed in style that further abbreviation is impracticable.

CONSTITUTIONAL LAW (Delegation of Legislative Power)

IN the *Central Law Journal* of July 7 (V. lxi, p. 3) F. E. Williams prints a brief entitled, "In How Far May Acts of the Legislature be Made Contingent upon Being Accepted by Popular Vote without Violating the Principle that Legislative Power Cannot be Delegated."

He summarizes his views as follows:

"It may be said under the sanction of what is believed to be the better opinion and weight of authority, that the following propositions are established:

"*First.* Independent of any express constitutional authorization, the enactment, operation, or taking effect of a legislative act cannot be made contingent upon popular acceptance by the state at large, for the reason that such acceptance is inconsistent with our system of representative government and is therefore construed as a violation of the principle that legislative power cannot be delegated.

"*Second.* In the absence of an express constitutional limitation, local option laws both general and special, if confined to local affairs, may be passed, although their operation is contingent upon a favorable vote of the districts to be affected, and such laws do not violate the principle that legislative power cannot be delegated, for the reason that they are justified by virtue of the power and discretion of the legislature in its control of public corporations, and because of their analogy to the system of local self-government which existed in America before our constitutions were adopted and in the mother country from time immemorial."

CONSTITUTIONAL LAW (Freedom of Contract. Limitation of Hours of Labor)

JEROME C. KNOWLTON contributes to the June *Michigan Law Review* (V. iii, p. 617) an article on the constitutional right of "Freedom of Contract." Of contracts with municipalities he says:

"There can be no doubt but that the state, for itself or its municipalities, mere agents of the state for most purposes, may by general law specify the terms upon which it will contract with parties. There is no principle of local self-government involved." The cases, however, leave this principle of doubtful application. "The line of demarkation in this respect between the legislative functions and the business functions of a municipality is very dim and sometimes overlooked. Freedom of contract is, by some courts, considerably restricted, as in the Atkin case, and wholly unbridled, as in the Michigan case. The New York doctrine, if we can tell what it is, seems to approach nearer to the constitutional guarantees of the citizen.

"The right of contract as between individuals is no less uncertain than as between the individual and the state. It is conceded that this right as pertaining to private property or personal liberty is guaranteed by the Constitution of the state and of the nation, but what limitations may be placed upon its free enjoyment present troublesome questions before the courts.

"Where persons are incapacitated from giving complete assent to a contract, by reason of age or infirmity or artificiality of construction or where the contract itself is of such a nature that the making of it would be detrimental to the public generally, then there is little doubt of the right and duty of the legislature to regulate or prohibit. Within this field public policy has full control, but beyond it the Constitution stands to protect the citizen in his natural rights.

"The right of contract is possessed and enjoyed subject to the police power of the state. This power has never been defined, and its relation to freedom of contract is imperfectly understood. It certainly includes the power

of the state to protect itself by legislation, and under it contracts which tend to defeat the ends of government or are manifestly prejudicial to the interests of the whole people may well be prohibited. Beyond this very little can be said that is satisfactory.

"There has been no doubt but that the state may pass laws in preservation of the public health. The constitutional guarantees of the individual do not abridge the power of the state to do this."

In this connection the author discusses elaborately, among others, the now famous case of People *v.* Lochner. Of this case he says:

"If the Supreme Court of the United States continues to look beyond the proclaimed purpose of a law and to judge of its constitutionality from the manifest motives for its enactment, there will be found in a few years much waste paper in the statute laws of our several states. Nothing is better known than that a large part of the paternal legislation of recent years, relating to the ordinary callings in life, has been enacted and defended on one pretended purpose or another when the real purpose and effect of the law are in violation of the letter and spirit of the Federal Constitution."

In the main his views of this case agree with those of Professor Freund in his article in our last number.

CONSTITUTIONAL LAW (Mandamus)

"Mandamus Against a Governor" is discussed by Edward J. Myers in the June *Michigan Law Review* (V. iii, p. 631).

"The question whether the courts have the power to issue the writ of mandamus against the chief executive of a state to compel the performance of a duty imposed upon him by law, has been answered in two irreconcilable lines of decision — the one being that the Governor is not answerable to the writ to compel the performance of his duty, be it either discretionary or ministerial in its character, the other, that he is liable to the writ to compel the performance of duties purely ministerial in nature.

"It is proposed to review here the cases wherein the question has been decided, covering the period of time from the year 1839 to and including the decision of another very recent case, that of State ex rel. Higdon *v.* Jelks, Governor, and to make this examination in the light of the discussion in State of Ohio *v.* Nash."

The author first collects an array of authorities supporting the proposition that the writ will not lie against the Governor to compel the performance of any official duty, he being entirely removed from the control of the courts without regard to the question as to the nature of his duties, whether strictly executive or political or purely ministerial. Then follows a collection of authorities from jurisdictions, which, "while granting the complete independence of the Governor of the state from judicial control in the performance of his purely executive and political functions, have held as to the ministerial duties incumbent by law upon him and which the legislature might, with equal propriety, have required any other officer to perform, that the writ of mandamus will lie to compel the performance of such duties."

"The rule, *that the Governor of a state is not amenable to the writ of mandamus, to compel the performance of a duty, be it ministerial or discretionary in its nature*, is the one which seems to be more in accord with sound legal principles. And as a basis for this conclusion, the following reasons are advanced:

"*First.* That the rule that the writ is issuable and enforceable against the Governor of a state, in matters purely ministerial in character, is clearly against the great weight of judicial authority.

"*Second.* If the writ of mandamus were granted, it would prove unavailing.

"*Third.* The independent and distinctive features of the departments of government forbid the interference by one with the other.

"*Fourth.* The Governor's accountability to the people at the polls, and his liability to impeachment, afford adequate remedies for his failure to perform ministerial duties.

"There seems to be no doubt as to the trend of judicial authority and no further comment upon that point is necessary.

"It is a fundamental principle of law, that the writ of mandamus will never be granted in cases where, if issued, it would prove unavailing. And where the object sought is

impossible of attainment, that is, where there is a want of power to enforce it, if granted, it will be withheld. The Governor being the chief executive officer of the state, is not amenable to the processes attempted to be enforced by executive officers of a rank inferior to him. No power exists to compel the chief executive to act."

EVIDENCE (Expert Testimony)

IN the June *Michigan Law Review* (V. iii, p. 597) H. B. Hutchins continues his treatise on "The Examination of the Medical Expert." He concludes his elaborate analysis of the cases as follows:

"A reading of the cases upon the subject of expert testimony must reveal the fact that the criticisms of the courts upon it are justified, not on account of any inherent danger in such testimony, or because of its necessarily unsatisfactory character, but rather because of the frequent failure of counsel to conduct the examination of experts in accordance with the rules governing the admission of opinion evidence and a lack of appreciation, or, at all events, a forgetfulness, in many cases, by both counsel and expert that the function of the latter is quasi-judicial. In his enthusiasm for his client, the trial lawyer steps beyond the bounds, and he finds a ready second in his expert who has become imbued with the spirit of the advocate. The result is error which prompts caustic comments by the reviewing court, not always upon the course of counsel or the attitude of the witness, but frequently upon the general worthlessness and danger of expert testimony. That within his proper field the expert is a necessary factor in the administration of justice, cannot admit of doubt. In many cases, without his aid, courts and juries would be helpless. That expert testimony, if the case demands it, and it is properly and logically developed, is safe and helpful, is the verdict of reason and experience. In the absence of a reform that would make the expert the appointed officer of the court, instead of the paid employee of a party, he can escape disparagement only through the care of counsel in the conducting of the examination and his own care in preserving the judicial attitude."

INTERNATIONAL LAW (Destruction of Neutral Prize)

A BRIEF sketch of the law relating to "Destruction of Neutral Ships by a Belligerent" by Hugh H. L. Bellot, in the *Law Times* of July 1 (V. cxix, p. 193) thus summarizes the subject:

"By a universal rule of international law a belligerent captor must take his prize, whether enemy or neutral, into one of his own ports for adjudication. To this rule there are certain exceptions, some of which are generally recognized as legitimate, whilst others are regarded as doubtful, or, at any rate, do not receive universal acceptance. The recent cases of the *Thea*, the *Knight Commander*, and the *Oldhamia* are examples of the latter class. To the general rule, the destruction of an enemy's ships forms the first exception. The weight of authority, municipal regulations, and international usage unite in admitting that under certain circumstances, such as the dangerous condition of the prize, the possibility (if released) of giving information to the enemy, the want of men to form a prize crew, the lack of provisions or water, the prize, if an enemy's, may be ransomed, sold, retained, and used as a tender or what not or destroyed.

"The proposition that a belligerent may destroy every ship, perhaps chartered by a neutral and laden with neutral goods, sailing under his enemy's flag, because he lacks a prize crew or has no ports, is not supported either by international usage, law, or authority. 'Such a proposition,' says Mr. Charles Clarke, 'is an application of the rule of piracy which may be very convenient to the pirate, but is wholly unjustifiable as to anyone else.'

"But with the destruction of neutral vessels and cargoes it is far otherwise. A right to destroy neutral vessels has no existence in international law. If it is impossible to bring a neutral prize within the jurisdiction of a court of competent jurisdiction, she must be released immediately.

"The confusion of thought which has made this an apparent exception to the general rule that a prize, whether enemy or neutral, must be brought in for adjudication has arisen from regarding exceptional conduct as a rule of conduct.

"What the decisions of the English prize

court establish is this: An enemy's ship may be destroyed under exceptional circumstances; if a neutral ship is destroyed under similar circumstances, this confers no right upon the captor. On the contrary, he has committed an offense against international law for which he must make not merely restitution for what he has destroyed, but must also pay a penalty in the shape of damages and costs."

The author criticizes as suicidal the attitude of the British government of acquiescing as neutrals in a contrary policy while enforcing greater strictness on her own commanders in time of war.

JURISPRUDENCE (Law Merchant, Vitality of)

IN the *Law Journal* of June 17 (V. xl, p. 467) appears the following note of an interesting recent English decision.

"The decision of the Divisional Court in Webb, Hall & Co. *v.* The Alexandria Water Company that the share warrants of the defendant company are negotiable instruments, illustrates the adaptability of the law merchant to the conditions of modern commerce. The law merchant is that portion of the common law which is founded on the usages of merchants. It has been developed by judicial decisions, and has certain disadvantages inseparable from a system of case law; but, on the other hand, it has the great advantage of being flexible, while codified law is rigid. If the view expressed in Crouch *v.* Le Crédit Foncier, 42 Law J. Rep. Q. B. 183; L. R. 8 Q. B. 374, had continued to prevail, much of this advantage would have been lost; for in that case the Court of Queen's Bench held that the quality of negotiability could only be annexed to an instrument by the ancient law merchant. Fortunately, in Goodwin *v.* Robarts, 45 Law J. Rep. Exch. 748; L. R. 10 Exch. 337, the Court of Exchequer Chamber prevented the mischief threatened by this decision, by affirming the rule that the custom of merchants may make any instrument negotiable — a judgment which has been acted upon in several instances. Moreover, in one of the latest cases, Edelstein *v.* Schuler, 71 Law J. Rep. K. B. 572; L. R. (1902) 2 K. B. 144, Mr. Justice Bigham showed an appreciation of the fact that the world of commerce moves faster than it was wont to do. 'It is to be remembered,' said the learned judge, 'that in these days usage is established much more quickly than it was in days gone by; more depends on the number of the transactions which help to create it than on the time over which the transactions are spread, and it is probably no exaggeration to say that nowadays there are more business transactions in an hour than there were in a week a century ago.'"

JURISPRUDENCE (Sociology)

A SUGGESTIVE editorial on the process of development of modern law appears in the *Law Journal* of June 17 (V. xl, p. 468).

"Sociology is a word which meets us often in print now. Is has a society all to itself in England. It has an important journal devoted to it in the United States. It is the crown and consummation of Herbert Spencer's lifelong labors in philosophy, but somehow the lawyer —even the scientific lawyer—pays no attention to it. Perhaps it is that there is something too indefinite about it for the practical intellect of the lawyer, and it must be confessed that a haze does hang round the subject. But it is a great illuminating idea, and sooner or later the jurist will have to reckon with it. Pascal long ago conceived of society as a sort of 'colossal man,' but to that great thinker it was rather a figure of speech, a brilliant guess like some of Aristotle's, than a scientific theory. The sociology of to-day is nothing if not scientific. It grounds itself on the hypothesis that society is a living organism, analogous to plants and animals, grows like them in accordance with fixed laws, has its maturity and its decay. Certainly there are striking analogies between the individual and society, their constitution and their development. Think, to take an illustration of what Spencer calls 'differentiation,' how the Curia Regis branched out into the King's Bench, the Common Pleas, the House of Lords, the Privy Council, the Court of Chancery; how the process of 'integration' again has been bringing together the feudal and petty jurisdictions under one head, the King's justice, and consolidating local customs into the common law of England. To trace the processes here and in other directions would take volumes; but if these principles are really at work determining the evolution of society and of law, are they not worth the lawyer's attention?"

THE LIGHTER SIDE

THE COST OF A PRINCIPLE

By Edgar White

At the December call of the Kansas City Court of Appeals docket, the biggest case over a small matter ever tried in Missouri passed into history. The style of the action was John Massengale *v.* Elijah E. Rice. The Appellate Court's uncontested order of affirmance crowned Elijah with the victor's laurel wreath.

The subject of litigation was a spindle-shanked steer, "a very ordinary animal, a scrub," the plaintiff said, "worth about $30." The life of the steer fight and the great Civil War were about the same — five years.

If there is a Missourian who has not heard of the Celebrated Steer Case it is because his parents were shamefully derelict in their educational obligations to him. It has become a part of the state's fame, just as in less peaceful days Charles Quantrill, Bill Anderson, and the James boys enriched the commonwealth's history with a certain distinction.

In September, 1899, John Massengale, of Macon County (known as "Missouri John" when herding cattle back in Wyoming), missed from his ranch a small red steer. It didn't bother him much, because he had a thousand of much better quality left, and he never lost any time in hunting up the prodigal. But one evil day a horseman came along the road and called "Missouri John" out. He told him he had seen his missing animal down on Rice's farm, which was just across the line in Chariton County. John went over to see Farmer Rice. Together they visited the herd, and Massengale promptly spied the scrub.

"That's mine, Elijah," he said.

"No, John," replied Elijah, "we raised that steer ourselves."

Massengale telephoned to his lawyer at Macon and a suit in replevin was filed. Before the justice the plaintiff described his animal as "a dark red steer, a round body, rather a small dark two-year-old, a little under average size with a white spot in his forehead, and an underbit in the right ear."

Elijah gave the description of his steer as follows: "Well, the steer is what I would call a red steer. He has just a white spot on his forehead, with an underbit in the right ear."

The similitude of belief furnished beautiful grounds for warfare. Both men had money burning in their pockets. The border was soon aroused by adherents of the two prominent litigants. "Missouri John" had begun his career by rounding up cattle in the West and he knew he could not be mistaken. Elijah had grown up in the valleys where a man's social success was rated according to his knowledge of steercraft, and he felt that he knew the subject of controversy as well as he did any member of his family. In passing, it may be remarked that it is fairly safe to criticise a cattleman's command of the King's English, or his manners at the dinner table, but when you challenge his capacity to identify anything that wears horns you can look for trouble with entire confidence.

There were seven trials. Hung juries, appeals, and changes of venue strung the litigation out half a decade. It traveled along a highway paved with shining dollars, until at the climax it was figured the unsuccessful litigant stood to lose $5,000.

The case would have ended in 1900, but at the very end of the trial, during a strong appeal to the jury, Elijah's leading lawyer, J. A. Collect, used this language, taken from the printed record:

"Massengale obtained his start by rounding up unbranded cattle in the West; and branding them as his own. In the West they call that 'branding mavericks,' but here in Missouri we call it plain-out cattle stealing."

That short tirade cost Elijah $300, for the plaintiff appealed on the ground that there was no evidence in the record to justify the attack, and after the Appellate Court had read through the 275 printed pages it so held, and Elijah had to pay for the brief.

During the life of the steer case it had been tried at Bynumville, Salisbury, Kansas City, and Fayette. When the trial was "on" in a town, the tavern-keepers would send out for extra help in the cook room and buy out the grocers. Each side levied on its respective township for witnesses, and when the two clans would meet in a town there wasn't much room for anybody else.

The case was fought out with varying honors until a fatal day in last April, when a jury came

into court at Fayette and said the steer belonged to Elijah.

"Missouri John's" lawyers went through the long record of the last trial with a microscope, and then met their client at Macon.

"The jig's up, John," said one of the barristers, gravely. "There ain't the ghost of a ground to hang an appeal on this time."

"We're beat, you mean?" asked the big ranchman.

"You've guessed right."

"Well," said John, "I hate a croaker. I went to law for a measley, spindle-shanked steer, and I'm going to take what the law hands out. Figure up what the fun has cost me, boys, and the check's ready."

He sat awhile and calmly pulled at his pipe. Then he picked up his sombrero and walked to the door, where he hesitated and looked back.

"But, say, fellers," he remarked, "*that was my steer!*"

The defendant notified "Missouri John's" attorneys that he would file a motion for affirmance in the Court of Appeals at the fall term, and they told him to go ahead — they were tired.

The steer is still enjoying life on Elijah's broad pastures. He has recently had it photographed and to show he entertains no ill-will has sent copies of the picture to "Missouri John" and his four lawyers.

MACON, MO., July, 1905.

He Was Only Lieutenant. — It is said that legal documents are dry, yet, at times, much of humor and pathos, unknown to either the public or the profession, creep into the record.

In a divorce proceeding recently instituted, when and where is immaterial, the parties had lived together more than seventeen years, and there were three children, the oldest a girl of sixteen; and differences had arisen between the parents, concerning the hour at which a young man, who was waiting on the daughter, should leave. High words followed, and while they continued to occupy the same house their relations became strained. The husband was a mechanic, working some distance from home and consequently was obliged to take his dinner with him. The couple had accumulated some property and owned their own home, the title to which, however, was in the wife's name. After he had eaten his breakfast one morning he went to his work, carrying with him his dinner, both prepared by his wife. During his absence the wife, advised by intermeddling friends, instituted divorce proceedings, alleging cruel and inhuman treatment, making her life burdensome, etc., that her husband quarreled with her and applied, during such quarrels, abusive language to her, and obtained through her attorney an order on her husband to show cause why he should not be enjoined from returning home, or from interfering with their property, alleged to be the wife's separate estate. The story told in the affidavits filed by the husband in response to the order, contains something of humor and all of pathos that can be compressed into words: We quote verbatim.

"This defendant admits that he and the plaintiff quarreled, but such quarrels were not more serious than those arising in many families over differences concerning their domestic affairs, and the plaintiff bore her full share in their promotion and continuance, for it is proverbial that 'It takes two to make a quarrel.'

"Affiant denies that he treated the plaintiff either cruelly or inhuman, but on the contrary he alleges that during their seventeen years of married life she has been in control of the house and swayed the scepter over, and ruled himself and his family with no uncertain hand; that he has never had any higher position than that of lieutenant in his own household in which his wife was the officer in command and that he has never been in the line of promotion.

"Affiant further says that he knows of nothing more cruel than the treatment attempted to be meted out to him in this case by the plaintiff here — receiving from him but three days since his monthly earnings up to the last dollar, preparing his breakfast, handing him his dinner pail and bidding him good-bye this morning as he went forth to labor for her and those he loved, and then, without a word of warning and leaving him without a penny to procure himself a supper or a bed, among strangers, seeks to exclude him from the home built and made possible by his industry, and which he hoped would be his refuge in old age when his power to labor longer has passed away."

It is needless to say the injunction was refused and plaintiff enjoined from interfering with his enjoyment of his home pending trial.

Idem Sonans. — When Judge Lemuel LeB. Holmes was district attorney he told this story on himself: About the time that the law was passed providing for the trusteeing of wages, he had a case given him by a client, and he trusteed the wages of one Manuel Sylvia, an operative in the Potomska mill, New Bedford. Now, the Manuel Sylvias in the New Bedford directory fill pages, like unto the John Smiths and Joseph Johnsons in other communities, requiring some other description if identity is aimed at.

Shortly after the writ had been served, Hiram Kilburn, the agent of the mill, stopped Mr. Holmes on the street and began emptying the vials of his wrath. Mr. Holmes demanded to know what the trouble was.

"Why, you trusteed the wages of Manuel Sylvia in our mill," exploded Mr. Kilburn.

"What of it?" asked Mr. Holmes, with dignity.

"What of it?" repeated Mr. Kilburn, excitedly; "there are twenty-seven Manuel Sylvias in the Potomska mill. We have had to hold up the pay of every one of them, and when I left things looked like a riot." — *Boston Herald.*

Advice. — Abe Hummel, the New York lawyer, who is known as a master of repartee, is to be credited with a new, pithy, and very-much-to-the-point retort. The other morning, accompanying a client to court, the case at issue being a breach of promise suit for damages, based on letters written by the defendant, the counsellor had been giving a lesson on morals to his client, when the latter dejectedly remarked: "Oh! I know all about it, Abe; the same old song, 'Do right and fear nothing.'"

"No! no! That's not it at all," answered Abe; "don't write, and fear nothing." — *Argonaut.*

An Oklahoma Letter. — (Mr County Atturna.) — Dear Sir on the 28 of Last Mo i wear veary Much taKen biuy a surprise When i wear Call to Bee pressen at Judge falice Coart. to ancer to a charge of taKing the sume of a Bout 2½ Bushels of coin from Mr. H. C. reaves on the 24 of last Mo i and My Broth Hav give a good Bound and are read-y. for tryel at eney day Dear Sir i cand prove Whear Wee Wear and that Wee Hav a bout 45 Head of Hougs and 5 Head of Haurses. and that Wee Hav Bouit Couirn from Ever mand that had it to sell a round us.

We Hav bouit coirn from Mr. H. C. Reaves to fead with and Hav Keep out the best years to plat so Whend the Charge Wear made ouit We had a bout 3 PKs. of the H. C. Reaves Coirn and Hav got it untell yet Mr. County (Att) i cand prove Buy my Nabers that i am a worker and not a loafer of Course i Hav Ben told What was the Mater Buiy 1 of My Nabers. that if wear not eney thing But Presddgeuess a gain Mee. But Mr. County Atturney I Will ask You for ane Eariley tryle i want to show to this county and my Community Just Who i am a worker and not a corn thief.

Now i will Close My Lanthey Letter.
Hopeing to heare from you at Wounce.
Your Writers
Harry Wall and Lee Wall
At Whome.

A BOOK of delightful interest to one familiar with the English law reports, though not as well known as it deserves to be, is the anonymous collection of anecdotes regarding famous Englishmen of the last century, entitled "Personalia," by "Sigma" (Copyright, 1903, by Doubleday, Page & Co.).

From its chapter on lawyers we reprint by permission the following extracts.

THE Baron was trying a case which turned on what constituted "necessaries" for a minor, the leader on one side being a rather decrepid and eldery Queen Councillor, whose marriage to the somewhat mature daughter of a patrician house had occasioned a certain amount of ironical comment on the part of his learned friends, while the opposing party was captained by a "silk" who, although younger than his antagonist, had decidedly the advantage of him in the matter of olive branches. The question for decision was whether a piano constituted a "necessary," the childless old benedict arguing that it was, and his opponent, the

paterfamilias, insisting that it was not. At last the former, by way of clinching his contention, began to allude rather pompously to his married experiences, a subject he was very fond of introducing on account of the augustness of his alliance. "My lord," he ostentatiously urged, "as a married man I can speak with some authority on these matters, and in my experience I have always understood that a piano was a 'necessary' for any one in the position which the minor in this case occupies." Hereupon the "paterfamilias" counsel cruelly interupted with: "My lord, my learned friend boasts of his married experiences, but I must remind him that, as a matter of fact, he only entered upon the connubial state comparatively recently, whereas I, my lord, have not only been married nearly twenty years, but am the father of a large family; while in that respect, so far as I am aware, the union to which my learned friend refers with so much complacency has not proved equally fortunate." "My lord," furiously rejoined the other, "I must really protest against my friend making these offensive remarks. I request your lordship——" he was continuing with accelerated wrath as the titter in court became more pronounced, when Baron Pollock, bending over from the bench, threw oil upon the troubled waters by quietly interfering with, "Gentlemen, I think we had better confine ourselves to the issue in the present case."

Mr. Justice Byles was another "strong" judge of that epoch whose austere demeanor was in strict harmony with an almost ultra-puritanical attitude of mind, which on one occasion was subjected to a very unwelcome experience. He was trying a case at Winchester, in which some soldiers of the depot were indicted for a riotous affray with a gang of navvies employed in the neighborhood. One of these navvies had been under examination for a considerable time with very little practical result, and at last the judge, interposing, observed to the examining counsel that he appeared to be making very little way with the witness, who had better be allowed to give his evidence after his own fashion. "Come, my man," said the judge reassuringly, "we must get to the end of this. Suppose you tell the story in your own way." "Well, my lord," broke out the navvy, greatly relieved at being delivered from his tormentor, "you see it was like this: We met the sodjers on the bridge and one of 'em says to me 'Good mornin'.' 'Good mornin', yer—'." But before the specimen of appalling vernacular that followed was well articulated Mr. Justice Byles had fled precipitately from the bench, with, no doubt, a mental resolution never again to invite a witness of the navigating order to "tell his story in his own way."

Apropos of witnesses and counsel, I think the most scathing retort that I ever read was the following, which I saw in some country newspaper report of an assize case. A counsel had been cross-examining a witness for some time with very little effect, and had sorely taxed the patience of the judge, the jury, and every one in court. At last the judge intervened with an imperative hint to the learned gentleman to conclude his cross-examination. The counsel, who received this judicial intimation with a very bad grace, before telling the witness to stand down, accosted him with the parting sarcasm: "Ah, you're a clever fellow, a very clever fellow! We can all see that!" The witness, bending over from the box, quietly retorted, "I would return the compliment *if I were not on oath!*"

Although posing as one of those unterrestrial judges who have never heard of a music hall, and are wholly unacquainted with slang, Lord Coleridge was not above enjoying an occasional touch of billingsgate when applied to any individual whom he did not particularly affect. One of his learned brethren, with whom he was on intimate terms, was one day abusing a fellow puisne, who happened to be especially repugnant to them both, in language the reverse of Parliamentary. Coleridge listened to the opprobrious appellations with bland satisfaction and then unctuously observed, "I am not addicted to expressions of that kind myself, but would you mind saying it again?" As is well known, he signalized his tenure of the lord chief justiceship by presenting the unprecedented spectacle of appearing as a defendant in an action brought against him by his son-in-law, in the course of which he sat in the body of the court prompting his counsel. Doubt-

less this unedifying incident was due rather to his misfortune than to his fault; but ermine, even if itself unsullied, becomes somewhat depreciated when placed in contact with dirty linen, and Lord Coleridge never quite survived so unfortunate a shock to his prestige.

How much Coleridge, when at the bar, owed to the untiring ability and laboriousness of Charles Bowen only those who were behind the scenes can properly estimate. Bowen certainly never recovered the strain of the Tichborne trial, in which he was throughout the animating spirit of the Attorney-general, who without him would many times have perilously floundered. Bowen was one of the subtlest and most brilliant lawyers that ever adorned the English bench. Moreover, he was endowed with a peculiarly mordant wit, enunciating the most sardonic utterances in a voice of almost feminine softness. Of these, perhaps, the most prominent was his protest to the counsel who was impugning wholesale certain evidence which had been filed against his client. "Aren't you going a little too far, Mr.——?" he murmurously interposed. "Truth, you know, will occasionally out, even in an affidavit."

Lord Esther was at the best but rugged ore compared to the thrice-refined gold of Charles Bowen, who, if he had only deigned to trample the dust of the political arena, would have equaled on the woolsack even the reputation of Westbury.

But law was not the only field in which he shone. If not actually a poet, he was a verse-writer of a very high order, while as an essayist or a historian he would, by dint of style alone, assuredly have won a distinguished place. His single defect was perhaps an undue proclivity for irony, which on one occasion he indulged in from the Bench, with disastrous effect on the jury. Shortly after his appointment as a puisne judge he was trying a burglar in some country town, and by way of mitigating the tedium of the proceedings summed up something in the following fashion: "You will have observed, gentlemen, that the prosecuting counsel laid great stress on the enormity of the offense with which the prisoner is charged, but I think it is only due to the prisoner to point out that in proceeding about his enterprise he at all events displayed remarkable consideration for the inmates of the house. For instance, rather than disturb the owner, an invalid lady, as you will have remarked, with commendable solicitude he removed his boots and went about in his stockings, notwithstanding the inclemency of the weather. Further, instead of rushing with heedless rapacity into the pantry, he carefully removed the coal-scuttle and any other obstacles which, had he thoughtlessly collided with them, would have created a noise that must have aroused the jaded servants from their well-earned repose." After proceeding in this strain for some little time, he dismissed the jury to consider their verdict, and was horror-struck when, on their return into court, they pronounced the acquittal of the prisoner.

Lord Bowen was probably the only judge who, on being summoned on an emergency to the dread ordeal of taking admiralty cases, entered upon his doom with a pleasantry. After explaining to the counsel of that consummately technical tribunal the reason of his presiding over it on the occasion in question, and warning them of his inexperience in this particular branch of practice, he concluded his remarks with the following quotation from Tennyson's beautiful lyric, then recently published:—

"And may there be no moaning of the Bar
When I put out to sea."

One of the greatest equity judges of the last half century was the late Sir George Jessel, the first and so far the only Jew who has been raised to the English Bench. Jessel's appointment was received with a certain amount of misgiving, not on account of his attainments, which were unexceptionable, but by reason of an undesirable audacity which had occasionally marked his conduct of cases at the Bar. There is no doubt that at a pinch, in order to score a point, he was not above "improving" the actual text of the report which he purported to be quoting, and I well remember that this practice produced quite a dramatic little scene when, having sprung upon a particularly painstaking opponent some case which apparently demolished the latter's argument, that learned gentleman, with an almost apoplectic gasp, requested that the volume might be passed to him. The result of his perusal was more satis-

factory to himself than it was to Jessel, who, however, treated the matter as a mere trifle not worth fussing about and calmly restarted his argument on a new tack.

In this undesirable habit he resembled an eminent predecessor who, on investing some obsolete case on which he was relying with a complexion peculiarly favorable to his argument but quite new to the presiding judge, the latter quietly asked him to hand up his volume of reports. After a moment's critical examination the judge handed the volume back with the scathing rebuke: "As I thought, Mr.——, my memory of thirty years is more accurate than your quotation."

But once on the Bench, Jessel not only discarded all derogatory methods, but also pounced remorselessly on any too ingenious practitioner who might attempt to resort to them, and brief as was his judicial career, he contrived to leave a reputation unrivaled in the Rolls Court since the days of Sir William Grant.

A CHANCERY court is not, as a rule, a very amusing resort, but Vice-chancellor Malins was always able to command a fairly "good house," as he might generally be counted on to show a certain amount of sport under the stimulating attacks of Mr. Glasse and his Hibernian rival, Mr. Napier Higgins. Mr. Glasse, whose countenance recalled that of a vicious old pointer, when not engaged in bandying epithets with Mr. Higgins, applied himself only too successfully to developing the unhappy Vice-chancellor's propensities for making himself ridiculous. Sir Richard, an amiable, loquacious old gentleman, who had bored and buttonholed his Parliamentary chiefs into giving him a judgeship, was certainly an easy prey for a bullying counsel. In external aspect dignified enough, he was afflicted with a habit of conversational irrelevancy which might have supplied a master-subject for the pen of Charles Dickens. While Higgins roared him down like a floundering bull, Glasse plied the even more discomfiting weapons of calculated contempt and impertinence.

The following is a sample of scenes which were then of almost daily occurrence in Sir Richard's court. "That reminds me," the judge would oracularly interpose, fixing his eyeglass and glancing round the court, "that reminds me of a point I once raised in the House of Commons—"

"Really, my lord," Mr. Glasse would bruskly interrupt with a withering sneer, "we have not come here to listen to your lordship's Parliamentary experiences." Whereat, with an uneasy flush, the Vice-chancellor would mutteringly resume attention. On one occasion I recollect Mr. Glasse so far forgetting himself as to exclaim audibly in response to some sudden discursion from the bench, "D——d old woman!" Every one, of course, tittered, and the Vice-chancellor, for once nerving himself for reprisals, bent forward with a scarlet face and the interrogatory, "What was that you said, Mr. Glasse?" But his terrible antagonist was not to be confounded. Without a moment's hesitation he replied, airily flourishing his many-colored bandana, "My lord, I will frankly acknowledge that my remark was not intended for your lordship's ears," an explanation which Malins thought it prudent humbly to accept.

But in justice be it said that though intimidated in a fashion by this brace of forensic bruisers, the Vice-chancellor was in his judgments no respecter of persons, and in the celebrated Rugby School case he administered a rebuke to a right reverend prelate, lately at the head of the Church, which must have been far from comfortable reading if a full report of the proceedings ever came under his notice.

Sir Richard's garrulity once cost him rather dear. On arriving unusually late in court he artlessly explained that his unpunctuality was due to his having started for his morning ride without his watch, which he had accidentally left at home, and in consequence had been beguiled into a prolongation of his amble with the "liver brigade." About an hour after this unnecessary explanation a person presented himself at the Vice-chancellor's house in Lowndes Square and informed the butler that he had been sent from the court for Sir Richard's watch. The butler at first was suspicious, but on finding the watch on his master's dressing-table, and thinking that he would be greatly inconvenienced without it, he handed the timepiece, a very valuable one, to the messenger, who promptly hurried off, but not in the direction of Lincoln's Inn.

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM

(Copies of the pamphlet Reporters containing full reports of any of these decisions may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.)

ACCIDENT INSURANCE. (DEATH — VISIBLE MARK ON BODY)

N. Y. SUP. CT. APP. DIV. 4TH DEPT.

The meaning of a clause commonly contained in accident insurance policies, but which has seldom been construed by the courts, is passed upon in Root *v.* London Guarantee & Accident Company, 86 New York Supplement, 1055. An accident policy insured against bodily injuries sustained wholly and exclusively through external violence occasioned accidentally by visible means, and further provided that the insurance did not cover injuries of which there was no visible mark on the body. The insured fell from a bicycle and received internal injuries, causing angina pectoris from which he died. There was no visible mark on the body of insured, and it was contended for this reason the case did not fall within the compass of the policy. There was, however, considerable evidence that after the injury, insured grew pale and weak and became emaciated. This paleness and emaciation it was held were visible marks upon the body within the meaning of the policy. Menneiley *v.* Empire Liability Assurance Co., 148 N. Y. 596, 43 N. E. 54; Mutual Accident Ass'n *v.* Barry, 131 U. S. 100, 9 Sup. Ct. 755 and Gale *v.* Mutual Aid & Accident Ass'n, 66 Hun. 600, 21 N.Y. S. 893, in which identical provisions have been held not to prevent recovery under somewhat similar circumstances are cited, and the statement in the first mentioned case that the purpose of the policy was to provide that a case of death or injury should not be regarded as within the policy, unless there was some external or physical evidence that indicated that it was accidental, is quoted with approval.

BENEFICIAL ASSOCIATIONS. (COMPETENCY OF WITNESSES — TRIBUNAL OF THE ORDER — CONCLUSIVENESS OF DECISION)

MICHIGAN SUPREME COURT.

The effect of a statutory enactment as to the competency of witnesses upon the proceedings of a tribunal, established by a beneficial association, is considered apparently for the first time in Michigan, in Dick *v.* Supreme Body of International Congress, 101 Northwestern Reporter 564. Michigan Comp. Laws § 1897, 10181, provides that no person authorized to practice medicine shall be allowed to disclose any information which he may acquire in attending a patient. A by-law of a beneficial association provided for a hearing before the supreme board of trustees on death claims, the claimant to appear and give evidence to establish his claim, and further provided that on an appeal to the supreme body the decision of such body should be final and binding on every member and his beneficiaries. The statute, it is held, governs proceedings before the supreme tribunal of the order so that on a hearing, such as that provided for by the by-laws, evidence by physician as to facts which he learned while treating the deceased member is not admissible. A necessary corollary to this holding is the further decision that the determination of the supreme body, as to liability on a certificate of membership, is not conclusive where such body acted upon the physician's evidence admitted in violation of the statute.

CARRIERS. (IMPOSSIBILITY OF PERFORMANCE — SPECIAL SHIPPING AGREEMENT — MODIFICATION BY BILL OF LADING)

U. S. SUPREME COURT.

Northern Pacific Ry. Co. *v.* American Trading Co., 25 Supreme Court Reporter, 84, is authority for the proposition that nonperformance of a special agreement by a carrier to transport a through shipment by the vessel of a connecting carrier sailing on a designated day, is not excused by the wrongful refusal of the deputy collector of the port to grant a clearance while the freight was on board, on the ground that it was contraband of war. It is to be noted, however, that the contract was not unlawful when made, nor rendered unlawful by any subsequent legislation, and was made with the knowledge that difficulty might arise in the course of transportation because of the character of the freight. It was also held, that the mistaken action of the deputy revenue collector did not constitute a "restraint of princes, rulers, or people" within the meaning of that phrase in the bill of lading.

Another question of considerable importance arose in this case upon the contention of the carrier that the special agreement for through shipment was modified by the subsequent receipt by the shipper of a bill of lading, containing a provision that the carrier was not to be liable for any loss not occurring on its own road. It, however, appeared that the special agreement was made between the authorized agents of the shipper and

of the carrier, and that the bill of lading was afterward delivered apparently as a mere matter of form; that the condition relied on was in small type, and that the bill itself was received only by a clerk of the shipper and was immediately hypothecated. Under these circumstances it is decided that the special agreement was not modified by the bill of lading.

CARRIERS. (Injury to Passenger Standing on Platform — Contributory Negligence)

Michigan Supreme Court.

Under Michigan Comp. Laws, § 6303, declaring that if a passenger is injured while on the platform of a car, in violation of the regulations of the railroad company, the latter shall not be liable, provided room and seats inside were sufficient for the accommodation of passengers, it is held by a divided court in Morgan *v.* Lake Shore & Michigan Southern Ry. Co., 101 Northwestern Reporter, 836, that where all seats were occupied and a passenger became faint from conditions existing as a result of the company's negligence, and because of inability to get to a window to relieve his faintness, he sought to get fresh air on the platform, he was not guilty of contributory negligence as a matter of law. The force of this decision as a precedent, especially in other states, is somewhat weakened by the fact that three of the six judges dissented.

CONSPIRACY TO DEFRAUD UNITED STATES. (Essentials of Offense)

U. S. D. C. N. J.

The disclosures which followed the burning of the excursion boat, *General Slocum*, resulted in the indictment of the officers of the Nonpareil Cork Works for conspiracy to defraud the United States, in that they caused a half pound iron bar to be placed in blocks of cork to be used in making life-preservers for use on vessels navigating the waters of the United States, in order that the preservers might fulfill the regulations of the United States government as to the weight and pass the inspection of the United States officers, in accordance with section 4400 of the Revised Statutes. The indictments were demurred to, and the demurrers overruled. The federal judge held that conspiracy to defraud the United States is not limited in its application to conspiracies to deprive the United States of money or property, as was contended by the defendants. It was further claimed that the life-preservers to be made from the cork which had been weighted with iron were not to be sold to the United States but to another party, and that the United States could not, therefore, by any of the acts charged in the indictment, be defrauded. It will be remembered that the cork was being furnished to a company which had received the contract to supply life-preservers for use upon certain vessels, and this firm had notified the Nonpareil Cork Works that the blocks of cork previously furnished were not of sufficient weight to comply with the United States regulations, and the weighted blocks were then sent with directions that one weighted block should be used in each life-preserver to bring it up to the required weight. The court holds that this was a conspiracy to deceive the officers of the government in their execution of a duty by securing their unwitting approval of what the law condemned.

CONSTITUTIONAL LAW. (Citizens — Exclusion of Person of Chinese Decent)

U. S. Supreme Court.

A case which will no doubt attract a great deal of attention is that of United States *v.* Ju Toy, 25 Supreme Court Reporter, 644. Defendant claimed to have been born in the United States, and to be returning from a visit to China, when he was detained by the immigration officers at San Francisco. A hearing was had under the rules of the Department of Commerce and Labor, and Ju Toy was ordered deported. A writ of *habeas corpus* was issued by the United States District Court, and a referee to whom the matter was referred reported that the petitioner was born in the United States and was a citizen thereof. The government appealed to the Circuit Court of Appeals, which court certified to the United States Supreme Court questions, first, as to whether the District Court should have granted the writ of *habeas corpus;* second, whether it should have directed a new or further hearing upon evidence to be presented; and, third, whether it should have treated the finding and action of the executive officers of the Department of Commerce and Labor upon the question of citizenship as final and conclusive. The majority of the court, by Mr. Justice Holmes, upon the authority of U. S. *v.* Sing Tuck 194 U. S. 161, 24 Sup. Ct. Rep. 621, holds that *habeas corpus* should not be granted when the petition alleges nothing but citizenship as making the detention unlawful; and, further, that the decision of the executive officers is no less conclusive on the federal courts in such proceedings when citizenship is the ground on which the right of entry is claimed, than when the ground is that of domicile and the belonging to a class excepted from the exclusion acts, citing Yamataya *v.* Fisher, 189 U. S. 86, 23 Sup. Ct. Rep. 611, U. S. *rel* Turner *v.* Williams, 194 U.S. 279, 24 Sup. Ct.

Rep. 719; Chin Bak Kan *v.* U. S. 186 U. S. 193, 22 Sup. Ct. Rep. 891; Fok Young Yo *v.* U. S. 185 U. S. 296, 22 Sup. Ct. Rep. 686, and Lem Moon Sing *v.* U. S. 158 U. S. 538, 15 Sup. Ct. Rep. 967. The court then holds that the constitutional guaranty of due process of law does not require a judicial trial, and is not infringed by the Chinese immigration act making the decision of the appropriate department on the right of a person of Chinese descent to enter conclusive on the federal courts in *habeas corpus* proceedings in the absence of any abuse of authority, even where citizenship is the ground on which the right of entry is claimed, citing in addition to the above, Nishimura Ekiu *v.* U. S. 142 U. S. 651, 12 Sup. Ct. Rep. 336 and Fong Yue Ting *v.* U. S. 149 U. S. 698, 13 Sup. Ct. Rep. 1016. Judge Brewer in his dissenting opinion says that the decision is to his mind appalling, and that, if the procedure provided for by the rules of the Department of Commerce and Labor does not constitute a star chamber proceeding of the most stringent sort, what more is necessary to make it one? adding, "I do not see how any one can read these rules and hold that they constitute due process of law for the arrest and deportation of a citizen of the United States."

CONSTITUTIONAL LAW. (EQUAL PROTECTION OF THE LAWS — DUE PROCESS OF LAW — PROSECUTION OF LYNCHERS)

U. S. C. C., N. D. ALA.

Ex parte Riggins, 134 Federal Reporter, 404, was a *habeas corpus* proceeding growing out of the lynching of a negro named Maples at Huntsville, Ala. The federal grand jury indicted a number of the lynching party for conspiracy under sections 5508 and 5509 of the Revised Statutes. The indictment alleged that, by reason of the acts complained of, Maples was deprived of the enjoyment of rights, privileges, and immunities secured to him by the constitution and laws of the United States. The demurrers to the indictment were overruled by Judge Jones in an interesting and exhaustive opinion, the principal holdings of which are to the effect that it is impossible for private persons to prevent the enjoyment of the right to the equal protection of the laws under the fourteenth amendment, since that right is actually enjoyed when a citizen is not improperly discriminated against in the making or execution of state laws. The due process of law guaranteed by the same amendment, however, is denied when individuals forcibly take a prisoner from the custody of state authorities and lynch him, making it impossible for the state to afford him the enjoyment of the proceedings which make up the state's established course of judicial procedure. Also, that the authority given to Congress to enforce the provisions of the fourteenth amendment includes and involves the power to legislate for the protection which the amendment creates, and that this power may be exercised by Congress either under the implied power found in the amendment itself, or under it and section 8 of article 1 of the constitution, giving Congress general authority to enforce all powers vested in it by the Constitution.

DIVORCE. (DIVISION OF PROPERTY — RIGHT OF ACTION FOR PERSONAL INJURIES)

COURT OF CIVIL APPEALS OF TEXAS.

In Ligon *v.* Ligon, 87 Southwestern Reporter, 838, an effort was made to set aside a judgment granting a divorce, and providing further that a right of action which the defendant below had against a certain railroad company for personal injuries sustained while in the service of the railroad company, was community property, and setting apart an undivided half interest in this cause of action to the wife in her own right. Provision was also made for the payment of a certain sum for the support of a child. The injury above referred to was received by the defendant below after he and his wife had agreed to a separation, and after the suit for the divorce in question had been instituted. The court disposes of the question as to whether this right of action is community property by the simple statement that there was no error below. No cases are cited.

EMINENT DOMAIN. (REMOVAL OF PROCEEDING TO FEDERAL COURT)

U. S. SUPREME COURT.

The United States Supreme Court holds that a proceeding for the taking of land by eminent domain, authorized by the statutes of a state to be begun in courts of that state, is, where the requisite diversity of citizenship exists, a suit involving a controversy between citizens of different states, of which a federal circuit court has original jurisdiction, and which is, therefore, removable to that court when commenced in the state court. A number of authorities, among them Osborn *v.* Bank of the United States, 9 Wheat. 738; Kohl *v.* United States, 91 U. S. 367; Mississippi & R. River Boom Co. *v.* Patterson, 98 U. S. 403; Searl *v.* School District No. 2, 124 U. S. 197, 8 Sup. Ct. Rep. 460, and Mineral Range R. Co. *v.* Detroit & L. S. Copper Co., 25 Fed. 520, are cited in support of an argument, which, in its last analysis, seems to be that although the power of eminent domain resides in the state, nevertheless, when it is delegated to a corporation or individual,

an exercise of the delegated power is, in effect, a civil suit, subject to all its incidents, and consequently removable if the proceeding is by a citizen of one state against a citizen of another. Mr. Justice Holmes, in a dissenting opinion, in which the Chief Justice and Justices Brewer and Peckham concur, takes the view that as eminent domain is a prerogative of the state, which may be exercised in any way that the state sees fit, either by act of the legislature, or by the machinery of the courts, the United States has no right to intervene and substitute other machinery because the state has chosen to use its law courts rather than a legislative committee and thus to give to the exercise of its sovereign power the external form of a suit at law.

GAMING. (Conveyances for Gambling Consideration)

Illinois Supreme Court.

A firm engaged in gambling transactions in the state of Missouri had an office in charge of an agent in the District of Columbia. The firm transacted business to some extent in Illinois. Customers depositing money with the Missouri firm were guaranteed a certain weekly income thereon. A citizen of Illinois for the purpose of making such a deposit, endorsed to the agent in the District of Columbia a certificate of deposit, issued by an Illinois Bank and later on failure of the firm stopped payment. On these facts it is held, in Thomas *v.* First National Bank of Belleville, 72 Northeastern 801, that the transfer of the certificate was void as a gambling transaction within Hurd's Rev. St. of Illinois, 1903, c. 38, § 131, declaring that all conveyances made, where any part of the consideration shall be for money won by gambling, shall be void; but a more novel and interesting portion of the decision is that necessitated by the contention of the transferee that as the assignment was made in the District of Columbia, and as the principal office of the firm was located in Missouri and no law of either Missouri or the District of Columbia was offered in evidence condemning the transactions in those jurisdictions, the transfer should have been sustained. It is held, however, that as the firm carried on its gambling business to some extent in Illinois, and this suit is brought there, the enforcement of the laws of that state necessitated a holding that the contract was invalid.

GAMING. (Gambling Device — Poker Table — Chips — Cards)

Supreme Court of Missouri.

A poker table, cards, and chips, "adapted" for playing the great American game, do not constitute a gambling table or gambling device within the meaning of Mo. Rev. St. 1899, § 2194, making it a felony for any one to set up, or keep any kind of gambling table or gambling device "adapted, devised or designed" for the purpose of playing any game of chance for money or property, etc. (State *v.* Etchman, 83 Southwestern Reporter, 978.) The court relies upon the earlier case of State *v.* Gilmore, 11 S. W. 620. The court, conceding for the moment that the earlier case is not applicable, holds that the indictment, which read "adapted" to the purpose of playing a game of chance, does not follow the terms of the statute, in which the words "adapted, devised and designed" are used. The court points out that, in order to be a violation of the law, the paraphernalia must have been "devised and designed" to be used as a gaming table in addition to being "adapted" to that purpose.

GAMING. (Gambling Device — Crap Table)

Supreme Court of Missouri.

The same court in a decision handed down a few months later holds that a crap table is within the statute discussed in the preceding note. State *v.* Locket, 87 Southwestern Reporter, 470. In this case, the court overruled the contention of counsel that the game of crap could be played without the intervention of a table, and as it was not one of the games enumerated in that section, the prosecution could not lie. The case, as the court says, is decided upon broad lines, and the case of State *v.* Rosenblatt, 83 S. W. 975, is cited to the effect that the statute was broad enough to, and does include the setting up or keeping of any kind of gaming table or gaming device for the purpose of playing any game of chance for money or property. Texas and Arkansas cases are also cited. While this holding is manifestly proper, it is a notable coincidence that the gentleman's game of poker is permitted by a slavish adherence to precedent and a technical construction of the statute, while the black man's game of crap is prohibited by a construction upon "broad lines."

HOMICIDE. (Corpus Delicti — Circumstantial Evidence)

Oregon Supreme Court.

The case of State *v.* Williams, 80 Pacific Reporter, 655, is a notable departure from the generally accepted common law rule as to the evidence necessary to establish the *corpus delicti* in a prosecution for homicide. From the earliest days of the common law, to the present time, it has been held that there could be no conviction for murder or manslaughter without direct proof of the

killing, unless the body of the supposed victim had been found. Illustrations of this rule carried to its last extreme, may be found in Hindmarsh's Case, 2 Leach, C. C. 571; Regina *v.* Hopkins, 8 C. & P. 591 and in the leading American case of Ruloff *v.* People, 18 N. Y. 179.

The case at Bar can scarcely be regarded as a direct holding that the *corpus delicti* may be established by circumstantial evidence, inasmuch as there was some direct evidence, although it was so meager that its probative force was scarcely greater than that of cogent circumstances. The court, however, goes to the extent of saying that the death of the person alleged to have been killed must be established by direct testimony or presumtive evidence of the most irresistible kind.

Defendant was indicted for the murder of two women, the crime appearing to have been committed, if at all, in the early part of February, 1900. Neither of the women were seen after that time and an investigation of defendant's premises about four years later resulted in the discovery of an excavation in which were buried a lot of gunny sacks which had been soaked with some liquid which experts testified was human blood, and two tufts of hair which persons, acquainted with the missing women, testified belonged to them. There was considerable circumstantial evidence pointing to defendant as the perpetrator of the crime, if one was committed, and it was held that the evidence referred to was sufficient proof of the *corpus delicti* to justify a conviction.

INSURANCE. (Failure to Submit to Examination after Loss — Flight to Avoid Arrest)

South Carolina Supreme Court.

In Pearlstine *v.* Westchester Fire Ins. Co., 49 Southeastern Reporter, 4, a rather peculiar reason is advanced for failure of insured to submit himself to examination as to his loss, at the demand of the insurer, according to the terms of the policy. The policy contained an agreement by insured to submit to examination under oath by any person named by the company and subscribe to the same. At the time of, or immediately after the loss, insured, having killed a man, was a fugitive from justice, and consequently failed to submit himself for examination. In deciding that this was an insufficient excuse, the court admits, that, if circumstances arose without fault of insured, which made it practically impossible for him to appear for examination, his failure would be excused, but holds that his unlawful flight from legal process cannot be rewarded by allowing him to recover the benefit of a contract without performance of its obligations.

INTERSTATE COMMERCE. (Unlawful Restraints and Monopolies — Combination of Meat Dealers)

U. S. Supreme Court.

Act July 2, 1890 (U. S. Comp. St. 1901, p. 3200), protecting trade and commerce against unlawful restraints and monopolies, is violated by a combination of a dominant proportion of dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of different states, to bid up prices for a few days in order to induce shipments to the stock yards, to fix selling prices, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and to secure less than lawful freight rates to the exclusion of competitors. Swift & Co. *v.* United States, 25 Supreme Court Reporter, 276. The contention of chief importance seems to be that it is not sufficiently shown that the acts set forth constitute commerce among the states, but this is met by the statement that commerce among the states is not a techincal legal conception, but a practical one, drawn from the course of business, and that when cattle are sent for sale from a place in one state, with the expectation that they will end their transit after purchase in another, and when, in effect, they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.

MARRIAGE. (Annulment — Rules of Church)

New Jersey Court of Chancery.

Misrepresentations inducing marriage as a cause for annulment of a marriage contract are briefly considered in Boehs *v.* Hanger, 59 Atlantic Reporter, 904. Complainant sought a decree annulling the marriage between herself and her husband, alleging in substance, that she was a member of a church, one of the tenets of which was, that a marriage cannot be dissolved except by the death of one of the contracting parties, and that a marriage with a divorced person, the other party to the divorce being yet living, is invalid and cohabitation therein a sin. It was further alleged that defendant represented that he had never been married, when in fact he had been divorced, and his divorced wife was still living. Citing the rule laid down in Carris *v.* Carris, 24 N. J. Eq. 516 and Crane *v.* Crane, 62 N. J. Eq. 21, 49 Atl. 724, that the marriage relation will be annulled for fraud only, when the

fraud operates upon the very essentials of the marriage, the court decides that in this instance, the false statement did not in any respect touch or affect any essential of the marriage, and that although complainant may have been misled, the marriage being valid by the law of the land, would not be annulled merely because claimed to be invalid by the law of a church.

MARRIAGE. (ANNULMENT — WIFE'S RIGHT TO SUIT MONEY)

N. Y. SUP. CT., APP. DIV. 3D. DEPT.

A case almost, if not entirely, without direct precedent, and serving to illustrate the rights of a wife in actions for annulment of marriage, is that of Gore *v.* Gore, 92 New York Supplement 634. In an action by a wife for annulment of a marriage contract, on the ground of impotence, an order was granted, directing defendant to pay counsel fees to the plaintiff, and in discussing the propriety of this order, the court very clearly differentiates between the rights of the wife in the case at Bar, where, of course, the marriage was valid until judicially determined to be otherwise, and the right of the wife to alimony where the suit for annulment is based upon some ground rendering the marriage utterly void *ab initio*. The cases of Bloodgood *v.* Bloodgood, 59 How. Prac. 42, and Meo *v.* Meo, 2 N. Y. Supp. 565, are referred to, and it is suggested that the holdings therein, that in similar cases the wife was not entitled to alimony *pendente lite*, are based upon a dictum in Griffin *v.* Griffin, 47 N. Y. 134, wherein it is said that where the wife denies the existence of the marriage, she cannot consistently claim that the defendant is under any obligation to provide her with means to carry on her suit against him. The Griffin case, however, it is pointed out, is distinguishable from the case at Bar by the fact that in the former case, the action was for annulment on the ground that the defendant (in that case the wife) had a husband living at the time of the marriage to plaintiff. This, of course, would render the second marriage of no effect whatever, and the wife would have no standing to claim alimony or suit money. In the case at Bar, however, the marriage was valid until the wife saw fit to exercise her right to have it annulled, and hence she was properly entitled to the expenses of her suit.

MASTER AND SERVANT. (LABOR UNIONS — ENJOINING DISCHARGE OF SERVANT)

N. Y. SUP. CT., APP. DIV., 2D. DEPT.

A case reaffirming the doctrine of liberty of contract on facts somewhat different from those involved in former cases, decided on practically the same principle, is that of Mills *v.* United States Printing Company of Ohio, 91 New York Supplement, 185. A strike by the employees of the defendant printing company had been terminated by an agreement providing that the printing company should not in the future employ any workmen who were not members of a union, and should discharge such as were in its employ if they refused to join the union. Plaintiff, who was an employee, did so refuse, and brought suit to enjoin the printing company from discharging him pursuant to its contract. Injunctive relief was denied. It is argued, in effect, that as neither party to the contract was seeking to avoid it, and as the employer had the right to employ whom it chose, and the employees the right to work for whom they chose, one not a party to the contract by which the conditions of labor were regulated could not be heard to question the validity of that contract merely on the ground that under it he could not be retained as an employee. Assuming that the agreement has been performed, it is said that plaintiff has suffered no injury directly traceable to the contract, inasmuch as the employer was free to discharge him in any event, without any reason or for any reasons, which seem to the employer sufficient, no matter how shortsighted or arbitrary. National Protective Ass'n *v.* Cumming, 65 N. Y. Supp. 946, and Mayer *v.* Journeymen Stone Cutters' Ass'n, 20 Atl. 292, are cited in support of the holding, and Reid *v.* Vanderheyden, 5 Cow. 728; Grant *v.* Duane, 9 Johns. 591; Baxter *v.* Baxter, 43 N. J. Eq. 82, 10 Atl. 814, and Cranford *v.* Tyrell, 128 N. Y. 341, 28 N. E. 514, are referred to with approval as throwing light upon the questions discussed.

MASTER AND SERVANT. (RESPONDEAT SUPERIOR)

KENTUCKY COURT OF APPEALS.

The principle that a master is not liable for the wrongful acts of his servant unless acting within the scope of his authority, is again well illustrated in Mace *v.* Ashland Coal & Iron Company, 82 Southwestern Reporter, 612. There it was alleged that defendant's servant gave a warning of danger which caused plaintiff to jump from an incline on which he was standing to the deck of a barge, thereby receiving injuries. There was in fact no danger, and the warning was given either mischievously or maliciously with a design to alarm and terrify plaintiff. It was, however, not alleged that the warning was in any way connected with the servant's duty, or that he represented defendant in any manner therein, and the court,

holds that no cause of action is stated against defendant. Smith *v.* L. & N. R. Co., 95 Ky. 11, 23 S. W. 652; Lexington Ry. Co. *v.* Cozine, 64 S. W. 848, and William's Adm'r *v.* Southern Ry. Co. in Kentucky, 73 S. W. 779, are cited as illustrations of malicious actions of a servant for which the master is liable, and are distinguished from the case at Bar in the fact that in each of the cases cited, the servant was engaged in some manner in performing his regular duties or furthering the interests of the master.

NEGLIGENCE. (Attempt to Save Life)
Tennessee Supreme Court.

A reaffirmation of the doctrine that the law will not impute negligence to one who imperils his safety in an attempt to rescue another from a position of danger, is contained in the case of Ridley *v.* Mobile & O. R. Co., 86 Southwestern Reporter, 606. A railroad employee saw a boy, unconscious of his danger, standing on defendant's track in front of a rapidly approaching train, and in an attempt to rescue him, was killed. Under these circumstances, it is held that deceased was not guilty of contributory negligence, and the principle is laid down in general terms that one is justified in attempting to save human life, when it is imperiled by great danger, and in a sudden emergency, and in such cases the rescuer need not stop and hesitate and weigh probabilities until it is too late to make the rescue, but that it is sufficient if he acts with such care as a reasonably prudent person would use in such an emergency and under similar circumstances. In support of the proposition, the following cases are cited: Pennsylvania *v.* Roney, 89 Ind. 453; Linehan *v.* Sampson, 126 Mass. 506; Eckert *v.* R. Co., 43 N. Y. 503; Gibney *v.* State, 137 N. Y. 6, 33 N. E. 142, and Spooner *v.* R. R., 115 N. Y. 34, 21 N. E. 696.

PATENTS. (License Restricting Use — Contributory Infringement)
U. S. Cir. Ct., E. D. Wisconsin.

The principle originally laid down in Victor Talking Machine Company *v.* The Fair, 123 Federal Reporter, 424, is reasserted in Brodrick Copygraph Company of New Jersey *v.* Mayhew, 131 Federal Reporter, 92, in which it is held that it is within the right of the owner of a patent for a machine to sell the machines under a license, containing a condition that they shall be used only in connection with patented materials, also made by such owner, and that one who makes and sells to users other materials specially designed and intended to be used in such machines, and which are so used, is liable as a contributory infringer.

PHYSICIANS AND SURGEONS. (Christian Science healer — Liability for Negligence — Standard of care)
New Hampshire Supreme Court.

An interesting discussion of the legal obligations of one professing to cure disease by means of Christian Science, and of the standard by which his treatment is to be judged, is contained in Spead *v.* Tomlinson, 59 Atlantic Reporter, 376. A number of interesting questions are raised by assignments of error, only a brief summary of the decision being possible here. It is held in effect that the standard of care by which a Christian Science healer is to be judged, is the care, skill, and knowledge of the ordinary Christian Scientist, who undertakes to treat diseases according to the method practiced by such healers, and that he is not to be judged by the standards applicable to the ordinary physicians. The facts showed that the plaintiff, who was afflicted with appendicitis, applied to defendant, a Christian Science healer, for treatment, and was told to keep about the room, to eat anything she wanted, and not to lie down. The directions are held not to be proof of any negligence on the part of the healer, in the absence of any showing that the principles of Christian Science practice require any other course of treatment. Plaintiff is also denied a recovery on the ground of deceit and misrepresentation. The defendant declared himself able to effect a cure by the use of his methods, and it is held as the statement was made with respect to a matter as to which the defendant could have no personal knowledge, it could not be made the foundation of an action for deceit, unless it was made with knowledge of its falsity, of which there was no evidence. The contention that defendant was liable because his course of conduct was unlawful is met by the statement that if it was unlawful for defendant to administer such treatment, it was equally unlawful for plaintiff to knowingly employ him to give such treatment or consent to be so treated, and that consequently her own illegal act contributed to whatever injury she received.

POLICE OFFICERS. (Disorderly House — Unlawful Interference with Business)
N. Y. Sup. Ct., Special Term.

In Delaney *v.* Flood, 91 N. Y. Supp. 672, the plaintiff is denied an injunction to restrain a police captain from posting officers in front of a hotel where liquors were sold, and which the

officer claimed was a disorderly house, but it was held that plaintiff was entitled to restrain defendant from interfering with customers by stating to them that the house was disorderly and was liable to be raided at any moment and the occupants arrested. The question as to where the officer should post his men for the purpose of preventing or detecting crime was held to be a detail of police administration, with which the court would not interfere. This, however, it is said, must be done in a lawful manner. The officer may observe, may arrest, and may arraign, but if he arrests, the court must pass upon the facts; the court must do the suppressing. The officer has no power to decide that a place is to be suppressed as disorderly and to act on that theory out of court, hence his action in interfering with plaintiff's customers by statements as to the character of plaintiff's place and threats of possible arrest was without warrant of law. If such conduct were approved, says the court, any legitimate business might be ruined.

RAILROADS. (Automatic Couplers — Due Care)

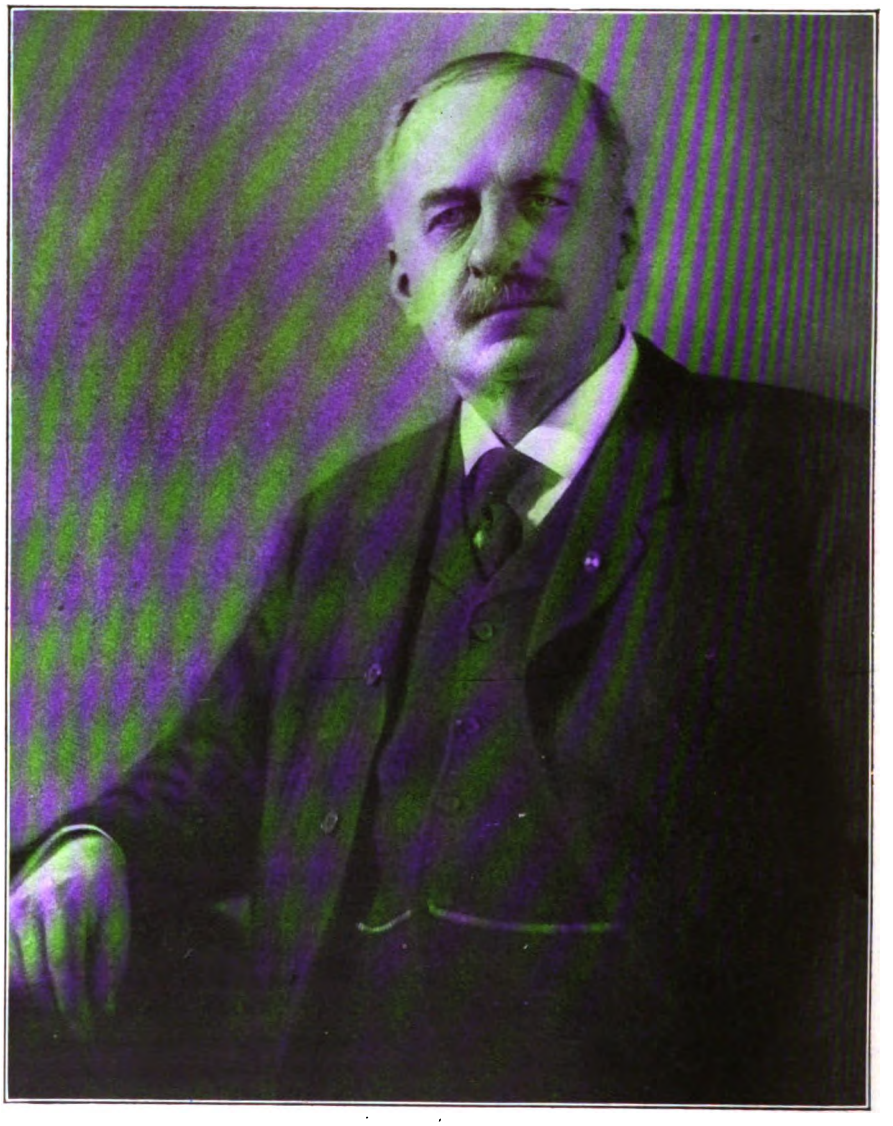
U. S. Dist. Court, Southern Dist. of Ill.

A decision which, while it might well be thought unnecessary, is, nevertheless, so far as we know, the first of its kind, is that in United States *v.* Southern Ry. Co., 135 Federal Reporter, 122. The question relates to the scope and effect of Act Congress, March 2, 1893 (U.S. Comp. St. 1901, p. 3174). Section 2 of that Act provides that it shall be unlawful for any interstate carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the engine and the cars. In an action for the penalty provided for violation of this act, defendant introduced evidence tending to show care and diligence in the employment of inspectors and repairers, and asked the court to hold the propositions of law based upon this theory of defense. It is argued by the court, in passing upon this question, that to construe the statute in such a manner that the exercise of diligence by a railroad company would excuse it for a violation of law, would in effect nullify the statute. The fact that the position of the defendant is untenable is made reasonably apparent by the mere statement of the case by the court, where it says: "The defendant asks the court to hold, in effect, that they cannot haul the car in a defective condition, provided they have failed to use diligence, to discover its defective condition, but that if they have used due diligence, they may haul the car in its defective condition." In such cases it is submitted that it would be impossible for the officers of a government to determine in advance whether a statute had been violated or not, and that before a prosecution could be properly instituted they would have to go to the company, ascertain what care it had used, and determine, as a matter of fact and law, whether the acts of the defendant constituted due diligence, and from that determine whether a prosecution might be safely instituted. The case is considered in its analogy to other cases involving statutory penalties for the handling of adulterated goods, the selling of liquor without a license, the selling of oleomargarin, etc., and the cases of State *v.* Newton, 50 N. J. Law, 549, 18 Atlantic 77; Commonwealth *v.* Gray, 150 Mass. 327, 23 Northeastern, 47; Reg. *v.* Woodrow, 15 M. & W. 404; Altschul *v.* State, 8 Ohio Cir. Ct. Rep. 214; People *v.* Roby, 52 Mich, 577, 18 Northwestern, 365, and People *v.* Snowberger, 71 Northwestern, 497 are cited, and the holding therein, that in such prosecution the question of intent is of no importance, is approved.

TREASURE TROVE. (Title — Owner. of Realty)

N. Y. Sup. Ct., 3d App. Div.

In Burdick *et al. v.* Chesebrough, 88 N. Y. S. 13, the dust to some extent is shaken off from the venerable doctrine of treasure trove, and it is held that personal property deposited beneath the surface of the soil and so left until the place of deposit is forgotten and neither the owner nor his personal representatives can be found, becomes as a part of the soil, the property of the owner of the realty and passes by gift, sale, or descent as a part of the realty, and if discovered and removed from the soil becomes the personal property of the owner of the realty as against every one but the true owner, and is not the property of the finder.



The Green Bag

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GEORGE R. PECK, PRESIDENT OF THE AMERICAN BAR ASSOCIATION

By Edgar A. Bancroft

THE sensitive Keats, fearful that approaching death would rob him of the poet's amaranth, asked that these words be graven on his tomb: "Here lies one whose name was writ in water." This brief sentence is not only the fit epitaph, but even the generic biography, of the lawyer. His attainments, his qualities, his successes vanish with the breath of those whose spoken praise makes his fame. The only record is in the brief memory of man, or in the hidden volumes of the courts. The reputation of even the greatest lawyer scarcely outlasts his generation, unless he has won eminence outside his profession. When the Bar recounts its great names, the public recognizes only those who, beside their legal victories, have rendered notable service as statesman, publicist, or man of letters. The familiars of Daniel Webster and Jeremiah Mason regarded Mason as the greater lawyer. The fame of Rufus Choate as the foremost American advocate is but a shadowy tradition. And Lord Brougham wrote of the elder Pitt that nothing remained by which a later time could judge of his eloquence or of his power as a debater, except the testimony of his contemporaries.

The recital of the facts in a lawyer's career is not only brief, but often uninteresting; and it wholly fails to indicate what manner of man he is, what power he wields, and what talent he possesses.

George R. Peck, the new president of the American Bar Association, was born in Steuben County, New York, and spent his boyhood and youth upon a Wisconsin farm. In 1862, in the beginning of his college course, he enlisted in the Union Army. Soon promoted to a lieutenancy in the 31st Wisconsin Infantry, he marched with Sherman's army to the sea; and, when the war ended, was mustered out with the rank of captain. Returning to Wisconsin, he studied law, and was admitted to the Bar in 1867. He began practice at Janesville, Wis., but removed to Independence, Kan., in 1871. In 1874, he was appointed United States District Attorney, and went to Topeka, where he resided until 1893. In 1880, he resigned the district attorneyship, and two years later became general solicitor of the Atchinson, Topeka & Santa Fé Railroad Company. During the six years of his service as district attorney, he successfully conducted many important causes, among them the great Osage land case, involving the government's title to 960,000 acres of land. Since 1893 he has been engaged in general practice at Chicago, Ill., as a member of the leading law firm of Peck, Miller & Starr. He has also been general counsel of the Chicago, Milwaukee & St. Paul Railway Company since 1896.

During thirty-eight years of active practice, Mr. Peck has argued many important cases in the State and Federal Courts of the West and Southwest, and before the Supreme Court of the United States. The extent of his professional experience has given him a wide acquaintance among leading American lawyers, while the warmth and generosity of his nature, and the fascination of his wit and learning have made these acquaintances his devoted friends.

In 1900, he delivered the annual address

before the American Bar Association upon "The March of the Constitution," a subject suggested by a chapter title in Carlyle's French Revolution. In it he traced the history and growth of the immortal document, its adaptability and adaptation to the changing conditions of our people and our institutions, and the paramount influence of Chief Justice Marshall. He largely anticipated the learning and eloquence that were bestowed upon the great Chief Justice at the "Marshall Day" celebrations of the following year. Ever since the delivery of that masterly address, Mr. Peck has been known not only as a great lawyer, but as a student of American institutions and law, and a master of English speech. Here are a few paragraphs that show its quality:

"Unwritten constitutions are constitutions only by fiction. In England constitutional principles are much discussed, but no one ever claimed an act of Parliament could be ignored or disregarded for a supposed or real violation of that intangible and liquid ideal called the British Constitution. It seems strange to us, but yet in England an act of Parliament may be unconstitutional, and still be legal and valid. In other words, the British Constitution is perfect as a text, but worthless when Parliament preaches the sermon. But the omnipotence of Parliament is a very different thing from the acts of a legislature whose powers are circumscribed by the only omnipotent thing in our government, which is the constitution; not a list of precedents and prescriptive rights, but the deliberate will of the people set down in written words, by the only sovereign authority — the people themselves.

"Gibbons *v.* Ogden, decided in 1824, is the great source to which all must go who would understand the scope and import of the commerce clause of the Constitution.

"There is a certain solemnity in all of Marshall's constitutional decisions; a solemnity becoming a great magistrate with such duties to perform. No judge ever had to walk in a harder path. But he never faltered, and his judgments have stood every test, as the firm and convincing pronouncements of the law.

"The argument in the case dealt largely with the question whether navigation is commerce, but Marshall, answering the question in the affirmative, added in that conclusive way which no other judge ever equalled or approached: 'Commerce undoubtedly is traffic, but it is something more; it is intercourse.' It would almost seem that he was prophet as well as judge, for in that sentence he unconsciously foretold the railroad, the telegraph, the telephone, and all the wonderful appliances by which science compels nature to be the servant and minister of man.

"There is something very noble and elevating in the discussion towards the end of the opinion, of the powers of the states and of the general government where he speaks of 'powerful and ingenious minds,' who would explain away the Constitution 'and leave it a magnificent structure, indeed, to look at, but totally unfit for use.'

"His judicial career and his earthly career ended July 6, 1835. He had been chief justice thirty-four years, and it is only true of him to say that, 'take him for all in all,' he was the greatest judge that ever lived. By the common and unfettered judgment of the Bar, by the unanimous voice of statesmen, jurists, and scholars, he was the oracle of our constitutional law, the interpreter, the expounder, and in a certain sense the maker of the Constitution.

"During all his long incumbency of the chief judicial office there never was a day that the Constitution did not move forward, as a constitution should, to meet the crowding exigencies of human affairs.

"And so, gentlemen, the constitution marched; and without exaggeration it may be truly declared that John Marshall was its guide, its light, and its defender. Our profession looks upon him with a somewhat idolatrous feeling, but I do not think it is excessive. When we consider what might

have been our fate if another and not he had occupied that great seat, we may well believe that Providence watched over the Republic. He interpreted the constitution, but he interpreted it in the comprehensive way which made it a thing of life instead of death; a chart of government instead of a collection of meaningless phrases. Only two Americans are better entitled to the gratitude of our people — George Washington and Abraham Lincoln."

Mr. Peck's characteristics as a lawyer are thoroughness of preparation, rare discrimination in the use of his materials, whether of fact or law, directness and simplicity in presentation coupled with unusual literary form, and a keen insight into the springs of human action. His arguments are not symmetrical creations of articulated thought, cold and colorless. They are interesting discussions in which sound reasoning is made persuasive by a charming style and a moral earnestness, and by subtle appeals to sentiment and experience which give logic a compelling power. In a word, he has what has been aptly called an unerring sense of the jugular. He plans to deliver the one lethal blow rather than many. The simplest case involves many questions that may be controlling, but the most complicated case generally turns at last upon a single issue that Court or jury deems decisive. Perhaps it was his experience under General Sherman that taught him to concentrate his fire, to find and most fiercely to attack the weakest spot in the enemy's lines, while diverting such an assault from his own.

In an address before the law class of the University of Wisconsin, in 1892, Mr. Peck declared that, while learning, training, and reasoning power are essential to success at the Bar, tact is the supreme qualification; for, without it, other qualities prove ineffective in the actual combats of the profession. This, tersely, describes his own equipment as a lawyer, but it gives no hint of his capacity and great versatility; his intellectual strength directed by sound and practical judgment, the rare combination of beauty and vigor in diction, the charm of manner, the breadth of culture, the exuberant imagination, the play of wit and humor, which give lightness and carrying power to his arguments, and delight the listener while they convince him.

Singularly qualified to win and hold popular favor, and enjoying the full confidence of the people among whom he has lived, Mr. Peck has steadfastly refused office, and has devoted himself unsparingly to the work of his profession. The district attorneyship, which he held in his youth, was his only public office. He declined the appointment as senator from Kansas which was tendered him by Governor Humphrey, in 1891, upon the death of Senator Plumb.

He drafted, in 1893, the original articles of association of the Civic Federation of Chicago, from which the National Civic Federation and its allied organizations have grown.

For more than twenty-five years he has made each year memorable to some community by an address before university, or literary society, or patriotic organization. Wherever he has spoken he has carried the gospel of idealism, and has presented it with a literary beauty that never failed to win praise and personal regard in equal measure. His address on "The Kingdom of Light," first given before the students of Washburn College, Kansas, suggests by its subject his delight in the intellectual life. His oration before the University of Virginia upon "The Worth of a Sentiment," made him known to the people of the Old Dominion as an orator of the first rank. His speech at the unveiling of St. Gauden's statue of Logan, in Chicago, is, perhaps, the most perfect address of its kind delivered in recent years. His lecture on "Temperament" has been given before the State Teachers' Associations of Wisconsin and Kansas, and before the State Normal Schools of Illinois and Iowa. Unique and notable is his lecture upon "The Puritans," first delivered before the Ethical Society of Milwaukee, in 1902.

Everything he writes has a literary quality and distinction. His brief eulogies of Lincoln, Grant, and Logan, are prose poems. In the "Lincoln" he said:

"Ideal characters cannot be made to order. They must stand for something more than accident, for something better than titles and dignities.

"Abraham Lincoln outshines the Plantagenets and ennobles common blood forevermore.

"He was great, not knowing his own greatness. In him common sense took on flesh and blood. Rooted in humble soil his life grew and strengthened and unconsciously blossomed into fame.

"When, in 1858, he made that memorable canvass of Illinois, the Republican party was a great instrument, discordant and untuned. He touched its chords, and straightway a nation leaped into life to follow its enchanting strains. No herald announced his coming, no trumpet sounded when a new Agamemnon rose from the prairies. 'Is not a man better than a town?' asks Emerson. Verily, Abraham Lincoln, proclaiming the truth that had just begun to dawn, was more than a city with all its domes and turrets flashing against the sky.

"History has given Abraham Lincoln a unique place. He had power greater than king or emperor, and he used it as modestly as a village pastor might wield his influence over a rural congregation. He was granite for the right, but yielding as water when common sorrows touched his own sad heart.

"He was above all things a man; strong, resolute, modest, too great to be proud, too deeply introspective not to see his own limitations and his own possibilities. No ruler by divine right ever had more true dignity; no laborer driving his team afield more true humility. As Abraham Lincoln, he never forgot that he was president; as president, he never forgot that he was Abraham Lincoln.

"Out of the nightmare of the war, clear cut against the April sky, there rose a figure for which he had longed by night and by day. It was the figure of a nation. The camp, the march, the battle, and the prison had upreared its walls. No contract made it. No parchment can define all its powers or limit its possibilities. It is sufficient unto itself. Not States but people gave it life, and not States but people must perpetuate it. It preceded and will survive the written formulas which are the husk, and not the kernel, of constitutional government."

In his dedication of the Statue of Grant, is this passage:

"I would not take from that noble life one little flaw through which the real brightness of his character shines more plainly. Victory is sweet to a soldier's heart. When Lee surrendered, the measure of success was heaped and crowded for U. S. Grant. He had won for all time the fame of a great general. But he was something more than a great general when in that hour he bade the weary soldiers he had fought so long to go back to their farms and cotton fields, and build up their broken fortunes. It was an act such as poets love, when they sing of Arthur and the Table Round, or of the fabled Cid whose gentle hands bound up the wounds his own right arm had made. Whatever it meant to others, to Grant Appomattox meant only peace. Some blossom from the famous apple tree dropped into the old commander's heart, and filled it with the sweetness of the Spring."

And in the Logan address are these sentences:

"Anniversaries are harmonies; and, in observing them, we set history to music."

"Behold the bronze epic! *Arma virumque* to all who shall gaze on these heroic features."

"Art has a subtle vision. It worships beauty. Poems and songs are links which unite it to Nature, and to human nature, which is the flower of all things. It puts light and color upon canvass, only that the

picture may speak the universal language. It shapes ideals into form, as Phidias carved in the rude marble those dreams of beauty that haunted him when he thought of Marathon. Its noblest conceptions rise from events which have moral grandeur in them; from illumined moments, when some soul has reached its highest exaltation. Seeing that they are beautiful, it keeps them so forevermore."

"The real proof of genius is the manner in which high responsibilities are met. Abraham Lincoln, in the school of Sangamon, was hardly a prophecy of him who became the foremost man of all this world. Galena and Appomattox are wide apart; but Grant spanned them. The law of growth rules; and only those who can rise to occasion are great. Measure Logan by this unfailing test and he becomes collossal. Emerson tells, in a familiar line, how Michael Angelo 'wrought in a sad sincerity'; but so in truth does every man who, in the stress of duty, builds domes, or carves statues, or fights battles."

"This day is dedicated to Logan as a soldier. He won it from the calendar, and made it his own."

Mr. Peck had a large part in both the fact and the commemoration of the return of fraternal relations between North and South. At Atlanta in the Peace Jubilee, which followed the end of the Spanish War, he expressed the new spirit in an address entitled "The New Union," and in the following year he addressed the University of Georgia upon "Scholarship and Patriotism." In recognition of his attainments as a scholar and of his service to civic betterment, three colleges have conferred upon him the degree of LL.D.

As the quality which is called tact gives success where mere strength would fail, so the personality of a lawyer counts for more than his abilities or his achievements in his standing at the Bar and in the community. George R. Peck is to-day president of the American Bar Association, not only because he is a great lawyer, but because he is a great man. His abilities are made fascinating by the frankness, geniality, and hospitality to ideas and all high human qualities, which show in his every public and private utterance. The life of the mere lawyer has never been his; it could not confine the amplitude of his tastes and powers. In all the years of arduous struggle for success at the Bar, he has lived as close to Chaucer, Milton, Shakespeare, Wordsworth, Tennyson, and Burns, as to Blackstone, Chitty, Coke, and Stephen. He has been a thorough student of literature as well as of law, has cultivated the humanities, as well as the judges and the jury, has had an interest and an influence in public affairs, and has kept himself in vital relations with the intellectual life of the world.

In "the noble though arduous profession of the law," he has won the "truly enviable reputation" by that "industry, energy, perseverance, and self-denial" which Lord Campbell, in the dedication of his "Lives," commended to his son. His generosity to his associates and his kindliness to his juniors win their affection and devotion. Companionable, large-hearted, and open-handed, he inspires enthusiastic friendships, in which admiration of his masterful abilities is submerged in a warmer admiration of the man.

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THE AMERICAN LAWYER

By Alfred Hemenway

WE are told that in the United States there are more than one hundred and fourteen thousand lawyers, each of whom as a part of the ceremonial of admission to the Bar has taken the oath of allegiance and that other oath of impressive solemnity, the attorney's oath, whereby he invokes God's help that he may do no falsehood nor consent to the doing of any in court; that he may not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same; that he may delay no man for lucre or malice, but that he may conduct himself in the office of attorney within the courts according to the best of his knowledge and discretion and with all good fidelity as well to the courts as to clients.

That he has a good moral character must appear to the satisfaction of the court. With zealous care justice guards her portals.

On admission to the Bar each becomes an officer of the court. It is the "office of attorney" to which he is admitted. His tenure is for life or during good behavior.

Thus accredited and so consecrated, he enters upon the practice of the law whose code of morals finds fit expression in the memorable words of the "Institutes": "*Juris præcepta sunt hæc: honeste vivere, alterum non lædere, suum cuique tribuere.*" "These are the precepts of the law: to live honorably, to injure nobody, to render to everyone his due." This is the golden rule of the civil law. Its terse utterance is the law's practical rule of conduct. Its generality does not make it valueless. It is like the cardinal points of the compass.

The Bar is a part of the court. "It is believed," said Mr. Justice Miller in Garland's case, "that no civilized nation of modern times has been without a class of men intimately connected with the courts and with the administration of justice, called variously attorneys, counselors, solicitors, proctors, and other terms of similar import. . . . They are as essential to the successful working of the courts as the clerks, sheriffs, and marshals, and, perhaps, as the judges themselves, since no instance is known of a court of law without a Bar. And Mr. Justice Field, in the same case, said: "The attorney and counselor being, by the solemn judicial act of the court, clothed with his office does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors and to argue causes is something more than a mere indulgence, revocable at the pleasure of the court or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court for moral or professional delinquency."

The lawyer can be removed from his office by no act of the legislature, for disbarment must be a judicial act.

The great lawyers of Rome were the real interpreters of the law. They furnished the knowledge of the law to the prætor. So it has ever been that in great measure the learning of the Court is the learning of the Bar. The opinion of the judge survives; but the arguments of counsel are forgotten. The fame of the judge lives in the memory of succeeding generations. The reputation of the lawyer is fleeting. Pemberton Leigh refused to be solicitor general, a puisne judge, a vice-chancellor, and finally declined the high office of Lord Chancellor and a peerage. Who remembers him now? His name is writ in water.

And yet many an opinion of light and leading is but the recasting of the brief which is forgotten. Webster's argument moulded the opinion of Marshall in the Dartmouth College case. Goodrich's argument is in-

corporated in the opinion of Mr. Justice Bigelow in the Brattle Square case, an opinion involving the rule against perpetuities as applicable to an executory devise, and of which an associate of Chief Justice Shaw said even Shaw could not have written it. Of this opinion it has been said that in it "the law assumes the beauty and precision of the exact sciences."

As long as there is a belief in immortality, as long as there is physical infirmity, as long as justice dwells on earth, so long will flourish the three learned professions, for so long must soul, body, and estate be ministered unto; and not the least is our profession dedicated to law and consecrated to justice.

Law is permanent but ever changing. As a city grows, its streets and byways multiply, but its original highways remain, and the law of the road is applicable to the old and the new ways, subject to the modification which increasing use and utilities make inevitable. The *reasonableness* of the law is applied common sense, and common sense has been admirably defined as "an instinctive knowledge of the true relation of things."

In a eulogy of Chief Justice Shaw, Benjamin F. Thomas, an able lawyer and his associate upon the Bench, cited the case of Commonwealth *v.* Temple (14 Gray, 69), as one of the great opinions of the chief justice whose primacy in the judiciary of Massachusetts was never disputed.

The opinion is brief. It is of interest to the lawyer as illustrative of the application of common sense to legal principles.

It was in the infancy of horse railroads. A corporation was chartered to construct a railroad. A section of the statute provided for the punishment of any person wilfully and maliciously obstructing the passing of cars on its tracks. The defendant, with a heavily-loaded team, was driving on the public street in front of a horse-car. Requested to turn aside, he did not, but continued thereon for some rods before turning off. For this seemingly trivial act, the defendant was indicted and convicted, in spite of his contention that the exercise of his right to use the way as before was not malice, and that the right of the corporation was subordinate to the existing rights of travelers.

The opinion admirably states the great merit of the common law in "that it is founded upon a comparatively few broad general principles of justice, fitness, and expediency, the correctness of which is generally acknowledged and which at first are few and simple, but which carried out in their practical details and adapted to extremely complicated facts, give rise to many and often perplexing questions; yet these original principles remain fixed and are generally comprehensive enough to adapt themselves to new institutions and conditions of society, new modes of commerce, new usages and practices, as the progress of society in the advancement of civilization may require." The right of each traveler on the highway must be exercised with a due regard to the rights of others. The teamster was bound to turn out because the car could not.

Thus our customary law grows with the growth of society. Judge-made law keeps step with invention. The Reports are, in truth, the chronicles of the time. The business, the crime, the habits of life of each generation are recorded in their pages. In them we trace our growth. They are full of human nature, not always at its best, but often in its abnormal development. The physician treats the maimed and diseased; the clergyman's work is among sinners, and the lawyer deals greatly with that which is new or abnormal in business or conduct.

Lord Mansfield tells us that "the law does not consist of particular cases, but of general principles which are illustrated and explained by those cases." But its practice does consist of particular cases. Special cases increase with the general complexities attendant upon the growth and development of society.

Compare a volume of the Reports of the current year with a volume of forty years ago of the same court, and the comparison shows the increasing complexity of our everyday life. Compare the 90th volume of Massachusetts Reports (8 Allen), 1865, with the 187th volume of Massachusetts Reports, 1905. The new subjects of litigation not found in the earlier Report are:

Automobiles,
Bankruptcy,
Parks and Parkways,
Boxing Matches,
The Civil Service Law,
Dynamite,
Elevators,
Elevated Railways,
Employers' Liability Act,
Grade Crossing Acts,
Liability Insurance,
Water Rates,
Obligations Redeemable in Numerical Order, and
The Negotiable Instruments Act.

Each of these subjects is prolific in litigation. The law is never at rest. It is in constant development.

It is interesting to note in the earlier Report that a corporation is plaintiff in fifteen cases, and is defendant in an equal number; while in the latter volume a corporation is plaintiff in only ten cases and is defendant in sixty-four cases. Surely corporations have a legitimate page in their accounts for Legal expenses.

The law is a science, and in the picturesque words of Lord Nottingham, the Cicero of the English Bar: "The sparks of all sciences in the world are taken up in the ashes of the law." Magnificent as are the praises of the law, the law by itself is like a beautiful statue, whose exquisite proportions excite unbounded admiration; but the marble is cold and lifeless. It is a work of ornament and delight, but it is only beautiful. Law as law, is theoretical and utopian. But it is the *administration* of law with which the lawyer is most concerned. To Cromwell the law was "a tortuous and ungodly jungle," but to the lawyer the whole body of the law is the considered wisdom of all time. To him its history, its development, its learning, its adaptation to all the mutations of time and chance are a source of ever-increasing admiration. He looks upon the law as the handmaid of Justice, in whose temple he is a minister. It is a living force. It is the preservative power in civilization.

The lawyer has a pride in his profession. The great men whose names are inscribed on its rolls are to him the real heroes of history.

All knowledge is the province of the lawyer. This versatility was admirably illustrated in the argument of the telephone cases. On the way to the Capitol on the day of the argument, a scientist walking with Chief Justice Waite, said to him: "I don't see how *any* tribunal of judges can understand the scientific questions involved in the case." After hearing the argument of the late Mr. Storrow, he said: "*Now* I don't see how the Court can fail to understand the scientific questions involved." So clearly had the lawyer with trained accuracy stated the matters in controversy.

We are glad to remember that D. Appleton White and John Pickering, two Massachusetts lawyers, — one a Judge of Probate, the other City Solicitor of Boston — prepared an edition of Sallust for publication a hundred years ago. It was the first classic, not a mere reprint, published in the United States.

The lawyer as a part of the court is a part of the government and interested in its prosperity. We are a great people, and notwithstanding the hysterical complaints that find vent in the daily and periodical press, a well-governed people. Well-housed, well-fed, well-clothed, with an open school-house and a free altar, on this earth there is no nation where the skies are bluer and the grass greener, the people more contented or with a brighter future than in the United States of America in this very year of grace. All

about us are unmistakable signs of material, intellectual, and moral prosperity. The people are free; the ballot is in their hands, and *they* are the government. By them officers are elected and measures enacted. There is rotation in office and laws are subject to change. All action is temporary. The will of the people is the thought or the whim of the hour. That which is permanent is the inherent power of the people. That abides; all else is transient. If the law of to-day be unsatisfactory, to-morrow it may be changed. There is nothing sacred in a statute. Its enactment and repeal are but the expression of the hour. While the statute remains it is the supreme law. In its impartial execution is the whole safety of our government. Only in the courts can the honest administration of the law be determined. Their judgment is the final arbitration.

The stability of the court does not lie in its power. To the lawyer it may be a source of admiration that the people bow to the authority of the Court when a law is declared unconstitutional. But it must be remembered that such a decision always sets at naught the will of the majority. The majority is conquered, but retains its "unconquerable will." It yields, because of its belief in the integrity of the Court; it yields because, although failing in its special exercise, its power still remains.

Every declaration of unconstitutionality is a test of the loyalty of the people to the majesty of the law. The acquiescence of the people is a magnificent tribute to the judiciary. Why do the people pay this tribute? It is trite to say that it is because of the acknowledged power of the courts vested in them by the Constitution. The Constitution rests upon public opinion, and in matters pertaining to law, public opinion rests upon the opinion of the bar, and the bar recognizes and sustains the authority of the Court. The judiciary is the strongest department of our government. It is the most permanent. It has amplified its power and jurisdiction. It was never stronger than to-day.

Commercialism is a threadbare topic of universal discussion. Its existence is assumed, and all activities are believed to be influenced by it. We hear on all sides of the materialism and commercialism in all things, and the sad inference is drawn that the pursuit of wealth is now the sole object of life; that the rich are growing richer and the poor poorer. It is a clever phrase and catches the open ear of the thoughtless. To the thinker it is idle. It is true the material prosperity of our country has marvelously increased during our lifetime. In this prosperity all have shared. We have better houses, better furniture, better food, better schools and colleges, and libraries and churches; better roads and parks; better hospitals and asylums, better public buildings. If this generation be chargeable with avarice, it is rather *rapacious* than *tenacious*. Never was wealth held with a more generous hand. The claims of humanity are acknowledged. Never were the poor and needy better watched over and cared for than to-day. Never did the child born into the world have a better opportunity for health, growth, education, comfort, and culture. Never did the law reign more supremely or more benignly. Never before could a president of the United States suggest peace to belligerent nations; one elated by continuous successes, the others wounded by unexpected reverses, and receive the thanks of each and the gratitude of the world. We are told the dove that went forth from the ark returned, for it found no resting-place. The letter of the President found a resting-place in the heart of humanity. If there be commercialism in all these things, then, indeed, is it robbed of its sting.

It is an old cry.

John Adams, in 1776, wrote bitterly of the corruption of his time, of its rapacious and insatiable venality. He was ashamed of his age. Fisher Ames, in 1802, said of the Boston Bar: "I know of no very promising

young men coming forward." In Jefferson's day all Federalists *believed* the country ruined; in Jackson's day the Whigs *knew* the country was ruined; and in the days of the Mexican War rascality and fraud were rampant. Lord Kenyon, the successor of Mansfield, arguing for the right of testamentary disposition of property, declared if disappointed in that, "the great and main pursuit of men in society was disappointed."

The outcry against monopolies was raised by Aaron Burr when Alexander Hamilton procured a charter for the Bank of New York. It caught the people, and he was elected to the legislature. In turn he procured a charter for a water company with powers so broad that the Manhattan Bank was incorporated under its provisions.

We are *not* degenerates. To-day is better than yesterday. The people are honest; their instincts are right. They are slow to believe in the corruption of those in high places, but once believing they always "turn the rascals out."

There is no new crime under the sun. The love of money, the peril of the rich, hypocrisy and all forms of vice have flourished since recorded time. The decalogue is not new. The story of Eden is short.

Goldsmith, whose revels irritated Blackstone, while writing those commentaries which are still classic in spite of modern criticism, truly wrote:

> "Ill fares the land to hastening ills a prey
> Where wealth accumulates and men decay."

Wealth *is* accumulating, but there is no moral, intellectual, or physical decadence, in the American people.

We are told that commercialism has permeated the learned professions. Is it true of the ministry? Are the clergy less charitable, less earnest, less learned than a generation ago? Are not these tests? Is it true of the medical profession? The discoveries of modern science, the numerous dispensaries and hospitals, where the best service of the most skilled is rendered gratuitously, the care of the sick and wounded, the attention to sanitation, the care of the feeble-minded and insane, the exactness of modern medical learning as compared with former generalities, leave no room for the charge of degeneracy. As to the legal profession, its scholarship is broader and deeper than ever before, its ethics more exacting.

The quaint advice of Jeremiah Gridley, born two hundred years ago, and sometimes called the father of the Boston Bar, is still followed. "Pursue," he said, "pursue the *study* of law rather than the *gain* of it; pursue the gain of it enough to keep out of the briars, but give your main attention to the *study* of it."

No longer does a priest inform the king's conscience in matters of equity. It is the composite conscience of the people as interpreted by the Court, that now dictates its decrees. Equity acts by injunction, and so the *ad captandum* phrase, orginated by Governor Altgeldt, "government by injunction," has found its way to the platform — a phrase containing a half truth, and to the layman, ignorant alike of legal principles and the administration of law, full of ill-omen. He forgets or never knew that equity came to ameliorate the hardship of the common law. He has never learned that a system of procedure which can deal only with past infractions of the law and is powerless to prevent further infractions is unworthy of civilization. Equity defeats unaccomplished fraud. He thinks with Selden that equity is a "roguish thing." But every lawyer knows better. He knows that equity is merciful. Daniel Webster admired the "searching scrutiny and high morality of a court of equity."

To join in the outcry against government by injunction is in the lawyer a violation of his oath. It is not fidelity to the courts; it brings discredit upon them and excites mob law and anarchy. It makes the law-abiding discontented. They confound liberty with license. Mistaken in their interpretation of its meaning, they believe that resistance to

an injunction is obedience to God. In the name of liberty they become rioters. If 114,000 lawyers in the United States were to refrain from abusing injunctions, and each, according to his knowledge and discretion, should strive to teach the people that the doctrines of equity are for the common good, it would in these days of agitation immeasurably promote that "general welfare" for which the government was established.

Trial by newspaper is infinitely more harmful than government by injunction. In our Constitution there is no prohibition more pronounced than in relation to bills of attainder. Article I prohibits the passage of bills of attainder, in section 9 to Congress, and in section 10 to the states. It is followed by a provision as to the judiciary "that no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted." Now, in English law, what had been the character of acts of attainder? Mr. Justice Miller in Garland's case, said:

"1. They were convictions and sentences pronounced by the *legislative department* of government instead of the judicial.

"2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule.

"3. The investigation of the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence or that of his counsel, and *no recognized rule of evidence governed the inquiry.*"

Most of these are the peculiar characteristics of trial by newspaper. It is as lawless as the shameful trials of the witches in Massachusetts, in 1692, concerning which it should be always remembered that the judges were none of them lawyers. It was a *quasi* ecclesiastical court. Its ways were not our ways.

The lawyer, as an officer of the court, should be temperate in language. He should recognize the responsibility of office. Superlatives are for the weak, for those limited in observation and experience. The writings of Abraham Lincoln, a typical American lawyer, are splendid models of temperate language. His words as well as his acts were tempered with wisdom.

With the privileges of the profession go its responsibilities. Unconsidered words spoken by one in authority have a borrowed and fictitious value. The lawyer is not debarred from fair criticism, but indiscriminate abuse is not criticism. Criticism is an act of judgment. A common scold is not a critic.

The literary style of lawyers and judges is, oftentimes, the subject of popular sarcastic comment. But Noah Webster, in the preface to his dictionary, in the edition of 1828, referring to the legal decisions of the Supreme Court of the United States and of some of the particular states, says their style "in purity, in elegance, and in technical precision is equaled only by that of the best British authors and surpassed by that of no English compositions of a similar kind."

Of the judicial style of the opinions of Chief Justice Bigelow in the Massachusetts Reports, the late Judge Curtis said he knew of no better models in any law reports.

Chief Justice Shaw had the bluntness of Ellenborough in interrupting counsel. He had the unconscious insolence of conscious strength. He disliked Rufus Choate's voluminous vocabulary. Once, when with great redundancy the eloquent advocate had stated his contention, the chief justice asked him to repeat his proposition. Choate hesitated for an instant and then complied, with even more picturesque elaboration. "You mean this," said the chief justice, compressing the statement into the baldest terms. "Yes, your honor." "Then, why didn't you say so?" "I should, had I your honor's felicity of diction," was the unruffled reply.

Diffuseness and prolixity are the perils of the lawyer. Chief Justice Parsons, like Scarlett, said that "a half-hour was long

enough in which to argue a case to court or jury." He was marvelously concise. Of him Story said: "His words are gold." Sir James Scarlett, being asked why he never addressed a jury more than a half-hour, replied: "It takes just thirty minutes to lodge an idea in a juryman's head. The average juryman's mind can hold but one idea, consequently if I succeed in putting a second idea there I only dislodge the first."

A great principle was laconically expressed in a single sentence by Marshall in American Insurance Company *v.* Canter (1 Peters 511, 542): "The Constitution confers absolutely on the government of the union the powers of making war and of making treaties, consequently that government possesses the power of acquiring territory either by conquest or by treaty."

Thus was the whole doctrine of expansion and the elasticity of the Constitution embraced within the limit of thirty-four words.

Language is uncertain. Few legislators are trained philologists. Chief Baron Pollock said: "*Judges* are philologists of the highest order." In the transmutation of thought into language, words with but one meaning can seldom be used. So it happens that a great part of the proverbial uncertainty of the law arises from the language used in contracts, opinions, and statutes. Herein lies the necessity of construction. "One-half of the English language," said Baron Alderson, "is interpreted by the context." In this, as in all matters, the Court is the final arbiter. Every statute is interpreted in the light of surrounding circumstances. The state of the law, like the state of the art in new inventions, is to be considered. The existing statutes and their judicial interpretation throw light on the new enactment. The meaning of the statute involves not only the words used, but the spirit of the law. If the words fail to express the spirit of the enactment, the intention of its framers fails. The lawyer who detects flaws in a statute is no more responsible for such flaws than is the physician who diagnoses a disease responsible for the bodily ailment of his patient. To the physician it counts for skill. The more latent the cause of the malady the more honor is paid to the skill that discovers it. How is it with the lawyer whose skill and learning give an unexpected but accepted interpretation to a statute? Does he win a crown?

What says the layman? Ignorant of the province of the lawyer, ignorant of the meaning of those grand words written indelibly in the Constitution of Massachusetts, words which Governor Andrew could never repeat without a thrill — "To the end that it may be a government of laws and not of men"; ignorant of the rules of logic, he draws the important conclusion that the lawyer advises his client how to break the law. Is it possible to suppose that there is need of legal advice to break a law? Any tyro can do that. But to know what the law means, what offense is forbidden, is not only the right and duty of all men in every capacity, but it is a knowledge imputed by the law, and ignorance of which excuses no one. The doing of that which is not within the scope of a statute is not its *evasion*. It is neither circumventing nor overriding the law; it is the exercise of an undoubted right. It is the duty of counsel to determine the scope of a statute.

Judge Story once drafted an act passed by Congress, which afterward came before him for construction. He decided that the act had a different meaning from what he had intended in its drafting. His words failed to express his intention. After the passage of an act, the words become the words of the law and are to be construed by accepted canons of construction.

The wide-spread, popular criticism of the lawyer for his part in the construction of statutes has no foundation in reason. The duty of the lawyer is self-evident, and in its performance he violates no rule of law or code of ethics.

It has been recently stated by one who has a wide experience on the Bench of the Superior Court of Massachusetts that "the provisions of the statutes relating to employers' liability furnish grounds for probably one-quarter of the civil jury cases tried in court at the present day." This percentage is not normal. Such litigation smacks of maintenance. It suggests a reason for other states to follow the precedent of Alabama, where a statute was recently passed making it a misdemeanor for an attorney to employ runners to solicit practice, and requiring the public prosecuting officer, upon complaint of the Council of the State Bar Association, to institute proceedings for any violation of the statute. This statute is noteworthy, inasmuch as it makes criminal what before was dishonorable and unprofessional. A rule of ethics becomes a rule of law. It is a warning to the ambulance chaser. It is a statutory acknowledgment of the dignity of the legal profession. It is a happy sign.

The question is mooted in current literature whether a lawyer by virtue of his retainer may violate his duty as a citizen. It is a question raised by the laity. It is not discussed in the profession. In the courts there is a settled practice not to hear counsel argue "against a first principle respecting which there has never been any doubt." So this question is not arguable. No lawyer to-day accepts Brougham's impassioned declaration of the duty of counsel to his client.

The oath of allegiance takes precedence of the attorney's oath. Loyalty is the first duty of every citizen. Civic pride is above personal emolument. The government is more than the client. History shows that the advances of freedom and public rights have been promoted by lawyers in all times. In the time of the Civil War in England Sir Orlando Bridgman and Sir Geoffrey Palmer, retiring to the seclusion of the study betook themselves to conveyancing and invented resulting trusts and springing uses. They are not the ideals of the American lawyer.

Philosophy and oratory were the preparation of the Roman lawyer. To-day the fifteen thousand students in the United States preparing for admission to the Bar in more than one hundred law schools do not find these studies a vital part of the curriculum. And yet, says Sir Henry Maine, "Roman law is the source of the greatest part of the rules by which civil life is still governed in the laws of the western world." Another has said Roman law is written reason. "Here," said Hilliard, standing amid the ruins of the Forum, "Here law had attained the dignity of a science while yet the Druids worshiped the mistletoe on the site of Westminster Hall."

Integrity is an inherent part of the lawyer. Without seeming honest he cannot succeed; and the only way of seeming honest is to be honest, for in the words of Lord Chancellor Napier, "There is an idiom in truth which falsehood never can imitate."

The law is a laborious profession. When Prescott published his "History of Ferdinand and Isabella," Daniel Webster spoke of him as a comet which had blazed out upon the world in full splendor. And Franklin Dexter, then leader of the Boston Bar, said: "It has made him famous; and yet I have spent more time and labor on cases that are now forgotten than Prescott has bestowed on his history."

The lawyer is not a popular favorite. In literature and on the stage his foibles are depicted. Happily there are no lawyers in Dante's "Inferno." Of all men, he is most independent. It is human to dislike superiority. Brougham's assumption of universal knowledge aroused personal antagonism. Even Wordsworth's gentle pen was turned against him. In a pamphlet opposing his election to Parliament, the poet wrote of his boasted independence, "Independence is the explosive energy of conceit making blind havoc with expediency."

Of all men he is most trusted. "I dislike the American people," said a foreign visitor, "but the individuals I have met are

most delightful." Implicit faith is placed in the individual lawyer. It is not alone the great men who give character to a profession. In a profession it is the individual that counts. Each is a unit of energy.

Our government is a government of lawyers. Among a free people the lawyer is always in the ascendant. A written constitution is his protecting shield.

Our roll of great lawyers is long. Yet I cannot forbear a word of eulogy of him who was foremost in the work of our Association, James Coolidge Carter. He was the ideal lawyer. Always in the zone of conflict, there was no stain on his fair fame. Living, he was the leader of the Bar, and when he died there was universal mourning.

Of Governor Russell, Professor Norton said: "He died in a fair hour; he escaped old age." Our brother died in a fairer hour; he reached old age. He lived to fulfill the promise of youth and died in the fullness of time,

"Wearing the white flower of a blameless life."

BOSTON, MASS., August, 1905.

NOTEWORTHY CHANGES IN THE STATUTE LAW OF THE YEAR

By Henry St. George Tucker

THE annual address of the President of the American Bar Association is required by the constitution to review the legislation of the year in the various states and territories, and in the Congress of the United States. Of necessity, therefore, this important address is too long to print in full in this number, and in spite of the difficulty of discriminating, we have tried to select for our readers the most important subjects discussed by President Tucker.

Administration of Justice

"Illinois has passed a stringent act for the suppression of mob violence, first defining what a mob is, then providing that any persons composing a mob who shall by violence inflict material damage to the property or serious injury to the person of any other persons upon the pretense of exercising correctional powers over such person or persons, shall be deemed guilty of a felony, and such injured person shall have a right of action against the county or city in which such injury is inflicted, and that the surviving wife or heirs of any person who has lost his life by lynching at the hands of a mob shall have a right of action for damages against the county or city in which said loss of life occurred in a sum not to exceed $5000.

"The most stringent provision of the act is that which makes the taking from the hands of a sheriff, or his deputy, by a mob, of a person who is lynched, *prima facie* evidence of failure on the part of such sheriff to do his duty, and the governor shall at once declare his office vacant and appoint a successor, with a proviso that, within ten days after such lynching, the sheriff may be reinstated upon filing a petition with the governor, stating and showing by proof that he did all in his power to protect the life of his prisoner.

"Michigan has passed an important act regulating the employment of expert witnesses, in which it is provided that 'no such witness shall receive as compensation in any case for his services a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear or has appeared awards a larger sum; and it is further provided that no more than three experts shall be allowed to testify on either side as to the same issue in any given case, except in criminal prosecutions for homicide, except by permission of the court, and in criminal cases for homicide where the issues involve expert knowledge or opinion the court shall appoint one or more suitable and disinterested persons, not exceeding three, to investigate such issues and testify at the trial; and the compensation of such person or persons shall be *fixed by the court* and *paid by the county* where the indictment was found, and the fact that such witness or witnesses have been so appointed shall be made known to the jury, but this provision shall not preclude either prosecution or defense from using other expert witnesses at the trial, and the act shall not be applicable to witnesses testifying to the established facts or deductions of science, nor to any other specifications, but only to witnesses testifying as to matters of opinion.

"Missouri has adopted an amendment to her constitution prescribing that a jury for the trial of civil and criminal cases in courts not of record may consist of less than twelve men, and that a two-thirds majority of such number concurring may render a verdict in all civil cases; and in all civil cases in courts of record three-fourths of the jury concurring may render a verdict.

Education

"South Dakota provides for instruction in the public schools in physiology and hygiene to be taught as thoroughly as arithmetic and geography are taught in said schools, and such instruction is to be given orally to pupils who cannot read and by the use of text books to those who can, and the text-books used must give about one-fourth of their space to the nature and effects of alcoholic drinks and narcotics, to be at least twenty pages and not to be embraced in a separate chapter at the end of the book.

"We may confidently look for a genuine revival of abstinence in the use of alcoholic drinks in a state where the instruction on this subject is to be as exact as arithmetic and as boundless as geography itself.

"The Court of Appeals of New York is allowed to admit to the Bar without examination, upon the production of a diploma, graduates of the Albany Law School, the Law School of the City of New York, the Law School of Columbia College, the Law School of the University of Buffalo, or the New York Law School, or of the College of Law, Cornell University, Syracuse University, or the Brooklyn Law School of St. Lawrence University.

"Perhaps the acts of assembly in no state in the union contain as much legislation on the subject of education as those of the state of North Carolina. This is largely due to the efforts of the Southern Educational Board, in which the state of North Carolina has exhibited remarkable interest; and I think I am safe in saying that North Carolina is the first cotton state which has advanced to the position of trying compulsory education. The city of Asheville and Raleigh Township provide for compulsory attendance upon schools; while Yadkin and Macon counties, and probably others, provide for submitting this question to the vote of the people; and attendance upon schools is made compulsory upon Indians.

Labor

"South Dakota has passed an act to establish a twine and cordage plant, shirt and overall factory, at the state penitentiary, and appropriated $76,000 to carry it into effect. Said plant is to be under the charge of the Board of Charities and Corrections, and its product is to be sold to farmers of the state who are actual consumers for cash, upon such terms as shall be fixed by the authorities.

"This bill is evidently aimed at the twine and cordage trust. Many of its provisions are similar to the act of the State of Kansas authorizing the establishment of a branch penitentiary and an oil refinery thereat to compete with the Standard Oil Company, which has recently been declared unconstitutional by the Supreme Court of Kansas.

"Tennessee has passed an act to 'exempt thirty-six dollars of all monthly salaries or wages amounting to over forty dollars, and to make ten per cent of all salaries and wages of forty dollars and less subject to garnishment.'

"Colorado, emerging from the throes of labor revolutions, passes a stringent law against boycotts and also decides that eight hours is sufficient length of time for a laborer to work in any one day.

"Illinois, to protect laborers in the mines, provides that in all mines where gas is generated in dangerous quantities a number of men, designated as 'shot fires,' are to be employed at the expense of the company, whose duty it is to inspect the mines and do the firing of all blasts.

"Massachusetts, by resolution of her legislature, expresses the opinion that it is desirable that the Constitution of the United States should be so amended as to place it clearly within the power of Congress to enact laws regulating the hours of labor in the several states according to some uniform system.

"A corporation engaged in mining and manufacturing is prohibited in Missouri from working its employees in its mills or plants

reducing, refining, or smelting minerals or ores, etc., for a period of time longer than eight hours in a day of twenty-four hours. Montana has passed a similar act.

"Texas provides that it shall be unlawful for any corporation to issue any tickets, check, or writing, obligatory to any servant, or employee for labor performed redeemable in gold or merchandise.

"Kansas provides that no corporation shall require or permit any conductor or engineer, or other employee, who has been at work for sixteen consecutive hours to continue on duty, or to perform any work for such railroad until he has had at least eight hours' rest.

"The same state provides that wages earned out of the state and payable out of the state shall be exempt from garnishment or attachment, or where the cause of action arose out of the state, unless the defendant to the suit is personally served with process.

Marriage and Divorce

"A law which will be criticized as one of doubtful propriety was passed by Pennsylvania last winter, permitting a divorce from husband or wife who is a hopeless lunatic. The act seeks to guard its questionable provision by providing that the hopeless lunacy must be proven beyond a reasonable doubt, except that ten years in an asylum shall be regarded as conclusive proof of hopeless insanity. The taking in Pennsylvania hereafter of husband and wife, for better or for worse, in sickness or in health, must be modified to the extent that if the sickness shall partake of the nature of lunacy in a chronic state there may be a dissolution of the bond. May not the man in Pennsylvania, now married to one who is a hopeless invalid from bodily disease, or perhaps maimed and disfigured for life by some unavoidable accident, see in this act ground for an appeal to the legislature to be released from his bonds also? Hopeless mental infirmity is in many respects no worse than hopeless physical infirmity; the exemption of the one must lead to the other.

"This act finds its parallel in a law passed last winter by the legislature of Hawaii allowing a divorce to a man or woman whose wife or husband is afflicted with leprosy.

"An act of Pennsylvania authorizes the governor to communicate with the governors of the several states, requesting them to coöperate in the assembling of a congress of delegates from the states, with the object of securing as nearly as possible a uniform statute on the matter of divorce throughout the United States.

"This has been done by several of the other states.

Private Corporations

"Wisconsin, responding quickly to popular demand, has passed a law providing for the distribution of the surplus of mutual life insurance companies among the policy holders at least once every five years.

"New Jersey provides for the appointment by the governor, of a committee of three persons to revise and codify the laws relating to corporations, who shall report to the legislature on or before the first day of its next session, bills for carrying out this purpose.

"Minnesota prohibits corporations from contributing for political purposes, and by a singular obtuseness a penalty is imposed, not upon the corporation, but upon any officer or stockholder who takes part in or consents to the making of such contributions.

Trade and Commerce

"In Kansas, any corporation, foreign or domestic, engaged in the manufacture or distribution of any commodity of general use that shall intentionally, for the purpose of destroying competition, discriminate between different sections or communities by selling such product to one section or community at a lower rate than to another, after equalizing the distance from such point of manufacture and freight rates therefrom, shall be deemed guilty of an unfair discrim-

ination, and upon conviction thereof shall forfeit not less than $200 for each offense.

"All pipe lines for the conveyance of crude oil in the state of Kansas are declared by law to be common carriers, and the owners thereof are subject to rules prescribed for them by the State Board of Railroad Commissioners for the conduct of their business; and the same act prescribes a maximum rate of charge for all oil transported over said lines."

The President's summary of the results of his investigation is as follows:

"A few comments seem pertinent upon this imperfect review of the legislation of our country. What impresses one most deeply in an examination of the legislation of the states is the number and variety of subjects of legislation, and the assumption (I will not say always improperly) by the state of functions which in our earlier history were unclaimed by it. We are a much-governed people, and there is nothing which affects the American citizen, from infancy to the grave, awake or asleep, in motion or at rest, at home or abroad, in his personal, social, political, or property rights which is not the subject of regulation by the state. Fish and game wardens regulate where, when, and the amount of fish or game that may be taken, and that too though they may be taken from one's own streams or forests. The commissioners of forestry prevent the devastation of timber, and in the public interest limit the amount of timber taken from the land, require the planting of trees in certain places and by inducement or bounty secure the planting of trees in other places. Railroad and warehouse commissioners, under the power of the state, acquire control of railroads and warehouses by prescribing rate regulations and prohibiting the doing of many things deemed unwise by the commissioners. In some states we have internal improvement commissioners, with large powers over the property of the citizen; mine inspectors, with power to make regulations for the owner of the mine, and under which alone can he operate *his own* property; highway commissioners to lay out and beautify and preserve the roads of the state; probation officers to follow the convict or delinquent with a sleepless eye, even after conviction, to see if, perhaps, there may be a spark of virtue, a lump of leaven for his reformation left within his nature; inspectors of cattle; inspectors of sheep; inspectors of bees; inspectors of food; inspectors of weights and measures; inspectors of beef and hides; live stock associations; poultry associations; associations for the conduct of all classes of business; and drainage commissioners, with power to condemn private property for building drains and bridges; boards of charity; boards of equalization; boards of health, of pardons, of prison industries; civil service boards; boards of arbitration, not even allowing a man the right to fight in peace; and after death has come to us, our bodies are embalmed under regulations of the state board of embalmers.

"Then we have factory inspectors; insurance commissioners; boards of dental examiners; bank commissioners; water commissioners to regulate the use and even the amount of water one may use; boards of pharmacy; state veterinarian surgeons; boards of medical examiners; boards regulating cemeteries and irrigation; and even locomotion by automobiles and bicycles is allowed only after compliance with specific state regulations; while the 'kindly fruits of the earth' are ours only when the rules of the state entomologist may permit our enjoyment of them. Indeed, as we look at the whole range of property and social rights, of human wants, necessities, and human action, nothing is left to the arbitrary, uncontrolled will of the individual. Indeed, whether we eat or drink, or whatsoever we do, we do it all in subordination to the law of the state. The government, as trustee for society, controls our rights, our wants, our necessities, and our individual action in their relation to society. The pangs of hunger and thirst, the

uses of property, and the freedom of individual action are all regulated by their effect upon others, and we realize at last in its fullness of meaning the truth that 'no man liveth unto himself.' The home is no longer a man's castle, but it may be a prison house with the family as the inmates and the board of health as jailer. When the state as *parens patriæ* steps in and assumes control by boards and commissioners and other agencies of the safety of society, of the health and morals of the people as well as of their property rights, special care must be taken not to endanger any of those inalienable rights of 'life, liberty, and property' guaranteed to every citizen under 'the law of the land.' For it must be remembered that these are rights which do not proceed from government, but are antecedent to government, and are those for the preservation of which governments are ordained.

"Another view impressed upon the mind by a review of this legislation is that, while it comes from forty-five states and three territories, organized under different constitutions, a common purpose, a common hope, and a common ambition is easily discernible in all for the advancement of their own people and the enlargement of their development under the stimulus of truly American ideas. In many of the states, separated geographically many hundreds of miles, we find a similarity of legislation, indicating the same needs of these widely separated people; and while it is undoubtedly true that there are certain basic principles of morality and virtue necessary to the proper advancement of all the people, whether under the torrid or arctic zone, I can but feel that there is a danger that uniformity of state legislation may be pressed to a dangerous extreme. We must never forget that law is a progressive science, a system of growth. It does not lag behind or precede in its march the needs and advancement of a people, but it goes hand in hand with such to carry out in orderly fashion the requirements of social needs. When we consider the vast expanse of this country, organized as the people are under different constitutions, with different climatic conditions, with social and ethnic conditions of varying hues; when we find conditions of society among the older states, of necessity differing from those which obtain in the newer, all these tend to show that from habits of thought, social and political customs, commercial activities, habits of life, sources of industry, and the sparsity or density of population, the needs of one, as expressed in law, may not be those of another state differing in these conditions.

"The Constitution of the United States, 'the most wonderful work ever struck off at a given time by the brain and purpose of man,' would not be fitted for the Chinese empire, nor even for the Philippines, it is asserted, until in the progress of time, by the process of assimilation, they shall reach the height of the stature of American citizenship; nor would the laws of Draco be other than a misfit if adopted by the State of Rhode Island, in which we are to-day assembled. While ever striving, therefore, for the unification of laws which embrace essentials in those principles which should control and govern all people, however and wherever situated, we should be careful not to impose upon all those laws which may be suited to conditions in some of the states only. Our motto should be, 'In essentials, unity; in varying conditions, variety,' presenting in the result a mosaic, it may be, of infinite variety, like some great orchard of ripe fruit, made up of many different kinds of trees, each extracting from the soil those elements which it needs for its development, and each differing from the others in shape, size, color, and flavor, but each beautiful of its kind, and by contrast adding infinite charm to the whole."

LEXINGTON, VA., Aug., 1905.

PRACTICE WORK IN LAW SCHOOLS

By James Parker Hall

ONE of the difficulties confronting the persons yearly honored by invitations to read papers before this Section is that of choosing a subject with even a flavor of novelty. Those law-school problems which can be much enlightened by discussion are neither many nor complex, and we have talked about them all before. Experience is solving them for most of us more effectively than argument, and, like our theological brethren, the temper of these gatherings is passing from the rigor of doctrinal debate to the genial toleration of the experience meeting. So long as our greatest court decides its most interesting cases by a five to four vote we must admit that reasonable men may differ about some of our questions; and one over which disagreement is certainly reasonable is how far practice should be taught in the law school. Some consideration of this will form the first part of my paper.

Discussion of the subject in recent years has often been prefaced with the statement that half of the appellate litigation in this country is over questions of practice, and has proceeded upon the assumption that law schools could give instruction which would very much diminish this proportion. The first proposition, as usually stated, is extravagantly misleading, and the second may well be doubted. In 1894, there was published in the minutes of this Section,[1] a table prepared by Frank L. Smith of New York, purporting to show that nearly one-half the points passed upon in ordinary civil cases by the appellate courts of the United States and Canada in 1893 did not involve the merits of the causes, but concerned evidence, pleading, or practice. This table is the basis for the statement referred to. Nearly one-third of the points included in it are in evidence or pleading, regarding the teaching of which there is no general controversy. The thirty-five per cent remaining, however, seemed extraordinarily large, and to test the figures I examined the reports of the highest courts in Massachusetts, New York, Michigan, and Illinois for the year 1902–3, tabulating the practice points and endeavoring carefully to distinguish them from points of substantive law. It appeared that less than ten per cent of practice points were passed upon by these courts; and I strongly suspect that Mr. Smith's system of classification must have been very liberal toward the practice headings.

Really, the case against our practitioners is not nearly so bad as even this, for many practice questions are included by counsel as makeweights in cases where the appeal is really taken on the merits or for delay. That such objections are overruled in an appellate court does not stamp either lawyer as incompetent. They are simply playing all of the points in the game. In about one-fourth only of the practice points raised in the cases I examined, was the practice followed held bad where an alternative existed, and in part of these the questions must have been doubtful and no more to be settled without litigation than are moot points in substantive law. Badly-drawn statutes and rules of court are responsible for much earnest controversy over points of practice. The proportion of practice points on appeal in which the lawyers might reasonably have been expected to do better, is thus probably somewhere between one and two per cent, a showing much more encouraging than the fifty per cent version. Just how good or bad this is we cannot tell because we have no record of the proportion of errors in practice which do not get into the reports. Granting, however, that mistakes are too numerous to be creditable,

[1] 17 American Bar Assn. Reports, 367 (1894).

how far might law-school instruction reduce them?

In answering this, a distinction should be made. Many rules of practice depend in detail upon no principle, but are arbitrary rules of convenience. Of this class, for instance, are many of those relating to appellate procedure. A variety of things are to be done in a manner and at times that are minutely specified. No lawyer not largely engaged in perfecting appeals ever tries to charge his memory with these *minutiæ*, or fails to refresh it by a reference to his books. Most mistakes here occur through carelessness, and would not be sensibly lessened by any reasonable amount of law-school instruction. Now, it is precisely this class of questions which is raised most frequently. About one-third of all practice points concern the one subject of appeal and error; and such topics as judgment, judicial sale, levy and seizure, limitation of actions, replevin, and attachment, all of them bristling with minute statutory regulation, form a considerable part of the remainder. The experienced lawyer becomes familiar with the common details of practice in these matters, but even for the tyro the information is plainly written out in the statute or contained in his annotated manual of local practice, and if he be careful and intelligent there is little the law school can give him on such points which he will not readily acquire for himself. The attitude of the law school toward such matters should be that expressed by one of the New York Board of Bar Examiners, when he said before this Section a few years ago: "We know that the legislature is apt to repeal at any time all we know on the subject of pleading and practice, and as we practice with a Code on our desks for ready reference at all times, we will not exact from the student knowledge we do not possess in an eminent degree ourselves."[1]

On the other hand, while the details of practice in our various states differ, its general principles and theories are similar. The chief benefit which a student will gain from a course in practice in the law school will be less an abiding knowledge of the exact steps to be taken in a given proceeding than an idea of what kind of steps he must expect to look up the details about in his local practice books. Just as it is a better use of his time to learn the arrangement of a digest than to try to memorize the cases, so it is better for him to learn what is typical of practice in general than to spend much time in familiarizing himself with local methods of doing typical acts. No doubt the best method of teaching what is typical in practice, even in schools whose students come from many states, is to base the instruction upon the practice of one state, as Professor Redfield suggested a few years ago, emphasizing what is essential rather than details. The important elements of common practice, including the steps in the principal forms of action through judgment to execution, with their ordinary incidents, the procedure in the chief provisional remedies, and the typical procedure of an appeal, may be fairly well covered in the equivalent of two hours of class-work weekly for a year. If, in addition, a serious attempt is made to teach trial practice and the art of conducting cases before a jury, probably at least as much more time must be spent.

No doubt both of these courses, well-conducted, would be useful to a student. The practical question, as has often been said, is one of relative values. What is the best use of a student's time? I do not think this question can be answered in the same way for all law schools. A school may be unable to provide a wide curriculum, and its students, drawn almost wholly from a single state, may for the most part go into practice for themselves immediately after leaving the school. A large majority of American law schools are of this type. The relative value of the practice courses in

[1] American Bar Assn. Reports, 533 (1899).

such schools will be high. Not only are they likely to be better taught than a number of the courses in substantive law, but there are no valuable elective courses to be substituted for them. Inasmuch as nearly all of the students are from the state whose practice is taught, even details are not valueless, and the student who does not have the benefit of an apprenticeship in an office before he starts for himself, needs instruction in practice more than if he had had some office experience first.

At the other extreme are those schools which offer more important courses on substantive law than can be taken in three years, whose student body represents many states, and whose graduates are commonly able to spend some time in an office before starting for themselves. Every argument for the relative value of practice courses in such schools is much weakened. Where more work is offered than can be taken in three years many students will wisely choose that which they are least likely to be able to master by themselves. Probably ordinary practice can be learned with less difficulty than most branches of substantive law. It is chiefly statutory, the statutes are abundantly annotated and there are usually excellent local books upon it, its precedents are rarely sought outside the local jurisdiction, its historical roots are of little consequence, it is not a reasoned system based upon complex conceptions of social warfare, it is not related to other branches of law in evolution or by analogy, and its problems conspicuously lack that wealth of circumstance and variety of incident which create so much of the fascination and difficulty of the substantive law. The student who enters an office for a short time after leaving the law school, will not at once have to decide emergency questions of practice on his own responsibility, and a reasonable amount of systematic study in connection with his office work will make him a fair practitioner in those matters in which proficiency can be gained without considerable experience.

On the other hand, there are several respects in which law-school instruction in practice is superior to what even a diligent student will gain in an ordinary office. Unless a long time is spent in an office, the work done is apt to be fragmentary. Some things he will do frequently. Some not uncommon proceedings may never chance to be turned over to him. These he must learn from reading, and there are a good many practical hints which he will not find in the books. The unwritten customs of lawyers approve ways of doing things puzzling to one acquainted only with the annotated practice act. Moreover, there is often a choice between several methods of procedure where the most intelligent reflection, unaided by experience, would scarcely suggest the one best for a client. A good teacher of practice can give the student much of his experience in such matters, and in his early days this may be very useful to the young lawyer. Even in those schools whose graduates generally enter offices there are a respectable number who wish to begin practice for themselves at once, or to whom it is important to have a fair knowledge of practice immediately upon entering an office. Certainly there are circumstances where such knowledge is of substantial advantage at the start, and its ultimate value as compared with another course in substantive law the student can probably determine as well as anyone else. The theory of elective studies in law schools rests largely upon the belief that there may be a reasonable difference of opinion regarding the best courses for the individual needs of students, and that the student may ordinarily be trusted to decide this for himself. There must be many instances where students might reasonably think a course in practice more beneficial to them than certain courses in substantive law, and my conclusion would be that law schools of all types might wisely offer at least elective

instruction in practice, exclusive of those features which are supposed to be taught only by mock jury trials.

Regarding the value of the latter, in view of the time they take, I am skeptical. It is true an elaborate system of such trials has been in existence at the University of Michigan for several years, and has been introduced in some other schools; and it is true that members of the Michigan law faculty for whose judgment I have the highest respect, believe in their value. In spite of this, I think one may have serious doubts. The ability to try jury cases even fairly well is far more an art than a science, and is to be acquired only by an amount of experience and observation far greater than any law school can afford time for. The school at best can give students but a slight start in this direction — how slight appears when we consider the artificial conditions under which mock trials must be held.

The witnesses are all intelligent young men, somewhat versed in law. There is among them neither the variety of intelligence, training, age, sex, occupation, social condition, or even of character, which marks the ordinary witness and is the distraction of the trial lawyer. The same is true of the jurors. The mere fact that they are accustomed to legal ways of thinking makes them totally different material from the juries of our courts. Then there is the evidence. If it is merely learned by the witnesses there will be almost no element of reality in their examination. If, as at Michigan, the witnesses actually see the facts to which they testify acted out before them, this is better; but even here there can be no real element of passion, bias, or interest to color their testimony, to induce falsehood and concealment, and to be exposed by cross examination; and there is an additional artificiality in that the witnesses know beforehand that they are to observe what goes on in order to tell of it in court. Such observation must be much less casual and less likely to be mistaken than is that of most real witnesses. Finally, the sense of responsibility on the part of the attorney, which is so great an educational factor in real trials (as in all real life), must be largely lacking in the imitation.

It is hard to believe that many students can obtain such benefit from taking part in a few mock jury trials that the third or fourth case they try in actual practice will be affected by it. The cases that are adapted to mock trials lie in a narrow compass. The classes of facts most difficult to deal with in actual litigation are in general those least suited to the moot court, such as questions of negligence, value, damages, mental states, expert opinion, and the like. I do not suppose it would be claimed that students can get from this exercise much practice in the art of handling questions of fact before a jury. Its value must rather consist in giving them some knowledge of the processes of this branch of litigation: how to empanel a jury and open a case, how to present various kinds of evidence, in what form questions should be put, how objections should be made and exceptions taken, and so forth. Now these matters are very easily learned. Some of them may be treated in the course on evidence, and any bright boy who has had a year or two in a law school can get a fair theoretical knowledge of the others in a few days by attending some actual trials and reading a small treatise on trial practice. He can do this in vacation, and devote his time in the law school to more difficult matters and those which better repay theoretical study. The trouble with the young lawyer is not that he does not know these things in cold blood, but that he doesn't remember some of them at the right time in the excitement of trying a case. He will lack self-possession more than knowledge, and until he has tried enough cases so that certain processes have become almost habitual he will continue to make simple errors. A ready command of trial procedure is to be gained only like a ready command of the rules of evidence — by con-

stant practice at the real thing. There could be no simpler rule than that requiring an exception to be taken in order to preserve an overruled objection for appeal, and yet a failure to do this was one of the most frequent errors in practice which I found in the reports of the four states which I examined. The lawyers who made this mistake knew better, but they forgot, and it is hardly conceivable that they would have done better had they participated in a few mock jury trials before beginning practice.

These are the reasons why I do not think that a law school of high grade which offers more courses in substantive law than can be taken in three years, should encourage its students to spend any of their school hours in trying mock jury cases. The really difficult things about trial litigation cannot be learned in this way, and the easy ones can be acquired elsewhere with an expenditure of less valuable time. I do not lay any particular stress upon the fact that the great majority of lawyers do practically no trial work. This would be a good reason for making such work elective, but not for omitting it entirely, if we believed that the law school could do work in this direction comparable in value to what it does in substantive law.

UNIVERSITY OF CHICAGO, Aug., 1905.

THE CONSTITUTIONALITY OF GENERAL ARBITRATION TREATIES

By Everett P. Wheeler

THE general arbitration treaties with Great Britain, France, and other countries, which at the last meeting of the association we recommended for ratification, were rejected by the Senate in the form in which they were submitted. The change proposed by the Senate was in one word only. As negotiated by the President, these treaties provided that the President could and would make an agreement with the other signatory power to submit to arbitration any matters within the scope of the treaty, according to the provisions of The Hague Convention. This word "agreement" undoubtedly referred to "the special submission" provided for in Article XXXI of The Hague Convention. For this word the Senate substituted "treaty." The effect of this change, if approved by the President, would have been to require the ratification by the Senate of every subsequent arbitration. Inasmuch as the power to make a special treaty of arbitration is conferred by the Constitution of the United States, and has always existed since the foundation of the government, the advantage is not perceived of declaring by a treaty that this power exists. Its only effect, if adopted, would be to restrict the power conferred by The Hague Convention upon the President and exercised by him in the matter of the Pious Fund Arbitration. The exercise of that power does not require the consent of the Senate. The President naturally objected to limit his future action by any such restriction.

The argument that the President and Senate cannot constitutionally make a general treaty of arbitration seems to your committee untenable for the following reasons:

1. It ignores the difference between a treaty and an agreement. Every treaty is an agreement, but every agreement is not a treaty. Every deed is a contract, but every contract is not a deed. The contract to be a deed must be under seal. The agreement to be a treaty must be made "by and with the advice and consent of the Senate." Just as a deed may authorize the person named in it to make a contract not under seal, so may a treaty authorize the President to make an agreement to submit to arbitration a matter in difference between the United States and a foreign power, without requiring any further advice and consent of the Senate than that involved in the original ratification.

2. It ignores the well-settled rule of construction that when the Constitution itself makes no exception, the court should not make one by construction. To use the language of Chief-justice Marshall in Gibbons *v.* Ogden.[1] "The subject is transferred to Congress, and no exception to the grant can be admitted, which is not proved by words, or the nature of the thing."

The Constitution of the United States, Article II, Section 2, contains the following grant of power to the President.:

"He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur."

This is a general grant of power. It has no limitation expressed. And how can it be said that any limitation is necessarily to be implied? It follows that the President, by and with the advice and consent of the Senate, can make a general treaty. In fact he has been doing this ever since the foundation of the government.

Not only have general treaties been made, dealing with a variety of subjects, but general arbitration treaties have been made and ratified by the Senate. The most notable

[1] 9 Wheaton 1, 215.

of these was The Hague Convention.[1] But the very first treaty of them all, the famous Jay Treaty of 1794, made by Washington himself, and ratified by the Senate, was in effect a general arbitration treaty. It provided for three arbitrations before three separate commissions. The first of these was to adjust the boundary between Maine and Nova Scotia. The second was to decide a multitude of claims pressed by British citizens against the United States. The third was to decide a multitude of claims pressed by citizens of the United States against Great Britain. The language of the treaty describing these claims is general in its character. It can hardly be maintained that the President cannot make a very general treaty, but can make a pretty general one. Epithets have no place in constitutional construction.[2]

3. The effect of a treaty, when once made, is declared by Article VI of the Constitution:

"All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

It follows, therefore, that The Hague Convention, when ratified by the Senate, became a part of the supreme law of the land. It did not any the less become the supreme law of the United States, because it is also the supreme law of all the signatory powers —that is to say, of almost all the civilized world.

4. The question has been asked: Where did the President get his power to submit to arbitration the Pious Fund controversy with Mexico? The answer is obvious:

Article II, Section 3, of the Constitution provides:

"He (the President) shall take care that the laws be faithfully executed."

[1] A copy of this is appended to the report of this committee, 1899.

[2] An analogous case is that of extradition treaties. These enumerate a list of offenses for which a surrender will be granted. Each act of surrender involves a separate agreement. Holmes *v.* Jennison, 14 Peters 150.

The Hague Convention is one of these laws. And the Pious Fund Arbitration was in execution of The Hague Convention. That great treaty, as this committee has pointed out in previous reports, especially that for 1899, contains full provisions for the submission to a competent tribunal of all matters in difference between the signatory powers. The tribunal has been organized. It has judicial offices and a permanent administrative council at The Hague. It is, to quote from Article XX of the convention, "A permanent court of arbitration, always open, and exercising its powers, in the absence of an agreement to the contrary, conformably to the rules of procedure included in the present convention."

The President's power to submit to the decision of this "permanent court" any matter in difference between the United States and any other of the signatory powers, rests on the same basis as his power to direct the attorney general to bring a suit in the Circuit Court of the United States, to recover a debt due to the United States. The "permanent court of arbitration" at The Hague is the Supreme Court of the nations. The sooner that great fact is realized the better it will be for the cause of peace and for the development of the science of international law.

5. The object of making additional arbitration treaties, as we pointed out in our report for 1904, was to bind the nations by express promise to submit to the decision of The Hague tribunal matters in difference between them. Those that the Senate rejected were perhaps inaptly phrased. It might have been argued that they limited the scope of The Hague Convention. It may be that their rejection will turn out to be a blessing in disguise. All that is needed, in our judgment, is a treaty with the various nations which joined with the United States in making the rejected treaties expressed substantially in the following terms:

All matters in difference between the high contracting parties that are within the

scope of The Hague Convention, shall be submitted to arbitration in accordance with the terms of that convention.

6. The argument thus far has been confined to the question of power. A few words on the subject of the advisability of general treaties will close this part of the report.

In general, it may be said that jurists are agreed that general legislation is likely to be wiser than special legislation. The abuses to which the latter is subject have led many of the states to adopt constitutions prohibiting many classes of special legislation. Formerly, for example, all corporate charters were special. These are now prohibited in many of the states. Even before constitutional amendments to that effect were adopted, general laws under which individuals could incorporate were passed. Certainly the grant of a corporate franchise is a legislative power. But it was never doubted that a legislature could exercise this by general law as well as by special charter. And the general laws are certainly far wiser in their provisions, and more considerate of the public interests, than special charters. It is always better to arrange matters beforehand, on general principles, than to decide on the spur of the moment.

In the case of the civil service of the country, it has been found advisable to provide in general terms for its administration, and to confer upon the President the power to make from time to time, regulations for its further government. By these regulations he has greatly extended the scope of the classified service. His power to do this has been questioned. The validity of the civil service legislation has been assailed. But it has been sustained by the courts.[1]

[1] People *v.* Civil Service Boards, 103 N. Y. 657 ; aff'g s. c. 41 Hun. 287.
People *v.* Common Council, 16 Abb. N. C. 96.
Foreman *v.* Union etc. Co., 83 Hun. (N. Y.) 385.
Opinion Justices, Supreme Court, 138 Mass. 601.

So it has been found expedient to confer upon the Secretary of the Treasury power to make regulations respecting the importation of foreign goods. The supervising inspectors have been authorized to prescribe rules for inland navigation. The pilot commissioners of a state have been authorized to make rules for the pilotage of vessels entering and leaving its ports. In all these cases, it has been found that the exigencies of the situation could best be served by the action of public officials, which could be modified from time to time without the necessity of a resort to Congress. In all these cases, the rules promulgated under the statute are held to have the force of law.[1]

The reasoning in these cases is especially applicable to treaties of arbitration. When a matter in difference arises between two nations, the passions of each are apt to become excited. It is claimed on each side that the national honor is at stake. And then the platitude is brought forward that a nation must never arbitrate a question involving its honor.

As Hamilton said when this objection was made to the Jay Treaty:

"It would be a horrid and destructive principle that nations could not terminate a dispute about the title to a particular parcel of territory by amicable agreement, or by submission to arbitration as its substitute, but would be under an indisputable obligation to prosecute the dispute by arms till real danger to the existence of one of the parties would justify, by the plea of ex-

[1] " This court has too repeatedly said that they have the force of law to make it proper to discuss that point anew." Gratiot *v.* United States, 4 How. 80.
Ex parte Reed, 100 U. S. 13.
United States *v.* Barrows, 1 Abb. (U. S.) 351.
Matter of Moore, 108 N. Y. 280.
Sturges *v.* Spofford, 45 N. Y. 446.
Cisco *v.* Roberts, 36 N. Y. 292.
United States *v.* Williams, 6 Mont. 379.
United States *v.* Fuellhart, 106 Fed. Rep. 911.

treme necessity, a surrender of its pretensions."

There can be little doubt that the Dogger Bank incident would have involved Great Britain and Russia in war had it not been for The Hague Convention. The English were naturally indignant at the unprovoked attack upon their fishing fleet. There was no time to negotiate a new treaty, and public sentiment would not have supported the ministry in making one. But they took advantage of the terms of the existing general treaty, and the controversy was amicably settled, with justice to both parties.

The development during the nineteenth century of this branch of international law is thus admirably summed up by Sir John Macdonnell:[1]

"Looking back on the arbitrations of last century, they are seen not to be detached incidents in its history. We witness the formation of a new institution, a new organ for harmonious relations between states, with functions of its own; an evolution not unlike that which created ages ago in most countries, tribunals for the settlement of domestic disputes. The sixteenth and seventeenth centuries gave the world permanent embassies, permanent means of conducting intercourse between nations. The eighteenth century, at its close, gave the rudiments of a rational law of neutrality. The nineteenth gave international arbitrations, which, in the words of William Penn, tend not a little 'to the rooting up of wars and planting peace in a deep and fruitful soil.'"

NEW YORK, N. Y., Aug., 1905.

[1] Nineteenth Century and After. The Living Age, May 13, 1905, p. 392.

The Green Bag

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Communications in regard to the contents of the Magazine should be addressed to the Editor,
S. R. WRIGHTINGTON, 31 State Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

To elevate the ideals of the profession and to formulate its opinion on legislative problems of national importance, is the mission of the American Bar Association. As a national representative, affording the most effective means for the application of the public spirit and capacity of those who devote their energy to the practice of their profession rather than to the pursuit of political honors, its proceedings are of interest to every American lawyer who loves his calling, and deserve his more active support. Those who were unable to attend its meetings and feel the inspiration of contact with leaders of the Bar from all parts of our country, may welcome an opportunity to read of the most important proceedings of the recent session at Narragansett Pier.

The informal debates which resulted in a policy of inaction on the resolution to expressly confer equity jurisdiction on the federal courts to enjoin violations of the Sherman Act, and on that advocating federal control of insurance companies aroused much interest among those present as curious examples of parliamentary practice, but owing largely to the neglect of committees to report in accordance with the by-laws and the failure of those present to inform themselves accurately in advance as to the law upon which their opinions were to be expressed, these promising discussions did not furnish anything which requires attention.

EDGAR A. BANCROFT.

As introductory to this number, we have thought it appropriate to present a brief sketch of the new president of the Association. Mr. Bancroft, who kindly took time from his vacation to prepare this for us, is peculiarly qualified for his task from long association with Mr. Peck. He was born in Galesburg, Ill., is a graduate of Knox College and Columbia Law School. He practised in Galesburg from 1884 to 1892 when he moved to Chicago. From 1895 to 1904 he was general solicitor of the Chicago and Western Indiana Railroad. He is the President of the Chicago Bar Association and is a member of the firm of Scott, Bancroft, Lord, and Stevens.

The annual address delivered by Mr. Hemenway, which we print in full, was received by his audience with the enthusiasm it deserved. His selection to deliver the most important address at a gathering in New England was particularly appropriate, for Mr. Hemenway is justly regarded as one of New England's leading lawyers. He is a native of Hopkinton, Mass., a graduate of Yale College and the Harvard Law School and has always practised in Boston. In 1897, he was appointed by the governor sole commissioner to draft the act embodying the Torrens system of land registration, which is now law in Massachusetts. He is a member of the firm of Long and Hemenway.

ALFRED HEMENWAY.

The problem of the president of the Association in preparing the address required by the constitution, was especially hard this year, since the legislatures of nearly all the states had been in session. The address in full would have filled over thirty of our pages and we

have, therefore, been obliged to content ourselves with the inadequate extracts we present.

Mr. Tucker is a native of Winchester, Va., and the son of John Randolph Tucker, one of the former presidents of the association. He graduated from the college and law school of Washington and Lee University and was admitted to the Bar in 1876. He was a member of Congress from 1889 to 1897 when he succeeded his father as professor of law at Washington and Lee University. He was dean of the school from 1899 to 1902, when he became dean of the law school of George Washington University. He is the editor of "Tucker on the Constitution."

HENRY ST. GEORGE TUCKER.

Immediately preceding the formal meetings of the Association were held several extremely interesting conferences of a special nature, the most important of which was that of the Association of American Law Schools. The meetings of this earnest body of men were marked by a devotion to the cause of legal education that cannot but elevate the standards of the whole profession. We print the most important address delivered before them.

Mr. Hall is a native of Jamestown, N. Y., and a graduate of Cornell University and of the Harvard Law School. After a few years of practise in Buffalo where he was also an instructor in the Buffalo Law School, his ability was recognized by his selection as dean of the Law School of Chicago University, then recently established.

Among the reports of committees of the Association that of the Committee on International Law was made noteworthy by the presentation of the argument in favor of the constitutionality of general international arbitration treaties, prepared by the chairman, Mr. Wheeler, which we are permitted to include in this number.

EVERETT P. WHEELER.

Mr. Wheeler is a native of New York, a graduate of the College of the City of New York and of the Harvard Law School. Though in active practice as the head of the firm of Wheeler, Cortis & Haight, in New York City, he has found time to take an active interest in movements for political reform, and has published several treatises on legal and economic questions. From 1883 to 1889 and from 1895 to 1897 he was chairman of the civil service commission of New York City.

CURRENT LEGAL ARTICLES

This department represents a selection of the most important leading articles in all the English and American legal periodicals of the preceding month. The space devoted to a summary does not always represent the relative importance of the article, for essays of the most permanent value are usually so condensed in style that further abbreviation is impracticable.

BIOGRAPHY (James Boswell)

JAMES S. HENDERSON contributes to the June *Juridical Review* (V. xvii, p. 105) an interesting account of "James Boswell and His Practice at the Bar," whose fame in literature has caused us to forget that his early career was that of a practitioner in the Scotch courts, where, he frankly admits, that the fact that he was a son of a judge helped him to a successful start. He could not resist the temptations of London, however, but his attempt at practice in England proved a failure, and he gradually came to devote his entire time to the writing of books.

BIOGRAPHY (Pinkney)

AN address delivered before the Maryland Bar Association, by Hon. Wm. P. Whyte, entitled, "William Pinkney," is published in *The American Lawyer* for July (V. xiii, p. 283).

CONTEMPT (Jury Trial)

OF a recent Iowa case, Brady *v.* District Court, the *Central Law Journal* (V. lxi, p. 21) says that "it is a serious departure from the fundamental principles which have governed the opinions of courts in contempt proceedings," in holding that a statute had abrogated the Common Law rule that a contemner's unequivocal sworn denial of the facts was conclusive. Except where the facts are within the knowledge of the Court the rule has been to give the contemner the benefit of a trial by jury as to the facts, and then on the facts found to determine his status. By giving the Court the right to determine also the facts, he is deprived of his constitutional right to trial by jury. The author also thinks that this is an unconstitutional interference by the legislature with the inherent right of courts to punish for contempts.

CRIMINAL LAW (See Jurisprudence)

EMPLOYER'S LIABILITY (Workmen's Compensation Act)

IN the June *Juridical Review* (V. xvii, p. 117) Alexander Moncrieff presents the second part of his commentaries on "The Report of the Departmental Committee on Workmen's Compensation." It contains an interesting comparison of various foreign methods of industrial insurance. It criticizes the English system which is based on the compensation of the employee, and concludes that ultimately this will be superseded by an absolute insurance under state guarantee. He also believes that the right to compensation should not be limited to cases of injury by accident.

HISTORY (Magna Charta)

"Magna charta Re-read" is the title of an interesting article in the *Juridical Review* for June (V. xvii, p. 128) by George Neilson. It is a review of Mr. McKechnie's commentary on that instrument, which is rather an essay on the subject than a review of the book. While acknowledging that modern investigation proves that much of the influence which we have attributed to the charter of John belongs to subsequent instruments founded upon it, he still feels that its fame is well deserved.

"British legislation is an art which, after seven hundred years of experience, is painfully open to improvement, as any table of mortality of our short-lived modern Acts of Parliament would show. In King John's century a statute was a very indefinite thing; it might be a charter; it might be a code; it might be a temporary ordinance; Parliament was prior to 1215, only a word for a talk at a council of magnates. Conscious legislation, in our sense, was only making a start. Are we to reject as a 'myth' the influence of a charter which at the worst was an experiment in legislation, itself unsuccessful, but to be followed, and followed soon, by experiments which were an emphatic success, and which, confirming

time after time a Magna Carta which was the reënactment of King John's, slowly formed the English constitution?"

HISTORY (The XII Tables)

In the *Juridical Review* for June (V. xvii, p. 93) Professor Henry Goudy publishes an article entitled "Are the XII Tables Authentic." It is suggested by the work of a recent Italian historian, Professor Pais, who challenged the whole tradition of the XII tables as legendary, and of Professor Lambert, a French historian, whose conclusions are even more radical than those of his Italian colleague. The author analyzes their arguments in detail but differs from their conclusion. He finds in some use of the letters and names in a list of Roman officials, which purports to date back to the XII tables, evidence of antiquity and in the style and language of the tables themselves as well as in their contents, indications of much earlier origin than the recent critics admit.

JURISPRUDENCE (Criminal Law)

Under the title of "Short Studies in the Common Law," A. Inglis Clark contributes to the *Commonwealth Law Review* (V. ii, p. 193) a consideration of The Fundamental Conceptions of our Criminal Law.

"The earliest laws which mark the emergence of a people out of a condition of savagery are those which refer to offenses against the person, and these are followed by laws which take cognizance of offenses against property. We might, therefore, be disposed to say that the oldest department of all law is that which we now describe as Criminal Law. But this would not be an exact statement of historic fact, in the light of modern distinctions in the domain of law, because the offenses which we describe as crimes, and regard as properly punishable by the state, were regarded in the infancy of law as being the same in character as the acts which we now describe as torts, or, in other words, civil wrongs, for which the injured party is entitled to compensation from the wrong-doer.

"The conception that such an act as the malicious killing of one man by another, or the infliction of a grievous wound on one man by another, is an offense against the whole community of which the wronged or injured man was a member, did not arise until men had made considerable progress in civilization and political organization. The primitive jural conception of the nature of all offenses against the person, as well as offenses against property, was that they were wrongs committed against the individual or his family for which he or his family ought to have compensation and redress.

"The conception of moral delinquency finds its most direct expression in the Criminal Law of England in the doctrine that the essence of all crime is criminal intent or malice. But it is also a fundamental doctrine of the law of England that ignorance of the law is not an excuse for breaking it. This doctrine is *prima facie* at variance with the other doctrine that malicious intent is the essence of all crime; because if a man does not know that he is violating the law, he cannot by a strict use of language be correctly said to have an intention to violate it. But the doctrine, that ignorance of the law shall not excuse a violation of it, has been found to be absolutely necessary for the accomplishment of the purposes for which the law is made; and the problem which the judges, as the authorized exponents af the law, have been required to solve, is the reconciliation of the two doctrines in a manner that would secure an efficient enforcement of the law, without offending the moral sentiments of the community upon whose acquiescence and approval its enforcement must ultimately depend. This has been accomplished through the medium of a long series of decisions stretching from the earliest recorded cases down to the present time, with the result that while the law continues, in regard to both crimes and torts, to use words and phrases which imply an ethical or moral standard of conduct, yet when it is called upon to decide the question of the guilt or innocence of any person charged with a crime, it applies a purely external standard of conduct to determine it.

"In regard to the acts which the law designates as crimes and for the doing of which it inflicts punishment, the standard or rule of conduct which it prescribes is that every man shall refrain from doing anything which, in

the midst of a particular set of circumstances, would produce, or tend to produce, any result which the law declares to be a crime and which as such it prohibits with a penalty.

"Nevertheless, it is a fundamental maxim of the Common Law that every man is supposed to intend the natural and probable consequence of his acts; and the question which now confronts us is, whether we can reconcile this maxim with the statement that the law does not attempt to look into a man's mind, and that it takes notice of only outward and visible acts. The reconciliation is found in the fact that the law presumes every man to possess an average amount of intelligence and an average capability of foresight. The subject-matter of the law's observation and control is human conduct, and all human conduct necessarily involves intelligence and intention, or foresight, as the conditions of its normal operation. Therefore, when the law says that a particular act done in the midst of a certain set of circumstances is a crime, it includes the presumption that the doer of the act has sufficient intelligence and capability of foresight to foresee that his act would produce the particular result which the law prohibits. But this presumption may be rebutted by sufficient evidence of mental disease or deficiency; and if a man is devoid of the average intelligence and capability of foresight, which the law presumes him to possess, to such a degree that he is removed out of the normal and natural relations of the human mind to the world around him and cannot be properly said to know what he does, an act committed by him in the midst of circumstances which would make it a crime in a man in the full possession of his faculties is not a crime, because the necessary conditions of average intelligence and normal mental relations to the surrounding circumstances which the law ascribes to every man, until it is proved that he does not possess them, are absent.

"The type, therefore, of a criminal act at Common Law is an act done in a set of circumstances which would enable, or permit, or tend, or assist to produce, any direct and forcible interference with the person or property of another which the law did not authorize or excuse, and for which it prescribed a penalty. By a forcible interference is meant any interference against the will or consent of the person against whom or against whose property the act of interference is directed. The crime of forgery at Common Law may at first sight appear to have been an exception to this description of a criminal act. But it seems to be tolerably certain that all the forgeries that were brought under the cognizance of the Courts of Common Law and which were punished by them, previous to any statutory provisions on the subject, were forgeries of deeds and other documents which were made for the purpose of being directly used to deprive a person of the possession of some real or personal property under compulsion of legal forms or process, and the element of trespass was therefore involved in the purport of the offense.

"The growth of the statutory law of England in regard to crimes has been produced by three distinct causes. First, the necessity to provide for the punishment of frauds which were not accompanied by trespass and which were, therefore, not punishable at Common Law. Secondly, the desire which possessed the Legislature in the seventeenth and eighteenth centuries to increase the severity of the punishments of crimes. Thirdly, the amelioration of the severity of the Criminal Law which took place in the middle and latter portion of last century. Under the combined operation of these causes, and the process of consolidation which successive alterations of the law have periodically made necessary, in order to make the knowledge and administration of it practicable, something like a code of a very large part of the Criminal Law has been produced. But it is a code which would be largely incapable of being consistently applied to the concrete experiences of men, and, in some aspects of it, would be almost unintelligible without a knowledge of the law which preceded it and which still exists alongside of it as *lex non scripta* or Common Law."

TORTS (Affirmative Obligation, Theory of)

In the *American Law Register* for June (V. lxiii, p. 337) Francis H. Bohlen concludes his series of articles on "The Basis of Affirmative Obligations in the Law of Tort" by discussing the "American cases upon the liability of man-

ufacturers and vendors of personal property." Of these he says:

"The tendency throughout the United States is, with but few exceptions, to regard the act of sale as terminating all liability on the part of the maker or vendor of a defectively constructed article or structure, unless the article is either a drug-chemical or explosive, and so 'imminently dangerous to human life,' or the defect is known to and concealed by the vendor.

"In New York and some other states it would appear that where the maker sells or provides an article for immediate use in its existing condition, and the defect is not patent to any reasonable inspection, the maker is liable to one who may be expected to come in contact with the article in the course of such use if he be injured, but if the defect be patent, if it is known or could probably be discovered by the purchaser or him to whom the article is supplied if he properly perform his duty of examination, then the liability, if any, is upon him who with knowledge, or (probably) with means of knowledge, uses the article for a purpose for which it is unfit."

He inclines to favor the broad doctrine of the rule of Brett in Heaven *v.* Pender, and criticizes Wharton's doctrine that an intervening human agency breaks the causal connection even where not actively negligent. He also criticizes the common assumption that there is a limited class of articles such as drugs and explosives which are peculiarly dangerous and the manufacture of which imposes obligations different from that arising from the manufacture of ordinary merchandise. The test he puts is the probability of danger to a person or class in case of negligent concealed defects and not the acquaintance of the parties. As to the theory that public policy requires that manufacturers be not subject to annoying suits, he contends that it is merely a reflection upon the administration of justice. Of the broader ground of public policy, he says:

"While it is highly burdensome to require that the manufacturer shall answer to all the world that the article he makes contains no hidden defect which he himself could not by proper conduct of his business prevent, it is not too much to ask that he shall conduct his business carefully, otherwise the manufacturer who obtains the profits from the business is relieved from all liability for injuries caused by the manner in which he conducts it. He is allowed to reap the profits enhanced by the saving inherent in cheap labor, insufficient equipment, inferior material, and generally incompetent and careless supervision and management, while those who must use his product bear the burden and pay the price in insufficient protection to the safety of their persons and property. To encourage commerce and industry by removing all duty and incentive to protect the public is to invite wholesale sacrifice of individual rights on the altar of commercial greed. A similar public policy in railroad matters throughout the United States has resulted in the yearly sacrifice of thousands of lives and injury to tens of thousands of persons, both employees, passengers, and others. It would appear to be high time to consider whether this price is not too high to pay for industrial expansion, and whether those who profit by the operation of a business should not bear at least the burden of exercising reasonable competence and care therein. That such a burden is not too onerous, that such care is compatible with the profitable conduct of business, is shown by the fact that reputable manufacturers do habitually the world over exercise the greatest care in order that the reputation of their products may be maintained. Surely it is not too much to require of the others that they shall take at least equally as great care to protect their patrons, the public, who use their products, from injury. While it is undoubtedly to the interests of society, especially in a country the natural resources of which are still comparatively undeveloped, to encourage trade and manufacture, it cannot be to the interest of any community to encourage carelessness and disregard of human life and property therein."

He distinguishes liability in cases of sale, and classifies it as a separate sort of liability arising under the same doctrine of probability of injury. The wrong consists in the sale or delivery of the article and not in the original negligence whereby the concealed defect arose.

TORTS (Strikes and Boycotts)

Dean William Draper Lewis contributes to the August *American Law Register* (V. lxiii,

p. 465) an analysis of "The Modern American Cases Arising Out of Trade and Labor Disputes." He divides these into cases of strike and of boycott which he carefully defines with further subdivisions depending on whether the liability arises from relations of traders with traders, traders with laborers, or laborers with laborers. He summarizes the results of his examination as follows:

"Comparing these labor boycott cases with the trade boycott cases, we find that the question whether a boycott of one trader by rival traders is legal is a question in which there is a conflict of authority, but a boycott of a trader by laborers, or others who are not rival traders, has invariably been held illegal. The same line of distinction has been followed in England. The only justification for the distinction lies in the fact that in the labor boycott cases the connection between the acts of the defendants and their own advancement is sometimes one degree more remote than in the boycott by rival traders. The distinction, in view of the real facts, is a narrow one, and the writer does not believe it will stand analysis. The boycott is an appeal to force, not an appeal to reason. The force is not physical force, but is none the less an attempt to coerce the will of third persons, so that they will act in a way prejudicial to the plaintiffs' interests. The purpose of self-advancement in business or trade is one to be encouraged by the law, but it should not be sufficient to excuse harm to others through the coercion of their customers.

Of strikes he says: "Though the question of the liability for the harm done to an employer by a sudden and prearranged cessation of work on the part of his employees has never come fairly before the courts, it may be assumed, that if the purpose of the strike is to improve the economic conditions of the laborers, or has something to do with their terms of employment, they are not liable for the resulting harm. Indeed, this assumption has been frequently made by our courts. Whether the strikers would be liable if their purpose was a purely malicious one is doubtful. It depends upon two questions: First, whether the purpose of an actor should be taken into consideration in solving questions of alleged tort; and, second, admitting that purpose should at least in some cases be taken into consideration, whether the act of severing the relations of employer and employee by the latter or by the former should be treated as an act over which the purpose of the actor could have an effect on his legal liability for the consequent harm. These are questions which remain undetermined in our law and on which great confusion exists.

Down to the point which we have now reached in the development of the law we notice a sharp contrast in the way in which the law treats a strike and a boycott. The strike, at least for the purpose of economic advancement, is, from the point of view of Civil Law, legal. The boycott, on the other hand, for the same purpose, has usually been considered illegal. Laborers may combine to leave the service of their employer and he cannot recover from them damages for the resulting loss to him; but if they leave him in order to compel him not to deal with a third person, then, though he may have no action against them, the third person has an action."

TRUSTS (Precatory Trusts, Wills)

THAT there has been a gradual change in the attitude of the English courts toward precatory trusts as shown in a recent decision of the House of Lords is contended by Will C. Smith in the June *Juridical Review* (V. xvii, p. 145). He says that "it certainly appears that the English courts would now reject the idea of a precatory trust in many cases where it was formerly admitted."

Of the true rule the author says:

"It seems to be immaterial in principle, although this may affect the construction of the will, whether the words of desire are addressed to an executor, or a residuary legatee, or a particular legatee. Apart from the particular words employed, the leading considerations against the creation of a trust seem to be (1) uncertainty as to what the legatee is to do; (2) uncertainty as to what property the alleged trust applies to; (3) doubt as to the extent of the discretion expressly reposed in the alleged trustee; (4) the absence of any gift over in default of an exercise of the discretion. But it will be seen that, even where there is no uncertainty or doubt in these respects, the general law is established that

mere words of wish or recommendation do not create a trust. . . . The conclusion of the whole matter seems to be that, as stated by Lord St. Leonards in 1849, where testators mean to make their own will, and to leave no discretion, they should be encouraged to say so by the use of imperative and mandatory words, and that it is inexpedient, and likely to mislead and defeat the real testamentary intention, if imperative words and words of recommendation are permitted to be used in the same will with the same legal effect, although their popular meaning is different."

TRUSTS (Right of Trustee to Purchase)

In the July *Law Quarterly Review* (Vol. xxi, p. 258), Walter G. Hart discusses "The Development of the Rule in Keech *v.* Sandford."

"In this case Lord Chancellor King decided that a trustee of a lease who had renewed the lease in his own name and for his own benefit, was a constructive trustee for his *cestui que* trust of the renewed lease, although there was no proof of fraud and the lessor had declined to renew for the benefit of the *cestui que* trust. The Chancellor said that the trustee should rather have let it run out than have had the lease to himself. The ground on which the rule is based is in fact that of public policy.

"Two questions with reference to the extent of the rule applied in these cases have lately been the subject of decision. The first is — what constitutes a fiduciary relation within the rule? From the judgment of Lord Justice Collins it would seem that in the case of trustees, executors, administrators, and agents, and also tenants for life there is a conclusive presumption of personal incapacity to retain the benefit in such cases. But that in the case of mortgagees (and mortgagors?) and partners there is only a rebuttable presumption of fact.

"The second and more recently discussed of the two questions is — when does the purchase by a trustee of a lease of the reversion in fee simple fall within the rule? The learned judge held that it only applied where the lease is renewable by contract or by custom.

"It is submitted that the introduction of the distinction as regards the purchase of the reversion, between leases renewable by contract or custom and those to which no such 'tenant right' is attached, while no such distinction is drawn as regards the actual renewal of the lease, imports into this branch of the law an 'inelegantia' which destroys the symmetry of the rule and makes it more difficult of application, which is inconsistent with several of the decisions and which ought not to be admitted without more careful consideration of the principles on which the rule is based than has yet been given to it."

THE LIGHTER SIDE

THE ART OF CROSS EXAMINATION

BREWSTER, looking back through the mellowing vista of ten hustling, not to say acrobatic years of modern Chicago law practice, can smile now, but it hurt then.

It was his first case. As he sat in the dingy justice shop on Cottage Grove avenue, he was aware that many of the conditions set forth in all lives of great lawyers, were absent. In the first place he was for the prosecution, and then there was no jury to rise in their places with an unanimous verdict of "not guilty" at the conclusion of a tear-compelling peroration on behalf of the helpless and innocent defendant. The case, as the surroundings, well illustrated the difference between the ancient and honored profession of law and the modernized "law business." There had been no spilling of hot blood, and no mysterious romance. The owner of a bicycle repair shop, finding business failing, had placed a chattel mortgage on the shop and contents, and then disappeared with everything. He had been arrested and Brewster had been retained to see that Justice held the prisoner to the Grand Jury.

While his dreams had pictured a far different first case, still he felt that here was an opportunity to show that the general complaint of the college man's lack of initiative is not always well-grounded and that the aggressiveness of the center rush can be utilized in the battle of life. The hearing was nearly concluded, and the defendant was on the witness-stand. He had sworn that he knew nothing about the missing property. Brewster had proved suspicious circumstances, but no witness had been produced who had seen the prisoner in the act. The case seemed lost unless the prisoner could be discredited. Brewster resolved to break him down. Looking the defendant full in the eye, he demanded at the point of his leveled forefinger: —

"Prisoner, haven't you been arrested before?"

The hunted look of the pursued gleamed in the prisoner's eye. Shifting uneasily in his chair, he slowly murmured, "Yes; once."

Triumph fluttered about Brewster's athletic figure as, springing from his chair, he thundered: "Tell the Court where and for what you were arrested."

Forcing the words from his unwilling lips the prisoner answered, "It was in Denver."

"Yes," punctuated Brewster, "and for what crime?"

Like a flash the witness answered:

"For riding a bicycle without a light,"

Brewster's saving sense of humor enabled him to join in the general laugh that followed as the Justice dismissed the case, but he has yet to bulldoze another witness.

HERBERT W. HOLCOMB.

CHICAGO, ILL., Aug., 1905.

Special pleading. — A story is told of one of the early practitioners at the Chittenden County (Vermont) Bar who was asked, during his examination for admission to the Bar, to explain the difference between a special issue and a general issue. His reply was that a general issue was where one party denied all the material allegations in the case, but he could not for a time recollect the nature of a special issue. Finally, after some encouragement and prompting from one of the examiners, his face brightened up, and in reply to a repetition of the inquiry as to what a special issue was, made answer that it was where *both* parties denied all the material allegations in the case.

In doubt about the head. — Patrick Murphy while passing down Tremont street, was hit on the head by a brick which fell from a building in process of construction. One of the first things he did, after being taken home and put to bed, was to send for a lawyer.

A few days later he received word to call, as his lawyer had settled the case. He called and received five crisp, new $100 bills.

"How much did you get?" he asked.

"Two thousand dollars," answered the lawyer.

"Two thousand, and you give me $500? Say, who got hit by that brick, you or me?" — *Boston Herald.*

A Tennessee Judgment. — The following story is true as far as treacherous memory recalls, after the lapse of only a short year:

Jim D—— lives on the west side of Dry Creek in a West Tennessee county. It is strictly a farming community and most of the farmers live on east side of Dry Creek Valley. A heavy rain fell in the valley on July 15, 1904. Jim's young friends decided to hold a "surprise party" at his house that night. They gathered at the creek bank at "early candle-lighting" and found the old "gum-log" completely submerged in muddy, raging waters. A hasty conference on ways and means resulted, largely in favor of employing the use of the first "hoss" to be found as a means of crossing the turbid waters. Lots were cast and the duty of procuring the "hosses" fell upon Bud S—— and "Sis" Mc. Without further delay these two enthusiasts proceeded to the nearby barn of Mr. Isaac N—— and appropriated two of his best and gentlest "critters" for the aforesaid purpose. There was much hilarity and genuine rejoicing when, a few minutes later, the entire party was on the west side of the creek. The horses were turned loose after having transported the party-goers across the creek and were soon back at the lot gate where they were welcomed by their anxious owner, who had suspected something wrong at the barn by the sound of hoofs, and was in waiting with shot-gun in hand when the animals returned. Circumstances led to the arrest of Bud and Sis early the next morning. At 1 P.M. of the same day they were arraigned before his honor, Squire William Mc., Justice of the Peace for the whole valley.

After a brief trial Squire William made the following startling announcement of his findings in the case:

"Stand up here, Bud, you and Sis." The command being obeyed with fear and much trembling, his honor proceeded, "You'ns has ben guilty of a mighty bad crime, and you'ns both orter know that I could send you to the penitentiary ef I want to. I'll find you, Bud, $2.75; $2. for the Court, 50 cents damage for Mr. N—— and 25 cents for the officer. Sis, you can go this time, but ef you'ns is guilty of sich agin, I'll put it to you'ns as long as the law will lay it on. You'ns can both go now, Close the court, Mr. Officer."

Both Judges. — James C. Crawford, a reporter on one of the San Francisco dailies, related the following incident as having actually occurred before Judge Mogan.

Andrew Judge, a former pugilist, charged with begging on Kearney street by Patrolman Teutenberg, smiled propitiatingly as he faced His Honor Mogan, who coldly inquired:

"What's your plea, Judge?"

"I'll tell you how it was, Judge——"

"Are you guilty or not guilty, Judge?"

"If you'll let me explain, Judge——"

"Thirty days for you, Judge."

"Thank you, Judge."

"Don't mention it, Judge."

Legal Limitations. — Upon the trial of a personal injury case wherein a young man sought to recover damages for a crushed and stiffened ankle, the result of being run over by the wheel of a freight car, which he was trying to couple to another car, in making a flying switch, one Dr. H—— was called by plaintiff to prove the extent of the injury. On his direct examination, the doctor had given strong testimony showing that the injury was permanent, and that it would permanently incapacitate the young man for manual labor. The attorney for the railroad company undertook to break down the force of this testimony, and on the cross examination the following took place.

"You say, doctor, this injury is permanent and will incapacitate the young man for manual labor. Is it not true that he could study law or become a doctor, and this injury not materially affect his success?" The doctor sat for a few seconds, which seemed, to the crowded court-room minutes, and then, with a genial glow suffusing his face, he looked at the attorney and said:

"Well, I don't know, Mr. J——. He may have brains enough to make a lawyer, but I don't think he has got enough to make a doctor."

Verdict and judgment for plaintiff for $8,000. And the funny part of it is, that the young man afterwards studied law and was admitted to the bar. He had great confidence in his doctor's judgment on his limitations.

Though by no means a wit even of the judicial order, Sir Richard must be credited with an apposite pleasantry which, though well enough known among lawyers, may be nar-

rated for the benefit of the lay community. At the time when Vice-chancellor Bacon was one of his colleagues, Malins had before him some case in which one of the parties was of that order peculiarly obnoxious to the legal mind, namely, the "cranky" litigant. In delivering judgment, the Vice-chancellor felt himself constrained to take a view adverse to the claims set up by this individual, who determined to avenge himself for what he chose to consider a miscarriage of justice. Accordingly, one morning shortly after the judgment, he presented himself in court, and taking aim from amid the bystanders, hurled an over-preserved egg at the head of his oppressor. The Vice-chancellor, by ducking, adroitly managed to avoid the missile, which malodorously discharged itself at a comparatively safe distance from its target. "I think," observed Sir Richard, almost grateful in spite of the *lèse majesté*, for so apt an opportunity of qualifying as a judicial wag, "I think that egg must have been intended for my brother Bacon."

Apropos of troublesome litigants, the days of Mrs. Weldon's forensic feats are now far distant, and, sad to relate, her solitary reappearance, as is too often the case with retired "stars" was a dismal fiasco. But twenty years ago she was a power and something more in the High Court, in spite of public ridicule and professional prejudice scoring triumph after triumph, such as fall to the lot of few of even the most practiced advocates. One of her most effective weapons was her exquisitely modulated voice, which was capable of the subtlest inflection of scorn and irony that I have ever heard from human lips. It showed to particular advantage in one of the numerous actions which she successfully brought by reason of having been improperly placed in a private lunatic asylum by certain well-meaning but injudicious friends. The case was tried by a judge whose well-known proclivities for patrician society and surroundings rendered him occasionally a somewhat partial arbiter. In this instance his sympathies were from the first manifestly in favor of the defendants, while he displayed toward the plaintiff, who was as usual conducting her own case, a harshness and *brusquerie* which were quite uncalled for. But judicial antipathies never greatly troubled Mrs. Weldon, who, as a litigant, had very soon discovered that a dead set by the judge, especially against a woman, not infrequently results in enlisting the sympathies of the jury. Accordingly, after one or two ineffectual attempts on the part of the Bench to stifle the whole business, Mrs. Weldon was allowed to proceed. I did not hear much of her opening address, but was fortunate enough to be present during the first part of her examination of Sir Henry de Bathe, the substance of which, for the sake of convenience, I will give in dialogue form. It must be borne in mind that Sir Henry had once been one of Mrs. Weldon's oldest friends, and that she was perfectly acquainted with all particulars as to his rank and status.

MRS. WELDON (to witness): I believe your name is Sir Henry de Bathe?

SIR HENRY (with lofty indifference): Yes.

MRS. WELDON: A baronet?

SIR HENRY: Yes.

MRS. WELDON: And formerly colonel commanding the Scots Guards?

SIR HENRY (with a touch of self-complacency): Just so.

MRS. WELDON: You are also, I believe, a county magistrate?

SIR HENRY (with a bored air): Oh, yes.

MRS. WELDON: Anything else?

SIR HENRY (after a pause): Not that I know of.

MRS. WELDON: Oh, come, Sir Henry de Bathe, just refresh your memory, please.

SIR HENRY (after a longer pause): I really can't recollect.

MRS. WELDON: Dear me! And I should have thought it so very important! Come, now, have you never heard of St. Luke's Asylum?

SIR HENRY (with an enlightened expression): Oh, ah, yes; but I wasn't thinking of that kind of thing, you know.

MRS. WELDON: I can quite believe that. Well, now, tell my lord and the jury what your connection with St. Luke's Asylum is.

SIR HENRY: Well, I am one of the governors, you know.

MRS. WELDON: Exactly. You are one of the governors of St. Luke's Asylum, which, I believe, is an asylum for sufferers from mental diseases?

SIR HENRY: I believe so.

MRS. WELDON: You only believe so! Come. Is it a fact or not?

SIR HENRY: Oh yes; certainly.

MRS. WELDON: Well, now, will you tell us in what your duties as a governor of St. Luke's Asylum consist? (An embarrassed silence, during which the witness rather nervously adjusts his necktie.) I am waiting, Sir Henry de Bathe, you are not going to let the jury infer that, although a governor of this important asylum, you are unable to give any account of your duties?

SIR HENRY (after a further pause and almost agitated attention to the ends of his tie): Well, I—I—look in now and then, you know.

MRS. WELDON (with an inflection of consumate irony): You look in now and then! (To the jury.) I hope, gentlemen, you will appreciate the answer of the honorable baronet. Here is a person, who, being governor of a lunatic asylum, signed an order declaring me to be of unsound mind, and yet the only definition he can give of his duties is that he "looks in now and then!"

(Sir Henry writhes, and the jury smile with a significant air of sympathy, which renders a verdict for the plaintiff a foregone conclusion.)

I will close this chapter with an anecdote about another chancellor, Lord Cairns, which illustrates the wide divergency between precept and practice. Some years ago I ordered some hosiery of an Oxford Street tradesman with whom I had not previously dealt, and happened to be at dinner when the articles were sent home, was rather annoyed at the messenger refusing to leave them without being paid. The next morning I called at the shop and expostulated at having been treated with what I considered scant ceremony. The proprietor politely apologized, but explained that he always made a practice in the case of a new customer of not delivering goods without payment, and proceeded to support his usage by declaring that it had been enjoined by no less a personage than Lord Chancellor Cairns, who, according to the hosier, had intimated in some case that if tradesmen left goods without waiting to be paid and afterward failed to get their money, they had only themselves to thank. "I read this," he explained, "in some newspaper, and at once resolved that I would in future act on his lordship's advice, at all events where new customers were concerned. Curiously enough, not long afterward, who should come into my shop but Lord Cairns himself, who ordered some shirts which, when made, were to be sent to his house on South Kensington. Accordingly, when they were ready I sent my man with them, and bearing in mind his lordship's own excellent advice, I told him to wait for the money, which, to tell the truth, I was at the moment rather in want of. My man, accordingly, on delivering the shirts, presented the bill to the footman, requesting that it might be paid. The footman at first seemed disposed to shut the door in his face, but on my messenger declaring that if payment was not made his orders were to take the parcel back, the man departed to consult the butler, who appeared on the scene, bursting with indignation, and ordered my messenger to be off. The man remaining obdurate, the butler departed in hot haste for the steward, or groom of the chambers, who raged even more furiously but to no purpose; my man standing firm. Finally this official departed, and after a short interval his lordship himself appeared, and hectored the man to such a tune that he finally capitulated and left the parcel minus the account. On hearing my man's report of what happened, I wrote a most respectful letter to Lord Cairns, explaining that but for his own advice on the subject I should not have thought of requesting payment at the door; that, moreover, I really supposed (which is true) that he preferred to have this system adopted in his household; concluding with a hope that under the circumstances he would not be offended. However, added the disillusioned hosier, "his lordship took no notice of my letter, and actually kept me waiting two years for the money."

Moral: Be chary of judicial precepts, even when they emanate from a chancellor.

From "Personalia" by "Sigma" (Copyright, 1903, by Doubleday, Page & Co.).

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM

(Copies of the pamphlet Reporters containing full reports of any of these decisions may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.)

ACCIDENT INSURANCE. (DEATH BY BLOOD POISONING — BREACH OF THE PEACE)

U. S. C. C., DIST. OF SOUTH CAROLINA.

The holder of an accident policy, insuring against disability or death resulting from bodily injuries sustained through external, violent, and accidental means, became involved in an altercation with another person and struck him in the mouth with his fist. This caused an abrasion of the skin on the hand of insured, wherein microbes found lodgment and caused blood-poisoning, from which insured died.

Quoting the definitions of the standard lexicographers, it is held that the death of insured resulted from accident; that is, something unforeseen, unexpected, fortuitous, and not within the contemplation of the insured, nor the probable consequence of his act.

It is also held that the mere fact that accused was, at the time he received the injuries, guilty of a breach of the peace, did not prevent a recovery of the policy which contained no special clause vitiating it on that ground. Carroll *et al.* *v.* Fidelity & Casualty Company of New York, 137 Federal Reporter, 1012.

BAILMENTS. (MEASURE OF CARE — FURNITURE MOVER — MALICIOUS INJURY BY THIRD PERSON)

MISSOURI SUPREME COURT.

The measure of responsibility incurred by a furniture mover, who agrees to transport furniture safely from one house to another, is determined in Jaminet *v.* American Storage & Moving Company, 84 Southwestern Reporter, 128. It was shown that defendant corporation was engaged in the business of furniture moving, and contracted to move plaintiff's furniture for a certain price. Preliminary to the making of the contract, defendant's agent stated that defendant previously had safely moved furniture for others, was responsible, and would move plaintiff's furniture with care and deliver it safely. Defendant exercised due care in the transportation of the furniture, but a valuable picture was injured by the malicious act of a boy, who came past while the picture was standing by the sidewalk, and struck it so as to break the canvas. It was contended for plaintiff that in view of defendant's statement that it would move the furniture with care and deliver it safely, it was subject to the liability of a common carrier. The court decides, however, that defendant only assumed the responsibility of a bailee for hire and was only liable for the negligence of its servants, and that by agreeing to be responsible for the furniture, it did not warrant safe delivery at all events, and was not chargeable with the damage resulting from the wanton act of the boy. The analogous cases of Foster *v.* Essex Bank, 17 Mass. 479; Ames *v.* Belden, 17 Barb. 513; Stewart *v.* Stone, 127 N.Y. 500, 28 N. E. 525, are referred to with approval, and a distinction is suggested between these and the apparently somewhat contradictory holdings in Drake *v.* White, 117 Mass. 10 and Harvey *v.* Murray, 136 Mass. 377.

BANKRUPTCY. (PARTNERSHIP — STOCK EXCHANGE SEAT — OWNERSHIP)

U. S. C. C. A. 2D CIRCUIT.

A slight extension of the principle heretofore decided in Page *v.* Edmunds, 187 U.S. 596, 23 Supreme Court, 200, that property in a stock exchange seat vests in a trustee in bankruptcy, is contained in the case In re Hurlbut, Hatch & Company, 135 Federal Reporter, 504. There it is held that under certain circumstances a seat in a stock exchange, standing in the name of an individual partner, may be partnership property and pass to the trustee in bankruptcy. The partnership articles provided that there should be contributed to the capital stock for the purpose of carrying on the firm, the seat in the New York Stock Exchange owned by one of the partners. This seat was to be regarded as capital, at an agreed valuation, and the firm was to pay the partner owning it interest at this valuation. The firm thereafter paid all dues and assessments chargeable against the seat, which were charged on the firm books as firm expense. These facts are regarded sufficient to show that the seat constituted firm property.

The contention that the membership was a personal privilege and not property which the owner could have transferred to the trustee, is met by a quotation from the United States Supreme Court in Sparhawk *v.* Yerkes, 142 U.S. 1, 12 Sup. Ct. 104, where it is said, that while such property is peculiar and in its nature a personal privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is susceptible of being realized by the credi-

tors. Hyde *v.* Woods, 94 U.S. 523; People *ex rel.* Lemon *v.* Feitner, 167 N.Y. 1, 60 N.E. 265, and Matter of Hellman, 174 N.Y. 254, 66 N.E. 809, are cited in support of the holding that the seat was property of such a nature that it could be transferred to the trustee.

BILLS AND NOTES. (Drafts — Bona Fide Holders)

N.Y. Sup. Ct., App. Div., 3d Dept.

In Hathaway *v.* Delaware County, 93 New York Supplement, 436, it appeared that an ex-county treasurer, fraudulently pretending to act as a representative of the county treasurer, represented that the county wished to borrow money from a certain bank and procured a draft payable to the county treasurer, which the latter in good faith, supposing that the ex-treasurer was the owner of the draft, received and accepted in discharge of the shortage in the ex-treasurer's accounts. After the draft had been collected and its proceeds passed to the credit of the county, the bankers who drew it sought to recover from the county, on the ground that the fact that the draft was made payable directly to the county treasurer was notice of the irregularity in the procurement of the draft. In passing upon this claim, the court suggests that it seems to have a good deal of force, and says that if the question were a new one, they would be inclined to hold that upon its face such a draft discredits the claim that the alleged purchaser has any ownership in it, but that they consider themselves bound by the case of Goshen National Bank *v.* State, 141 N.Y. 379, 36 N.E. 316, where on a state of facts very much similar, it was held that the form of such a draft was not notice to the person to whom it was made payable, of any irregularity in the means by which the person having possession of the draft obtained it.

BRIBERY. (Construction of Statute — Tender of Check)

U. S. D. C., Northern District New York.

In United States *v.* Green, 136 Federal Reporter, 618 (one of the cases growing out of the alleged bribery of George W. Beavers of the Postal Department), the Federal District Court for the Northern District of New York decides that the tendering by a person of his personal check, drawn on a bank and payable to an officer of the United States, to such officer with intent to thereby affect his official action, does not constitute the crime of bribery under Rev. St. § 5451 (U.S. Comp. St. 1901, p. 3680), since such a check made and delivered for such an illegal purpose is void, and is not within any of the classes of instruments enumerated in the statute. The statute provides that every person who promises, offers, or gives, or causes or procures to be promised, offered or given, any money or other thing of value, or makes or tenders any contract undertaking obligation, gratuity, or security for the payment of money to any officer of the United States with intent to influence his decision or action, shall be punished, etc.

After the citation of an almost infinite number of authorities, both text writers and cases, as to the meaning of the various terms used in the statute, it is decided, as above stated, that a check given under the circumstances mentioned does not fall within the description of any of the instruments mentioned in the statute, is not a thing of value, and hence the tendering of it not an infraction of the statute.

CARRIERS. (Baggage — Papers)

Mississippi Supreme Court.

A recent contribution to the list of cases by which the term "baggage" is being defined by a process of exclusion, is that of Yazoo & Mississippi Valley Railroad Company *v.* Georgia Home Insurance Company, 37 Southern Reporter, 500, in which the Supreme Court of Mississippi holds that memoranda and papers in the possession of an agent, but relating exclusively to the business of his principal, and carried by the agent solely for business purposes, are not baggage when put by the agent in his trunk, and that in the absence of consent or custom of the railroad to accept such papers as baggage, no damage can be recovered either for the loss of the papers or for delay in their shipment and delivery. The definition of baggage given by Chief Justice Cockburn in Macrow *v.* Great Western Railway Company, L. R. 6 Q. B. 622, wherein it is said, that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal baggage, is referred to as being as accurate a definition as can be found; and it is said that to hold that the papers under consideration constitute baggage would expand the definition of that word beyond anything warranted by any well-considered case. The cases of Staub *v.* Kendrick, 23 N. E. 79, and Gleason *v.* Goodrich Transportation Company, 14 Am. Rep., 716, are referred to and distinguished from the case at Bar, in that in both of those cases the property destroyed was the property of the agent personally.

CARRIERS. (Violence of Strike Sympathizers — Injury to Passenger — Liability of Carrier)

Rhode Island Supreme Court.

Bosworth *v.* Union Railroad Company, 58 Atlantic Reporter, 982, holds that under the evidence in that case, a railroad company is not liable to a passenger injured by the unlawful acts of strikers and their sympathizers. Plaintiff was a passenger on a street car running between two towns, and was injured by a stone thrown by one of a mob of strike sympathizers. A strike had been on for several days accompanied by violence, but the mob had been suppressed in one of the towns, and cars were running regularly at the time. There was no indication of danger to plaintiff or the motorman as the car passed, until stones were thrown, except the presence of a large crowd of people on the street which might be regarded as indicating danger. Policemen were present, and though the preceding car had been stoned, such car was not in sight of the motorman of the car on which plaintiff was riding at the time, and the stoning thereof was unknown to him. This evidence was held insufficient to show notice to the carrier that it was dangerous to run cars there. Two other questions of interest are decided in this case, to wit, that the court will take judicial notice of the historical fact that on the day of the injury, the Governor had ordered a military force to the town in question to preserve order and to restrain violence towards the property and employees of the railroad company, and had issued a proclamation calling upon all persons riotously assembled to disperse, and also that these facts did not constitute notice to the company that it was dangerous to run its cars, but were rather an invitation to operate its road under the protection of the militia.

CHECKS (Loss — Execution of Duplicate — Liability of Indorser of Original Check)

Texas Court of Civil Appeals.

The nature of a duplicate copy of a negotiable instrument executed in lieu of an original which has been lost, is very well illustrated in Lewis *v.* Commercial National Bank, 83 Southwestern Reporter, 423. A check was indorsed by the payee and by the indorsee again indorsed to a bank for collection. The bank lost it. Afterward the bank obtained a duplicate check which was indorsed by the payee of the original check. When the duplicate was presented for payment, the maker had no funds and the bank sued the payee. Under these circumstances, it is held that the payee's indorsement of the duplicate check did not change his relation to the original, or create any liability on the duplicate other or different from the liability he assumed by indorsement of the original, and as the laches of the bank in failing to present the original within a reasonable time prevented it from enforcing the payee's liability on that check, he was not liable on the duplicate.

CONTEMPT. (Libel of Court — Publication after Termination of Cause)

Virginia Court of Appeals.

In Burdett *v.* Commonwealth, 48 Southeastern Reporter, 878, the Supreme Court of Appeals of Virginia holds that where one convicted on a criminal prosecution publishes a libelous article concerning the conduct of the judge in the case, the court has power to punish him for contempt, though the cause has ended by entry of judgment and satisfaction thereof. It is conceded that there are a large number of cases outside of Virginia which hold that courts are without authority to punish as a contempt a publication with respect to an ended cause. Blackstone's definition of contempt, as speaking or writing contemptuously of the court or judge's act in their judicial capacity, and the definition contained in Cyc. vol. 9, p. 6 of a constructive contempt, are quoted to show that publications, concerning the court with respect to a cause, may constitute contempt and be punished as such after the termination of the cause. A number of other cases including the recent Missouri case of State *v.* Shepherd, 76 S. W. 79; Dandridge's case, 2 Va. Cases 417; State *v.* Morrill, 16 Ark. 384; Pryor's case, 18 Kan. 72, Wooley's case, 11 Bush. 95; Chadwick's case, 67 N. W. 1072, are cited as holding in a general way the doctrine, that by the common law courts possess the power to punish for contempt, for libelous articles upon their proceedings, pending or past. Incidentally, it is also held that a summary punishment as for contempt for the publication of a newspaper article is not an invasion of the liberty of the press.

DEEDS. (Consideration — Delivery in Escrow)

New York Supreme Court, Trial Term.

A husband executed a deed conveying property to his wife, and placed it in escrow to be delivered to the grantee, if the grantor got drunk again. The grantor did get drunk again, but at the time of his death, the deed had not been delivered. This, it is held, was not a delivery in escrow, because not made pursuant to any valid contract, and not depending upon any condition

to be performed by the grantee. Though the husband had a perfect right during his life to give the property to the wife for any consideration or without any consideration; nevertheless, it is argued, that as he did not deliver the deed but simply agreed to deliver it, this agreement was not enforceable unless based on a consideration. No consideration, it is pointed out, exists in this case, the wife not agreeing to do anything, but merely receiving the benefit if the husband got drunk. It is also stated that while a court of equity will many times sustain transfers by the husband to the wife on account of the duty and obligation for the support and maintenance of the wife, it is against public policy to have these agreements in a family, by which each may forfeit to the other all or part of his or her property on account of certain shortcomings which he or she may have. This, it is said, sets each party in a position of benefiting by the frailties and mistakes of the other, and cannot be sustained on the theory of public policy. Bosea *v.* Lent, 90 New York Supplement, 41.

ELECTIONS. (Ballots — Distinguishing Marks — Indorsement by Judge)

Supreme Court of Illinois.

Choisser *v.* York, 71 Northeastern Reporter, 940, contains a holding that the distinguishing marks which will invalidate a ballot need not necessarily be placed on the ballot itself. It appeared in that case that when the votes of a precinct were counted, three democratic ballots had folded in them pieces of colored paper, and that at the polls a person working for the democratic ticket exhibited pieces of paper of that color and stated that any one voting such ticket, with such colored paper therein, would receive two dollars the next day at a certain store. These colored papers were held to be distinguishing marks justifying the rejection of the ballot.

It is also decided in this case, that the provision of the Illinois statute, that one of the judges shall give a voter a ballot on the back of which such judge shall indorse his initials, is not satisfied by the use of a stamp bearing the initials of one of the judges.

EVIDENCE. (Effect of Uncontroverted Testimony — Suspicious Circumstances)

South Dakota Supreme Court.

The fact that mere circumstances may have an effect, which is practically equivalent to probative force, is well illustrated by Iowa State Bank of Ottumwa *v.* Sherman & Bratager, 103 Northwestern Reporter, 19. It there appeared that a bank had discounted a note for a corporation, and in an action on the note it was contended that the transfer was not in good faith. There was no evidence with respect to the transaction, except that given by the president and cashier of the bank who testified that it was in good faith. It appeared, however, that the president was the treasurer and a director and stockholder in the corporation, and that the cashier was secretary of the corporation and a stockholder therein, and that the note was discounted without inquiry and its proceeds placed to the credit of the corporation against which there was a large over-draft. These facts, it is held, were sufficient in spite of the uncontroverted testimony of the president and cashier, to justify submission to the jury of the question whether the transfer of the note was *bona fide*.

GAMBLING CONTRACTS. (Futures — Purchase on Margin for Protection of Legitimate Business)

North Carolina Supreme Court.

North Carolina Laws 1899, p. 233, c. 221, prohibited in effect all wagering contracts or betting on the rise or fall in the prices of any commodity, with the intention that instead of delivery there should be paid merely the difference between the contract price and the market value of the article on the day specified. Under this statute it is held that a dealer in wholesale merchandise, who purchased pork on margin merely to protect his contract with customers and with no intention to require actual delivery, is indictable. This sort of transaction would seem to come very near to being, in its effect, a sort of insurance. A merchant who desires to protect himself in this manner may, however, find some consolation in the further holding that, where a person engaged in business buys or sells futures to avoid risks in his business by reason of possible fluctuations in the commodities which he needs in the ordinary course of his business, retaining in good faith the right to call for delivery, and there is no intention not to exact delivery, the contract is valid, though he may think it probable that he will not need to call for delivery. Such contract is authorized by Laws 1905, c. 538, § 7, permitting persons engaged in manufacturing or wholesale merchandising to purchase or sell the necessary commodities required in their business. State *v.* Clayton, 50 Southeastern Reporter, 866.

INSANE PERSONS. (Husband's Liability for Support of Wife)

Wisconsin Supreme Court.

One of the few cases dealing directly with the

common law liability of a husband to support his wife while she is an inmate of an insane asylum, is the recent one of Richardson *v.* Stuesser, 103 Northwestern Reporter, 261. After laying down the preliminary propositions that the common law liability of the husband to support his wife does not extend to supporting her outside the matrimonial home reasonably chosen by him, unless he refuses to do so there or she resides away therefrom by his consent, and that such common law liability cannot be extended by implication from the written law as to the support of other persons but can only be extended by a statute plainly so intended, it is held that where a wife, as a charity to her and protection to others, is, by due process of law, taken from the matrimonial home and confined in an asylum for the insane, and the husband submits, or even takes the initiatory proceedings to secure for her the benefit of the public charity, there is no element of refusal by him to support her at the matrimonial home, or consent by him to her absence therefrom within the common law rule rendering him liable under such circumstances for her support outside the home. The majority of the cases touching on the same or analogous points are cited in the opinion, among them being the following: County of Delaware *v.* McDonald, 46 Iowa, 170; Board of Commissioners of Noble County *v.* Schmoke, 51 Ind. 416; Board of Commissioners of Switzerland County *v.* Hildebrand, 1 Ind. 555; Board of Commissioners of Marshall County *v.* Burkey, Adm'r, 1 Ind. App. 565, 27 N. E. 1108; Davis *v.* St. Vincent's Inst. for Insane, 61 Fed. 277, 9 C. C. A. 501; Watt *v.* Smith, 89 Cal. 602, 26 Pac. 1071; Wray *v.* Wray, 33 Ala. 187; Board of Supervisors *v.* Budlong, 51 Barb. 493; Goodale *v.* Lawrence, 88 N.Y. 513, 42 Am. Rep. 259, overruling Goodale *v.* Brockner, 25 Hun, 621; City of Bangor *v.* Inhabitants of Wiscasset, 71 Me. 535; Senft *v.* Carpenter, 18 R.I. 545, 28 Atl. 963; Howard *v.* Whetstone Township, 10 Ohio, 365; Trustees of Springfield Township *v.* Demott, 13 Ohio, 104; Baldwin *v.* Douglas County, 37 Neb. 283, 55 N.W. 875, 20 L. R. A. 850.

INSURANCE. (Employers' Liability — Rights of Employee)

Tennessee Supreme Court.

The rights of the insured in an employers' liability policy in the various forms in which such policies are usually written, is considered in Finley *v.* United States Casualty Co., 83 Southwestern Reporter, 2. It is there held that the amount of such a policy, if issued directly against liability, becomes an asset of the insured immediately upon the happening of the event upon which liability depends, and upon the giving of such notice as the policy provides for, and that it may then be assigned by the assured or taken for his debt. But where the policy insures against damage by reason of liability, the amount of the insurance does not become available until assured has discharged the liability, and not even then available unless proper notice has been given as provided in the policy. In this case the insured employer compromised a claim against the company pending an action by an injured employee for damages, and the employee, after obtaining judgment against the employer, sought to recover from the insurance company on the ground that the policy inured to his benefit. In either form of policy it is held that this contention is unsound, and that neither under a policy insuring directly against liability nor under one insuring against loss or damage by reason of liability, is the employee in privity with the parties to the contract.

INTOXICATING LIQUORS. (Regulation of Sale — Seats in Saloons)

Arkansas Supreme Court.

A statute conferring power on cities to license, regulate, tax, or suppress drinking houses and dram-shops, is held in Pate *v.* City of Jonesboro, to justify the enactment of an ordinance forbidding the keeping of chairs or anything for persons, except the bar-tender or proprietor, to sit on in saloons. The work of Judge Dillon on Municipal Corporations, Commonwealth *v.* Casey, 134 Mass. 194, and Robinson *v.* Haug, 71 Mich. 38, 38 N. W. 668, in which practically similar regulations find support and approval are cited as authority for the holding.

LIBEL. (Publishing White Man as Negro — Effect of Thirteenth, Fourteenth, and Fifteenth Amendments)

South Carolina Supreme Court.

It has long been held in South Carolina that to call a white man a negro is actionable *per se.* Wood *v.* King, 1 Nott & McCord, 184; State *v.* Farley, 4 McCord, 317. It is said in Flood *v.* News & Courier Co., 50 Southeastern Reporter, 637, that neither the Thirteenth Amendment of the Federal Constitution, abolishing slavery, the Fourteenth Amendment, providing that all persons born or naturalized in the United States and subject to its jurisdiction are citizens, and that no state shall abridge their privileges or deny the equal protection of the law, nor the Fifteenth Amendment, providing that the rights of citizens shall not be abridged on account of race, color, or previous condition of servitude, have destroyed

the force of the older holdings, making the publication of a white man as a negro a libel.

LOTTERIES. (Guessing Contests — Equitable Jurisdiction)

Ohio Supreme Court.

In Stevens *v.* Cincinnati Times-Star Co., 73 Northeastern Reporter, 1058, the Supreme Court of Ohio holds that a guessing contest instituted by a newspaper company by which persons are invited to deliver to the company fifty cents each, of which twenty-four cents was for payment of a subscription to the paper and twenty-six cents for the privilege of making a guess upon the vote for a state officer to be chosen at an approaching election, the guesser coming nearest to the actual total vote cast to receive a money prize from the fund equal to one tenth thereof, and others next nearest to receive from the fund lesser money prizes, is within the condemnation of the statutes of Ohio against lotteries and schemes of chance, and is an unlawful enterprise. It is also decided that a similar scheme involving the same amount of payment by each person, but differing from the former in that there was to be no subscription to a paper, the prizes promised being definite amounts from $5,000 down to $2.00, was equally unlawful. But while the plaintiff in this case succeeded in vindicating a most admirable principle of the law, his triumph is somewhat shorn of practical results by the further decision that one who delivered fifty cents to the company, under the before-mentioned plan, has no standing in a court of equity to maintain an action for injunction and a receiver, on the claim that the money paid by himself and other contributors, amounting to $200,000 or over, constituted a fund equitably belonging to all who had made guesses and paid money.

MASTER AND SERVANT. (Interference with Relation — Procuring Discharge — Contract with Labor Union)

Massachusetts Supreme Judicial Court.

The right of a labor union, acting under a contract with an employer, which obligated the latter to employ only union workmen, and to discharge such as refuse to join the union, to insist upon performance of the contract as against a non-union workman, who of course was not a party thereto, is denied in Berry *v.* Donovan, 74 Northeastern Reporter, 603. It is incidentally decided that one has an inherent right to dispose of his labor, which can only be legally interfered with by one acting in the exercise of an equal or superior right which comes in conflict therewith, and that an intentional interference with such right without legal justification is malicious in law, even if it springs from good motives and is without express malice. What would seem to be the real essence of the decision, is the argument in answer to the contention that procuring the discharge of a non-union workman, is justifiable as a kind of competition, to wit, competition between employers and employed, in the attempt of each class to obtain as large a share as possible of the income from their combined effort. It is pointed out that the gain which a labor union may expect to derive from inducing others to join it, is not an improvement to be obtained directly under the conditions under which the men are working, but only added strength for such contests with employers as may arise in the future; and it is held that an object of this kind is too remote to be considered a benefit to business, such as to justify the infliction of intentional injury upon a third person for the purpose of obtaining it.

MUNICIPAL CORPORATIONS. (Lowering Grade in Street — Damages — Evidence — Mortality Tables)

Washington Supreme Court.

A rather curious theory as to the measure of damage in an action against a municipal corporation for lowering the grade in front of property abutting on a street, is illustrated by an offer of evidence in the case of Swope *v.* City of Seattle, 78 Pacific Reporter, 607. At trial the plaintiffs offered in evidence, mortality tables for the purpose of showing the expectancy of their respective lives, as a basis for the determination of the length of time during which the extra burden placed on them in the use of their home would obtain, and the extra steps plaintiffs would be obliged to climb for ingress from the street. Without argument or citation of authority the court's ruling, excluding the evidence is sustained, the supreme court contenting itself with observing that plaintiff's counsel had not mentioned any rule of law, violated or ignored by the ruling, and that it would seem to require no extended argument to demonstrate its propriety.

NEGLIGENCE. (Proximate Cause — Burning of Vacant House)

Virginia Supreme Court of Appeals.

A house located in a negro community was abandoned by the lessee before the expiration of the term. When he moved out, the lessee left an up-stairs door unlocked, and some three weeks after it was vacated the house was burned.

There was testimony that a certain negro had been seen passing in and out of the house several times before the fire. There was no evidence that the tenant had anything to do with the fire, unless his negligence in leaving the door unlocked and thus affording an opportunity for third persons to enter and set fire to the house was to be regarded as the proximate cause of the fire. This the court denies, citing Connell *v.* C. & O. Ry. Co., 93 Va. 57, 24 S. E. 467; Fowlkes *v.* Southern Ry. Co., 96 Va. 743, 32 S. E. 464; Watts *v.* Southern Bell Tel. Co., 100 Va. 45, 40 S. E. 107; and Standard Oil Co. *v.* Wakefield, 102 Va. 824, 47 S.E. 830, upon the general doctrine of proximate cause. These cases announce the principle that to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. Under these principles it is concluded that it cannot be maintained that the natural and expected result of leaving the up-stairs door of an empty house unlocked is, that some one who has no right there will enter the house and burn it and that the act of a third person was the efficient, intervening, and proximate cause of the damage, so that the tenant, if negligent, was not liable. Winfree *v.* Jones, 51 Southeastern Reporter, 153.

PHYSICIANS. (Assault — Unauthorized Surgical Operation)

Minnesota Supreme Court.

A physician was consulted concerning a difficulty affecting the patient's right ear. After examining the organ, the physician advised an operation to which the patient consented. After being placed under the influence of anæsthetics, and when the patient was unconscious therefrom, the physician examined her left ear and found it in a more serious condition than her right, and in greater need of an operation. He called the attention of the patient's family physician to the conditions he had discovered, and it was finally concluded that the operation should be performed upon the left, instead of the right ear, to which the family physician made no objection. The patient had not previously experienced any difficulty with her left ear and was not informed, prior to the time she was placed under the influence of anæsthetics, that any difficulty existed with reference to it, and, she, of course, did not consent to an operation thereon. The action of the physician was held to constitute in law an assault and battery, unless a consent by the patient could be implied from circumstances, and this, under the evidence, was held to be a question for the jury. Mohr *v.* Williams, 104 Northwestern Reporter, 12.

PUBLIC NUISANCE. (Street Fair — Power of City Council)

Georgia Supreme Court.

In City Council of Augusta *v.* Reynolds, 50 Southeastern Reporter, 998, the Supreme Court of Georgia announces that a fair, occupying, for over a week, seventy or eighty feet in width and four blocks in length of an important business street in the city, and consisting of numerous tents, inclosing shows and exhibitions, in front of which are stationed men blowing horns and talking through megaphones to attract attention, together with various other stands, booths, structures, Ferris wheels, merry-go-rounds, and other devices for amusement for the public and profit to the owners, a company of state militia, is a public nuisance of a most aggravated nature.

Some of the old English cases which held that a fair in a highway is permissible, for example, Elwood *v.* Bullock, 15 L. J. N. S. and King *v.* Smith, 4 E. S. P. 109, are referred to, and it is shown that the rule in those cases was based upon the existence of an immemorial custom in addition to which, it is to be remarked, that the old English fairs were very different enterprises from the one described. It is also held that there is nothing in an ordinary city charter which permits the city authorities to grant the use of its streets for the operation of an enterprise of the nature described.

PUBLIC SCHOOLS. (Religious Exercises — Reading of Scripture)

Kentucky Court of Appeals.

Hackett *v.* Brooksville Graded School District, 87 Southwestern Reporter, 792, is a recent authority for three different and interrelated propositions, relative to religious worship in public schools. It is held that a prayer offered at the opening of a public school, imploring the aid and presence of the Heavenly Father during the day's work, asking for wisdom, patience, mutual love, and respect; looking forward to a heavenly reunion after death, and concluding in Christ's name, is not sectarian and does not make the school a sectarian school within the provision of the Kentucky constitution, prohibiting the appropriation of educational funds for the support of sectarian schools. It is likewise decided that a public school, opened with prayer and by reading, without comment, of passages from King James'

translation from the Bible, during which time pupils are not required to attend, is not a place of worship, nor its teachers ministers of religion, within the constitutional provision declaring that no person shall be compelled to attend any place of worship, or contribute to the support of a minister of religion. The question which the court regards as being of chief importance, is whether or not the King James' translation of the Bible is a sectarian book, so that its reading would constitute sectarian instruction within the meaning of the constitutional provision, that no books of sectarian character shall be used in any common school nor any sectarian doctrine be taught therein. In support of the decision in the negative, a number of cases are cited, among them Vidal *v.* Girard's Ex'r, 2 How. 127; Donahoe *v.* Richards, 38 Me. 379; Spiller *v.* Inhabitants of Woburn, 12 Allen 127; Pfeiffer *v.* Board of Education, 77 N. W. 250; Moore *v.* Munroe, 20 N. W. 275; McCormick *v.* Burt, 95 Ill. 263.

NEW BOOKS RECEIVED

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LEGISLATION AGAINST SPECULATION AND GAMBLING IN THE FORMS OF TRADE. By *T. Henry Dewey.* Baker, Voorhis & Co., New York, 1905.

ENGLISH COLONIAL ADMINISTRATION UNDER LORD CLARENDON. By *Percy Lewis Kaye.* One of the Johns Hopkins University Studies. The Johns Hopkins Press, Baltimore, 1905.

ANCESTOR-WORSHIP AND JAPANESE LAW. By *Nobushige Hozumi.* Z. P. Maruya & Co., Ltd., Tokio, 1905.

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LEADING CASES IN THE BIBLE. By *David W. Amram.* Julius H. Greenstone, Philadelphia, 1905.

OFFICIAL REPORT OF THE UNIVERSAL CONGRESS OF LAWYERS AND JURISTS AT ST. LOUIS IN SEPTEMBER, 1904. Edited by the Secretary of the Congress. Copies may be obtained of V. Mott Porter, 220 N. Fourth St., St. Louis, Mo.

Hannis Taylor

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LEGITIMATE FUNCTIONS OF JUDGE-MADE LAW

By Hannis Taylor, LL.D. (Edin. and Dub.)

THE comparative method of investigating the origin and growth of government and law, which begins with their germs in primitive society, attempts to explain their nature and meaning through the record of their development. Perhaps the most important single revelation which this new method of investigation has made to students of jurisprudence, is embodied in the explanation of the subtile and silent process through which the primitive and unelastic codes of infant states are expanded and adapted, mainly through the agency of judge-made law, to the ever-changing conditions of progressive societies. If a state may be compared to a watch, its case or outer shell represents the state's political constitution, while its inner mechanism represents the code of municipal law by which the state's internal affairs are regulated. The primary purpose of the new science known as comparative politics, is to classify and label the outer shells of states as represented by their political constitutions; the primary purpose of the new science, known as comparative jurisprudence, is to classify and label the municipal codes by which the internal affairs of states are governed. So far, the world has given birth to only two great systems of jurisprudence; there are really but two great codes of municipal law whose principles have seriously influenced modern civilization. As the Greek genius lacked the capacity to produce a philosophy of law, legal science must be regarded as a Roman creation, jurisprudence as a Roman invention. As the jurisprudence of the western world, Roman law has but one rival, and that is the system with a Teutonic base, which prevails in parts of the British Empire and in the United States under the name of the common law of England. My primary purpose to-day, will be to demonstrate that no matter where the developments of these rival systems may be studied, the facts appear, in the history of each, first, that the primitive customary law inevitably crystallizes into an unelastic, written code; second, that after a society has outgrown the strait-jacket in which it thus incases itself at the outset, it is only possible through the agency of judge-made law to expand and adapt such a jacket to the larger conditions arising out of the after-growth. In other words, that the subtle process of thus expanding and adapting primitive written codes, even when organic, to the ever-increasing wants of progressive societies, is too refined for formal legislation, which must ever remain as it has ever been, the mere handmaid of judicial interpretation.

Judge-made Law at Rome

As Roman jurisprudence has the longest known history of any set of institutions, and as the character of the changes through which it has passed are very well understood, it is possible to outline its development as a whole. Such an outline should begin with the fact that, at the outset, Roman law was simply the code of a single city-state, a code that grew out of a body of unwritten municipal customs, a special knowledge of which was for a long time confined to an aristocracy or oligarchy who claimed to be the sole repository of the principles by which controversies should be determined. The departure which took place at Rome from that condition of things, was simply a

part of a wider transition from unwritten customary law to the ancient codes which appeared in Greece, on the Hellenized seaboard of western Asia, and in Italy, and of which the Twelve Tables of Rome are the most famous illustration. Such codes of laws engraved on tablets and published to the people, were substituted for traditional usages reposing in the recollection of privileged oligarches, not through the refined motives now urged in favor of codification, but rather as a matter of convenience suggested by the discovery of the art of printing, and also by the abuses arising out of the aristocratic monopoly of legal knowledge. The Roman code of the Twelve Tables was merely an enunciation in written words of the existing customs of the Roman people, put forth at a time when Roman society had barely emerged from that intellectual condition in which civil obligation and religious duty are inevitably confounded. The vitally important result brought about by the transition which thus took place from unwritten customary law to a written code, is embodied in the fact that when archaic law is once condensed into a code there is an end to its spontaneous development; all after changes in it must be effected, if at all, deliberately and from without.

As law is stable, and societies of the higher type progressive, as social necessities and opinions are ever more or less in advance of law, how is the latter to be kept in harmony with the former? The problem of problems for students of the historical school is involved in the process through which the strait-jacket put on by an infant state, in the form of a written code, is to be made sufficiently elastic to adapt itself to all the changing conditions of the after-growth. Leaving out of view legal fictions which, at certain stages of social progress are invaluable expedients for overcoming the rigidity of law, by all odds the most important instrumentality through which the primitive Roman code was expanded beyond the wants of the citizens of a single city to those of the citizens of a vast league of cities, was that known as equity, a name given to a body of principles built up by Roman magistrates and Roman lawyers alongside of the original civil law which it claimed the right to supersede by virtue of a superior sanctity inherent in such principles. In order to understand how that body of judge-made law called equity was evolved, it is necessary to know something of the manner in which justice at Rome was administered.

In theory the supreme judicial power was vested in the prætor who was either a jurisconsult himself, or a person entirely in the hands of those who were. When a suit was commenced, the litigants appeared before the prætor who made a preliminary examination in order to ascertain the precise points in controversy. After hearing the statements and counter-statements of plaintiff and defendant, he constructed a brief technical outline of the disputed issues called a *formula*. That formula was then put into the hands of a judex (something very different from the modern conception of a presiding judge), who, after hearing the evidence of the witnesses and the arguments of the advocates, returned his decisive judgment to the prætor who had appointed him. The entire proceeding thus carried on by the prætor, judex, and advocates, was under the intellectual guidance of the jurisconsults, the makers of the scientific law literature of Rome, who were regarded as law experts, and respected and resorted to as such by all concerned in the administration of justice. Primarily the prætor was a great statesman or politician whose final function was to enforce the law; the judex, or as we would now call him, the referee, might have no technical knowledge of law whatever. Under such conditions the unlearned judicial magistrates naturally looked for light and leading to the jurisconsults who instructed them through

their *responsa prudentium*, the technical name given to their opinions as experts, which were promptly recorded on tablets by their students or disciples. As the jurisconsults thus became the reservoir from which was drawn that body of principles heretofore described as equity, it is all-important to ascertain the source from which they themselves derived such principles. According to the institutional treatise published under the authority of Justinian, "The law which a people enacts is called the civil law of that people, but that which natural reason appoints for all mankind is called the law of nations, because all nations use it." What was the origin and nature of this Roman *jus gentum*, this law used by all nations, a law utterly different, of course, from what is now called international law, the body of rules regulating the intercourse of states as corporate persons. It was the general rule of the ancient world that the law of one city had no application to the citizens of another. The *jus civile* of Rome, the exclusive property of her citizens, was the special law administered by the *prætor urbanus* between Roman and Roman; it could not be applied between a Roman and a foreigner. For that reason, as there was a large body of resident foreigners at Rome who would have been entirely without the benefits of law if they had been forced to rely upon the *prætor urbanus*, it was necessary to constitute a *prætor peregrinus* (247 B.C.), the prætor of foreigners, whose duty it was to administer justice between Roman citizens and foreigners, between foreigner and foreigner, and between citizens of different cities within the empire. As such prætor could not rely upon the law of any one city for the *criteria* of his judgments, he naturally turned his eyes to the codes of all the cities from which came the swarm of litigants before him.

In the generalizations necessarily made upon such broad data, we have the beginning of comparative jurisprudence, whose first fruit at Rome was the ascertainment of the fact that there are certain uniform and universal conceptions of justice common to all civilized peoples. Before this new growth, watered by the learning of the jurisconsults, reached its maturity, the intellectual life of Rome passed under the dominion of her subjects in Attica and Peloponessus just after they had yielded to the ascendency of the Stoic philosophers, who were ever striving to discover in the operations of nature, physical, moral, and intellectual, some uniform and universal force pervading all things that could be designated as the law of nature — the embodiment of universal reason, identical with Zeus, the supreme ruler of the universe. Through the mind of the Roman lawyer that splendid conception entered into the *jus gentium* as an expanding and enriching force that finally lifted it into a higher sphere. In that way a broad principle of Greek philosophy became so blended with a particular branch of Roman commercial law that the Antonine jurisconsults finally assumed the position that the *jus gentium* and the *jus naturæ* were identical. Long before that time, however, Cicero had recognized the fact, and had declared in his gorgeous phrase that the fruit of the union was not one law for Rome, and another law for Athens, one law to-day, and another law tomorrow, but one eternal and immortal law for all time and for all nations, as God the common master and ruler, is one.

Such was the general nature of the process by which the primitive and unelastic Roman code was liberalized and adapted to the changed conditions of an expanding society through the growth of that system of judge-made law called equity, built up alongside of the primitive code by the jurisconsults during the period that preceded the overthrow of the republic and the advent of Augustus. While the "answers of the learned" varied a good deal at different periods, they always consisted of explanatory glosses on authoritative written docu-

ments, and, at first, were exclusively opinions interpretative of the Twelve Tables. The authors of this defining and expanding jurisprudence always professed the most profound respect for the letter of the code, whose full meaning they were ever attempting to bring out by piecing texts together, by introducing principles of interpretation derived from other sources, by adjusting the law to states of fact which actually presented themselves, and by speculating on its possible application to others that might occur thereafter. Thus, of course, were educed a vast amount of canons never dreamed of by the compilers of the Twelve Tables, and which were, in truth, rarely or never to be found therein. Not until we approach the fall of the republic are causes found at work which clearly indicate that the responses are encountering obstacles fatal to their farther expression.

Foremost among these must be noted the effort made to systematize and reduce them to compendia inaugurated by Q. Mucius Scaevola, an older contemporary of Cicero, who is said to have published a manual of the entire civil law, and who is the earliest writer cited in the Digest. Soon the number of jurisconsults who wrote treatises on law began to be large, and in the reign of Augustus two schools or sects appeared, the one headed by Capito, a warm supporter of the imperial despotism, the other by Labeo, whose independent spirit gave him a strong leaning towards the older republicanism. The final blow to the responses, whose growth was thus checked by the rise of scientific law writers, was dealt by Augustus himself, who limited to a few leading jurisconsults the right of giving binding opinions on cases submitted to them. At an earlier period which cannot be precisely fixed, it became the custom for the prætor to issue an annual proclamation or edict, in which he embodied the system of principles upon which justice would be administered during his official term. As a new system could not be put forth for every year, each succeeding prætor published the edict of his predecessor with such additions as the necessities of the moment or his own views of the law compelled him to introduce. Thus came into being the continuous or unbroken edict which, as an engine of law reform, was simply a new method of superseding the civil law as much as possible by an edictal jurisprudence fabricated by the prætor out of the principles of the *jus gentium*, finally assumed by the Roman lawyers to be the lost code of nature by which man was governed in a primitive state. So, no matter whether the civil law of Rome was expanded or superseded directly by the edict of the prætor, or whether by the responses of the jurisconsults, the practical result was the same — the deficiencies of an archaic and unelastic legal system were supplied by judicial exposition, by judge-made law.

Not until Roman jurisprudence had thus become a broad and philosophic system did formal legislation, in the modern sense, become important. As it is very unusual in the infancy of a nation for the legislature to be appealed to for the general reform of private law, statute law, which became voluminous under the empire, was scanty during the republic. Not until the establishment of the empire did the true period of Roman statute law really begin. The enactments of the emperors extend in increasing massiveness from the consolidation of the power of Augustus to the publication of the code of Justinian. During the creative period in which the jurisconsults were putting forth their wonderful treatises, it was that the power of legislation passed from the people to the senate and then through a gradual process of usurpation from the senate to the emperor. When Justinian came to the throne of the Eastern Empire, it was with the settled purpose of collecting, revising, and systematizing the entire aftergrowth of Roman law superimposed upon the primitive system during the ten centuries that had intervened be-

tween his time (A.D. 527–565) and the adoption of the Twelve Tables (B.C. 450). The outcome was the famous code of Justinian, the Pandects, and Institutes, which, with the later constitutions of Justinian, known as Novels, constitute the *Corpus Juris Civilis Romani*. And so while it may be said that the most famous and widely extended jurisprudence known to the world begins, as it ends, with a code, the fact must not for one moment be lost sight of that what gave importance to the first code and made the last possible, was the creative work performed by the jurisconsults and magistrates who, during the ten centuries intervening between the two, built up a scientific system of judge-made law whose influence upon the history of mankind has been second only to that of Christianity itself. The Roman Empire is dead and gone, but Roman law has survived it; its rule is eternal.

Judge-made Law in England

When we pass from Rome to England we there find a repetition of the old story of a code of customary law, which had crystallized into a written form, being expanded and adapted to the ever-increasing wants of a progressive society, through the results of at least six centuries of judge-made law. In the happy phrase of Taine, the Teutonic founders of the Old-English Commonwealth, "created in Britain a Germany outside of Germany."

The English kin transferred to Britain that rough, yet vigorous system of political, judicial, and military organization which everywhere prevailed among the Teutonic tribes of the fatherland. Wherever a district of country was won from the native race, the conquerors encamped upon the soil; and then, after dividing the land upon the basis of that peculiar system that rested at once on military and tribal divisions, they organized self-governing communities, which became nurseries of English customary law. Just as the English language is the outcome of the fusion of the dialects spoken in those local communities, so English customary law, as a distinct and entire code, is the outcome of the fusion of the customary or popular law developed therein. The primitive system of law which thus matured in the provincial courts of the English people, like all archaic law, took on an iron rigorism of form which rendered it unelastic. Its entire inadequacy to the wants of a progressive society never became apparent, however, until the Norman conquest drew England into the march of the continental nations. The most important single outcome of that event was the centralization of justice through the establishment of a great court at Westminster, by whose agency a new system of royal law, which found its source in the person of the king, was brought in to remedy the defects of the old, unelastic system of customary law prevailing in the provincial courts of the people. As soon as the new judicial system put into operation by the Normans, was in working order, "decisions of tribunals," as Digby has expressed it, "came to constitute in the strictest sense of the term a source or cause of law. Judge-made or judiciary law, henceforth gradually displaces customary law." The English common law judges, in the exercise of perfectly legitimate or normal functions, thus undertook to enlarge the unelastic and inadequate primitive code by engrafting upon it new principles, either formulated by themselves or borrowed freely from the current compendia of the Roman and Canon law. Mr. Dicey has said very lately that, "As all lawyers are aware, a large part, and as many would add, the best part of the law of England is judge-made law — that is to say, consists of rules to be collected from the judgments of the courts. This portion of the law has not been created by act of Parliament, and is not recorded in the statute book. It is the work of the courts; it is recorded in the reports; it is, in short, the fruit of judicial legislation. The amount of

such judge-made law is in England far more extensive than a student easily realizes. Nine-tenths at least, of the law of contract, and the whole, or nearly the whole, of the law of torts are not to be discovered in any volume of the statutes." (Law and Opinion in England, pp. 359–60.) While the customary law of England has thus, in fact, been extended, modified, and improved through case-law, in very much the same way in which the primitive Roman code was transformed through the responses of the jurisconsults, in theory, the means employed have ever been held to be incapable of altering one jot or one line of the existing jurisprudence.

By the baldest of legal fiction, the new principles announced were assumed to be drawn from a preëxisting nebulous body of English law, called the common law, ample enough to supply doctrines applicable to any conceivable set of circumstances. And yet effective as such means were in liberalizing and improving the English common law as such, they fell far short of the task to be accomplished. Just as it became necessary at Rome to build up, outside of and apart from the primitive code, a distinct set of principles capable of superseding it called equity, so it became necessary to build up alongside of and apart from the English common law a like system under the same title. That process began with the growth of the equitable jurisdiction of the English chancellor which Lord Campbell has defined to be "the extraordinary interference of the chancellor, without common law process, or regard to common law rules of proceeding upon the petition of the party aggrieved, who was without adequate remedy in a court of law." Thus the new body of equitable rules which began to flow from a royal source, and openly avowed that its right to supersede or supplement the primitive code rested upon the indisputable inadequacy of that code to then existing conditions. As the prætorian equity of Rome and the equity of the English chancellor thus grew out of the same necessity, it is natural that their comparative histories should reveal many common features. As a master of the subject has said: "The prætor was the chief equity judge as well as the great common law magistrate, and as soon as the edict had evolved an equitable rule, the prtæor's court began to apply it in place of or by the side of the old rule of the civil law, which was thus directly or indirectly repealed without any express enactment of the legislature." (Maine, Ancient Law, p. 64.) No better statement can be made of the process through which the same result was worked out in England. At Rome, the growth of equity had its limits; it seems to have exhausted itself when the succession of jurisconsults comes to a close with the reign of Alexander Severus. Then follows a period during which, Gibbon tells us, "the oracles of jurisprudence were almost mute." From that time the history of Roman law is the history of the imperial constitutions and of the attempts finally made to subject the unwieldy body to codification. In the same way the expansion of English equity seems to have ended with the chancellorship of Lord Eldon, who devoted himself rather to harmonizing and explaining the principles announced by his predecessors than to the germination of new ones in *gremio magistratum*. The most striking point of difference, of course, between Roman and English equity is embodied in the fact that the latter, despite its bulk, has always abhorred codification.

Judge-made law in the United States

The political dogma that the executive, legislative, and judicial departments of government should be separate and distinct was first announced by Montesquieu, who accepted it and promulgated it in the modified form in which it existed in the English constitutional system. In that form it appeared in the constitutions of the several

states, and finally in the Constitution of the United States. When that dogma, which assumes the impossibility of one department encroaching upon the domain of another, was thus embedded in the most solemn form in our organic laws, jurisprudence was brought face to face with the ultimate question: Can any kind of a written code or constitution be devised by the wit of man for the government of an infant state, sufficiently elastic to adapt itself to its ever-changing conditions, through formal amendments, without the expanding and adapting power of judge-made law? Leaving out of view the first twelve amendments to our federal Constitution, which were nearly contemporaneous with it, and really a completion of it, but three remain whose adoption, as all the world knows, was the outcome of civil war. Nothing is more generally admitted in the politics of this country than the fact that any reform is practically hopeless that depends upon the amendment, under normal conditions, of the Constitution of the United States. Experience has shown that the ponderous machinery provided can only be moved by the giant hand of revolution. Under such conditions, who can doubt for a moment that our federal Constitution, so justly regarded as "the most wonderful work ever struck off at a given time by the brain and purpose of man," would have been a hopeless failure but for the expanding and adapting power of judge-made law promulgated by that tribunal which has no prototype in history, the Supreme Court of the United States? At the outset, neither the nature nor the extent of its powers were at all clearly understood. As late as January 2, 1801, John Jay, the first chief justice, in declining a reappointment, wrote to President Adams: "I left the Bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect, which, as the last resort of the justice of the nation, it should possess. Hence, I am induced to doubt both the propriety and expediency of my returning to the Bench under the present system." Fortunately for the cause of good government throughout the world, Jay's wail of despair was a bugle call to a jurist who has exercised a wider influence, perhaps, than any other in the history of mankind.

On the day of the first meeting of the Supreme Court in the permanent capital of the nation, John Marshall took his place for the first time as chief justice, and, as such, he sat in the midst of six associates for thirty-four years. The time was ripe for the advent of a jurist and statesman clear-visioned enough to sweep the entire horizon of federal power, and bold enough to press each element of it to its logical conclusion. The success of his life work was assured by the manner in which he solved the problem of problems that awaited him. Thirteen years after the organization of the Supreme Court he announced, for the first time, in the case of Marbury *v.* Madison, that it possessed both the right and the power to declare null and void an act of Congress in violation of the Constitution. The invincible logic employed in the demonstration rested necessarily upon the admission that the august right in question was a mere deduction from the general nature of a system of government whose Constitution had failed to grant it in express terms. Such deduction was, of course, a pure creation of judge-made law. The only precedents that existed were to be found in the states, where it had frequently been held that a state court could declare an act of the legislature void because of repugnancy to the state constition. The states had borrowed the idea from the action of the English Privy Council, which sometimes annulled the acts of colonial legislatures when in conflict with colonial charters. After such charters were

transformed into state constitutions, the Judicial Committee was superseded by the Supreme Courts of the several states. Finally, when the new system of limitations on legislative power, thus born in the states, widened into national importance through its application to the legislative power vested in the unique Federal Republic created by the Constitution of 1787, the inevitable outcome was the Supreme Court of the United States, the only court in history ever endowed with the right to pass on the validity of a national law. When by the unaided force of irresistible judicial logic, Marshall lifted that right into the highest possible sphere, he wrought a revolution in the jurisprudence of the world by giving to judge-made law its widest possible expansion, an expansion for which no precedent could be found in the history of the past. And yet no jurist ever recognized more religiously than Marshall the difference that divides a system of organic law from a mere code of municipal law. In a leading case he said: "A constitution to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It could probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language." He perfectly understood that the fathers, in their wisdom, had undertaken to do no more than construct a framework of governmental timbers, leaving the filling out of the interior details to legislation and to the defining and expanding hand of judicial interpretation. While no one was more content to dwell within the sacred circle marked by the outer walls of the temple, no one was more resolute than Marshall in harmonizing and adorning its interior through the application of the resources of judge-made law. Such an application was never more necessary than when the Supreme Court was called upon to create a body of rules sufficiently comprehensive to give effect to that brief and vague constitutional provision, providing that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Vast areas of territory were to be acquired and governed, without any definite grant of power to do either. Fortunately, Marshall and his associates clearly understood that the history of colonization from the Greek days down put beyond question the fact that inhabitants of undeveloped states, while in a colonial condition, have no right, natural or historical, to be admitted at once to the full citizenship guaranteed by the Constitution of the parent state. Jefferson, the real founder of our territorial system, perfectly understood that truth, and Gouverneur Morris, the draftsman of the provision in question, wrote at a later day that: "I always thought that when we would acquire Canada and Louisiana it would be proper to govern them as provinces and allow them no voice in our councils." Fortunately for this country that conservative view entertained by the makers of the Constitution, and coined into judge-made law by Marshall and his associates, has not been supplanted by the romantic yet dangerous afterthought of a later time.

Nothing has been more remarkable in the history of our federal constitution than the ease with which it has adapted itself to the ever-increasing wants of a rapidly swelling population, continually organizing new systems of local government beyond our original limits. When, during Jefferson's second term, the application of steam to

navigation was made by Robert Fulton, a revolution was wrought in the commerce of the country through a transition from the primitive and ineffectual means of transportation by pack-horse and wagon to the methods in use to-day. A notable legal result of the change was a substitution for the ancient English rule of admiralty jurisdiction, resting on the ebb and flow of the tide, of a new one better adaped to totally different physical conditions. As you all know, in Taney's time, the navigable character of the water was made the test; and thus, by the silent stroke of the judicial pen the admiralty jurisdiction of the federal courts was extended not only beyond the flow of the tide in all public navigable waters, but even over the great fresh-water lakes as well, inland seas upon which fleets have encountered. No one will deny that the unparalleled material development of this country has been largely worked out through the agency of corporations, the public confidence in whose stability has rested largely upon the famous decision rendered in 1819, in the Dartmouth College case, wherein it was held that the charter of a corporation is a contract, and as such protected from violation by article 1, section 10, of the federal constitution. Thus by a momentous stroke of the judicial pen American corporations were placed in a condition of security as to the legislative power never before occupied by such bodies in any other country in the world. If, in the great case in question, Marshall, with the concurrence of his associates, had written but a line declaring that such charters are not contracts within the meaning of the clause in question, the economic conditions of this country, so far as trusts and monopolies are concerned, would stand in an entirely different situation. Now, that an appeal is being made for relief from such conditions to the judicial tribunals, the fact cannot be ignored that the power that made can unmake, that the power that built up can destroy. In this grave matter, a silent stroke of the judicial pen could work a revolution. No other department of government is so capable as the judicial to deal with a problem whose complexity is as great as its influence is far-reaching. Our experience has demonstrated the fact that nothing so rapidly advances commercial and industrial interests as legitimate corporations, exercising normal powers according to law. The problem is how to protect such in their legal rights, and at the same time crush out the illegitimate and abnormal. After formal legislation has exhausted its resources, the ultimate solution of the problem will still remain for the judicial power — the last and decisive word must be spoken by the Supreme Court of the United States.

When, in the light of what has now been said, the growth of the jurisdiction of that tribunal is viewed as one unbroken development, is there anything in its history, taken as a whole, to disquiet us? When the intricacy and delicacy of the mighty task which it has been executing for more than a century is calmly considered, must not the scientific jurist frankly admit that it could only have been performed through the agency of judge-made law — that agency which silently expanded and adapted the primitive and unelastic codes of Rome and England to the ever-increasing wants of progressive societies? When viewed in the light of its beneficient history, as illustrated by those codes, there is no reason to apprehend that that kind of law may eventually undermine our federal constitution. On the contrary, there is every reason to believe that without the adjusting, defining, and expanding power of judge-made law it would have been impossible to adapt our complicated and rigid system of written constitutions to the new and varied conditions which have so rapidly arisen out of an unparalled national development.

WASHINGTON, D. C., August, 1905.

THE SUPREME COURT-ROOM OF THE MINNESOTA CAPITOL

By Berta Nabersberg

THE recently completed capitol of Minnesota contains what is probably the most beautiful court-room in the United States. It is a room full of dignity, harmonious with unified thought, and above all impressive in the consistent application of the decoration to the use of the room.

The court-room is merely one part of a splendid whole, for the State house is a building of surprising beauty. It stands upon high ground and can be seen from almost every part of the beautiful city which forms its setting — seeming itself a seat of restfulness and purity. The building is of white Georgia marble piled in the Italian rennaisance style, chaste, perfectly proportioned and as harmonious in lines as beautiful music. The dome, the largest marble dome in the country, is as exact a copy of the dome of St. Peter's at Rome as is possible.

Effort has been made to make the capitol in every respect worthy of being classed with the capitol at Washington, the Congressional Library, and the Boston Public Library. John La Farge, Edward Simmons, Edwin H. Blashfield, Kenyon Cox, Douglas Volk, F. D. Millet, Daniel Chester French, H. O. Walker, and Elmer E. Garnsey have been chosen to enrich the splendid background provided by the architect, Cass Gilbert. To some extent the decorations illustrate historic periods and incidents in the life of the state.

MORAL AND DIVINE LAW
(Copyright, 1904, by John La Farge)

Outside, over the great doorway, are six symbolic figures of heroic size, by Daniel Chester French, representing Wisdom, Justice, Prudence, Truth, Bounty, and Courage.

In the interior many marbles and stones have been used, relieved by rich color in side-panels and ceilings, and by embellishments of gold. In the rotunda, soft grays and dull blue are used with the gold, and through the corridors rich red is introduced in panels. The senate occupies the west wing of the building, the House of Repre-

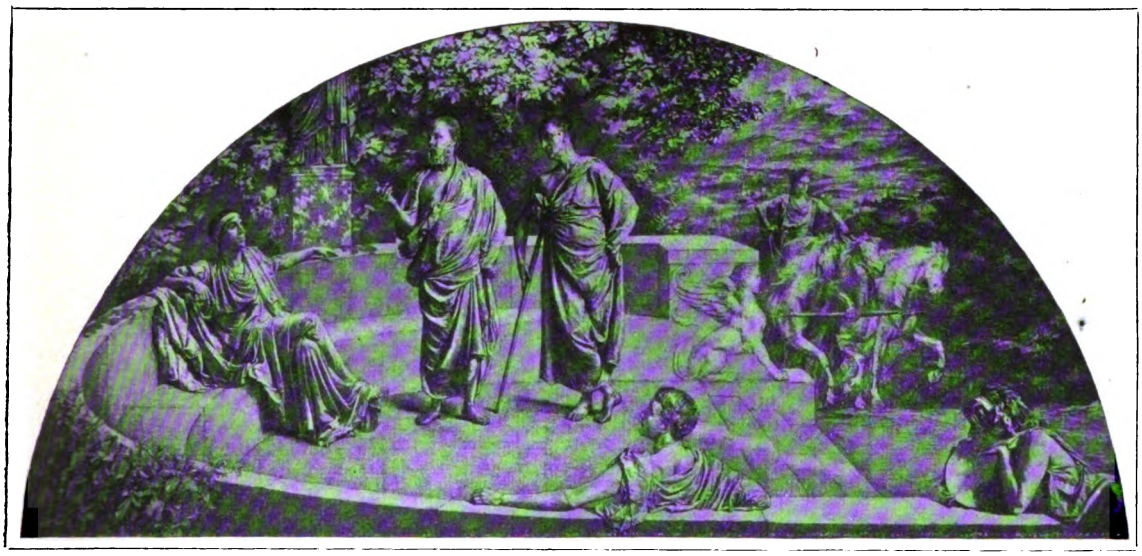
sentatives the north, and the Supreme Court the east wing.

The Supreme court-room is a large, square chamber, architecturally severe, surmounted by a domed skylight. The walls are panelled in three tones of warm gray, relieved with gold and bands of gray-blue. Back of the raised platform upon which are the chairs of the justices are four white marble columns with gilded ionic capitals, gleaming against a hanging of dull red. The furniture is rich San Domingo mahogany, simple in design.

Without any mural decoration the room would be too severe, would even be cold; but Mr. La Farge has so admirably considered his paintings in relation to their setting, that they furnish just the right amount of embellishment without giving a feeling of over-decoration. So often wall-paintings seem to be unnecessary, but in the case of this room they fill a want and fill it exactly.

There are to be four lunettes by John La Farge, two of which are now in place. The subjects of the decorations are: Moral and Divine Law — Moses receiving the Law on Mount Sinai; The Relation of the Individual to the State — Socrates and his friends discussing the Republic as in Plato's account; The Recording of Precedents — Confucius and his pupils collating and describing documents in their favorite grove; The Adjustment of Conflicting Interests — Count Raymond, of Toulouse, swearing at the altar to observe the liberties of the city, in the presence of the bishops, the representatives of religious orders, and the magistrates of the city.

It has been the artist's aim in these paintings to present the feeling of different and special historical moments and to portray the various attitudes of mind of the actors therein. As he himself says: "In Moses on Mount Sinai, the forces of nature and conscience contend. In Socrates and his Friends, there has been a wish to convey in a typical manner the serenity and good-nature which is the note of the famous book and of Greek thought and philosophy. In Confucius and Pupils, a serenity of purpose, somewhat akin to the Greek, but more in the manner of instruction and less of argument. In the Adjustment of Interests, the figures in the story, acting within the four walls of the church, represent the organized bodies whose chiefs and representatives meet in a



THE RELATION OF THE INDIVIDUAL TO THE STATE
(Copyright, 1904, by John La Farge)

form of war, wherein strict law, and no longer ethical justice, is the theme."

Of these decorations "Moral and Divine Law" and "The Relation of the Individual to the State," are finished and in their setting. Related in color and treatment as they are, they are in great contrast — one dramatic, full of supreme power, the other a quieter theme of mental power.

"Moral and Divine Law" has all the impressiveness of an awful moment. Clouds surround the mountain, and from the crevices in the rocks and the deep abyss on the left, clouds of vapor rise, tinged red and violet. Moses against a background of cloud, surrounded by a golden effulgence, kneels in utmost reverence and awe. At the right Joshua in a robe of dull red and yellowish-green loin cloth, warns the people away. Aaron in neutral reds and blues kneels beside Joshua, awed and fearful. The whole effect is somber, yet filled with a light unearthly. Mr. La Farge made the studies for the painting from actual experience in a volcano, and from photographs of eruptions in the Carribbean Islands.

On the other hand, "The Relation of the Individual to the State" is full of sunlight and the Grecian qualities the artist desired to put into it — serenity and good nature. He describes the circumstances thus: "Socrates has gone down from Athens to Piraeus because he wanted to see in what way they would celebrate the festival of Bendis, the Thracian Artemis, which is a new thing. After the procession and the prayers, as he turns with a friend in the direction of the city — Polemarchus, the son of a wealthy citizen, detains him, asking him to spend the day and later to see the races and other festivities. Socrates accepts and goes to his friend's residence and remains in conversation with the two sons and the father and various other guests and friends who come in and out throughout the story."

THE RECORDING OF PRECEDENTS
(Copyright, 1904, by John La Farge)

In the representation, Socrates, a dignified figure in gray, is standing talking; at his side in brilliant red is presumably Polemarchus. Another guest, the sophist Thrasymachus, sits in a position of indolent interest, ready to interrupt should the opportunity come. A slave girl at the right listens eagerly, her tambourine in hand, evidently a participant in the festivities just over. In the background a charioteer drives his horses over the hill. The

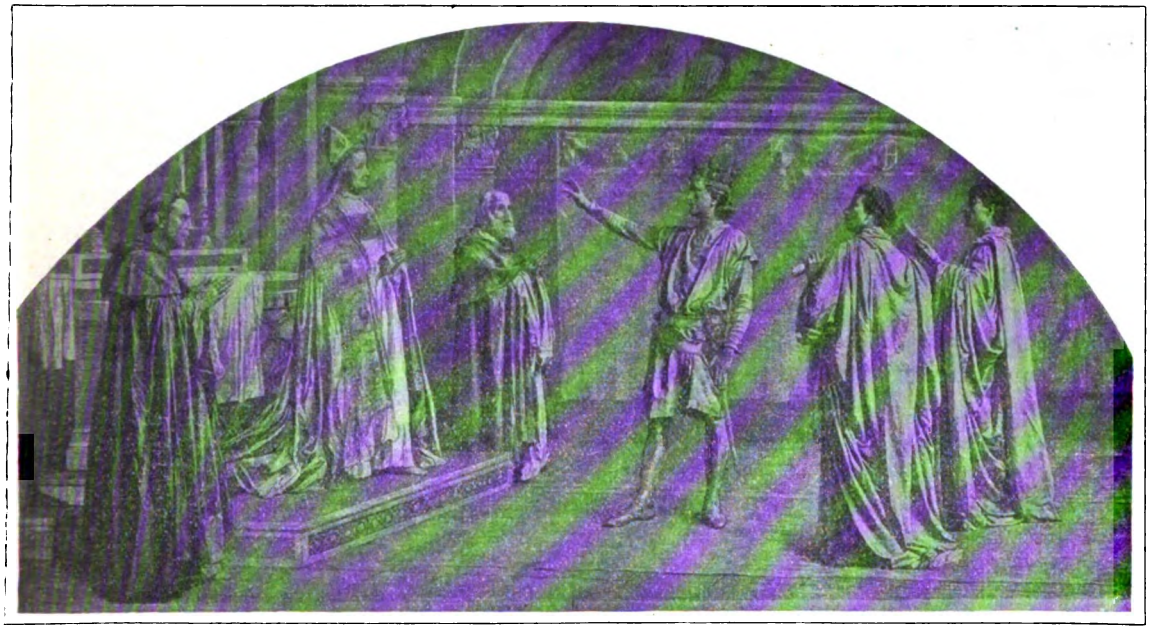
setting is a Grecian garden and the stage a semi-circular marble seat.

The artist suggests that could a moment be chosen for this painting it were when Socrates explained to Thrasymachus that "the true artist in proceeding according to his art does not do the best for himself nor consider his own interest, but that of his subject."

These decorations in their placing, evidence a most striking thought — one which cannot fail to influence those gathered in session in the court-room. Back of the justices, on the wall which the counsel face in addressing the court, is "Moral and Divine Law," full of contention and struggle — the engagement of mightiest forces — the birth of law in its primal simplicity. The grandeur of that moment so impressively depicted should be an inspiration — an influence uplifting beyond trivial and ignoble affairs.

Directly opposite the judges lies "The Relation of the Individual to the State," appealing to the quieter judicious attitude of mind. The peaceful, rational atmosphere might wield an influence for a just and deliberate decision. One seldom sees decoration so consistently applied with such powerful thought behind it. It is not picture-writing as is so much mural decoration, but art moved by the finest of art purposes.

To this perfect room the court in session brings one flaw. In this setting — a typification of the majesty of the law, against a background made by the four perfect columns — themselves symbolic of the law's severity and inexorableness, sit the five judges of the State Supreme Court in business suits. Did they but wear the black robes of their office, such as are worn by the federal courts, they too would seem to be symbols of that great power, not mere men with man's frailties and imperfections.



THE ADJUSTMENT OF CONFLICTING INTERESTS
(Copyright, 1904, by John La Farge)

In such a room — a room which awes in its solemnity, sounding as it does a grave harmony of noble thought, anything trivial or selfish should never come, but all should be uplifted beyond petty strife and should put forth the best and strongest effort for justice.

ST. PAUL, Minn., September, 1905.

THE PUBLIC DUTY OF THE COMMON CARRIER IN RELATION TO DEPENDENT SERVICES

By Bruce Wyman

Of the Faculty of Law in Harvard University

I

SUCH control has the common carrier over modern commerce, so indispensable is its service to the conduct of every business, that the efficient regulation of this public utility is more imperatively demanded by public opinion to-day than ever before. Indeed, it is not too much to say that the public temper is such that only if the law succeeds in thoroughly controlling the whole conduct of the common carrier in an adequate manner, in all contingencies, towards all men, will the furnishing of transportation be left in private hands. To be thorough and efficient, the law and its administration must be comprehensive and detailed; and it is proposed, therefore, to single out for discussion in this article one particular phase of the public duty of the common carrier, one which concerns many conflicting business interests of the greatest importance, and one that involves a bitter legal controversy as to fundamental principles and their necessary corollaries. This particular problem proposed for discussion is whether in dealing with dependent services the common carrier is under the general obligations of the public service law or whether the common carrier is free to deal with them as it sees fit, consulting only its own interests. So close is the argument and so recent is its origin that there has been, and there remains, a square conflict of authority as to whether this law extends so far as to cover this situation. On one side are the jurisdictions conservative in attitude, which hold that there is no public duty involved and that therefore, the carrier may, for example, discriminate among expressmen. On the other hand, are the progressive jurisdictions which hold that there is a public obligation involved and that the carrier may not, therefore, admit certain hackmen to its station while excluding others. And in various other subsidiary businesses of the same sort, where those who offer a service to the public are dependent to a considerable extent for opportunity to conduct their calling upon obtaining privileges from the carrier, there will be found the same issue and the same controversy.

II

The most important instance of this general problem is whether the railways are bound to furnish facilities to all expressmen that apply without discrimination. There is, upon this matter, as upon all of these allied questions, a square conflict of authority. Much is said upon both sides; and in a matter of such commercial consequence much of this is worth repeating. The discussion is carried on along the whole line; not only is the matter discussed from the point of view of the proper theory to be held, whether the general rules of public service govern or whether they are inapplicable; but the matter is also discussed with much heat from the point of view of public policy and business convenience.

The leading case upon this subject is undoubtedly the Express Cases (117 U. S. 1). This is the general heading covering several suits presenting substantially the same question, as they were all suits begun by expressmen against railways to compel them to give them respectively the express facilities on the several lines of railway which they had previously enjoyed by contract and of which they had been dispossessed by notice given in accordance with the terms of exclusive contracts made with favored companies. Judgments below had been rendered in favor of the express companies from which the railroad companies appealed. The cases were elaborately ar-

gued; and the whole history of the course of dealings that had gone on between the express companies and the railroad companies was discussed.

The decision of the majority of the court went off upon this evidence. Mr. Chief Justice Waite concludes the majority opinion thus: "In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practicable moment, to take one express company on some or all of their passenger trains, or to provide some other way of doing express business on their lines, it has never been the practice to grant such a privilege to more than one company at the same time, unless a statute or some special circumstances made it necessary or desirable. The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts, and no other companies have ever been admitted except by agreement."

According to prevalent opinion as to the local force in the federal courts of a decision of the Supreme Court upon matters of general commercial law, it must be admitted that this decision practically settles the law for interstate commerce. It is, also, the common law for intrastate commerce in California, Indiana, Massachusetts, and North Carolina, at least.

At the beginning of this controversy both sides admit that to the extent to which a common carrier has made public profession covering a given line of business he is bound to serve all that apply without discrimination. Here is the first difficulty. It may be established that the usual course of dealing between the railroad companies and the express companies has been upon the basis of special contract; on the other hand, it may be shown that the railways have universally made some provision for handling express matter. This is so clear that it may be asserted that the modern railroad owes some duty in respect to the transportation of small and valuable parcels safely and quickly. But to whom is this duty owed? It hardly seems to be to the expressman; for the railroad could plainly carry on this branch of the transportation business for the general public, and it could then exclude all expressmen from the route. Therefore, the duty that it owes seems to be rather to the general public who ship through the expressmen. But even if this be accepted as an accurate preliminary statement, the discussion is but fairly begun.

The arguments from policy that are urged in these conservative cases are not conclusive, although they have a certain force. It is true that it is somewhat more difficult for the railroads to handle three distinct expresses than one, but not more difficult than many problems of railroading that are part of every day traffic handling. Subdivision of express cars upon light runs, and more development of the special train for express matter, would solve the difficulty; and the railroad is protected in any event by the right to charge a fair price for its services based upon the cost of service. Again, it is said that large express companies are better than a greater number of smaller companies. It should be pointed out, however, that the doctrine of the Express Cases may be used to exclude the national express companies with their full equipment from any railroad system, the directors of which favor some local company.

[1] Pfister *v.* R. R., 70 Cal. 169; Louisville, etc. Ry. *v.* Keefer, 146 Ind. 21; Sargent *v.* R. R., 115 Mass. 416; Exp. Co. *v.* R. R., 111 N. C. 463. This is governed by statute in some jurisdictions; for example, to-day in Massachusetts by statute, such number of local expressmen shall be permitted to operate over a given route as the railroad commissioners shall decide. See Rev. Laws, c. 111, § 241.

III

To bring out the difference of opinion upon this important matter it may be well to give at some length, one of the leading cases upon the other side of this controversy. The most radical decision upon this side is to be found in McDuffee *v.* Portland and Rochester Railroad (52 N. H. 430). This was an action on the case by the plaintiff, an expressman, against the defendant railway for not furnishing the plaintiff terms, facilities, and accommodations for his express business on the defendants' road between Rochester, N. H., and Portland, Me., reasonably equal to those furnished by the defendants to the Eastern Express Company. The defendants demurred to the declaration, which demurrer the Supreme Court finally discharged.

The gist of Chief Justice Doe's opinion may be seen from the following extract: "A railroad corporation, carrying one expressman, and enabling him to do all the express business on the line of their road, do hold themselves out as common carriers of expresses; and when they unreasonably refuse, directly, or indirectly, to carry any more public servants of that class, they perform this duty with illegal partiality. The legal principle, which establishes and secures the common right, being the perfection of reason, the right is not a mere nominal one, and is in no danger of being destroyed by a quibble."

The doctrine of this case is also the law of England, Maine, New Hampshire, and Pennsylvania,[1] because there are square decisions upon the point in those jurisdictions. But as this issue is but one instance of the more general problem, this would naturally be the holding in other jurisdictions where there are decisions of similar tendency, which will be discussed later in this chapter.

It is admitted by both sides to this controversy that the modern railroad company owes a duty in respect to express matter to the general shipping public. Thereupon, it will be maintained by one side that if the railroad makes provision for the transportation of express matter by entering into an arrangement with an expressman to carry on the business along its route, it thereby fulfills its duty; and that it may, therefore, make an exclusive contract if it pleases, although that involves discrimination. But it may be answered from the other side that this argument carried to its logical conclusion leaves the public without protection. If the public duty in this matter does not go to the extent of preventing discrimination in performing it, none of the law of public service applies between the railroad company and the express company; and it follows that any express company may be charged extortionate prices. Such unreasonable charges, if not forbidden, will inevitably react upon the general shipping public to whom, by the hypothesis, a public duty is owed to provide adequate service for reasonable rates.

It may be urged at this stage that since the express business itself is a public calling, therefore, the express companies themselves are bound to give satisfactory service at reasonable rates. But their duty is relative; if they cannot get adequate facilities they are not bound to provide them; and if they must pay extortionate prices they may charge these against the general shipping public as necessary operating expenses. If the Express Cases are law, there is no limit upon the amount which the railroad may charge the express company and no way by which the reaction of that charge upon the shipping public may be avoided. This seems to reduce the doctrine of the Express Cases to an absurdity; if, as those cases decide, there is no public duty owed from the railways to the expressmen, then it is because of that gap impossible in any way to protect by the law the shippers of express matter from the machinations of those who are concerned with transporting it.

[1] *Accord:* Pickford *v.* G. J. Ry., 10 M. & W. 399; Parker *v.* G. W. Ry., 7 M. & G. 253; New Eng. Exp. Co. *v.* R. R., 57 Me. 188; McDuffee *v.* R. R., 52 N. H. 430; Sandford *v.* R. R., 24 Pa. 378.

IV

These are not dead issues that are being discussed, for the doctrine of the Express Cases continually hampers the common law in dealing with real oppression in connection with transportation. Within the year public opinion has been much aroused against the exclusive arrangements entered into between the railways and the refrigerator car companies. Finally the Interstate Commerce Commission, upon complaints made by various shippers and consignees, instituted an investigation into the matter, the results of which are reported under the heading, Re Transportation of Fruit (10 Int. Com. Rep. 360). It was shown that the respondent railroad companies, the Pére Marquette and the Michigan Central, had entered into contracts with the other respondent, the Armour Car Lines, to furnish the refrigerator car service for the transportation of fruit over their lines, that under these contracts the use of any other car service was prohibited, and that the icing during transportation was to be exclusively performed by the car company. Further, it was proved that following after the making of this arrangement the cost of refrigerator car transportation increased from fifty to one hundred and fifty per cent.

The conclusions of the commission may be seen by a few extracts from the opinion of Mr. Commissioner Prouty: "We think it is the duty of the respondent railroad company to furnish refrigerator cars for the transportation of this fruit. The defendant railways may provide such cars either by purchase on their own account or by lease from other roads, and if the latter plan is adopted they may undoubtedly enter into exclusive contracts like that before us. This has been settled by the Supreme Court of the United States. (*The Express Cases*, 117 U. S. 1). Whether the carrier is legally compellable to furnish ice for the refrigeration of such cars is more doubtful. In our opinion it should be. Granting, however, that there is no liability resting upon the common carrier to provide refrigeration, this must be clear, that the railway must either furnish ice itself for a reasonable price or permit the shipper to do so. We have seen in this case that the refrigeration charges imposed by the Armour Car Lines Company are unreasonably high. By making these exclusive contracts the defendant railways in effect impose upon the shippers of such fruit, exorbitant charges for the transportation of their product to market, and we think they thereby violate the first section of the interstate commerce."

It is pretty generally agreed that what ought to be done in dealing with the private car lines is to apply to the whole situation the coercive law that regulates public calling. Either the railways ought to be obliged to conduct the refrigerator service themselves, furnishing their own cars, or if they decide upon a different policy they should be obliged to haul the cars of as many refrigerator lines as chose to undertake the business. But the conservative doctrines held by the Supreme Court of the United States stand in the way of the immediate application to interstate commerce of any such progressive views as these.

It does not seem that the ruling by the Interstate Commerce Commission is relieving the situation much; for if the favored car line is allowed to retain its monopoly it is hopeless to expect the refrigeration charge to be brought down to the cost of service. Even after it has been established, as it soon will be, that the refrigerator-cars and the tank-cars are as much employed in the public service as the parlor-cars and the sleeping-cars, the problem will remain so long as the principle of the Express Cases is law. Therefore, it must be reluctantly recognized that this rather exigent problem must await the slow processes of compromise legislation.

In the meantime, in the absence of efficient regulation by thorough-going law, those private car lines that have exclusive agreements with the railways are showing

very clearly what may happen when a common carrier is permitted to foster a monopoly in a dependent service. The truth is that a wide gap exists between the maximum charge beyond which the courts will not allow those who are serving the public to go, and the minimum rate which competition between rival services will produce. Whether this be good economics or not, the firm belief of the Anglo-Saxon race, as expressed in its common law, is that the advantages of free competition to the public where competition is possible outweigh, in the long run, any temporary conveniences from monopolistic arrangements that may be urged.[1]

V

An analogous question is raised when a railroad having terminus upon a wharf in a navigable stream, enters into some arrangement with one steamboat line whereby it may have exclusive access to the wharf. In Indian River Steamboat Co. *v.* East Coast Transportation Co. (28 Fla. 387), the scheme employed was this: The Indian River Steamboat Company leased from the Jacksonville, Tampa & Key West Railway Company, 390 feet of the east end of its dock on the Indian River, at Titusville, on which dock was located the railroad track and terminal facility of the railroad company; and the railroad company covenanted, and agreed in the lease, to maintain the railroad track on said dock and bulkhead and to furnish exclusive facilities for transfer of local freight to and from the bulk-head. The bill asked for an injunction to restrain respondents, a rival steamship line, from using this dock at Titusville.

Mr. Justice Mabry wrote the opinion of the court. He said in one place: "The real question presented here is, can complainant corporation, engaged in carrying freight and passengers on the Indian River by means of steam-boats, rent from a railroad common carrier its dock on said river, on which its track and terminal facilities are located, and exclude others from landing at said terminal point for the purpose of receiving and delivering freight and passengers to and from said common carrier? This question, we think, must be answered in the negative. If it be competent to sustain such a contract, the common carrier can select one connecting line of boats, and exclude all others from doing business with it. Such a doctrine would lead to the legalizing of a monopoly, and the sanction of an unfair and unjust preference between connecting and competing lines of transportation. We do not understand that a common carrier ever had such power as this." [1]

The principal case seems sound in every particular if one accepts the progressive view in dealing with this problem; but if one adopts the conservative view it is difficult to see why the decision must not be the other way. And it seems that any other result would be unfortunate; since, by force of such an exclusive arrangement, the railroad might turn its patrons over to the favored company and demand what price it pleased for fostering this monopoly. And again, if this were legal, there would seem to be no way to prevent the Steamboat Company from charging this terminal expense against the shipping public. In some instances, perhaps, this exclusive arrangement might stand, as if it were all one line operated by one system, competing steamboats might be excluded from the intermediate wharf; and, although this is more doubtful, if the wharf were no public station of the railroad at all, but private prem-

[1] What may be done by a progressive court in dealing with a situation like the one under discussion in this section, is shown by the decision about the private tank-car lines, State *v.* Cincinnati, etc. R. R., 47 Oh. St. 130.

[1] West Coast Co. *v.* Louisville & N. R. R., 121 Fed. 645, is squarely accord; so is Macon D. & S. R. Co. *v.* Graham & Ward, 117 Ga. 555; so it seems is Alexandria Bay Steamboat Co. *v.* New York C. & H. R. R. R., 45 N. Y. Supp. 1091; and perhaps Ilwaco Ry. & Nav. Co. *v.* Oregon S. L. & U. N. R. R., 57 Fed. 673, is not opposed.

ises controlled by the steamboat company, other steamboats possibly might be kept away. In this case, as in the others, the first question is as to how far the public duty goes; within those limits there ought to be no discrimination.

VI

The most modern application of this law is to be seen in a case from Canada, the Telephone Case (3 Can. Ry. Cas. 203). The facts require full relation for appreciation of the problem. The Bell Telephone Company by an agreement, dated November 11, 1891, covenanted to furnish to the Canadian Pacific Railway Company wherever it might have exchanges, telephone connections between the offices and stations of the railway company and the exchanges of the telephone company free of charge, and to issue to the officials of the railway company annual passes good for the trunk lines of the telephone company and free telephone exchange connection. The railway company agreed to furnish to the telephone company annual passes over its lines, and the telephone company was to have the exclusive right of placing telephone instruments, etc., in the stations, offices, and premises of the railway company throughout the Dominion. This agreement was to remain in force for five years, and on November 11, 1896, it was continued for a further period of three years. On May 1, 1902, a new agreement in similar terms was entered into between the two companies and was to remain in force for a period of ten years. The municipalities at Fort William and Port Arthur, having previously established municipal telephone exchanges in competition with the Bell Telephone Company in those towns, desired to connect with the stations of the Canadian Pacific Railway Company and after the passing of the Railway Act of 1903, an application was made to the Board of Railway Commissioners.

The majority of the tribunal held that there was nothing illegal in giving such a exclusive right; but a minority held for the applicants. An extract from each view is given herewith as the case is of first impression. Bailey J., for the majority, said: "If it be said that the Bell Company has a monopoly, the question may fairly be asked, 'What does their monopoly consist of?' Certainly not of the telephone business. There is nothing to prevent telephone companies from being established in any locality where a company with means sufficient for the purpose may choose to locate. The extent of their monopoly so far as affects the present application is the right to have their phones in the railway station on railway premises. The only difference between the Bell Company and any other company is that the railway company's agent may be reached directly by subscribers by phone, other companies not having a phone in the station may reach him indirectly by their agent most conveniently located. There is, therefore, no monopoly of the business of telephony; there is no monopoly of the information which the railway officials have to furnish for the general public; there will be no material difference in the expense of maintaining him; so that, so far as I can discover, the general interests of the public are not prejudicially affected."

Mills, dissenting, said in part: "In all these cases, however, one thing is clear, viz: that the fundamental and guiding principle is the public interest, and that no restraint upon trade or restriction upon legitimate business in any part of the country, should be regarded as reasonable and in harmony with public policy, unless it can be clearly shown that it does not interfere or tend to interfere with the rights and interests of the public in that locality. It may be said that an exclusive privilege, such as that in the telephone agreement, does not interfere with the public interest, because the public will be better served by a strong, well-equipped organization, such as the Bell Telephone Company, than it would be served if free competition were allowed. That may or

may not be so. One thing we know, viz: that this is the argument of all monopolists. We know, also, that, generally speaking, the people are the best judges of their own interests; and, on a well-established principle of government in free countries, they should be allowed to decide such questions for themselves — whether to depend wholly on an organization such as the Bell Telephone Company, or to establish a municipal system of telephones for their own use." [1]

VII

One of the most bitter controversies within this general dispute is over the right of a railway company to exclude all but certain favored hackmen from its station grounds. It is admitted by all, that a railroad owes such duties to its incoming and outgoing passengers that it cannot exclude from its station driveways hackmen bringing passengers, or hackmen directed by passengers to call for them; for of course no one, upon reflection, would go so far as to deny the duty of the carrier of passengers to permit free access and egress for those whom it is serving. Notwithstanding this, it is maintained by many courts that the railroad company is under no public duty to admit hackmen to its station grounds to solicit business.

One of the strongest cases for the railway in this matter is the New York, New Haven & Hartford R. R. Co. *v.* Scoville (71 Conn. 136). In that case it appeared from the complaint that the plaintiff by its Board of Directors adopted a regulation excluding from its station grounds all persons who, without special permission in writing, should come to solicit the carriage of passengers or their luggage. The defendant, knowing the regulation, soon afterwards entered upon its station grounds in Middletown to solicit business of that description. This is a bill for an injunction to stop this practice. The injunction was granted in the lower court, but the higher court set this aside.

Mr. Justice Baldwin held that the main question to be determined was whether the regulation was reasonable; saying that it rested primarily within the discretion of the company: "In regulating matters of this kind, a wide discretion is necessarily entrusted to the managers of the railroad. They are in a situation which should make them the best judges of what promotes the comfort of those who ride upon their road. Courts will always be slow to pronounce unreasonable any rule purporting to be directed toward that end, which they have deliberately adopted. It appears from the complaint that the station grounds at Middletown are sufficiently large to allow the establishment there of a public stand at which to ply the carriage and express business, and also that an exclusive privilege for maintaining such a stand there has been granted by the plaintiff to a third party. Such a grant was within its lawful powers, provided its terms were not inconsistent with the reasonable accommodation of the passengers upon its road. Nothing appears on the record to indicate any such inconsistency. It may well be more convenient for them to deal with a single local carrier than to be met, on alighting from their train, by importunate solicitations from a number of rival competitors for their custom; and, in the absence of averments to the contrary, it is to be presumed that the prices at this stand are fair, and the service sufficient. If any of them prefer that of some other person, they can secure it by an order in advance, which would justify his entrance on the grounds; or by passing by the stand established there, and going into the streets outside, to engage whomsoever they think fit. It follows that the defendant had no right to enter the Middletown station grounds for the purpose of soliciting business."

This rule that a railway may exclude

[1] Compare People *v.* Western Union Telegraph Co., 166 Ill. 15; and see Cumberland Telephone Co. *v.* Morgan's La. R. R. Co., 51 La. Ann. 29.

from the privilege of soliciting passengers upon its station grounds all hackmen except those to whom it has granted an exclusive right would seem to be the law of England, the federal courts of the United States, and of Connecticut, Massachusetts, Minnesota, New Hampshire, New York, Ohio, Rhode Island, and Virginia.[1]

There is again plainly no public duty owed by the railways to the hackmen. The hackmen are not asking for transportation nor are they paying rates. And, *ultra vires* aside, the railways might, if they chose, establish a cab-service of their own for the further transportation of their passengers, and in connection therewith they might exclude all rival carriages from soliciting patronage in their stations. Nor could the hackmen complain if they were all confined behind a bar in an appropriate part of the station, for this would be a reasonable regulation for administering the facilities for the general benefit of the passengers. But a regulation which arbitrarily admits one line of hacks to the station and excludes another is a different matter; and whether this is valid or not depends upon whether it is consistent with the general duty of the carrier or not.

[1] Barker *v.* Midland Ry., 18 C. B. 46; Borst *v.* Hardie, 23 Vict. Sup. Ct. 479; Pennsylvania Co. *v.* Donovan, 116 Fed. 907, S. C. 120 Fed. 215, S. C. 124 Fed. 1016; N. Y. N. H. & H. *v.* Scoville, 71 Conn. 136; Kates & Cab Co., 107 Ga. 636; Old Colony R. R. *v.* Tripp, 147 Mass. 35, Boston & A. R. R. *v.* Brown, 177 Mass. 65; Boston & M. *v.* Sullivan, 177 Mass. 230; Godbout *v.* Union Depot, 79 Minn. 188; Hedding *v.* Gallagher, 72 N. H. 377; Brown *v.* N. Y. C., 75 Minn. 359, Brown *v.* R. R., 151 N. Y. 674; N. Y. C. *v.* Flynn, 74 Hun 124; N. Y. C. *v.* Sheeley, 27 N. Y. Supp. 185; N. Y. C. *v.* Warren, 64 N. Y. Supp. 781; Snyder *v.* Depot Co., 19 Oh. C. C., 368; N. Y., N. H. & H. *v.* Bork, 23 R. I. 218; Norfolk *v.* Old Dominion Co., 99 Va. 111.

In the following cases, among others, it was held that at all events hackmen bringing passengers or coming for passengers on special order must be admitted: Griswold *v.* Webb, 16 R. I. 649; Sumnutt *v.* State, Shea 413.

VIII

The best case to bring out the argument on the other side, because the most succinct, is State *v.* Reed (76 Miss. 11). From the agreed statement of facts it appeared that there was in connection with the railroad station in the city of Vicksburg a considerable enclosure; that the railroad company had granted to one Perue, exclusive privilege of entering the station grounds in order to solicit passengers; and that hackmen kept thereby outside the enclosure were, therefore, at great disadvantage. One Reed, a hackman, was arrested for trespassing within the enclosure contrary to the public prohibition made by the railroad company; he was acquitted and appealed.

Mr. Chief Justice Woods held that the action of the court below in discharging Reed was correct; he sums the matter up thus: "The question is one that affects not only the excluded hackmen, it affects the interests of the public. The upholding of the grant of this exclusive privilege would prevent competition between rival carriers of passengers, create a monoply in the privileged hackmen, and might produce inconvenience and loss to persons traveling over the railroad, or those having freights transported over it, in cases of exclusion of drays and wagons from its grounds, other than those owned by the person having the exclusive right to enter the railroad's depot grounds. To concede the right claimed by the railroad in the present case would be, in effect, to confer upon the railroad company the control of the transportation of passengers beyond its own lines, and, in the end, to create a monopoly of such business, not granted by its charter, and against the interests of the public.

This rule that the railroad may admit favored hackmen to solicit business upon the station premises and exclude all other hackmen would seem to be the established law in Florida, Illinois, Indiana, Kentucky,

Michigan, Missouri, Mississippi, and Montana.[1]

There seems to be a violation of the duty owed by the carrier to the passenger to permit free egress by these special privileges at the station which prevent the passenger from having equal access to all who wish to put themselves at their disposal. The right of the passenger to have ingress to the station by any carriage that he chooses to employ nobody dares to deny; it is very hard to see any essential difference from the obligation to give egress without discrimination. Moreover, to allow the grant of exclusive privilege permits the exploitation of the passenger by this monopoly; for monopoly price is always higher than competitive price; as may be shown by the fact that the favored lines are always willing to pay roundly for the exclusive privilege, even when maximum fares are fixed by local ordinance.

IX

A case since the express cases which came up for decision in the Supreme Court of the United States really involves the same general issue — Chicago etc. R. R. *v.* Pullman Southern Car Co. (139 U. S., 79). The facts so far as they are material to the present issue are these: An exclusive contract was entered into between a railroad company and a palace-car company whereby the latter company was to have the exclusive right for fifteen years to furnish parlor and sleeping-cars on all passenger trains of the railroad company, the railroad company binding itself not to contract with any other company to run the same class of cars over its lines during that period. Now, if this be considered an arrangement within a field not covered by public duty there is really no objection to such a transaction; for such arrangements for exclusive dealings between two private parties are properly not considered objectionable. But if there is a public duty in the premises then such a contract should be held void as against public policy.

The court disposed of the case by denying that there was any public duty to take on competing lines of palace-cars. An extract from the opinion of Mr. Justice Harlan follows: "The defendant was under a duty arising from the public nature of its employment to furnish for the use of passengers upon its lines, such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing-room and sleeping-cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendants' lines were supplied with the requisite number of drawing-room and sleeping-cars, it was a matter of indifference to the public who owned them." [1]

The argument for the conservative view is undoubtedly put most attractively when it is phrased in terms of public duty. It is squarely averred in this case, and in others which follow its line of thought, that the duty to the public is fully performed when the railroad makes provision for the subordinate service by entering into an arrangement with an independent company to do it, and that the public stand indifferent as to who shall serve them, provided that service

[1] Indian River S. B. Co. *v.* East Coast Transp. Co., 28 Fla. 387; Penna. Ry. Co. *v.* Chicago, 181 Ill. 289; Indianapolis Ry. *v.* Dohn, 153 Ind. 10; McConnell *v.* Pedigo, 92 Ky. 465; State *v.* Reed, 76 Miss. 211; Kalamazoo Hack & Bus Co. *v.* Sootsma, 84 Mich. 194; Cravens *v.* Rodgers, 101 Mo. 247; Montana Ry. *v.* Langlois, 9 Mont. 419.

In the following cases, among others, reasonable regulations governing carriage stands at railway stations were held valid upon the ground that no discrimination was involved: Cole *v.* Rowen, 88 Mich. 219; Smith *v.* R. R., 149 Pa. St. 249.

[1] *Accord*, Worcester Excursion Car Co. *v.* Pa. Ry., 2 Int. Com. Rep. 792.

is offered. This argument has the force and weakness of half-truth. All this is so; and yet if public duty plays no part in governing the arrangement between the railroad company and the palace-car company the public may without illegality be made subject to an exorbitant price by reason of the exaction of an outrageous fee for the monopoly; while, if public duty governs the railroad in entering into this arrangement, it must accept as many palace-car companies as care to take the risk of entering into this business upon paying a fair charge for haulage. There would never, in fact, be much actual competition under such circumstances; but there would always be the benefit to the public which results from potential competition.

X

The point has been raised a few times whether there is a duty in respect to the provision of food for passengers. In Kelly *v.* C. M. & St. P. R. R. (93 Ia. 436), it appeared that the railroad had arranged with the plaintiff to have a dining-room near the station premises at Sanborn Station where trains were stopped for meals. Later, another arrangement was made with other parties at Spencer Station, twenty-seven miles distant; in this latter contract the railroad agreed to transport supplies free, and to furnish fuel. Thereafter, the train schedule allowed for meals at Spencer instead of Sanborn. Plaintiff in this action alleged these discriminations.

The court decided in favor of the railroad. Extracts from the opinion of Mr. Justice Deemer follow: "We are not inclined to commit ourselves to the doctrine that because a railroad company carries freight free of charge to one of its eating-houses, and furnishes the proprietor with fuel, ice, and transportation for his family and his employés, it is bound to do so for all without reference to the contractual relations existing between them. Again, it is charged that others doing a like business with plaintiff were not charged for carrying their goods. Now, plaintiff was conducting an eating-house under an express contract for the benefit of the defendant company, in which we have held that all the conditions are fully expressed. And, under the allegations of the pleading, others who were engaged in a like business had their freights free. It is evident, then, that the charge is that others who were conducting eating-houses for the benefit of the defendant, under express contracts, had their freight free. According to the petition, the whole matter is relegated to the domain of contractual relations, and there is nothing to show that plaintiff, and the others to whom he refers, had the same kind of contracts. The company may well have considered the benefits to be derived from one eating-house were much more than from another, and may have agreed to pay the proprietor of one more than it did another. Any other rule would compel the defendant company to make leases of its grounds for eating-house purposes on the same terms and conditions with all persons, without reference to the difference in benefits to be derived on account of location, character of building, ability of lessee, or any other of the many considerations which always enter into such transactions. We do not think a cause of action is stated."[1]

The public duty here again, is to the traveling passenger; for it cannot be denied that those who carry passengers over long distances owe them the duty to make provision for food for them. The rule is thus stated in Penniston *v.* Chicago, St. Louis, etc., R. R. (34 La. Am. 777), by Mr. Justice Poché: "In conveying passengers through long journeys, such as from Chicago to New Orleans, at great speed and with rapidity, a common carrier is required by humanity, as well as by law, to provide its passengers with easy modes and to allow them reason-

[1] It may be claimed with some truth that Perth General Station Committee *v.* Ross, 1897, A. C. 479, is accord.

able time for the purpose of sustaining life by means of food and necessary refreshments. Hence it is that on all such roads arrangements are made to enable passengers to obtain at least two meals a day, and that announcement is made in every passenger train by employés of the road of the approach of a train to a station where, under arrangements with the company, meals are prepared for the convenience of passengers."

There may be seen in this again, the conflict of opinion between the two schools of thought, the first finding no duty in respect to food supply, the second insisting that there is a duty. If the prices charged for food should be outrageous there ought to be redress; and it should be pointed out again that any monopolistic arrangement tends toward higher prices.

XI

Another case of the public duty of carriers of passengers, is the admitting of baggage-transfer men to stations. There is, upon this issue, therefore, the same bitter controversy; some jurisdictions would permit the exclusion of all but the favored line, while others would allow equal access to all. The history of the New Hampshire case of Hedding *v.* Gallagher, shows in how delicate a balance public opinion is upon the question. In that case the Boston & Maine Railroad granted to plaintiff for valuable consideration, the exclusive right to solicit business from passengers within the station grounds at Manchester. When Hedding first asserted his right, the Supreme Court finally decided against him (69 N. H. 650 S. C. 70 N. H. 631) but a little later Hedding revived his suit, joining the railroad as a party, and the Supreme Court then gave judgment for plaintiff upon demurrer. (72 N. H. 377.)

The opinion of Walker, J., is a most comprehensive argument for the conservative view, that there is no public duty involved which prevents discrimination such as this is. He elaborately disposes of the arguments for the progressive view and concludes as follows: "As the corporation does not claim it has the right to exclude job teamsters employed by its passengers to bring baggage to the station for transportation on the cars or to meet them on their arrival, and as it is admitted that, under its contract with Hedding, its passengers will receive better service at the station, with reference to opportunities for the removal of their baggage, than could be afforded by the presence there of an unnecessary number of unemployed truckmen engaged in the solicitation of passengers for the carriage of their baggage, its right to exclude the defendants from its station when there on their private business is as broad and unlimited as that of any owner of real estate to expel persons trespassing upon his premises. If its duty to its passengers is fully and satisfactorily discharged by other instrumentalities, there is no reason, arising from considerations of public convenience or necessity, why the additional burden should be imposed upon it, as a property owner, to furnish standing-room in its station for other people to render the performance of that duty less efficient and more disagreeable to the traveling public."

This question, whether access to the station may be granted exclusively to one baggage-transfer line and altogether denied to others, is another case under the general problem. On one side it may be said, as before, that there is no direct duty owed by the company to the baggage-transfer lines or any of them; and that, therefore, the railroad may make any discriminations that it pleases. For, as is pointed out in the principal case just quoted, if there is no public duty in the matter, a public-service company may bestow its favors as it pleases; and to many courts it seems that the railways may deal as they please with the baggage-transfer people. This is undoubtedly law in Connecticut, Georgia, Massachusetts,

Minnesota, New Hampshire, New York, Rhode Island, and Virginia.[1]

On the other hand, in many other jurisdictions it would certainly be held that the general duty owed by the railway company to its passengers to allow them free egress from its station, involved the duty to allow them free access within the station to those who might wish to put themselves at their disposal to aid them in getting their belongings away. This certainly would be held in Florida, Indiana, Kentucky, Michigan, Mississippi, Missouri, and Montana.[2]

XII

Whatever the duty may be, it must have some stopping place. It cannot be matter of obligation, for example, to do for every baggage transfer man what is done for any. The obligation is only in so far as there may be fairly said to be a duty to the public. It will be profitable to inquire, therefore, the precise extent to which it may be agreed that the duty goes in this case. In Kates *v.* Atlanta Baggage and Cab Co. (107 Ga. 636) the complaint was made in four separate counts: First, that the defendants permitted the cab company to enter the passenger-trains before reaching the city, for the purpose of soliciting baggage, and refused the same privilege to the petitioner; Second, that the servants of the cab company were allowed access to the passenger-train for the purpose of soliciting patronage and for more conveniently attending to its business, and this privilege was refused to petitioner; Third, that the privilege of using an office in the baggage-room of the defendants for the transaction of its business was granted to the cab company and refused to Kates; Fourth, the privilege of checking the baggage of prospective passengers at hotels and residences in advance of delivery of the baggage at the passenger-station. Each of which privileges was refused to the petitioner."

Mr. Justice Little held that none of these four grounds of complaint were well founded. "The merit of his complaint, if any exists, must be found in the fact of the refusal of the defendants to grant to him the opportunities so to serve the public and thereby better his business. Whether the refusal so to do is proper or unlawful does not depend upon the favor or inclination of the railroad company, but upon the plaintiff's right. If it should depend upon favor, then the plaintiff in error has no cause of complaint, because favor is essentially free and voluntary, and may not be demanded; and it is in this view that we come to measure by the legal standard what are the rights of the petitioner under the allegations he makes, as against the rights of the defendants to control property to which they have title and consequently the right of use; and the plaintiff in error, to succeed, must establish the proposition that the defendants as common carriers are in law bound to afford to him the same conveniences and facilities for carrying on his business which they afford to others engaged in the same calling."

But is not a distinction to be made in handling the complicated facts of the principal case now under discussion? If it be maintained that at arrival at the station, the railroad owes to the passenger with baggage, free movement and free access, so that it must allow the transfer men equal accommodation there and the same proximity to passengers, is it necessary to go further and to require the railroad to grant to all, the privilege of soliciting upon trains

[1] Cartier *v.* Grand Trunk Ry., 12 Lower Can. Jur. 140; N. Y., N. H. & H. R. R. *v.* Scoville, 71 Conn. 136; Kates *v.* Atlanta Baggage Co., 107 Ga. 636; Old Colony R. R. *v.* Tripp, 147 Mass. 35; Godbout *v.* Union Depot, 79 Minn. 188; Hedding *v.* Gallagher, 72 N. H. 377; Brown *v.* N. Y. C. R. R., 151 N. Y. 674; Norfolk & W. Ry. *v.* Old Dominion Baggage Co., 99 Va. 111; N. Y. N. H. & H. R. R. *v.* Bork, 23 R. I. 218.

[2] Indian River Sb. Co. *v.* East Coast Co., 28 Fla. 387; Indianapolis R. R. *v.* Dohn, 153 Ind. 10; McConnell *v.* Pedigo, 92 Ky. 465; Kalamazoo Co. *v.* Sootsma, 84 Mich. 194; Craven *v.* Rogers, 101 Mo. 247; Montana Ry. *v.* Langlois, 9 Mont. 419; State *v.* Reed, 176 Miss. 211.

before arrival, and of checking from houses of intending travelers? It would seem that these last privileges are truly matters of favor and not matters of right; and that the Georgia and Texas cases which allow exclusive privileges in these respects are to that extent, at least, unexceptionable decisions.[1]

It is obvious that the outside limits of this public duty which the common carrier owes in respect to dependent services have now been reached. So long as there was a question of the right of shippers in respect to the transportation of their goods, there was a public duty in the premises; and while it could be said that the service was one concerning adequate facilities for passengers, the public duty existed. Within these lines there should be neither exploitation nor discrimination; but beyond these conditions the common carrier should remain free to carry on its own business in its own way. For example, as it owes no duty to passengers to see to the provision of flowers, magazines, cigars and souvenirs, it may grant exclusive privileges for the sale of these articles upon its trains; and so it may grant in a station exclusive rights to barbers and bootblacks. In street-cars, likewise, advertising rights may be given to one and refused to another, and certain newsboys may be allowed to sell papers while others are not. All these are more than the adequate facilities that the law requires to be provided by the common carrier to its patrons. And this may be shown by the fact that none of these trades which have just been mentioned are so affected by a public interest as to be held public employments.

XIII

There have been brought forward now the principal arguments for the conservative view and the progressive view. The former ignores what the latter insists upon, that the inevitable consequences to the general public of holding that there is no public duty governing the dealings between the common carriers and the dependent services always may be, and often proves to be, extortion in a way which the law governing public calling, if thus limited cannot reach. For if there is no duty upon the common carrier not to discriminate among those who wish to conduct dependent services there is no duty not to overcharge for the special privileges; and whatever those that conduct the dependent service must pay for these facilities, they can charge against the public as a necessary expense of operation. It seems that this result, which is not at all improbable, must outweigh any convenience which sometimes may happen where there is an exclusive privilege granted.

But even if the common carrier at times exercises his discretion by seeing to it that the dependent service is provided under fair conditions, the danger remains in leaving this important situation without law; for if there is abuse of discretion and those who need the dependent service are systematically exploited, then there will be no law in reserve by which redress is possible. And if experience in dealing with the public service companies is teaching anything, it is showing that only the most comprehensive law will prove effectual; for if a way of escape is left, it will be found. Therefore, it is to be hoped that the progressive program in dealing with this special problem of the relation between the principal service and the dependent service will be the one that will prevail; so that every one may appreciate that the universal rule is that the common carrier by the principles of public duty in all its dealings that affect shippers and passengers, is bound to see to it that they are all served without discrimination, with adequate facilities, and for reasonable compensation.

CAMBRIDGE, MASS., September, 1905.

[1] Kates *v.* Atlanta Baggage Co., 107 Ga. 636; Lewis *v.* W. W. & N. W. R. R., 81 S. W. 111 (Tex. Cir. App.)

AN OCTOGENARIAN LORD HIGH CHANCELLOR

By R. D. McGibbon, K. C.

HARDINGE STANLEY GIFFARD, Earl of Halsbury, Lord High Chancellor of England, entered upon his eighty-first year on September the third, 1905. Although the longevity of English lawyers and judges is proverbial, it has seldom happened that a judicial officer is found at the age of fourscore discharging his duties with admittedly unimpaired physical and mental powers.

The chancellors of England, have, as a rule, been a long-lived race. Camden died at 81, Bathurst at 86, Eldon at 87, Campbell at 82, and Brougham and Lyndhurst at 90. Lord Campbell, in his diary, after mentioning the ages of a number of Lord Chancellors, says with some complacency and pride, that since the time of St. Swithin, who flourished about the middle of the ninth century, he, Lord Campbell, had been the only person who had held the Great Seal and exercised the functions of chancellor after having entered his eightieth year. The achievement of Lord Halsbury is, therefore, quite exceptional.

Lord Halsbury has held the chancellorship for brief periods in two previous administrations, and is now in his eighteenth year of office but his record is yet far behind that of Lord Eldon, who held the seals for over twenty-four years.

At the recent banquet of the Hardwicke Society held in London, July 6, 1905, the perennial vitality and fitness of Lord Halsbury were the predominant theme of the oratory of the evening.

However suspicious one may be of compliments and praises bestowed under the influence of what the French call *la chaleur communicative des banquets*, there can be no doubt of the genuineness of the admiration and respect — one might almost say the affection — entertained towards the chancellor by the Bench and Bar of England.

His official duties are multifarious and exacting. *Inter alia* he sits judicially in the House of Lords and in the Judicial Committee of the Privy Council; he is a member of the Cabinet; he presides over the deliberations of the House of Peers, in whose debates he must frequently take part, he makes appointments to both high court and county judgeships; he nominates magistrates; selects sheriffs; appoints clergy to crown livings; generally supervises the administration of justice; promulgates countless rules of procedure and order; has the care of lunatics and wards in chancery, and attends to a hundred and one minor duties, all taking time and attention.

In addition, the ceremonies of the court would be incomplete without the chancellor, and Lord Halsbury is continually found delivering spirited and breezy speeches at public dinners and meetings of all kinds. He presided at the farewell banquet to Mr. Choate in Middle Temple Hall, on which occasion his remarks were both sympathetic and witty, and his most recent exploit was a charming speech in the French language at the luncheon given by the members of Parliament to the admiral and officers of the northern squadron of the French Republic in celebration of the *entente cordiale*.

One of the judges at the Hardwicke dinner is authority for the statement, that, not long ago, Lord Halsbury astounded an assembly of Anglican bishops by proclaiming without apparent contrition, that he is in the habit of playing golf on the Sabbath day.

Chancellor Thurlow, by the way, when staying at a country house at which a bishop was a fellow-guest, was asked by the latter if he would come and hear him preach on Sunday.

"No," said Thurlow, "I am obliged to listen to your damned nonsense in the House of Lords, but there I can answer you,

and I am damned if I am going to hear you when I cannot reply."

Evidently, if Lord Halsbury is to be taken as a specimen, the British race is not deteriorating physically.

His judicial deliverances seem to satisfy not only the standard of the legal profession, but the sublimated wisdom that is popularly supposed to be possessed by "the man in the street" — supreme arbiter of the twentieth century. In the consideration of the many new problems which have arisen of late years, such as those connected with modern Company Law, combinations and conspiracies in restraint of trade, Trade Union Law, and the Workmen's Compensation Act, the Lord Chancellor's pronouncements have been characterized by their extreme sanity, and by the large vein of common sense and reasonableness which pervades them. Other judges may be more showy and pedantic, their judgments may seem more recondite and subtle, and their parade of black-letter learning and case law more labored, but the chancellor has a knack of saying what he means in vigorous terse English, in a manner which appeals strongly to the profession and the public as the opinions of a virile, fearless, and well-balanced man, who hits the nail on the head.

No judge differentiates more clearly between the sphere of the legislator and that of the judge, and he does not endeavor to convert the latter into the former.

Withal, the chancellor has the reputation of being a profound classical scholar and strongly favorable to the compulsory study of Greek as part of a literary education.

At the Hardwicke society dinner referred to, Sir Edward Clarke, K.C., formerly solicitor general, speaking of Lord Halsbury, said that the Lord Chancellor was the greatest judge before whom he had ever practised, and while his indomitable and perpetual youth might have disappointed the expectations of other people, those who were really interested in the efficient discharge of judicial duties could not but be thankful that the Lord Chancellor had been granted so long a period for the exercise of his most excellent influence on the administration of the law.

Other distinguished speakers coincided in the encomium of Sir Edward. In fact, members of the Bench of England may to-day piously look up to Lord Halsbury as the author and finisher of their iudicial being, as with only three exceptions every judge now on the Bench owes his elevation to the present chancellor.

It would be affectation to affirm that none of his Lordship's appointments have been properly open to criticism, but on the whole, the judicial force which owes its selection to him is distinctly creditable. The courts are up to date and delays are uncommon. The "cunctative" judge would be an impossibility in these days under Lord Halsbury.

The great office of Lord High Chancellor of Great Britain and keeper of the Great Seal, is certainly the most historic judicial position in the world. Probably it is also the most important, and a list of the predecessors of Lord Halsbury from the time of Augmendus, chancellor under King Ethelbert, A.D. 605, up to the present time contains the names of many of the best-known figures in English history.

One may be pardoned for enumerating a few of the more distinguished. St. Swithin (who was canonized for his virtues, but whose name is now chiefly connected with the superstition as to forty days of rain or sunshine) was chancellor A.D. 827–836; Thomas a'Becket, 1135; Walter de Merton, 1262; Scrope, 1378; Beaufort, 1403; Wolsey, 1515; Bacon, 1618; Littleton, 1641; Clarendon, 1658; Jeffreys, 1685; Somers, 1693; Hardwicke, 1737; Eldon, 1801; and in more recent years, Brougham, Erskine, Campbell, Lyndhurst, Cottenham, Camden, Bathurst, Westbury, Chelmsford, Cairns, Selborne, and Herschell, make a long roll of eminent jurists.

One holder of the chancellorship was

Eleanor, queen of Henry II, who was delivered of a princess on November 25, 1253, during her term of office.

It is also interesting to note that Lord Halsbury is the fourth of the name of Giffard who has been Lord Chancellor, although we are not in a position to say that he is a member of the same family as his medieval predecessors. One, William Giffard, Bishop of Winchester, held the office in 1086, under William the Conqueror. He also held office under William Rufus, in 1087, and was reappointed by Henry I, in 1100. Walter Giffard became Lord Chancellor under Henry III, in 1265, and Godfrey Giffard was appointed in 1266.

The Lord Chancellor, as keeper of the conscience of the sovereign, is supposed to keep the Great Seal constantly in his personal custody and within the realm, and Cardinal Wolsey got into serious trouble with his royal master, Henry VIII, for having taken it to Calais.

In more modern times the versatile, but eccentric Brougham made a quixotic, triumphal journey through his native Scotland, taking the Seal with him in his carriage. An amusing incident occurred on this absurd journey. The story is told by Lord Campbell as follows:

"At Rothiemurchus, the residence of the Dowager Duchess of Bedford, Brougham found a large party of English ladies, with whom he romped so much, that the ladies to be revenged upon him, took the Great Seal and hid it where neither he nor his attendants could find it. This was rather a serious practical joke, as without the Seal the government is at a standstill, the Great Seal giving authority to all the acts of the government, and every instrument bearing the impression of it is law.

"At last the Lord Chancellor was in such distress, that the ladies took pity upon him, and said he might find it blindfolded, one of the ladies playing on the piano, soft or loud as he got nearer to or further from the hiding-place. He was accordingly blindfolded, and eventually the bauble was found hidden in a tea-chest.

"This was very harmless sport, but unfortunately exaggerated reports were sent to a lady-in-waiting, and she in turn exaggerated the story in repeating it, and thus did much mischief."

On the same journey Brougham is said to have made pan-cakes on the Great Seal for the amusement of another Duchess.

Lord Eldon, incarnation of Toryism, also had a peculiar experience in connection with the Seal. During the autumn of 1812, Lord Eldon's house, at Encombe, was destroyed by fire, which he describes very graphically as follows:

"It really was a very pretty sight, for all the maids turned out of their beds and they formed a line from the water to the fire-engine, handing the buckets; they looked very pretty *all in their shifts*."

While the flames were raging, His Lordship was in violent trepidation about the Great Seal, which he always kept in his bed-chamber. He flew with it to the garden, and buried it in a flower-border. But his trepidation was almost as great next morning, for what between his alarm for the safety of Lady Eldon, and his admiration of the maids in their vestal attire, he could not remember the spot where the *clavis regni* had been hidden.

"You never saw anything so ridiculous," His Lordship said, "As seeing the whole family down that walk probing and digging until we found it."

Lord Halsbury will hardly take rank as one of the great law reformers of England. His immediate predecessors, Cairns and Selborne, were very active in this respect, but perhaps the congested state of business in the British Parliament, and the difficulty of carrying any contentious measure through both Houses may afford some reason why no great law reforms have been associated with His Lordship's chancellorship.

Still it cannot be denied that Lord Halsbury has missed a golden opportunity of

accomplishing many effective legal reforms during his long term of office, but who can say that he may not yet enable his sovereign, Edward VII, to realize the beautiful dream of Lord Brougham in his speech on law reform, in 1828, when, adverting to the boast of Augustus "That he found Rome of bricks, and left it of marble," continued, "But, how much nobler will be our sovereign's boast, when he will have it to say, I found law dear, and left it cheap; found it a sealed book and left it a living letter; found it a patrimony of the rich, left it the inheritance of the poor; found it a two-edged sword of craft and oppression, and left it the staff of honesty and the shield of innocence," and that the name of Halsbury himself may not live imperishably in English history with that of Romilly, Mackintosh, Brougham, Campbell, Selborne, and other eminent law-reformers?

One would like to see the Lord Chancellor more strenuous in accomplishing the founding of the proposed British University of Law, a scheme which moves with stately slowness. It may be recalled that in the sixteenth century, Cardinal Wolsey actually projected an institution to be founded in London for the study of all branches of law, and even furnished an architectural model for the building, which was considered a masterpiece, and remained long after his death as a curiosity in the palace at Greenwich.

Lord Campbell says, "Such an institution is still a desideratum in England, for with splendid exceptions English barristers, although very clever practitioners, are not such able jurists as in other countries where law is systematically studied as a science."

In modern times, it would appear that the importance of the political side of the Chancellorship has diminished. Certainly since the days of Eldon and Brougham none have made themselves conspicuous or notorious as cabinet-makers or political intriguers. Nor would the public of to-day tolerate neglect of the judicial duties of the office on account of excessive devotion to statecraft and wire-pulling.

The chancellor, being still a member of the cabinet, naturally is called upon to promote and defend government measures in the House of Lords, on such occasions leaving the woolsack and speaking from the floor of the chamber. In the closing days of the last session of Parliament, the venerable chancellor replied to the Earl of Rosebery, in the debate which was raised over the refusal of the government to resign or dissolve on account of an adverse vote in the Commons. The chancellor's speech was spirited, concise, and full of caustic sarcasm. In fact, of all the many speeches made, none in either House compare with the Lord Chancellor's for cogent reasoning, clear statement, and sparkling retort.

Still, less and less will the chancellor be the politician, and more and more the chief judicial officer of the empire. But even if denuded of a portion of its duties, the office will still retain occupations of a magnitude and importance amply sufficient to preserve its historic dignity and prestige.

The chancellorship of Lord Halsbury will always be a memorable one in the annals of English history, and for nothing will His Lordship be more particularly remembered than for his courtesy and consideration for his brethren on the Bench and at the Bar, for his admirable selection of judges, for his great executive ability, and for the manly, unaffected, and optimistic influence which he has irradiated throughout his long and brilliant career, during which he has shown himself to be the highest type of an English gentleman and an almost ideal chancellor.

As he passes the fourscore mark, we are sure that lawyers the world over will extend to him their congratulations, and wish him many happy returns of the day.

MONTREAL, CANADA, September, 1905.

THE KANSAS–COLORADO WATER SUIT

By George P. Costigan, Jr.

On May 20, 1901, the state of Kansas, by leave of court, filed in the Supreme Court of the United States an original bill of complaint against the state of Colorado. The general purpose of that bill was stated to be to get a decree preventing the state of Colorado from diverting, or from authorizing any person, firm, or corporation, to divert any of the waters of the Arkansas River or its tributaries for any purpose except for domestic use. The Arkansas River takes its rise in Colorado, where the doctrine of the appropriation of water for mining and irrigating purposes is fully established, and flows into Kansas, where the common law doctrine of riparian rights largely prevails; and the suit raises broadly the question of the proper adjustment of the rights of water users in such an interstate stream. Preliminary to a somewhat detailed reference to the suit, a word should be said about the appropriation of water doctrine and the importance of this particular litigation.

West of the 99th meridian lies what is known as the arid region of the United States — a part of the country which, because of altitude, of mountain ranges which deflect storms, and of inland situation, has so dry a climate that the soil, if watered only by rainfall, is unproductive. The result is that in all that region, with a few exceptions that simply emphasize the rule, agriculture is carried on wholly by irrigation, *i.e.*, by the diversion of water from the various streams and rivers — all too few in number — which are found there, and the application of that water to the otherwise dry and thirsty soil sought to be cultivated. Even in the mountains, where the melting snows furnish the source of supply of many of the streams, the exigencies of mining require the diversion and using up of much of the water. The consequence has been that in the arid part of the United States necessity has given rise to the general abandonment by common law states of the old common law doctrine of riparian rights in streams. In Colorado, for instance, water is no longer, as it was at common law, an incident to the land over which it flows, but on the contrary, is of such nature that it may be appropriated in the stream in which it runs by wholly non-riparian proprietors, if they are the first appropriators, and when appropriated, may be entirely used up by them for beneficial purposes, such as farming and mining, despite the protests of the riparian owners.[1] It has long been agreed that it is only because of this doctrine of appropriation — a doctrine several times recognized and sanctioned by Congress and by the United States Supreme Court — that Colorado and the other states and territories of the arid region have enjoyed any sort of prosperity.

In the petition in intervention filed by the United States in the Kansas-Colorado water suit, it is pointed out that under the appropriation of water doctrine, the inhabitants of Colorado and of Kansas have, "within the watershed of the Arkansas River, reclaimed and made productive and profitable about two hundred thousand acres of land, which have provided, and now provide, homes for and support a population of many thousands" and that under that doctrine the inhabitants of the whole arid region have "reclaimed and made productive and profitable not less than ten million acres of land, which now provide homes for and support a population

[1] In Colorado water-rights do not necessarily pass as appurtenances of lands granted, though they pass as such if the intention of the parties to have them do so can be ascertained. Bessemer Irrig. Ditch Co. *v.* Wooley, 76 Pac. 1053. Under the Reclamation Act of Congress of June 17, 1902, the right to the use of water acquired under that act is made by the act appurtenant to the land irrigated. 32 U. S. Statutes at Large, Part I, page 390, Sec. 8.

of several millions." It is further pointed out in that petition that under the reclamation act of Congress of June 17, 1902 whereby irrigation reservoirs and dams are to be erected by the United States, about one hundred thousand acres of land belonging to the United States within the watershed of the Arkansas river west of the 99th meridian, which are now uninhabitable, unproductive, and unsalable, can be reclaimed and rendered habitable, productive, and salable, "provided that under said act reservoirs and dams are erected and maintained to catch, store, and impound the unappropriated waters of natural streams in said region, and to catch, store, and impound the flood and other waters therein, and provided such waters, when stored and impounded, are conducted to and used upon such arid land as by said act intended;" that these one hundred thousand acres when reclaimed and irrigated will be capable of supporting a population of not less than fifty thousand; and that in the whole arid region not less than sixty million acres of land now uninhabitable, unproductive, and unsalable can be reclaimed and rendered productive by irrigation under that act; and that these sixty million acres when reclaimed will provide homes for and support a population of many millions. It is further pointed out that if the common law doctrine of riparian rights were to be held applicable to riparian lands within the arid region, the aforesaid sixty million acres of land in said region belonging to the United States would forever remain uninhabitable, unproductive, and unsalable, and the area of ten million acres now irrigated therein and supporting a population of several million people must be deprived of water for irrigation and be returned to its original desert condition. The appropriation of water doctrine is thus shown to be of vital importance to the arid region.[1]

[1] It should be borne in mind, of course, that the Kansas-Colorado water litigation affects only interstate streams and their tributaries, and that as to streams which lie wholly within appropriation-law states, the doctrine of appropriation will not be affected by that suit. The destructive effect of a strict application of the common law riparian-right doctrine to interstate streams in the arid region can, however, hardly be overestimated; as the petition in intervention points out, many thousands in the Arkansas River valley alone would have their farms desolated thereby.

And now to scrutinize more closely the suit of the state of Kansas against the state of Colorado. To the bill in that case a demurrer was filed, attacking the jurisdiction of the court. On April 7, 1902, that demurrer was overruled.[1] Thereafter the bill was amended by adding as defendants a number of Colorado corporations which own and operate ditches or canals in Colorado and divert therein a large amount of the waters of the Arkansas River and its tributaries; and the issues in the cause were made up on that amended bill and on a petition in intervention filed in behalf of the United States. By motion the attack on the jurisdiction of the court was also renewed.

The amended bill is primarily one to maintain the right of riparian proprietors along the Arkansas River in Kansas (the state of Kansas itself claiming to be one of such proprietors) to prevent the appropriation in Colorado for irrigation of any more of the waters of the Arkansas River than have heretofore been appropriated. The amended bill alleged in substance:

1. That the Arkansas River rises, and all its tributaries rise, in Colorado; that it flows in Colorado for about 280 miles; that it then flows in Kansas for about 310 miles, and that it has a drainage area of about 22,000 square miles.

2. That when the territory of Kansas was organized in 1854, it included all the drainage area of the Arkansas River now in Colorado, and that the common law, including the doctrine of riparian rights, extended over the whole Arkansas valley; that by reason of prior settlement, occupa-

[1] Kansas *v.* Colorado, 185 U. S. 125.

tion, etc., the state of Kansas and the owners of land upon the banks of the river acquired, and now have the right, to the unimpeded and uninterrupted flow of the water of the river into and across the state of Kansas and that these rights accrued prior to any appropriation of water in Colorado.

3. That Colorado, by its constitution and legislation, has attempted to grant to individuals the right to divert the waters of the Arkansas River in Colorado; that upwards of one thousand persons, firms, and corporations claim that under the Colorado constitution and statutes they have derived rights to divert water for irrigating non-riparian arid lands, and in pursuance of those claims have constructed reservoirs, canals, and ditches, and do divert water which otherwise would flow through Kansas.

4. That the flow of water in the river-bed in Kansas is valuable; because evaporation therefrom tends to cool and moisten the surrounding atmosphere and to enhance the value of the lands, and not only conduces directly and materially to the public health, but makes the locality habitable. That the "underflow" of the Arkansas river in Kansas, *i.e.*, the portion of the river which flows beneath the surface through the sand and gravel, when said underflow is at its usual height, is also of great and lasting benefit to the bottom lands, both those which abut on the river and those which do not, and is of great benefit to the people owning and occupying said lands, in that it furnishes moisture sufficient to grow ordinary farming crops in the absence of rainfall, and furnishes water at a moderate depth below the surface for domestic use and for the watering of animals. That the ordinary and usual rainfall in the major portion of the valley of the Arkansas River in Kansas is utterly inadequate to the growing and maturing of cultivated crops at any time, because the precipitation is very scanty, and because it does not fall during the growing season of the year; and that the diversion of water from the river in Colorado is carried to such an extent that no water flows in the bed of the river from Colorado into Kansas during the annual growing season, and the underflow is diminishing and continuing to diminish, and if said diversion continues to increase a large part of the fertile bottom-lands of the Arkansas valley in Kansas will become arid desert.

5. That the diversion of the water of the river in Colorado not only has a bad effect upon agriculture and pasturage in Kansas, but also causes the channel of the river itself to fill, and, therefore, in times of freshets to allow adjacent land to be overflowed and injured by the deposits of debris and dirt.

6. That the state of Kansas owns lands along the Arkansas River in Kansas, and, on that account, is injured by the diversion of water in Colorado, and that, in addition, such diversion, by causing the value of the land in the Arkansas valley to shrink, diminishes the taxes which the state can collect.

7. That the state of Colorado itself diverts water, and is threatening to divert more water from said Arkansas River and said tributaries in Colorado.

The amended bill prayed that the state of Colorado be enjoined from granting, issuing, renewing, or permitting to be granted, any charter, license, permit, or authority, to any firm, person, or corporation, to divert the water of the Arkansas River or its tributaries in Colorado, except for domestic use, and from itself diverting any; that the other defendants be enjoined from diverting any of said water; that the respective rights of the parties be defined and fixed, and that the complainant have general relief.

While the allegations of the bill and the prayer for relief are so framed as to deny any right of appropriation of the water of the Arkansas River in Colorado for other than domestic purposes, the contention of Kansas does not in fact go so far. As was said by the United States Supreme Court in deciding on the demurrer:

"The state of Kansas appeals to the rule of the common law, that owners of lands on the banks of a river are entitled to the continual flow of the stream, and while she concedes that this rule has been modified in the western states so that flowing water may be appropriated to mining purposes and for the reclamation of arid lands, and the doctrine of prior appropriation obtains, yet she says that modification has not gone so far as to justify the destruction of the rights of other states and their inhabitants altogether; and that the acts of Congress of 1866, and subsequently, while recognizing the prior appropriation of water as in contravention of the common law rule as to a continuous flow, have not attempted to recognize it as rightful to that extent. In other words, Kansas contends that Colorado cannot absolutely destroy her rights, and seeks some mode of accommodation as between them, while she further insists that she occupies, for reasons given, the position of a prior appropriator herself, if put to that contention as between her and Colorado." [1]

The various answers to the amended bill deny the allegations about the diversion in Colorado diminishing the flow or the underflow of the Arkansas River in Kansas; the allegations about the damage to land proprietors in Kansas, and to Kansas itself by the diversion, etc. They go further and allege that the flow of water in the Arkansas River in Kansas has not been decreased by irrigation in Colorado, but rather "equalized," because while such irrigation has diminished the volume of the river in times of flood, the seepage from the water used in times of flood has increased the flow of the river in periods of comparative drouth. They further deny that the underflow alleged in the amended bill is really an underflow, but on the contrary, allege that the underground water in the Arkansas valley in Kansas is "the ordinary water-table of the country." They further allege that Kansas is not only guilty of laches, but has, in part, recognized and adopted the doctrine of appropriation of water for irrigation. They all deny in substance that the common law doctrine of riparian rights ever applied in the Arkansas valley region. Colorado goes further and after declaring that Colorado is a sovereign state, that the Arkansas River is non-navigable, and that the right to the continual use of the waters of said stream by diversion and application on the land is as essential to the life and well-being of the inhabitants of the valley as is the lands on which they dwell, asserts that under international law and interstate law, Colorado cannot be subjected to the burden of denying its inhabitants the use of an element which nature has supplied entirely within Colorado, and without which, and the free use thereof, its lands would be uninhabitable.

The pleadings are quite voluminous, but enough has been stated above to show the general nature of the issues. Thousands of pages of testimony have been taken and the case may go off on a question of fact; for there seems to be considerable ground for contending that even supposing Kansas to be entitled to the strict application of the common law doctrine of riparian rights, she has failed to show any injury done. As, however, the suit looks to the future, and as, by insisting as it does unqualifiedly that its inhabitants have the right to divert for beneficial uses within Colorado (and, of course, only for beneficial uses) all the waters of the Arkansas River, if such uses require all such waters, Colorado threatens future injury to Kansas, the chances are that the legal questions will receive a square determination. What adds weight to this belief is that the United States has intervened, stating that both Colorado and Kansas take positions which imperil the interests of the United States; and the Supreme Court will probably feel that as the litigation is before them, the United States is itself entitled to have the legal questions passed on.[1]

[1] Kansas *v.* Colorado, 185 U. S. 125, at page 146.

[1] The allegation of the United States is: "That neither the contention of the state of Colorado, nor the contention of the state of Kansas is correct; nor does either contention accord with the

The fight on the legal propositions in the Kansas-Colorado case is, therefore, three cornered. Colorado insists that in all streams taking their rise in Colorado the inhabitants of Colorado have a right to diversion of water, qualified only by the requirement that the water shall be put to beneficial use, and, therefore, a right which, if sufficient beneficial uses can be found in Colorado, may by its exercise, utterly cut off the inhabitants of another state from any use of the waters of such streams. Kansas, on the other hand, insists in general that interstate streams entering Kansas must be allowed an uninterrupted, unimpeded, and undiminished flow into that state, though concessions are made in argument to the court in favor of appropriators in Colorado whose rights have already vested. The United States insists that both Colorado and Kansas are wrong and that the true view is that the doctrine of appropriation must prevail, but without any limitation by state lines.

Since the Kansas-Colorado case was started, the Supreme Court of Kansas has decided that the riparian-rights doctrine prevails in that part of Kansas affected by the suit.[1] There would seem no longer to be any question, therefore, that unless the Kansas-Colorado case goes off on matters of fact, it presents squarely for determination the rights in a riparian-law state of proprietors of riparian lands in an interstate stream which takes its rise in a state where the appropriation of water doctrine in its extreme form is adopted. It takes no prophet, however, to say that the United States Supreme Court will never hold that a riparian-law state lower down on an interstate stream can prevent any diversion and dissipation of the water in an appropriation-law state higher up;[1] just as it takes no prophet to say that the court will not permit the state where the interstate stream takes its rise to keep states lower down on the stream from having any benefit of the waters of the stream;[2] and it seems certain that some interstate application of the appropriation of water doctrine will be the ultimate result. To make this apparent it is necessary only to consider briefly the history of landownership in the arid region.

With the exception of certain Spanish and Mexican land grants to individuals, which do not affect the question in hand to any appreciable extent, all the lands in the arid region were acquired by, and, therefore, belonged originally to, the United States.

doctrine prevailing in the arid region in respect to the waters of natural streams and of flood and other waters. That either contention, if sustained, would defeat the object, intent, and purpose of the Reclamation Act, prevent the settlement and sale of the arid lands belonging to the United States, and especially those within the watershed of the Arkansas River west of the 99th degree west longitude, and would otherwise work great damage to the interests of the United States."

[1] Clark *v.* Allaman (Kas., April 8, 1905), 80 Pac. 571. The attorney-general of Kansas appeared in the case as *amicus curiae*, because of the bearing of the litigation on the Kansas-Colorado suit.

[1] See U. S. *v.* Rio Grande Co., 174 U. S. 690, where the right of an up-stream state to adopt the appropriation of water doctrine is affirmed.

[2] Kansas *v.* Colorado, 185 U. S. 125. See Howell *v.* Johnson, 89 Fed. 556. That the lower state is entitled to all surplus waters cannot, of course, be doubted. Perkins County, Neb. *v.* Graff, 114 Fed. 441.

Colorado would never allow an individual land-proprietor, in whose lands were springs which had supplied the water which had been used for years by lower proprietors, to terminate the latter's enjoyment of the water, by himself devoting to beneficial uses all the waters of the stream. It is only where one has artificially developed water that previously was not there that he is entitled to come in ahead of lower proprietors. See Platte Valley Irrigation Co. *v.* Buckers Co., 25 Colo. 77. For a case where the latter doctrine was carried to an extreme, see Crescent Mining Co. *v.* Silver King Mining Co., 17 Utah, 444.

The Supreme Court of the United States cannot be expected to give to Colorado as against Kansas greater rights than the Supreme Court of Colorado would give to an upper proprietor in whose lands a stream took its rise as against a lower proprietor. Its decision on the demurrer so indicates. Kansas *v.* Colorado, 185 U. S. 125.

While these lands were owned by the United States there was no necessity for the application of the common law regarding riparian ownership and rights,[1] but, on the contrary, the United States government was free to adopt any policy about water rights which it saw fit. It naturally adopted the policy which the necessity of the case demanded. First, through the executive department of the government, and then by the Act of July 26, 1866,[2] the United States recognized the appropriation of water doctrine and protected water-rights acquired under it.[3] By a number of subsequent acts, including the Desert Land Act of March 3, 1877,[4] and the Reclamation Act of June 17, 1902,[5] the United States continued to recognize the appropriation of water doctrine as the one applicable to the arid region.

While it is true that Kansas was admitted into the Union in 1861, and therefore, prior to the act of 1866, Colorado was not admitted until after that act, and it would never be held that by admitting Kansas into the Union the United States gave up any right to adopt or legalize the appropriation of water doctrine in the territory now known as the state of Colorado. Besides the United States Supreme Court has said that the Act of 1866 "was rather a voluntary *recognition of a preëxisting right of possession* constituting a valid claim to its continued use, than the establishment of a new one," [1] and that preëxisting right undoubtedly antedated the admission of Kansas into the Union.[2] After the United States has so persistently countenanced the appropriation of water doctrine, and, indeed, has actually made most of its sales of land in the arid region because that doctrine existed and was recognized by it, and particularly after the United States Supreme Court has itself enforced the doctrine,[3] and has also affirmed the right of the several states to adopt the doctrine,[4] there would

[1] It is often said that the federal government, as such, has no common law. By statute, however, the United States from time to time, adopts common law rules, and it seems settled that as to interstate and other transactions where federal questions are involved, the principles of the common law are operative, except so far as they are modified by congressional enactment. Western Union Telegraph Co. *v.* Call Pub. Co., 181 U. S. 92, at pages 100 to 103. We shall see, however, that the common law regarding riparian ownership and rights never prevailed in the arid region.

[2] Now Section 2339 of the United States Revised Statutes.

[3] "It is the established doctrine of this court that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of water was an absolute necessity, are rights which the government had by its conduct recognized and encouraged, and was bound to protect before the passage of the Act of 1866." Broder *v.* Water Co., 101 U. S. 274, at page 276.

[4] 19 United States Statutes at Large, 377.

[5] 32 United States Statutes at Large, Part 1, page 388.

[1] Broder *v.* Water Co., 101 U. S. 274, at page 276, citing: Atchison *v.* Peterson, 20 Wall. 507. Basey *v.* Gallagher, 20 Wall. 670. Forbes *v.* Gracey, 94 U. S. 762. Jennison *v.* Kirk, 98 U. S. 453.

[2] See Coffin *et al. v.* Let Hand Ditch Co., 6 Colo., 433, at pages 446–47.

[3] See cases in Note 14.

[4] United States *v.* Rio Grande, etc., Co., 174 U. S. 690, at pages 702–3. There the right of a state to adopt the appropriation of water doctrine is stated to be subject to the two exceptions: (1) that it cannot thereby destroy the right of the United States as a riparian claimant, and (2) that it cannot thereby interrupt the navigability of streams. As to the second exception, it should be borne in mind that the petition in intervention of the United States in the Kansas-Colorado water-suit, sets up that the Arkansas River is navigable in Arkansas and in Indian Territory, though that question may never be material. A third exception to the right of a state to adopt the appropriation of water doctrine has apparently been established by the decision on demurrer in the Kansas-Colorado suit itself, viz: That by adopting the appropriation of water doctrine a state may not deprive a state lower down the stream from all use of the water. Kansas *v.* Colorado, 185 U. S. 125.

seem to be little doubt that the appropriation of water doctrine will stand, though it will undoubtedly be given some interstate application which will protect as fully as may be, the rights of water users in states lower down the stream.[1]

Upon the question of the right method of protecting riparian proprietors in the downstream states, there is room for a difference of opinion, but it would seem as if the contention of the United States as intervenor in the Kansas-Colorado suit is right. Where a state higher up on a stream adopts the appropriation of water doctrine, riparian rights in a state lower down on the stream are necessarily to some extent infringed, and as long as it is established that the upper state has a legal right to adopt the appropriation doctrine, the only way for riparian owners in the lower state to get other recompense than damages[1] is to come in as appropriators. They can do this by insisting that appropriation, historically and in essence, knows no interstate lines; that, fundamentally, it requires only the diversion of water and its application to a beneficial use to establish an appropriation;[2] and that

[1] The Kansas Supreme Court attempts to show that by authority of Congress the common law, and, in consequence, the riparian-right doctrine, was extended over the arid region. Clark *v.* Allaman (Kas.), 80 Pac. 571. It should be noted, however, that general statutory provisions adopting the common law leave that law subject to change by special statutes, and that, as a result, the Federal Act of 1866, and subsequent acts, excepted the riparian-law doctrine from the common law prevailing in the arid region controlled by the United States, if it had not already been excepted. Moreover, the common law has never been adopted in the several states and territories, except so far as applicable to conditions there; and the riparian-law doctrine has certainly never been "applicable" to Colorado and the rest of the strictly arid region. It is further to be remembered that even if it must be deemed that from an early day the common law has fixed rights to water in the arid region, it by no means follows that the riparian-law doctrine has been part of it there. The common law has considerable flexibility, and just as its existence in the several states of the United States is consistent with the ownership of land in those states being non-feudal so its application to the arid region is perfectly consistent with the appropriation of water doctrine. It may indeed, be asserted that the doctrine of appropriation of water has always been the common law doctrine for arid regions, just as that of riparian rights has always been the common law for wet localities. It is no objection to the appropriation of water doctrine as the common law rule for arid regions to say that it is a new *pronunciamento* of the courts. The Rule against Perpetuities, for instance, was not announced in any form until after 1607, the year which the Colorado statute names as the one in which the common law adopted by Colorado shall be ascertained; yet the Colorado Supreme Court very properly held that the Rule against Perpetuities exists in Colorado, and that too, in the very latest form given to it by the English courts. The reasoning of the Colorado court is found in the following sentences: "The common law thus being a constant growth, gradually expanding and adapting itself to the changing conditions of life and business from time to time, what the law is at any particular time must be determined from the latest decisions of the courts; and the recognized theory is that *aside from the influence of statutory enactments the latest judicial announcement of the courts is merely declaratory of what the law is, and always has been.* We are at liberty, therefore, if not absolutely bound thereby, to avail ourselves of the latest expression of the English courts upon any particular branch of the law, in so far as the same is applicable to our institutions, of a general nature, and suitable to the genius of our people, as well as to consult the English decisions made prior to 1607." Chilcott *v.* Hart, 23 Colo. 40, at page 56. What was true of the Rule against Perpetuities is no less true of the arid region appropriation of water doctrine.

[1] In Nebraska an appropriator's right to the use of the water appropriated is superior to that of a riparian owner, even though the latter be higher up on the stream, where the riparian owner, after the appropriation, seeks to make reasonable use of the stream for the irrigation of the riparian lands; but the riparian owner can recover damages to the extent that his riparian rights are impaired. McCook Irrigation & Water Power Co. *v.* Crews (Neb.), 102 N. W. 249. See former opinion in same case in 96 N. W. 996.

[2] "This appropriation is the intent to take accompanied by some open physical demonstration of the intent, and for some valuable use." McDonald *v.* Bear River Co., 13 Cal., 220. See Ft. Morgan Land & Canal Co., *v.* Ditch Co., 18 Colo. 1.

on such basis, riparian owners in the down-stream state may easily be held to be appropriators and as such entitled to share, according to priorities of appropriation, in the waters of the interstate stream. In other words, the situation between an appropriation-law state higher up on a stream and a riparian-law state below, with respect to that particular stream, should be held to be the same as that which exists where two appropriation-law states are disputing over water. In the latter case it has been held that an appropriator in the lower state can go into the federal court and compel the appropriators in the upper state to allow enough water to come down to give him his rightful share.[1] While the appropriator in the lower state cannot go into the upper state's courts and compel an adjudication of his priority of rights under the latter's local statutes,[2] he can go into the federal courts and get adequate relief. So a riparian proprietor appropriator,[1] living though he does in a down-stream state, should be given the protection in the federal courts against diversion in an up-stream state which he would be given if he were an appropriator in a down-stream appropriation law state.

In closing it should be said that in the Kansas-Colorado water suit a serious condition is presented, and the Supreme Court of the United States is the one to deal with it. As that court points out: "The states of this Union cannot make war upon each other; they cannot make reprisal on each other by embargo; they cannot enter upon diplomatic relations and make treaties,"[2] and it is, therefore, the duty of the United States Supreme Court to adjust the water-rights of the inhabitants of Kansas and of Colorado. It is believed that this can be done most equitably by adopting the general legal doctrine advocated by the intervenor, the United States, viz: That priority in the appropriation of water, regardless of which state the appropriation was made in, must control.

DENVER, COL., September, 1905.

[1] Howell *v.* Johnson, 89 Fed. 556. To the same effect is a so far unreported decision by Judge Hallett in the Circuit Court for the District of Colorado in the case of Hoge *v.* Eaton. The opinion in that case was filed Feb. 27, 1905. See also Willey *v.* Decker (Wyo.), 73 Pac. 210.

[2] Lamson *v.* Vailes (Colo.), 61 Pac. 23. That the courts of the upper state cannot, even by consent, adjudicate finally the rights of water-users in the lower state, see Conant *v.* Deep Creek etc., Irrigation Co. (Utah), 66 Pac. 188. But see Willey *v.* Decker (Wyo.), 73 Pac. 210, apparently *contra*.

[1] This is a correct designation, owing to the fact that even the riparian-rights doctrine allows the reasonable use of the waters of a stream for irrigation. See Long on Irrigation, Sec. 11.

[2] Kansas *v.* Colorado, 185 U. S. 125, at page 143.

The Green Bag

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Communications in regard to the contents of the Magazine should be addressed to the Editor, S. R. WRIGHTINGTON, 31 State Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

The problems arising from the multiplication of judicial precedents are among the most pressing that confront not only the reformers of our jurisprudence, but the practitioners who endeavor to prepare their cases with the accuracy they deserve. As it is an increasing difficulty, discussion of the many phases of the subject is natural and desirable, for as the time of reform is forced upon us it is important that lawyers have a clear understanding of the problem and of the suggestions which the history of the jurisprudence of other nations may afford. It is worthy of notice that discussions of this sort are of increasing frequency in the meetings of our Bar Associations and in the pages of our magazines.

Chief among these is the controversy between the advocates and opponents of codification as a remedy. Many articles upon this subject have been reviewed in our recent issues. The chief argument of the opponents is that good codification is impossible, and, therefore, will only increase the difficulty. They add to this the historic evidence that a written code is soon interpreted by judicial decisions until the judge-made law surpasses the written in volume and importance. The reply to this is usually that the code, at least, will give us a fresh start.

Dr. Taylor's address before the Virginia State Bar Association, which we publish in this number, throws fresh light on the historic evidence that permanent adherence to written law is impossible for an advanced civilization. The analogies afforded by the history of Rome and England have been the subject of recent discussions by specialists in ancient law, but, although the facts regarding the interpretation of our Constitution are even more familiar, his bold conception of these decisions as an adaptation rather than an interpretation, pointing the way to like developments in future when the real or fancied dangers from changes in industrial conditions demand a different relation between corporations and the state, is a new presentation which deserves the attention the reputation of its author is sure to command.

Dr. Taylor's long residence abroad and his devotion at that time to the historical rather than the practical side of constitutional law and jurisprudence have not only won him a wider recognition in England than at home; but have caused us, perhaps, to think of him more as a student of institutions than as a lawyer, but his work of recent years in practice in Washington, as evidenced by the recent publication of his new book on "Jurisdiction and Procedure in the Supreme Court of the United States," remind us that his ability and experience are not confined to the subjects in which he made his early reputation.

The beginning of the beautification of American life as evidenced in our modern public buildings very properly finds an opportunity in the court-rooms. Decorations of some of the New York courts have been frequently described in current magazines and we have thought that the profession would be interested in the account we publish in this issue of the paintings that will lend dignity to the Supreme Court-room at St. Paul. We were fortunate in securing the services of so able a critic as Miss Nabersberg to prepare our description. We wish also to acknowledge the kindness of Mr. La Farge in loaning us the photographs we reproduce.

To show that the question of the rights of carriers to grant exclusive privileges on their premises to others who deal with the public is still a live one, we need only to note the story of the recent New Hampshire cases referred to in Mr. Wyman's article in this issue. An earlier case had held that the rail-

ways could not discriminate among expressmen. Within the last few years, however, the matter was reopened by the Boston & Maine Railroad, which granted an exclusive privilege to a certain baggage transfer in its Manchester Station. Upon the first hearing the Supreme Court adhered to the earlier law, but later, upon rehearing, the decision was for the railroad. An interesting readjustment of the judicial establishment occurred between the two hearings.

The very modern subject of private car lines and refrigerating charges is also a phase of the topic of Mr. Wyman's article which will command general interest. Mr. Wyman has been a frequent contributor to our pages in the past and we need only add, for the information of our readers, that the subject of his article is included in his course on public-service corporations at the Harvard Law School.

R. D. McGibbon, K. C.

It has, sometimes, been observed that the tremendous strain of trial practice wears out a lawyer before his time, and it seems generally true that the trial lawyers who survive to a venerable age have, in their later years, been diverted to other fields of practice. It is natural that the effect of trials upon judges should be less wearing and it is pleasant to note the occasional instances of efficient judicial service at extreme old age. In our own country much attention has recently been called to the remarkable activities of Judge Jackson, of the United States District Court of West Virginia.

The record of Lord Halsbury, however, with his multifold responsibilities is a marvel among his own people, and his eightieth birthday well deserves recognition on this side of the Atlantic.

The author of our narrative of the venerable chancellor was born in Montreal, in 1857, and is a graduate of the college and law school of McGill University in that city. He was admitted to the Bar of Lower Canada in 1879, and ten years later became Queen's Counsel. He has always practised in Montreal, and has devoted himself exclusively to his profession. He is counsel for a large number of corporations and other financial institutions and the senior member of the firm of McGibbon, Casgrain, Mitchell & Surveyor.

George P. Costigan, Jr.

Though eastern readers do not always appreciate the importance of the water-problem in the West, lawyers are familiar with the fact that the courts of our western states have felt obliged to make variations in the common law respecting some ancient property rights to adapt them to the necessities of their communities.

These changes in the mining law are probably more familiar than those with respect to riparian rights, but the importance of the latter is well indicated not only by the dignity of the parties involved in the Colorado-Kansas water suit, but by the magnitude of the interests described in Mr. Costigan's contribution to this number.

He is a native of Chicago and a graduate of Harvard College and Law School, and has practised in Salt Lake City, New York City, and Denver, where he also taught in the Denver Law School. He has recently been appointed Professor of Law at the University of Nebraska.

In this issue we offer a development of our editorial department which we believe will prove indispensable to careful lawyers. The reviews of current legal articles will, hereafter include reference to all such articles as are not summarized. The notes of recent cases, prepared by the editors of the West Publishing Company, whose work on the Reporter system affords exceptional opportunity for selection of cases, will be further annotated by a group of eminent teachers and practitioners who will show the exact importance of cases in the subjects upon which they are experts.

CURRENT LEGAL ARTICLES

This department represents a selection of the most important leading articles in all the English and American legal periodicals of the preceding month. The space devoted to a summary does not always represent the relative importance of the article, for essays of the most permanent value are usually so condensed in style that further abbreviation is impracticable.

ACCIDENT (See Definition).

BIOGRAPHY (Alexander Asher Dean). Anonymous, *Scottish Law Review* (V. xxi, p. 255).

CARRIERS. "When Negligence of Carrier Will Render Him Liable for Loss of Goods Caused by Act of God," by John T. Marshall, *Central Law Journal* (V. lxi, p. 85).

CONSTITUTIONAL LAW. "The Juvenile Court in Utah as a Branch of Equity — Constitutionality," Anonymous, *Central Law Journal* (V. lxi, p. 101).

CONSTITUTIONAL LAW. "The Law of the Constitution in Relation to the Election of President," by T. Hampton Dougherty, *Albany Law Journal* (V. lxvii, p. 195).

CONSTITUTIONAL LAW. "Legislative and Judicial Encroachments on Constitutional Provisions," by Robert M. Rowland, *Central Law Journal* (V. lxi, p. 181).

CONSTITUTIONAL LAW (Regulation of Rates). "Regulation of railway rates by Congress is impracticable," asserts Blackburn Esterline in the July *American Law Review* (V. xxxix, p. 517). He admits that Congress, under its power to regulate commerce may establish a schedule of rates subject to certain limitations. This is a legislative function, the reasonableness of which is subject to review by the judicial department. His principal reason for his thesis seems to be the length of time that elapsed between the argument and the decision of certain cases in the past involving rates on a comparatively small fraction of our railroad mileage.

CONSTITUTIONAL LAW. "Regulation of Corporations," by Hon. Thomas Hagsett, Hon. C. T. Lewis, and Hon. Howard C. Hollister, *Ohio Law Bulletin* (V. 1, p. 296).

CONSTITUTIONAL LAW. "The Regulation and Taxation of Corporations," by Hubert B. Fuller, *Ohio Law Bulletin* (V. iv, p. 277).

CORPORATIONS (Federal Jurisdiction). An address by Judge Jacob Trieber before the Arkansas Bar Association on "The Jurisdiction of Federal Courts in Actions in Which Corporations are Parties," is published in the July *American Law Review* (V. xxxix, p. 565). The author analyzes the decisions and summarizes the law upon this subject. He particularly emphasizes the difficulties arising out of the modern problem arising from incorporation in more than one state.

"A foreign railroad corporation which by the laws of a state may become a domestic corporation of the latter state upon complying with certain statutory requirements, is still for jurisdictional purposes of the federal courts a foreign corporation, authorized to maintain suits against citizens of that state or remove them from a state court, but for the purpose of enjoying all the rights, privileges, and immunities of domestic corporations, including the exercise of the right of eminent domain, it is a domestic corporation, and that in the face of a constitutional provision of a state that the legislature may authorize foreign corporations to do business in the state but shall not grant them the power to condemn or appropriate private property."

He suggests the advisability of legislation to remove these anomalies.

CORPORATIONS. "Alabama's New Corporation Law," by Armstead Brown, *American Lawyer* (V. xiii, p. 327).

CORPORATIONS (See International and Constitutional Law).

CRIMINAL LAW (See Procedure).

DAMAGES. "Mental Anguish as an Element of Damage," by George Lawyer, *Central Law Journal* (V. ixi, p. 147).

DEFINITION (Accident). The cases defining the meaning of "accident" in relation to the verdicts of inquest juries, accident insurance policies, and friendly society rules, and workmen's compensation acts, are collected in an article entitled, "Definitions of Accident, Accidental, Accidentally," by Stanley B. Atkinson, in the August *Law Magazine and Review* (V. xxx, p. 439).

DIPLOMACY (Monroe Doctrine). In the July *American Law Review* (V. xxxix, p. 495) Alfred Spring publishes an interesting discussion of the history and extent of our foreign policy known as the Munroe Doctrine.

EDUCATION. The results of President Edmund J. James's "Inquiry into the Present Condition of Legal Education," which has already been much commented on in the press, are summarized in the July *American Law Review* (V. xxxix, p. 581).

FEDERAL JURISDICTION. "The Common Law in Federal Jurisprudence," by Thomas Dent, *Central Law Journal* (V. lxi, p. 123).

FEDERAL JURISDICTION (See Corporations).

HISTORY (Biblical Reference). The *Law Magazine and Review* for August (V. xxv, p. 387) publishes an interesting collection of biblical references and quotations bearing upon legal subjects by James Williams, under the title of "The Bible in Law."

HISTORY. "The Booth Case. A Chapter from the Judicial History of Wisconsin," by Hon. John B. Winslow, *American Lawyer* (V. xiii, p. 275).

HISTORY (English Manorial System). "Vinogradoff on the Manor" is the title of a review of Professor Vinogradoff's recent work entitled "The Growth of the Manor," by W. Paley Baildon in the July *Law Quarterly Review* (V. xxi, p. 294). He says that although its author modestly calls it "a summing up" this description though correct is incomplete, for it is "much more than a mere colorless summary of the work of other writers, and the submission of a choice of views to the reader; it is more in the nature of a review of many expert opinions by an expert himself; it is the summing up and judgment of the chancery side rather than the placing of facts before a jury such as obtains at common law. The book is eminently one for senior students, who have made a careful study of the voluminous literature on the subject, who have some knowledge of the intricacies of domesday, and who are acquainted with court rolls, extents, and plea rolls; these will read it with pleasure and advantage, but these only."

The author then gives a summary of the work including some criticisms and finally expresses regret that the work has not covered the history of a later period than domesday.

HISTORY (Magna Carta). To the July *Law Quarterly Review* (V. xxi, p. 250) Professor P. Vinogradoff contributes a review of Mr. McKechnie's Commentary on the Great Charter of King John, a review of which by Mr. Neilson in the July *Juridical Review* was summarized in our September number. He gives a series of criticisms of details in the several chapters of the book, concluding with a brief estimate of the importance of Magna Carta, which he says depends upon "whether it should be considered as a grant, or a treaty, or a statute, or a code." He regrets a want of definiteness in this respect in the instrument itself but feels that "as the contents of the charter include, by the side of restrictions on royal power, provisions for the general welfare of the country, and parallel concessions on the part of the barons in regard to their tenants, it seems appropriate to consider Magna Carta as a *stabilimentum*, a legislative enactment formulated in concert by king, church, and barons, as participants in sovereign power. The historical importance of this mode of legislation was considerable it brought the notion of a compact between king and subjects into public law, and thus

prepared the ground for the development of a system of estates and of Parliament."

He criticises Mr. McKechnie's book for neglect of this side of the subject, but expressly disclaims any desire to lessen the recognition of the great service of the book as a guide to the great charter in its immediate sursoundings, but he desires that this should be supplemented by another bearing on the history of Magna Carta in succeeding centuries.

INTERNATIONAL LAW (Rights of Neutral Shareholders in Corporations of a Belligerent). Sir Thomas Barclay discusses an interesting question on international law in the July *Law Quarterly Review* (V. xxi, p. 301) entitled "The South African Railway Case and International Law." This railway was constructed under a concession of the South African Republic prior to the Boer War on the condition that the government might appropriate it upon making indemnity in time of war. The government of the republic exercised its right and gave notice to that effect. The English later by proclamation announced that they would not recognize alienation of property within the republic made by it after the date of the proclamation. Later, upon evidence discovered of the use for belligerent purposes of the railway, the property was seized by the English military government. Much of the stock of this railway was held by investors in neutral countries and probably many of their shares were acquired during the war directly from the South African Republic which had owned a large block of shares previously. Foreign owners have addressed the British foreign office as to its intentions regarding their rights and a reply has been made that compensation will be offered to shareholders who prove that their shares belonged to private persons before the outbreak of the war. It is not alleged that the property in the railway passed to the British Government on the outbreak of the war. But its policy appears to be to confiscate the shares held then by the South African Republic as having at some date during the war become the property of Great Britain. But the author declares "that a confiscation based on an arbitrary distinction, devoid of legal foundation, might obviously become a most dangerous precedent, especially in the hands of some filibustering government." The possible attitude that the government is entitled to shares acquired from the republic after the publication of the notice above referred to or after the date of the proclamation of annexation the author contends is improper, because, as a matter of fact, these proclamations do not seem to have been brought to the attention of any possible purchasers.

"The only legal, even judicious course, for international law is often only expediency in a comprehensive sense. Nevertheless, the British Government, having acknowledged the existence of the government of the South African Republic down to May 31, 1902, when the treaty of surrender was negotiated, cannot now deny its existence at any time before that date, though for political purposes the British military commander professed to do so. And so long as the government of the South African Republic existed, it could dispose of what belonged to it. Nobody will dispute that the government which displaces another government assumes its obligations. Nor has any distinction ever been made between obligations incurred for civil or for military purposes. Purchases even of war material for use against the conquering forces are debts properly incurred, and it is immaterial whether the purchases were made before or in the course of the war. The only criterion is that the transactions be *bona fide*. If the South African Republic paid off any part of its debts in shares of the railway company, it only parted with property which it had a right to part with, so long as it continued to possess acknowledged corporate existence. If the shares are annulled, the right of those who received them to be paid otherwise, in accordance with the terms of their contract, by the successor of the South African Republic would revive.

"It is to be hoped, apart from the question of legality, that the British Government, in dealing with the matter, will take into consideration the danger of creating a precedent which might be used, in other similar cases, against British investors.

"The best, and indeed only proper course, would be that the British Government, setting aside all questions with individual sharehold-

ers, or groups of shareholders, take over the railway from the company either in accordance with the terms of the concession, or on such other terms and with such distinctions as may be negotiated; in case of disagreement, all differences to be submitted to arbitration."

JURISPRUDENCE (History). In the July *Law Quarterly Review* (V. xxi, p. 274) Sir Frederick Pollock continues his interesting commentaries on Maine's famous work under the heading of "Notes on Maine's Ancient Law." This is in the form of a running commentary on the text, which it is impossible to summarize.

JURISPRUDENCE (Analysis of). Judge George H. Smith contributes to the July *American Law Review* (V. xxxix, p. 531) another of his analyses of the law entitled "Of the Subject-matter of Jurisprudence." This is an analysis of the entire field of the law which it is impossible to summarize.

JURISPRUDENCE (English Land Law). In the July *Law Quarterly Review* (V. xxi, p. 221) Professor A. V. Dicey discusses what he calls "The Paradox of the Land Law," which is apparently the result of some of his studies in preparation for his recent book on "The Relation of Law and Public Opinion in England in the Nineteenth Century."

"To the student of legal history the development of the English land law from 1830 to 1900 presents this paradox: incessant modifications or reforms of the law, which extend over seventy years, and have certainly not yet come to an end, have left unchanged, in a sense almost untouched, the fundamentals of the law with regard to land. The constitution of England has, whilst preserving monarchial forms, become a democracy, but the land law of England remains the land law appropriate to an aristocratic state. This is, in itself, a phenomenon to excite attention. It must seem an absolutely incomprehensible fact to the many persons who tacitly assume that the advance of democracy necessarily tends towards the equal division of property, and especially of landed property."

He gives three reasons for this paradox. The first is the universal difficulty of making any serious change in property rights except in the midst of the changes in a political revolution. Then there was never in the nineteenth century a politically effective demand for the reform of the land laws. "Nor is it at all clear that the mass of the English people are possessed by that vehement desire for the ownership of land, which is certainly common in some continental countries and in Ireland, if one may believe the best authorities, amounts to a passion. The absence of this desire is, one may assume, in part due to economical reasons. Land is not a lucrative investment."

"Alterations, lastly, in the fundamental principles of the English land law have been arrested by the latent conflict between Benthamite individualism and democratic collectivism; modern socialism has stopped the progress of early radicalism. The whole history of public opinion during the last forty years bears witness to the conflict, sometimes tacit, sometimes open, between schools of land reformers who pursued two opposed ideals. The progress of collectivism is marked in each volume of the statute book; the slowness of its progress bears witness to the power of surviving Benthamism. In any case, the existence of this conflict is certain."

"The hostility of old radicalism to new collectivism has divided the army of reformers. Collectivists and Tories have unconsciously not for the first and assuredly not for the last time played into one another's hands. The force of the attack on the existing land law has been broken, because the assailants cannot agree on the method or the object of their campaign."

"The paradox then of the land law is fully explainable by the history of public opinion. The fundamentals of the land law stand unchanged though not unshaken, first, because their amendment is a task of great technical difficulty; secondly, because there has never as yet existed an effective demand for any root and branch reform; and, lastly, because the conflict between radicalism and socialism has for a time arrested every attempt to modify our system of land tenure."

JURISPRUDENCE. "The Human Interest of the Law," by T. R. Hughs, K. C., *Canadian Law Review* (V. iv, p. 419).

LAWYERS (Their Opportunities). An address by Louis D. Brandeis entitled "The Opportunity in the Law" is published in the July *American Law Review* (V. xxxix, p. 555) which the author summarizes as follows:

"Here, consequently, is the great opportunity of the bar. The next generation must witness a continuing and ever-increasing contest between those who have and those who have not. The industrial world is in a state of ferment. The ferment is in the main peaceful, and, to a considerable extent, silent; but there is felt to-day very widely the inconsistency in this condition of political democracy and industrial absolutism. The people are beginning to doubt whether in the long run democracy and absolutism can co-exist in the same community; beginning to doubt whether there is a justification for the great inequalities in the distribution of wealth, for the rapid creation of fortunes, more mysterious than the deeds of Aladdin's lamp. The people have begun to think; and they show evidences on all sides of a tendency to act. Those of you who have not had an opportunity of talking much with laboring men can hardly form a conception of the amount of thinking that they are doing. With many it is the all-absorbing occupation, the only thing that occupies their minds. Many of these men, otherwise uneducated, talk about the relation of employer and employé far more intelligently than most of the best educated men in the community. The labor question involves for them the whole of life and they must, in the course of a comparatively short time, realize the power which lies in them. Many of their leaders are men of signal ability, men who can hold their own in discussion or action with the ablest and best educated men in the community. The labor movement must necessarily progress; the people's thought will take shape in action, and it lies with us, with you to whom in part the future belongs, to say on what lines the action is to be expressed, whether it is to be expressed wisely and temperately, or wildly and intemperately; whether it is to be expressed on lines of evolution or on lines of revolution. Nothing can better fit you for taking part in the solution of these problems, than the study, and, preëminently, the practice of law. Those of you who feel drawn to that profession may rest assured that you will find in it an opportunity for usefulness which is probably unequaled. There is a call upon the legal profession to do a great work for this country."

LIEN (Innkeeper). "When Will an Innkeeper's Lien for the Board and Lodging of His Guest Extend to the Property of Third Persons Brought to the Hotel by His Guest," by Walter J. Lotz, *Central Law Journal* (V. lxi, p. 43).

MONROE DOCTRINE (See Diplomacy).

MUNICIPAL CORPORATIONS (Constitutional Law). "Municipal Ordinances Relating to Materials Entering into Public Work which Interfere with Interstate Commerce and the Privileges or Immunities of Citizens of Other States," by Eugene McMillin, *Central Law Journal* (V. lxi, p. 69).

MUNICIPAL CORPORATIONS (Constitutional Law). "Restricting Competition in Contracts for Public Work — Test of Validity," by Eugene McMillin, *Central Law Journal* (V. lxi, p. 204).

NEGLIGENCE. "Proximate and Remote Cause," by Silas Alward, *Canada Law Journal* (V. xli, p. 585).

PERSONS (Legitimacy, English Legacy Duties). W. P. W. Phillimore concludes in the August *Law Quarterly Review* (V. xxx, p. 422) his interesting argument entitled "Nullius Filius: 'The Stranger in Blood,'" against the validity of a long-established ruling of the officials of the English Inland Revenue Office, classifying illegitimate children as "strangers in blood," and requiring them to pay the higher duty under the Legacy Duty Act. This ruling the author shows is based on too literal an interpretation of the old Latin phrase "*nullius filius*." He regards it as

absurd to depart from the plain grammatical sense of the words and apply them "to a person who in every point of the law but that of succession to property and title is regarded as the child of his actual parents." "The custom or practice of a government department, though ancient, is no criterion for the interpretation of the law, and we may more properly say, on the other hand, that every action of official bodies should always be closely scrutinized, especially when it takes the form of imposing a penalty upon any particular class." Since the common law is more stringent than any other in determining legitimacy, the opinion of Blackstone should be heeded that "any other distinction but that of not inheriting which civil policy renders necessary would be odious, unjust, and cruel in the last degree."

PLEADING. "Demurrers to Oral Pleadings," Anonymous, *Bench and Bar* (V. xi, p. 55).

PRACTICE. "Examination of Party before Trial," by D. H. Fernandez, *Oklahoma Law Journal* (V. iv, p. 1).

PROCEDURE (Criminal. Appeals. Beck Case). An author who styles himself "Appellant" contributes to the August Law *Magazine and Review* (V. xxx, p. 399) a new criticism of the English system of reviews by the Home Office of criminal cases suggested by the now famous Beck case and the report of the Beck Commission, entitled "The Home Office and Criminal Appeals." The author objects to the suggestion of strengthening the legal element in the Home Office as a remedy and insists that the real difficulty is in the fact that the reviewing body is not an independent tribunal, and that it purports to act in the "interest of mercy rather than of justice. Moreover, their decisions could hardly have more authority so long as the grounds of them are not stated, and the policy of secrecy is maintained. Any open tribunal is pretty certain in time to become better than any secret one, because it is so much more open to amendment."

"A strong and independent tribunal would act in precisely the same manner whether there was agitation or not. It would not yield to clamor, but neither would it refrain from doing justice because it might be charged with yielding to clamor; and if the agitators threw any fresh light on the subject it would welcome that light irrespective of the quarter from which it came. But the Criminal Department of the Home Office is essentially a weak tribunal and, like most weak bodies, it follows the line of least resistance. The minimum of trouble and responsibility appears to be the great object at which it aims; and, as less trouble and less responsibility is involved in an affirmance than in a reversal, the tendency to affirm everything will soon manifest itself, more especially as no reasons for affirmance are required. 'The Home Secretary sees no reason to interfere' is the only announcement made — an announcement which in the literal sense is not true; for the reasons for interference are often clear and manifest."

PROCEDURE (Modern English). A criticism of "Some Evils of the Judicature Acts," by Anthony Pulbrook in the August *Law Magazine and Review* (V. xxx, p. 450) asserts that the main cause of the passage of this legislation was a feeling that law and equity should in some manner be fused so that one Court might have jurisdiction to grant what was termed substantial justice.

"Great expectations were indulged in that the passing of these acts would not only reduce the cost of a lawsuit, but bring justice to a poor man's door in such a manner as would place him on an equal footing with his more wealthy opponent. The Judicature Acts having now been in operation for thirty years, a sufficient period of time has elapsed to form a judgment whether they have effected the object anticipated."

The author feels that these expectations have not been realized since a judge administering what is called substantial justice is more effectively influenced by the more plausible advocate whom wealth can more easily obtain. He finds a great increase in the expense of litigation not only for plaintiffs, but for defendants who do not contest liability, and for bankrupts. Much of this expense

seems to be due to the increasing inclination of solicitors to employ counsel for all contentious matters, some of which the solicitors formerly attended to themselves. The fact that even the solicitor gets a higher fee when counsel are employed on these matters indicates a reason for the modern tendency.

PROPERTY (Contingent Remainders). In the July *Law Quarterly Review* (V. xxi, p. 265) Edward Jenks, under the title of "Future Interests in Land" replies to the proposition in the article by Mr. Kales (reviewed in our June number) that "independently of the English Contingent Remainders Act, legal contingent remainders have, as the result of recent decisions, ceased to be affected by that possibility of failure which for upwards of three centuries at least was one of their recognized features." The author notes that this is of importance not only to the states of the Union, where no such statute has been passed, but to England in cases arising out of settlements made prior to the statute. The author objects to the inferences drawn by Mr. Kales from the decisions he cited, for they were nearly all rendered in "cases in which the Court was called upon to decide not whether a particular limitation took effect, but how many members of a class could claim under it." All of these he says were influenced by an attempt to avoid the hard law of the case of Festing *v.* Allen. The other cases cited by Mr. Kales, the author distinguishes apparently more easily.

"Even, therefore, where it is a matter in dispute only between the different members of the same class, the courts have, within the last ten years, acknowledged the application of the rule whose existence Mr. Kales professes to doubt. And, as I said before, I believe there is absolutely no case in which a gift to a single person has been validated on the ground that, though it failed as a contingent remainder, it could take effect as an executory limitation under the *Lechmere and Lloyd* rule. Even if there were, it would not prove Mr. Kales' thesis, unless it clearly admitted that the limitation in question created a remainder.

"Mr. Kales' argument seems to me to amount to this: that because the courts have held certain particular forms of limitation to have created executory interests, which are, of course, incapable of failure through abeyance of the seisin, therefore all future limitations must be so treated. As the court has, in every such case, given elaborate reasons why, in its opinion, the limitations in question did not create contingent remainders, it seems rather hard on their lordships to treat their careful distinctions as mere subterfuges. Whether the two classes of future interests, which have existed side by side in English law for nearly 400 years, ought now to be assimilated, is a question of policy which I do not propose to discuss here. It may even be that such an assimilation may eventually be brought about as the result of judicial decisions. All I wish to point out is, that such a result has not yet been reached."

PROPERTY. "Reform of Our Land Laws," by Eugene C. Massie, *Virginia Law Register* (V. xi, p. 359).

PROPERTY (Restraint on Anticipation). An interesting criticism of recent English decisions on "Restraint on Anticipation Under the Married Women's Property Acts," by Kenneth R. Swan, appears in the July *Law Quarterly Review* (V. xxi, p. 233). The equitable doctrine protecting from creditors the separate estate of married women, settled with a restraint on anticipation, was early held to allow creditors to enforce their claims only against income to which she was entitled at the time the contract was made and which remained in existence at the time of the judgment. Various statutes have been passed to assist creditors in reaching a married woman's separate property, but all have carefully excluded from their provisions property which she is restrained from anticipating. In some recent cases in the House of Lords, however, while stating that the law with reference to restraint on anticipation has not been changed by these statutes, the Court has declared that the creditor can reach income, which at the date of the judgment she has power to make liable for her engagements. The author criticises this as the abandonment of a rational principle for an arbitrary limit, enabling a married woman to anticipate her income to the

extent that it accrues before the date of the judgment, setting, "the seal of judicial sanction to the long-continued practice which, since the decision of Pike *v.* Fitzgibbon, has gradually filched from the married woman restrained from anticipation a substantial portion of the freedom from liability for her debts which equity originally gave her." More recent decisions have endeavored to extend this relax ation and to reach income accrued after the date of judgment which can at least be reached by further actions on the judgment, and to the mind of the author such extension would seem a logical result of the decisions he criticises. The Court, however, has declined to make the extension.

"The question whether restraint on anticipation is, in effect, operative from the date of contract, or from the date of judgment, is therefore, reserved for some future tribunal to decide. How the courts will meet it, is not easy to forecast. For the sake of simplicity and convenience in giving effect to the judgment, doubtless *the date of judgment* has everything to commend it. But if judicial consistency is to be preserved and the equitable doctrine of restraint to be upheld in its fullest integrity, then *the date of contract* must unquestionably prevail."

PROPERTY (See Jurisprudence).

PUBLIC POLICY. "American Democracy on Trial," by Oliver E. Branch, *American Lawyer* (V. xiii, p. 278).

PUBLIC POLICY. "Lawlessness," by Moorfield Storey, *American Lawyer* (V. xiii, p. 290).

PUBLIC POLICY. "The Mortality of Trusts," by Henry Wollman, *Albany Law Journal* (V. lxvii, p. 227).

RAILROADS (See Constitutional Law).

WITNESSES (Expert Testimony). An address by Lucilius A. Emory before the Maine State Bar Association last February on "Medical Expert Evidence," is published in the July *American Law Review* (V. xxxix, p. 481). The author discusses the familiar criticisms of the system of expert testimony and adds the weight of his indorsement to several remedies that have frequently been suggested and deprecates much of the thoughtless criticism to which medical witnesses, and the system in general, have been subjected. His most striking suggestions are:

"If we, ourselves, would acquire more knowledge; would take more pains to draw out medical evidence clearly and accurately; would refrain from incomplete and contradictory hypothetical questions; would allow him reasonable limits in which to make clear his meanings; would refuse to let him act as coach; would frown upon any exhibition of partisanship; would make him understand that he is to be a witness only, and as to the truth only; would make him realize by vigorous cross-examination that he must be nothing else in the case, I think we would, on our part, contribute much to the desired improvement."

He also renews the suggestion that such witnesses be appointed by the Court and paid by the state.

NOTES OF THE MOST IMPORTANT RECENT CASES COMPILED BY THE EDITORS OF THE NATIONAL REPORTER SYSTEM AND ANNOTATED BY SPECIALISTS IN THE SEVERAL SUBJECTS

(Copies of the pamphlet Reporters containing full reports of any of these decisions may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.)

BALLOT. (VOTING MACHINES)

MICHIGAN SUPREME COURT.

City of Detroit *v.* Board of Inspectors of Election, 102 Northwestern Reporter, 1029, appears to be the first case which contains a direct decision as to whether voting by machine is a vote by "ballot."

The Michigan law provides that any city council may authorize the use of voting machines, providing that all voting by machine shall be secret. The Constitution declares that all votes should be given by ballot, and the question presented is whether the statute is in conflict with the Constitution. In determining what constitutes a vote by ballot the court declares that the question is not one of mere philology, and that the meaning of the words "by ballot" is not to be limited to the vehicle used in voting or the method of depositing votes, which was probably in the contemplation of the framers of the Constitution. The real gist of the decision is contained in the ensuing statement that the constitutional provision is a declaration of state policy assuring to the elector a secret, as distinguished from an open or announced vote. Bouvier's definition of "voting by ballot" is quoted to show that secrecy is the essential part of this manner of voting. *Ex parte* Arnold, 128 Mo. 260, 30 S. W. 769, is cited, and the statement therein that the expression "election by ballot" has been expounded and construed by the various courts of last resort, and with entire unanimity declared to be a secret ballot, and that the essential principle of this manner of voting is that the elector may conceal from every person the name of the candidate for whom he votes, is quoted with approval. Williams *v.* Stein, 38 Ind. 90; Ritchie *v.* Richards, 14 Utah, 345, 7 Pac. 670; and Brisbin *v.* Cleary, 26 Minn. 107, 1 N. W. 825, are also referred to as supporting the same idea, *In re* Voting Machines, 19 R. I. 729, 36 Atl. 716, is referred to because the court considered the argument that the framers of the Constitution as individuals never had in mind such method of voting, and stated in answer that the question was not what limitations they might have had in mind by reason of the methods to which they were accustomed, but what the language of the Constitution means or might reasonably mean, with reference to the matter under consideration. The Constitution of Massachusetts provides that representatives should be chosen by a written vote, and a divided court in opinion of the Justices, 178 Mass. 605, 60 N. E. 139, held that this authorized the use of voting machines. In this case it is said that no doubt the picture in the minds of those who used the words was that of a piece of paper with the names of the candidates voted for written upon it in manuscript, but that the thing which they meant to stop was oral or hand voting, and the benefits which they meant to secure were the greater certainty and permanence of a material record of each voter's act and the relative privacy incident to doing that act in silence. The Michigan court concludes that as the whole ballot system is based upon the idea of secrecy, and as this result is as certainly obtained by the use of voting machines as by the use of written or printed ballots, voting by machine is a "voting by ballot" within the meaning of the Constitution.

ILLINOIS SUPREME COURT.

The same question was subsequently brought before the Supreme Court of Illinois in the case of Lynch *v.* Malley, 74 Northeastern Reporter, 723. That court held that the constitution of the state, which provides that all votes shall be by ballot, does not render invalid Laws 1891, p. 178, providing for the use of voting machines. The court rests its decision upon the Michigan case above referred to, and also reviews the cases *In re* Voting Machines, R. I. 36 Atl. 716, and *In re* House Bill No. 1291, Mass. 60 N. E. 129.

BILL QUIA TIMET. (APPREHENDED INSOLVENCY OF TORT FEASOR)

TENNESSEE SUPREME COURT.

An attempted extension of the scope and application of a bill *quia timet* is denied judicial approbation in Slover *v.* Coal Creek Coal Co., 82 Southwestern Reporter, 1131. The complainants alleged that they were holders of an unliquidated claim for damages for a tort committed by defendant which was a mining corporation. It was also alleged that other claims existed growing out of the same occurrence and that suits had been commenced thereon which would go to judgment

and execution before complainants could obtain judgment, and that by the levy of the executions, the leases under which defendant conducted its business and which constituted its chief asset, would be forfeited, and all the assets of the defendant consumed leaving nothing for complainants. Complainants further declared that defendant was using every effort to work out its leases and distribute the avails as profits among its stockholders, so that its property, which chiefly consisted of the mines, would be exhausted, converted into cash, and distributed in the form of dividends before complainants could obtain a judgment. All these allegations together are held to be insufficient to support a bill *quia timet* for the purpose of impounding defendant's property.

There is nothing new in this decision, but it serves to remind those interested in remedial legislation that between the commission of a tort and judgment therefor, there is an interval during which the person injured is helpless at common law against schemes of a tort-feasor to render himself execution proof. Attachment, in a few states, affords a remedy more or less effectual. See for example, N. Y. Code Civ. Proc., § 635.

Frank Irvine.

CARRIERS. (Interstate Commerce)
Texas Court of Civil Appeals.

A recent case in support of the general proposition that the federal regulation of interstate commerce does not extend to matters of police regulation by the states is that of Missouri, K. & T. Ry. Co. of Texas *v.* Nelson, 87 Southwestern Reporter, 706, wherein it is held that Tex. Rev. St. 1895, Arts. 4560(f) to 4560(h), making railway companies liable for the negligence of a servant affecting another servant, is applicable to an action for the death of a railroad engineer owing to a collision between two of defendant's trains though the trains at the time were engaged in interstate traffic. It was contended that such an application of the statute would render it violative of the commerce clause of the Federal Constitution, but the court holds in the language used by the United States Supreme Court in Sherlock *v.* Alling, 93 U. S. 99, that general legislation of this kind prescribing liabilities or duties of a citizen of a state is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. King *v.* Transportation Company, 14 Fed. Cas. 512, Houston & T. C. R. Co. *v.* Mayes, 83 S. W. 53, Brechvill *v.* Randall, 102 Ind. 528, 1 N. E. 362, and Norfolk & W. Ry. Co. *v.* Commonwealth, 93 Va. 749, 24 S. E. 837, are cited as supporting in a general way the proposition passed upon.

CONSTITUTIONAL LAW. (Denial of Equal Protection of Laws — Religious Liberty)
N. Y. Supreme Court — Special Term.

The charter of the city of Buffalo, in defining the duties of the school examiners, provides that they shall hold at least one stated meeting each month, and shall hold examinations at such of their regular meetings as they may designate, and at least as often as once every three months. Acting under this regulation the Board determined upon a time for examinations, which time included Saturday. An applicant for a teacher's license, alleging that she was a member of the Orthodox Jewish Church, under the teaching of which labor of any kind on Saturday is regarded as sinful, protested against the continuation of examination on Saturday, and brought suit to enjoin the examiners from continuing the examination on that day. There being no statute prohibiting the holding of examinations on Saturday, or requiring the Board to refrain from examining on that day persons who observe it as a day of worship, or to grant such persons a special examination on some other day, the court reaches the conclusion that plaintiff was not deprived of the equal protection of law or discriminated against because of her race by being denied such examination on some other day than Saturday. This holding seems to rest largely upon the view which the court takes of the legal status of Sunday, which, it is affirmed, is regarded as a day of rest, merely because it was regarded as such at common law before that system was adopted in New York, and not because of its religious observance by any particular sect. The whole matter seems to be summed up in the court's statement that the transaction of public business on Sunday is prohibited because of the character of the day as a civil institution. Cohn *v.* Townsend, 94 New York Supplement, 817.

CUSTOMS DUTIES. (Damage to Merchandise — Refund of Duties — Salvage)
Circuit Court of Appeals — Second Circuit.

The first construction which we have noticed of the provisions of the so-called Tucker Act is that contained in United States *v.* Cornell Steamboat Co., 137 Federal Reporter, 455. Rev. St. Sec. 2984 (U. S. Comp. St. 1901, p. 1958), declares that the secretary of the treasury is authorized to abate or refund the amount of impost duties paid or accruing upon imported merchandise damaged or

destroyed accidentally while in custody of the officers of the customs. Such merchandise was saved from destruction by fire and the salvors filed a petition against the United States for an award of salvage. For the government it was contended that the statute confided to the secretary of the treasury an absolute and irreviewable discretion to refund in such a case or refuse to do so as he might see fit. But it was held that the secretary might not refuse arbitrarily or capriciously, and where all the facts enumerated in the section are presented to him, undisputed, it should be assumed that that would satisfy him that the case was within the terms of the section. It is also decided that under the circumstances existing in the case the government had such an interest in the property that it should respond to those whose services prevented the loss which it would otherwise have sustained through the refund.

DAMAGES. (Remoteness)

Missouri Supreme Court.

An item of damage for breach of a building contract which on its face seems remote, and is so held by the court, is put forward in Harrison *v.* Craven, 87 Southwestern Reporter, 962. Plaintiff employed defendant to purchase land on which, together with land already owned by him, plaintiff intended to erect a building. Defendant bought the land in his own name and refused to convey to plaintiff, except on payment of a price largely in excess of that paid by him. Plaintiff was thereby unable to commence work on the building until over a year from the time when he intended to do so. In the meantime the price of labor and materials for building increased. It was not shown that when the agency was created plaintiff had any contract for the erection of the building, nor that defendant knew that the price of labor and materials were going up. In an action to compel defendant to convey to plaintiff and for damages for the breach of the contract of agency, a recovery for the increased price of labor and materials for building was denied on the ground that this element of damage was too remote.

DRUGGISTS. (Negligence in Filling Prescription — Judicial Notice)

New York Supreme Court — Trial Term.

A case of such importance as to justify mention, although it was decided at trial term, is Laturen *v.* Bolton Drug Co., 93 New York Supplement, 1035. A physician gave a prescription to his patient calling for "Elixir Pinus Comp. cum Heroin." The compound called for was a proprietary medicine and was known as Elixir Pinus Compositus "with" Heroin. The same manufacturer also made an Elixir Pinus Compositus without any Heroin. The druggist to whom the prescription was taken examined a pamphlet issued by the manufacturer and discovered that the proportion of Heroin contained in the mixture known as Elixir Pinus Compositus with Heroin was one twenty-fourth of a grain to the dram. Acting on this information the druggist added one twenty-fourth of a grain of Heroin per dram to the Pinus Compositus. As a matter of fact the Elixir Pinus Compositus contained a certain portion of morphine which was omitted in the Elixir Pinus Compositus with Heroin, that substance itself being a preparation of morphine. The prescription as compounded consequently contained more morphine than the physician intended. On these facts it is held that the druggist was not negligent in compounding the prescription, the negligence, if any, being that of the physician in not giving his directions more explicitly. This is the point which seems to be of chief importance, and to which the largest portion of the opinion is devoted, although the case might well have been decided on the common sense view of the matter taken by the court when it says that it will take judicial notice of the scientific fact that one-tenth of a grain of morphine, taken every four hours, could not have a poisonous effect.

This case seems to decide a point that lies between the general rule of liability of druggists for compounding dangerous medicines, as held in Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455, and followed generally, Peters v. Johnson & Co., 50 W. Va. 644, 57 L. R. A., 428, and the rule of non-liab lity for selling unknown dangerous proprietary medicines in the unbroken package, as stated in West v. Emanuel, 198 Pa. St. 180, 53 L. R. A. 329.

FISH AND GAME. (Ownership — Non-Resident Landowners)

Arkansas Supreme Court.

The precise nature and extent of the right of an owner of land to take fish and game thereon is determined in State *v.* Mallory, 83 Southwestern Reporter, 955. The particular question at issue was whether Arkansas Act, 1903, p. 306 declaring it unlawful for any non-resident to hunt or fish at any season of the year, violated the provision of the Federal Constitution guarantying to all persons the equal protection of the law. The defendant Mallory was a non-resident who owned

a quantity of land in the state of Arkansas, upon which land he hunted. As a conclusion from a number of cases cited and considered, it is held that the state's ownership of fish and game, is not such a proprietary interest as will authorize the granting of a special interest therein, but is solely for regulation and preservation for common use and is not inconsistent with a claim of individual or special ownership by the owner of the soil. In support of this conclusion the court cites the following cases: Sanborn *v.* Ice Company, 82 Minn. 43, 84 N. W. 641, 51 L. R. A. 829, 83 Am. St. Rep. 401; Ice Co. *v.* Davenport, 149 Mass. 322, 21 N. E. 385, 14 Am. St. Rep. 425; Rowell *v.* Doyle, 131 Mass. 474; Brown *v.* Cunningham, 82 Iowa, 512, 48 N. W. 1042, L. R. A. 583; Barrows *v.* McDermott, 73 Me. 441; Woodman *v.* Pittman, 79 Me. 456, 10 Atl. 321, 1 Am. St. Rep. 342; Priewe *v.* Improvement Co., 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645; McLennan *v.* Prentice, 85 Wis. 427, 55 N. W. 764; Ill. Cent. Ry. Co. *v.* State of Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018.

As a more or less necessary corollary of this holding it is decided that a landowner's right to take fish and game on his own land which inheres in him by reason of his ownership of the soil, is a property right subject only to the state's ownership and title held to regulate and preserve the public use, and hence that a law prohibiting a non-resident landowner from enjoying this property right to the same extent that it is enjoyed by a resident land owner denies the equal protection of the law, and that the taking of such right, merely because of non-residence, is without due process of law.

A distinction is to be taken between such game or fish as may be found within the boundaries of private property and such game or fish as may be found elsewhere. The taking of game or fish of the latter sort may be restricted to citizens of the state. Corfield v. Coryell, 4 Wash. C. C. 371 (1823); McCready v. Virginia, 94 U. S. 391 (1877). In holding that the rule is otherwise as to game and fish found within the boundaries of private property, the principal case indicates the inaccuracy of the rather common allegation that the ownership of wild animals not yet reduced to possession is in the state. See Geer v. Connecticut, 161 U. S. 519 (1896).

Eugene Wambaugh.

GAMING. (Dealing in Futures — Constitutional Law)

North Carolina Supreme Court.

North Carolina Laws, 1905, c. 538, prohibiting dealing in futures, where it is not intended by the parties that the articles agreed to be sold and delivered shall be actually delivered, is held in State *v.* McGinnis, 51 Southeastern Reporter, 50, not to be violative of the constitutional provision guarantying equal protection of the laws, merely because section 7 of the act provides that it shll not apply to any business corporation, etc., engaged in the purchase or sale of the necessary commodities required in the ordinary course of business. This provision is held not to constitute a discrimination, because not only the person mentioned in the exception, but all other persons have a right under the law to make *bona fide* dealings in futures, so that the exception in the statute was merely the product of an excessive caution. The statute further provides that proof that nothing was actually delivered at the date of the contract and that a margin was put up shall be *prima facie* evidence that the contract was a wagering one. Section 7 above quoted, limits the application of this provision to such an extent that it does not apply to purchases or sales by manufacturers or wholesale merchants of necessary commodities required in the ordinary course of their business, and this exception is contended to be a discrimination forbidden by amendment 14 of the Federal Constitution. It is, however, held that as the provision is a mere rule of evidence, it does not render the act invalid, inasmuch as the power to prescribe when, and under what circumstances, and as to what events a certain act chall be *prima facie* evidence is within the legislative discretion in the exercise of the police power.

HIGHWAYS. (Automobiles — License)

St. Louis Court of Appeals.

Mo. Laws, 1903, p. 163, section 4, declares that any person desiring to operate an automobile in a city must procure a license from the license commissioner thereof, and if he desires to operate it in the county outside the city limits, he shall procure a license from the county clerk of such county. In construing this statute in case of State *v.* Cobb, 87 Southwestern Reporter, 551, the St. Louis Court of Appeals rules that a license has only a local application, affords no protection beyond the boundaries of the jurisdiction of the officer who issues it, and, consequently, that an automobile owner is required to take out a license in each and every county over the roads of which he desires to run his machine.

HUSBAND AND WIFE. (Community Property — Right of Action for Personal Injuries)

Texas Court of Civil Appeals.

Without argument or citation of authority, it

is held in Ligon *v.* Ligon, 87 Southwestern Reporter, 838, that a right of action against a railroad company for personal injuries sustained by a husband after he and his wife have separated with the intention of never again living together as man and wife and after proceedings for divorce were begun, is community property, one-half of which may be set apart to the wife on her obtaining a divorce.

INDIANS. (EMANCIPATION FROM FEDERAL CONTROL — SALES OF LIQUOR)

U. S. SUPREME COURT.

In re Heff, 25 Supreme Court Reporter, 506 decides that an Indian allottee on receipt of his first patent under Act of February 8, 1887, must be deemed within the provision of section 6 of that act that upon the completion of such allotments and the patenting of the lands to such allottees, each allottee shall have the benefit of and be subject to the laws of the state where he resides. This holding is based upon the fact that every allottee is made a citizen and that the issue of the final patent provided for by section 5 was to be delayed for twenty-five years when it was to be issued to the first patentee, or his heirs. The case arose on *habeas corpus* to secure the release of a person convicted of selling liquor to an Indian, and it is held that inasmuch as under the act mentioned, an allottee is a citizen of the United States and of the state in which he resides, the sale of liquor to him cannot be made a crime under the federal laws when a sale to any other citizen of the state would not be an offense.

It was also contended that although the United States might not have power as a police regulation to punish the sale of liquor within a state by one citizen to another, it had that power if the purchaser was an Indian because of the provisions of Constitution, article 1, section 8, empowering Congress to regulate commerce with foreign nations, among the several states and with the Indian tribes. In answer to this it is in effect decided that the power to so regulate commerce, while extending to commerce between white men and Indians as individuals, ceases when the Indian becomes a citizen of the United States and of the state in which he resides and does not continue *ad infinitum* merely because a person has Indian blood in his veins.

INNKEEPERS. (LIEN — PROPERTY OF THIRD PERSON IN POSSESSION OF GUEST)

N. Y. SUP. CT., APP. DIV. 1ST DEPT.

In Horace Waters & Co. *v.* Gerard, 94 New York Supplement, 702, the New York Supreme Court commits itself to a holding which, it seems, is a trifle in advance of the general current of authority on this question. It is there held that a hotel keeper who receives a guest and furnishes her board and lodging from day to day, without any special contract as to time or the price to be paid, is entitled to enforce an innkeeper's lien on a piano brought into the hotel by the guest, though the piano was bought by the guest on credit under a contract stipulating that the title was to remain in the seller until the price was paid, and though the guest left the hotel after having leased rooms therein for a definite period at a definite rental, and without having paid for the piano. The holding seems to be on the theory that as there is nothing that requires any one to deliver to a guest in a hotel any property for the use of the guest, any one furnishing such a guest with property is presumed to do so with a knowledge of the law which gives to an innkeeper a lien upon the property brought by a guest into the hotel, and that a person thus furnishing a guest with property for his use in the hotel voluntarily submits that property to a lien in favor of the innkeeper. The force of this holding outside of New York is impaired by a strong dissent by O'Brien, P. J., in which Patterson, J., concurs.

This case represents the limit which the modern decisions have been approaching. Knowledge or ignorance on the part of the innkeeper that the goods brought by, or sent to, the guests are not his property has ceased to be the test; indeed, by such a test, the true owner might be divested of his property in his chattels by a thief who, unsuspected, might put up at an inn with them in his possession — a result not shocking in former times, but repugnant to modern notions. More recently the matter has been approached by inquiring whether the true owner is not involved in the transaction, by voluntarily giving over possession to the guest either before he came to the inn or afterward; in either case, the owner may be said to give an implied authorization to the person who has the goods to deal with them in so ordinary a way as going to an inn, and to incur, thereby, the usual consequence, that if the innkeeper is not paid his bill, goods in the possession of the guest may be held by the landlord. For example, it is now definitely established that an innkeeper may detain the samples of commercial travelers for their bills, notwithstanding it is apparent that the title to them is in the employer upon the ground of this implied power, even if the employer has forbidden the employée to run up bills. The present case is but one step further in the same direction.

INSURANCE. (Injuries During Construction of Building — "Contingent Liability" of Owner)

N. Y. Supreme Court, Appellate Term.

The head-note to the case of Sroka *v.* Frankfort American Insurance Company of New York, 94 New York Supplement, 501, would seem to state a rather startling proposition. It is as follows:

"A policy insuring the owner of a building in process of erection against loss from common law or statutory liability *arising from the 'contingent liability'* of the assured as owner, for damages on account of injuries accidentally suffered by any person in connection with and during the construction of the building, caused by the act or negligence of any contractor or subcontractor, imposes no liability on the insurer."

The proposition that the document purporting to be a policy imposes no liability of any kind on the insurance company seems, however, to be substantiated by the opinion in the case, wherein it is said that the somewhat elaborate verbage of the policy is well calculated to induce in the mind of a layman a belief that he is obtaining an insurance against something in return for the premium he pays, but that, as a matter of fact, the words are meaningless. "The insurance," says the court, "is against *contingent liability*" for the act or negligence of a contractor or subcontractor. There is no such liability known to the law. The owner may be liable in a given case for the result of an accident, but his liability in such a case will be original and not contingent. A suggestion by defendant's counsel that the policy was intended to cover the cost of investigating claims and defending actions when the owner was wrongfully sued for injuries caused by the contractor or his workmen is met by the statement that it is not apparent why the defendant admitted that much liability, unless for mere shame's sake in order to avoid the appearance of having given nothing for the premium received but that, even in that event, the "contingent liability" against which the policy purported to insure was limited to the owner's "common law or statutory liability" and that the expense of defending an unfounded claim was neither a common law nor statutory liability.

In saying that "the words are meaningless," it is possible that the court was discouraged too easily. The language of the policy indicates an intention that the underwriter shall assume the liability which may be cast upon the assured in the future by reason of accident; and as the liability of the assured has not yet accrued, and can never accrue except upon condition that an accident shall happen and that an injury shall result therefrom, the liability may naturally enough be called "contingent."

Eugene Wambaugh.

INTOXICATING LIQUORS. (Interstate Commerce — Fraudulent Shipment)

Kentucky Court of Appeals.

Crigler *v.* Commonwealth, 87 Southwestern Reporter, 276, contains a holding relative to the Interstate Commerce Act, which is analogous to several cases which have been previously decided, but which involves facts which are somewhat different from those in any previously decided case which we have noticed. Whisky manufactured in Kentucky was sent by the distiller to Ohio, for the express purpose of having it reshipped from that state into a section of Kentucky where the local option law was in force, and where orders for the whisky had been taken by the distiller's agents. Quoting from Austin *v.* Tennessee, 179 U. S. 343, 21 Sup. Ct. 132, where Mr. Justice Brown says that the doctrine of original packages has no application where the manufacturer puts up the package with the express intent of evading the law of another state, it is held that the fraudulent intent of the distiller in the present case prevents a reshipment from Ohio to Kentucky from constituting a subject of interstate commerce.

Prima facie, transportation from Kentucky to Kentucky by way of Ohio is interstate commerce. Hanley v. Kansas City S. Ry. Co., 187 U. S. 617 (1903). Quære whether this would be true in case the very place of shipment and the very place of destination were identical. In the principal case the places were different; and hence the rule in the case just now cited is applicable, unless some other distinction can be taken. The distinction upon which the decision proceeds being the mere intent to evade the statutes of Kentucky, it may be interesting to inquire whether the legal result would be the same where the intent was wholly or partly to obtain for the liquor the improvement sometimes supposed to result from transportation. Possibly it is a needless refinement to distinguish between the case where this improvement can be obtained from transportation within the state of manufacture, and the case where it can be obtained only through subjecting the liquor to the climate of another state. It is of greater practical importance to notice that in the principal case the shipment was from the Kentucky manufacturer to his own Ohio agent, and then from that same agent to a Kentucky customer, and that, consequently, the decision does not directly solve the

problem when the Ohio consignee is an independent contractor who contemplates making sales in Kentucky. Further, as the Kentucky customer had been secured before the shipment to Ohio was made, and as the shipment to Ohio was restricted, apparently, to the very quantity thus ordered, the decision does not cover directly the problem when the shipment to Ohio precedes the receipt of the order from Kentucky, or even when the shipment to Ohio exceeds the order.

Eugene Wambaugh.

JUSTICES OF THE PEACE. (Issuance of Void Process — Liability for False Imprisonment)

N. Y. Sup. Ct., App. Div. 3d Dept.

In McCarg *v.* Burr, 94 New York Supplement, 675, a justice of the peace is held liable in damages for false imprisonment for trying, sentencing, and imprisoning a person where he was without jurisdiction. Laws 1899, p. 520, c. 275, § 35, gives justices of the peace in the city of Gloversville the same powers, duties, and jurisdiction, except in criminal cases, as justices of towns. Code Crim. Proc. § 56, gives county courts of special sessions exclusive jurisdiction to determine charges of cruelty to animals. Code Crim. Proc. § 151, requires a warrant issued by a justice upon complaint to direct that defendant be brought before the magistrate issuing the same, or if the offense was committed in another town and is one which a court of special sessions has jurisdiction to try, it must direct that defendant be brought before a magistrate of the town in which the offense was committed. The holding under these statutes that a complaint charging cruelty to animals, committed in another town, did not authorize a justice in the city of Gloversville to make a warrant for the arrest of accused returnable to himself is fairly obvious. But it is also held, that since the warrant was in excess of the justice's jurisdiction to issue and was void, the act of the justice constituted false imprisonment.

It is admitted, of course, that for an error of judgment in performing a judicial act a judicial officer is not responsible civilly. It is also pointed out that the cases are not entirely in accord in defining the border line beyond which an officer cannot go without subjecting himself to civil liability. Quoting from Blythe *v.* Tompkins, 2 Abb. Prac. 468, where it is held that a justice of the peace acts ministerially in issuing and delivering a criminal warrant, so that if a warrant is not valid on its face, the justice who issues and the officer who executes it are liable for false imprisonment, and citing Reynolds *v.* Orvis, 7 Cow. 269, and Austin *v.* Vrooman, 128 N. Y. 233, 28 N. E. 477, the court determines that the justice acted ministerially and not judicially, and was liable for issuing the void warrant.

MANSLAUGHTER. (Failure to Furnish Medical Attendance — Religious Belief)

Indiana Supreme Court.

Owing to a preliminary holding that where in a prosecution for involuntary manslaughter the court directed a verdict for defendant for the reason that the evidence was insufficient to sustain a conviction, the sufficiency of the indictment cannot be reviewed on appeal, although the court intimated that it did not charge a defense the case of State *v.* Chenoweth, 71 Northeastern Reporter, 197, contains no direct decision upon the merits. It is, however, strongly intimated that where it is the duty of a person in charge of an infant child to furnish it with medical attendance in order to relieve or cure it of disease, it is no defense to a prosecution for manslaughter in case the child dies from want of such attendance that defendant conscientiously believed that the teachings of the Bible forbade recourse to medical attendance for that purpose and taught that prayer was a cure for all disease.

In the course of the dictum it is stated that the religious doctrine or belief of a person cannot be recognized as a justification or excuse for his committing an act which is a criminal offense under the law of the land. In support of this doctrine a number of cases are cited including Reynolds *v.* United States, 98 U. S. 145, 25 L. Ed. 244; Miles *v.* United States, 103 U. S. 304, 26 L. Ed. 481; Specht *v.* Commonwealth, 49 Am. Dec. 518; Commonwealth *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566; Regina *v.* Downes, 13 Cox, C. C. 111; Regina *v.* Senior, 1899, 1 Q. B. 283; 1 Bishop, New Cr. Law, 344, 345; People *v.* Pierson, N. Y., 68 N. E. 243.

MARRIAGE. (Impediment — Effect as to Innocent Party)

Texas Supreme Court.

A peculiar holding, the explanation of which is to be found in geographical and historical facts, and in a somewhat self-contradictory statute to which those facts gave rise, is contained in Barkley *v.* Dumke, 87 Southwestern Reporter, 1147. Therein it is decided that under the Texas Act of January 20, 1840, entitled "An act to adopt the common law of England, to repeal certain Mexican laws and to regulate the marital rights of parties," (the body of which is, however, with

reference to married persons, inconsistent with the rules of common law, and conformable in the main to the Spanish law), the common law rule declaring void the marriage of a woman to a man who is under the impediment of a prior existing marriage does not apply to a woman who contracts the marriage in good faith and without knowledge of the impediment, and as long as she continues to act innocently she has, as to property acquired within the time, the rights of a lawful wife and the corresponding obligations.

PRACTISING MEDICINE. (CHRISTIAN SCIENCE TREATMENT — CONSTITUTIONAL LAW)

OHIO SUPREME COURT.

It is now settled in Ohio that the exercise by a Christian Scientist of his powers or supposed powers, though in the form of "absent treatment," is an "appliance, application, operation or treatment" within the meaning of a statute declaring that any one who shall prescribe or recommend for a fee, any drug, medicine, appliance, application, operation or treatment of whatever nature for the cure or relief of any wound, fracture, or bodily infirmity or disease, shall be regarded as practicing medicine. State *v.* Marble, 73 Northeastern Reporter, 1063.

A contention that the statute was unconstitutional was based in this case upon the fact that members of different schools of medicines were not required to pass the same form of examination before the State Board of medical registration and examination. Thus osteopaths were examined only in the methods of treatment used by their schools, not being required to be familiar with the subjects of pathology, chemistry, therapeutics, and the principles and practice of medicine and surgery. Upon this provision is based the argument that as Christian Science entirely excludes drugs and all other material methods of treatment, one practising Christian Science should not be required to pass an examination in various different subjects which were not required of the osteopath and which had no relation to the practice of Christian Science. This argument is met by the statement that it is not necessary that other schools of healing should be recognized; that while the act does not provide a special examination and limited certificate for Christian Science practitioners, they may obtain a certificate to practise medicine upon the same condition as others and that there is nothing in the act requiring them to use the knowledge after they acquire it. A number of recent decisions are cited in support of the conclusion reached, among them being the following: State of Nebraska *v.* Buswell, 40 Neb. 158, 58 N. W. 728, 24 L. R. A. 68; People *v.* Blue Mountain Joe, 129 Ill. 370, 21 N. E. 923; Williams *v.* The People, 121 Ill. 84, 11 N. E. 881; The People *v.* Gordon, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165; Bragg *v.* The State, 134 Ala. 165, 32 South. 767, 5 L. R. A. 925; The State of Iowa *v.* Bair, 112 Iowa, 466, 84 N. W. 532, 51 L. R. A. 776; The State of Kansas *v.* Wilcox, 64 Kan. 789, 68 Pac. 634; Meffert *v.* Medical Board, 66 Kan. 711, 72 Pac. 247; State of Maine *v.* Bohemier, 96 Me. 257, 52 Atl. 643; People *v.* Reetz, 127 Mich. 87, 86 N. W. 396; State *v.* Biggs, 133 N. C. 729, 46 S. E. 401, 64 L. R. A. 139, 98 Am. St. Rep. 731, (monographic note); State *v.* Heath, Iowa, 101 N. W. 429.

TAXATION. (NATIONAL BANKS — DISCRIMINATION)

UNITED STATES SUPREME COURT.

In the case of City of Covington *v.* First National Bank of Covington, 25 Supreme Court, Reporter, 562, it is determined that the retroactive provision of Kentucky Act, March 21, 1900, relating solely to national banks, and charging such banks with liability for taxes for past years on their capital stock, whether held within or without the state, as well as subjecting them to a penalty in addition for delinquency, operates as a discrimination against such banks, in view of the fact that before the passage of such act national banks were not required to return for taxation shares of their capital stock held outside of the state, and that other capital is not required to do so now.

TELEGRAMS. (DELAY IN DELIVERY — MENTAL ANGUISH)

KENTUCKY COURT OF APPEALS.

In Western Union Tel. Co. *v.* Reid, 85 Southwestern Reporter, 1171, it is held that mental anguish of a father in beholding the sufferings of his child during the period that a telegraph company negligently delays delivering a message to a physician, announcing the nature of the child's trouble and requesting his immediate presence with surgical instruments, is not a proper element of recovery against the telegraph company. This would seem to be somewhat in conflict with the holding of the Supreme Court of Tennessee in Western Union Tel. Co. *v.* Robinson, 37 S. W. 545.

TRADING STAMPS. (ASSIGNABILITY — RIGHT OF MERCHANT TO REISSUE)

NEW JERSEY COURT OF CHANCERY.

Other cases have shown the trading-stamp companies on the defensive, attacking legislation

intended to limit or destroy their business, but in Sperry & Hutchinson Co. *v.* Hertzberg, 60 Atlantic Reporter, 368, however, the company attempts to restrain a merchant who had no contract with it, from giving to his customers stamps obtained from persons to whom they had been regularly issued by merchants who had such contracts. Stamps are issued to merchants under a contract providing that they shall be given out to purchasers of goods and that the company holds itself ready at all times to redeem the stamps in merchandise when a specified quantity of them is presented. Under these circumstances, it is held that the stamps are choses in action which are assignable and over which the trading stamp company has no control after they have once been given out by a merchant in accordance with this contract. It is also held that after stamps have been issued in this manner by the trading-stamp company, it has no power by a subsequent change of its plans and contract with its customers to limit the transferable quality of stamps theretofore issued and which have passed to dealers and persons dealing with its customers in the regular way. A contention, so palpably untenable as to create some mild surprise that it was advanced, is settled by the decision that there is no presumption that any particular scheme or plan of business, although lawful, is necessary, or even specially advantageous to the growth of commerce and the advance of civilization, and hence the trading-stamp business is not *per se* one which the courts must protect.

TRADING STAMPS. (Right of Merchant to Reissue — Nature of Obligation)

U. S. C. C. Rhode Island.

The case of Sperry & Hutchinson Co. *v.* Mechanics Clothing Company, 135 Federal Reporter, 833, was unpublished at the time the New Jersey case was decided and is in direct conflict with it. Here it was held that the complainant had the right to restrict the use of the stamps by contract and that stamps having once been issued by a merchant were *functus officio* except for redemption and though transferable for that purpose, defendant's use thereof was an improper interference with complainant's business, which complainant was entitled to restrain. The precise point of difference between these two cases seems to lie in the different view which the Federal Court takes of the nature of the transaction between the trading-stamp company and the merchant who purchases the stamps. The trading stamp is not regarded by this court as ordinary property, but is said to be *sui generis* and to represent a somewhat complicated transaction imposing necessary limitations upon the modes in which it may be transferred. The trading-stamp company by extensive advertising creates a demand for the stamps, and in effect sells to the merchant the right to supply this demand by issuing stamps which are at the time of the issue the property of the trading-stamp company. Thus, it is argued, the merchant is, in a certain sense, the agent of the company in issuing the stamps. Hence, the stamp, when issued, represents a closed transaction between the merchant and the company. Under this view the stamp is regarded by the Federal Court as a token or voucher of the sale and use of a certain amount of advertising, and is designed for a single use in an advertising scheme. Arguing from this standpoint, it is concluded that the merchant who obtains the stamps from persons who did not acquire them for advertising purposes, secures for himself the ability to do what it was not intended the collector of stamps should do, and that as the trading-stamp company has made large expenditures to create a demand for the stamps, the merchant who obtains them second hand and reuses them as an advertisement, gets for nothing what others are required to pay for, which it is contended he has no right to do.

WILLS. (Direction for Erection of Monument — Duty of Executor)

California Court of Appeals.

A case for which no known precedent exists is that of *In re* Koppikus' Estate, 81 Pacific Reporter, 732. The testatrix left her husband as her sole heir, and provided by will for the erection of a monument over her grave at a cost of $1,000. She also gave directions that she be buried in a certain cemetery, and the body was buried there with the knowledge and consent of the husband. After a petition was filed asking a sale of real estate for the purpose of raising funds to erect a monument the husband caused the remains to be cremated and the ashes were not returned to the grave. In opposition to this petition it was contended that the testatrix by the direction in her will attempted to dispose of her dead body, but it was held that even if such was her intention it was carried into execution by her husband, who would have the right to dispose of it himself, and that when her grave was located and established at the place directed by her, the removal of the remains and their cremation did not change its location, it having become, for the purposes of the case, a certain, fixed, and definite place; a grave without regard to the presence therein of the body, so that the executor was required to erect a monument as contemplated in the will.

THE LIGHTER SIDE

His Client Won the Case. — The late Charles P. Thompson of the Supreme Court at one time in his practice had a client named Michael Dougherty, who had been arrested for the illegal sale of liquor. The police had no evidence except one pint of whisky, which their search of his alleged kitchen bar-room revealed.

In the Superior Court this evidence was produced and a somewhat vivid claim made of *prima facie* evidence of guilt by the prosecuting attorney. During all this Mr. Thompson was silent. When his turn came for the defense he arose and said:

"Michael Dougherty, take the stand." And "Mike," with big red nose, unshaven face, bleared eyes and a general appearance of dilapitation and dejection, took the stand.

"Michael Dougherty, look upon the jury. Gentlemen of the jury, look on Michael Dougherty," said Mr. Thompson. All complied. Mr. Thompson himself, silently and steadily gazing at "Mike" for a moment, slowly and with solemnity, turned to the jury and said: "Gentlemen of the jury, do you mean to say to this Court and to me that you honestly and truly believe that Michael Dougherty, if he had a pint of whiskey, would sell it?"

It is needless to say "Mike" was acquitted, — *Boston Herald.*

Colonial. — "Colonel" McConogue, of Mason City, I., a leading lawyer of that State, received the sobriquet which lends military dignity to his name by having been on the staff of the late Governor Boise. He is too young a man to have been in the Civil War, and was too busy with a paying law practice to help whip the Spaniards. The "Colonel," is a large man, with a great store of severe dignity. Some years ago he attended the American Bar Association, and was constantly referred to by the Iowa contingent as the "Colonel." One day, Mr. A——, a little inquisitive lawyer from somewhere down in Massachusetts, accosted the dignified Colonel with: "Excuse me, Mr. McConlogue, but will you kindly tell me where you got your appelation of 'Colonel'; you don't appear to be old enough to have been in the Civil War?" McConlogue, assuming his most imperious look, eyed the little man for fully a minute, and then burst out: "Good God, man, go read your country's history!"

A Non-Possibility. — He was a large, raw-boned, red-faced lawyer from Maine, lately settled in a Southern State, and, of course, ambitious of making a reputation in his profession. His mouth was so large that it was unnecessary for him in uttering a word to more than half open his mouth, the corners thereof being the parts called into requisition.

He bad on the inquisitorial block, a backwoodsman as a witness. The witness had replied to a question from the interrogating lawyer, that "It was a non-possibility." Quoth the lawyer, "a non-possibility?" "Now will you tell this Court and this jury here what you mean by a non-possibility? Give us an example." Witness: "Well I think it u'd be a non-possibility to make your mouf enny bigger widout setting your years furder back."

Of course the dignity of the court was suspended.

Lamar and Taft. — Secretary Taft has always been an enthusiastic admirer of the late Justice Lamar, of Mississippi. Mr. Taft was assistant attorney-general when Justice Lamar was on the United States supreme bench. The first time the big Ohio man appeared before that august tribunal, he stumbled through a small duty just as the judges were about to retire. He was much embarrassed and felt that he had not appeared at all to advantage. As he was about to hurry away Justice Lamar came over, threw an arm over his shoulder and said in kindly tones: "It's all right, my boy. Don't you be afraid of those old fellows on the bench. They won't bite you. Even if they wanted to their teeth are too old and worn to do much damage. If you but knew it, yours are twice as sharp." The secretary in telling of this incident says: "From that day to this I have never ceased to thank the lovable Mississippian for making me have faith in myself."

The Theory of Insurance. — ANXIOUS INQUIRER IN INSURANCE OFFICE. — "I understand that for $5 I can insure my house for $1,000?"

CLERK. — "Yes, madam; if your house burns down, we pay you $1,000."

INQUIRER. — "And do you make any inquiries as to the origin of the fire?"

CLERK. — "We make the most careful inquiries, madam."

INQUIRER. — "Ah! I thought there was a catch in it somewhere." — *Fireman's Fund Record.*

Case for the Court's Ruling. — Going down Chesapeake Bay on an excursion when the wind was fresh and the white-caps tumultuous, Judge Hall, of North Carolina, became terribly sea-sick.

"My dear Hall," said Chief Justice Waite, who was one of the party, and who was as comfortable as an old sea-dog, "can I do anything for you? Just suggest what you wish."

"I wish," groaned the sick jurist, "that your honor would over-rule this motion." — *Boston Herald.*

Ancestral Damages. — Playwrights will henceforth have to be careful how they wound the sensibilities of the descendants of historic personages hitherto thought to have been "bad ones." The grandson of Bertier Sauvigny, who as comptroller-general of the treasury was hanged to a lamp-post during the French revolution, has obtained a judgment and damages against the author of a play describing his ancestor as a "villain," as he probably was. What is to prevent the descendants of Cain — and there are many — from now bringing suits against people who speak of him as a murderer and wanting in the fraternal instinct?

His One Plea. — Joseph S—— was on trial for the murder of his father and mother; the evidence was direct and conclusive and the jury handed in a verdict of "Guilty in the first degree" without leaving their seats. The judge asked "Joseph S—— have you anything to say before this Court proceeds to sentence?"

"Only this, Your Honor," S—— replied, "I hope you will use the customary leniency to orphans."

On His Own Recognizances. — Peter Smith had fallen from an elevator in Kansas City and was somewhat shaken up and bruised, and when he picked himself up, the only bystander, an utter stranger, seeing the frown on his face, and noticing that he was not hurt, laughed at him, whereupon Peter promptly called him a "Lunk-headed old fool," and walked off. . . .

A few months later, the damage suit of said Peter Smith against the elevator company was being tried in the Circuit Court, wherein said Peter claimed that he was greatly injured by the fall aforesaid, was picked up unconscious, etc. The aforesaid stranger was a witness for the defendant and testified that plaintiff was not picked up unconscious but that he "picked himself up and walked off." When asked how he knew that plaintiff was not unconscious, he replied, "He recognized me." He was then asked if plaintiff had ever seen him before and replied in the negative, whereupon he was asked what plaintiff said to him that caused him to think that plaintiff recognized him. His answer quoted plaintiff's language to him given above, his reply being, "He called me a 'Lunk-headed old fool.'" It is needless to say that it took some time to restore solemnity in the court-room.

So held in Michigan. — Some years ago a very able lawyer, whom, for purposes of designation we shall call "Judge Jones" for the simple reason that that was not his real name and we do not care to give away his identity, who has since become prominent as a law writer, and whose books adorn the shelves of most up-to-date attorneys, was called, on account of his known ability, to the position of law lecturer in a college of law in a western city, which shall be nameless.

Now, the judge, as already stated, though an able lawyer and excellent instructor, was nervous and somewhat fussy, as well as quick-tempered and inclined to scold, and this the students soon discovered and often took advantage of it to annoy him.

In the course of his law lectures, in speaking of any mooted law question, he would give the holdings of the courts of the different states, but most frequently referring to the courts of the State of Michigan, as he was more conversant with "holdings" of the courts of that State than any other (he had practised in that State before accepting the position which he then held), and by the

frequent use of the expression, "so held in Michigan" he had so familiarized the class with the expression that it had gotten to be quite a catch word among the boys.

One day, during a lecture that he was giving to his class, the young men were more than usually unattentive and noisy until the judge quite lost his temper, and stopping in the midst of his lecture he gave them a scorching that was so hot that it fairly hissed, and finally concluded with the interrogatory, "Do you suppose that I'm a fool to put up with such things?"

Immediately from a rear seat came a squeeking voice, "It's so held in Michigan."

Both Expired. — The charge was one of keeping a dog without a license, and the defendant evinced a tendency to interrupt the evidence. He was sternly hushed, but eventually his turn came. The clerk of the court turned to him: "Do you wish the court to understand that you refuse to renew your dog license?"

"Yes, but ——"

"We want no buts. You must renew the license or you will be fined. You know it expired on the 1st of January."

"Yes; but so did the dog. Do I have to renew him, too?" — *The Tatler.*

From Tennessee. — Legislatures of the different states at times introduce unique and peculiar bills, but they generally are not passed into laws; but the Legislature of Tennessee in 1901, passed a bill incorporating the town of Ripley, in Lauderdale County (which is in the printed acts, being Chapter 223, page 461), that is quite a freak. In setting out the corporate limits of the town by metes and bounds the following appears, to wit:

"Thence North Eighty five degrees East to a black-gum marked with a cross and with misseltoe in the top and with a blue bird sitting on a limb, which tree is a short distance East of Ed Johnsons' horse lot;"

The foregoing is a verbatim copy of the printed acts, signed by the speakers of both the lower house and senate and the governor.

Hopeful of His Young Client. — Atty.-Gen. Moody relates the following story: Happening by the police court in Washington, he went in to see the workings of Judge Kimball's court. Two colored boys of about ten years were being arraigned for having been disobedient and wayward. Officers gave testimony that the boys ran away from home and slept in boxes and under doorsteps; and one of the boys, Willie Jones, was charged with stealing a bicycle belonging to a little white boy.

A colored attorney named Smith arose and addressed the court in effect as follows: "If it please Your Honor, I appear for that boy there, Willie Jones — step out, Willie Jones. Now, he is the son of Mr. Jones, that gentleman there in white overalls. Mr. Jones says he thinks this great city is not the right place to bring up a boy, and if Your Honor sees fit to let Willie off he will send him down to Virginia to his old uncle's farm, where he can be looked after (here Mr. Smith was carried away with his argument), and where he won't see any bicycles, or tricycles, or automobiles, or ——"

The judge stopped him here and said: "Now, Mr. Smith, you do not think Willie Jones would steal an automobile, do you?"

Smith was puzzled for a moment, and then replied: "Well, Your Honor, they do claim this boy stole a bicycle, and the Lord knows he is bound to grow." — *Boston Herald.*

The Attorney-General of Porto Rico Leads a Strenuous Life. — Some idea may be had of the scope of the duties which the common people of Porto Rico think belong to the Attorney-General from the fact that Judge Savage, who is acting in that capacity during the absence of Attorney-General Feuille in the United States, was awakened from his slumbers at half past twelve the other night to receive the following telegram:

"Have this day been summoned to appear before the Municipal Court to-morrow the 12th at nine o'clock A.M. Summon served by child twelve years old, the Marshal being present in the town. I communicate this to you, requesting that you advise me if it is according to law."

Being long accustomed to a paternal government, the average Porto Rican applies to the Executive Department on all occasions to right his wrongs, real or imaginary.

Wm Travers Jerome.

The Green Bag

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JEROME THE LAWYER

By Arthur Train

THE fearlessly aggressive personality of the present district attorney of New York County, with his acknowledged capacity and effectiveness as a public prosecutor has naturally aroused the interest and commendation of the public somewhat to the exclusion of a proper appreciation of his ability and achievements in a purely professional capacity. One often hears asked the question, "Does Jerome know any law, or is he merely a fighter?" It is the purpose of this article to answer this interrogation and to satisfy the reader that while Jerome indubitably is a "fighter," an energetic servant of the public, and a leader of popular opinion, he is at the same time a trained lawyer of judicial mind, who combines with a thorough knowledge of the law an unusual originality and independence of thought and an extraordinary breadth of legal vision. Judged impartially upon their merits it is by no means sure that Jerome's greatest, as well as his most permanent, services to the community in which he dwells, have not been performed as a maker of law and of laws, rather than as a mere prosecutor of criminals or as a public-spirited citizen.

Jerome was compelled to abandon his college course at Amherst in 1881 at the end of his junior term, on account of general ill health, which for several years interfered with his legal studies but which did not prevent his graduating with distinction from the Columbia Law School in 1884. He was an enthusiastic and exhaustive student, and while entering immediately into general practice, made it a point to continue his studies into those branches of the law not covered by the curriculum, digesting text books and reports, and fitting himself in every possible way for the problems which he might later have to solve.

When, therefore, in 1888, he was appointed a deputy assistant upon the professional staff of John R. Fellows, then district attorney of New York County, he brought with him a general and effective knowledge of the law as a whole, unusual in an occupant of what has generally been regarded as a semi-political office. His vigor and resourcefulness in court, and his quickness of mind and practical grasp of fact, led Mr. Fellows at once to put his new assistant at trial work of the most varied and often of the most difficult character, and during the two years which followed, Jerome gave excellent account of himself as a capable and astute trial lawyer, as well as an acute and able arguer of points of law.

In those days, when the volume of business, though large, was relatively small as compared with that of the present time, the "trial-assistants," so called, not only conducted their cases in court but took them up on appeal after conviction. In this way Jerome had the opportunity and the consequent experience of defending a large number of his own convictions before the Court of Appeals.

Among these was the now famous case of The People versus Moran, which finally determined the doctrines which were to govern attempts at crime in the state of New York. Moran had been observed by a detective to place his hand in the pocket of an unknown woman and to withdraw it empty, under circumstances clearly indica-

tive of an intent to steal. The woman disappeared and it was impossible to show upon the trial that she had anything in her pocket. While it was true that a Massachusetts decision in a precisely similar case, held that such an act was a criminal attempt (Commonwealth *v.* McDonald, 5 Cush. 365), the last English cases (Reg. *v.* McPherson D. & B., 197 and Reg. *v.* Collins L. & C., 471) together with the whole trend of English decision, were to the contrary, while the law in New York, though in a somewhat confused condition, seemed to favor the English rule.

Jerome argued the point tenaciously in the trial court and convicted his man, the verdict in all probability, being the result quite as much of the jury's liking for the persistence and determination of the young assistant as of their horror of the crime itself. The rest of the staff told Jerome he was wasting time to follow the thing up on appeal; but he spent many laborious days and nights upon his brief, and argued the case with much learning and subtlety before the General Term of the Supreme Court, where he had the chagrin of seeing the conviction reversed on a rather specious distinction between "intent" and "attempt," the court standing two to one, with Justices Van Brunt and Barrett prevailing against Justice Daniels. Nothing daunted, Jerome appealed the case into the Court of Appeals, where this time the conviction was unanimously sustained and the decision of the General Term reversed (Peo. *v.* Moran, 123 N. Y. 254), while the court in a ten page opinion disapproved the English cases of Reg. *v.* McPherson and Reg. *v.* Collins. A few years later, the Court of Crown Cases Reserved over-ruled Reg. *v.* Collins in Reg. *v.* Brown (16 Cox, C. C. 715), and Reg. *v.* Ring (17 Cox C. C. 491), and fell into line with the Moran case.

Jerome resumed private practice in 1890 and almost immediately had a second opportunity to distinguish himself, being retained as special counsel for The People to argue The People versus Cannon on appeal. This case, which has since become a controlling decision on that branch of constitutional law, turned upon the constitutionality of a statute making the mere possession of certain articles by dealers in second-hand materials presumptive evidence of illegal traffic. Everett P. Wheeler and William J. (now Justice) Gaynor, offered an able brief for the appellants, but the Court of Appeals in a fourteen page opinion sustained the act. (Peo. *v.* Cannon, 139 N. Y. 645.)

The first case in which Jerome appeared as private counsel, and which attracted at the time any very wide attention, was that of The People versus Carlisle Harris. He had not sought criminal cases on entering general practice and most of his work had been purely civil in character, but he could ill afford to refuse a retainer, and prepared himself thoroughly to defend his client as best he could. It will be recalled that Harris had been indicted for poisoning his girl wife by means of morphine, and the clinical history of the case pointed clearly towards that conclusion. It was obvious from the start, that the only phase of the case upon which any adequate doubt could possibly be raised was on the actual cause of death. Jerome made an exhaustive study of the chemical and physiological questions involved, even undertaking some original experiments, and advanced as a defense the theory of ptomaine poisoning, which up to that time had hardly been heard of in a court of law. While John A. Taylor appeared as senior counsel, upon Jerome fell the entire burden of the actual conduct of the trial, and although Harris was justly convicted, Jerome's brilliant cross-examination of the prosecution's experts will long be remembered, as well as the learning and ingenuity which he displayed in an obviously hopeless cause.

Shortly after this he was retained, together with John W. Goff, now Recorder of New York County, as counsel for the Committee of Seventy, in which capacity he

was actively engaged in the Lexow investigation and performed valuable services as a drafter of proposed legislation, being one of a sub-committee of three, composed of Lewis L. Delafield, James Kilbreth, and himself, to prepare the Special Sessions law which was to create a new court for the trial of misdemeanors. The general law committee, composed of the most eminent members of the legal profession in New York, adopted the proposed statute as drawn, and it subsequently became law. (L., 1895, ch. 601.)

By a singularly appropriate and felicitous appointment, Jerome now became on July 1st, 1895, one of the original members of the very court which he had been instrumental in creating. The acceptance of this position, however, which implied constant service for a long period of time and an absolute abandonment of private practice, was regarded by his friends as singularly unfortunate for a young and ambitious lawyer with his way to make, but here Jerome's love of public service happily prevailed over his more conservative judgment. It is a strange coincidence in the career of this unique citizen, that most of the important decisions which he has reached have been diametrically opposed to the advice and counsel of his friends and advisers; they have been made regardless of political or professional advancement; they have at times seemed an abandonment of almost everything which to most men seem desirable, and yet, curiously enough, each of the decisions made in this manner has been accompanied by no loss of prestige or position to Jerome himself, and has resulted, I believe it to be universally admitted, in the elevation of the standard of public service. With Jerome's acceptance of a petty judgeship, which was stigmatized by his friends as little better than a police magistracy, he took a step which in the case of four men out of five would have resulted in permanent disappearance from public and professional life.

In Jerome's case, however, it was in many ways his making, for it gave him an opportunity for the thorough study of human nature and of the practical effect of legislation, which he could have secured in no other way. It is out of this knowledge that the writer submits that Jerome's chief effectiveness has grown. He has never been content to sit back after an unsuccessful prosecution and say, "The present state of the law is such that cases of this sort are practically hopeless," or, "If we had a law which fully covered this kind of thing we might accomplish something." Instead, what he says (and he says it on his feet and with his fist clenched) is; — "The law is useless as it stands; the legislature must pass a bill that will cover every aspect of this business so that I can put these rascals in jail," and then without more ado he retires to his library with a stenographer and returns with a drafted bill in his hand, which generally sooner or later becomes law, and the rascals go to jail.

Jerome is a constructive force. To a man of his resources there is no such thing as a failure to enforce the law, unless the law be of that character, which he has called (in his little pamphlet entitled "The Liquor Tax Law in New York") "unenforceable." This he defines as being a law "which under Democratic forms of government, based upon universal suffrage, is not permanently enforceable by authorities locally elected or appointed, because the acts prohibited are of such a character that a considerable number of the inhabitants of the locality do not consider the prohibited acts immoral in themselves and do not yield willing obedience to the law."

Such laws Jerome believes should be amended, until they represent the actual principles of the community where it is sought to enforce them.

It is in this ability to get to the root of a difficulty, that Jerome the lawyer differentiates himself from his predecessors in office. If the law is inadequate he demands

a new one and gets it. In this way he has personally drafted and secured the enactment of what is commonly known as the "Canfield Bill," which covers so exhaustively the question of the privilege of witnesses in gambling cases who decline to answer questions on the ground that their answers may tend to incriminate them, that practically every gambler in New York City went out of business on its passage. In the "Prince Bill," which amplifies the law against bribery to include specifically the bribing of representatives of labor organizations, and also extends the non-availability of pleas of privilege as established by the "Canfield Bill" to witnesses in proceedings instituted thereunder, he performed a valuable service to both labor and capital; and by his statute passed to remedy the desperate situation in which creditors found themselves after a fraudulent bankruptcy, where the books of the bankrupt had disappeared, by making the failure of such an one to produce his books on due notice presumptive evidence that his written representations as to his financial condition were originally false, he has rendered inestimable assistance to the merchants of the state.

By the simple drafting of a statute, Jerome drove the gamblers from New York when no other district attorney, no matter how honest may have been his intention, saw his way to do more than make a few ineffectual attempts to prosecute them before juries which rarely found them guilty, and it is not unreasonable to believe that the number of fraudulent bankruptcies will hereafter be reduced fifty per cent, when prior to Jerome's incumbency in office, convictions for crimes arising out of such frauds or for obtaining goods or credit by means of false representations as to financial condition, were practically unheard of.

Statutes of this character could have been drawn only by a man who united with a thorough knowledge of the necessities of the situation a comprehensive and subtle knowledge of the law itself.

No public official could have accomplished what Jerome has done unless he had had confidence in himself and in his own judgment. Jerome follows no interpretation of law which does not seem to him reasonable and right. He steps boldly in where angels might well fear to tread. If the law permits him to do an act he does it, and he stops at nothing in carrying out his objects within the law. When as a Special Session justice, he coöperated with District Attorney Philbin for the purpose of demonstrating that the alleged inability of the police to put a stop to the pool rooms was a pure farce and a mere cover for the collection of graft, many there were who raised their hands in horror at the sight of a judge doffing his silken robe of office, accompanying the officers while they executed warrants which he himself had issued, and in many cases holding court in the very locus of the crime as soon as the arrests had been made. There were among these horrified conservatives, many men learned in the law and prominent at the Bar, who averred that such acts were in violation of the constitutional rights of the persons thus apprehended. But Jerome the lawyer thought differently. It was no mere desire on his part to jump into the public eye and play to the gallery irrespective of the law, that animated him, but a conscientious belief that only in this way could the situation be dealt with, arrived at after a comprehensive study of the law governing the situation. When Jerome the lawyer had determined that his course was justifiable, then Jerome the judge went out and followed it. That his opinion was right is demonstrated by the fact that although over fifteen writs of prohibition, *mandamus* and *habeas corpus* were brought on the ground that the constitutional rights of the defendants had been violated in these cases, the Supreme Court in every instance dismissed the writs, and every prisoner indicted by the Grand

Jury (and there were some eighty of them) pleaded guilty, was convicted before a jury, or fled the jurisdiction.

It is this independence of thought and fearlessness of action which characterize Jerome as a lawyer. The result has been a comprehensive development of the criminal law within his four years of office. Indeed, one member of the Bar has facetiously remarked, that since Jerome's incumbency, "acts have become crimes which have hitherto been regarded as virtues."

Yet with all his originality and resourcefulness of mind, he is rarely misled by any mere impulse or desire to prosecute. Time and again the press have clamored for prosecution, of corporations and individuals which Jerome as a lawyer believed to be beyond the scope of the criminal law. By yielding to his natural inclinations and to public pressure he might well have added to his reputation as a fearless official and gained hasty general commendation, but this he has firmly refused to do. When the New York Central terminal accident occurred, the press instantly demanded the indictment of the corporation for manslaughter. The papers were filled with staring headlines prophesying the sensational prosecutions of directors which Jerome would of course immediately initiate. But he disappointed them all. He knew that the corporation had been guilty of maintaining a condition of affairs in the tunnel which did in fact amount to a public nuisance. The accident in question *might* have resulted at any time from this condition, since the signals *might* have been obscured by smoke. But unfortunately for the yellow press, the accident, in point of fact, had been due not to the obscuring of signals, but to the failure of the engineer to observe them. Jerome, in the face of public opinion, firmly refused to undertake the popular and spectacular prosecution of Mr. Depew, Mr. Vanderbilt, and the others, for manslaughter, and instead indicted and tried the negligent engineer. It is, however, true that the District Attorney believed that the directors should be indicted for maintaining a nuisance, and vainly tried to induce the Grand Jury to take action. His conduct in the case of the Metropolitan Street Railway was equally conservative. Persons who are prone to regard him as a seeker after notoriety rather than as a lawyer, would do well to investigate the facts. Jerome asks for no indictments which in his opinion cannot be sustained in law and where the facts cannot be construed legally to constitute a crime.

Only during his administration has the appeal work of the office been brought to its present state of efficiency, and it is a conservative statement to say that never before has the purely legal side of the administration of criminal justice received so much attention from the prosecuting officer in New York County, and in this purely legal aspect of his labors Jerome is seen at his best. While he rarely takes part in the actual conduct of a case by examining witnesses or addressing the jury, he makes it a point to appear in person and argue the more difficult questions of law presented by demurrer or otherwise pending and throughout the more important trials. On such occasions, Jerome's knowledge of law and grasp of fact make him the dominant figure in the court room. Without any waste of time or superfluity of words he seizes upon the salient point involved, shakes it free from the mass of irrelevant statement and specious argument in which it may be entangled, and in a few direct and oftentimes scathing sentences demonstrates the accuracy of his contention. On the other hand, if Jerome the lawyer thinks he is wrong he never hesitates to say so. "Give the devil his due and two more" is his principle, and this just as true whether the poor devil be in the right or in the wrong. But when Jerome has thought he was right the courts have usually agreed with him.

At the beginning of Jerome's term, the appeal business necessarily involved cases

which had been tried under his predecessors, and it would be difficult to present detailed statistics of the work of the Appeal Bureau.

It is, however, interesting to observe that since Jerome took office twelve cases of murder in the first degree have been argued on appeal, and, in every instance, the judgment has been affirmed. The respective defendants were: Filipelli, Flanigan, Triola, Conklin, Gaimari, Tobin, Spencer, Koenig, Totterman, Jackson, Breen, and Patrick.

The fact that during the court year, which comprises the months of October, 1904 — June, 1905, thirty-five matters were argued in the Appellate Division, and twenty-six in the Court of Appeals of which but two were lost, speaks for itself.

People often ask why Jerome does not try cases himself. The reason is that his purely legal duties do not leave him time. It is as a lawyer even more than as a fighter that Jerome is of such inestimable service as a public officer to the citizens who elected him. It is as a lawyer that he sits day after day in his office, passing upon the complex situations presented in intricate commercial and financial frauds, in the mismanagement of corporations, in the delicate questions of jurisdiction and extradition, and in the large number of investigations into malfeasance in public office which have been instituted under his direction.

As a lawyer, he knows the iniquities possible to members of his profession, and with relentless persistence he has pursued and brought to justice eight members of the New York Bar during his term of office, including lawyers Robert A. Ammon, Mills, Birnbaum, Conlon, Harris, Seeley, Alderdice, and Wooten. A majority of these convictions were for crimes arising out of breaches of trust towards the client by the defendant. Some fifteen other members of the legal profession are awaiting trial.

In conclusion, this fragmentary sketch would be incomplete indeed, without some reference to the fact that Jerome is and always has been "the lawyer" of his office as well as its "chief." When the members of his official family make use of this latter term for him with affectionate respect, it is in no idle sense, and although the professional staff contains several men of mature years and long experience as general practitioners of law, it is to Jerome himself that his assistants turn for help and advice in their time of need. It is then that they discover, if they have never realized it before, that the District Attorney has at his fingers ends a thorough knowledge of every aspect of the criminal law as well as its allied branches. It is often said that Jerome knows the Penal and Criminal Codes. with the decisions thereunder, better than any other man at the New York Bar, and he uses this knowledge to solve a problem or reach a desired end as a skilled mechanic manipulates a complicated, but powerful machine. The writer is unaware of an instance where an assistant when caught unprepared by one of the many exigencies of a criminal trial, has appealed to Jerome for aid that it was not instantly forthcoming without the necessity of sending for books of reference or reports, and he recalls more than one occasion where his Chief's fortuitous presence at a trial, and his ability to furnish the law to the Court itself has saved a case about to be abandoned.

Whatever else he may be as well, the District Attorney of New York County is a lawyer of thoroughly balanced legal mind, of unusual attainments in his own department, with a comprehensive knowledge of the law as a whole, and a statesmanlike grasp of the purposes and possibilities of legislation. With an extraordinary capacity to see all sides of a question at one and the same time, he unites rapidity of thought and precision of statement. These qualities, apart from his independence of judgment, steadfastness of purpose, and indomitable energy entitle him to a permanent place among the leaders of the Bar.

NEW YORK, N. Y., October, 1905

THE ADMINISTRATION OF THE JURY SYSTEM[1]

By Hon. Henry B. Brown

An experience of thirty years on the Bench, one-half of which were spent in courts of original jurisdiction, and the other half in an appellate court, could not fail to call attention to certain departures from the ancient common law methods, which have crept into the trial of jury cases.

Of the great body of American law, I have little criticism to make. It is founded upon principles of natural justice, and consorts well with the habits and traditions of the people. Such amendments as local conditions require, such pruning of ancient usages as the gradual progress of civilization suggests, the legislatures are usually alert to make in response to a popular demand. If there be any error in this particular, it is usually in the direction of conservatism.

Perhaps the most startling of these innovations in the practical administration of justice is the abolition, except in special cases, of grand juries in about one quarter of the states, notably Connecticut, Michigan, California, Missouri, Indiana, Nebraska, Oregon, Utah, Colorado, and Wyoming. Grand juries were undoubtedly of great value in the days when criminal proceedings were private affairs, and a body of intelligent and disinterested men was needed to stand between the accuser and the accused, for the protection of the latter against unfounded and malicious charges. But the assumption of criminal proceedings by the state, and the appointment of attorneys charged with the duty of prosecuting only those who are held to bail by an examining magistrate, upon proof of probable cause, has been found in practice to afford ample protection to the accused. Indeed, as the accused may introduce evidence before the magistrate to disprove the existence of probable cause, he is even better protected than he is by a grand jury, which listens only to evidence of his guilt, given in secret and with no opportunity for explanation. The system of prosecuting felonies by information has obtained in Connecticut for eighty years, and in Michigan for over fifty years, and so far as I know, no voice has ever been raised for the restoration of the useless and expensive procedure by indictment. If there be a lawyer in Michigan who advocates it I have never heard of him, although for several years it was my duty to deal with grand juries in the Federal Courts of that state. Whatever changes in the common law are accepted without protest and continued for years without complaint, may be looked upon as well within the line of safety. A wise provision of the Michigan law permits grand juries to be summoned at the discretion of the court, where their inquisitorial character has been found of value in the unearthing of frauds and the abatement of nuisances.

A like reception seems to have been accorded to recent statutes of a majority of the Trans-Mississippi states abolishing, or permitting the legislature to abolish, the rule of unanimity, and allowing juries in civil cases to return a verdict by a three-fourths or five-sixths vote. The advantages of this system seem to largely outweigh an occasional hardship. I say this, notwithstanding the fact that in a few instances I have known the odd man to be clearly right; but as a rule well-nigh universal, a minority of two or three will refuse to agree upon grounds quite irrespective of the merits of the case. If the requirement of unanimity occasionally saves an unjust verdict against a corporation, in a great number of cases it prevents a disagreement, which is often as disastrous as a wrong verdict.

[1] Response by Mr. Justice Brown to a toast at the annual banquet of the American Bar Association at Narragansett Pier, August 25, 1905.

The power of the court to set aside an unjust verdict is, of course, unaffected by this amendment.

While there is more or less dissatisfaction with its practical results, I take it there is no one in this country who would advise the abolition of the jury trial, at least in criminal cases. Not that I believe the opinion of twelve laymen upon the single question of guilt or innocence under a statute is more apt to be right than that of a bench of judges, skilled in the art of fathoming motives and weighing testimony; but a jury I regard as practically a representative of the sentiment of the community upon the question of the punishment of crime, and may be depended upon to convict where the evidence satisfies it that the accused has been guilty of a crime which that sentiment pronounces dangerous to the community, and to acquit, although technical guilt be proved, where public sentiment justifies the act under the peculiar circumstances of the case. Thus, if the popular sentiment of one locality demands the punishment of homicide in all cases, when committed without legal excuse, the jury will be apt to convict. But in cases arising in another locality where public opinion condones it, when committed in fighting a duel, in a street brawl, or in lynching some unfortunate object of public execration, the jury will side with the accused. The same may be said of prosecutions for horse stealing, gambling, selling liquor, and social aberrations, which are viewed quite differently in different communities. This practical assumption of the pardoning power by juries may be illogical; but after all it is far more desirable than a trial by a bench of judges, which would undoubtedly incur the popular ill-will by judgments which failed to accord with the general sentiment of the laity. The moral of all this is that criminal courts are not intended as teachers of morality or good government, but as protectors of the community in those things which it judges necessary to its security. Trial by jury remains, and probably always will remain, the only practicable method of dispensing justice between the Commonwealth and the individual citizen. The only remedy for acquittals in defiance of the testimony must be found in the selection of better juries and the gradual elevation of society.

Perhaps the strongest argument in favor of trial by jury in civil cases is the fact that it has come down to us sanctified by the usage of many centuries, and that while it is far from being an ideal method of determining the rights of individuals as between themselves, he would be a bold man who would demand its abrogation. The principal cause of its growing unpopularity, I think, may be found in the departure of the modern American jury trial from the common law methods still pursued in England, and the exaltation of the jury at the expense of the court. The tendency of modern legislation has been to belittle the functions of the court, and to make of the jury a kind of fetish, who must not even listen to suggestions upon questions of fact. The burden of conducting the trial is taken from the court and shifted to the shoulders of counsel, who are only too glad to assume it, and "run" the cases their own way without interruption from the court. The difference between the two methods is a real and substantial one. In what may be called the common law method, the trial is one by the court assisted by the jury; while in the method pursued here, it is a trial by the jury advised and often insufficiently advised, by the court. In both, the jury is of course the ultimate tribunal.

One who has watched day by day the practical administration of justice in an English court cannot but be struck by the celerity, accuracy, and disregard of mere technicalities with which business is transacted. One is irresistibly impelled to ask himself why it is that with the reputation of Americans for doing everything from the

building of bridges over the Nile, or battleships for Russia and Japan, to harvesting, reaping, plowing, and even making butter by machinery, faster than other people, a court in conservative old England will dispose of a half dozen jury cases in the time that would be required here in despatching one. The cause is not far to seek. It lies in the close confinement of counsel to the questions at issue, and the prompt interposition of the court to prevent delay. The trial is conducted by men trained for that special purpose, whose interest it is to expedite and not to prolong them. No time is wasted in immaterial matters. Objections to testimony are discouraged, rarely argued, and almost never made the subject of exception. The testimony is confined to the exact point in issue. Mere oratory is at a discount. New trials are rarely granted. A criminal trial especially is a serious business, since in case of a verdict of guilty, it is all up with the defendant, and nothing can save him from punishment but the pardoning power of the Home Secretary. The result is that homicides are infrequent, and offenders rarely escape punishment for their crimes.

The delays in bringing cases to trial, which are so frequently the cause of complaint in this country, and which were fully treated of in a recent number of the GREEN BAG, are serious enough; but the delays which vex the soul, weary the patience, and deplete the pockets of litigants and tax payers, are those which take place after the case is called for trial.

There is first the empanelling of the jury — a proceeding which ought never take more than an hour or two, but for some reason I could never quite understand, is sometimes made to consume a month or even six weeks, in which each proposed juror is expected to give the history of his life and of his opinions upon every conceivable subject, for the apparent purpose of laying the ground, not for a challenge for cause, but for a peremptory challenge. During all this time a large number of jurors are kept in attendance, drawing pay but rendering no service.

While examining witnesses, counsel are permitted to sit at the table and take notes, consuming nearly double the time necessary if they were required to stand. Probably more time is lost by want of rapidity in putting questions than in any other way — no long delays, but a habit of dawdling between questions, which not only consumes a great deal of time in the aggregate, but is usually destructive of the very purpose of a cross-examination. Not only are one's ideas clearer and more abundant if the examiner be standing, but where questions are rapidly put, no time is allowed an unwilling witness to concoct an untruthful answer. Where a stenographer is employed, the practice of taking notes is not only unnecessary but an intolerable nuisance. From personal experience I have found that at least one-third of the time was saved by requiring counsel to stand.

Objections are constantly made to immaterial items of testimony and argued as though the whole case depended upon them, when no argument should be encouraged except at the suggestion of the judge himself, who in the end usually resorts to that favorite device of weak judges of admitting testimony subject to objection, and thus getting it before the jury. Equally indefensible is the habit of submitting cases to a jury when there is really no conflicting evidence. As a matter of practice, I have found that about fifty per cent of the cases should be taken from the jury.

Finally, in its charge, the court is forbidden in many of the states from indicating its opinion, or even commenting upon the facts, and is tied up to giving or refusing a series of requests prepared by counsel, which are thrown at the heads of the jury unexplained by any reference to the facts, and which must often serve to entangle them in hopeless confusion. The judge is thus stripped of his ancient function of advising the jury,

and becomes little more than the moderator of a New England town meeting.

But this is not all. The verdict, instead of being the end, is little more than the beginning of the serious litigation. There is the inevitable motion for a new trial; motions in arrest of judgment; bills of exception, taking months to settle; appeals to one and sometimes two appellate courts, where the judgment is often reversed for error which the law pronounces material, but which could not possibly have affected the verdict. The motion in arrest is a favorite device of the criminal lawyer, who, after spending a month in a trial, where every resource has been exhausted, suddenly discovers after a verdict of guilty, that he was not informed by the indictment what his client was being tried for, though he may never have demurred or objected to the testimony at the trial. Good sense would seem to require that motions of this kind should be made at the earliest moment, and should not be allowed for insufficient pleading, where the facts have been fully developed and submitted to the jury. Such I understand to be the law in some of the states.

That by reason of these delays jury trials have become so intolerably prolonged, that, except in actions for torts, they have in some jurisdictions fallen largely into disuse. Indeed, so expectant is the public of these delays that when, in an important criminal case, the accused is tried, convicted, and sentenced within a single day, be the trial never so fair, the papers speak offensively of his having been "railroaded" to the penitentiary. The result is that the venerable system of trial by jury, which we inherited from England, has been so completely transformed as to be hardly recognizable, and to have become so unpopular in some jurisdictions as to have largely given place to trials by the Court. Indeed, the great legal business of this country for the past fifty years, has been carried on quietly and upon the whole satisfactorily, in courts of equity.

Unfortunately, the chief difficulties of which I have spoken are such as cannot be remedied by legislation. The multiplication of judges, already enormously out of proportion to the population, promises no relief, since the delay inheres in their system of doing business. How far these delays, and the uncertainties of securing verdicts which shall stand, are responsible for the savage practice of lynching with its attendant horrors of hanging, shooting, burning, and torture, it is impossible to say, but it is significant at least, that in the adjoining Dominion to the north of us — a country where justice is administered nominally at least on the same principle as here, that system is entirely unknown.

WASHINGTON, D.C., August, 1905.

GOVERNMENTAL REGULATION OF PRICES

By Eugene A. Gilmore

THAT every commodity has a just price, that there is some amount of money for which it is fair and right that the owner of the commodity should exchange it, was a doctrine quite generally held by writers of the Middle Ages on economic questions. This just price is not the arbitrary demand of an extortionate dealer driving a hard bargain, nor the sacrifice by one in extremity of his property for an insignificant sum. The just price is the common estimate of what the article is worth, what it is fair and right to give for it under ordinary circumstances. The modern doctrine of price is essentially the same; the normal or natural price of a thing is its value as fixed in the course of free competition, and that is determined by common estimation. Common estimation, formerly and now, is the true exponent of the normal or just price. The modern economist differs from the mediæval ecnomist as to the best means of bringing out this common estimate. The former relies upon competition free from disturbing causes, as efficient; the latter believed that it was possible to bring common estimation into operation beforehand, and by the consultation of experts, to estimate the right price, and having ascertained what the true price should be, to enforce it in all dealings.

It was the influence of this doctrine, the condemnation by Christianity of avarice and greed of gain, and the enforcement by the ecclesiastical courts of canons against such sins, that is accountable in part for the many attempts, especially in England, and to some extent in this country, to establish by law, as a matter of public policy, and to relieve from economic disturbances, this just price.

In view of what seems to be a growing tendency in recent years towards paternalistic legislation which has for its purpose, not only the fixing of prices and the prevention of their manipulation, but also the regulation of hours of labor and the conditions under which private business shall be carried on, it will be of interest to notice some of the earlier English and American statutes having similar purposes. The enumeration is not exhaustive, and is given merely to show how far the state has gone in its attempts to fix by law the prices in purely private businesses. It is not intended to draw from the failure of all this legislation to accomplish its purposes any argument against the futility of governmental interference in such matters. Closely related to the statutes fixing the prices of labor and commodities, and forming an essential part of governmental industrial regulation, are those ancient and modern statutes prohibiting, engrossing, regrating, and forestalling. No attempt is made to give an account of this legislation. It will be found that, by reason of the intimate relation between wages, the price of commodities, and the hours of labor, these three matters are frequently dealt with in the same statute.

The occasion for the first important legislation by Parliament on the subject of prices, arose from the ravages of the terrible Black Death which devastated England in 1348-49, although prior to that time there was much regulation to be found in the customs of the manors and the ordinances of the guilds in the towns. There were the Assizes of Bread, of Ale, and of Cloth, by which the price and quality of these articles were fixed with considerable certainty. The year 1349 marks approximately the beginning of the attempts by the central government to prescribe prices and wages. The first statute, known as the Statute of Labourers, was passed in this year, 23 Edw. III. The occasion and purpose is best

stated in the language of the statute: "Because a great part of the people, and especially of workmen and servants, late died of the plague, many seeing the necessity of masters, and great scarcity of servants, will not serve unless they may receive excessive wages, and some rather willing to beg in idleness, than to labor to get their living," wherefore it was enacted that laborers shall "take only the wages, livery, meed or salary, which were accustomed to be given in the places where he oweth to serve to xx. year of our reign of England, or five or six other common years next before." It was further provided that no master shall pay, and no servant shall receive, more than the customary wages. In order that laborers might not be compelled to serve at the old wages while paying the greatly advanced prices of victuals, this act provided, "That butchers, fishmongers, regrators, hostelors, brewers, bakers, pulters, and all sellers of all manner of victual, shall be bound to sell the same victual for a reasonable price, having respect to the price that such victual be sold at in the places adjoining, so that the same sellers have moderate gains, and not excessive."

This first Statute of Labourers, by merely fixing the wages at what was customary, and the prices of victuals at what was reasonable, was too vague to be practicable. In 1350, 25 Edw. III, St. 1, a second Statute of Labourers was passed, which provided that "Carters, ploughmen, drivers of the plough, shepherds, swineherds, deies, and all other servants shall take . . . where wheat was wont to be given . . . for the bushel ten pence. . . . And that none pay in the time of sarcling or haymaking but a penny a day. And a mower of the meadows for the acre five pence, or by the day five pence. And reapers of corn in the first week of August two pence, and the second three pence. . . . That carpenters, masons, and tillers, and other workmen of houses, shall not take by the day for their work, but in the manner as they were wont, that is to say: A master carpenter iii. d. and an other ii. d. A master free mason iiii. d. and other masons iii. d. and their servants i. d. ob. tylers iii. d. and their knaves i. d. ob., and other coverers of fern and straw iii. d. and their knaves i. d. ob. plaisterers and other workers of mud walls, and their knaves by the same manner, without meat or drink," . . . In this statute it was also provided that "Shoes &c shall be sold as in the 20th year of King Edward the 3rd."

To make the scheme of regulation effective and to insure laborers at the wages fixed, there were provided in this and subsequent statutes strict requirements as to the conduct of workmen. All able-bodied persons within certain ages, and not having means of support nor following any craft or trade, were bound to serve whomsoever might require; laborers were forbidden to leave their service and masters to discharge servants without reasonable cause or excuse, to be allowed before two justices of the peace; all workmen were required to "bring openly in their hands to the merchant towns their instruments, and there shall be hired in a common place and not privy." No laborer was permitted to "go out of the town where he dwelleth in winter to serve the summer, if he may serve in the same town." No employer "shall by any secret ways or means, directly or indirectly, retain or keep any servant, workman or laborer, or shall give any more or greater wages or other commodity . . . contrary to the rates or wages that shall be assessed or appointed." No person "shall retain, hire, or take into service another for any less time than one whole year" in any of a large number of enumerated trades. The diet and apparel of laborers of various classes were also prescribed with great detail by statutes.

The foregoing legislation was a part of the national industrial regulation which began with Edward I, was actively promoted by Edward III, and reached its

culmination in the time of Elizabeth. The objects sought to be accomplished were, first, the fixing of fair wages and prices; second, compelling the furnishing of the commodities at the rates fixed, either by committing the offenders to jail or by fines. As a part of the second object was the detailed control of the conduct, diet and apparel of servants and laborers. The rates were sometimes designated as the customary or reasonable rates, sometimes they were prescribed by the statute, and frequently they were such as should be fixed yearly or oftener by certain of the King's counsellors, justices of the peace, sheriffs, mayors, bailiffs, or other officers.

In 37 Edw. III, c. 3 (1363) it was enacted "That the price of a young capon shall not pass 3 d., and of an old, 4 d., of an hen 2 d., of a pullet 1 d., of a goose 4 d. . . . " By 25 Hen. VIII, c. 2 (1533) it was provided, that the price of cheese, butter, capons, hens, chickens, and other victuals necessary for existence should be fixed from time to time by certain justices and officers, and further, that those who had such provisions must sell them at the prices fixed. The justification of this statute is said in the preamble to be the dearth of a good and sufficient supply of such provisions, the hard, difficult and uncertain prices, and the enhancing of the prices thereof "by the greedy covetousness and appetites of the owners of such victuals." The latter reason is no doubt entertained by some good people in modern times as accounting for the unsatisfactory condition of the meat market.

As indicating that the attempts at regulation of prices was not always confined to objects of prime necessity, there was a statute passed in 1533 (25 Hen. VIII, c. 15) providing that certain of the King's officers are authorized on complaint that sellers of books charge unreasonable prices to examine into the matter and to limit the prices of books and the charge for binding them. The price of beer barrels was fixed at x. d. by 35 Hen. VIII, c. 8 (1543). To encourage archery, long bows were required to be sold at iii. s. and iv. d., and in 33 Hen. VIII. c. 9, is found a schedule of prices for various sorts of bows.

By 8 Anne, c. 18 (1709) and 31 Geo. II., c. 29 (1758) the regulation of the old Assize of Bread was more elaborately worked out; the constituents of all kinds of bread, the weight of the loaves, and the price, was regulated according to the price of grain, meal or flour in the public markets, allowing a reasonable profit to the baker.

Usury being originally in England an ecclesiastical offense, it is not remarkable to find in the legislation permitting the taking of interest a regulation of the rate and provisions preventing aggravated forms of usury. Such legislation proceeds on the theory that the taking of interest is a privilege and which may be accompanied with restrictions.

The English attempts at legislative control of prices exerted much influence upon early American legislation. During the financial distresses of the Revolutionary War and the stringency in trade caused by the presence of large quantities of depreciated currency, the Continental Congress by resolution urged the several states to pass laws for the fixing of prices and the prevention of forestalling, regrating, and engrossing. In 1777 two statutes were passed in Massachusetts. The first recited that "Whereas the avaricious conduct of many persons by daily adding to the now exorbitant price of every necessary and convenient article of life, and increasing the price of labor in general, etc., be it enacted, etc., that the price of farming labor, in the summer season, shall not exceed three shillings by the day, and found, as usual, and so in usual proportion at other seasons of the year." The wages for other laborers and mechanics is also fixed at the customary price. "The following articles shall not be sold for a higher price than is hereinafter settled, etc., vis., good merchantable wheat, at seven shillings and six pence per bushel,

good merchantable rye or rye-meal, at five-shillings per bushel." . . . Likewise, the price of other grains, salt, rum, sugar, molasses, shoes, beef, cotton, tow-cloth, flannel, wool, leather, cloth, flour, and many other commodities is prescribed. This act was supplemented by another in the same year which empowered selectmen and committees of correspondence of the several towns to fix in the respective towns once in two months the prices of labor and commodities. A person having in his possession any more of a commodity than was necessary for the support of his own family and dependents, was required to sell the surplus to such as needed it at the lawful prices. This statute was repealed the same year (Province Laws, 1776-77, c. 46).

In 1778 New York passed a statute (ch. 34) which fixed the wages of farm laborers, mechanics, and others. It also prescribed the prices of hemp, wool, various manufactured articles, woolen cloth, rum, sugar, and numerous other articles. It also regulated the profits of traders, retailers and vendors. This act was repealed during the same year. In 1786 there was also in New York a statute requiring authors of books to furnish them at reasonable prices (Greenleaf's Laws, p. 275).

As an essential part of the state regulation of wages and prices was the regulation of the hours of labor. Whatever affects the hours of labor also affects the wages, and whatever affects wages necessarily involves prices, so that it is impracticable to legislate on one subject without becoming concerned with the other. The modern legislation attempting to fix the hours of labor will logically lead to similar attempts at fixing prices and wages. As early as 1562, a very extensive regulation of hours of labor is found. In 5 Eliz., c. 4, it is provided "that all artificers and labourers, being hired for wages by the day or week, shall betwixt the midst of the month of March and September be and continue at their work before five of the clock in the morning and continue at work and not depart until betweixt seven and eight at night (except it be in the time of breakfast, dinner or drinking, the which times at the most shall not exceed above two hours and a half in a day, that is to say, at every drinking one half hour, for his dinner, one hour, and for his sleep, when he is allowed to sleep, the which is from the midst of May to the midst of August, half an hour at most, and at every breakfast one half hour); And . . . between the midst of September and the midst of March shall . . . continue at their work from the spring of the day in the morning until the night of the same day, except it be in time afore appointed for breakfast and dinner." The hours of labor for tailors was fixed by 1. Geo. I, c. 13 (1720) at from six o'clock in the morning until eight at night, with one hour for dinner, and the wages from March 25, to June 20, were not to exceed two shillings per day, and for the remainder of the year, one shilling and eight pence. The first statute was not formally repealed until 1875 (38 & 39 Vict. c. 86, §17). Thus for over three hundred years the legal day's work for a large class of workmen, as fixed by statute, was from eleven to thirteen hours. When the law was finally repealed no one suggested as a reason for so doing that it deprived Englishmen of their "liberty" or "property."

The English and the early American laws fixing the prices of labor and other commodities in private businesses were never successfully enforced, and either became obsolete soon after their passage or were repealed, and the whole scheme of governmental regulation of prices was abandoned as economically inexpedient. There are few instances in the United States of direct regulation of prices in business of a strictly private nature. There is a strong and prevalent feeling that a general legislative power to regulate private business, to prescribe the conditions under which it may be carried on, and to fix the price of commodities and services would be a deprivation

of liberty and property guaranteed under the American constitutional system and would be contrary to the genius of American institutions. There is, however, a large body of law which, while not directly fixing prices, has for its purpose the prevention of monopoly and the prohibition of combinations to restrain trade. It is also a well-recognized principle that in a business properly designated public, state regulation of prices is not only legitimate but desirable, and laws fixing the charges for carriage, ferriage, wharfage, etc., are common. There is also recognized by the case of Munn *v.* Illinois and the decisions arising out of the Granger legislation, the principle that any business, whether or not concerned in the work of the state and enjoying governmental prerogatives or franchises, may become "affected with a public interest" so as to justify state regulation of its charges. When a business will be so "affected" is not clear. It was suggested in Budd *v.* New York, 143 U.S. 517, that whenever the business possessed a "virtual monopoly," whether legal or *de facto*, the state might regulate its charges, on the ground that monopolistic conditions often bring oppression, to the relief of which the state's police power properly extends, even to the fixing of rates. But in Brass *v.* North Dakota, 153 U.S. 391, state regulation of charges for grain elevating and storing was upheld, although there was no monopoly of any kind. For aught that appears, it was simply convenient and desirable that such prices should be regulated. In Inter-Ocean Pub. Co. *v.* Associated Press, 184 Ill., 436, there is an intimation that whenever any private business becomes essential to the comfort and convenience of the public, it is "affected" and may be regulated. An examination of most of the preambles of most of the statutes regulating prices shows that they were enacted for the purpose of relieving from economic distresses and to secure to the people those commodities which were deemed by the legislative branch of the government to be of prime necessity for the existence or for the comfort and convenience of the body politic. The principle seems to be that whatever is essential or desirable for the public good the state may secure, and if to secure it the price must be fixed by law, the state may fix it. As indicating this, a recent statute of New Hampshire (Laws of 1899, c. 85) may be mentioned. Its striking similarity in language, and purport to some English statutes three hundred years old, is apparent. "Any person or persons who feel aggrieved by any rates charged by any fire insurance company doing business in this state may complain to the insurance commissioner, who shall hear the parties; and if it appear to him that the rates charged are excessive, he shall fix a reasonable rate, and the rate so fixed shall be binding upon all such companies. . . . If any such insurance company refuses to insure property at the rates fixed by the insurance commissioner it shall be fined $200 for each offense." This is not different in principle from 25 Hen. VIII, c. 15, above, which authorized certain officers on complaint to fix the price of books and binding, or 16 & 17 Car. II, c. 2, authorizing officers to fix a reasonable price for coal.

Whether there is under the American constitutional system a general legislative power to fix prices in private business is an open question. The views of many on questions of economics and expediency, and on the proper functions of the state, would undoubtedly oppose the exercise of such a power. But it may well be that a time will come when dominant public sentiment will incline less to the *laissez-faire* and more to the socialistic idea of the state. The decision of the Supreme Court of the United States in People *v.* Lockner, holding the New York ten-hour-a-day law for bakers unconstitutional, because its "real object and purpose were simply to regulate the hours of labor between the master and employees (all being *sui juris*) in a private business not dangerous in any degree to

morals and not in any real or substantial degree to the health of the employees," indicates that a bare majority of the court does not regard police legislation limiting the hours of labor in a private business for purely social and economic reasons as within the constitutional power of the state. What is said of a law limiting the hours of labor would apply equally to a law fixing rates and charges in a private business. The dissenting opinion of Holmes, J. in this case, is, however, suggestive: "State constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical as this (the New York law) and which, equally with this, interfere with the liberty to contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state, or of *laissez-faire*. It is made for people of fundamentally different views, and the accident of our finding certain opinions natural and familiar, or novel, or even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. . . . I think that the word 'liberty' in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of dominant opinion." If dominant opinion should favor a return to the paternalistic conditions of mediæval England, or to some modified and less extensive control of private business, such as reasonable restrictions on the hours of labor, and prohibitions on the manipulation of prices, however inexpedient such legislation might by some be thought to be, the Constitution should not be construed to check the working out of such opinion.

MADISON, WIS., September, 1905.

CHARLES E. HUGHES, THE PILOT OF THE INSURANCE INVESTIGATION

By Lindsay Russell

WHEN Mr. Hughes rejected the Republican nomination for mayor of New York, he did no more than was expected by those who knew him. No one, except, perhaps, the machine politicians, doubted that he would refuse to renounce his duties as chief counsel of the insurance investigating committee, even had there been a prospect of his winning the election. He is not the sort of man to shun an obligation for personal considerations.

Although the "insurance inquisitor" as he had been called since the New York State Legislature selected him for their advisor, was scarcely known a year ago, except to the bench and bar of New York City as an able advocate, and in educational circles as a competent instructor in legal topics, he now holds a position among the leaders of the American Bar. The elevation, however rapid, is not questioned. The fact would have been recognized throughout the country if he had never been mentioned in connection with the mayoralty. Two million or more of insurance policy-holders had been praising his efforts in their behalf for a month before political preferment was held out to him.

It was the investigation of the Gas Trust that first ushered Mr. Hughes into the limelight as a lawyer of national reputation. That was last winter. The members of the bar, of course, had known him as a man of learning, intellect and skill in handling cases, but there had been little in his career to distinguish him from scores of other attorneys able to win suits involving large business interests. The judges of the courts, high and low, had recognized his ability as equal to that of almost any New York barrister; but in none of his important court appearances had there been proof of his preëminent qualifications for the work that has made him famous.

The insurance committee, having before it the memory of his successful exposure of the Consolidated Gas Company's outrageous monopoly in Greater New York, was quick to choose him as the right man to discover the corruptions and ailments of the so-called "mutual" companies. Even after he had accepted the trust, despite his record in the gas inquiry, there were cynics who prophesied a "whitewash" for the insurance corporations. But the prophets did not know Hughes. The investigation had been in progress less than a week, when they found that he meant to carry it to the bitter end. The committee, itself, had it wished to do so, could not stop him; the blustering of the scorched financiers did not frighten him; the manœuvers of the politicians, some of whom had been benefited by the lavishness of the insurance lobby, did not deceive him.

Mr. Hughes' methods as an examiner of witnesses was disclosed in both the investigations, but naturally did not attract as much attention in the gas inquiry as when he attacked the question of insurance, with its interest for men and women throughout the world. There is not a newspaper reader in America to-day, who has not heard how Hughes made playthings of the "mutual" corporation presidents, those autocrats whose very names had been a terror to less bold inquisitors. It has become common gossip how he forced them to confess their carelessness and drove them to the wall in their meager defense of worse faults. The story of his proof of campaign contributions, fabulous salaries, wasteful extravagance, gross favoritism, financial jugglery and personal misappropriations has spread over the world until every man who

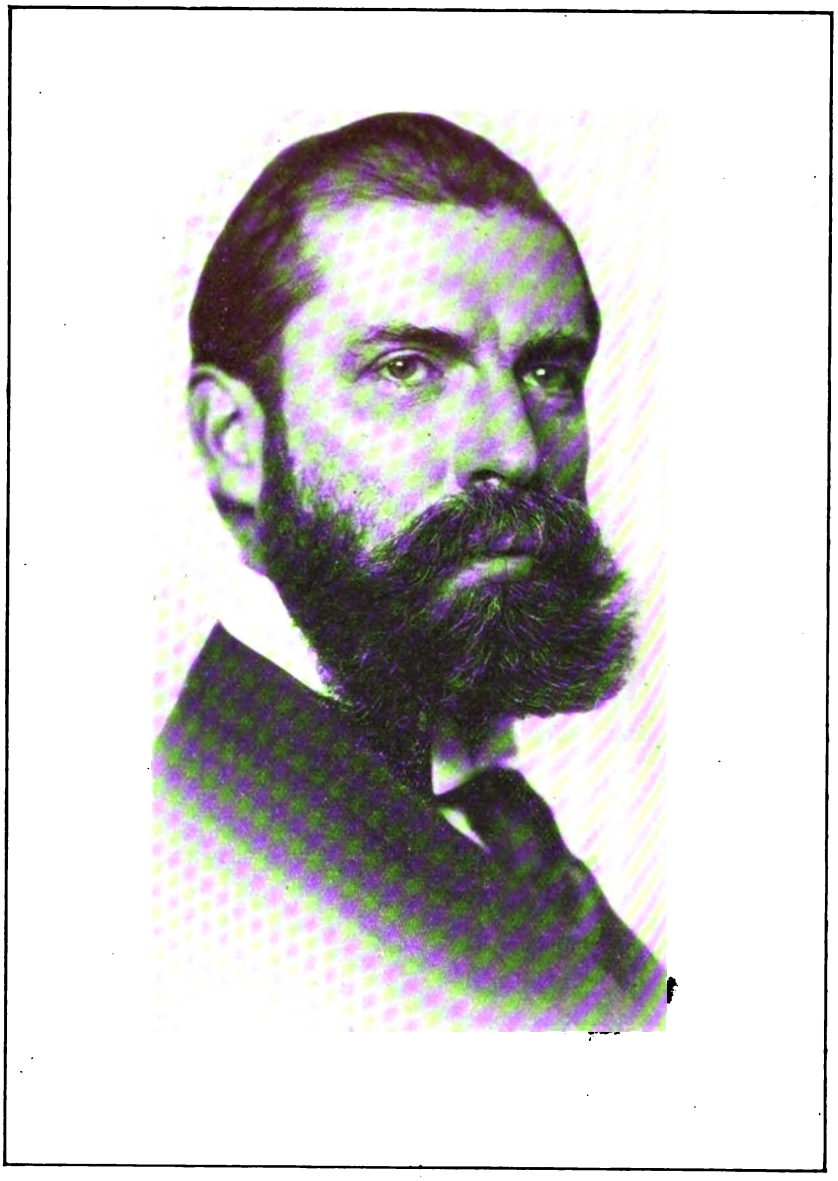

PHOTO BY MACDONALD

CHARLES E. HUGHES

goes in for American insurance under present conditions knows he is walking blindfolded into the other fellow's game.

In unfolding the inside workings of the insurance manipulators, Mr. Hughes displayed, first of all, unlimited patience; no point was too small for his attention, no road too devious, if only it led toward the end in view. He would retrace, over and over again, his questions to an unwilling witness, seeking by each new line to weave a net from which there was no escape; and finally the witness, whether he was a president or a clerk, would be forced to yield at least a part of the information desired. The questions could not be expected, of course, to draw out confessions of criminal guilt, but he did manage, where there had been an approach to such guilt, to convince the audience that the witness had been negligent of his duties. It is not going too far to say that in many cases he produced plenty of moral proof that a crime had been committed. Had he been a prosecutor instead of a mere legislature's investigator, detailed to discover reasons for remedial laws, he might have sent some of his victims to a cell instead of back to their now precarious fiduciary positions. Patience was not the only trait he displayed as an examiner. He was both quick to seize upon new clues and remarkable in his ability to comprehend complex financial transactions beyond the grasp of most men who are untrained in such matters. His "poise," too, was conspicuous — this by the way is the possession of what his friends say he is proudest — and there was not a moment when he lost his temper or forgot his good manners, no matter how annoying or recalcitrant the witnesses might be. From first to last he was alert, concise and polite. Nor did he ever seem to tire, and the stenographers said he was as "hard to take" after four o'clock in the afternoon, as he had been when the hearing opened in the New York City Hall at half-past ten o'clock in the morning.

Mr. Hughes is a worker "from the word go." Ever since he was a boy — he was born in Glenns Falls, New York, on April 11, 1862 — he has been noted for his industry. When his father, the Rev. D. C. Hughes, a Baptist minister, took him to the family's new home in Newark, N. J., he studied more than his parents thought was good for him in the primary grades of the public schools. When he attended a High School in New York City, after another move of the family, he became known as a youth of unusual ability and of depth beyond his years, and he was ready to enter The College of the City of New York a whole year before he was old enough to matriculate.

After a period under his father's tutorship in 1875–76, he changed his plan of attending college in the city and went to Madison (now Colgate) University, at Hamilton, New York. There he remained until 1878, when he transferred his allegiance to Brown University, joining the Sophomore class. In 1881, he was graduated with honors, having been one of five members of his class eligible to the scholarship society of Phi Beta Kappa.

For a year after his graduation he taught school. He experienced some difficulty in securing a position, because of his youthful appearance, but finally persuaded the principal of the Delaware Academy, at Delphi, N. Y., to let him try his hand on the greek and mathematics classes. The principal, outgrowing his misgivings, was disgruntled when the young man left him to study law in 1882.

Two years at the Columbia University Law School, where he won a prize fellowship after his first spring term, fitted him for a clerkship. He was employed at a nominal salary by Chamberlain, Carter and Hornblower. Previously, while a student, he had been registered in their office as well as with Gen. Stewart L. Woodford, then United States District Attorney. As a salaried clerk, quickly growing in favor with

Walter S. Carter, of the firm, he worked hard from 1884 until 1891. Then he accepted a professorship of law at Cornell University, much to the disgust of Mr. Carter, who had already rated him as one of those young men not to be let go. Mr. Carter was celebrated for his ability to surround himself with youthful talent of unusual quality.

The reason Hughes took the professorship was that he had worked too much for his physical well-being. He needed a rest, and, besides, he liked teaching. With his wife, who was Miss Antoinette Carter, his employer's daughter, and whom he had married on December 5, 1888, he spent two quiet years at Ithaca, N. Y., where Cornell is situated. At the end of that time he was ready for an active life again. Leaving behind him a reputation that had caused him to be classed as one of the most scholarly men in the university faculty, he returned to New York to enter the new law firm of Carter, Hughes and Dwight.

Since then Mr. Hughes, who was known as the "working member" from the start, had many important cases, beginning with the one that took him to Oregon in behalf of the Eastern bondholders of a wrecked railroad corporation in that state. He has never figured in criminal actions, but has devoted himself to civil litigation, and, perhaps, most of his work in recent years has been as counsel to other lawyers. The firm, after it had been styled Carter, Hughes and Cravath, and later, Carter, Hughes, Rounds and Schurman, became Hughes, Rounds and Schurman, when Mr. Carter died in the spring of 1904.

The "insurance inquisitor" whose growing practice has now compelled him to give up the special lectureships he held for some years at Cornell and the New York Law School, resides with his wife and three children in an unostentatious house at No. 570 West End Avenue, where he has a fine library that monopolizes his attention most evenings, after the long day's work at the office is done. His only son, now sixteen years old, is a Freshman, at Brown University, and the two little daughters attend a private school in the city.

Golf is Mr. Hughes' chief diversion, and he tries to be on the links at least once a week, generally Saturday afternoon. He is also fond of mountain climbing; hence an annual vacation in Switzerland. Occasionally, too, his love of outdoor life carries him to the Maine woods for a fortnight of trout fishing. His friends know him as a man who believes in exercise and hard work, as much of each as one can get.

The Baptist Church numbers the lawyer among its staunch members, and he was one of the organizers of the Bible Class led by John D. Rockefeller, Jr. His political beliefs are Republican, though he never sought office. The speech he made in declining the recent mayorality nomination on October 9, was as illustrative of his even temperament as it was of his sagacity. In it he said to the Notification Committee:

"You know how desirous I have been that the insurance investigation should not be colored by any suggestion of political motive. Whatever confidence it has inspired, has been due to absolute independence of political considerations. It is not sufficient to say that an acceptance of this nomination, coming to me unsought and despite an unequivocal statement of my position, would not deflect my course by a hair's breadth, and that I should remain, and that you intend that I should remain, entirely untrammeled. The non-political character of the investigation and its freedom from bias, either of fear or favor, not only must exist; they must be recognized. I cannot permit them, by any action of mine, to become matters of debate.

"There are abundant opportunities for misconstruction. Doubtless, many abuses will remain undisclosed, many grievous wrongs, to which the evidence may point from time to time, will be found unsusceptible of proof, many promising clues will be taken up in vain. Were I, with the best of

intentions, to accept the nomination, it is my conviction that the work of the investigation would largely be discredited, its motives would be impugned, and its integrity assailed. To many it would appear that its course would be shaped and its lines of inquiry would be chosen, developed, or abandoned, as political ambition might prompt, or political exigency demand.

"Such a situation would be intolerable. There is but one course open. The legislative inquiry must proceed with convincing disinterestedness. Its great opportunities must not be imperiled, by alienating the support to which it is entitled, or by giving the slightest occasion for questioning the sincerity and single-mindedness with which it is conducted.

"There is, however, another consideration which is to be conclusive. The work of the investigation is laborious and exacting. It taxes the strength of the counsel of the committee to its limit. It is performed under great strain. Whatever success is gained, is the result of unremitting toil and undivided attention. There is no wizardry in it.

"It is idle to suppose that if I accepted your nomination I could continue my part of the work of the investigation efficiently. I may be pardoned for saying that I am a better judge of what that work requires than any one apart from my associates. It requires every moment of available time. It requires endeavor secure from interruption, and a mind free from distraction. It has been suggested that it would not be necessary for me to make an active canvass, that I should not be obliged to make a speech, to attend a meeting, or even to write a letter.

"In effect you ask me to enter upon a campaign in which important questions should be discussed and brought home to the conscience of the people, with my mouth shut and my hands tied. Apart from a natural disinclination to place myself in such a situation, I believe the plan to be wholly impracticable. But, assuming it to be carried out as fully as is contemplated, it would still leave a large demand upon time and nervous energy which would be inexorable, and would be an element of distraction most injurious to the investigation. I do not believe that the man lives, and certainly I am not the man, who, while a candidate for the mayoralty, could perform with efficiency that part of the work which has been devolved upon me in the pending inquiry. If I were to accept the nomination for the high office of mayor of this city, I should be obliged to curtail this work, and this I have no right to do.

"For your expression of confidence, I thank you. The honor you would confer upon me I most highly esteem. Your generous approval and the unanimity and enthusiasm with which the nomination was made, I warmly appreciate. But I have assumed obligations of the first importance which make it impossible for me to meet your wishes. I must, therefore, respectfully decline the nomination."

In spite of his professional duties, Mr. Hughes finds time to mingle with his friends. He is an attractive after-dinner speaker, and a charming conversationalist when in the humor for it. His clubs are the University, Cornell, Brown, and Lawyers', and he belongs to the American Bar Association, the State Bar Association and the American Baptist Social Union.

NEW YORK, N. Y., October, 1905.

LYNCH-LAW AND LYNCHING [1]

By Duane Mowry

MR. JUSTICE BREWER,[2] of the Supreme Court of the United States, is reported to have recently said that lynch-law is now a habit of the American people. And he very justly denominates it "a most terrible blot on our national life." He adds: "It used to be said that it was one of the worst evidences of the lawlessness that prevailed in our frontier life. I have seen it operate in such communities, a society where the machinery of the law was not yet in full operation. But now, alas, scarcely a day passes that we do not learn that 'the people have taken the law into their own hands,' as the remark is, somewhere in this country."

In a government, whose subjects pride themselves upon their law-abiding proclivities and respect for law, this arraignment, coming from such eminent authority, becomes a most important and serious matter, if true. And is it true?

Dr. J. E. Cutler, in his investigation into the history of lynching in the United States, who has recently submitted the most comprehensive treatise extant on the subject of lynchings and lynch-law in this country, does not hesitate most positively to say that "the practice whereby mobs capture individuals suspected of crime, or take them from the officers of the law, and execute them without any process at law, or break open jails and hang convicted criminals with impunity, is to be found in no other country of a high degree of civilization." And he asserts that "we may be reluctant to admit our peculiarity in this respect and it may seem unpatriotic to do so, but the fact remains that lynching is a criminal practice which is peculiar to the United States." Ample statistics, data, and reports, from court proceedings, newspapers, and other sources, are introduced by the author, not, perhaps, entirely reliable, but nearly so, which go far to sustain the indictment by Justice Brewer. It is believed that the claim that lynching has become an American "habit" is fully warranted by the facts.

Mr. Cutler's discussion of the origin and growth of lynch-law in this country is very full and shows that in its inception lynch-law, which is defined as the popular administration of justice without the forms of law, did not contemplate the execution of its victims; that the taking of human life has been a practice of a comparatively recent date, since the Civil War. So that to-day "a lynching may be defined to be an illegal and summary execution at the hands of a mob, or a number of persons, who have in some degree the public opinion of the community behind them." In the earlier days of its administration, lynch-law meant some sort of corporal punishment, usually whipping, or, possibly, banishment from the community. How far it has degenerated it is not difficult to determine from the examination of the initial chapters of this interesting book.

In considering the causes for the prevalence of lynch-law in this country, Dr. Cutler doubtless states the true one. He does not believe that it lies along racial lines, or is due, primarily, to race prejudice. He says, as we think, truly: "The American people are not any more disposed toward lawlessness — they are not less law-abiding — than European peoples; it is rather that they maintain a wholly different attitude toward the law. Social and political conditions are different, and the

[1] Lynch-law. An Investigation into the History of Lynching in the United States. By James Elbert Cutler, Ph.D. New York: Longmans, Green & Company.

[2] In a Public Address before the Yale Law School.

law, instead of being something in itself to reverence and respect, is little more than a device for securing freedom. The value of laws as rules of conduct is not minimized, but there is no sense of sanctity pertaining to them. To outwit, avoid, defy, or forget the laws is not a serious offense so long as an appeal can be made to the individual sense of justice in support of such courses of action." How important it is, therefore, that some definite and wise legislation be invoked to impress upon the mob the power and virtue of our penal statutes as administered in our courts of justice under the forms of law. As was once said by Thomas Jefferson: "It is more dangerous that even a guilty person should be punished without the forms of law, than that he should escape." And as good and law-abiding citizens we shall have to, sooner or later, recognize the force of this wise and just observation. The price of good government is the willingness to be governed by it. Admitting, as it must be admitted, that the reign of the mob is all too frequent in this country, it will be worth while to examine some of the facts, arguments and conclusions found in the volume before us.

There has been a wide-spread opinion prevailing in this country, and, perhaps, elsewhere, that most of the lynchings of negroes was for the crime of rape against white women. For in most cases, where a negro is the victim of the mob, his summary execution is justified on account of the loathsomeness of his crime against a white woman. The author shows conclusively, from statistics which seem quite convincing, that during the last twenty-two years not more than thirty-four per cent of the negroes summarily put to death have been lynched for that crime, either alleged, attempted, or actually committed. The argument offered in some quarters in justification of the lynching of negroes because of the criminal assault on defenseless white women, must, in the light of the conclusions of Dr. Cutler, based, as he assures us, on carefully prepared statistics, prove untenable and unavailing.

The writer suggests that the lynching of negroes in recent years can be justified on no other ground than that the law as formulated and administered has proved inadequate to deal with the situation, that it has seemed utterly unsuited to the function of dealing with negro criminals. There may be more truth in the following observation than we are, at first thought, willing to concede: "A judicial system adapted to a highly civilized and cultured race is not equally applicable to a race of inferior civilization, and the failure to realize this fact and act upon it, by making special provision for the control of the negro population in the southern states since slavery was abolished, is a fundamental reason for the disrepute into which legal procedure has fallen as regards negroes accused of offenses against the whites." It would be interesting to know just what "special provision" would be equal to meet the case under the federal constitution. Certain it is that no invidious distinctions of citizens on account of race, color, or for any other cause, are permissible under our constitution and laws. And this applies with equal force with reference to punishments for the commission of crime as well as for social, economical, or other reasons.

In the discussion of remedies for lynching, reference is had to the condition which prevails in all well-settled communities, rather than to conditions found in a frontier society. The changed social conditions incident to a density of population in a frontier region, and the establishment of an adequate judiciary, remove the cause for the frontier type of lynch-law.

It is the author's firm belief that "the only ultimate remedy for lynching is a strong public sentiment against it." But such a sentiment already exists in this country. The vast majority of our people, in theory, at least, are opposed to lynch-law. And still the triumph of lawless force

by whole communities, continues. I do not minimize the value and virtue of public opinion upon any important movement in the interest of better governmental conditions. It is of paramount importance in a democracy. But it is neither the "ultimate" nor sufficient remedy for the crime of the mob. How can there be an effective "strong sentiment" against lynching unless the intelligent oppose the crime? And our author has shown quite clearly that the most frequent lynchings do not occur among the illiterate and ignorant classes. The crime, moreover, has grown more frequent during the last decade, and the torture accompanying the execution of the victims of the mob has also increased in both frequency and severity.

The certainty of prompt and adequate punishment for crime is, I am convinced, one of the most positive and satisfying preventatives. Punishment awakens fear; it inspires respect. Our author has already been quoted as saying that the American people are wanting in respect for law, and lynching is one form of the manifestation of that disrespect. And what is law but the orderly arrangement of all existence. Does not the term imply not only the precept, but the penalty also? "Indeed, law, without punishment for its violation, is impossible in the nature of things."

There is no doubt that the conviction of the mob under existing laws is extremely difficult and practically impossible. It need not be so. Legislation is possible which will effect certainty of punishment for the mob. Such legislation might require amendments to both the federal, and most, if not all, of the state constitutions. For I believe that the only hope of conviction of the mob can come by having its trial elsewhere than in the "district wherein the crime shall have been committed." We are all solicitous to have those accused of crime given a speedy trial by an impartial jury. But how can such trial be "impartial" when the history of all prosecutions of the mobs have been prompt acquittals in spite of the fact that ample evidence has been submitted establishing the guilt of the mob beyond a reasonable doubt? Is the lesson of judicial experience to have no meaning? No jury of the vicinage, where the lynching was committed, has ever convicted the mob. The conclusion is irresistible that too many friends, relatives, and sympathizers of the accused are either members of the jury or other officers of the court to guarantee the due administration of justice. While it is never desirable to have the criminal procedure of the country so rigid and severe as to make remotely possible the conviction of the innocent, it is most desirable, yea, imperative, that where our criminal procedure has proved inadequate to meet actual conditions of lawlessness, and this inadequacy has been uniformly established in the actual trial of causes, as in that of the trial of whole communities that have participated in the illegal execution of a human being, then it is the business and duty of the law-making branch of our government to so amend our laws as to effectually meet the needs of the case. It is my contention that the state, in criminal cases, should be given the absolute right to remove for trial such cases as are now under consideration, to some other part of the Commonwealth than the county wherein the offense is alleged to have been committed. Perhaps the proposed amendment or statute ought to go further, and make it mandatory on the part of the state to remove all such cases to some territory in the state far away from the scene of the commission of the alleged crime. Such a change in our criminal procedure would require amendment of those state constitutions which require trial by a jury of the vicinage similar to the 6th Amendment of the Constitution of the United States, and the writer believes that the importance of the question requires it. Indeed, he would even go so far as to advocate amendment of the federal constitution and legislation by Congress if the states failed to act.

The writer inclines strongly to the view that these cases should be prosecuted by officers selected by the chief executive of the state, by and with the advice and co-operation of the office of the attorney-general of the state. For the objection which is made to a jury of the county where the offense is charged to have been committed applies also to the local prosecuting officer. These prosecuting officers are usually elected by the citizens of the county, and while their duty is made quite clear and plain by the statute books, the disposition to temporize with the local conditions is very great, if not overpowering. The temptation to trifle with these conditions ought to be removed; rendered impossible. It would seem that this last suggestion could be made immediately operative without the necessity of constitutional amendments.

As a concurrent remedy for lynching, our author does not believe there is much virtue in giving damages to the lawful heirs of the victim. His reason for this view is that it has been impossible, in most cases, to enforce the provision. I cannot take Mr. Cutler's view of this matter as either just or tenable. I strongly favor the recovery of damages from the county for the surviving representatives of the victim, because it is in some limited sense a punishment to all of the tax-paying community where the lawless act was committed. And also for the following additional reasons: first, as a punishment to the state for its failure to give one of its citizens the protection guaranteed under our laws; and second, to make to the immediate heirs of the deceased some slight compensation for their loss. The amount of this damage should be fixed by law and should be at least $5,000.00. There seems to be some ground for the statement that the collection of this damage under state laws is difficult. If this is true, then Congress should take up this phase of the matter, for the recovery of damages should be made very simple, easy, and inexpensive, the principal requisites being proof of the killing, of the time and place of same, and of heirship. If Congress should see fit to enact a law giving heirs of victims damage, its collection could be made effective through the Court of Claims at Washington and out of the National Treasury, and by the general government collected from the state, which in turn should be required to collect it from the county where the offense was committed. This salutary provision can be enforced. The failure to do so, if it has ever been tried before, was due, doubtless, to the unwillingness of the very people who committed the crime to make any amends for it. By passing the entire matter over to the government at Washington, this objection of want of enforcement is met and answered. This provision will tend to restrain many would-be lynchers from the commission of its intending crime. In this way it will exert a wholesome and deterring influence. We all know that a fine exerts a restraining influence on the commission of crime. Why not, then, the payment of money by whole communities, as in the nature of punitive damages for illegally taking the life of a human being?[1]

[1] Since the above article was written, the writer has had his attention called to a recent statute passed by the General Assembly of Illinois, and approved May 16, 1905, which is designed to suppress mob-violence. This statute recognizes conditions which are emphasized in our article and provides for mild penalties for violation of the law by the mob. It permits the recovery of damages from the county or city in which injury is inflicted to the person or property of the victim of the mob, to an amount not exceeding five thousand dollars. And in case of the death of the victim, damages not exceeding five thousand dollars may also be recovered by the spouse, lineal heirs, or others who were dependent upon the deceased for support. It is also provided that the taking of any person from the hands of the sheriff and lynching him shall be *prima facie* evidence of failure on the part of such sheriff to do his duty, and his office shall thereupon become vacant. He may, however, be reinstated, if he petitions the governor for a hearing and prove to the satisfaction of the governor that he did his full duty in

The attorney who appeared for the assassin of President McKinley, when addressing the court, contributed a real service to the peace and good order of society in declaring that mob-law is worse than anarchy. Most of us abhor and condemn the man who does not believe in any law, or any form of government. All feel that such doctrines are dangerous; are criminal; that they will overthrow our government in time if they are allowed to prevail. But this jurist, while conceding the danger that would follow the prevalence of anarchistic doctrines, declared that he did not believe it created, or would create, a danger equal to the belief, becoming so common, that men who are charged with crime shall not be permitted to go through the form of a trial in a court of justice, but that lynch-law shall take the place of the calm and dignified administration of law by our courts of justice. "When that doctrine becomes sufficiently prevalent in this country" he says, "if it ever does, our institutions will be overthrown, and, if we are not misinformed as to the state of mind of some people in some parts of the country, the time is fast approaching when men charged with crime will not be permitted to come into court and submit to a calm and dignified trial, but will be strung up to a tree on the bare suspicion that someone may hold the belief that they have committed some crime."

Too strong emphasis cannot be given the above sentiment. It is the patriotic outburst of a good citizen. It voices the hope of all law-abiding people. To say, as has been said, that past crime must be met with present crime in order that future crime may be avoided or prevented, for this is what the mob says, in effect, is a most intolerable and monstrous doctrine. It is foreign to all human government and to all truly civilized peoples. Let us beware of all such false and vicious doctrines. It is the reign of law under the forms of law that is the true test of all civic virtue.

President Tucker, in his address before the American Bar Association, has said that we are a much-governed people; that laws are enacted for almost every conceivable object and purpose. Inferentially, we conclude that he believes there are too many laws covering too many phases and conditions of human life on our statute books. There is truth in the observation, but not the whole truth. When we consider that one phase of crime has become so common as to be denominated a "habit" of our people; that we have become incapable of punishing this crime under the existing order; that this crime is increasing in frequency and in the brutality accompanying it; have we not the evidence, clear and positive, for yet other legislation, — legislation which the changed conditions of our social and political life imperatively demand? It is not, perhaps, that we need laws for another subject, but more stringent laws for securing the certainty of punishment of a class of criminals now permitted to go free with the accompanying benediction of the masses.

Incidentally, I hear it replied to my contentions, that it will be exceedingly difficult to secure the amendments and enactments suggested. This may be so. But it is no answer to the necessity for the same.

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the premises. The penalty for inflicting "material damage to the property or serious injury to the person of any other person upon the pretense of exercising correctional powers over such person or persons, by violence and without authority of law," is imprisonment in the penitentiary not exceeding five years.

The effect of this legislation would be most salutary were it not for the objection which has been suggested in our main article, viz: Inability of our courts to grant the relief which the various provisions of this law contemplate, mainly due to the fact of being unable to secure an impartial jury. Perhaps, however, the love of law and order, among the citizens of Illinois, exceed that of other states, in which case, we may be able to see some effective results of the practical workings of this law. Of course, it is too early to pass judgment upon this law at this writing (October 14, 1905), but the purpose of the law is sound and meets the writer's approval.

It is true that the history of this government shows that the people have been unwilling to grant many radical changes in our constitutions and laws. But rarely has the present conditions been duplicated. Never in the history of this government has there been such a constant and uniform violation of the criminal code by whole communities, and never before has the criminal code failed to measure out exact justice to such communities in every instance. The case under consideration is an exceptional one calling for exceptional treatment.

It will also be argued in some quarters that severe penal laws were never known to accomplish much in the interest of law, and order, and good society, particularly, in a free country, like our own; that public opinion must precede rather than follow all legislation along lines indicated. I do not entertain this view. It is my firm belief, based upon many years of observation and experience, that both individuals and communities do right under the social order not from choice, but from policy and from fear. The mob will participate in its lawless act because it is sure to be absolved from all punishment. The fear of punishment is eliminated. If, however, certainty of punishment is sure to follow such lawlessness, this American "habit" will become less frequent until it is known no more forever.

There is reason to believe that the American people are being aroused to the gravity of this one foul blot on our national escutcheon. It calls for a high order of lofty statemanship. And shall we doubt that it will not be forthcoming at the opportune moment?

MILWAUKEE, WIS., October, 1905.

THE LAW OF NATURALIZATION

By Hon. Henry Stockbridge

NINETEEN hundred years ago imperial Rome was mistress of the then known world. To be a citizen of Rome was the proudest boast a man might make. It was alike a protection and a pride to him who could rightfully claim it. Roman citizenship, like citizenship in this our great, modern Republic, might be acquired in two ways. In each it might result as a birthright, and that of Rome might, as St. Paul declares, be purchased at "a great price," either in money or by the rendition of distinguished service to the state; while ours may similarly be said to be capable of being purchased under the legal designation of naturalization, though a price of fifty cents paid, not by the individual upon whom it is bestowed, but by the agent or committee of some political party which hopes to get his vote, can hardly be called "a great price." Is our citizenship to-day worth less than that of Rome? Or do we value it too cheaply? Or have the changed conditions of the past century been lost sight of when we bestow upon an alien citizenship with us?

When our legislation upon this subject began we were a nation of about thirteen millions of people scattered along an ocean coast. To-day we are a nation of over seventy millions, occupying a continent. From one of the poorest we have become one of the wealthiest of nations. From a state essentially agricultural we have become one in which the busy hum of active industry in a myriad different forms resounds from shore to shore. Greater changes than the century has produced among us it is difficult to conceive. It is but natural, therefore, to find that in this vast change there should have been a modification of the national policy with regard to the reception into our midst of vast numbers of aliens to form part and parcel of our body politic. This first found its expression in 1890, in the act of Congress intended to regulate immigration, and prevent the landing on our shores of those who would be undesirable, not merely as citizens, but as denizens of our Republic.

But, notwithstanding that and other restrictive acts, the tide of immigration has continued to pour in at an annual rate of from one to one and a third per cent of our entire population.

Nor is it longer true that those composing this stream are individuals oppressed in the land of their nativity and seeking here a freedom and opportunity they cannot enjoy at home. If anything is needed to emphasize this it may be found in the fact, that the Austrian government not long since contracted with one of the great trans-Atlantic lines, to furnish thirty-five thousand emigrants annually, for transportation to this country. There will be no need to consult a list of the peerage or nobility to discover that the individuals so "furnished" are not members of the first families. They may be patriots, all who take passage under such a contract; but it will occur to many that they are in all probability the sort of patriots "who leave their country for their country's good."

And when these reach our shores it may well be that under existing law, the greater part, or all of them, will be landed, but because they may land is no reason why they should be admitted to citizenship, but rather suggests a closer scrutiny of the principles, laws and practice affecting naturalization.

In August, 1903, Judge Clifford D. Gregory, of Albany, refused to naturalize forty-three applicants for citizenship, and in doing so, said: "I will not naturalize any person who comes before me and is unable to speak the English language sufficiently to make him-

self understood . . . when a man has been in this country five years and is unable to talk our language, in my opinion he is not fit to be admitted to citizenship." The action of Judge Gregory and his remarks just quoted, were widely commented upon at the time by the press, and at least one of the legal journals, and it was assumed by some of the critics that the judge had imposed a new requirement for citizenship.

A few weeks later when the courts of the country resumed business after the summer recess, they found themselves with apparently an additional requirement to impose on all who aspired to citizenship, as the result of an act of Congress passed early in the year, which was intended to exclude all aliens of an Anarchistic or Nihilistic type from enrolling themselves as citizens of the United States.

In January, 1904, Judge Marr, sitting in Schuylkill County, Pennsylvania, the heart of the anthracite coal region, announced that every applicant for naturalization from the mining towns, where were thousands of Slavs, Lithuanians, Hungarians and Poles, would be required to prove to the court that he did not take part in the riots in the coal region which had made it necessary to call out the state troops.

These successive events all happening within a comparatively short space of time, have attracted attention to questions connected with the naturalization of aliens, and raise the queries: What was the effect of the recent act of Congress? Was it declaratory of what was existing law or did it add a new condition of citizenship? And were or were not the respective positions of Judges Gregory and Marr correct, or did they exceed the powers conferred on them?

To answer these questions it will be necessary to look briefly at the history of legislation upon this subject, the nature and extent of the powers exercised by our state courts in dealing with these questions, and lastly, the construction placed by various courts upon the several existing requirements enacted by Congress, to be demanded of those who aspire to enjoy citizenship with us.

By the articles of confederation there was no provision made for naturalization, the subject was left entirely to the discretion of the several confederated states. This had two obvious results: while any state could grant its own citizenship to an alien, that did not operate to give him the rights of a citizen in any other state, and unless he continued to reside permanently within the boundaries of the state in which he had obtained citizenship he was likely to be involved in a maze of doubt and uncertainty, especially with regard to his power to hold and transmit property at a time when nearly every state placed restrictions of some description upon the right of aliens to hold or inherit.

Furthermore, the policy of neighboring states was not uniform with regard to the facility or difficulty with which citizenship therein might be acquired, and this diversity tended to increase the distrust and suspicion with which neighboring states regarded one another.

When the convention assembled to draft the Constitution, this subject was one which was early considered, and in the report of the committee of detail, presented by Mr. Rutledge on the 6th of August, 1787, we find the provision exactly as it appears in Section 8 of Article I of the Constitution, where among the enumerated powers of Congress is that "to establish a uniform rule of naturalization." So heartily were all the delegates in favor of it that this clause does not appear to have been the occasion of any discussion in the convention.

By the ratification of the Constitution this power having been given to the general government, chapter 2 of the acts of the Second Session of the First Congress, passed on the 26th of March, 1790, made provision how it was to be exercised. This act differed from the present law in the following essential particulars: no preliminary declaration

of intention was required, the period of residence in the United States was but two years, and the power was one to be exercised by any common law court of record in any one of the states.

This first act was superseded in 1795 by the act approved January 20th, of that year. Under this the term of residence in the United States was raised to five years, and a declaration was required three years before naturalization could be granted, while the exercise of the powers was confided to the circuit or district courts of the United States, and concurrently to the supreme, superior, district or circuit courts of any one of the states. To make it plainer what courts were intended by this act, the Act of 1802, chapter 3, was passed, which granted the power to any state court having common law jurisdiction, and possessing a seal and a clerk. This act further provided that all persons arriving in this country, in order to be naturalized should be registered in the office of the clerk of the court, and the registration was required to contain the name, birthplace, age, nationality and allegiance of each alien, together with the country whence he or she had migrated, and the place of his or her intended settlement. This requirement of registration was formally repealed by the Act of 1828, but had been virtually so by the Act of 1824, under which there was practically a consolidation of the registration and the declaration of intention. The Act of 1824 also introduced the naturalization of those who had come to this country under the age of eighteen, without requiring a prior declaration of intention.

The grant of the power of naturalization to Congress by the Constitution was an exclusive one, as will be seen when in connection with it there is taken the provision entitling the citizens of each state to all the privileges and immunities of citizens of the several states (Taney, C. J., in Thurlow *v.* The Commonwealth, 5 How. 504), and from this it followed that the passage of a naturalization statute operated practically to repeal all the previously existing state statutes, since it was then no longer possible for a state court to grant the right of citizenship merely upon a compliance with the state statutes. (Matthews *v.* Rae, Fed. Cas., No. 9, 284; Lanz *v.* Randall, Fed. Cas., No. 8,080.)

No power therefore remained in the states to change or vary the rule of naturalization Congress imposed, by imposing new or different or additional conditions, qualifications or restrictions, or to authorize any foreign subject to denationalize himself and become a citizen of the United States, without compliance with the conditions Congress had prescribed (Minneapolis *v.* Reum, 56 Fed. Rep. 580 C. C. A.). If, therefore, the respective rulings of Judges Gregory and Marr did impose any qualification not warranted by the language of the naturalization acts, their zeal to elevate the standard of American citizenship prevailed over the proper interpretation of the act.

It is somewhat anomalous that at the time when the regulation of naturalization was bestowed upon Congress the reason for so doing was to guard against a too rigid instead of a too liberal mode of conferring citizenship (Collet *v.* Collet, 2 Dall. 294), and yet in these later days a single court is claimed to have naturalized in the neighborhood of 5,000 individuals in a single day, and this suggests a glance at the tribunals in and by which the process of naturalization is affected.

Ordinarily when exclusive authority over a subject is given to Congress, the courts invested with the jurisdiction pertaining to it are the federal courts — for example, cases in admiralty — and it has even been held in some cases that Congress has no power to confer jurisdiction on state courts (*Ex parte*, Knowles, 5 Cal. 304), yet from the very first act of Congress upon the subject of naturalization, the exercise of the power has been entrusted to certain state tribunals, and it is no exaggeration to say

that fully ninety per cent of all the aliens who have been naturalized in this country during the last century have received their citizenship from state tribunals. This exercise of the granted power has been upheld in the long line of adjudications of the Supreme Court of the United States, and the rule is undoubtedly that expressed by Field, J., in United States *v.* Jones (105 United States, 512), — he says: "Whether the tribunal shall be created directly by the act of Congress, or one already established by the states shall be adopted for the occasion is a mere matter of legislative discretion. Undoubtedly, it was the purpose of the Constitution to establish a general government independent of and in some respects superior to that of the state governments, one which could enforce its own laws through its own officers and tribunals, and this purpose was accomplished. That government can create all the officers and tribunals required for the execution of its powers. Yet from the time of its establishment the government has been in the habit of using, with the consent of the states, their officers, tribunals, and institutions, as its agents. Their use has not been deemed violative of any principle or as in any manner derogating from the sovereign authority of the general government, but as a matter of convenience, and tending to a great saving expense. At different times various duties have been imposed by acts of Congress on state tribunals. They have been invested with jurisdiction in civil suits and over complaints and prosecutions for fines, penalties, and forfeitures arising under the laws of the United States. And though the jurisdiction thus conferred could not be enforced against the consent of the states, yet, when its exercise was not incompatible with state duties and the state made no objection to it, the decisions rendered by the state tribunals were upheld."

But while the right to confer is thus clear, it is not a right to exact the exercise of the power; that is, the authority to the state court to naturalize is permissive, not obligatory, for in Houston *v.* Moore (5 Wheat. 1), the idea was disclaimed that Congress could authoritatively bestow judicial powers upon state courts. Therefore, for a refusal to exercise the power no mandamus could be maintained. This principle was established in Kentucky *v.* Dennison (24 How. 108), when it was laid down that where Congress had authorized a state officer to perform a particular duty, it had no power to coerce or punish him for his refusal.

The importance of this distinction is greater than at first appears. From it flows a power in the states to formulate and enforce acts or rules governing the mode in which the power conferred may or shall be exercised. The state may not by any legislative enactment, and the court may not by any rules, impose any other or greater qualifications to be possessed by the applicant for naturalization, than are contained in the act of Congress, but it may prescribe the times, the quantum, and mode of proof, and generally all that is included in the word "practice." By way of illustration: When New Jersey passed a statute prohibiting any of her courts from acting upon any application for naturalization within thirty days of any election, the cry went up that an unwarranted increase of requirement was being imposed, but the court held that inasmuch as it was competent for the legislature to entirely forbid a state court to entertain or act upon an application for naturalization, it could, therefore, lay any restraint, regulation, limitation or condition upon the practice in such cases which it might deem expedient or proper (State *v.* Judges, 58 N. J. L., 97). And the same rule has been adopted in Massachusetts (*In re* Stephens, 4 Gray, 561) and in Pennsylvania (*In re* Lab. 3 Pa. Dist. R. 728).

At one point, and at one only, thus far, has there arisen any question which involved a possible conflict between courts, and with regard to this the decisions are at variance,

the two cases which have arisen having terminated with judgments diametrically opposite in effect.

It is axiomatic law that a judgment or degree procured by fraud and false evidence will be set aside by the tribunal rendering it, upon the fraud being shown; or its effect annulled by an injunction prohibiting the giving of it effect. It is, therefore, apparent that the admission of an alien to citizenship may be annulled and canceled by the court in which he was admitted, when his admission has been procured by false testimony or fraud, and it was so held in the United States *v.* Kommehle (89 Fed. Rep. 10).

But take a slightly different case: Assume that the naturalization had been procured by fraud practiced upon the state court when the applicant was admitted. Of course the validity of the citizenship can not be attacked collaterally either in the courts of the same or another state, or in those of the United States; but the question still remains can the United States proceed directly for the cancelation of the naturalization in the federal courts? That it could not do so successfully in the courts of another state, will hardly be questioned by any one, even though the allegation of fraudulent procurement should be held to obviate any constitutional objection on the ground of according "full faith and credit to the judgments and decrees" of the courts of another state.

With regard to the attitude of the federal courts there is more doubt. In the United States *v.* Norsch (42 Fed. Rep. 417), decided by Judge Thayer in the United States Circuit Court for the eastern district of Missouri, it was distinctly laid down that such a proceeding is maintainable, the limitation being that fraud, and that alone, could afford a sufficient basis for such a proceeding, and that it would fail where "the proceeding is merely tantamount to a motion to set the judgment aside for irregularity, or to a writ of error, or to a petition or bill of review." And the cases of Gaines *v.* Fuentes (92 U. S. 10), and Barrow *v.* Hunton (99 U. S. 82), were relied on as supporting the conclusion.

The same question was again raised a few years later, before Judge Wheeler, in the United States Circuit Court for the eastern district of New York, in the case of the United States *v.* Gleason (78 Fed. Rep. 396), and an opposite conclusion reached. The reasoning of the latter case appears the more satisfactory. While it is true that in a few cases the judgments and decrees rendered by state courts have been set aside, or their execution enjoined in the federal courts, they have been judgments operating only *inter partes*. This would not be true with regard to naturalization. A federal court might compel the surrender of the certificate, which is the evidence of the judgment, but it is difficult to see how that could affect the citizenship established by the judgment, or the record of the state court, and an injunction which could only run against further exercise of the rights of citizenship would not affect past acts performed as a citizen. Said Judge Wheeler in the case just cited: "The defendant became a citizen of the state of New York as well as a citizen of the United States. Other citizens became entitled to vote for him for such offices as citizens could hold as well as he became entitled to vote, hold office, hold lands, or do what else citizens can do. Neither the state, nor any citizen of New York or of the United States, is a party to this suit; nor do they hold their right to vote for him, or to have him hold office, under him, and no decree against him could affect their right. An attempt to carry out such a decree would produce great confusion and mischief. Chief Justice Marshall, in Spratt *v.* Spratt (4 Pet. 392), stated that the inconvenience which might arise from holding the judgment conclusive had been pressed upon the court, and added 'but the inconvenience might be still greater if the opposite opinion be established.'"

The objection suggested in the language

of Judge Wheeler just quoted would, of course, be equally applicable to the correction by a court of its own record, and the soundness of this position may be fairly questioned, but the entire absence of any power or authority in the federal courts to alter or modify the record or judgment of a state court by a proceeding in which no official of the state is a party, rests upon more solid foundation, and is apparently sound.

This phase of the subject has been dwelt upon somewhat fully for the reasons, that the law with regard to it is still apparently in a somewhat unsettled condition, and also because it serves to emphasize the importance of cautious and well-considered action when dealing with such cases, cases which almost universally are conducted as *ex parte* proceedings, but the consequences of which may be of great importance.

Thus far the consideration has been of principles where the pathway has been fairly clear. But in connection with naturalization, just as with other branches of the law, the difficulty is not so much in the determination of principles, as the application of them. The statute after prescribing the required length of residence, and declaration of intention in certain cases, then imposes in effect three qualifications to which the applicant must measure up: (I) that he is of good moral character; (II) that he is attached to the principles of the Constitution of this country, and (III) that he is well-disposed to the good order and happiness of the government.

For the correct interpretation of each of these, every court is a law unto itself, and inevitably there is no uniformity of construction, and but too often in practice they are treated as merely formal and are slurred over in a most prefunctory manner. It would be idle to attempt to work out a harmony of interpretation, or even to recite the various conceptions which have been expressed of the significance of those phrases. But there are one or two observations which can be made with regard to them in the light of the adjudicated cases.

I. Good Moral Character.

This is not presumed, but must be supported by proof (*In re* Bodek, 63 Fed. Rep. 813). We are so in the habit of applying the rule of the criminal law with regard to the presumption of innocence to everything which affects character, that the natural tendency is to say that the good character of an applicant for naturalization will be presumed, but this is error, it is a requisite qualification just as much as residence and to be proved in the same way. What standard shall be applied is a very different question, but this much may be confidently asserted, that one who has been convicted of a felony does not possess such character as will permit a court to naturalize him. Such conviction stamps the character of the individual ineffaceably so that even executive pardon will not rehabilitate the person. The length of time for which such good character must be shown may have been formerly open to debate though it had been judicially held that it applied to the entire period of the residence of the applicant in the United States (*In re* Spencer, Fed. Cas., No. 13,234). This rule now seems the proper one in view of the restrictions imposed by the immigration act designed to debar any convicted of crimes in lands of their nativity from landing on our shores. Nor is it necessary in order to determine that an applicant is not of good moral character that he shall have been convicted of a felony. An habitual violator of the laws, though the character of the offense be not so serious, will have the like effect, and it has, therefore, been held that habitual gaming, or selling of liquors, where these were forbidden by statute, would be sufficient derogation from the moral character of the applicant to make his rejection proper (*In re* Spencer, Fed. Cas., No. 13,234). And in like manner an alien who lives in a state of polygamy, or believes that polygamy may be rightfully practiced in defi-

ance of the laws of the country, is not entitled to citizenship (*Ex parte* Douglas, 5 West., Jur. 171).

II. Attached to the Principles of the Constitution.

It is not extravagant to say this condition is one which is in practice ignored. Assuredly it cannot be said that the propounding of the single question to the applicant and his witness, "Is or not A attached to the principles of the Constitution of the United States?" measures up to the standard of proof which would be required in any other matter. For before it can be said that A is so attached, it must be proven that he knows what those principles are, for no one can be said to be attached to that of which he is profoundly ignorant, or ought the bald statement of a witness to be regarded as affording the requisite proof until it is first shown that the witness himself knows what those principles are. As illustrating how lax courts have at times been in this regard, take the following language from the opinion in the case of *In re* Rodriguez, 81 Fed. Rep. 337.

"An alien who is ignorant and unable to read and write and who cannot explain the Constitution is entitled to be naturalized where it is shown that he is a thoroughly law-abiding and industrious man of good moral character."

And this was the language of a federal judge in the western district of Texas. It can find no justification anywhere, in any act of Congress, and was neither more nor less than a plain disregard of the laws the judge was expected and had sworn to uphold and enforce.

It is a relief to turn from such a case to one decided by the Supreme Court of Utah (*In re* S. W. Nian, 4 L. R. A. 726) and read:

"The man entrusted with the high, difficult, and sacred duties of an American citizen should be informed and enlightened. No one should be admitted who has not sufficient intelligence to understand the principles of the government which may rest in part on his will."

And acting upon the principles so laid down, the court held that an applicant who could not read or write English, though he testified that he had read the Constitution in a foreign language, and who knew that the United States had a president, but could not mention his name, and spoke of Washington as president, did not understand the principles of this government or its institutions sufficiently to become a citizen. It was upon this same ground that the action of Judge Gregory, was based, and it is one of the encouraging signs of the opening century that there are members of the judiciary whose love for ease and the dispatch of what is usually an irksome and disagreeable duty will not prevent them from honestly, fearlessly, and painstakingly scrutinizing those who aspire for citizenship in this great Republic, and insisting that they shall give evidence in fact of the possession of those essentials which the act of Congress has prescribed. Where, as the Utah court said, "the maintenance of the government may rest upon the will of the citizen it is assuredly only the plain duty of the court to require that there shall be a comprehension of the fundamental principles of that government."

III. Well-disposed to the Good Order and Happiness of the Government.

As in the case of individual character, there is no presumption in this particular. It is subject-matter for proof (*In re* Bodek, 63 Fed. Rep. 813). Judicial interpretations of this phrase are rare, but some things are patent upon the surface. No one meets this requirement who disbelieves in all organized form of government, or who inculcates such doctrines, or associates with organizations, which seek to inculcate the idea of destruction of all lawful authority. For since such belief or teaching or associations are destructive in tendency of the machinery upon which organized society exists, they represent the direct antithesis

of good order and happiness of government. The act of Congress of 1903, therefore, introduced no new principles into naturalization, but only emphasized that which was already there by providing for the more perfect preservation of the evidence in regard to this requirement. And under this head may properly be classed the position taken by Judge Marr. Riots had taken place, participated in by a large number of aliens; riots of so grave a character that it had become necessary in order to preserve the peace to call out the military forces of the state, few of those participating in these occasions of disorder had ever been brought to trial for their acts of violence, acts directly subversive of the good order and happiness of the government. Since there was no presumption of law with regard to this requirement, it became his sworn duty to require proof that applicants for citizenship had not by their very acts stamped themselves as deficient in one of the essential qualifications as prescribed by Congress. There is a corollary to this which has not yet been passed upon by the courts, but will have to be at no distant day.

This Republic of ours in proportion to its extent and population, maintains but a small standing army; the several states of this Union maintain none; but the ultimate dependence is upon the militia in each state for the preservation of order in the state, or for the military operations of the nation in time of war. There are growing up in our midst organizations for various purposes which in effect are antagonizing this system of our government, and are demanding that the members of those organizations shall not become members of the militia of the state, liable to be called upon to repress internal disorder or check foreign aggression. Are not such organizations by reason of their attitude and the exactions demanded of their members taking a position directly inimical to the good order and happiness of the government, and must not the alien who is a member of such a body be debarred from becoming a citizen of the United States? Does the question differ in any respect from the requirement we have been considering?

BALTIMORE, MARYLAND.

THE EXTRADITION OF GAYNOR AND GREENE

By William Lambert Barnard

JOHN F. GAYNOR and Benjamin D. Greene were indicted at Savannah, Georgia, for conspiracy with Oberlin M. Carter, while a captain in the United States Army, to defraud the government in contracts for harbor improvements. After a protracted fight in the federal courts against extradition from New York to Georgia, they were arraigned at Savannah. But before their case was reached for trial they fled to Canada, arriving in Quebec in March, 1902.

In May, an application for the surrender of the fugitives was made to Extradition Commissioner Lafontaine, sitting at Montreal. The complaint charged Messrs. Gaynor and Greene with having participated in fraud and embezzlement committed by Carter by conspiring, counseling, etc., with Carter to commit such fraud and embezzlement and receiving the money so obtained from the Government. Acting on this complaint the commissioner issued, on May 14, a warrant for the arrest of the fugitives and their return before him. This warrant was served in Quebec the following day and the two prisoners were immediately placed upon a tug, already chartered for the purpose, and rushed up the river to Montreal. This episode was sensational in the extreme, pursuit being given by other officers with a writ of habeas corpus, service of which, however, the arresting officers managed to elude until after they had taken their prisoners before the commissioner. This was early in the morning of May 16, and Judge Lafontaine issued an order of remand and committal to Silas H. Carpenter and two other peace officers, directing them to hold Messrs. Gaynor and Greene and bring them before him again upon the 19th. This order of committal was partially in accordance with the desires of the prisoners, who preferred confinement at the Windsor Hotel to the hospitality of the sheriff at the jail.

In the meantime counsel had been busy and Mr. Justice Andrews, of the Superior Court for the Province of Quebec, had issued a writ of habeas corpus directed to Constable Carpenter who made the arrest. This was served on him at 9.30 A.M. and was returnable at Quebec. Mr. Carpenter did not obey the writ. On May 17 a motion that he be adjudged in contempt was filed with Judge Andrews. On Sunday, the 18th, the prisoners' counsel applied to the commissioner to place Messrs. Gaynor and Greene in the custody of the Montreal gaoler, which he refused to do, and on the 19th, the commissioner decided that the prisoners should be held for a hearing. He accordingly committed them to jail in the custody of Sheriff Vallée, with an order that the sheriff bring them before him for hearing of May 27.

The same day that Judge Lafontaine made this last order of remand and committal, Judge Andrews issued a writ of habeas corpus directed to the sheriff. Petitions were presented to Judge Andrews for the issue of writs of *certiorari* to the commissioner, directing him to transmit to Judge Andrews the information, process, evidence, minutes of adjudication, etc., in connection with the charges against the prisoners. The sheriff duly responded to writ of habeas corpus but the commissioner did not appear or show cause against the petitions for *certiorari*, but counsel for the United States did so.

On the twenty-first day of June, Judge Andrews gave his decisions on these two matters, as well as that on the contempt proceeding, in which a rule *nisi* was granted May 20. In the meantime, however, the petitioners had attempted a shrewd move by formally waiving or withdrawing their writs issued by Judge Andrews. This was on June 20 and application was thereupon made to Mr. Justice Caron, an associate of Judge Andrews on the Superior Court bench,

for new writs of habeas corpus. These were issued but do not appear to have been served; they were, at any rate, soon abandoned.

This backing and filling was without effect upon Judge Andrews, except possibly to make his pronouncement a little more emphatic. He held that as to *certiorari*, a foreign sovereign or state possessed the right to appear before the Canadian courts as parties to judicial proceedings and consequently might intervene in such proceedings, but that the issue of writs of *certiorari* would be useless, as the matters of fact they might elucidate were not open to inquiry on the writs of habeas corpus before him. He held that in view of the comprehensive and peremptory language of the statutes he was entitled to issue the writs of habeas corpus, that he had jurisdiction to do so, and that the writs could issue before the Extradition Commissioner had made an order of surrender. But such writs when so issued before the commissioner's final order were confined to the question of the lawfulness of the custody of the prisoners, and that the warrant being good on its face the writs should be quashed; that the commissioner's record and orders could not be reviewed until after committal for surrender. The petitioners having attacked Judge Lafontaine's jurisdiction on the ground that he could not order the arrest of any one outside of his district at Montreal, Judge Andrews held, that while possibly a hardship, the commissioner's jurisdiction extended over the whole Province.

After giving his opinion, Judge Andrews concluded it by stating that he denied the right of any other judge to intervene until he made his final order, and that the petitioners having applied to him for the writs could not take advantage of any lack of jurisdiction in him, to avoid recommittal. He concluded by a final, formal order, denying the petitions for *certiorari*, quashing the writs of habeas corpus, and issued an order of remand and committal.

On the motion to adjudge Constable Carpenter in contempt, Judge Andrews found that the officer not being in sole custody of the prisoners, being commanded by the commissioner to do one thing and by Judge Andrews to do another, might be excused for exercising some discretion and could not be said to have acted contemptuously. Judge Andrews did express, however, his disapproval of the constables' conduct in making the arrest, saying that while their acts did not disclose an intention to disregard a writ of habeas corpus if served, they formed part of a scheme to prevent the effective service of such a writ.

The day Judge Andrews made known his finding new writs of habeas corpus were obtained from Judge Caron, who also entertained petitions for writs of *certiorari* for the purpose as before, of bringing before the court all documents, exhibits, etc., on which the commissioner had remanded the fugitives to await a hearing on the extradition complaint.

On August 13, Judge Caron announced his decision in a lengthy opinion, going fully into all the points involved in extradition proceedings and in habeas corpus founded thereon. He dwelt at length upon points not apparently material to the issues before him. He held that prior writs of habeas corpus were no bar to subsequent ones provided the petitioners had waived the former writs and so stated in their later petitions, or if new allegations were contained in the subsequent petitions, or they were addressed to a different jailer, or served in a different district. That the writs before Judge Andrews, having been waived by the petitioners, the judge had no jurisdiction to proceed further, that his decision was consequently null and void and his order of recommittal invalid.

Judge Caron went further; he decided that Judge Andrew's decision could not constitute the questions involved *res judicata* because Judge Andrews did not decide the merits of the cause at all but merely ordered the return of the prisoners to Montreal.

He then decided that it was a needless waste of time to await the commissioner's final order if it could be shown that the petitioners had not committed an extraditable offense or were not liable to extradition. For that purpose anciliary *certiorari* might issue. He was not confined merely to the question of whether or not the return showed a lawful custody, but could review the entire cause. He held, with elaborate reasoning, that the treaty was not retroactive (the treaty expressly so states), that a conspiracy is not an offense within the treaty, and held that as the indictment for conspiracy was so framed that acts of larceny were charged as overt acts of the conspiracy, the United States could not treat them as distinct acts of larceny; that as the order of remand did not contain the date of the alleged commission of the crime, it might have been committed before the treaty was made, and so an attempt might be made to give the treaty a retroactive effect. Consequently, Mr. Justice Caron granted the writs of habeas corpus and liberated the prisoners.

There was no appeal in Canada from the decision of Judge Caron, but the United States obtained leave to appeal to the Privy Council from the judgment of the Colonial Court.

The hearing took place on the 16th and 17th of December, 1904, and a decision was rendered by the Judicial Committee of the Privy Council on February 8, 1905. This decision, delivered by the Lord Chancellor, was terse, to the point, and (between the lines), scathing in its references to Judge Caron.

The Privy Council found that the only question to be decided was whether the accused were in lawful custody at the time of the issue of the writ; that it was difficult to understand of what the supposed unlawfulness of the custody consisted; that Judge Andrews was quite accurate in what he did after having heard the parties.

"Then the somewhat extraordinary intervention of Mr. Justice Caron took place." He "first gets rid of the adjudication by Mr. Justice Andrews by a singular misapprehension of that learned judge's language . . . Though it is common enough to speak of a learned judge's judgment in referring to the reasons by which that judgment is supported, it is somewhat singular to find a learned judge himself confusing the two things."

They further held that an accusation of theft, on information, was enough for the claim to arrest and detain. Whether the accusation was well-founded or whether there was enough to justify the commissioner in committing for surrender, was a question which would have been regularly brought before him and determined at the proper time if the due course of justice had not been interfered with by the interposition of the learned judge. And then on committal by the commissioner for surrender the accused have fifteen days allowed them to bring the legality of the surrender before a court of justice.

This decision brought the matter back to the Extradition Commissioner, but Messrs. Gaynor and Greene immediately applied to Mr. Justice Davidson of the Supreme Court for a writ of prohibition to prevent Judge Lafontaine from proceeding further, on the ground that the Dominion Parliament was incompetent to create Extradition Commissioners and that Judge Lafontaine had no authority to act upon the application for extradition. Judge Davidson decided, March 22, 1905, that Parliament did have authority to create such officers, and to confer such office upon such judicial officers as Judge Lafontaine, and denied the petition for the writ. He held moreover, that *quo warranto*, and not a writ of prohibition, was the proper form of proceeding by which to determine the title of a *de facto* judicial officer.

The petitioners then appealed to the Court of Kings Bench. Pending the appeal they applied to that court for an order

directing the commissioner to stay the proceedings before him pending the appeal, for a writ of habeas corpus for the purpose of being admitted to bail by that court, and to be admitted to bail, the Commissioner having refused it on the ground that he had no power.

These three applications were all refused on May 3, 1905, on the ground that it would require very serious reasons to induce the court to stay proceedings by a person who is, *de facto*, an extradition commissioner, and who performs the functions of his office with an authority equal to that of the judges of the court, that the application for habeas corpus was made in the wrong district; that the court would not put restraint on the commissioner by admitting to bail after his refusal.

On May 19, the Court of Kings Bench decided the appeal from Judge Davidson's decision adversely to the appellants. It held that an appeal would lie, that it saw no necessity in determining whether *quo warranto* or prohibition was the proper remedy, as the members of the court preferred to base their decision on the construction of the statutes affecting the creation and appointment of extradition commissioners. That such a commissioner sitting as a court was not an inferior tribunal, that the Superior Court could not control a federal court such as the commissioner. That Parliament had the authority, and it was necessary, to create a special court, or appoint persons to apply the extradition laws. That the Imperial Act, naming the magistrates who should hear extradition proceedings did not apply to Canada, that Colony's statute having been accepted by an order of the King in Council. The appellants claimed that the Colonial Act having been amended and not subsequently reaccepted by order-in-Council, the Imperial Act had regained its original force and effect, but the court held that the orders-in-Council had been renewed.

In the meantime the commissioner had proceeded and on June 6, he found that the fugitives should be extradited and committed them for surrender. He found that the conspiracy and the acts of the accused were such, and that they had so far participated in the overt acts of Oberlin M. Carter both as to fraud and embezzlement as to be subject to extradition for fraud and embezzlement (theft in Canada and England), and also for knowingly having received stolen property (the money of the United States); that there was no necessity for a prior requisition; copies of depositions were properly in evidence before him though the originals had not been signed by the deponents; that the commissioner cannot discharge the accused on the ground of a reasonable doubt.

The next step was to obtain leave to appeal to the Supreme Court of Canada from the decision of the Court of Kings Bench refusing the writ of prohibition. Leave to appeal was granted by Judge Hall on the ground that the application for such a writ was not a criminal proceeding, and consequently the Court of Kings Bench was not the Court of last resort as it is in all criminal matters.

On June 19, Judge Ouimet issued a writ of habeas corpus (returnable before himself in chambers), to review Commissioner Lafontaine's proceedings. Ten days later he decided that this writ was properly returnable before him in chambers, and on July 7, he denied the prisoners' application to be admitted to bail since no exceptional circumstances were shown, and intimated that he feared the prisoners might escape.

Counsel for the fugitives had now practically exhausted their resources for delay, and nothing remained but the technical appeal for the writ of prohibition and the final hearing on habeas corpus. These were either decided adversely to the petitioners or abandoned by them, and the prisoners are now once more in Georgia, awaiting trail.

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The Green Bag

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Communications in regard to the contents of the Magazine should be addressed to the Editor,
S. R. WRIGHTINGTON, 31 State Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE demands on the time of the members of our highest court make doubly precious any contribution of theirs to periodical literature, and we are grateful when the problems of their profession are given a place beside the questions of public policy and religion. Those who had the privilege of hearing the remarks of Mr. Justice Brown at the banquet of the American Bar Association, will be glad of an opportunity to give them maturer reflection, nor need we commend them to the attention of our other readers. We are glad to have the force of his long experience and high position in approval of the English trial practice, which we have previously called to your attention. His conception of the real function of the criminal jury of the vicinage is no less important, and reminds us that the practical instinct of the Saxon will work out effective results with even inadequate instruments. The essential is after all a correct and powerful public sentiment which will force a relaxation of even judicial technicalities. It is to be hoped that some effort to improve our method of jury trials may result from a study of this address by the profession.

HON. HENRY B. BROWN

THE most important events of the last month in the legal world were doubtless the revelations of the New York insurance investigation and the ending of the most bitterly contested extradition proceedings that our government has ever pressed. It is the criminal law which engages our attention, and in both instances the persistent work of our lawyers seems destined to bring to justice men who are alleged to have used for their private profit funds in which the public had an interest. The public conscience which reprobates acts such as are charged against the Georgia contractors, is awakening from a torpor which palliated as "business" the secret profits of high finance. Mr. Hughes is daily accumulating evidence which suggests the possibility of criminal prosecution of insurance officials. It is to be hoped that when his work is done there will be in New York a public prosecutor in whose courage and ability the people will have confidence.

That Mr. Jerome is such a man is attested by the interest displayed throughout the country in his re-election. That he is also a lawyer of ability we are prone to forget, and our thanks are due to Mr. Train for recalling this to our attention. Mr. Train, himself the son of one of the ablest attorneys-general of Massachusetts, has had in the last four years a wide experience in criminal prosecutions as one of the assistant district-attorneys of New York, under Mr. Philbin and Mr. Jerome. He has of late had especial charge of so-called "commercial frauds," and has tried many murder cases. He is a graduate of Harvard College and Harvard Law School. He has still found time to continue the literary activities of his college days and has been a frequent contributor to current periodicals.

ARTHUR TRAIN

For our sketch of Mr. Hughes we are indebted to a native of Wilmington, N.C., and a graduate of the law department of the University of Michigan. After a few years of practice in Detroit, Mr. Russell became a member of the firm of Carter, Hughes, and Dwight, of New York.

Lindsay Russell

He is now a member of the firm of McLaughlin, Russell, Coe, and Sprague.

As an example of the possibilities afforded by the technicalities of procedure when counsel are striving for delay, the case of Greene and Gaynor is a masterpiece. It is such cases as this that breed distrust of the certainty of justice.

William Lambert Barnard

Mr. Barnard was raised in Savannah, and from his early associations has been especially interested in the case which he so graphically describes. He is a Harvard man, but studied law at Boston University. Since receiving his LL.B., he has always practiced in Boston, where he has attained a reputation as a persistent advocate.

In the arguments advanced in support of many schemes for control of industrial monopolies and public utilities it has often been asserted that state regulation of prices would be but a reversion to first principles. The evidence in support of this collected by Mr. Gilmore will be of interest to all who deal with the legal phases of modern problems.

Mr. Gilmore is a graduate of De Pauw University and the Harvard Law School. After a few years of practice in Boston, in 1903 he was appointed professor of law at the law school of the University of Wisconsin. His study of the regulation of prices was made in connection with his course on the Police Power.

Though the impossibility of getting prompt and adequate reviews of new books by capable and impartial reviewers has compelled us to abandon the customary formal book reviews, it is our wish to publish from time to time some more extended notice of important publications by way of discussion of the subject treated. The publication of the first treatise on the very modern subject of lynch law seemed to deserve such consideration.

Mr. Mowry was born in Rhode Island, but has always lived in Wisconsin. He is a graduate of this law school of the University of Wisconsin, and has been active in the discussion of many public questions.

At this time of year when the ward boss lines up his cohorts and the courts of justice are blocked and burdened with the clerical work of wholesale naturalization, it is worth while to consider the law of naturalization as expounded by Judge Stockbridge in his address to the Maryland Bar Association.

Hon. Henry Stockbridge

Mr. Stockbridge is a graduate of Amherst and the Law School of the University of Maryland. In 1882 he was appointed one of the examiners in chancery for the equity courts of Baltimore City, and held that position till he was elected to Congress in 1888. In 1896, he was elected an associate judge of the Supreme Bench of Baltimore. In 1899 he was made instructor at the law school of the University of Maryland.

CURRENT LEGAL ARTICLES

This department represents a selection of the most important leading articles in all the English and American legal periodicals of the preceding month. The space devoted to a summary does not always represent the relative importance of the article, for essays of the most permanent value are usually so condensed in style that further abbreviation is impracticable.

ASSOCIATIONS (Legal Personality). Professor F. W. Maitland contributes to the *Journal of the Society of Comparative Legislation* (No. xiv, p. 192), an interesting criticism of the legal theory of corporations under the title of "Moral Personality and Legal Personality." He quotes Professor Dicey's words that when a body of men bind themselves to act for a common purpose "they create a body which, by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted." He explains the reason for the modern doctrine that such bodies are not distinct personalities historically. The necessity for forming a legal conception of a body of men as distinguished from the individuals composing it arose in the middle ages, and the canonists in applying their mediæval learning and second-hand Roman law held that the personality of the corporation was a legal fiction and that it was, therefore, a gift of the prince; hence the necessity for a charter to create a distinct corporate personality. The author contends that if the law permits men to form permanently organized groups, they are of necessity "right-and-duty-bearing-units, and if the lawgiver will not openly treat them as such he will misrepresent the facts." Group personality is no purely legal phenomenal. "For the morality of common sense the group is person."

BIOGRAPHY (Bacon). J. E. G. deMontmorency contributes to the *Journal of the Society of Comparative Legislation* (No. xiv, p. 263), an article on Francis Bacon. It contains an interesting account of Bacon's legal experiences and of his legal writings which remain, and deals sympathetically with the charges of corruption against the great chancellor as a part of the system of the times. Of Bacon, as a jurist, it says:

"His massive intellect and subtle mind appear at first never to have been persistently applied to, though they often approached and dallied with, the great problems of jurisprudence. One is tempted to imagine that he never repaid to the law of England the debt which he owed to it. He was a great advocate and a great pleader, we say, 'great, even as a lawyer,' to use Lord Coleridge's critical phrase, but there is no evidence to show that he was a great judge, and little evidence to prove that he was a great jurist. That is the way in which a perusal of the professional works inevitably at first strikes the reader. He lived by the law, but the law did not live by him. A second and third reading leave a different impression. We realize that it is greatly due to the fragmentary character of the legal remains that this somewhat sordid impression arises. Bacon did, in fact, live by the law, and was on the whole careless as to the literary merit of his legal writings. When he thought that such writings were likely to advance him, he was at times, as in the case of the Four Arguments of Law, more careful. But not always. We have but a disordered fragment of his famous Double Reading on the Statute of Uses. We ought, if Bacon is a great jurist, to be able to disregard the disordered condition of his legal writings, and to find therein an essential orderliness and dry luminosity of thought calculated to give life to the law he lived by. The more closely Bacon's legal works are studied the more certain it becomes that this is the case, and the reader is more and more tempted to regret that his legal conceptions have been so rarely pursued and so generally disregarded. It will be useful briefly to consider the works in their chronological order."

He also calls attention to the fact that by Bacon's Ordinances in Chancery, the practice of that court was finally fixed and it was made "a definite court of justice under ordered governance, and not a mere court of conscience dealing out an erratic measure of equity in graciously disordered fashion."

BIOGRAPHY (Leibnitz). An account of

Leibnitz is contributed by Sir John Macdonnell, to the *Journal of the Society of Comparative Legislation* (No. xiv, p. 283.) The author finds a great similarity between the theories and labors of his subject and those of his contemporary Bacon, and especially controverts the inference natural in consequence of his fame as a philosopher that he was a theorist and insists that the impression from reading his legal works is all in favor of his practical sagacity. He particularly detested the scholasticism of the lawyers of his time and his great work was to purge the law of chaotic conditions and barren subtleties and to simplify jurisprudence. In his remarks on legal education he insists on the necessity of preparing the student for action and recommends moot courts and the importance of general knowledge. He did his best also to create an accurate and stable terminology of international law. In conclusion the author says:

"Leibnitz had book-learning and its rare companion, a desire to keep in touch with facts. He sought to bring jurisprudence into line with other sciences. He was interested in its philosophy, versed in its history. He had always present the great object of law, to do justice between men; he rediscovered, it may be said, justice beneath the formalities and technicalities of his time; if he resembled Selden or Savigny, he also resembled Bentham. He anticipated more or less clearly many of the future developments of jurisprudence, and some even now dimly seen, and only by a few."

BIOGRAPHY. "Lord Monboddo: A Judicial Metaphysician," by Henry H. Brown, *Judicial Review* (V. xvii, p. 267).

CONFLICT OF LAWS (Jurisdiction). An article of some interest to English lawyers as well as to students of comparative jurisprudence is a discussion of "Jurisdiction Ratione Originis" in the Scotch law by George Duncan in the September *Juridical Review* (V. xvii, p. 254).

"It was indeed a marked feature of the English common law that it recognized only one sure foundation of jurisdiction in such actions, viz., the actual presence of the defendent within the realm at the time of service of the writ.

"Scots law, on the other hand, has always recognized a number of possible grounds of jurisdiction against a defender furth of Scotland, and if such a defender chanced to be a native Scotsman, that circumstance weighed heavily, in the early cases, in favor of jurisdiction being sustained against him. On a correct interpretation of these cases, however, nativity was not of itself regarded as a sufficient ground of jurisdiction. It may be taken as clear that neither the Scots domicile nor the Scots nationality of a defender will found jurisdiction in a petitory action, unless he is in Scotland when the action is served. The Court of Session may have jurisdiction to divorce a man against whom they have no jurisdiction whatever to pronounce decree for a civil debt."

From an examination of the authorities the author decides that "the result, however, is that there is authority for the proposition that both domicile of origin and allegiance will found jurisdiction if combined with personal citation, and it does not appear that there is any reason in principle for drawing a distinction between domicile of origin and domicile of choice as a foundation for jurisdiction in such circumstances. But if a defender, originally Scots, abandons his Scots domicile and his nationality, he must be regarded as a foreigner against whom jurisdiction will not be sustained unless founded in some of the other recognized modes. A more difficult question arises where the defender has lost his Scots domicile of origin without also losing his nationalty, it being assumed that, for the purposes of local jurisdiction, Scots nationality can be regarded as something distinct from the common allegiance which all British subjects, whether Scotch, English, Irish, or Colonials, owe to the Crown. It is suggested that, apart from the *obiter* opinion of Lord Kinloch in *Kermick's* case, and the opinion of Lord Low in Tasker *v.* Grieve, in neither of which cases was the question of allegiance considered, there is not yet any distinct authority for affirming that the mere loss of domicile would of itself be sufficient to free a Scot from his natural obligation to submit himself to the courts of his country when personally cited thereto in Scotland. It is possible, however, that the general tendency of our courts to regard domicile

and not nationality as the criterion in questions of personal law may not be without effect on the ultimate decision of this problem."

"How, it may be asked, would the English courts regard jurisdiction *ratione originis?* On the cases, it would seem that, although not allowing allegiance as a ground of jurisdiction in their own practice, they will, nevertheless, recognize the decrees of foreign courts founded on it."

CONFLICT OF LAWS (Jurisdiction). "Exit of the Doctrine of Situs," by John R. Rood, *Central Law Journal* (V. lxi, p. 265).

CONSTITUTIONAL LAW (Citizens). An exhaustive review of our decisions relating to the Chinese Exclusion Act is contributed by B. Frank Dake to the September *Albany Law Journal* (V. lxvii, p. 258), entitled "The Chinaman before the Supreme Court." Of the recent climax in those decisions he says: "But a far more startling proposition is announced when the court, conceding for the purposes of the argument that Ju Toy was an American citizen and entitled to the protection of the Fifth Amendment of the Constitution, providing that no person shall be deprived of life, liberty, or property, without due process of law, states that he was not entitled to a judicial trial of the question of his citizenship, and that the power of determining that question may be entrusted to executive officers."

If the rights flowing from American citizenship, "when drawn in question, are not of sufficient importance to entitle the one who claims such rights to a judicial determination, it is difficult to imagine any right of sufficient magnitude to justify the exertion of judicial powers. The banishment of a citizen from the land of his birth is as much an act of punishment as his incarceration in a penitentiary. If Congress can empower immigration officers to permanently banish American citizens, it is hard to see why it may not direct their summary execution. The difference would be in the degree of the punishment rather than in the power to inflict it. The Constitution draws no distinction between the power to banish and the power to hang."

"In view of the nature of exclusion laws, the loose notions of Chinamen as to the sanctity of an oath, their similarity rendering identification difficult, the decision rendered with reference to Ju Toy was probably necessary if the exclusion laws are to be effective; but constitutional government is in danger when the judicial decision of constitutional questions is determined by considerations of political expediency or necessity; and in his person fundamental principles of American liberty have received a greater shock than the exclusive population of all of the Pacific states by subjects of the Celestial Kingdom would cause."

CONSTITUTIONAL LAW (Commerce). A very valuable monograph on "The Exclusiveness of the Power of Congress over Interstate and Foreign Commerce," by James S. Rogers, is published in the *American Law Register* for September and October (V. liii, pp. 529, 593). In opening he says:

"Power over interstate commerce is granted by the same words as power over foreign commerce. No logical distinction can be made between them. Yet, although it is generally admitted that the power of Congress over foreign commerce is exclusive, three different theories have been advanced in the opinions of the court as to the power of Congress over interstate commerce.

"First: That Congress has exclusive power over all interstate commerce.

"Second: That Congress and the states have general concurrent power over all interstate commerce.

"Third: That Congress has exclusive power over national, and Congress and the states concurrent power over local matters of interstate commerce."

"This article is an endeavor to clarify the subject by a consideration of the three theories and the reasoning supporting them, and, as a result, to show that only the exclusive theory is sound. Then by tracing the theories chronologically through the opinions of the court, by quotations therefrom, it is sought to let the reader judge for himself whether the court has not substantially acted upon that theory and is free to discard the other two, and that such action by the court would simplify the subject immensely.

His argument is that, "historically the purpose of the commerce clause was to free commerce from control by the states; that the historic fact is that it was immediately so

accepted, and all state regulations fell; that it is admitted that Congress has exclusive power over foreign commerce, and that since the same words grant power over interstate commerce Congress must have exclusive power over it also; that the grant is a general one and not a divided one; that it would be arbitrary amendment of the Constitution for the court to divide it; that it would be as much so to divide it according to the local concurrent powers' theory as according to any other possible division; that if the court should divide the grant and establish two classes of subjects of commerce, it would be necessary that the subjects be classified according to established general principles, and that as such principles are not contained in the Constitution it would be still further amendment of the Constitution for it to formulate them, and that without so doing the court would be without Constitutional restraint in this respect."

Reviewing what the court has actually done, he finds: "That it has twice overruled the general concurrent powers theory and has so far discarded it that it would be safe to ignore it, were it not for one recent important decision.

"That the local concurrent powers theory has always been hotly disputed, and is stated tentatively and in effect waived aside even in many cases which do not expressly controvert it. That in those cases where this and the exclusive theory lead to the same results the decisions are equally supportable upon the latter theory as upon this. That in those cases where these two theories lead to opposite results, which are numerous and most important, the actual decisions of the court have been uniformly inconsistent with the former and consistent with the latter theory.

That the exclusive theory, notwithstanding reasoning inconsistent therewith in many of the opinions, is consistent with all of the decisions of the court except comparatively few, and is the only theory with which the decisions of the court in fact harmonize.

"The conclusion seems justified that on general principles the court should, and that, in fact, in its decisions it has, generally speaking, followed the exclusive theory."

CONSTITUTIONAL LAW (England). An address by Sir Frederick Pollock on "Imperial Organization" is published in the *Journal of the Society of Comparative Legislation* (No. xiv, p. 37). This concerns the possibility of some closer relations between England and her colonies to be represented by a new imperial body. The author recognizes the impossibility of anything like a written constitution and hopes merely for an advisory board, the importance of which will depend upon its intrinsic merits.

CONSTITUTIONAL LAW (Interpretation). In the *Atlantic Monthly* for October (V. 96, p. 525) appears an article entitled "Our Changing Constitution," by Alfred Pierce Dennis, which elaborates the conception of the development of that instrument suggested by Dr. Taylor in our October issue.

It is the contention of Mr. Dennis that the constitution is in a state of constant development of which no record is made in the document itself. The growth of the nation, the inevitable influences of the spirit of new times and the exactions of new needs compel new interpretations and extra-constitutional practices that come to have the power of controlling law and are accepted as existing facts which it is useless to dispute. In this way our Constitution is assuming the character of a growth like the English Constitution, something undefined in express terms, a spirit and a life, not a rigid, unchangeable form.

"The measure of the interpretation of our Constitution," he says, "is found in the logic of personality rather than in the logic of legalism. The unfolding of our national life according to this logic has involved three processes: First, new meanings have been written into the fundamental law by judicial interpretation; second, the unrebuked exercise of doubtful powers by the executive and legislative branches has extra-legally enlarged the sphere of government action; finally, through the spontaneous outworkings of our political genius, new rules, understandings and convictions have been introduced into our constitutional system without the intervention of direct governmental agency."

He finds illustrations of the first method in decisions relating to our Philippine policy and in the interpretation of the Interstate Commerce Act.

"The great corporation is the most potent

force in our economic life of to-day. These great artificial beings, the creations of state laws, have outrun the control of their creators. It is inevitable that the nation should take hold where state control has broken down. . . . With the destruction of the states as industrial entities will follow, in the fulness of time, their destruction as political entities. Historically, federalism is like the grave: it takes but it does not give."

The refusal of the governor of Indiana to surrender a fugitive on demand of the governor of Kentucky and the nullification of the 13th Amendment by the South and numerous supposed "extra-legal" acts of the executive illustrate the second mode of development. The author approves of this tendency.

CONSTITUTIONAL LAW (Jurisdiction. Australia). "The Judicial Power and Interstate Claims," by P. McM. Glynn, *Commonwealth Law Review* (V. ii, p. 241).

CONSTITUTIONAL LAW (Regulation of Rates). In the October *North American Review* (V. 181, p. 481) Richard Olney discusses "Some Legal Aspects of Railroad Rate-making by Congress." He first discusses the effect on the power to regulate commerce of the prohibition of giving preference to the ports of one state over those of another. This would constitute an insuperable limitation upon the power of Congress to authorize the equalization of railroad rates between different ports, when the effect of such equalization would be to give to one port commercial advantages which it would not otherwise obtain. The manifest purpose of this constitutional limitation was to permit national commerce to flow freely in its natural channels by making it impossible for the national government through its interference to divert it from one port to another. The railway systems of the country have adopted for their own purposes the plan of equalization, but these, as private corporations, are at liberty to act in such manner as they please.

The second section of the argument turns on the question: Can Congress delegate to a commission the power which the Constitution gives it to regulate commerce? This, he believes, Congress can do only to the extent of having a commission administer a system of legal regulations which Congress has enacted. Congress might pass a law that the rate of passenger transportation throughout the country should be two cents per mile and that freight transportation should be one cent per ton per mile, and then turn over to a commission the duty of seeing that this law was observed by the interested railroad companies. But to have the commission itself determine what the rates should be would be an unwarranted extension of legislative authority, which, by the Constitution, is confined to Congress. To lay down as a standard of action that the rates or duties are to be reasonable would not be a sufficient guide for administrative action, for it has been repeatedly held that there must be some substantive provision of law to be administered and carried into effect.

Finally, has Congress the right to dictate rates to the carriers of the country, or, as is frequently urged, acquire control through ownership of the railroads themselves. To prescribe the price which shall be charged for a service is the next thing to taking possession of the property of one performing the service. If Congress, either directly or through other instrumentalities, made railroad rates covering all interstate business, then it would inevitably follow that the various states would make the rates at which business within their respective areas was to be carried on. We should have two more or less competitive boards of control, each aiming to secure special benefits at the expense of the other, and anything like skilful, just, reasonable or stable-rate making would become impossible.

The logic of the situation would be such as to force government ownership. This, however, would be ownership by the national government. Its power to regulate does not imply that it has itself the right to engage in business, and if it can take an immediate part in transportation as one part of commerce, might it not also buy and sell products? Such action he holds to be unconstitutional, and is of the opinion that if this question of authority had been submitted to the United States Supreme Court at any time before a quarter of a century ago it would in all probability have given a decision adverse to the jurisdiction of the general government.

CONSTITUTIONAL LAW. "The Constitutional Discretion of the President," by Hon. C. A. Gardiner, *New Jersey Law Journal* (V. xxviii, p. 261).

CONSTITUTIONAL LAW (See Jurisprudence).

CONTRACTS (Interpretation of Promise). The second number of the new *Calcutta Law Journal* (V. i, p. 9n) contains an interesting discussion of the theory of contract entitled "Interpretation of Promise," by Priya Nath Sen. The author contends that the accepted rule of interpretation of promise from an exclusively objective standpoint or the interpretation that a reasonable man will put upon the promise under the circumstances of the case reaches undesirable results in certain cases. Nor does he entirely agree with Paley's subjective standpoint, namely, "the sense in which the promisor believed that the promisee accepted his promise." He agrees with Pollock's criticism of this that where the promisee's real expectation differs from the supposed expectation, the promisor should not be absolved from a more onerous obligation on the plea that he did not understand that that expectation was being entertained by the promisee. The author would apply the test of the expectation entertained by the promisee when it is that of a reasonable man. Where the expectation entertained by the promisee is less advantageous to him than what the promisor understood his expectation to be on Paley's theory, the promisor would be bound to confer a greater advantage. The author argues that while "misapprehension of the promisor may not be regarded as furnishing a proper measure of his legal obligation when it appears that the expectation induced by him was different, . . . the interpretation that could be placed on the promise of a reasonable man should not be held to debar the promisee from claiming at least as much as he really expected, if it falls short of what the promisor intended to confer, merely because another man more considerate or less sanguine than himself would not have expected as much." In cases where the real expectation of the promisee coincides with what the promisor supposed it to be, the author believes that Paley's rule furnishes a correct solution. He finds support for this view in a recent English decision.

The author meets the objection of lack of uniformity by insisting that "in the complexity of human affairs mere simplicity is not the true test to determine the correctness of a rule of law." He also says, "no doubt jurisprudence is not psychology; but it should should not ignore psychological states, in so far as they are capable of being proved with practical certainty, when sound morality demands that they should not be ignored."

CONTRACTS (See Sales).

CRIMINAL LAW. "Abolition of Capital Punishment in Switzerland," by Maynard Shipley, *American Law Review* (V. xxxix, p. 734).

CRIMINAL LAW. "Christian Scientists and the Law," by Walter Mills, *Canadian Law Review* (V. iv, p. 435).

CRIMINAL LAW (Medical Jurisprudence). "Medico-Legal Aspect and Criminal Procedure in the Poison Cases of the XVI Century," by Charles Greene Cumston, *Medico-Legal Journal* (V. xxiii, p. 173).

ECCLESIASTICAL LAW. "Doctrinal Subscription in the Church of Scotland," by Christopher N. Johnston, *Juridical Review* (V. xvii, p. 201).

EDUCATION (Scotland). In the September *Juridical Review* (V. xvii, p. 240), appears an interesting article on "Legal Education," by Prof. N. J. D. Kennedy, which emphasizes the differences still existing between the method of training lawyers in Scotland and those in favor here. He presents convincing arguments of the high qualifications that should be required of a lawyer and shows that they are not limited to merely legal learning. The state is entitled to look to lawyers for services outside the strict limitations of their profession. From this he argues the necessity of university training. He also shows that the old system of apprenticeship under modern conditions is as ineffective for the purposes of training in that country as in this, and insists that a law school education is essential.

HISTORY (French Code). Sir Courtenay Ilbert discusses "The Centenary of the French Civil Code," in the *Journal of the Society of Comparative Legislation* (No. xiv, p. 218). The origin of this, he says, was due to the "intolerable practical inconveniences which arose from the coexistence of several different

systems of law within the same political state." He explains the work of amendment of the law which had to precede codification. This was divided into two periods, the first progressive, the second reactionary, the sympathies of Napoleon being on the whole with the latter. The work was peacefully carried on by a convention in the midst of the exciting scenes of the French Revolution. Of the results of the work he says:

"Two things at any rate the Code has done. It has familiarized all Frenchmen with the principles of the law which they have to observe. It has supplied a model which other nations have eagerly and extensively copied. In England the law is ordinarily regarded as something technical, mysterious, not to be understanded of the lay folk. In France the leading provisions of the Codes have become household words. They form the topic of village conversations. Familiarity with them is presupposed in popular literature and on the stage."

He thinks that the French Codes have arrested the development of French law in some respects, but rather in the domain of procedure than of substantive law. It has simplified jurisprudence and facilitated the work of judges, without eliminating the importance of their interpretation, and though at first a degeneration of the system of teaching in French law schools seemed imminent, this tendency has since been avoided.

INSURANCE. "Life Insurance: Shall We Have State or Federal Supervision?" by Samuel Bosworth Smith, *American Lawyer* (V. xiii, p. 372).

INTERNATIONAL LAW. In the *Journal of the Society of Comparative Legislation* (No. xiv, p. 201) Thomas Baty publishes a discussion of "Some Questions in the Law of Neutrality." He deals first with several questions relating to contraband.

"The real importance of the subject of contraband at the present day is that it provides a loophole to the Declaration of Paris. That declaration, when it made enemy goods free on a neutral ship, included the goods of the enemy government. The temptation is strong to seize them as contraband. It will easily be imagined that a belligerent could see, with more or less composure, a neutral's goods (not clearly contraband) going to the enemy's country as a mercantile speculation; whilst it is a very different matter to watch such supplies when actually consigned to the enemy government passing safely on neutral vessels. The old-time belligerent would in many cases simply have seized the cotton, corn, oil, and coal on the plea that it was enemy property: this can no longer be done, and he attempts to seize it as contraband. Probably the declaration requires modification: such a course would be preferable to an unsettlement of the accepted general law. It is not certain whether the Russian ukase, subjecting goods forwarded 'aux frais ou à l'ordre de l'ennemi' to confiscation, meant to include only goods ordered by the enemy government, as distinct from those ordered by private individuals. If it is so limited, it forms the basis of a reasonable understanding — provided that it is extended to telegraph and railway plant, and the other matters which the Russian practice is to treat as absolute contraband."

The author says, "a long period of maritime peace produces a crop of curious doctrine unchecked by the logic of facts." As instances of this he refers to the doctrine that a warship must be sent away from a neutral port within twenty-four hours on penalty of internment. "The sinking of neutral prizes, though perhaps allowed by Russian regulations and countenanced by writers of authority, seems to be an entire innovation and an inadmissible one." He similarly regards the confiscation of vessels laden wholly or mainly with contraband goods.

INTERNATIONAL LAW. "Exclusion and Deportation of Aliens," by "Parliamentum," *Canadian Law Times* (V. xxv, p. 487).

INTERNATIONAL LAW (History). Edward Lindsey in the September *American Law Review* (V. xxxix, p. 658) discusses "The Evolution of International Law." He contends that international law is now in the state in which private municipal law stood in mediæval times and shows that its development hitherto appears strikingly analogous to the development of primitive private law. He, therefore, conjectures that the future of international law may conform to the later history of private law.

HISTORY (Northern Securities Case). "The

Northern Securities Case" is explained to English readers by William Mitchell Acworth in the *Journal of the Society of Comparative Legislation* (No. xiv, p. 251). His most interesting suggestion to American readers is that while it may have been important to the government to impress upon one benevolent despot in the railroad world that his power was not unlimited, and though the repression of such a combination might be of importance in the western states it is hardly to be expected that similar prosecutions will be enforced against the old consolidations in the east.

INTERNATIONAL LAW (History). "The Development of International Law before Grotius" is the subject of a brief contribution by Edwin Maxey to the September *American Law Review* (V. xxxix, p. 747). "With the Greeks," he says "international law was for a long time a code of rules mainly for the purpose of governing the relations of their own communities with each other. The Amphictyonic council served to some extent as an international court," but "it had no power to settle differences between Greek and other independent states." Even between themselves their rules were very limited in scope, relating chiefly to right of sanctuary, inviolability of envoys, and rules of war. Rome did little in the actual development of a system for in theory at least, during a considerable portion of its existence, the Roman Empire was universal. The mediæval maritime codes were the first steps toward modern international law. Vasquez first put forth "the doctrine of the existence of a group of states subjects of reciprocal rights irrespective of a world empire, temporal or ecclesiastical." Suarez followed with a theory of a law of nations resting upon custom. The greatest of these, however, was Albericus Gentilis, who attempted "to adjust the principles of the *jus naturale* to the new fact of territorial sovereignty."

JURISDICTION (See Conflict of Laws and Constitutional Law).

JURISPRUDENCE, COMPARATIVE (Constitutional Law). An interesting "Comparative Study of the Constitutions of the United States of America and the United States of Mexico," by William H. Burges appears in the September *American Law Review* (V. xxxix, p. 711). The political framework of each is very similar.

"Each recognizes, as the basis of governmental authority, the consent of the governed. Each divides the functions of government into legislative, executive, and judicial powers, and each attempts to prevent the encroachment of one department on the other. Each looks to the formation in a federal government of an indestructible union composed of indestructible states, and each provides for safe-guarding the autonomy of the states within the union." The powers of the House and Senate are in general like those of ours."

An original feature is a sort of select committee of the two houses of the legislature which exercises authority during the recess of Congress.

"Briefly stated, the powers of the executives of the two countries are the same. There are minor differences in the terms of the grants of power and the methods of administration; but nothing of substantial importance distinguishes one from the other in theory.

In practical operation the differences are very great. In practice the power of the Mexican president is apparently autocratic. A careful study of their constitution discloses no warrant for this, and I attribute so much of it as is real rather than seeming to the deep and abiding hold which their present chief executive has upon the hearts and minds of the Mexican people, and their faith in his wisdom and his loyalty to their welfare."

"Again speaking generally the jurisdiction of the Mexican federal courts extends to all matters of which our federal courts have jurisdiction, except that they have not jurisdiction of causes arising under their federal Constitution, and laws which affect private interests only, that jurisdiction being vested in the state courts; nor have the Mexican federal courts jurisdiction of causes on the ground of diverse citizenship, while the jurisdiction over controversies between a state and a citizen of another state, which is expressly denied by our 11th Amendment, exists under their system."

"Under this grant of jurisdiction and for the protection of these rights the courts hold

acts of the general congress and of the several state legislatures unconstitutional just as our courts do, and restrain by appropriate remedies their enforcement."

"What to an American lawyer, appears to be the most serious omission from their constitution (except that of the right of trial by jury), is the omission of any provision for the writ of habeas corpus."

"The decrees of the Mexican Supreme Court of Justice are preserved and published. In arguments in their courts they are cited as we cite the opinions of the courts of other jurisdictions than our own — for their persuasive effect. In the same way our brethren of the Mexican bar cite the works of great commentators on the civil law, and on their Constitution, and in discussions of constitutional questions very frequently, if not most frequently of all, are cited Cooley's 'Constitutional Limitations,' and 'Story on the Constitution,' the latter having been well abridged and translated into Spanish."

The author briefly compares the Bills of Rights of the two constitutions. "Theirs is a longer though not the more comprehensive of the two." But he concludes that the great fundamental rights of man are well-preserved in theirs as in ours.

JURISPRUDENCE (Precedents). The September *American Law Review* (V. xxxix, p. 696), publishes an address of Henry D. Ashley on "The Effect of American Jurisprudence of the Doctrine of Judicial Precedent," which contains the familiar criticism of the modern multiplicity of reported decisions and expresses the hope that some remedy may be discovered through legislation guided by the Bar.

JURISPRUDENCE (Torts). In the August *Commonwealth Law Review* (V. ii, p. 250) A. Inglis Clark continues his "Short Studies in the Common Law," this time discussing torts.

"None of the writers of the numerous textbooks on the English law of torts," he says, "has suggested a definition of a tort which would convey to a person totally unacquanited with the history or contents of the law of England, a clear conception of the specific difference between a tort and a crime. The absence of any such definition of a tort is doubtless largely due to the fact that the distinction now made by the law of England between a tort and a crime is entirely a distinction of historic growth. A tort and a crime are both legal wrongs or, in other words, violations of a legal right; and some violations of a legal right are regarded by the law as being simultaneously torts and crimes, such as assault and libel. The recognition of this dual character in such wrongful acts seems to make it impossible to construct a definition of a tort which will concisely, clearly, and specifically distinguish a tort from a crime. But if we are content to accept the practical distinction which the law makes between a tort and a crime, and to relinquish any attempt to find what may be properly described as a logical or philosophical basis for the distinction, a sufficient definition of a tort would be a violation of a legal right for which the law provides a remedy in an action for compensation against the wrongdoer, at the suit of the person whose legal right has been violated. The essential ingredient of a crime is malice. But the absence of malice is not in itself a permanent distinction between a crime and a tort. . . . It may, however, be broadly stated that malicious torts which the law does not regard as crimes, are acts which, although they are violations of legal rights, are not acts which immediately disturb the peace and security of the community, which are the primary objects of the law's care and protection."

The author then proceeds to classify torts in three groups, viz. (1) those within the general category of trespass, (2) those of negligence, (3) violations of other rights or omissions of duties recognized by law. He then discusses certain phases of the law of torts.

LEGAL ETHICS. "Remarks of John T. Dillon at Banquet on Twenty-fifth Anniversary of Columbia Law School Class," *American Law Review* (V. xxxix, p. 707).

LEGAL ETHICS. "The American Lawyer," by Alfred Hemenway, *American Law Review* (V. xxxix, p. 641) (published in our September number).

LEGISLATION. "Labor Legislation," by W. E. O'Brien, *Canada Law Journal* (V. xli, p. 729).

LEGISLATION. "Review of Legislation

1903," *Journal of the Society of Comparative Legislation* (No. xiv, p. 302).

LEGISLATION (Uniformity). "The Desirability of Harmonizing State and Federal Statutes on Irrigation," by Carroll B. Graves, *American Lawyer* (V. xiii, p. 383).

LIENS. "Mechanics' Lien. The Authority of Russell *v.* French," by Frank E. Hodgins, *Canada Law Journal* (V. xli, p. 733).

LIMITATIONS. "Limitation: Right and Remedy," by Haribaus Sahai, *Allahabad Law Journal* (V. ii, p. 259).

LITERATURE (Law Reports). Thomas Dent, in the September *American Law Review* (V. xxxix, p. 675) treats "Of Law Reports as Memorials of History and Biography," and relates interesting instances of this collateral value of our system of reports.

MASTER AND SERVANT. In the October *Canada Law Review* (V. xli, p. 673) C. B. Labatt publishes another chapter of his valuable work on the law of Master and Servant, dealing with "Service Distinguished from Tenancy."

NEGLIGENCE. "The Doctrine of Imputed Negligence as between an Infant, *non sui juris*, and Its Parent or Guardian," by Sumner Kenner, *Central Law Journal* (V. lxi, p. 244).

PERSONS. "Powers of the Managing Member of a Mitakshara Joint Hindu Family," by K. Srinwasa Iyengar, *Madras Law Journal* (V. xv, p. 211).

PRACTICE. "The Acquisition and Retention of a Clientage," by Frank Asbury Johnson, *Law Students' Helper* (V. xiii, p. 272).

PRACTICE. "Right of Court to Interfere with the Determination of the Amount of Damages Fixed by a Jury," by Frederick A. Teall, *Central Law Journal* (V. lxi, p. 286).

PRACTICE (Jurors). "Right of Jurors to Consider their Own Knowledge and Experience," *Bench and Bar* (V. ii, p. 95).

PROCEDURE (Arbitration). "Who May Refer Matters to Arbitration," by Durga Charan Banerjee, *Allahabad Law Journal* (V. ii, p. 275).

PUBLIC POLICY. "Government by the People," by Richard Lockhart Hand, *American Lawyer* (V. xiii, p. 377).

PUBLIC POLICY. Frederick Bausman contributes to the September *American Law Review* (V. xxxix, p. 727), a criticism of what he regards as an American tendency toward "Light Sentences and Pardons."

"Our people seem not to have a sufficient horror of crime to get an actual relish in sentencing offenders of any class. Judges shrink from imposing long terms. When they do impose them, they are sure to hear murmured exclamations in the court room, or to receive indirectly from their friends, when the matter is referred to as a newspaper item, some expression as to their having been that day very severe.

"Let us now turn to the subject of pardons. These are granted in America in such number that there is hardly a week in any state in which one may not see in the newspapers an announcement of one. Indeed, there has lately sprung up a new sort of custom, of a most pernicious sort, to imitate the bounty of kings upon their birthdays or marriages, by setting felons free. On last Christmas day the governor of Illinois indulged himself in this fashion by setting free four murderers under sentence for life. All were set free and one received a pardon outright. This good example was followed in Indiana with the same number, in Missouri with three, in New York and Michigan with one. Those who know the tendency of our race and its sentimental attitude in many respects will not doubt that this amiable custom will grow."

REAL PROPERTY. "Abstracts of Land Titles," by C. H. Kirshner, *Kansas Lawyer* (V. xii, p. 1).

REAL PROPERTY (Partition). "The Law of Partition in Ceylon," by W. R. Bisschop, *Journal of the Society of Comparative Legislation* (No. xiv, p. 232).

REAL PROPERTY (Statute of Frauds). "Do Gas and Oil Contracts or Leases Convey or affect such an Interest in Real Estate as to come within the meaning of the Statute of Frauds requiring all Conveyances of Real Estate or an interest therein, or an assignment thereof to be in writing?" by Walter J. Lotz, *Central Law Journal* (V. lxi, p. 224).

SALES (Contracts). Under the title of "The Contract of Sale or Return," Richard Brown discusses in the September *Juridical Review* (V. xvii, p. 221), the law applying to a familiar transaction of wholesale dealers who stock a store with goods under an agreement

that those not sold may be returned. The author distinguishes this from the contract of sale on approval, and criticises the Sale of Goods Act which treats them together under the head of Transfer of Title by Mere Intention. The problem is discussed relating (1) to the effect of reputed ownership and (2) the effect of actual ownership.

"The common law of Scotland in regard to reputed ownership differs materially from that of England. It was largely owing to these differences that, as already mentioned, the earlier Factors Acts were not at first supposed to apply to Scotland, and, indeed, the very case in which the House of Lords resolved the doubt had been previously decided in exactly the same manner by the Court of Session on common law grounds. This divergence between the laws of the two countries is of old standing, and may be traced to the different development of the law of possession of moveables. In the law of Scotland, as in that of Rome, possession was the badge of ownership. Goods could not be transferred, even in sale, without a transfer of possession; and, on the other hand, the fact of lawful possession by a person not the owner created a presumption of ownership which might be pleaded by third parties against the owner himself. This, however, was not the doctrine of English law. The absence of the principle of reputed ownership in England caused much commercial inconvenience, and led to legislation in at least three different directions — (1) in favor of the general creditors of the ostensible owner by means of a special provision in the English Bankruptcy Act; (2) in favor of the general creditors of the actual owner, by preventing a transference *retenta possessione* without registration under the Bills of Sale Acts; and (3) in favor of third parties dealing with the reputed owner by means of the provisions of the Factors Acts.

"The result, so far as third parties are concerned, may be summarized as follows: In Scotland the common law protects third parties, such as pawnbrokers, by means of reputed ownership. It, however, gives no right to a trustee in bankruptcy acting for the general creditors of the buyer, such trustee not being a third party, but vested only in the estate of the bankrupt *tantum et tale*. In England, the common law, where it has any effect at all, only protects third parties by laying down a rule as to actual ownership, viz., that the property on 'sale or return' passes when the buyer adopts the transaction, *e.g.*, when he pawns the goods. The same act which passes the property renders the transactions of the new owner valid, but this is subject to the *intention* of the parties to the original contract, and if the wholesale dealer stipulates that the property is not to pass, the stipulation will be effectual, and third parties can acquire no rights from the buyer who has never become owner. The common law rule, with its qualification as to intention, acquired statutory sanction in the Sale of Goods Act, 1893, and as this Act applies also to Scotland, its effect was to introduce into that country a statutory *actual* ownership, which, however, owing to the power of latent reservation, is of no value to third parties. On the other hand, the Factors Act, 1889, and the Factors (Scotland) Act, 1890, introduced a statutory *reputed* ownership, which is repeated in section 25 of the Sale of Goods Act. This may in Scotland be pleaded by third parties concurrently with the common law reputed ownership which there exists, and in England it may be pleaded by itself as taking the place of a common law reputed ownership."

TORTS (See Jurisprudence and Negligence).

WITNESSES (Expert Testimony). "Opinions of Lay Witnesses as to Insanity" *Bench and Bar* (V. ii, p. 102).

NOTES OF THE MOST IMPORTANT RECENT CASES COMPILED BY THE EDITORS OF THE NATIONAL REPORTER SYSTEM AND ANNOTATED BY SPECIALISTS IN THE SEVERAL SUBJECTS

(Copies of the pamphlet Reporters containing full reports of any of these decisions may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.)

ADMIRALTY JURISDICTION. (Torts — Structure Affixed to Land.) U. S. S. C. — The Federal Supreme Court is now committed unanimously to a holding which practically overrules the holding in The Plymouth, 3 Wall. 20, which case, as remarked by Mr. Justice Brown has been accepted by the profession and the admiralty courts as establishing the principle that the jurisdiction of the admiralty does not extend to injuries received by any structure affixed to the land, though such injury were caused by a ship or other floating body. In U. S. *v.* Evans, 25 Sup. Ct. Rep. 46, it is held that the admiralty jurisdiction of the federal courts extends to a libel *in rem* against a vessel for negligently colliding with and destroying a beacon standing some fifteen or twenty feet from the channel in water twelve or fifteen feet deep, although the beacon is built upon piles driven firmly into the bottom. One reason for the decision, which commends itself to the ordinary judgment, is that advanced by Mr. Justice Brown in his special concurring opinion, where he says that the distinction between damage done to fixed and floating structures is a somewhat artificial one, founded upon no sound principle, and that the fact that Congress, under the Constitution, cannot extend the admiralty jurisdiction of the Supreme Court affords an argument for a broad interpretation of that jurisdiction commensurate with the needs of modern commerce. The concluding sentence of the special concurring opinion may throw some little light on the view which will be taken of cases arising in the future. It is as follows: "To attempt to draw the line of jurisdiction between different kinds of fixed structures, as, for instance, between beacons and wharves, would lead to great confusion and much further litigation."

The ground of the main opinion in this case is that even under the narrow limits imposed upon Admiralty by the English common law, its jurisdiction was undoubted over the sea. The beacon was surrounded by navigable water and was therefore in the sea, even though attached to the bottom. In this respect it differed from a wharf or bridge which would be attached to the shore and therefore a part of the shore. The opinion does not overrule the Plymouth case, but distinguishes it on this very ground. The distinction is clear and can hardly lead to confusion or further litigation as predicted by Mr. Justice Brown.

The decision, however, is epoch-making in the growth of the American Admiralty.

See the official reference sub. nom. the Blackheath, 195 U. S. 361.

Robert M. Hughes.

CARRIERS. (Reasonableness of Charges.) U. S. C. C. for W. D. of Ga. — Tift *v.* Southern Railway Company, 138 Federal Reporter was a successful effort by a number of manufacturers of lumber in various southern states to resist attempted extortion through an arbitrary increase of freight rates. It was shown that shipments of lumber had enormously increased within the last decade, and in spite of this increased tonnage there had been a steady increase of rates, culminating in an advance of two cents per hundred pounds. This last advance was the concerted action of a number of railroads acting under articles of organization, and it is held that this aspect of the case is not altered by the fact that the railroads had a stipulation in the articles of organization that each and all members might at will, and at any time, withdraw from the agreement. In considering the questions involved the statement of the interstate commerce commission that the general rule is that the greater the tonnage of the commodity transported the lower should be the rate of freight charges for such transportation, is expressly approved.

M. & St. Paul Railroad Company *v.* Minnesota, 10 Supreme Court Reporter, 702, is cited to the point that the reasonableness of a rate of charge for transportation is eminently a question for judicial investigation, and Chicago & N. W. Railroad Company *v.* Osborn, 52 Federal Reporter, 914, and Smyth *v.* Ames, 18 Supreme Court Reporter, 418, are quoted as authority for the proposition that reasonable compensation for the

service actually rendered is all that a common carrier is permitted to exact.

The principle upon which the railroad seemed to have acted is discountenanced in the concluding statement that railroads have no legal right to graduate their charges in proportion to the prosperity which attends industries whose products they transport.

CONSTITUTIONAL LAW. (Chinese Exclusion—Deportation of Slave Girl.) U. S. C. C. A. 9th Circuit. — The Circuit Court of Appeals, Ninth Circuit, has recently handed down an opinion in the case of United States *v.* Ah Sou in which the decision of the District Court for the Northern Division of the District of Washington is overthrown. The District Court in effect held that where the deportation of a Chinese slave girl, illegally brought into this country for immoral purposes would result in remanding her to slavery and degradation, her deportation would not be ordered. The Circuit Court of Appeals agrees with the District Court in its holding that the girl's marriage to a registered Chinese laborer who, however, was not entitled to have a wife in this country, was not a defense to proceedings for her deportation, and especially so in view of the fact that the marriage was at her solicitation for her protection, and was not followed by cohabitation, nor apparently regarded by the parties as more than a formality. The view of the district judge is very briefly expressed where he says: "If sent back to her own country where she was by her kindred sold to a cruel master she must abandon hope, and it is shocking to reflect that the laws of our country require the court to use its process to accomplish such an unholy purpose." Basing its conclusion apparently on the 13th Amendment to the Federal Constitution prohibiting slavery, the lower court directed that the order for deportation be vacated.

The Circuit Court of Appeals treats this phase of the subject very briefly, merely observing that they do not understand the ruling of the court to be a holding that the 13th Amendment by its terms prohibited the deportation of the girl, that it was not contended on the appeal that by virtue of an order of deportation her condition as a slave would be recognized, or that she would be sent into slavery, at any place within the United States, or within its jurisdiction. In conclusion, it is said that while the case is one which from its nature enlists the sympathy of the court, nevertheless, the law is so written that the court cannot yield to the humane considerations which actuated the court below.

CONSTITUTIONAL LAW. (Compulsory Vaccination.) U. S. S. C. — In Jacobson *v.* Massachusetts, 25 Supreme Court Reporter, 358, in which the constitutionality of the Massachusetts compulsory vaccination law is attacked on the ground that it is in derogation of the rights secured by the preamble of the Federal Constitution and opposed to the spirit of the constitution itself, it is held that the spirit of the constitution or its preamble cannot be invoked apart from the words of that instrument to invalidate the statute. Aside from this general contention the statute is attacked specifically as being in contravention of certain constitutionally guaranteed rights and privileges. In response to these various contentions it is maintained that the personal liberty secured by the 14th Amendment against state deprivation is not infringed by the statute; that the lack of any exception in favor of adults who are certified by a registered physician to be unfit subjects for vaccination does not render the statute objectionable as denying the equal protection of the laws, although an exception in favor of children in like condition is made. Aside from overruling these direct attacks upon the constitutionality of the statute, its validity is maintained on the ground that the state legislature in enacting it was entitled to choose between the theory of those of the medical profession who think vaccination worthless and believe its effect to be injurious and dangerous, and the opposite theory, which is in accord with the common belief and is maintained by high medical authority; and was not compelled to commit the matter to the final decision of a court or jury.

In this case the U. S. Supreme Court deals for the first time with the question of the constitutionality of compulsory vaccination.

The following points should be noted:

1. The decision sustains the exercise of the power with reference to adults; by implication this sanctions the requirement as applied to children attending school.

2. The case does not decide, that the power can be exercised where there is neither prevalence nor danger of smallpox. No case appears to have arisen in any state calling for a deliverance upon the question, whether, in the absence of an emergency adults can be required to submit to vaccination.

3. The decision recognizes that the requirement would not be enforceable against a person who was not a fit subject for vaccination.

4. The decision cannot control state courts with reference to the question whether and to what extent the power of local or administrative authorities to require vaccination may be implied from a

general delegation of authority, and whether and to what extent such power may be delegated.

E. F.

CONSTITUTIONAL LAW. (Due Process of Law — Administration of Estates of Absentees.) U. S. S. C. — In Cunnius *v.* Reading School District, 25 Supreme Court Reporter, 721, it is held, abstractly, that the due process of law clause of the 14th Amendment does not wholly deprive the state of the power to confer jurisdiction on its courts to administer the estates of absentees, irrespective of the fact of death, by a special and appropriate proceeding, distinct from the general law for the settlement of estates of decedents, and specifically that Pennsylvania Laws, 1885, p. 155, providing a system of procedure for the administration of estates of absentees sufficiently complied with the requirements of due process of law.

This last phase of the case requires the consideration of three related propositions. It is first said that the provision authorizing the administration of property of one who has been absent from the state for seven or more years is not, with respect to the period of absence, so unreasonable as to render it repugnant to the due process of law clause of the 14th Amendment. Closely connected with this holding is the second proposition that, notice by publication of the special proceedings authorized by the statute satisfied the requirement of due process of law. Possibly the point of chief importance is the one last touched upon in the opinion, where it is determined that the provisions of the statute authorizing the revocation of the administration at any time on proof that the absentee is in fact alive, and in such event permitting him to recover the shares of his estate received by the distributees, and providing that until the latter shall give security for refunding their shares, with interest, in case the supposed decedent shall be alive, no distribution can be made and that in case of inability to give such security, the money shall be invested, under the control of the court, and only the interest paid to the distributees, furnishes sufficient safeguard for the protection of the property of the absentee to satisfy the requirement of due process of law.

The decision will be welcomed as settling in the affirmative the question whether the states have power to provide for administering the estates of absentees. The case of Scott v. McNeal, 154 U. S. 34 had created some doubts upon that point, and appears to have been understood by at least one court (Rhode Island, Carr v. Brown, 20 R. I. 217) as denying such power. The court now draws a clear distinction between administration of estates of absentees and of deceased persons. What is constitutionally sufficient for the latter, does not necessarily meet the requirements of due process as applied to the former. This is not merely a matter of jurisdiction of courts, which would not present a federal question. (In Scott v. McNeal the probate court had been organized under an act of Congress, but the decision did not go on that point.) It is a question of procedure and of methods of administration. The administration of an absentee's estate requires in addition to a reasonable presumption of death, first, adequate notice according to the circumstances, not merely notice to the relatives who are interested adversely to the absentee; second, reasonable safeguards securing so far as possible the restoration of the property to the absentee, should he turn up alive.

These requirements were met by the Pennsylvania statute, while in Scott v. McNeal the absentee was declared "dead to all legal intents and purposes," and the estate administered accordingly.

E. F.

CONSTITUTIONAL LAW. (Eminent Domain — Private Irrigating Ditch.) U. S. S. C. — Clark *v.* Nash, 25 Supreme Court Reporter, 676, is authority for a proposition which while expressly limited to the particular facts involved in that case is, nevertheless, of such a nature that it may give rise to abundant litigation involving the applicability of its principles to other, but similar states of fact. In the case referred to, it is held that the peculiar local conditions in Utah justify, as authorizing condemnation for public use, a statute of that state under which an individual landowner may condemn a right of way across his neighbor's land for the enlargement of an irrigation ditch therein in order to enable him to obtain water from a stream in which he has an interest, to irrigate his land which otherwise would remain absolutely valueless. As throwing light upon the ground of the decision, it may not be amiss to call attention to the observation of the court that the validity of such statutes as the one under consideration may depend upon many different facts, the existence of which would make a public use, even by an individual, where in the absence of such facts the use would be clearly private. These facts, it is said, must be general, notorious, and acknowledged in the state so that, though not the subject of legal investigation as to their existence, the local courts, nevertheless, know and appreciate them. In view of these considerations the court suggests that where the use is asserted to be public and the right of the individual to condemn land

for the purpose of exercising such use is founded upon, or is the result of some peculiar condition of the soil or climate or other peculiarity of the state where the right of condemnation is asserted under a state statute, the court is always, where it can fairly be done, strongly inclined to hold with the state courts when they uphold a statute providing for such condemnation.

Mr. Justice Harlan and Mr. Justice Brewer dissented.

CONSTITUTIONAL LAW. (Obligation of Contracts — Effect of Judicial Decisions.) U. S. S. C. — A case which well illustrates the fact that the law is not always an exact science, and that its application even by the most learned of judges is attended not only with considerable difficulty, but with a reasonable amount of uncertainty as well, is that of Muhlker *v.* New York & Harlem R. Co., 25 Supreme Court Reporter, 522. The action originated in New York, and the Supreme Court, Appellate Division, affirmed a judgment for plaintiff with Van Brunt, P. J., dissenting. On appeal to the Court of Appeals the judgment of the Appellate Division was reversed with Bartlett and Cullen, J. J., dissenting, and on error to the United States Supreme Court the judgment of the New York Court of Appeals was reversed with four justices concurring, one justice concurring in the result, and four justices dissenting. The explanation of this conflict in opinion is to be found in the fact that the case is one of considerable difficulty, involving as it does, a further extension of a principle which, as Mr. Justice Holmes remarks in his dissenting opinion, "it took the court a good while to explain." Plaintiff sued to enjoin the use of an elevated railroad structure unless payment should be first made for easements of light and air, which it was alleged the elevated structure destroyed. Plaintiff's property abutted on a street in New York City, and he derived his title from the person who had granted the street to the city in trust for a public highway. At the time plaintiff acquired title the state courts had decided that one so situated had a contract right to easements of light, air, and access, which could not be taken away from him without compensation by the construction of an elevated railroad in the adjoining street. At the time of the conveyance, however, defendant railroad company operated a surface railroad in the street which considerably interfered with the plaintiff's easement of access. Thereafter, by command of the state, expressed in New York Laws, 1892, c. 339, an elevated structure was built in lieu of the surface road-bed, and defendant company by authority of the statute operated its trains thereon. Under these circumstances the Supreme Court holds that the taking without compensation of plaintiff's easements of light and air by means of the elevated structure is an impairment of the obligation of his contract, forbidden by the Federal Constitution.

Mr. Justice Holmes, dissenting in this case, considers the decision an unwarranted extension of the doctrine of Gelpcke v. Dubuque, 1 Wall. 222 [1864]. In this the learned justice appears to be wrong. When a state court gives effect to a subsequent statute alleged to impair the obligation of a contract, the Federal courts have always exercised an independent judgment in passing upon the validity and effect of the contract, even though this required an interpretation of the common or statute law of the state. This exception to the rule that the federal courts will ordinarily accept as conclusive a state court's construction of its own statutes or real property law is considerably older than Gelpcke v. Dubuque. It was stated by Taney in Ohio Insurance Co. v. Debolt, 16 How. 416, 432-33 [1853], was unanimously applied in Jefferson Bank v. Skelly, 1 Black, 436, 443 [1862], and has been constantly followed since. Stearns v. Minnesota, 179 U. S. 223, 233 [1900], citing cases. It is applied to cases on writs of error to state courts, as well as to those coming from the federal circuit courts, while the rule in Gelpcke v. Dubuque can be invoked in the latter only. Railway v. McClure, 10 Wall. 511 [1871]. The Supreme Court has never suggested that its independent judgment may not be as properly exercised in interpreting unwritten property law as statute law, and it is in the exercise of this judgment that the majority in the Muhlker case follows the earlier New York decisions holding that grantees from New York City of land abutting on a street have a contract easement of light, air, and access. 197 U. S. at 570. This may or may not have been a correct construction of the alleged contract, but it involves no novel proposition of constitutional law, nor does it decide, as Mr. Justice Holmes seems to think, that state courts may not constitutionally reverse their decisions upon the faith of which property rights have been acquired. 197 U. S. at 574.

James P. Hall.

CONSTITUTIONAL LAW. (Obligation of Contracts — Special Franchise Tax.) U. S. S. C. — N. Y. Laws, 1899, c. 712, imposing a special franchise tax, is not, it is held, objectionable on the ground that it impairs the obligation of contracts by which the state or municipality had previously granted the right to construct, operate,

and maintain street railways in the city of New York in consideration of a gross sum or of the annual payment of a fixed amount or fixed percentage of earnings, there being no stipulation that such payments were to be regarded as in lieu of or as an equivalent or substitute for taxes. It is also held that the exemption of subsurface street railways from the operation of the special franchise tax does not make the statute invalid as denying to the owners of surface street railways the equal protection of the law or as depriving them of their property without due process of law. N. Y. *ex rel* Street Ry. Co. *v* Tax Com'rs, 25 Sup. Ct. Rep. 705.

CONSTITUTIONAL LAW. (Peonage.) U. S. C. C. for N. D. of Fla. — Coming as it does, soon after the case of United States *v.* Clyatt, 197 U. S. 207, 25 Supreme Court Reporter, 429, in which the Supreme Court dealt for the first time with the construction of the peonage statute, the language of District Judge Swayne, charging the grand jury (*In re* Peonage Charge, 138 Federal Reporter, 686), is not without interest. Peonage is defined in much the same language employed in the Supreme Court case mentioned, which was noted in this magazine at the time, and in addition, it is said that the 13th Amendment, prohibiting slavery, forbids involuntary servitude for the payment of debt within the jurisdiction of the national government, whether created by contract, by criminal individual force, by municipal ordinance, state law, or otherwise.

Rev. St. U. S. Sec. 5526, is also referred to and it is stated that if a person desiring to have a servant returned to him to work out a debt, causes such servant to be arrested on a warrant procured by the master and after incarceration the master procures the servant's release on his promise to return to his master's employment to continue to work out the debt, the master is guilty of peonage, provided the servant had been charged with the crime for the purpose of procuring his arrest and incarceration and to enable the master to extort from the servant a promise to return and work out the debt.

COPYRIGHT. (Subjects of Protection.) U. S. C. C. Dis. of N. J. — American Mutoscope & Biograph Co. *v.* Edison Mfg. Co., 137 Federal Reporter, 262 is authority for the proposition that a photograph which is not only a light-written picture of some object, but also an expression of an idea, or thought, or conception, of the one who takes it, is a writing, and a proper subject of copyright. Several analogous cases are cited, among them being Lithographic Co. *v.* Sarony, 111 U. S. 53, 4 Sup. Ct. Reporter, 279; Falk *v.* Brett Lithographing Co., 48 Fed. 678; Same *v.* Donaldson, 57 Fed. 32 and Same *v.* Item Printing Co., 79 Fed. 321.

A correct apprehension of the scope of the present holding requires a slight explanation as to the facts. The photograph which it was alleged was infringed consisted of a strip of film 370 feet long bearing several hundreds of pictures which, when passed rapidly through an apparatus similar to a magic lantern, gave the observer the impression of motion. The scenes represented were the conception of the artist who prepared the pictures, and were produced by a number of performers who had been carefully rehearsed in their parts. This obviously required such originality of conception on the part of the persons who designed the scenes and secured the negatives that the expression of their ideas in the form of a series of photographs in a sense told a story, so that the only physical representation of these ideas might very properly be considered a writing.

EQUITY. (Injunction — Stock Exchange Quotations.) U. S. S. C. — In Chicago Board of Trade *v.* Christie Grain and Stock Company, 25 Supreme Court Reporter, 637, the Board of Trade sought to enjoin the defendants from using and distributing quotations of prices on sales of grain and provisions for future delivery. It was alleged and proven that these quotations were collected by the plaintiff at its own expense and furnished to telegraph companies under contracts that they should not be furnished to bucket shops, or in fact, to any persons not previously approved by the Board of Trade. Defendants in some manner obtained possession of the quotations, although they had no contract with the telegraph companies, and it was held that as the quotations could not be obtained without a breach of the confidential terms on which they were communicated by the Board of Trade to its customers, their use might be enjoined even though the quotations related to "pretended buying and selling," within the meaning of Illinois Act, June 6, prohibiting the keeping of places where such transactions are permitted.

The only other point in the case arises on defendants' contention that the contracts with the telegraph companies by which the communication of quotations of prices was limited, effect a monopoly, or attempt at monopoly, forbidden by federal statutes. This seems to have given the court less trouble than the other point for it is briefly disposed of by the observation that as the Board of Trade might have refrained from communicating these prices to any one, its refusal to

allow certain specified persons to obtain possession of the information, did not constitute a monopoly.

FEDERAL PRACTICE (State Statute.) U. S. C. C. A. 9th Circ. — In Northern Pacific Railway Company *v.* Kempton, 138 Federal Reporter, 992, plaintiff sued for damages resulting from delay in the transportation of live stock, the contract of shipment being made in Minnesota to a destination in Montana. This contract contained a stipulation providing a sixty-day limit for an action thereon, which stipulation would be void under the express provisions of Montana Civ. Code, Sec. 2245, but was not prohibited by the laws of Minnesota where the contract was made. Plaintiff was a resident of Montana and brought suit in that state, after the expiration of the sixty-day limit. The suit was removed by the defendant to the Federal Court sitting in Montana. Under these circumstances it was held that the Federal Court would not enforce the stipulation limiting the time for the bringing of an action, it being said on the authority of Missouri, K. & T. Trust Company *v.* Krumseig, 172 U. S. 351, 19 Supreme Court Reporter, 179, that the benefit of the prohibition against the stipulation was a substantive right belonging to plaintiff of which he could not be deprived by removing the case to the Federal Court.

FEDERAL PRACTICE. (State Statutes.) U. S. C. C. A., 3d Circ. — A case somewhat in contrast with that preceding, is that of Doll *v.* Equitable Life Assurance Society of the United States, 138 Federal Reporter, 705. In this case it is held that a statute of another state, where a life insurance contract is made, prohibiting a physician from disclosing any information acquired in attending any patient in a professional capacity, which information was necessary to enable him to prescribe for such patient as a physician, affects the remedy only, and hence is inapplicable in an action on the policy in a federal court sitting in another state. In this case the court also takes the position that Rev. St. U. S. Sec. 721, providing that the laws of the several states, except where otherwise provided, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply, did not apply to the objection to the competency of the physician under the statute of the state where the policy was executed. The case of Connecticut Mutual Life Insurance Company *v.* Union Trust Company, 112 U. S. 250, 5 Supreme Court Reporter, 119, is distinguished, and it is pointed out that the holding therein merely is that the state statute involved in the present case was obligatory upon federal courts sitting within that state.

INSURANCE. (Policy — Immediate Peril.) Ky. — Two questions of importance, one of which is almost, if not entirely, novel, are decided in Rochester German Ins. Co. *v.* Peaslee Gaulbert Co., 87 Southwestern Reporter, 1115. A building which was insured against loss or damage by fire until noon of a certain day, caught fire at 11.45 A.M. of that day by standard time which was 12.02½ by sun time. A question most naturally arose as to what was meant by noon. On this point it was argued that noon was but another name for a physical phenomenon such as sunrise or sunset, but the court holds that this is not the case and that it is used to express merely practical approximation and does not necessarily refer to the actual fact. There was evidence in the case that in some lines of business, particularly that of banking, in the city in which the insured property was situated, sun time was still in use, although for most business purposes standard time was employed. On this state of facts the court holds that it was necessary to submit to the jury the question whether or not there existed a custom or usage with reference to the meaning of the word "noon" which was so well-settled and uniformly acted on as to raise a presumption that both insurer and insured contracted with reference to it. If such a custom existed it is held that it would govern in determining whether the policy was expired when the loss occurred. Authority for this proposition is found in the similar case of Jones *v.* German Ins. Co., 110 Iowa, 75, 81 N. W. 188, and in the earlier and somewhat analogous case of Finnie *v.* Clay, 2 Bibb. 351.

The question referred to as novel, arose from the consideration of when the loss must have occurred in order to be covered by the policy and the court instructed that if the fire did not reach the building before noon, but at noon the destruction of the building from the fire already in existence elsewhere was inevitable, the loss was covered by the policy. This is held to be erroneous, the Appellate Court observing that the risk assumed by the insurer was that of loss or damage pending the term of the insurance and not merely peril without loss during the term of the policy. It is said, however, that if the fire broke out in the insured building before the policy expired and continued to burn thereafter until it was totally destroyed, the loss was one occurring within the insured period. In the language of the court, "a damage begun is damage done, where the culmination is the natural and unbroken sequence of the beginning." The line between the

liability and non-liability of the insurer is thus drawn by the court at the point where the actual burning of the insured property commences.

This decision is interesting because of its bearing upon the doctrine of "death wound," which had its origin in Marine Insurance. Knights v. Faith, 15 Q. B. 649 [1850]; 1 Arnould on Marine Insurance, § 437. The doctrine of death wound has very reasonably been carried over into Fire Insurance. Yet it is merely a doctrine as to the amount of recovery; and it is not applicable until it has been made to appear that within the lifetime of the policy some loss to the subject matter, and of the sort insured against, had already begun. The decision in the principal case thus harmonizes with the doctrines of death wound. It harmonizes also with the law of Life Insurance, as developed in Howell v. Knickerbocker Life Insurance Co., 44 N. Y. 276 [1871], where about two hours before the expiration of the policy the person whose life was insured was so fatally stricken with disease that he died on the next day, and where the court overthrew a contention that within the meaning of a life insurance policy this person was in effect dead before the policy expired.

Eugene Wambaugh.

LARCENY. (Conspiracy to Cheat Under Color of a Bet.) Ark. — The case of Johnson *v.* State, 88 Southwestern Reporter, 905, presents the crime of larceny in a form which, while not entirely without precedent, is, nevertheless, unusual. The evidence showed that the prosecuting witness was induced by defendant to bet money on a foot-race, it being represented to prosecuting witness that the runner on whom he was to bet would win the race, although the other contestant, who was supposed to be the representative of a club, was a favorite in the betting. The prosecutor was induced to believe that he would thereby be enabled to win large sums from the members of the club, and he was persuaded to furnish money on representations that the money was to be returned to him, and not really bet, and that he was to get a share of the winnings as compensation for aiding the defendant and his confederates. The runner on whom the money belonging to prosecuting witness was bet, lost the race, of course, and appellant refused to return prosecutor's money. The obtaining of the money under these circumstances was held to constitute larceny. The action of the trial court, in admitting evidence of similar transactions by defendant at other places, prior to the commission of the offense on which the prosecution was founded, is sustained on the ground that it tended to prove system and show design.

Whether obtaining money by fraudulent bet is larceny depends on whether it is to be deposited as a stake, or paid as consideration for a chance of winning, as in case of a pool. The ordinary bet, like this, is the deposit of a stake; possession only is parted with, and the act is larceny.

J. H. B.

This case is worth notice for the clear cut and careful distinction that it draws between larceny and false pretenses. The jury having found that the money was deposited by the victim with the stakeholder merely as a form, the latter at most acquired only possession; it is possible from the facts that all that was given him was custody. In either event the fact that at the time he got the money he intended to keep it, made it larceny, in the one case by trick, in the other because there was never even a fraudulently induced consent to part with possession: P. v. Shaughnessy, 110 Cal. 598, 43 P. 2; S. v. Skilbrick, 25 Wash. 555, 66 P. 53. On the other hand, had the victim been induced to believe that he had lost and so consent to let his money go, parting with both possession and title, this would have been an equally clear case of false pretenses, Rex v. Nicholson Leach 3d. ed. 698.

MUNICIPAL CORPORATIONS. (Statutes — Contracts — Competitive Bidding.) Ind. App. Ct. — A decision upon a point which seems to have been a matter of first impression in Indiana, is rendered by the Appellate Court of that state in the case of Monaghan *v.* City of Indianapolis, 75 N. E. Rep. 33. The question is whether, under a statute requiring a municipal board of public works to let contracts for street improvements to the lowest and best bidder after advertising for bids, the city has power to specify that a street shall be paved with a patented pavement. Two of the earliest cases on this point, both cited by the Indiana Court, are Hobart *v.* City of Detroit, 17 Mich. 246, in which the power to let such a contract is affirmed, and Dean *v.* Charlton, 23 Wis. 590, in which the power is denied. The Indiana court follows the latter case, holding that the city has not power to specify a patented pavement, even though the owner of the patent agrees to furnish the necessary material to any contractor equipped to lay the same, or who will equip himself to lay it, at a specified price, and to furnish free of charge an expert to supervise the preparation of the material. The obvious effect of this holding is to prevent the use of any patented

pavement. If some one should invent and patent a pavement as hard as steel, as smooth as glass, as resilient as asphalt, and cheaper than sawdust, and agreed to sell its component elements to any body who wished to buy for ten cents a cubic yard, the pavement could never be used in Indiana unless the court changed its mind or the legislature repealed the statute requiring competitive bidding. Justices Wiley and Myers dissented.

MUNICIPAL CORPORATIONS. (Torts — Proximate Cause.) **N. Y. S. C., App. Div.** — The plaintiff, in Sadlier *v.* City of New York, 93 New York Supplement, 579, claimed damages for injuries to his property resulting from the maintenance of the New York and Brooklyn bridge. As the case is somewhat unusual, a number of interesting propositions arose from it, chief among which, probably, is the holding, that the fact that the legislature authorized the construction of the bridge by the municipality, does not relieve it from liability for a trespass committed in the administration of the bridge. This trespass the court regards as having been sufficiently shown by evidence that persons caring for the bridge, swept debris therefrom so that it fell on the roof of plaintiff's house. This house, it appears, was some twenty feet distant from the base of a vertical line dropped from the edge of the bridge. On this was found d defendant's contention that the currents of air which carried the debris on plaintiff's premises were a superseding cause, relieving the city from liability for the trespass. This view is negatived by the court. The general rule is announced that as the construction of the bridge was authorized by the legislature, and the bridge itself constituted a highway, the obligation of the city with respect to its care is to be determined with regard to the duties of the city as to highways or streets, modified by the consideration that the bridge is not on the surface of the earth, and pursuant to this principle it is held specifically that, under evidence showing that it was not feasible to so construct the bridge as to prevent water from rain and melting snow from flowing or being blown by the wind from the sides thereof onto houses below, the city is not liable for damages to a house caused thereby.

NATIONAL BANKS. (Compound Interest.) **U. S. S. C.** — In Citizens' Nat. Bank *v.* Donnell, 25 Sup. Ct. Rep. 49, it is held that by compounding interest oftener than is permitted by a state statute, a national bank charges interest at a higher rate than that allowed by the laws of the state, and thus violates U. S. Rev. St., Sec. 5197, fixing the rate which national banks may charge; and this is true, although the compounded interest is less than the state laws permit to be charged directly without compounding. The rights of a national bank with respect to interest charges upon overdrafts are also defined, and it is determined that where a twelve per cent charge is made when eight per cent is the highest rate of interest permitted by the state laws, the forfeiture of all the interest prescribed by U. S. Rev. St., Sec. 5198, as the penalty for usurious transactions cannot be escaped because of the trifling amount involved, or on the theory that the charge is a penalty because of the failure to pay a debt when due. The election of the bank in suing on a note to remit the excessive interest is also determined to be unavailing to avoid the forfeiture.

PROPERTY. (Meteorites — Severance from Realty — Evidence.) **Ore.** — A case which, so far as appears from the opinion, finds its only precedent in Goodard *v.* Winchell, 86 Iowa, 71, 52 Northwestern 1124, is that of Oregon Iron Company *v.* Hughes, 81 Pacific Reporter, 572, wherein it is held that a meteorite, though not buried in the earth is, nevertheless, in the absence of proof of severance, real estate belonging to the owner of the land and not personal property. The holding in both cases is based upon the idea that a meteoric deposit is a natural accretion to the soil, and hence that its ownership is determined by the ownership of the soil. The force of this principle was in the Oregon case, sought to be avoided by evidence tending to show that at some time in the past, the Indians had dug the meteorite up, used it as an object of worship, and afterwards abandoned it so that it belonged to the next finder. The evidence of this was held insufficient.

SALES. (Rescission — Pari Delicto — Laches.) **U. S. S. C.** — In Harriman *v.* Northern Securities Co., 25 Sup. Ct. Rep. 493, the decisive point is that the stock, which had been transferred to the Northern Securities Company, could not be returned to its original owners; first, because property delivered under an illegal contract cannot be recovered back by the parties in *pari delicto*; second, because those seeking to recover their stock had stood upon their rights as shareholders in the Northern Securities Company until nearly a year after the Supreme Court had adjudged the combination to be illegal.

THE LIGHTER SIDE

THE LAW'S DELAY

By Donald Richberg

Fourteen years ago, the files in a certain case now pending in a federal court were returned to their box in the vault. The dust of one, two, ten, years accumulated on the wrapper. One day a young attorney called for the files, glanced over the various documents with an ironic smile, handed them back to the vault clerk, and returned to his office to wash his hands — of the case. Four more years passed by. Then one morning last March, the young attorney came again, this time armed with a receipt, O.K.'ed by the proper judge and departed with the somnolent files. A few weeks later, notices were received by some eighty attorneys that at 10 A.M. on the following morning, or as shortly thereafter as, etc., Richard Roe would, by his attorney, John Jones, make a motion, etc.

At ten o'clock on the following morning, the usually quiet federal court-room appeared to be in the possession of an excited mob. Not only was the court-room crowded, but the overflow of lawyers and lawyers' clerks extended far down the outside hallway. The judge raised his eyebrows slightly, as this throng rose to greet his entrance. The usual formalities proceeded in the customarily monotonous and stupid fashion, until the clerk called a case possessing a general number which brought a tone of surprise into his singsong voice. A young attorney advanced to the bar and stated his motion briefly. As he concluded, fully forty voices joined in an anxious:

"If your honor please — "

The surge of unfortunates stranded in the corridor pressed the speakers forward until the stout rail before the judge cracked ominously. The bailiff pounded and shouted for order. When a partial calm had been procured, the chorus broke forth once more:

"If your honor please — "

The judge leaned over the bench.

"Mr. Martin," he said, "do you wish to be heard upon this motion?"

A gray-haired man in the front row of lawyers said emphatically:

"Yes, your honor, I do."

"Then proceed," said the Court.

"I wish to object," began Martin, "to the hearing of the motion at the present time upon the ground of insufficient notice. I am aware that according to the rules, the notice served has been sufficient, but this is a most unusual case. Your honor, it has been fourteen years since this case has been in court. I don't know a thing about it, and I question whether another lawyer here knows any more. My former partner, Judge Stillman, took care of the matter, I believe, but as he died seven years ago that doesn't assist my knowledge greatly."

"Whom do you represent, Mr. Martin," asked his honor?

Mr. Martin looked distinctly embarrassed.

"I am not quite sure, your honor."

"What's that," demanded the judge?

"Well you see, your honor, there have been so many transfers of interest in regard to the subject matter of this litigation, that I — well — I am not quite sure whether the parties originally represented by my deceased partner, that is — I am not quite sure who they were, but to-day it is really quite impossible for me, on so short notice, to tell who they are — that is — "

His honor's temper had never been the subject of enconiums by the Bar, and his face was rapidly assuming a purplish tinge which visibly affected even as tried an attorney as Martin.

"May I ask," said the judge, in tones reminiscent of the first hissing overflow of lava from a long quiet Vesuvius — "may I ask whether you are opposing or supporting this motion?"

"I really don't know, your honor," replied the gray-haired attorney in so piteous a tone that a distinct titter was heard in the midst of the legal mob.

The judge's voice rose in sharp tones of displeasure.

"Does any attorney here know who his client is, and what his position on this motion is?"

A full quarter minute of silence ensued.

Then a lawyer crowded his way forward.

"If your honor please," he said, "fourteen

years ago, John Sprague was a plaintiff in this case. He died about ten years ago, leaving surviving him, one child, his sole heir, a girl. This girl married one Lucius B. Farwell, from whom she was divorced some four years ago. She had, however, entered into a post-nuptial agreement with her husband, which I believe to be a good and valid agreement —"

The judge cleared his throat after the manner of stage-thunder, and glaring at the history-ridden attorney, said:

"Whom do you represent, sir? Skip the family scandals, and come to the point."

"I am representing Darius Green."

"And his flying machine," softly quoted a voice behind the speaker, who thereupon turned a pink which seemed a faint reflection of the judicial countenance before him.

"In order to properly present my objections to the granting of this motion, your honor, I shall need to have the depositions of two parties at present resident in Brazil, South America."

An audible sigh of relief spread over the crowded room.

"I therefore ask your honor that this motion be continued and set down on the contested motion calendar for hearing not sooner than three months from date."

"I am agreeable to that," broke in the attorney who had caused all the trouble.

"Write out your motion," snapped the judge, "and give it to the clerk. Call the next motion, Mr. Clerk."

As the attorney turned away from the clerk's desk, he was seized upon by the throng of retreating lawyers, who, in mingled amusement and relief shook hands with him and slapped his broad back. Finally one said:

"Remember me to Mr. Green most cordially."

"I can't do that," was the quick reply. "He's dead."

"Dead?" came the query. "I thought you said you were representing him?"

"I am. I'm his executor."

CHICAGO, ILL., October, 1905.

Sunday Services. — The Court (Judge Kavanagh) — I will allow you $480 for your services in the matter.

ATTORNEY — If your honor please, I think my bill should be allowed in full — $600. Probably your honor has omitted a very important item, the work done on Sunday.

THE COURT — I did not count that. You should have been attending to your religious duties on that day.

ATTORNEY — I esteemed it a religious duty to defeat these scoundrels.

THE COURT — For that you get your reward hereafter. Mr. Clerk, enter the attorney's compensation "$480 here, $120 in heaven."

ATTORNEY — But, your honor, what security have I that the order will be there recognized?

COURT — Never mind; I will be there, and if necessary I will have you sent for. — *Chicago Inter-Ocean.*

Indigestion. — The following incident certainly did not take place either in Massachusetts or New York, where the bugbear of a relentless Board of Bar Examiners stares the student in the face from his first lecture. We will in charity let the location remain a secret.

A fledgling attorney had as his first client, a merchant who had received a consignment of China silk not up to contract requirements, and desired to know what his proper course was in regard to payment, etc. The young man being somewhat nonplussed, asked for time to consider the matter, and a little later visited an older brother at the bar as "senior counsel." After stating the details of the case, he said, "Now I've looked in all the digests under China, and under silk, and I can't find a thing which bears on this case."

Judge Derby and Saco's Court House. — Shortly after the court house at Alfred, Me., was remodeled, Judge Derby of Saco was chatting in the old Central House with a young fellow who had recently been admitted to practice, when the latter suggested that they go up to the court house and look it over.

"All right," said the judge; "let's view the ground where we shall shortly lie." — *Boston Herald.*

Signs. — Lawyers should take care not to allow themselves to become bound by set forms of language in examination of witnesses, otherwise the effect of some otherwise telling

point may be made ridiculous. As an example of this triumph of form over substance, the following will serve. In the conduct of a murder trial the prosecuting attorney, a very able lawyer, asked the following remarkable question, "Did the defendant show any signs of remorse, *and if so how many?*" Even the learned judge was forced to join in the laugh which followed.

Too Short. — Any one fortunate enough to be acquainted with Judge F. M. Bixby of the Police Court of Brockton, Massachusetts, knows that he is much longer in wit than he is in inches, of which fact the following episode is a forcible illustration. One morning one of the usual crop of "drunks" on hearing the judicial decree of "Ten Dollars," fall from Judge Bixby's lips, made this plea for clemency, "Couldn't yer make it five? I'm a little short, judge." Quick as a flash came the retort, "No — sorry — can't do it. I'm a little short judge myself."

A Rising Jury. — Another amusing story of Judge Bixby was told by Thomas H. Proctor of Boston in recalling one of his early cases in the Plymouth Superior Court, in which Judge Bixby (who presides in the local Police Court) was counsel for the defendant. It was the first case of the term and the court officer had been impressing the new jurymen with a sense of the dignity of the occasion. He had particularly cautioned them to stand when the court came, in accordance with the good old Bay State custom. Of course they forgot it and he had to prompt them with vigorous instructions to stand whenever the judge did. Proctor, for the plaintiff, put in his case and took his seat. When Judge Bixby, known to all the jurymen for years, arose and started toward the jury rail, the panel rose as one man and respectfully faced him. Court and counsel were convulsed, the court officer in despair, and the jurymen frightened, but Judge Bixby was equal to the occasion. "That's all right, friends. You needn't stand for me. That's for the big judge up there. I'm only the little judge. I stand for you." Whether home talent won the case, deponent saith not.

Put in Plain United States. — It was in a case before the Supreme Court of Maine. A party had sued the Boston & Maine railroad to recover damages for personal injuries. The company's attorney, Mr. Yeaton, was examining the plaintiff, a rather illiterate man from one of the rural districts, and was endeavoring, apparently, to confuse him.

"Did you sustain an abrasion of the tibia?" he asked.

The witness stared helplessly at his questioner.

"I say," again ventured the attorney, "was there a contusion of scina?"

The witness was ready to collapse, when his attorney, Lawyer Copeland, who had a voice like a megaphone, cried out: "He wants to know did he bark his shin." — *Boston Herald.*

Sacred. — "Senator, I congratulate you. I understand you have been vindicated."

"Triumphantly, Johnson. At the first trial the jury disagreed. At the second trial, my lawyers found a flaw in the indictment, and the case was thrown out of court." — *Chicago Tribune.*

Profane. — An elderly lady of extreme sensibility and prudish notions on the subject of profanity called at one of our leading bird stores and purchased a parrot, on the express stipulation by the proprietor that the bird was guaranteed not to "swear."

On taking the feathered creature home, and using her most persuasive endeavors to induce it to talk, the bird promptly responded, — "Shut up, you d—— old fool."

Being highly shocked at this procedure, the lady brought suit against the proprietor of the store, alleging in aggravation of damages, her extreme sensitiveness on the subject of profanity, and the injury to her moral finesse as a result of the above quoted language on the part of the bird.

At the trial, the parrot was placed upon the stand; an officer of the court tickled its nose with a feather and the bird promptly remarked "damn." His honor facetiously inquired of a young attorney recently admitted to the Bar, "if it was not a good illustration of what we term 'real evidence.'" The young attorney hastily replied, "Your Honor, it bet-

ter seems to illustrate the doctrine of *res ipsa loquitur*."

Trading Stamps in the Court. — About three years ago, the late Judge Erastus M. Reed of Mansfield, then presiding at the second session of the first district court of Bristol, at Attleboro, on taking his seat one morning, was confronted by a prisoner of the Russian Hebrew type, charged with peddling without a license.

"Are you guilty or not guilty?" asked the judge.

"I didn't do it," moaned the frightened prisoner.

After listening to the evidence, which was conclusive, Judge Reed called out: "Slipperygaski, or whatever your name is, stand up. On the complaint against you for peddling without a license, the court finds you guilty, and orders you to pay a fine of $20."

"Oh, my goodness gracious! My goodness gracious! I shouldn't do it. I shouldn't do it," cried the distracted prisoner. "I should pay you $5."

"Sit down," yelled the judge. "The next thing I know you'll be asking for trading stamps." — *Boston Herald.*

Putting It Away. — Admiral Schley told in Philadelphia, a story about a judge.

"This judge," he said, "was sitting on the case of a man charged with putting off fireworks illegally. He was a dignified, reserved sort of judge. He laid a good deal of stress on ceremony, pomp and display, and in his court there was always an abundance of reverence, as in a church.

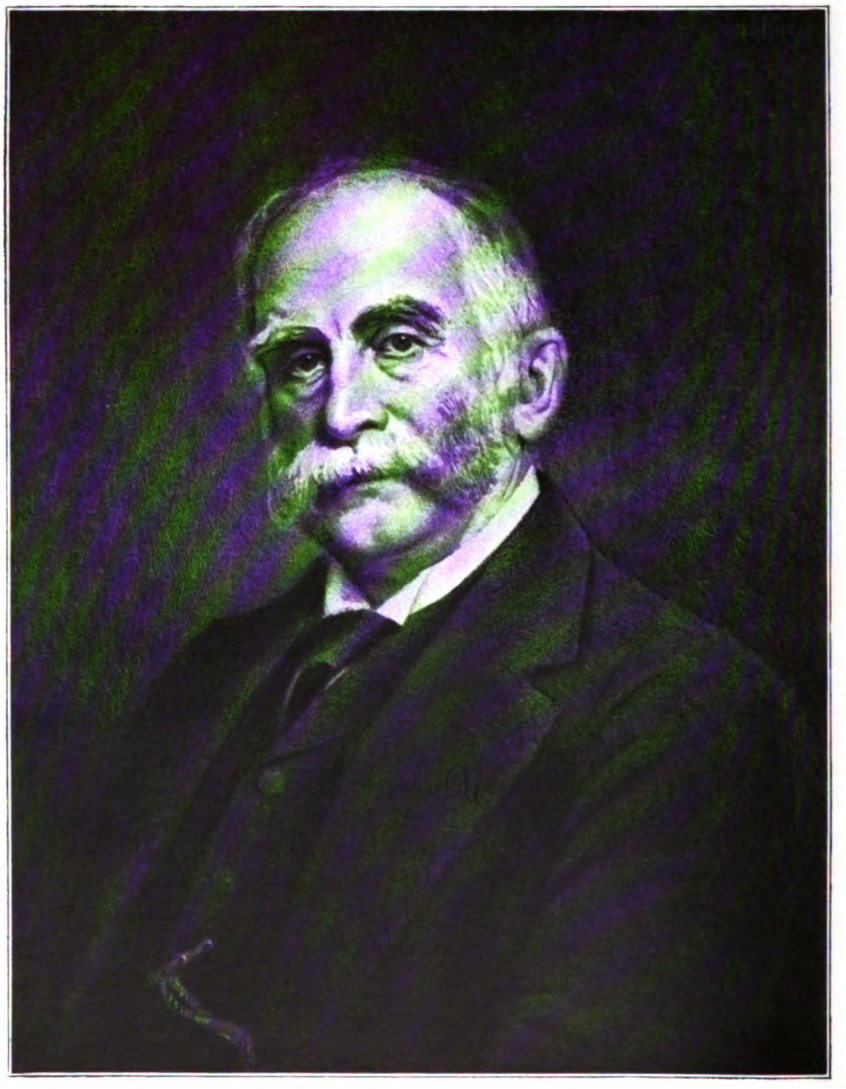
"Well, as the judge was trying this case in his usual stately way the prisoner in the dock put his hand in his pocket, drew out a large ham sandwich and began to eat calmly.

"Horror stricken, the judge shouted:

"'Put that away.'

"The prisoner wiped his mouth with the back of his hand.

"'I am putting it away as fast as I can,' he said." — *Pittsburg Dispatch.*



Grover Cleveland

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JAMES C. CARTER

By William B. Hornblower

I SHALL not attempt to give a biographical sketch of Mr. James C. Carter; I have not sufficient personal familiarity with the facts of his earlier career to enable me to give such a sketch with any accuracy or completeness. I can only undertake to give a sketch of Mr. Carter's personal and professional characteristics as I observed them during the later years of his life. He was already a man who had achieved position, and, if not at the zenith of his fame and ability, he had arrived at the full maturity of his powers when I was admitted to the Bar in 1875. It was, however, my privilege to come much in contact with him personally, as well as professionally, from that time until his death, in the early part of the present year; and I am thus enabled to give at first hand an estimate of one who was among the leading men of his generation in our profession.

A brief résumé of the leading facts of Mr. Carter's life must suffice. He was born in Massachusetts in 1827 and inherited the sturdy moral fiber of his Massachusetts ancestors. He was graduated at Harvard College in 1850, and at the Harvard Law School in 1853. Coming to New York City and being admitted to the Bar of New York State, he was for half a century an active member of the profession, rising to the position of one of the acknowledged leaders of the Bar of the United States, and dying while still in the full possession of his faculties in the early part of 1905. He became known to the public by his participation as counsel in many notable litigations, and by his services as a member of the Commission, appointed by Governor Tilden in 1875, to plan municipal government for cities of New York State; as a member of the Commission of 1890, appointed under authority of the legislature to suggest amendments to the Judiciary Article of the State Constitution, and as one of the counsel appointed by President Harrison to represent the United States before the Behring Sea Tribunal at Paris, in 1893. He was, however, better known to his brother lawyers and to the judiciary by his daily professional life which brought him into constant contact with Bench and Bar, and won from them respect, esteem, and admiration.

Mr. Carter was a splendid representative of the highest type of the Anglo-Saxon barrister. He was combative, aggressive, forceful; he had the *gaudium certaminis;* he "rejoiced as a strong man to run a race." When he had become satisfied as to the righteousness of his clients' cause, or as to the correctness of his clients' legal position, his zeal became intense and his devotion unbounded.

He spared no labor to master the case in which he was engaged. Intense and continuous application to the subject in hand was his watchword in his professional work. So closely would he concentrate his attention upon the particular case upon which he was engaged, that he has been known for days at a time to leave his correspondence not only unanswered, but unopened, while he gave his undivided attention to the preparation of a brief or the examination of the facts and the law of the case in hand. He was a standing rebuke to those members of the profession who think their entire duty to their clients is performed when they have

obtained a cursory and superficial acquaintance with the questions of fact and law to be tried or discussed, and who trust to their intellectual acumen and power of expression to enable them to properly present the questions to court or jury.

When Mr. Carter appeared in court, he was thoroughly saturated with his case, and his presentation of it was orderly and vigorous. He had an impressive personality, a powerful but pleasing voice, a copious vocabulary, and an elegant diction. He seldom hesitated for a word or a phrase, and seldom failed to use the particular word, or phrase, which most clearly and forcibly conveyed the meaning which he desired to express.

He excelled in trenchant denunciation of wrong or injustice, and when his "righteous indignation" was aroused he thundered his invectives with leonine ferocity. While not lacking in a sense of humor, he seldom indulged in badinage or jest. He was, perhaps, too much inclined to disdain the use of these lighter — but frequently most effective — weapons of forensic debate; he was not ready in playful repartee, though he could deal a heavy blow with the "retort courteous" on occasion. To him, the contests of litigation in the courts were very serious and earnest matters in which the cause of justice or the interests of jurisprudence were at stake, and he was disposed to resent anything which turned the attention of the court or the jury away from what he regarded as the main issue of the case. In one respect this might be said to be a defect in his equipment as an advocate; but it was a defect which won the respect and admiration of his brethren of the Bar, and of the judges upon the Bench. There have been, and are, other great advocates who have combined with learning, ability, and the highest type of forensic eloquence, a keen sense of humor and trenchant wit, which have added to the force, as well as enlivened the interest, of the forensic contests in which they have been engaged. Mr. Carter's personality, however, was such that in his case it would have seemed almost out of place for him to make use of the lighter and brighter side of the art of advocacy.

Nor did he avail himself to any considerable extent of the ornaments of rhetoric to embellish his oral presentation of the case. His arguments were clear, lucid, and vigorous, with an occasional apt illustration, and now and then a touch of irony, but wholly devoid of anything like metaphor or rhetorical flourishes.

The intensity of his conviction as to the correctness of his own point of view with regard to the merits of a case, or with regard to the legal questions involved, was a tremendous element of strength, but it was also, occasionally, an element of weakness. In his preparation for the presentation of his case in court, he frequently became so impressed with the particular aspect of the questions involved which appealed to his own judgment and his own sense of right, that he lost sight of other aspects of the case which might appeal to other minds, and he came into court with a preconceived and absolutely fixed opinion in favor of his own view of the case as the only logical, correct, and just view, so that he was unable and unwilling to yield a hair's breadth for the purpose of meeting or answering the views of his adversary or of the court. This intensity of conviction sometimes resulted in an apparent inability on his part to see the other side of the case, or to appreciate the force of his adversary's views, and an unreadiness to meet those views or to meet the objections of the court suggested on the argument. This was a fault of a strong mind and a strong character which elicited admiration even when it interfered with practical success in the particular case in hand. His arguments were "magnificent" even where they failed in the tactical features which go to make up the elements of successful "war" in the legal contest. Mr. Carter was not an op-

portunist in any of the relations of life, nor could he be an opportunist in the management of a lawsuit, or in an argument in court. What he believed to be right was for him the only right. What he believed to be just was for him the only justice. What he believed to be the law was for him the only possible law for the case in hand. He would not "stoop to conquer," nor would he yield to win.

Mr. Carter was a passionate admirer of the system of jurisprudence known as the "common law." He had a fine scorn and contempt for all attempts to fetter the unwritten law by statutory definitions or codifications. He regarded the system of "judge-made" law as the ideal system. Strange to say, however, he had little respect for the doctrine of *stare decisis*, and did not seem to appreciate that this doctrine was the essential backbone of the common-law system, and that without a strict and somewhat rigid adherence to precedents, the science of jurisprudence would cease to exist and each judge would become a law unto himself — "A cadi sitting in the gates and doing justice as to him might seem best." The flexibility of the common law, instead of being for him an objection and a ground for criticism — as with the Benthamites — was its greatest, its crowning merit.

Of course, I do not mean to be understood as saying that he avowedly repudiated the doctrine of *stare decisis*. On the contrary, he recognized and asserted it as a necessary feature of a jurisprudence founded upon "unwritten law." He was, however, inclined to subordinate the importance of adherence to precedent to the importance of arriving at rules of law founded upon abstract justice, and accomplishing concrete justice in the particular case before the court.

He himself, although a profound student of the common law, cared little for cases as such. His arguments were largely based upon his views as to what should be the law rather than upon what the judges had theretofore declared the law to be. He would sometimes contemptuously toss aside an authority as clearly wrong and contrary to justice and reason.

This characteristic of his arguments in court was in one sense an element of strength, and in another sense an element of weakness. It added to the vigor and persuasiveness of his oral forensic eloquence, but it detracted from the value of his argument when considered by judges in the quiet of their studies — when they realized the force of the decided cases which they must overrule in order to reach the conclusion which he had so persuasively presented.

No one has ever surpassed Mr. Carter in luminous, vigorous, and even passionate defense of the unwritten law as an instrument for obtaining substantial justice and a scientific jurisprudence, and in opposition to what he regarded as unwise and dangerous attempts to trammel and hamper the law by legislative enactments. To him more than to any other one man, is due the defeat of the attempt to adopt a Civil Code in the state of New York, which undertook to put into rigid statutory form the common law of that state and which he believed would be a step backwards, and not a step forwards, in the history of our jurisprudence. His views on this general subject were very fully expressed in the address which he delivered before the Virginia State Bar Association, in 1889 — an address which shows Mr. Carter at his best in its wonderful command of language, its happy and forceful use of apt quotations, its trenchant and vigorous argumentation, and its high idealism in thought and tone. Whether one agree or disagree with his views on the general subject, one cannot but be lost in admiration at the power, the learning, and the persuasive earnestness of his presentation of the subject.

The exalted view which Mr. Carter took of the object and function of jurisprudence is well set forth in this address before the Virginia State Bar Association, where he says:

"What is this thing which we call *the law?* Upon subjecting these rules to scrutiny, we at once perceive that they are affected with a *moral* character — that they are, or ought to be, *just.* The judge, in the performance of his function of declaring the law, seeks for that rule which is dictated by what is called *justice.* . . . The masters of human thought, after ages of endeavor, are able to carry us but a single step in advance; but the steps are, nevertheless, gradually taken and we thus approach, by slow and almost imperceptible stages, towards that knowledge of abstract and absolute justice which human reason will never reach, but after which it forever aspires. We may in despair abandon the search into this hidden reality; but let us never forget that it is a reality, or become insensible to its transcendent importance. Some ability to understand and apply it is given to all; and we share the possession in proportion to the earnestness and fidelity with which we cultivate the higher faculties of our nature, and seek to hold converse with the spirit of justice. Poor, indeed, will be the lawgiver or the judge who does not at every step draw inspiration from this fountain, and acknowledge that he is not a *maker*, but a *seeker*, among divine sources, for preëxisting truth."

And, again, he says, speaking of "the law," that

"It possesses as an essential feature a *moral* character; that it springs from and reposes upon that everlasting and infinite Justice which is one of the attributes of Divinity; and that it is so much of that attribute as each particular society of men is able to comprehend and willing to apply in human affairs."

It was because he believed that the reduction of the law to rigid statutory form tended to make it a set of arbitrary rules not based upon justice, and not capable of being molded by judicial tribunals into conformity with their standards of justice, that he was opposed so intensely to codification of the principles of jurisprudence. He did not, of course, claim that the courts always attained to the true standards of justice; but admitted that the courts were frequently misled by temporary misconceptions into departures from true justice. His view, however, was that the courts would tend to give expression to the highest form of justice which the public opinion of their generation should point out to them, and that the courts are better adapted to giving expression to the highest standard of justice of their generation than is the legislative body.

I have undertaken to speak of Mr. Carter as a lawyer and not as a citizen or a man. I cannot, however, refrain from adding a few words of tribute to his character in these regards.

As a citizen, he brought to the consideration of all public questions the same earnestness and intensity of conviction which characterized him as a lawyer without, however, any of the bias which, of necessity, more or less influenced his judgment in his professional capacity. In dealing with public questions and with his duty as a citizen with regard to those questions, he was singularly open-minded and free from prejudice. At a late period of his life, he threw off the ties which had bound him to the party of his early manhood because he became convinced that the opposite party stood for economic principles which appealed to his judgment, his reason, and his conscience. He never, however, became a party man, but held himself at all times free to act as his sense of duty required in each successive political contest between the parties.

In municipal matters he was one of the first to take the ground that party lines should not be allowed to interfere with the selection of the best and ablest administrators of city affairs. His voice and his influence were always ready in the cause of good government, and no one was more potent than he in influencing his fellow-citizens for right and against the wrong.

Courageous, absolutely unselfish, and disinterested, he threw himself without reserve into the struggle whenever it appeared that he could accomplish results for the welfare

of city, state, or nation. He never held an elective office, so far as I know, and never was a candidate for public office, so far as I know. He was content to be a private citizen. No office within the gift of the people would have added to his honor or reputation, though he might have achieved a position in the history of the nation which would have perpetuated his name and memory beyond the short period during which the reputation of the lawyer remains a recollection or a tradition.

As a man, Mr. Carter was a remarkable example of the combination of strength of character with gentleness and geniality; outwardly dignified and, apparently, even stern at times, he was affable, kindly, courteous, and generous to all who came into close contact with him. He was singularly simple-minded in his habits and tastes. Notwithstanding the intensity of his convictions — to which I have already so frequently alluded — his judgments as to his fellow-men were charitable to a fault; he seemed to always see the best side of every man's character. Sincere, honest, and outspoken himself, it was hard for him to believe that other men were not equally out-spoken, honest, and sincere. He seldom spoke harshly of individuals, however bitterly he might denounce their views or their conduct.

Mr. Carter's character as a lawyer, a citizen, and a man, may be summed up in the one phrase: Devotion to duty; duty to his client; to his profession; to the commonwealth, and to his fellow-men.

New York, N.Y., November, 1905.

THE INSURANCE INVESTIGATIONS

"What shall the harvest be."

By Charles Bulkley Hubbell

THE investigations that have been under way in connection with the conduct of the Life Insurance Companies in this city during the last few months have done more to break down confidence, not only in this particular kind of business, but in the conduct of all corporations in this country, than anything that has occurred since we reached any considerable commercial importance. This shattering of confidence prevails to quite as great an extent in Europe, where our securities have been so largely held, as at home. The protests that have been registered in the various states where elections have recently been held, were emphasized, I have little doubt, by the outraged feelings of thousands of men who desired to rebuke the genteel grafters who had so shamefully abused the positions of trust they held in these corporations. The extension of the same lack of confidence, it is believed by many, has largely contributed to the nervous condition that prevails at the present time in the financial world. The trustees of a life insurance company sustain the most delicate fiduciary relation to those supposed to be benefited by such institutions that it is possible to create. For this reason men who have been supposed to be above temptation, of established and tried character, and with an abundance of this world's goods, have been placed in the boards of trustees of these institutions. Their names have been set forth in the daily press for years as a guaranty of the absolute good faith and business-standing and methods of such companies. These men had the unlimited confidence of their fellow-men. And it is only fair to say that most of them deserted it. Was it strange, then, that it was easy to persuade men to make all manner of sacrifices to provide against the day when their loved ones could no longer rely upon their labors for their daily bread, by entrusting their savings to these trustees; or was it strange that millions of dollars, so many that we can scarcely comprehend their number, flowed into the coffers of these supposedly beneficent institutions? The more millions that a given company accumulated, the more certain was it that still more would follow. It was like the snow-balls that, as boys, we started rolling down some gentle slope.

Many of these companies have ingeniously and industriously advertised that their business methods in caring for the savings of the poor are more profitable and safer than those of savings-banks, and that their bonds and policies are "as good as Government bonds," while at the same time providing sustenance for the widow and the orphan, when the bread-winner has passed away. What a mockery there is in these words in the light of the hideous revelations that have, during the last few months, been made familiar to the world. The three great companies that have thus far had their methods and true inwardness revealed to the public, have in effect held themselves out to be mutual companies, that is, if that word has any legal significance, that they are operated for the exclusive benefit of the insured and the beneficiaries of such. The business of such companies has been managed by the officers and directors, much as the business of the savings-banks has been managed by similar officers, with little knowledge on the part of the insured as to how the funds were handled which became so vast, by reason of their tremendous aggregate, as to quiet any desire for information, if such ever existed. In other words, there was a condition established of absolute trust.

In March of the present year a committee of policy-holders of the Equitable Life Assur-

ance Society was appointed to take such action as might be considered best to bring about a mutualization of the company. These efforts finally became merged in the investigations that are still under way.

It is not the purpose of this article to review the evidence taken by the various committees, or reported by the State Examiner, except so far as it may be necessary to discuss the questions of recovery of moneys improperly disposed of, and the possible punishment of offending trustees for felonious breach of trust. Some of the facts brought out by the investigation, or known to exist, are as follows:

The presidents of these companies, receiving as annual salaries, some of them three times as much as is paid the president of the United States, have loaned to each other large sums of money belonging to their respective companies, at much less than the prevailing rates of interest; directors of these companies have engaged in syndicate operations in the purchase of stocks and bonds, in which their companies were interested — themselves taking profits that should have gone to the companies. One of the directors of one of the companies, not known to be a practising lawyer, whose duty it was to contribute all that was valuable in his equipment, without reward, makes a contract with his company by the terms of which he was to receive the snug income of $20,000 per year, and did actually receive such sum for many years. Of what the services of this eminent statesman consisted except "giving valuable advice on numerous occasions," has not yet appeared. If every director of a charitable, philanthropic or eleemosynary institution is to be permitted to withdraw from the funds of the society that he is supposed to serve gratuitously, large annual retainers, such institutions will have to be very wary about inviting members of the legal profession to serve on such boards. Happily, however, this is the first conspicuous example of such miserable graft.

To continue this interesting inventory of misdemeanors — large sums of money, in one case $100,000, were given by a director to some person in the employ of the company, without a voucher passing, and without the person who paid the money being able to explain where it went or for what purpose it was used; great sums were contributed by these companies to the campaign expense funds of political parties, and expensive establishments were maintained at State Capitols for the purpose of housing and entertaining legislators, while other large sums, hundreds of thousands of dollars, were paid for "legal expenses" in no way explained or satisfactorily accounted for, but which it may be fairly inferred were used to fill the greedy maws of the "black horsemen." Banking and trust corporations were formed by these great insurance companies, in which their own trustees were installed as officers at high salaries and with which the insurance companies maintained constant relations, which did not always inure to the benefit of the poor policy-holder whose money furnished the capital for these subsidiary institutions, but which did furnish channels through which the trustees could and did conduct profitable transactions for themselves. This system of "profitable opportunities" grew so slowly and so insidiously, that it came to be regarded as legitimate and respectable, and the men who had been brought up in it saw no possible harm in it, until they were conscious of an outraged public sentiment that has become universal and overwhelming.

It is not necessary to further enumerate the offenses against good morals and the fiduciary relations, as they are now matters of record and are known to all. But when the record is all in, what can be and what shall be done about it?

As to the civil end, there would seem to be little doubt that all these vast sums that were not used for the legitimate legal requirements of the companies, can be recovered from those who improvidently or improp-

erly expended them, and that all moneys received by directors of the companies in transactions where the company should have benefited, are recoverable, and doubtless will be recovered. It is an elementary principle that all persons who stand in a fiduciary relation to others must account for all the profits made upon money in their hands, by reason of such relation, and that agents, guardians, directors of corporations, officers of municipal corporations, and all other persons clothed with a fiduciary character, are subject to this rule. (Perry on Trusts, 3d Edition, Section 430). Our courts of law generally treat the directors as agents. Courts of equity, however, treat them as trustees and hold them to a strict account for any breach of the trust relation. For all practical purposes, they are trustees, when called upon in equity to account for their official conduct. Bosworth *v.* Allen, 158 N.Y., 155.

It was held by the late Presiding Justice Van Brunt, in the case of Beers *v.* The New York Life Insurance Company, reported in the 66th of Hun, that the company had no right to pay the retiring president a salary for the remainder of his life, at the rate of $37,500, in consideration of advice and counsel that he might render, and it will be not at all surprising if the vast sums paid to some of these presidents in excess of what any man could legitimately earn in any such position, are recoverable. There certainly must be some point at which appropriation of funds of a *quasi* philanthropic institution, in the form of salaries, amounts to sequestration, to use the least offensive term applicable. It is only a question of where the line of cleavage comes between fair and generous compensation, and fraudulent appropriation.

In addition to the civil liability that these directors will have to face, is there a penal liability that can be enforced? This is the question that is being asked at this particular time. That question must. of course, be determined by the penal statutes of this state. In order to constitute embezzlement, the accused must occupy a clearly defined fiduciary relation, and the property improperly disposed of must belong to his principal and come to the possession of the accused by reason of such employment; embezzlement has been defined as a criminal breach of trust, although the same authorities are careful to point out that every breach of trust is not embezzlement.

The penal statutes of this state, however, have included embezzlement in the provisions which relate to larceny, and Section 528 of the Penal Code, in defining larceny reads as follows:

"A person who, with the intent to deprive or defraud the true owner of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker, or any other person, either

"1. Takes from the possession of the true owner or of any other person; or obtains from such possession by color or aid of fraudulent or false representations or pretense . . . or appropriates to his own use *or that of any person* other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or writing of value of any kind, or

"2. Having in his possession, custody or control as a bailee, servant, attorney, agent, clerk, trustee or officer of any person, association or corporation, or as a public officer, or as a person authorized by agreement or by patent, either to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, writing of value of any nature, or thing in action or possession, appropriates the same to his own use or that of any other person other than the true owner or person entitled to the benefit thereof, *steals such property and is guilty of larceny.*"

Formerly there was much difficulty in bringing the crime of embezzlement within the inclusion of the larceny provision, but the present form of the statute quoted would seem to clearly accomplish that.

Mr. Justice Danforth said in the case of the People *v.* Dumar:

" . . . The Penal Code recognizes that the moral guilt of the two offenses was the same and swept away the theory by which the court had felt constrained to distinguish them in principle. . By it larceny is so treated (Chapter 4) as to include not only the offense as defined at common law and by 2 R. S., 679, 690, but also embezzlement, obtaining money by false pretenses, and felonious breach of trust."

The offenses committed by these life insurance directors, in just the form that they now appear, are to be dealt with for the first time in our courts, in applying these provisions of the Penal Code. It is difficult and, perhaps, unwise to undertake to define fraud, lest, as Howenden once observed, "by making the definition too exclusive and inclusive, opportunities for avoiding the consequences of fraudulent purposes and acts would be furnished by trimming and shading the fraudulent transaction so as to escape the consequences of their fraud." Lord Hardwicke has written to the same purpose and effect. Take, for instance, the transactions between the presidents of two of the companies under investigation, where a treaty of reciprocity was established, by the terms of which President Jones loaned President Smith and President Smith loaned President Jones (I don't like to mention their names) $200,000, or whatever the sum may have been, at one or one and one-half per cent interest, when the prevailing rate was two and one-half or three per cent, which last-mentioned rate was the one that the presidents were under obligations to their *cestui que* trusts to procure. Must it not follow that the fraudulent acts by which the beneficiaries of the company were cheated out of the difference between one and one-half per cent and the prevailing rate, had their *money withheld*, and that it was by a most devious process perverted to the use of persons making these loans?

The acts of "the high financier" must square with the penal provisions referred to, and it is difficult to see how any ingenuity of counsel can bring about any other result than punishment. The essence of the offense is fraud, and in the final analysis of these transactions, fraud must appear in the clearest outlines.

There is still another section of the Penal Code that may be applicable to some of the transactions of these insurance directors which have now become a matter of record. Section 168 of the Penal Code defines conspiracy as follows:

"If two or more persons conspire either:

"4. To cheat and defraud another out of property by any means which are in themselves criminal or which, if executed, would amount to a cheat, or to obtain money or any other property by false pretenses . . . each of them is guilty of a misdemeanor."

The situation furnishing the basis for the consideration of principles of common law rests upon the theory that the directors of a corporation are practically trustees, with the whole body of policy-holders as *cestui que* trusts.

These two provisions of the Penal Code, it would seem, must be laid down against the acts of the trustees of the life insurance companies now under investigation. If evidence to the same effect as the testimony already taken, shall be given before our Grand Jury, it is difficult to see how the offenders can escape the consequences of their acts. If it is found, however, that these provisions of the Penal Code are not applicable to the offenses under consideration, it will be high time then to recast some of our Penal Statutes. If it can be found that federal supervision of life insurance is within the functions applicable to interstate commercial relations, an important safeguard will be established.

NEW YORK, N.Y., November, 1905.

DISSENTING OPINIONS

By William A. Bowen

"IT would certainly be a subject of regret that the conclusions of the court have not been assented to by all of its members, if I did not know from its history and my own experience how rarely it has happened that the judges have been unanimous upon constitutional questions of moment, and if our decision in this case had not been made by as large a majority of them as has been usually had on constitutional questions of importance." — Mr. Justice Wayne, *in the Dred Scott Case.*

I

When, on the thirtieth day of January, 1905, the Beef Trust Case was decided by the Supreme Court of the United States without a dissenting voice, a chorus of praise and wonder greeted the auspicious event. This is significant: we are led to infer that little harmony obtains among the members of that court; and such is, indeed, the case.

At the October Term (1904), among some 203 reported decisions, the astonishing record discloses 100 dissents. Seventeen of these are in the form of more or less elaborate dissenting opinions. In 8 of the cases, *four* of the nine justices dissent in each; in 12 of them, three justices in each; in 7 of them, two justices in each; in 18 of them, one justice in each.

The preceding term (October, 1903) bears a similar distinction for discord. Ninety-four dissents appear in the 203 reported cases, of which sixteen were dissenting opinions. *Four* of the nine justices dissent in each of 5 cases; three in each of 9; two in each of 19; one in each of 9.

This is sufficiently amazing. It is the less so, however, when the history of the Dissenting Opinion in this country is considered, especially in the light of human prepossession for the past. Its career could not have begun earlier. In 1792, in the first case requiring deliberation which came before the new Supreme Court of the United States (Georgia *v.* Brailsford, 2 Dall. 402), every justice had and insisted upon his own views, and filed his separate opinion. At the first hearing, the court decided that an injunction should be granted to stay payment of a bond to its owner, a British subject, from whom the state of Georgia claimed to have confiscated it, until it should be determined to whom the bond belonged. But Justices Johnson and Cushing thought differently; each filed his dissenting opinion; and thus was Judicial Dissent started upon its career. A year later, when the matter came up again on a motion to dissolve the injunction, the Court thought it ought to be dissolved; not so, however, Justices Iredell and Blair. They had concurred before, but now they filed dissenting opinions, protesting vigorously against the dissolution of the injunction.

Evils, once grounded, persist rather by good nature than by ill. Abuses are more readily condoned than created. With that good-natured deference to the past which distinguishes the law above all other sciences, the precedent our early great ones made has been, in accordance with the principle we have just noticed, duly fortified and multiplied. When Taney came into his seat, he found the Dissenting Opinion already entrenched; "it has," he says in a great case, in 1838, having then occupied his place but a year — and there is a note of apology and excuse in the words which cannot fail to be observed — "it has, I find, been the uniform practice in this court, for the justices who differed from the court on constitutional questions, to express their dissent. In conformity to this usage, I proceed to state briefly the principle on which I differ."

What authority this usage now has and

whither the conformity thereto is now tending, we have seen from the record of the last two terms of the Supreme Court.

At the former of those terms, a celebrated case was decided, which exhibits so curiously and so frankly the evils of that practice, that an analysis thereof should be highly interesting, and most instructive.

As all the world knows, the respective owners of two great competing railroad systems turned over a controlling amount of the stock of each road to a third corporation, organized for the purpose, in exchange for shares of the stock of the latter; thus placing both systems under the single management of the directors of the third corporation, and giving to the stockholders of each road an interest in both. But the Sherman Act, passed for the "protection of trade and commerce against unlawful restraints and monopolies," invalidates every monopoly, and every contract, combination, trust, and conspiracy, in restraint of trade or commerce among the states, with foreign nations, and in all such territory as to which Congress may regulate commerce, and makes a violation of the act a criminal offense. The government accordingly brought suit to enforce this law against the corporations involved.

To the lay mind, no doubt this situation would seem extremely simple; but at least, whether simple or obscure, the lay mind may rightly expect, in a matter of such striking public interest, that the law, whatever it is, be declared so clearly, so surely, and so finally, that he who runs may read. Let us look at the spectacle which this case presents.

First and chief, the law of the land on the great issues there involved was settled by a *minority* of the Supreme Court. Of the five who decide the case for the court, only *four* agree on the controlling principles which are to guide and restrain the great enterprises of the future; the fifth enters a protest which for the vigor of its dissent has never been surpassed by any dissenting opinion. Besides this, two dissenting opinions are filed, in which the remaining four justices concur, and in which they declare their brethren quite mistaken at all points. The chief consideration in the case was whether the Sherman Act condemns not only those restraints on commerce which are unreasonable and injurious, but all restraints whatever. The minority hold that it applies to all restraints whatever, and this is now the law of the land. But with this vital decision, all the other judges wholly disagree.

This is not all. At all points the separate opinions filed reveal the same hopeless confusion. The court decides that the mere *existence* of a combination constitutes a restraint on commerce. Mr. Justice Holmes, dissenting (with whom agree Mr. Chief Justice Fuller, Mr. Justice White, and Mr. Justice Peckham on every point in the case), maintains, on the contrary, that the mere existence of a combination is in itself no restraint, but that something must be done in furtherance thereof.

The four judges for the court hold that any agreement preventing *competition* restrains commerce, that it need only be shown that it tends to restrain commerce, or competition, not that it really will result in a total suppression or a complete monopoly, and that to restrict free competition is to restrain free commerce. The four dissenting judges, however, contend that the act has nothing to do with fostering competition; that it does not contemplate competition at all; that otherwise any two persons forming a partnership for an export trade would be liable criminally under the act; that a mere indirect influence on commerce of such an agreement as the one in question does not justify such a law; that if the principle laid down by the court be logically pursued, it will result that *any* influence, even the *personal* influence of *one man*, due to his eminent capacity or experience, whereby, though he owned but one share of stock in each road, he might be

able to dictate policies and so restrain competition between them, will be unlawful, and that upon such a principle there is no phase of life in which Congress might not interfere.

The court holds that the agreement in question restrains "that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected"; that the trade which is to be protected against restraint is the trade of the *general public*, and that the combination of these two roads is a restraint of such trade and a monopoly within the meaning of the act. The four dissenting judges, however, contend that the act has no such meaning, but that contracts in restraint of trade are only those restraining the trade of *one of the contracting parties, not that of the general public;* that the contract here is, therefore, not a contract in restraint of trade, because the restraint is not on the trade of the parties to it, but on that of others; that the inhibition against restraint of trade "simply requires that a party's freedom in trade between the states shall not be cut down by contract with a stranger"; that the combination in question must be considered, if anything, a *monopoly*, but it would be unreasonable to condemn every combination which monopolizes; for if it is valid to grant exclusive powers to *one* railroad, a combination of *two* railroads obtaining thereby exactly the same powers as might be lawfully granted to the one, should be valid also; that the principle announced by the court, if developed, would condemn a charter granted to one company to operate two new and competing roads, bought by it; that it would be absurd to send Mr. Morgan to prison "for buying as many shares as he liked of the Great Northern and the Northern Pacific, even if he bought them both at the same time and got more than half the stock of each road"; and yet that result would follow from the decision of the court; that "the Act of Congress will not be construed to mean the universal disintegration of society into single men, each at war with the rest, or even the prevention of all further combinations for a common end"; and that if the decision of the court is correct, "then a partnership between two stage-drivers who had been competitors in driving across a state line, or two merchants once engaged in rival commerce among the states, whether made after or before the act, if now continued, is a crime."

The court holds that the question is one of commerce, and that Congress had power to regulate commerce in the way attempted by the act. Mr. Justice White, with whom the other dissenting judges agree, maintains that this is no question of commerce, but merely of the ownership of stock in a railroad.

The court holds that no action of a state, granting a charter authorizing a combination like the present, can be valid as against an act of Congress; the dissenting judges maintain that the state law must govern where the question is simply, as here, one of ownership of stock in a state corporation. The court decides that the power to regulate commerce includes the power to regulate the *ownership* of the *instruments* of commerce; the dissenting judges hold that it does not; they make a distinction between those *instruments* and the *ownership* of them, and contend that while Congress may regulate the former, the latter is a mere matter of private property, beyond the interference of Congress, and wholly within the purview of the states. The court holds that such power has in this case been validly exercised by Congress; but the dissenting judges maintain that even if Congress had such power, it has not been validly exercised by the act in question.

The decree in the case, affirmed by the Supreme Court, while it forbids the use of the stock of the holding company, authorizes the return of their stock to the original owners, and does not restrain them from exercising the control resulting from such ownership. The dissenting judges consider

this decree erroneous, even granting that any decree ought to issue, and they say of the arrangement condemned by the court that they "fail to perceive why it should be left to produce its full force and effect in the hands of the individuals by whom it was charged the conspiracy was entered into. . . ."

II

The truth is, Law is at best the least exact of all the sciences. It is but the Science of Opinion. It speaks with no inherent authority, as Mathematics does. We may with confidence assert, and the authority of the assertion defend against the world, that the whole is equal to the sum of its parts. This can no more be questioned in France than in England; but nothing so certain can be predicated of Law. In one of those countries, the presumption of innocence may lie at the foundation of criminal jurisprudence; but in the other, the presumption of guilt may have the same force of law. At best it is but temporary and adaptable; nothing is so mutable; nothing improves so much with age. The sole authority it has it derives *aliunde;* about it must be thrown all possible sanctions; and courts must be bolstered with a respect not always warranted by the men who compose them. Thus it is that the decisions of a bad judge are as good law, in his jurisdiction, as those of a good judge. The authority of courts is not dependent upon their wisdom, but is factitious and conventional merely; and the consequence is, that they who sit in the seats of judgment wield a vast but unstable power, which may, like fire, benefit or blight. Happily, in those countries where the people hold the law-making power, Law, if it be unjust, is easily changed; but if it be *uncertain*, the end is anarchy alone. It is not of so great importance, therefore, in such countries, that Law be *just*, as that it be *sure*. A bad but certain decision is not so dangerous to the permanence of courts as a good but vacillating one. The fundamental security of all peoples lies, not in the *justice*, but in the *certainty*, of their laws. The tyranny of all Inquisitions, all Star Chambers, all Councils of Blood, lies, not in the iniquity of their judgments, but in the irresponsible freedom of their wills, the absence of unquestionable principles binding their minds, and the consequent inability of every subject of their power, however willing, so to order his conduct as to escape. The first duty of judges is, therefore, to render more exact that science of which they are the chief professors; and in so far as they discourage its slow and painful progress to that end, they undermine the foundations of its authority and menace the security of the people.

If these simple and obvious principles are indeed of any validity, then the Dissenting Opinion is of all judicial mistakes the most injurious. Its effect on the public respect for courts is difficult to exaggerate. It is, happily, a habit of the public mind to regard the judiciary as the worthy and safe repository of all legal wisdom; but this respect must receive a sad shock when every court is divided against itself, and every cause reveals the amateurish uncertainty of the judicial mind. It is not to be dreamed that all men should be of one mind. But it is surely to be expected that the wranglings of our judges be at least decently veiled.

Obviously, if the Dissenting Opinion is injurious at all, it will be most unfortunately so in those cases which are of the greatest public moment. Yet it is the almost unbelievable fact, that it is the uniform justification of dissenting judges that the *importance* of the case warrants and demands their dissent. "I am unable," says Mr. Justice Brewer, in Perry *v.* Haines (1903), "to concur in the opinion and judgment in this case, and deem the matter of *sufficient importance to justify* an expression of my reasons therefor." Mr. Justice Harlan, on December 12, 1904, in Western U. Tel. Co. *v.* Pa. R. R. Co., explains his dissenting

opinion thus: "*In view of the importance* of these cases, I do not feel that any dissent from the opinion and judgment of the court should be expressed unless the grounds of such dissent be fully disclosed." And so recently as April 10, 1905, in Muhlker *v.* Harlem R. Co., 197 U. S. 544, Mr. Justice Holmes, dissenting, says: "I regret that I am unable to agree with the judgment of the court, and *as it seems to me to involve important principles I think it advisable* to express my disagreement and to give my reasons for it."

Therefore, it is that in the history-making cases, of which but a few punctuate a century, our courts have been most infirm, most vacillating, most confused. Let us look for a moment at that one in which the consequences of the Dissenting Opinion have been the most deplorable in the history of American jurisprudence.

In 1834, a negro slave was taken by his master, an army surgeon, from the state of Missouri, a slave state, to a military post at Rock Island, in Illinois, a free state, and was there held until 1836, when he was removed to Fort Snelling, another military post, located in that part of the Louisiana Purchase lying north of latitude 36 degrees 30 minutes north, and, under the Missouri Compromise, free soil. There he was held until 1838, when he was again removed, this time with his wife, a slave, whom he had married in 1836, at Fort Snelling, with his master's consent, together with their child, to the state of Missouri, where they ever since lived. He now claimed his freedom, on the ground that, having become free by reason of his enforced residence in a free territory and in a free state, his return to a slave state could not change his status as a free man.

To this contention, his then owner replied that the Circuit Court of the United States, in which suit was brought, had no jurisdiction of the matter, because Dred Scott was not a citizen of the state of Missouri, being a negro of African descent, whose ancestors were of pure African blood, brought into this country and sold as negro slaves.

The Circuit Court decided against this plea, and directed the case to proceed. On the trial, the Court instructed the jury that the law was with Scott's owner, and they found that Scott was still a slave. Thereupon, he took his case to the Supreme Court of the United States.

Men now promised themselves that the meaning of their Constitution, the powers of their government, the status of their slaves, were about to be peaceably but finally settled. Public excitement, the crucial character of the issue, and the peace of a torn country, demanded that now, if ever, the voice of law should be firm and calm. "It may with truth be affirmed," says Mr. Justice Daniel, in this case, "that since the establishment of the several communities now constituting the states of this Confederacy, there never have been submitted to any tribunal within its limits questions surpassing in importance those now claiming the consideration of this court."

Let us see how that court met its high responsibility.

The following analysis of the decision in this famous case is, we trust, sufficiently luminous:

FIRST.—WHETHER THE QUESTION OF JURISDICTION COULD BE CONSIDERED.

TANEY (for the court): Yes.

NELSON: Such consideration is not necessary, even though proper.

GRIER: As the decision is ultimately against Scott, it matters little whether it goes upon the merits or on a question of jurisdiction.

CAMPBELL: Unimportant. (He proceeds at once to the merits.)

CATRON: No. Scott had won on this point hence he has nothing to complain of, and the other side had waived its right to make the point, by pleading over on the merits.

MCLEAN: Same opinion as Justice Ca-

tron's. (Characterizes the Chief Justice's position as "rather sharp practice.")

CURTIS: Yes.

SECOND. — WHETHER THE FEDERAL COURTS HAD JURISDICTION; *i.e.*, WHETHER A DESCENDANT OF NEGRO SLAVES, HIMSELF FREE OR NOT, COULD BE A "CITIZEN."

TANEY: No; even though he were a free negro himself.

MCLEAN: Yes; if the question is open to discussion (which he denies).

CURTIS: Yes. The court had jurisdiction, so far as concerned the showing as to the ancestry of Scott; for he might still be a descendant of negro slaves, and yet, if himself a free negro, he was a citizen of Missouri; and if of Missouri, then of the United States.

THIRD. — WHETHER A CITIZEN OF A STATE IS THEREBY A CITIZEN OF THE UNITED STATES.

TANEY: It does not by any means follow, because he has all the rights and privileges of a citizen of a state, that he must be a citizen of the United States.

CURTIS: Every free person, born on the soil of a state, who is a citizen of that state by force of its constitution or laws, is also a citizen of the United States.

FOURTH. — THE COURT HAVING NO JURISDICTION, WHETHER IT OUGHT TO PROCEED TO THE MERITS.

TANEY: Yes.

CURTIS: On so grave a subject as this, I feel obliged to say, that in my opinion such an exertion of judicial power transcends the limits of the authority of the court. I do not hold any opinion of this court, or any court, binding, when expressed on a question not legitimately before it. . . . A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached.

MCLEAN: It is true this was said by the court, as also many other things which are of no authority. Nothing which has been said by them, which has not a direct bearing on the jurisdiction of the court, can be considered as authority. I shall certainly not regard it as such.

FIFTH. — WHETHER THE MISSOURI COMPROMISE WAS CONSTITUTIONAL.

TANEY: No. The power to make "needful rules and regulations respecting the territory" includes nothing but the Northwest Territory, and is anyway not a power to legislate or govern; and such a law moreover, would deprive the slave-owner from other states of his property on entering the territory, without due process of law.

CATRON: No. The above reasoning is erroneous. The Missouri Compromise Act is void because it attempts to repeal that part of the treaty of 1803 which guarantees to the inhabitants of the Louisiana Purchase protection of their liberty, property, and religion, and because it effectually excludes slave-owners from that territory.

MCLEAN: Yes. Under the constitutional power to make "needful rules and regulations respecting the territory," Congress has ample legislative power over the Louisiana Purchase; that even without it, "if there be a right to acquire territory, there necessarily must be an implied power to govern it"; that in prohibiting slavery, the Missouri Compromise Act neither forfeited property nor took it for public purposes.

CURTIS: Yes. To the same effect as McLean, and in addition that the act operated on *status*, and not on property rights at all.

SIXTH. — WHETHER SCOTT BECAME FREE AFTER HAVING LIVED IN FREE ILLINOIS.

TANEY: No. Because his status as a *slave* had already been acquired in Missouri.

NELSON: No. It is optional with Missouri whether to recognize the law of Illinois, and as a Missouri court had already decided this question against Scott, the Supreme Court was bound by its decision.

GRIER: Because the decision of the Missouri court had not been specially pleaded, it was improper to consider it at all.

McLEAN: Yes. The voluntary act of the master in removing the slave to Illinois precludes any complaint on the part of the former as to the Illinois law; the question is not one of Missouri law alone, and the decision of the Missouri court is neither final nor correct; and the status acquired in Illinois could not be divested by a return to Missouri which was not voluntary.

CURTIS: Yes. To the same effect as McLean, and in addition that the master's consent to his slave's marriage, in a free state, was an effectual emancipation, not to be questioned by any slave state.

SEVENTH. — THE STATUS OF THE SLAVE.

TANEY: At the date of the Constitution, the negro race had no rights which the white man was bound to respect; the negro was a mere chattel, an article of merchandise, and a subject of traffic; and he could not be considered otherwise, in law, until the Constitution should be changed.

McLEAN: A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence.

Two days after the inauguration of James Buchanan, this strange judicial spectacle was revealed to an awaiting world. Scarcely had his great successor taken his seat, before the voice of violent appeal spoke from Charleston harbor, and War was framing her severe and sure decree.

III

Of the many injurious aspects of the Dissenting Opinion, one of the most destructive is that by emphasizing the personal composition of courts it is subversive of their great anonymous authority. The more impersonal their character, the more willing is the respect they earn. It is well known that the courts of least dignity, as the justices' courts, are those in which the personality of the judge is the most striking feature. The litigant who addresses the highest court in our land, however, asks, not the opinion of Mr. Fuller, nor of Mr. Brewer, nor of Mr. Harlan, nor of any other man, but the judgment of the Supreme Court of the United States — which is a different entity from an aggregation of nine distinguished lawyers. In journalism, that which has given to the press its mighty weight in the counsels of the people, is its anonymous character. Each editorial carries, to the ear of the public, not the opinion of a man, but the vast and impressive sanction of Journalism. The verdict of a jury is not the sum of twelve men's opinions, but is a single, official, anonymous judgment, having the same factitious effectiveness which belongs to a court. That entity which is in the one case called a jury, and in the other a court, is in each a different thing from the sum of its members, and that which destroys its impersonality destroys the authority by which alone it lives.

Among the forms which Dissent has taken the most harmful is that which may he called the "Dissent of Warning." The office of this is to criticize the opinion of the court, and to warn an innocent public against the ills which will surely befall it if the court persists in its erroneous course. It seems strange that judges should indeed make such strictures on the judgments of their fellows; yet in the Northern Securities Case, in a concurring opinion more damaging than any dissent, Mr. Justice Brewer goes so far as to say: "I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts, and invite unnecessary litigation." And Mr. Justice Holmes, dissenting in the same case, says: "I am happy to know that only a minority of my brethren adopt an interpretation of the law which, in my opinion, would make eternal the *bellum omnium contra omnes*, and disintegrate society so far as it could into individual

atoms." Certainly these are serious charges to be laid by any one at the door of our highest court: and coming as they do from the body of that court itself, their effect upon the public may easily be conceived. "I earnestly hope," says Justice Wayne, dissenting in the Slaughter-house Cases, referring to the opinion of the court, "that the consequences to follow may prove less serious and far-reaching than the minority fear they will be."

But the most drastic treatment of this kind to which the court has ever had to submit at the hands of one of its members, is, perhaps, that furnished by Mr. Justice Harlan in Plessy *v.* Ferguson, 163 U. S. 556, in which the Jim Crow law of Louisiana came to be questioned. "It is to be regretted," he says, "that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. In my opinion, the judgment this day rendered will in time prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case. . . . The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution. . . . The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead anyone, *nor atone for the wrong this day done.*"

Moreover, the attitude of discussion which the Dissenting Opinion assumes, and the heat of argument which it sometimes evokes, create naturally a tendency to travel far out of the law and to extend the discussion to all manner of subjects, political, social, and economic, and cause the objecting judges to forget that it is not their province to make the law, nor even to direct its policy, but merely to interpret it. Thus, concerning the *political policy* regulating our relations with the Chinese, Mr. Justice Brewer had this to say, in April, 1904, in a dissenting opinion in United States *v.* Sing Tuck: "Finally, let me say, that the time has been when many young men from China came to our educational institutions to pursue their studies; when her commerce sought our shores, and her people came to build our railroads, and when China looked upon this country as her best friend. If all this be reversed, and the most populous nation on earth becomes the great antagonist of this republic, the careful student of history will recall the words of Scripture, 'they have sown the wind; they shall reap the whirlwind,' and for cause of such antagonism need look no further than the treatment accorded during the last twenty years by this country to the people of that nation."

A most remarkable instance of this tendency is to be found in the dissenting opinion of Mr. Justice Harlan in the Jim Crow Case, above referred to: "Sixty millions of whites," he says, "are in no danger from the presence here of eight millions of blacks. . . . What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?" "Such laws," says the distinguished jurist, "can have no other result than to render permanent peace impossible, and to keep alive the conflict of races, the continuance of which must do harm to all concerned. . . . It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor perhaps would he object, to separate coaches for his race, if his rights under the law were recognized. But

he does object, and he ought never to cease objecting, that citizens of the white and black races can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway." There are in the South able and honest men, lovers of their country, and in the North besides, who do consider the eight millions of blacks a grave and imminent danger, who favor their separation until they are prepared for social equality, and who will not subscribe to the learned judge's lecture; and it is, at least, palpable, that when the Dissenting Opinion assumes the role of moral instruction, it will awake worse dissensions than those the eminent jurist so eloquently prophesies.

If it is true that the effect of the Dissenting Opinion is to unsettle the law, then it is obvious that the more admirable the opinion the more unfortunate will be its result. Who can read the opinion of Judge Curtis in the Dred Scott Case — calm, judicial, answering the arguments of the court with respect, and pressing his own with a keen regard for his duty to be fair at that great crisis — without wondering where, between the two, did indeed lie the right of that unhappy quarrel? From such admirable dissents countless others grow, and thus the evil propagates itself. In that case of Dred Scott, Justice McLean founds his own dissent in part on a *dissenting* opinion in a previous case of Scott's in the Missouri courts; and Justice Curtis places his dissent in part on the same dissenting opinion. Moreover, Justice Curtis's dissent in that case has furnished authority for Justice Field's dissent in the Slaughter-house Cases. "The exposition," says he, "in the opinion of Mr. Justice Curtis, has been generally accepted by the profession of the country as the one containing the soundest views of constitutional law." And so late as May, 1904, the Supreme Court quotes this dissenting opinion of Justice Curtis, *as law*, upon the power of Congress over acquired territory (Dorr *v.* U. S.)

Unfortunately, the disproportion in numbers between the instruments and the subjects of judicial power is, and must be, very great. The prestige of the nine men who judge between the seventy-six millions must be upon the same huge scale as this disparity. At any moment, these nine may be called upon to speak again on those old questions of North and South, White and Black, Nation and State, which at this moment, no less than fifty years ago, are demanding sure and calm solution. That there should be no difference among them at such a time is neither to be hoped nor indeed desired. But that they shall, whatever their differences may be, speak with the unwavering and undoubting voice of Law, with one voice and no more, we may indeed both desire and expect. "If," says Justice McLean, on a great occasion, "the great and fundamental principles of our government are never to be settled, there can be no lasting prosperity. The Constitution will become a floating waif on the billows of popular excitement." Nor is the end of this matter, as we believe, far distant, in spite of the discouraging record recently maintained by the Supreme Court. Every great case in which a harmonious decision is rendered furnishes encouragement. As we have said, no dissenting voice disturbed the effectiveness of the Beef Trust decision; and less than two months later, the last appeal in the Northern Securities controversy received an equally harmonious settlement. In these important decisions we see indications that this pernicious practice commands no longer even the dubious favor it has for so many years enjoyed. At least one justice of the Supreme Court will assent to the strictures we have ventured to make. "I think it," says Mr. Justice Holmes, in the Northern Securities Case, "I think it useless and undesirable, as a rule, to express dissent." Surely this is well and wisely said.

Los Angeles, Cal., November, 1905.

LIMITATIONS UPON THE POWER OF ONE STATE TO EXCLUDE THE CORPORATIONS OF ANOTHER

HON. EUGENE F. WARE

THE Fourteenth Amendment to the Constitution of the United States was officially promulgated by the Secretary of State July 28, 1868. At that time the very celebrated case of Paul *v.* Virginia (8 Wall. 168) was pending. The case was decided (December, 1868) before the Fourteenth Amendment had been developed by discussion and long before the novel interpretation had been made of it giving us "a new Magna Charta," as some authors very justly phrase it. As matters then stood the Supreme Court decided that,

"Corporations are not citizens within the meaning of the first of these clauses (Section 2, Art. 4). They are creatures of local law, and have not even an absolute right of recognition in other states, but depend for that and for the enforcement of their contracts upon the assent of those states, *which may be given accordingly on such terms as they please.*" (Syllabus.)

Thus the court in the case of Paul *v.* Virginia went to the furthest extreme in recognizing the power of the states, and perhaps a brief citation from the opinion ought to be given to illustrate it. On page 181 is the following:

"Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

In deciding the case of Paul *v.* Virginia, the court made no limitations and took no notice of the case of Insurance Company *v.* French (18 Howard, 404, decided in 1855), where the following is found (407):

"A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state (13 Pet. 519). This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states, and by this court, *provided* they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

Therefore, in the foregoing, there were four limitations placed upon the power of a state to exclude foreign corporations:

"LIMITATION ONE. *The burden of admission must not be repugnant to the constitution of the United States.*"

As to this limitation, there can be no question of its propriety, and this is further exemplified by decisions hereinafter given:

"LIMITATION TWO. *The burden of admission must not be repugnant to the laws of the United States.*"

This limitation is not clear, and it needs considerable restriction; otherwise, taken in its full force, it would mean that Congress could enact such laws as it pleased, compelling one state to admit any corporation from any other states. Limitation Two may be correct, if taken into consideration with Limitation Eight, hereinafter given.

"LIMITATION THREE. *The burden must not be inconsistent with those rules of public law which secure the jurisdiction and author-*

ity of each state from encroachment by all others."

This limitation is not clear, and there never has been any decision which explains it, nor is it easy to imagine a state of facts to which the limitation might apply.

"LIMITATION FOUR. *The burden upon the foreign corporations must not violate the principles of natural justice which forbids condemnation without opportunity for defense.*"

The above limitation is difficult to understand. To illustrate: Would South Carolina have the right to enact a law saying that no Kansas corporation should be permitted to do business in the state of South Carolina? Or could Kansas pass a law that neither the Standard Oil Company nor any any other foreign company, refining petroleum, should be permitted to do business in Kansas? These questions have not yet been decided, but it would appear to violate the principles of natural justice, which forbids condemnation without opportunity for defense. In other words, can the state base its laws upon a whim or upon local prejudice, or must principles of natural justice govern? Suppose a black legislature to prevail in Mississippi, would a law be constitutional that provided that no foreign corporation composed of white stockholders should be admitted? Or suppose a state draws the line on religious or political boundaries? These questions have not yet been decided, and we will refer again to this question under the head of Limitation Ten.

In 1885 the United States Supreme Court decided the next case bearing upon this subject (Cooper *v.* Ferguson, 113 U. S. 727), from which is deduced:

"LIMITATION FIVE. *No burden may be placed upon foreign corporations which will prohibit or regulate commerce between the states.*"

This is a subdivision of Limitation One, and only requires for its understanding a definition of what class of corporations are engaged in interstate commerce, within the commerce clause of the constitution.

The next case in the order of time is Barron *v.* Burnside (121 U. S. 186), decided in 1887. From it is deduced:

"LIMITATION SIX. *The burden required of the foreign corporation must not be the sacrifice of a right or a privilege secured by the United States Constitution.*"

It would, therefore, appear that a state might in a general way and for the protection of its home insurance companies deny the right of any foreign insurance company to do business within its borders, but the decision assumes that if the state makes a requirement in the law that the insurance company shall surrender a constitutional right then the law is unconstitutional. This would considerably limit the powers of the state and might almost be equivalent to saying that a state cannot exclude a foreign corporation except for some proper and legitimate reason, and that it cannot act on such terms as it pleases, as was stated in Paul *v.* Virginia, and that the exercise of the power is not a matter which rests within the discretion of the state. In other words, if the state can keep a foreign corporation out without giving a reason, why did the foreign corporation have a right to come in if the reason was not deemed by the Federal Court a good one?

In 1888, the case of Pembina *v.* Penn was decided (125 U. S. 181). It contained three further propositions, first,

"LIMITATION SEVEN. *A state cannot refuse admission to corporations engaged in interstate commerce.*"

This was carrying Limitation Five further than it before had been carried. It (Limitation Five) prevented burdens which prohibited or regulated commerce between the states, but Limitation Seven denied to states the right to interfere with any interstate commerce corporation, although such corporation went into a state, regardless of state authority, and proceeded to do business there.

The case of Pembina *v.* Penn further announced:

"LIMITATION EIGHT. *A state cannot refuse admission to any corporation created by the United States.*"

Perhaps this limitation is based upon Limitation Two. There has always been some question as to whether or not Congress could incorporate any corporation except such as was engaged in interstate commerce. Of course, if Congress has no power to create any certain corporation, the attempt to do so would not create a corporation that any state was obliged to admit

The case of Pembina *v.* Penn further announced:

"LIMITATION NINE. *A state cannot refuse admission to a corporation in the employ of the United States.*"

This limitation would be illustrated in a case, for instance, in which a Chicago corporation went to Nebraska to build a government court-house, or a Missouri corporation contracted to carry the mail in Colorado. It is obviously proper that the United States should have a right to contract with any corporation to do any government work, and having so contracted the state should not prohibit the entrance of the foreign corporation.

In 1898 the case of Blake *v.* McClung was decided (172 U. S. 239), and in it the court announced:

"LIMITATION TEN. *Such power cannot be inserted with the effect of defeating or impairing rights secured to citizens of the several states by the Supreme law of the land.*"

In the discussion of this case the court says that the prohibition of the Fourteenth Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities. And the decision sets forth clearly that states do not derive the right from the Constitution of the United States to exclude foreign corporations, and that as the state does not thence derive its right the state is limited by the United States Constitution. Limitation Ten is in furtherance of Limitation One heretofore given, and, in this case of Blake *v.* McClung, the court reiterates the expression contained in the 18 Howard case heretofore cited (Limitation Four) that the burden must not violate "the principle of natural justice which forbids condemnation without opportunity for defense."

To the foregoing extent the doctrine of Paul *v.* Virginia has been diminished; and if the later expression of the United States Supreme Court, as regards Limitation Four, has any deliberate meaning it must be that no state can, without just cause or without good reason, exclude the corporations of another state. That is to say, if a foreign corporation is not engaged in some business that contravenes the public policy of the other state, such corporation would have a right under the comity of states to be admitted; otherwise not. As for illustration: In Kansas there is a prohibition law, and no corporation can be formed under the state law for the purpose of distilling whisky, but such a corporation can be incorporated in Kentucky. Obviously the state of Kansas could pass a law preventing the Kentucky corporation, or any distilling corporation, from doing business in Kansas. Therefore, the rule would seem to be that if a foreign corporation was organized for a purpose that contravened the policy of a state, the state would not be obliged to admit the foreign corporation, and courts would not lightly disregard the object or motives of the public policy. But if the objects and motives of the state were unreasonable and the purposes and objects of the corporation were unquestionably proper, the foreign corporation might move into the state, and, by complying or offering to comply with all proper requirements, might do business therein.

It is not certain that Limitation Four, although fortified by the decision of Blake *v.* McClung, goes so far or means so much. Perhaps it ought not to mean so much.

TOPEKA, KANSAS, November, 1905.

THE BOORN MURDER CASE

By Russell W. Taft

"So Justice, while she winks at crimes,
Stumbles on innocence sometimes."
— *Hudibras*.

IN September, 1819, the grand jury of Bennington County, Vermont, indicted Stephen and Jesse Boorn for the murder of Russell Colvin, alleged to have been committed on the tenth day of May, 1812. The Boorn household, consisting of Barney Boorn and his wife, their two sons, Stephen and Jesse, their daughter, Sally, wife of Colvin, and her two children, lived near the Battenkill River in Manchester, Vermont. Barney Boorn and his wife seem to have stood well in the community, but the reputation borne by their sons was that of reckless and turbulent spirits. Colvin, their son-in-law, was weak in intellect, at times mentally unbalanced, and would periodically absent himself from home, giving no account of himself on his return.

In the month of May, 1812, while his wife was on a brief visit in a neighboring town, Colvin suddenly disappeared. The Boorns reported him to have gone on one of his periodical trips. He did not return, and as time went on public curiosity gave rise to inquiry; suspicions of foul play, based on circumstances, trivial in themselves, but pregnant with meaning to a credulous rural community, agape for mysteries, speedily gained ground. Near the time of the disappearance one of the Boorn brothers had stated that Colvin was dead, the other that they "had put him where potatoes would not freeze"; the hat Colvin wore at the time of his disappearance was found, in a mouldy and dilapidated condition, near the Boorn place; Amos Boorn, an uncle of the brothers, thrice dreamed that Colvin came to his bedside and told him that he had been murdered and buried in a cellar hole about four feet square, over which a house had once stood, and used at the time of Colvin's disappearance as a place for burying potatoes; a barn on the Boorn place burned, giving rise to the suspicion that the body might have been concealed beneath it; and some bones were dug out by a dog from beneath a hollow stump, which, upon examination, were pronounced human.

This was the last straw. Suspicion became a certainty, and, as Stephen Boorn had recently removed to New York State, Jesse was arrested on complaint of Truman Hill, town Grand Juror, and examined before Joel Pratt, justice of the peace, on Tuesday, April 27, 1819. The examination lasted three days. A large knife, a pen-knife, and a button, the button and large knife being shown to have been Colvin's, were found in the old cellar hole and produced, and the bones found in the stump were pronounced by four physicians to be those of a human foot, together with some toe nails and perhaps a thumb nail. However, one of the physicians, on later examining a skeleton at his home, concluded that he had erred, and next day retracted his statement. His brethren were dissatisfied and caused a leg that had been amputated and buried to be exhumed and brought into court, when, upon comparison, it was apparent that the bones were not human.

At this, public sentiment against the accused abated, and in all likelihood Jesse would have been released had he not, urged thereto by his jailers, on Saturday night confessed that, during a quarrel that arose while they were hoeing in the "Glazier" lot, his brother Stephen struck Colvin with a club or stone: that Colvin's skull was fractured and that he, Jesse, believed Colvin to be dead, but could not tell what became of the body. Stephen was at once arrested at

Note. — Upon this remarkable case Wilkie Collins founded his well-known tale "The Dead Alive."

Denmark, Lewis County, New York, and on May 15 was brought to Manchester, where both brothers were promptly bound over to await the action of the grand jury.

Upon his arrest Stephen stoutly maintained his innocence, even when confronted by his brother, but after both had been indicted so many persons of character and influence told them that the case against them was hopeless, and urged them to confess, that Stephen made the following written confession:

"May the 10th, 1812, I, about 9 or 10 o'clock, went down to David Glazier's bridge and fished down below Uncle Nathaniel Boorn's, and then went up across their farms, where Russell and Lewis were, being the nighest way, and sat down and began to talk, and Russell told me how many dollars benefit he had been to father, and I told him he was a damned fool, and he was mad and jumped up, and we sat close together, and I told him to set down, you little tory, and there was a piece of beech limb about two feet long, and he catched it up and struck at my head as I sat down, and I jumped up and it struck me on one shoulder, and I catched it out of his hand and struck him a back-handed blow, I being on the north side of him, and there was a knot on it about one inch long. As I struck him I did think I hit him on the back, and he stooped down, and that knot was broken off sharp, and it hit him on the back of the neck, close in his hair, and it went in about a half of an inch on that great cord, and he fell down, and then I told the boy to go down and come up with his Uncle John, and he asked me, if I had killed Russell, and I told him no, but he must not tell that we struck one another. And I told him when he got away down Russell was gone away, and I went back and he was dead, and then I went and took him and put him in the corner of the fence by the cellar hole, and put briars over him and went home, and went down to the barn and got some boards, and when it was dark I went down and took a hoe and boards and dug a grave as well as I could, and took out of his pocket a little barlow knife, with about a half of a blade, and cut some bushes and put on his face and the boards, and put in the grave, and put him in four boards on the bottom and on the top, and t'other two on the sides, and then covered him up and went home crying along, but I wan't afraid as I know on. And when I lived at Wm. Boorn's I planted some potatoes, and when I dug them I went there, and something, I thought, had been there, and I took up his bones and put them in a basket, and took the boards and put on the potato hole, and when it was night took the basket and my hoe and went down and pulled a plank in the stable floor, and then dug a hole, and then covered him up, went in the house and told them I had done with the basket, and took back the shovel, and covered up my potatoes that evening, and then when I lived under the west mountain, Lewis came and told me that father's barn was burnt up the next day, or the next day but one, I came down and went to the barn, and there were a few bones, and when they were at dinner I told them I did not want my dinner, and went and took them, and there were only a few of the biggest of the bones, and throwed them in the river above Wyman's, and then want back, and it was done quick, too, and then was hungry by that time, and then went home, and the next Sunday I came down after money to pay the boot that I give between oxen, and went out there and scraped up them little things that were under the stump there, and told them I was going out fishing, and went, and there was a hole, and I dropped them in and kicked over the stuff, and that is the first anybody knew it, either friends or foes, even my wife. All these I acknowledge before the world.

STEPHEN BOORN."

The trial commenced on Tuesday, October 27, and closed the following Saturday

night. The court were Dudley Chase, Chief Judge, uncle to Salmon P. Chase, later Chief Justice of the United States Supreme Court, and Joel Doolittle and William Brayton, Assistant Judges. Owing to lack of space to accommodate the audience the trial was held in the Congregational Church. The evidence, aside from the written confession of Stephen and the testimony of Silas Merrill and Lewis Colvin, was mainly circumstantial. Stephen's written confession, having been excluded when offered by the state, was offered by the defense, and admitted. Lewis Colvin, son of Russell, whose testimony was in part corroborated by that of Thomas Johnson, testified that the last time he saw his father was during a quarrel with Stephen, in the course of which Stephen knocked his father down with a club. The witness, being frightened, then ran away to the house and was later threatened with being killed by Stephen if he said anything about striking. Silas Merrill, the principal witness before the grand jury was a fellow-prisoner, charged with forgery, and it appears that after giving his testimony before the grand jury Merrill's chains were taken off and he was permitted to go about the streets, whereas, previously he had been in chains and in close confinement. His testimony was as follows:

"Manchester, Aug. 27, 1819.

"In June last, Jesse's father came to the prison and spoke to Jesse. After the old man went away, Jesse appeared much afflicted. We went to bed and to sleep. Jesse waked up and shook me and wanted that I should wake up. He was frightened about something that had come into the the window and was on the bed behind him. He stated that he wanted to tell me something. We got up, and he went on to tell me. He said it was true that he was up in the lot together with Stephen and Russell Colvin and his son, picking up stones, as Mr. Johnson testified. That Stephen struck Colvin with a club and brought him to the ground. That Colvin's boy ran, that Colvin got up and Stephen gave him a second blow above his ear and broke his skull. That the blood gushed out; that his father came up and asked if he was dead. They told him no; he then went off. Soon after he came again and asked if he was dead. They told him no; he then went off. Soon after the old man came the third time and asked if he was dead; they told him no; the old man said, damn him. Then he (Jesse) took him by the legs, Stephen by the shoulders, and the old man round the body, and carried him to the old cellar, where the old man cut his throat with a small penknife of Stephen's. That they buried him in the cellar between daylight and dark; that he stood out one side and kept watch. That a jack-knife was found which he knew was Russell's that he had often borrowed it to cut fishpoles. Two or three days after Stephen had Colvin's shoes on. That he (Jesse) spoke to Stephen and told him that Sal. would know the shoes; that he saw no more of them. That the old man gave Stephen one hundred dollars, and Stephen promised twenty-five of it to him. After Jesse was put into another room, when we were permitted to see each other, Jesse told me that he had informed Stephen of his having told me the whole affair. Stephen then came into the room. I asked him if he did take the life of Colvin. He said he did not take the main life of Colvin. He said no more at that time. A week or ten days after, Stephen and I went up into the court-room together. Stephen then said he had agreed with Jesse to take the whole business upon himself, and had made a confession which would only make manslaughter of it. I told him what Jesse had confessed, and he said it was true. Jesse told me that in February, eighteen months or more after the body of Colvin was buried, there came a thaw. That he and Stephen took up the body, secured the bones and remains in a basket and pulled up a plank in a place where they kept sheep, and put

the bones under the floor. That the next spring the barn was burnt. That they took the bones and pounded them up and put them into a deep hole in the river. That the skull bone burnt so that it crumbled to pieces; that his father scratched up some pieces and put them into a hollow birch stump near the road."

The evidence in behalf of the respondents was confined mainly to an effort to weaken the effect of the confessions by showing the strong outside influence that was brought to bear on the brothers previous to, and at the time of their making, the confessions. The judge charged, in reference to the confessions, that no weight should be attached to a confession incited by hope or fear, leaving it for the jury to determine whether the confessions in the present instance were so influenced.

After an hour's deliberation a verdict of guilty of murder in the first degree was found against each brother. The result was eminently satisfactory to the spectators. Upon being asked if they had anything to say why sentence of death should not be pronounced against them, both brothers in the strongest terms protested their innocence. They were sentenced to be executed on the twenty-eighth day of January, 1820.

Petitions were at once made to the Vermont legislature, then in session, for a commutation of the sentences to imprisonment for life. The petition of Jesse was granted by a vote of 104 to 31, but that of Stephen was denied by a vote of 97 to 42. Jesse was quite elated at the news and Stephen correspondingly depressed. The latter gave up all hope, but a new idea occurred to him. He suggested to his counsel that an advertisement for Colvin be inserted in the papers. This was a desperate chance, for, even were Colvin alive, the limited circulation of the papers and the slowness of the mails would militate greatly against any news being received before the execution, then less than two months away. Nevertheless the following notice was published in the Rutland, Vermont, *Herald:*

"MURDER."

"Printers of newspapers throughout the United States are desired to publish that Stephen Boorn, of Manchester, in Vermont, is sentenced to be executed for the murder of Russell Colvin, who has been absent about seven years. Any person who can give information of said Colvin may save the life of the innocent by making immediate communication. Colvin is about five feet five inches high, light complexion, light colored hair, blue eyes, about forty years of age.

"Manchester, Vermont, Nov. 26, 1819."

The same issue contained an editorial, ridiculing the scheme and insisting that there was no possible doubt that Colvin had been murdered. The notice was copied into the New York *Evening Post* of the 29th and happened to be read aloud in one of the New York hotels. Fate decreed that two bystanders should hear it read, one of whom named Whelpley, a former resident of Manchester, related many anecdotes concerning Colvin and his peculiarities. The other, Mr. Tabor Chadwick, of Shrewsbury, N.J., pondering over the matter, concluded that Colvin was then in the employ of his brother-in-law, William Polhemus, of Dover, N.J., as a farm-hand. Mr. Chadwick, on his return home, wrote the following letter to the editor of the *Evening Post*, who printed it, and another to the post-master at Manchester. No notice was taken of the latter.

"SHREWSBURY, MONMOUTH, N.J.,
December 6.

"To the Editor of the New York *Evening Post:*

"Sir: — Having read in your paper of November 29th last of the conviction and sentence of Stephen and Jesse Boorn, of Manchester, Vt., charged with the murder of Russell Colvin, and from facts which have fallen within my own knowledge, and not knowing what facts may have been disclosed on the trial, and wishing to serve the cause of humanity, I would state as

follows, which may be relied on: Some years past (I think between five and ten) a stranger made his appearance in this county, and upon being inquired of, said his name was Russell Colvin — that he came from Manchester, Vt. He appeared to be in a state of mental derangement, but at times gave considerable account of himself, his connections, acquaintances, etc. He mentions the names of Clarissa, Rufus, etc. Among his relatives he has mentioned the Boorns above, Jesse, as Judge (I think), etc. He is a man of rather small stature, round forehead, speaks very fast, and has two scars on his head, and appears to be between thirty and forty years of age. There is no doubt but that he came from Vermont from the mention he has made of a number of places and persons there, and probably is the person supposed to have been murdered. He is now living here, but so completely insane as not to be able to give a satisfactory account of himself, but the connections of Russell Colvin might know by seeing him. If you think proper to give this a place in your columns, it may possibly lead to a discovery that may save the lives of innocent men. If so you will have the pleasure, as well as myself, of having served the cause of humanity. If you give this an insertion in your paper, pray be so good as to request the different papers in New York and Vermont to give it a place in theirs.

"I am, sir, with sentiments of regard,
"Yours, etc.,
TABOR CHADWICK."

Mr. Whelpley, however, took the matter up and visited Dover, where Mr. Polhemus took him to the field where his man was at work. Whelpley said nothing at first and Colvin, for it was he, merely looked at him sharply and turned to his work again. Then Whelpley called him by name. Colvin said that was not his name; that it had been but that he had changed it. Further conversation demonstrated that there could be no mistake in identity, but Colvin refused absolutely to return to Manchester. Stratagems were employed and he was gotten, upon one pretext or another, as far as Troy, being prevailed upon without further difficulty to proceed thence to Vermont.

County court was in session at Bennington on December 22, when someone entered the room and said that Colvin had come. Court broke up in confusion. Judges, officers, attorneys, litigants, and spectators alike, rushed out through the windows and doors to see the man whom all supposed to have been murdered. His recognition was immediate. Manchester was reached at sunset of the same day, and, a courier having gone on in advance, the entire population of the community were gathered at Captain Black's tavern. When the stage galloped up a scene of wildest excitement ensued. Cannon were fired, and Stephen was brought from his cell to fire the first shot, Jesse having been already taken to the State prison at Winsor, Vt., to begin his sentence.

Upon meeting Stephen and seeing the fetters upon his limbs Colvin asked, "What is that for?" Stephen replied, "Because they say I murdered you!" Colvin answered, "You never hurt me; Jesse struck me with a briar once but it did not hurt much." At the instance of the court Colvin was questioned most thoroughly to test his identity and his answers showed a knowledge of trivial affairs that no impostor could have acquired. For instance, being asked who built the tavern in which he was then sitting, he replied, "Captain Munson, and it is all of the best oak timber, too," which, upon inquiry, was found to be true.

The writer is not informed as to the fact, but avers upon his suspicion and belief that after Colvin's return a surprising number of people were found, who though they had sedulously refrained from letting it be known, yet believed all the time that the brothers were innocent.

Colvin's mental derangement was obviously greater than at the time of his disap-

pearance. He insisted that he owned the farm of his employer. With his wife he declined to have anything to do, merely remarking, "that is all over with," though of his children he appeared somewhat fond. After a short time Colvin expressed a wish to be taken back to New Jersey, which was accordingly done, on December 29, and he died there a few years subsequently.

A new trial was petitioned for in each case, upon the ground of newly-discovered evidence, and upon the petitions being granted a *nol pros* was immediately entered in each case. Thus ended one of the most remarkable trials in the annals of criminal jurisprudence.

It is worthy of note that no *corpus delicti* was proven. Another error upon the trial seems to have been the admission of the confessions. There can be no question of the innocence of the respondents. Stephen was the first one to suggest, when every other hope had failed, that Colvin be advertised for. The confessions, if, indeed, Jesse ever made such a one as was testified to by Merrill, were probably framed for the purpose of making the crime manslaughter or justifiable homicide. The following extracts from a letter of one of the examining magistrates may serve to shed some light on the matter:

"Much was said to Jesse, to get the facts from him; he was told that if he should confess the facts it would probably be the means of clearing him. Jesse at length confessed that Stephen told him that he (Stephen) gave Russell a blow and laid him aside where no one would find him. Upon this we sent for Stephen, who was brought here. Jesse now said that his former confession was not true; but nothing could now convince the people that Colvin was not murdered. During their commitment much exertion was made to get a confession from them. Stephen wrote a statement of what he said were facts, in which he acknowledged he killed Colvin, deposited him in the place where the knife and button were found, and that he took the bones from that place and put them under his father's barn, which was soon after burnt, and the body principally consumed. It appeared in evidence that several had promised to sign for their pardon if they would confess, at the same time telling them that there was no doubt they would be convicted upon the testimony that was then against them. A person in jail with them for perjury testified to a full confession of the murder made to him by Stephen and Jesse; and it was so artfully framed, so corroborated by other facts, that it had great weight with the court and jury, though it appears now to have been wholly false. But he has his end answered; he has got bail by the means, and gone off."

BURLINGTON, VT., November, 1905.

LIFE SALVAGE

By Frederic Cunningham

THE law of salvage is one of the most wise and humane branches of the maritime law, and it is also remarkably consistent and uniform in all of the countries where the maritime jurisdiction is exercised. It is peculiar to the maritime law. Nothing can be recovered for saving life or property on land. There is one strange anomaly in it, however, not perhaps generally recognized, to which it may be well to call attention.

If ship A finds ship B in a sinking condition and takes off her passengers and crew and brings them safely to port, she is entitled to no salvage compensation either from the owners of the sinking ship B or from the persons saved. That is to say, no salvage is allowed for saving life alone.[1] Again, if ship A finds ship B derelict with no one on board and brings her in safely, she *is* entitled to salvage. In other words, the owner of ship B must pay a certain amount or proportion of the value of the ship saved as salvage of his property.

But if ship A finds ship B in a sinking condition with passengers or crew aboard, and by patching her up succeeds in bringing in both the ship and her company, neither the passengers nor crew are liable to pay any salvage, but the owner of ship B must pay a greater amount of salvage than he would for the mere saving of his vessel, as a reward to the salvor for saving the lives of the crew or passengers.[2]

The courts do not say, if you save B we will give you A's property to pay for it, but they *do* say, if you save B on A's ship and the ship at the same time, we will give you more of A's property as salvage than we would have if you had not saved B, and that too without regard to whether the saving of B was in any way a benefit to A.

For instance, a steamship was on fire at a burning dock in New York; a number of tugs went to her assistance, her crew had been obliged to jump overboard and were struggling in the water, some of the tugs picked up the struggling men and then proceeded to tow the steamer away from the burning dock and put out the fire with their pumps and hose, and the court in awarding salvage against the steamship gave a larger amount against the steamship because the tugs had saved the lives of the men in the water, though it does not appear how this in any way benefited the owners of the steamship. On the contrary, it delayed the tugs from going promptly to the aid of the steamship. If the tugs had simply picked up the men and taken no part in towing the steamship away from the dock, it seems clear on the authorities, that the tugs could have recovered no salvage from the steamship.[1]

Now, it is highly desirable that every inducement and encouragement should be given for the saving of life in peril at sea and on the water, but it does *not* seem right that A should be called upon to pay for the saving of B's life unless it is of some benefit to A, particularly when we consider that B himself is *not* liable for anything to one who has saved his life. There really seems to be no sense in the rule.

The difficulty in giving salvage for life alone seems to be that the courts have hesitated to reward a man for doing what they consider his moral duty, the saving of life, and that a remedy for salvage against seamen, and many of those who go down to

[1] *The Emblem*, Daveis, 61. *The Mulhouse*, 17 Fed. Cas. 962. *The Plymouth Rock*, 9 Fed. Rep. 413–418. *The George W. Clyde*, 80 Fed. Rep. 157.

[2] See cases above cited.

[1] *The Bremen*, 111 Fed. Rep. 228, 236. *The Kaiser Wilhelm der Grosse*, 106 Fed. Rep. 963, 968.

the sea in ships, would be practically of no value on account of their poverty, and the further difficulty of determining the relative value of different lives for the purpose of ascertaining the salvage; for it would be manifestly unjust to award the same amount of life salvage against the poor mechanic and the multimillionaire. These difficulties, however, are more apparent than real. What we want to do is to encourage the saving of life at sea and a reward is a well-known means of stimulating to moral duty when human nature is halting and recreant. Lack of wherewithal to satisfy a judgment is a thing we meet with in all branches of the law, and is no reason for withholding a remedy altogether, even against those who have the means to pay. The difficulty of estimating the values of different lives is a thing constantly met with in actions by personal representatives for the death of the deceased by wrongful act, which are now, since Lord Campbell's Act in England, provided for by nearly all of the states of the Union. There would be no greater diffifulty in ascertaining the proper amount in actions for life salvage than in actions for death by wrongful act.

On the whole, it would seem that the objections to life salvage are rather sentimental than founded on common sense, and that the matter should be dealt with by statute of the United States, allowing a salvor to recover against one whose life he has saved on navigable waters. It has been dealt with by statute in England ever since the Merchant Shipping Act of 1854, but there no life salvage is allowed unless property is saved, and the old injustice of making the owner of property pay for the life salvage of another is perpetuated by the statute. Moreover, the life salvage is given priority over claims for the salvage of the property itself, so that the whole of the property saved may be applied to the payment of life salvage from which the shipowner gets no benefit at all. If, however, the ship or property be wholly lost or its value is insufficient to pay the life salvage, the Board of Trade may in its discretion pay the life salvage or the balance remaining unpaid by the shipowner out of what is called the Mercantile Marine Fund.[1]

In regard to this subject of life salvage, the Maritime Law Committee of the International Law Association, consisting of the Hon. Mr. Justice Phillimore, Mr. W. Arnold, Mr. Carver, K.C., Mr. Marsden, Mr. F. R. Miller, Mr. Douglas Owen, and Dr. Stubbs, in replying to the questionnaire of the International Maritime Committee for the Paris Conference in October, 1900, say, "We do not see the logical reason why property salved should pay for the salvage of life, but public policy and humanity seem to require this. We are not prepared to depart from the principle of law so far as to recommend that a person whose life is saved ought to be compelled to pay life salvage."

It would seem that public policy and humanity require that the salvage of life should be compensated, whether any property is saved or not. (The English statute itself supports this view by providing for its payment out of the Mercantile Marine Fund.) That the life salvage should be paid by the person whose life is saved, if he is able to pay it, and if not out of a public fund provided for the purpose and *not* by a private individual like the shipowner, who, in many cases, is in no way benefited.

In England there seems to be a fund applicable to this purpose. In this country, what better application of Mr. Carnegie's Peace Hero Fund could be made? There would be no liability to deception, because the money would be paid only after examination of the case and judgment by a competent court. If the trustees could be convinced of the advantage of this, it would be a great public benefaction.

A draft treaty for the purpose of making

[1] See *The Renpor*, L. R. 8 P. D. 115. *The Annie*, L. R. 12 P. D. 50. *The Pacific*, L. R. (1898) P. 170.

uniform in all the principal maritime powers the principal questions arising in salvage cases has been drawn up by a committee of the International Maritime Committee, of which Lord Alverstone was a member, and was under consideration at Brussels at a Conference to which representatives of the different powers were invited last winter.[1] The question of life salvage, however, is not dealt with in this treaty, excepting that it is provided that nothing therein shall be considered as preventing any of the contracting powers from allowing salvage against ship or cargo for salvage of life.

[1] A very amusing and interesting discussion of this question by committees belonging to the different nations represented in the International Maritime Committee may be found in the report of the Paris Conference of the International Maritime Committee, in 1900.

BOSTON, MASS., November, 1905.

PRECEDENTS

BY DONALD RICHBERG

O Precedent! where is that charm
That sages have seen in thy face?
When "contra" you greatly alarm,
And befriending me, bring me disgrace.

I wade through citations galore,
Dissect and distinguish the same,
Pile volumes around me a score
And prove my opponent quite lame.

My precedents now seem most sound,
But I find, 'mid defeat and vain fury,
There never was yet to be found
Precedent for a judge or a jury.

CHICAGO, ILL., November, 1905.

BRIBING A CHANCELLOR

By M. S. Gilpatrick

THE English House of Lords in May, 1726, presented an impressive spectacle. The peers in their robes of office were sitting as a court, the matter before them was an impeachment, the accused was the highest law officer in the realm, the "Keeper of the King's Conscience," Lord Chancellor Macclesfield, the charge against him was bribery, and the prosecutors were the people of England through the managers appointed by the House of Commons. Against these managers appeared three learned counsel and *mirabile dictu* the Chancellor himself, who acted as his own advocate, not only by suggestions to his counsel, but by personal cross-examination of witnesses, arguing points of law, and by making the closing address in his own behalf. The public interest in the trial was so great that, during the thirteen days it lasted, although the court sat from 10 A.M. till 9 P.M., great crowds assembled in Palace Yard to learn what was said and done within the House. The cause of the trial was in part a system of the Court of Chancery, and in part the fact that at length there came a chancellor who was a great lawyer, eminent both in law and equity, but who was also a politician who "worked for his own pocket all the time," and who developed the system which had for years been known and accepted as a necessary evil, into a business method, whereby in the eight years he held office, he acquired a fortune so large that, after paying a fine of thirty thousand pounds and the heavy costs of his trial, he was able to live in affluence.

Let us first consider the system whence the trouble originated. In the early part of the eighteenth century, there were in England no trust or safe-deposit companies and no banks of any standing except the Bank of England. There were no depositories of court funds and when property was brought into Chancery, and it was the fact that most of the estates in England came at least once into Chancery every thirty years, this property was given in charge of the Master, to whom the proceedings were referred during the years that elapsed between filling the bill and final decree. Such property was in the absolute control of the master. If he paid on demand such sums as the Court ordered during the long progress of the litigation, no one except the chancellor could call him to account. As the funds in Chancery amounted to a vast sum — at the time of the Macclesfield trial it was claimed they were four million pounds — it may be seen that the possession of such an amount of capital, which could be used in private business or speculation, made the office of Master in Chancery very desirable. So desirable was it that when a master gave up his office he sold it as a man now sells a "seat" in the stock exchange. But, as admission to the exchange depends on a committee, so the incumbency of a mastership by transfer or original appointment was vested in the chancellor. To secure an appointment or to validate a transfer, every sort of influence was brought to bear, and it was well known that this sometimes took the form of gifts of money. In the hands of Lord Macclesfield this patronage became a business wherein he generally employed an agent, one Peter Cottingham, although he sometimes dealt directly with the applicants. Those who succeeded in getting the office for which they had paid, proceeded to recoup themselves by using the trust funds for their own profit, and when the South Sea Bubble produced its excitement, the Masters in Chancery were among the most daring speculators. When the bubble burst it was widely rumored

that great sums had been lost by the Chancery officials, and later it was asserted that the Chancellor himself had caused or connived at the defalcations. That he was avaricious was well known, for when he was appointed to his office it was known that, in addition to the two thousand pounds usually granted to a new chancellor to provide him with a residence and other matters suitable to his station and salary of four thousand pounds a year, Macclesfield demanded and received from the king twelve thousand pounds in cash.

When the storm burst the Chancellor, in an effort to save himself, on December 17, 1724, issued a stringent order commanding all Masters in Chancery "to procure and send to the Bank of England a chest with one lock and hasps for two padlocks."

Within the chest each master was to place all moneys and securities belonging to suitors, and the chests were to be locked, the master keeping the middle key, one of the clerks in Chancery the key of one padlock, and an officer of the bank the key of the other. This was a most ridiculous mode of "locking the stable door after the horse was stolen." Depositing chests in the bank would not restore the funds that had been dissipated, and the inconvenience of the plan at once became apparent. The vault wherein the chests were kept could not be opened unless two of the directors of the bank were present, so that to get a single pound a meeting of five officials was requisite. It is not strange that in a few months a new order was issued requiring the masters to deposit the trust funds in the bank itself. The storm increased, and the Chancellor who, as has been stated, was an adept in the subtlest arts of political management, and who therein had placed the king under obligation to him, began to prepare his defensive works. It was reported that the losses would be made good out of the public funds. The Chancellor resigned his office and the Great Seal was put into commission, three leading lawyers being made commissioners to whom the king made an address, which it was hoped would spread oil on the angry waters. But the matter could not be hushed up. A petition was presented to the House of Commons by two noblemen of high rank, who were guardians of a lunatic duchess, stating that large sums entrusted to a master had been embezzled, and praying for action in the matter. Debate was postponed, and the king sent another soothing message to the Commons. It was unavailing, and Lord Macclesfield was impeached "of high crimes and misdemeanors." The force of political influence is shown by the fact that on the question of impeachment, one hundred and sixty-four out of four hundred and thirty-seven votes were cast in the negative.

Upon the trial the Chancellor was accused of demanding and receiving large sums of money for the appointment of Chancery officers and conniving at the practise of these officers repaying themselves from the trust moneys in their control, and with advising certain defaulters how to conceal their fraud. To this tremendous charge the Chancellor made no denial of fact. He relied upon law and usage — his formal answer to the articles of impeachment avowed that "he did not sell offices, but only received presents from the persons on whom the offices were conferred." But upon the trial the managers proved the contrary. They declared that 'there probably may be a difference between a present and a price, if there is, it is the latter his lordship is charged with taking, a price fixed by him, insisted on, haggled for, and unwillingly paid by the purchaser. Unfortunately the price was greater than could possibly be given by one who was to be contented with the fair profits of the office, as was well known to the recipient, who, to make amends to the purchasers, connived at their paying that extravagant price from the money of the suitors with which they were entrusted."

Let us read a little of the evidence. Thomas Bennet, who frankly stated that he had an income of two hundred and fifty pounds a year, or thereabouts, made a deal with a master for the purchase of his mastership. He also testified that he would not have bought the place had it not been for the cash of the suitors. He applied to the Chancellor's patronage agent, Cottingham, and then — let him tell his own story.

"I desired that he would acquaint my Lord Chancellor that I had agreed with Mr. Horrocks to succeed him in office; and desired him to let me know my Lord Chancellor's thoughts, whether he approved of me succeeding Mr. Horrocks. Soon after that, I believe the next day, or the day after, he met me, and told me he had acquainted my lord with the message I sent. He said, 'My lord expressed himself with a great deal of respect for my father, Mr. Serjeant Bennet, and that he was glad of this opportunity to do me a favor and kindness, and that he had no objection in the world to me.' That was the answer Mr. Cottingham returned. He then mentioned that there was a present expected, and he did not doubt but I knew that. I answered, I had heard there was, and I was willing to do what was usual. I desired to know what would be expected. He said he would name no sum; and he had less reason to name a sum to me, because I had a brother a master, and I was well acquainted with Mr. Godfrey, who had recommended me, and I might apply to them, and they would tell me what was proper for me to offer. I told him I would consult them. Accordingly, I did; and I returned to Mr. Cottingham, and told him I had talked to them about it; and their opinion was a thousand pounds (I believe I said I would not stand for guineas) was sufficient for me to offer. Upon this, Mr. Cottingham shook his head, and said, 'That won't do, Mr. Bennet, you must be better advised.' 'Why,' said I, 'won't that do? It is a noble present.' Says he, 'A great deal more has been given.' Says I, 'I am sure my brother did not give so much, nor Mr. Godfrey; and those persons you advised me to consult with told me it was sufficient; and I desire you to acquaint my lord with the proposal.' Says he, 'I don't care to go with that proposal; you may find somebody else to go.' Says I, 'I don't know whom to apply to.' Says he further, 'Sure, Mr. Bennet, you won't go to lower the price' (these were his very words; at least I am sure that was the meaning of them), 'I can assure you Mr. Kynaston gave fifteen hundred guineas.' I said that was three or four years ago, and since that time there have been several occasions of lowering the prices, the fall of stock hath lowered the value of money; and therefore thought, at this time of day, when stock and everything had fallen, one thousand guineas was more now than fifteen hundred pounds when Mr. Kynaston gave it. He still insisted that he did not care to go with that message. Says I, 'Only acquaint my lord with it, and if he insist upon more I will consider of it.' Says he, 'There is no haggling with my lord; if you refuse it, I don't know the consequence; he may resent it so far as not to admit you at all, and you may lose the office.' Then I began to consider, and was loath to lose the office, and told him I would give fifteen hundred pounds. He said Mr. Kynaston had given guineas. Then I asked whether it must be in gold. He said, 'In what you will, so it be guineas.' In a day or two after, he came and told me that my lord was pleased to accept of me; and he should admit me as soon as opportunity served, and he would give me notice. Accordingly, on the first of June he sent and desired me to come immediately, and to come alone, and to bring nobody with me, for my lord would swear me in that morning. Accordingly I went; and the first question Mr. Cottingham asked was, 'If I had brought the money?' I told him, 'To be sure, I should not come without it.' He asked me what it was in. I told him in bank-bills,

one of one thousand pounds and the other five hundred and seventy-five pounds. He took them up and carried them to my lord. He returned back, and told me my lord was ready to admit me. I was taken upstairs, and sworn in his bed chamber."

Another witness was one Elde, who being a member of the House of Commons, felt authorized to apply to the Chancellor in person; he testified that:

"The Chancellor said he had no manner of objection to me; he had known me a considerable time, and he believed I should make a good officer. He desired me to consider of it, and come to him again; and I did so. I went back from his lordship, and came again in a day or two, and told him I had considered of it; and desired to know if his lordship would admit me, and I would make him a present of four thousand pounds or five thousand pounds; I cannot say which of the two I said, but I believe it was five thousand pounds. My lord said, thee and I, or you and I (my lord was pleased to treat me as a friend) must not make bargains. He said if I was desirous of having the office, he would treat with me in a different manner than he would with any man living. I made no further application at all, but spoke to Mr. Cottingham, meeting him in Westminster Hall, and told him I had been at my lord's, and my lord was pleased to speak very kindly to me; and I had proposed to give him five thousand pounds. Mr. Cottingham answered guineas are handsomer. I immediately went to my lord's; I was willing to get into the office as soon as I could; I did carry with me five thousand guineas in gold and bank-notes. I had the money in my chambers, but could not tell how to carry it — it was a great burden and weight; but recollecting I had a basket in my chamber, I put the guineas into the basket, and the notes with them; I went in a chair, and took the basket with me in my chair. When I came to my lord's house, I saw Mr. Cottingham there; and I gave him the basket, and desired him to carry it up to my lord. I saw him go up stairs with the basket; and when he came down, he intimated to me that he had delivered it. [Cottingham subsequently testified that he carried it up to Lord Macclesfield, and left it covered up in his study, without saying a word.] When I was admitted, my lord invited me to dinner, and some of my friends with me; and he was pleased to treat me and some members of the House of Commons in a very handsome manner. I was, after dinner, sworn in before them. Some months afterwards, I spoke to my lord's gentleman, and desired him, if he saw such a basket, that he would give it me back; and some time after he did so.

"Question. Was there any money in it?

"Answer. No, there was not."

Still another witness, who had agreed with Cottingham to buy a mastership for five thousand guineas and had a promise from the Chancellor that he "should be admitted in a few days," learned with dismay that the Chancellor was dickering with another applicant, whereupon, being a man of energy, he made a morning call on his lordship's wife, stating that, "I was the person that my lord had promised the office to and I desired her to intercede with my lord that I might speedily be sworn in." The lady declared that she "never meddled in any affair of a public nature," whereupon the resourceful suitor stated that "he did not desire or expect to come in without the present that is always esteemed the perquisite of the Great Seal," and departed, leaving in an envelope addressed to her, bank notes to the amount of five thousand two hundred and fifty pounds. This gentleman apparently made a bad bargain; his predecessor in office had thoroughly exhausted the fund, a fact which, as he testified, "could not have been unknown to the Lord Chancellor," for which reason, perhaps, Master Thurston was lucky enough to recover part of his bribe, for when the clouds of wrath were gathering Lady Maccles-

field returned to him three thousand two hundred and fifty pounds, calmly stating that "it was too large a present."

At the trial, as has been stated, the Chancellor acted as his own senior counsel and his manner to the prosecutors was so insolent and overbearing that they appealed to the Court for protection, stating that "the managers cannot but observe the indecent behavior of this lord and his unworthy manner of treating us. We do not think the lord at the bar should be directing the managers as if he sat in his place as judge. We are here advocates of all the Commons of Great Britain to demand justice against him." The defense, which may be summarized from the arguments made by the Chancellor and his counsel, is a most memorable plea for the "spoils system." It was argued that the Commons had "in this instance mistaken their course and instead of proceeding legislatively to remedy a defective state of the law and asking your lordships to concur with them in prospectively amending a system which is supposed to lead to abuse, they have been misled by public clamor to appeal to this House as a court of justice, and to call for punishment where there has been no offense. . . . Assuming that the moderate sums paid to the Chancellor by the persons whom he appointed to office were the purchase price thereof, there was no offense unless the sale of an office was prohibited by common law or statute. He that has an office in his gift, if he takes care that the duties of it are faithfully performed, may dispose of it as he may anything else that is valuable, on such terms as may be agreed on between him and the person to whom it is bestowed. The payment of money for it is no act of injustice to the person appointed, for he had no right to the office, and his advancement is owing to the favor of him who has the power of nomination. If the office be valuable, so is the power of appointment, which may be considered part of the estate of the person to whom it belongs. Of whatever nature the office may be, it does not follow that its duties will be inadequately performed because a consideration has been paid for it."

Counsel then cited at great length authorities from the time of the Roman Empire to show that the sale of offices had been permitted and that there was a distinction "between the sale of justice and the sale of judicial offices." There was, it was true, a statute forbidding the sale of offices, but it did not directly apply to the sale of Masterships, and being a penal statute, it must be strictly construed, and counsel boldly challenged some of the "ermined sages who sit upon the woolsacks in your lordships' house to advise you whether the sale of offices be a misdemeanor by the common law of England." Counsel asserted that they "disdained to rely on technical points, for neither morally nor legally has the noble lord committed any offense. The best proof that the practice is neither against common nor statute law is that it has been invariably and notoriously practised by his predecessors, which we do not urge to palliate violation of duty but to show that no duty had been violated, that many fine and upright judges had without any public censure or any self-reproach received gratuities on dispensing of these offices and with as little hesitation and as little secrecy as they have received their fixed fees or their salary."

The peroration of defendant's counsel is most impressive. "There, my lords, remember how the noble earl has employed the wealth he has acquired, and consider whether so to employ it he would acquire it in the commission of a crime. It was a cruel application by one of the managers, of a well-known maxim 'that a man may be profuse of his own while he greedily grasps the property of others.' How has the noble lord been profuse? in relieving the needy and oppressed, in patronizing obscure merit wherever he could find it, in liberally contributing to benevolent objects.

Hard indeed is the condition of the earl when his most commendable actions are turned to his disgrace. He who has a hand open as day for melting charity you are required to believe must necessarily be guilty of corruption or extortion. Such is the reasoning of his accusers, but he has your lordships for his judges."

More than a century after this trial a similar exordium was made in behalf of certain political judges who were impeached in the state of New York. The result was the same in both instances — conviction. On May 25, 1725, the House of Lords assembled, ninty-three peers being present, and Chancellor Macclesfield was called in to hear the verdict. Lord Chief Justice King put the question to each peer, beginning with the junior, "Is Thomas, Earl of Macclesfield, guilty of high crimes and misdemeanors charged upon him by the House of Commons, or not guilty?" The unanimous answer was "Guilty upon my honor." Political influence was at once most actively set at work to procure a light sentence, but the voice of the people was not to be denied. The Ex-chancellor was fined thirty thousand pounds, ordered to be imprisoned until the fine was paid, and the King, with a sigh, ordered his name to be erased from the list of Privy Councillors. His emoluments had been so great that he was able to pay his fine within six weeks, and after his discharge to retire to a country seat wherein he spent the remainder of his life. But he felt that it was a ruined life. The energy and ability which had raised him from a clerkship in the office of his father, an obcure country attorney, to the offices of barrister, sergeant, Lord Chief Justice and Lord Chancellor, now failed, and as a politician he was useless because he had been "found out." The King, it is said, promised to pay the fine "out of the privy purse as fast as he could spare the money." He did pay one thousand pounds and sent word that two thousand pounds more was obtainable whenever Macclesfield chose to apply for it. Strange to say he did not go at once, and the death of George I ended the matter. The Ex-chancellor sent his son to Sir Robert Walpole, but received word that "his late Majesty and his minister had a running account which had not been settled, and as there was no saying on which side the balance was, it would be too great a risk to pay the balance at present." There was no present or future for that balance, but Macclesfield did not need it, and died at his country house, in April, 1732, a broken-hearted man, and a distinguished victim of the spoils system.

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Communications in regard to the contents of the Magazine should be addressed to the Editor, S. R. WRIGHTINGTON, 31 State Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

AT the end of its first year under its present editorship, THE GREEN BAG will be found to have continued the development begun a few years ago for the purpose of broadening its scope and influence. We trust that the numerous variations in the arrangement and material in our pages have proved our intention to spare no pains to improve the magazine, and that the result has been to produce something which shall be not only of interest but indispensable to a careful practitioner. As a result of these experiments, we are ready now to outline a definite policy for the future. While it is our purpose to adopt all new developments in legal periodical literature most likely to improve our pages, in general in the future the magazine will appear in its present form. Our leading articles will cover a wide range of topics including not only the discussion of purely technical problems of law, the broader questions of jurisprudence, and the more pressing ones of reforms in the judicial system, but also a due proportion of the so-called lighter articles, including biographical sketches of eminent lawyers and jurists, articles suggested by important recent books of interest to the profession, accounts of trials of national interest, and essays upon that borderland between law and literature which afford a fertile field, as yet but little developed, for the lawyer of aspirations to authorship. It will be our aim to select our articles so far as we may, with reference to topics of current interest, though we shall not neglect the historical or antiquarian fields. We are promised for the early numbers of next year, articles upon all of these lines by men not only familiar with their subjects but capable of expressing themselves in an interesting way. We also hope to devote an early issue to one of the crying evils of modern practice and a discussion by experts of the remedies that have been proposed, similar to the number devoted to the Law's Delays which we published last May.

The editorial department of the magazine is, however, that in which most changes have recently been made, and it is this work which we hope will make THE GREEN BAG an important as well as interesting part of the lawyer's equipment. The reviews of current legal articles, as in their present form, will contain alphabetically arranged under the topics discussed, not only summaries of the most important contributions to our contemporaries, but the titles of and references to all other leading articles in legal periodicals of the preceding month and received before going to press. Any selection of such articles must necessarily be colored by the personality of the reviewer and articles of interest to some would inevitably be overlooked, but with a complete classified index any lawyer will be able to find the recent discussions of a subject in which at the time he is especially interested.

The department of notes of recent cases we are convinced should be in the hands of every lawyer. The original selection of cases will be made and the summaries written by the experienced editors of the *National Reporter System*, who are obliged in their daily work to examine every decision published in the United States. Their selection seems more likely to include the most important cases of the month than any that can be devised. These summaries will then be submitted in galley proofs to a corps of eminent specialists, both teachers and practitioners, who will briefly note their views of the value and importance of cases in their special subjects with especial reference to the settlement of conflicting authorities, the establishment of old doctrines in new jurisdictions, and the recent tendencies of the law. Realizing that while decisions of the courts of the United States are of most

importance to our lawyers, there remains a broad field of rapidly developing common law jurisdiction in England and in her colonies, where our problems are also pressing for solution, we have felt it necessary to round out the department by presenting from time to time notes of the most important cases decided in England, Canada, and Australia and occasionally in other colonial jurisdictions. The English cases will be treated by R. Newton Crane, Esq., formerly of New York, now a barrister in London and a frequent contributor to this magazine. R. D. McGibbon, K.C., of Montreal, has kindly consented to send us notes of Canadian cases. Our arrangements in other jurisdictions are not yet entirely complete.

In some instances our annotations will be signed, in others initialed only, in others anonymous, as the preference for the time being of the author may dictate, and to encourage those who prefer to remain unknown, we shall see to it that some of the notes in each issue are unsigned. All of these notes, however, will be written by one or the other of the following list of experts, which is itself sufficient evidence of the important character of the notes in this department. James Barr Ames, Dean of the Harvard Law School; James Parker Hall, Dean of the Chicago University Law School; Robert M. Hughes of Norfolk, Va., author of "Hughes on Admiralty"; William Draper Lewis, Dean of the Law School of the University of Pennsylvania; Melville M. Bigelow, Dean of Boston University Law School; J. Newton Fiero, Dean of Albany Law School; Francis Rawle of Philadelphia, editor of Bouvier's "Law Dictionary," and former President of the American Bar Association; Professors, Eugene Wambaugh, Joseph H. Beale, Jr., Bruce Wyman, Edward H. Warren of Harvard Law School; Horace C. Wilgus and Henry M. Bates of Michigan Law School; Ernest W. Huffcut and Frank Irvine of Cornell Law School; William E. Mikell of Pennsylvania Law School; W. C. Dennis of Columbia Law School; William E. Walz, Dean of the Law School of the University of Maine; Harry A. Bigelow, Ernst Freund, Floyd R. Mechem, Clarke B. Whittier of Chicago University Law School; John H. Wigmore, author of "Wigmore on Evidence" and Dean of the Northwestern University Law School; Albert M. Kales, Charles Cheney Hyde of the Northwestern University Law School; Frank L. Simpson, Archibald Boyd, George G. Gardner, Oscar Storer of the Boston University Law School; Charles F. Chamberlayne of New York City; Lee M. Friedman of the firm of Morse & Friedman, of Boston; Edward Q. Keasbey of Newark, N.J.

The reputation of THE GREEN BAG as the publisher of the best original anecdotes of the Bar, which was the purpose of its foundation, will be maintained as in the past through the kindness of thousands of lawyers throughout the country who send us their best stories from which to choose, and the work of a group of clever young barristers who find an agreeable pastime in preparing original short stories for our humorous department.

Owing to the demands on our space caused by the expansion of these editorial departments, it will be necessary for the present to abandon the custom followed out this year, of printing at the opening of the editorial department some accounts of the authors of our contributions, together with small reproductions of their photographs. The modesty of our contributors has made this a difficult, though agreeable task, but that alone would not cause us to fail to gratify the natural curiosity of our readers regarding their professional brethren who seek them as an audience. As a less important feature these bits of introduction must give way to the other departments. We hope, however, to devote some other space to a very brief introduction of our contributors to our readers; for in a country the size of ours, eminent lawyers, unless they have been active in politics, may well be almost unknown beyond their own geographical section. In conclusion, we would state that we shall always welcome criticisms or suggestions from subscribers in the interest of improving the magazine.

CURRENT LEGAL ARTICLES

This department represents a selection of the most important leading articles in all the English and American legal periodicals of the preceding month. The space devoted to a summary does not always represent the relative importance of the article, for essays of the most permanent value are usually so condensed in style that further abbreviation is impracticable.

ARBITRATION. An address before the Colorado State Bar Association on "Compulsory Arbitration," by James H. Pershing, is published in the October *American Lawyer* (V. xiii, p. 435). The author summarizes his views as follows:

"The writer is of the opinion that from our system of jurisprudence may be deduced such legal principles, and such an administrative system as will bring the most difficult of our labor problems within the domain of law; for be it remembered that our industries affected with a public use grow the most serious of public disturbances.

"It is the paramount duty of the lawyer to establish justice according to law. And he should be the last man in the world to confess the failure of our jurisprudence to meet any demand that a progressive democracy may make in order that in all her wide domain, law may reign supreme."

AUTOMOBILES. "The Law of Automobiles," by X. P. H. *Law Notes* (V. ix, p. 147).

BIOGRAPHY. "The Calcutta High Court — Judges," by Shumbhoo C. Dey. *Bombay Law Reporter* (V. vii, p. 225).

CODIFICATION (see Sales).

CONSTITUTIONAL LAW (Commerce, Insurance). Carman F. Randolph, in the November *Columbia Law Review* (V. v, p. 500), publishes an exhaustive opinion on "Federal Supervision of Insurance." While he admits that the United States can control business done here by foreign insurance corporations, he does not believe that the Supreme Court will reverse its established doctrine refusing jurisdiction of interstate insurance to the Federal Government even if the issue is forced by congressional legislation. The foundation of his opinion is the distinction that insurance is a contract, while commerce among the states means intercourse, and an agreement in no sense can be described as intercourse. If the necessity of transmitting the policies between states justifies regulation, all business could be regulated by Congress under this clause. He distinguishes the lottery ticket case which has been made the basis of the present agitation on the ground that the tickets themselves were articles of traffic. He further suggests that "the delicate mechanism of the majority opinion is devised to suppress unwholesome gain," and is of opinion that "both its definition of commerce and its doctrine of prohibition are of little or no general value."

CONSTITUTIONAL LAW (Commerce, Insurance). Andrew Alexander Bruce contributes to the *Central Law Journal* (V. lxi, p. 384) a valuable discussion of "Federal Control of Insurance," in the form of a critism of the majority report of the committee of the American Bar Association which favored Congressional regulation. He admits their contention that, when Paul *v.* Virginia was decided, the Court had little conception of the modern development of the insurance business, and that it is difficult to distinguish between an insurance policy and a lottery ticket, which has lately been held a subject of regulation under the commerce clause. He denies, however, that Congress can declare what is a subject of interstate commerce, and explains the cases relied on by the majority as those in which the court was deciding not whether the transaction was interstate as opposed to intrastate commerce, but whether the articles in question were property at all. He severely criticises the discussion in the Lottery Case, but insists that it must rest on the ground that lottery tickets were common nuisances and hence no property at all, and had no rights that Congress was bound to respect, and finally he opposes regulation as a serious blow to state sovereignty, and reminds us that some day our states will themselves be empires with

dense populations and local needs that will be lost sight of, if the process of centralization is carried to extreme.

CONSTITUTIONAL LAW. "Governmental Regulation of Railroad Rates," by George R. Peck, *American Lawyer* (V. xiii, p. 431).

CONSTITUTIONAL LAW (Police Power). An article entitled "Some Limitations to a Well-known Constitutional Guaranty," by Percy L. Edwards, in the October *Albany Law Journal* (V. lxvii, p. 296) explains that the constitutional guaranty of freedom of speech and the press does not prevent the repression of publications devoted largely to the exploitation of crimes and immoralities.

CONSTITUTIONAL LAW (Treaties, Agreements). James T. Barrett in the November *Yale Law Journal* (V. xv, p. 18) commences an article on "International Agreements Without the Advice and Consent of the Senate," which seems to agree in substance with the conclusions of Mr. Hyde in his article on this subject in our April number.

CONTRACTS. "The Theory of Obligations in the Civil Law," by Hon. William Wirt Howe, *American Lawyer* (V. xiii, p. 439).

CONTRACTS (see Jurisprudence).

CORPORATIONS. "Are Directors of Corporations Held to a Sufficient Accountability?" by Henry W. Jessup, *Bench and Bar* (V. iii, p. 23).

CORPORATIONS (Personality). Professor Dicey's suggestion as to the personality of corporations is again discussed in an article by W. Jethro Brown on "The Personality of the Corporation and the State," in the October *Law Quarterly Review* (V. xxi, p. 365). He submits that a corporation is something distinct from the individual persons who constitute it and is in the eye of the law distinct from the sum of its members. The personality of the corporation is not a mere metaphor or fiction for "whenever men act in common they inevitably tend to develop a spirit which is something different from themselves taken singly or in sum." That same unity tends to beget a different kind of action, for the group is not an organism and can express its will only through individuals. The result of the description of corporate personality as a fiction has been the doctrine that it has no existence beyond that which the state chooses to give it. He contends that the fiction theory is merely a stage in the evolution of legal ideas.

"When at a certain stage in national development, lawyers find themselves brought face to face with the fact of corporate personality, they find it difficult to know what to do with it. Existing legal categories find no place for it. No material reality, nothing apparent to the senses is at hand. A crude realism denies that there can be any person except the corporators. Yet realities press with increasing urgency for legal recognition. It is seen that it is necessary to recognize in the group a capacity for legal rights and duties — the test of personality. To call the group a person is then the first stage — person not by reality, but by fiction of the law. There is nothing beyond the corporators, it is said, but let us *suppose* a person for convenience sake. As groups multiply and ideas develop, this provisional solution of law is seen to owe more to realities and less to the juristic imagination than was at first supposed. The corporate person is stated to be a *real person*. The statement is true, though, as I shall proceed to show, it is liable to be misunderstood."

He admits, however, that corporate personality is different from natural personality, and prefers to describe it as collective personality. "Such facts," he says, "may appear when so stated to savor of metaphysics, but the metaphysics is already implicit in the legal lore which asserts that a corporation is more than a mere partnership."

CORPORATIONS (Transfer of Shares). Under the title of "Certification of Shares," Frank Evans in the October *Law Quarterly Review* (V. xxi, p. 340) briefly explains the law relating to the entry on a transfer of shares by some officer of the company to the effect that the certificate representing the shares has been lodged for transfer.

CORPORATIONS (see International Law).

CRIMINAL LAW (see Jurisprudence).

EDUCATION (Electives). Ernest W. Huffcut in the October *Albany Law Journal* (V. lxvii, p. 292) criticizes too free an adoption of the "Elective System in Law Schools," but believes that in those schools where two years are entirely elective the necessity for this can be avoided by shortening the time given to less important subjects and the elimination of others. He believes that law schools should regard the question differently from colleges. "The college aims at general culture, the professional school at technical efficiency."

"To sum up, it seems to me that the elective system, in order to justify itself in the law school, must show, first, that it familiarizes all students who receive a degree with the fundamental and vital topics of the law, with the chief subject-matter of the profession, and, second, that it produces not merely general legal discipline, but also technical professional efficiency, not merely the ability to acquire, to weigh, and decide, but the ability to do, to act promptly in any emergency, to know and to practice the law. When we observe that under this system a considerable fraction of students have taken their degrees without any study of equity or agency or some other fundamental topic of the law, and that all are free to do so, we cannot but conclude that the elective system does not meet the test of fitting men in the best possible way for the practice of their profession, or of assuring the highest possible potential and practical efficiency."

EDUCATION. "Legal Education in the Province of Quebec," by W. S. Johnson, *Canadian Law Review* (V. x, p. 451).

EDUCATION (see History).

EQUITY (Fraud). "Bargains with Heirs and Expectants," by F. P. Betts, *Canada Law Journal* (V. xli, p. 769).

EQUITY (see Wills).

HISTORY. An interesting comparison of "The Libraries of a Civilian and Canonist and of a Common Lawyer," as described from some ancient records of 1294 by Robert Jowitt Whitwell, appears in the October *Law Quarterly Review* (V. xxi, p. 393).

HISTORY. In the November *Michigan Law Review* (V. iv, p. 1), under the title of "The Territorial Expansion of the Common Law Ideal," John E. Simmons traces "the common law from its primeval beginnings in the soul of man before history was."

HISTORY. "The Lawless Court of Essex," by Courtney Kenney in the November *Columbia Law Review* (V. v, p. 529) is an interesting account of an ancient English baronial court which survived in a picturesque form into modern times.

HISTORY (Education). "The Middle Temple Records" are interestingly discussed by J. R. V. Marchant in the October *Law Quarterly Review* (V. xxi, p. 346). The publication of the records of the Inns of Court recently completed affords much interesting material as to the methods of instruction of mediæval lawyers and the manner in which they were called to the Bar. Moot courts and "readings" or original treatises written by candidates and read to their fellow-students were the methods of instruction in those days before the development of text-books.

HISTORY (Juries). In the November *Law Magazine and Review* (V. xxxi, p. 1), G. Glover Alexander begins a series of articles on "The Province of the Judge and of the Jury." His purpose is to describe the history of the struggle between judge and jury which resulted in the present division of functions. To illustrate this he begins a detailed description of two early state trials, that of Lilburn and that of Lord Dacres.

HISTORY (Jurisprudence). The first of a series of articles explaining historically the origin of the different systems of native law in India and the effect of the different religious systems on their development entitled, "The Origin and Development of the Bengal School of Hindu Law," by Sarada Charan Mitra,

appears in the October *Law Quarterly Review* (V. xxi, p. 380).

HISTORY (Jurisprudence). "The Sources of Ancient Siamese Law" are proved by analogies from the Hindu law by Tokichi Masao in the November *Yale Law Journal* (V. xv, p. 28).

INSURANCE. "Recent Insurance Decisions Which Add Uncertainty to Future Litigation Involving the Construction of Policy Provisions," by Robert J. Brennen, *Central Law Journal* (V. lxi, p. 304).

INSURANCE. "Shall We Have State or Federal Supervision," by Samuel Bosworth Smith, *Chicago Legal News* (V. xxxviii, p. 102).

INSURANCE. "Stipulations in Fire Insurance Contracts Affecting the Insured's Right of Recovery," by R. E. Ressler, *Central Law Journal* (V. lxi, p. 323).

INSURANCE (see Constitutional Law).

INTERNATIONAL LAW. "International Court of Arbitration," by O. D. Jones, *Central Law Journal* (V. lxi, p. 346).

INTERNATIONAL LAW. "Exemption of Private Property at Sea from Capture," by Samuel B. Crandall in the November *Columbia Law Review* (V. v, p. 487) is a history of the diplomacy leading up to such exemption.

INTERNATIONAL LAW (Confiscation of Shares). In the October *Law Quarterly Review* (v. xxi, p. 335), J. Westlake replies to Sir Thomas Barclay's article reviewed in our October number on "The South African Railway Case and International Law." He agrees that shares not owned by private persons at the outbreak of the war, but later acquired, should not be deprived of compensation, but contends that if they were transferred as security for loans made to the government during the war they ought to be confiscated.

In conclusion he says: "Those who meddle with the finance of a state at war must bear in mind that common-sense prevents international law from giving to that state the right to bolster up its finance by pledging the security of its enemy in addition to its own, in case of its being conquered and annexed."

INTERNATIONAL LAW (Contraband). Douglas Owen discusses "Neutral Trade in Contraband of Law," in the November *Law Magazine and Review* (V. xxxi, p. 51) with especial reference to the damage to honest neutral traders by the seizure and delay of neutral mail and passenger steamers suspected of carrying contraband. The present situation is a survival of rules applicable to ancient methods of trade. He would avoid the necessity for conferring this right of search by a series of enactments by neutral powers punishing their citizens shipping contraband, indemnifying honest suspects, and enabling belligerents to collect claims for violation of these rules. Vessel owners should be protected by government certificate; what is contraband should be more definitely defined.

INTERNATIONAL LAW (Jurisdiction). Under the title of "Turkish Capitulations and the Status of British and Other Foreign Subjects Residing in Turkey," Edwin Pears in the October *Law Quarterly Review* (V. xxi, p. 408), explains a curious doctrine of jurisdiction resulting from Turkish treaties embodying medieval conceptions.

"In the Ottoman Empire the foreign colonies are so many *imperia in imperio*. Taken together with their common Capitulations and their common usages they constitute one great colony whose relations with the territorial ruler are limited by the same Capitulations as those which give them collectively and separately an independent character. Each of them is regarded in legal fiction as part of the territory to which its members are subject. Their members could not, if they had wished, have become subjects of the Turk. Like all early peoples the Turks were unwilling to grant their precious rights of citizenship to outsiders. Christian foreigners on their part had no such desire. Both sides, therefore, agreed that these separate *imperia* should continue, that their sovereign should do with their subjects what they wished, even having

over them the power of life and death. But they and their descendants were always to remain outside the pale of Turkish rule and the application of Turkish law, except in certain specific cases provided for in the Capitulations. That these various colonies have continued in existence for three centuries, and some of them for four and a half, shows that the system has been practicable, and no Western lawyer acquainted with the circumstances of Turkey and of the foreign colonists residing there, would seriously think of attempting to abolish the actually existing régime of the Capitulations."

INTERNATIONAL LAW (see Constitutional Law, Treaties).

JURISPRUDENCE. "Abolition of the Jury System," by George H. Williams, *Law Notes* (V. ix, p. 150).

JURISPRUDENCE. "The Development of Roman Marriage," by A. H. J. Greenidge, *Law Quarterly Review* (V. xxi, p. 357).

JURISPRUDENCE. "A Constitutional History of Hungary," by Paul Vinogradoff, *Law Quarterly Review* (V. xxi, p. 426).

JURISPRUDENCE (Contracts). "Consideration *v. Causa* in Roman-American Law," by Joseph H. Drake in the November *Michigan Law Review* (V. iv, p. 19) considers the probable effect of the civil law doctrine of *causa* in contracts when brought in competition with the common law doctrine of consideration, and quotes from the analogies of the South African and Louisiana experience to prove that ultimately these courts will cease to enforce in practice any gratuitous promises except donations.

JURISPRUDENCE (Criminal Law). The November *Yale Law Journal* (V. xv, p. 1) publishes Secretary Taft's address on the "Administration of the Criminal Law," much commented on in the papers last summer. He reminds us that we are prone to be narrow in our prejudice in favor of the common law and says:

"But certainly when in actual practice the common law lawyer is brought to the study of the beautifully simple and exactly comprehensive language of the civil code governing the rights between individuals, he begins to feel the veneration that comes from consciously viewing the work of twenty centuries of jurists and law-givers who have been struggling during all that period to simplify and make lucid the rules of law and to reduce it to the science that under the civil code it certainly has become."

The common law stands for the utmost liberty of the individual, and as a price of its liberty it imposes upon the person enjoying it the burden of looking out for himself. The means it developed for the protection of the individual were essentially practical and through the procedure of the law. He reminds us that "we have no right to force on the Porto Ricans or the Filipinos institutions of our own which have proved of the highest benefit to us, unless we can see upon other than sentimental ground connected with our own history, that such institutions will now prove beneficial to them in their present condition." He then calls attention to abuses of many of the common law safeguards of individual liberty to emphasize the fact that even for us their value in their present form may well be doubted. He advocates the abolition of the jury system in civil cases, calling attention to the fact that it is used almost solely in actions for personal injuries. It is effective only with jurors unlikely to be affected by their emotions and is inseparably interwoven with our system of evidence, which is also unknown to the civil law. The right of the accused to be exempt from testifying he also criticizes as a survival of barbaric times. Other rules making it difficult to convict a defendant he assigns as important reasons for lynch law. And he arraigns the Bar for permitting a portion of its number to obstruct reform legislation.

JURISPRUDENCE (Juries). William H. Holt, formerly a judge in Porto Rico, in the October *Albany Law Journal* (V. lxvii, p. 298) objects to Secretary Taft's criticisms of "The Jury System," as applied to Porto Rico. He believes that like the right of suffrage, it is one of the instruments of the sovereignty of the people and is an important educational

instrument. In his experience their administration of it was honest and efficient.

JURISPRUDENCE (Philippines). Charles S. Lobingier, one of our judges in the Philippines, describes in the October *Law Quarterly Review* (V. xxi, p. 401) "Blending Legal Systems in the Philippines." After briefly explaining the changes we have so far made in the Spanish codes, he calls attention to the fact that "besides the Roman and the English the world has produced but a single other legal system which has grown to the proportions of a cosmopolitan one. This is the Mohammedan law whose principles determine the rights and duties of the almost countless hosts of Islam from its westernmost outpost in Morocco to its easternmost in Mindanao. No other system save these three has become the law of more than one nation or sovereignty, and it is not a little curious that all of these cosmopolitan systems are now found side by side in the Philippines alone."

From this blending of systems he believes that an opportunity will arise for some future codifier in the Philippines to develop a system which will surpass that of all his predecessors.

"Such, then, is the new jurisprudence forming in the Philippines through the blending of diverse legal systems — the Spanish, preserving and continuing the law of old Rome with the garnered wisdom of its mighty jurisconsults — the American, inheriting and contributing the great principles of the English common law, won by the struggles of sturdy yeomen, formulated by a long line of illustrious judges, and tempered with the practical common sense of the Anglo-Saxon; and with it all perhaps a strain from those crude systems which antedate all others in the archipelago. It is a unique process — this blending of legal systems in the Philippines, and, except possibly in the early days of Louisiana, history furnishes no parallel. And as Sir Henry Maine found in the Livingston Code — an outgrowth of the peculiar conditions in Louisiana — the best example of codification, some future codifier in the Philippines may find the materials which will enable him to surpass all predecessors.

"The results of this process are already perceptible not only in the laws themselves but in the attitude of those who interpret and apply them. The American judge or lawyer who comes to the Philippines finds that he has much to receive as well as to give — that while his colleagues among the Filipinos may not have had the advantage of an early training in the remedial part of their present law, they are more familiar than he with the substantive element, and that each can learn something from the other. This conduces to a spirit of mutual helpfulness and to mutual concessions, which make the work of administering the law far easier and more agreeable. The American and Filipino Bar Associations, formerly distinct, are now one, and the united body recently tendered a banquet to Chief-justice Arellano (a Filipino), upon his return from a visit to the United States, at which the toast-master was an American and the speakers both Americans and Filipinos. A distinguished member of the Manila bar, entertaining at dinner recently some lawyer friends of both races, remarked that nowhere else in the world could such fraternizing be found. May it indeed prove the augury of harmonious relations in all walks of life between the two races whom destiny seems to have assured a common future."

JURISPRUDENCE (see History).

NEGOTIABLE INSTRUMENTS (see Sales).

PATENTS. In the November *Harvard Law Review* (V. xix, p. 30), William B. Whitney under the title of "Patentable Processes" contends that recent decisions of the Supreme Court have confused an important portion of patent law. A patent may be granted for a "useful art." A process (a series of acts producing physical change) is such an art, but the court has inserted a qualification "provided it involves a chemical or other elemental change." A process that does not invoke any power of nature to effect a result that may be produced by simple manipulation, though ordinarily and most successfully performed by machinery ought to be patentable. To hold the contrary would nullify the act and overrule decided cases. But a doubt is raised by recent cases.

A further proposition of the court that a

process that is simply the function or operative effect of a machine is not patentable, is true only if process is taken to mean merely the function or effect produced by a machine, or not a process but an abstraction. It is also true where a process is new only in the sense that it is better performed than before by the function of a new machine. If it means that a true process is not patentable though new, when seemingly identified with the function of a machine because it can be performed in no other way than by the machine, it is unsound in principle.

PATENTS (England). J. W. Gordon, in the November *Law Magazine and Review* (V. xxxi, p. 31), advocates " Reform of the Patent Law " showing that there are difficulties of interpretation in the English decisions similar to those found by Mr. Whitney in our American law. He chiefly criticizes " the perplexed and unsettled doctrine concerning subject matter, an illiberal and mischievous practice in the granting of injunctions, and a very unsatisfactory method of trying questions of fact." The first is due to a judicial interpretation requiring ingenuity in addition to novelty in an invention, leaving room for arbitrary decisions which counsel cannot forecast. The statute should properly have given a patent to the projector of an invention and not to an inventor, and thus avoided this difficulty. Some confusion has resulted from an acknowledged disposition of the courts " to regard favorably a practically useful machine." Another abuse is the granting of patents to foreigners who never manufacture in Great Britain but keep the field for sale of foreign-made articles. The gradual ousting of the jury and extension of injunction, he would remedy by a jury of experts in place of the common jury and the payment of damages.

PERSONS. " Action by Unborn Infant," by James M. Kerr, *Central Law Journal* (V. lxi, p. 364).

PRACTICE. " Justice in New York," by Willis B. Dowd in the October *Albany Law Journal* (V. lxvii, p. 290,) is a criticism of the constitutional limitation of the number of judges in New York City, to which he attributes the congestion of business and delay of justice.

PRACTICE. " The Congress of Advocates at Liège " is described by E. S. Cox-Sinclair in the November *Law Magazine and Review* (V. xxxi, p. 81). This was a meeting of representatives of various European Bar associations, which discussed a number of professional questions in which uniformity was desired but toward which little was accomplished. A permanent international organization was formed.

PRACTICE (see Arbitration).

PROCEDURE (see Jurisprudence, Criminal Law).

PROPERTY. " Effect of Possession of Land without Recorded Title," by M. G. Mason, *Virginia Law Register* (V. xi, p. 455).

SALES (Codification). In the November *Michigan Law Review* (V. iv, p. 41), Francis B. James, under the title of " Uniform State Laws Governing Negotiable Documents of Title," discusses certain sections of the proposed codification of the law of sales. He especially objects to the provision conferring negotiability on documents of title not until after ten days from their issue. The purpose of this limitation was to prevent some common fraudulent schemes for repledging warehouse receipts and bills of lading on goods purchased on credit. The author finds these too small in number and consequence to limit the negotiability of these documents which he thinks should be placed on the basis of other commercial paper.

" The merchants gave to the law their customs and usages, and now that our legislative bodies are to give to the merchant codes of mercantile law, these codes should so far as possible, embody these customs and usages freed from legal jargon and unhampered by mere legal rules except such as are based on ethical principles underlying all American jurisprudence and principles of economics underlying sane and sound commerce."

STATUTES. " Defects in Legislation," by Hon. Lewis H. Machen, *Virginia Law Register* (V. xi, p. 451).

STATUTE OF FRAUDS. "Lord Tenterden's Act in the United States, and an Important Omission Therefrom," by W. T. Fox, *Central Law Journal* (V. lxi, p. 344).

WILLS. "The Dead Hand," by J. M. Lely in the November *Law Magazine and Review* (V. xxxi, p. 24), is a criticism of some defects in the English law of wills and suggestion of remedies.

WILLS (Equitable Conversion). In the November *Harvard Law Review* (V. xix, p. 1), Professor Langdell concludes his important treatise on "Equitable Conversion." He deals chiefly with the changes in the law real and supposed, since the decision of Ackroyd *v.* Smithson. On the whole he finds these to be less than has generally been supposed. What constitutes such conversion is still the declared intention of the testator. Before that case, evidence of such intention seems to have been looked for only in such directions as the will contained respecting a sale of the land and the mode of dealing with the proceeds independent of any gift of the latter. Since that case, such evidence has been primarily looked for in the gift of the proceeds, and a gift which does not take effect is disregarded. Moreover, "the doctrine has become established that an equitable conversion by will is presumptively coextensive only with the purposes for which the sale is directed, and hence the distinction has become established between an equitable conversion for the purposes of the will only and an equitable conversion out and out." And an unqualified direction to sell is presumed to be only for the purpose expressed in the will. Hence, a conversion out and out has meant less than it did before "for while such a conversion before Ackroyd *v.* Smithson caused any portion of the land the produce of which was not disposed of, to go to the testator's personal representative, it now has merely the effect of causing the heir to take the same as money." The authorities, however, give no satisfactory reason for these changes. It has been held that these changes should be extended by analogy to the equitable conversion by will of money into land.

WITNESSES. "Memoranda to Refresh Mind of Witness and as Substitute for Witness's Recollection," by John D. Lindsay, *Bench and Bar* (V. iii, p. 12).

NOTES OF THE MOST IMPORTANT RECENT CASES COMPILED BY THE EDITORS OF THE NATIONAL REPORTER SYSTEM AND ANNOTATED BY SPECIALISTS IN THE SEVERAL SUBJECTS

(Copies of the pamphlet Reporters containing full reports of any of these decisions may be secured from the West Publishing Company, St. Paul, Minnesota, at 25 cents each. In ordering, the title of the desired case should be given as well as the citation of volume and page of the Reporter in which it is printed.)

ATTORNEYS. (Disbarment — Nature of Proceeding.) Fla. — An interesting comment upon the nature of disbarment proceedings is contained in State *v.* McRae, 38 Southern Reporter, 605. Therein it is maintained that disbarment proceedings are not designed as a penalty or punishment for any misfeasance or dereliction of duty by an attorney, but are solely for the purpose of purging the roll of legal practitioners of an unworthy or disreputable member. In such a proceeding, therefore, no fine, imprisonment, or other punitive sentence, can be imposed, but the judgment can be merely one revoking the formerly granted permit to practice law, and striking the name of the derelict from the roll of attorneys. Upon very much this same ground is based the further holding that a disbarment proceeding against an attorney is not a criminal prosecution and does not fall within that class of cases that require the charges to be preferred by information or indictment, or that require a trial by jury, or a confrontation of the accused with the witnesses against him.

It is admitted that proceedings to disbar an attorney are, in the absence of statutes, based solely on the inherent power of the courts over their officers, and are intended for the protection of the courts from the official ministrations of persons unfit to practice as attorneys. From this it follows that such proceedings are not of a criminal nature, that the statute of limitations is not a defense, that failure to testify on the part of the accused raises against him the presumption of the truth of such uncontradicted facts as must be within his knowledge, that the right of the court to proceed cannot be affected by a private settlement between the attorney and third parties, and that the offense need not be proved beyond a reasonable doubt, but that a clear preponderance of the evidence is sufficient. The principal case, with its additional deductions, is in line with the great majority of decisions that have dealt with this aspect of disbarment proceedings. Ex parte Wall. 107 U. S. 265, is the leading case, and constitutes almost a text-book by itself, for decision and dissenting opinion cover more than fifty pages. The contrary view, to be logical, must, among other things, insist upon proof beyond a reasonable doubt, even in cases where the offense constitutes in no sense either a crime or a misdemeanor, and may, conceivably, fall short even of a tort. We know of only one court, and that one of inferior jurisdiction, that has gone this length.

W. E. Walz.

BANKRUPTCY. (Exemptions — Life Insurance Policies.) U. S. S. C. — Holden *v.* Stratton, 25 Supreme Court Reporter, 656, contains an authoritative determination of a question as to which there has been some diversity of opinion. This question is the construction of the provisions of the Bankruptcy Act relating to exemptions of life insurance policies. Section 6 of the act provides that it shall not affect the allowance to bankrupts of the exemptions prescribed by the state laws in force at the time of the filing of the petition. A proviso contained in section 70a, declares, however, that if any bankrupt shall have any insurance policy which has a cash surrender value payable to him, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate, but that otherwise the policy shall pass to the trustee as assets. It has been held *In re* Scheld, 44 C. C. A. 233, 104 Fed. 870, that the proviso in section 70a limits the operation of section 6 so that life insurance policies, though exempt by the state laws, are not exempt to the bankrupt if they have a cash surrender value The contrary is held in Steele *v.* Buel, 44 C. C. A. 287, 104 Fed. 968. The Supreme Court unanimously holds that section 70a deals only with property which is not exempt but passes to the trustee, and that the only operation of the pro-

viso is to give the bankrupt, in a case where such a policy would not be exempt by the state laws, a right, upon paying or securing the cash surrender value of the policy, to continue to retain the same.

Besides the main point in issue this case confirms the decisions of the various District Courts to the effect that where a policy of life insurance is payable to the bankrupt, his executors, administrators, or assigns, even though it has no cash surrender value, it passes to the trustee in bankruptcy.

Gould v. New York Life Ins. Co., 13 A. B. R. 233.

In re Mertens, 12 A. B. R. 712, 131 Fed. 972.

In re Welling, 7 A. B. R. 340, 113 Fed. 189.

In re Slingluff, 5 A. B. R. 76, 106 Fed. 154.

If nothing can be realized either by the surrender or the sale of the policy there is nothing to pass to the trustee.

Gould v. New York Life Ins. Co. Supra and cases there cited.

However, a practical difficulty often arises where, as is common, the insurance is for the benefit of a third person named in the policy, although the cash surrender value may be payable to the bankrupt. Such a policy cannot be surrendered without the consent of the beneficiary.

Central Bank of Washington v. Hume, 128 U. S. 195.

Gould v. Emerson, 99 Mass. 154.

Wilburn v. Wilburn, 83 Ind. 55.

Ricker v. Charter Oak Ins. Co., 27 Minn. 193.

Charter Oak Ins. Co. v. Brant, 47 Mo. 419.

Pingree v. National Ins. Co., 144 Mass. 374.

Therefore, it has recently been decided by the Supreme Court of Massachusetts that if a bankrupt at the time of his bankruptcy holds a life insurance policy providing that, if he dies within twenty years, the company shall pay the amount of the policy to his mother if living, or if she is dead, to his estate, and at the end of twenty years if he survives the company shall pay to him, he has an interest in the policy which passes to his trustee: but the trustee in bankruptcy cannot surrender the policy without the consent of the mother, nor can he compel the insurance company to pay him anything for the insurance policy without such consent.

Haskell v. Equitable Life Assurance Society, 181 Mass. 341.

If once the trustee elects to abandon an insurance policy as valueless, if subsequently the bankrupt dies, the trustee has lost all his rights to the proceeds of the policy.

Myers v. Josephson, 10 A. B. R. 687.

Lee M. Friedman.

BENEFICIAL ASSOCIATIONS. (Members — Indebtedness to Order — Lottery Tickets.) Conn. — A debt is none the less a debt because contracted for lottery tickets, says the Supreme Court of Errors of Connecticut, in Kelly *v.* Court R. F. Phelan, No. 122, Foresters of America, 60 Atl. Rep. 1022. The by-laws of the defendant beneficial association defined a member in financial standing, entitled to share in death benefits, as one who was not indebted to subordinate courts for fines or assessments or anything else that might be charged against him as dues, to an amount equal to six months' dues. Plaintiff's decedent, who was a member of the order, was charged on the books thereof with an indebtedness for unpaid dues in the sum of $3.75, and a further indebtedeness of $1.00, making a total which was more than equal to six months' dues. The indebtedness of $1.00 arose from the fact that defendant had some time before joined with others in giving a fair, at which there was a drawing, for which tickets were sold entitling the holder to a chance on various prizes. Prior to the fair, these tickets were distributed by defendant among its members, and a book of some of them was taken by plaintiff's decedent for the purpose of selling the tickets for the benefit of defendant. Neither the tickets nor the money for them was ever returned to defendant, and the one dollar indebtedness was on account of these tickets. The court holds that notwithstanding the fact that the drawing was actually a lottery, the charge against insured for the tickets was a valid indebtedness, so that he was not a member in good standing under the by-laws at the time of his death.

CARRIERS. (Rebilling Rate — Discrimination.) Miss. — Quite a learned and extensive consideration of rebilling rates and their operation and effect is to be found in Alabama in Vicksburg Ry. Co. *v.* Railroad Commission of Miss., 37 South. Rep. 356. The court lays down the rule that a true rebilling rate is one in which the goods received in unbroken car-lots over one line of railway can be rebilled over the same or another line, completing one continuous trip, simply changing the consignee and altering the destination of the identical shipment without unloading. A so-called rebilling rate, which is not applied to consignments arriving over all connecting lines but is only available to those receiving freight over associated lines and under which freight, where consigned over the rebilling road, does not complete one continuous trip without rehandling, and is not necessarily the identical shipment originally consigned, there being a custom of

granting dealers, handling freight over the associated lines, the privilege of ninety days from the date of their expense bills for receipts showing the amount of freight received over such line of shipping an equal amount of freight over the rebilling line at the rate adopted, is held to be not a true rebilling rate but a discrimination.

CONSTITUTIONAL LAW. (Combining to Effect Malicious Injury.) U. S. S. C. — The scope, as well as the constitutionality of a provision of the Wisconsin statutes, which declares that if any two or more persons combine for the purpose of wilfully or maliciously injuring another in his reputation, trade, business, or profession, by any means whatever, they shall be fined, is rather briefly, but nevertheless satisfactorily treated in Aikens *v.* Wisconsin, 25 Supreme Court Reporter, 3. A newspaper had notified an increase of 25 per cent in its charges for advertising, whereupon the defendants, who were managers of other newspapers formed a combination, and agreed that if any advertiser paid the increased rate demanded by the first-mentioned paper, he should not be permitted to advertise in any of the defendants' papers, except at a corresponding increase of rate, but that if he should refuse to pay the increased rate, he should be allowed to advertise in defendants' papers at the rate previously charged. In an opinion supporting the constitutionality of the statute the court suggests that such a combination, followed by damage, would be actionable even in common law, and that in that case the motive with which the acts were performed would be material as affecting the question of justification. Attention is directed to the fact that while the statute punishes combining for the purpose of wilfully or maliciously injuring another in his business, the Supreme Court of Wisconsin had intimated that a narrower interpretation would be adopted, and the further fact that in the present case it was alleged that the combination was with the intent of maliciously inflicting injury, so that the validity of the statute as relating to a malicious, as distinguished from a wilful injury, was the only question involved. In this aspect, the statute is held not in conflict with the 14th amendment to the Federal Constitution. For the defendants it was contended that the means intended to be used in the particular combination under consideration were simply the abstinence from making contracts, and that a man's right to so abstain could not be interfered with, and carried with it the right to communicate the intention to abstain to others, and to abstain in common with them, and it was argued that the statute must be held unconstitutional if construed as extending to these acts. "The fallacy of this argument," says Mr. Justice Holmes, "lies in the assumption that the statute stands no better than if directed against the pure nonfeasance of singly omitting to contract. The statute is directed against a series of acts and acts of several, the acts of combining with intent to do other acts. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by such acts."

It is the belief of this annotator that a solution of the trust problem may be found, by the application to all situations where virtual monopoly prevails, of the law governing the public services. This law requires that all shall be served without discrimination; while the predatory competition which is carried on by many of the present combinations, involves outright refusal to serve those who deal with a rival or at least discrimination against those who will not sell upon the terms dictated by the trust. Two decisions of the Supreme Court of the United States within the last two years strengthens the hope that the legislatures will use some such law to curb the trusts, and that the courts will uphold the constitutionality of such statutes. In Montague v. Lowry, the Supreme Court held that if a combination of vendors of tiles refused to sell to a retailer they were liable for damages under the Federal Anti-Trust Act. Now, in Aikens v. Wisconsin, it permits the penalizing of a combination of newspaper proprietors for putting in force a discrimination designed to bring a rival to terms. Taken together these two cases open the way for more comprehensive legislation which may declare that in all business in which virtual monopoly is established there must be adequate service to all without discrimination against any.

Bruce Wyman.

This decision introduces into the criminal law as a test of the validity of conspiracy statutes, the doctrine of "want of justifiable cause" (malice), which has figured so conspicuously in actions for damages for interference with contracts and business. The common law punished conspiracies to injure another in his trade or calling. People v. Melvin (1810), 2 Wheeler's Cr. Cas. 262; People v. Trequier (1823), 1 Wheeler's Cr. Cas. 142. In New York a statute making it a criminal conspiracy for two or more persons to conspire to commit any act injurious to trade or commerce, was held to cover a combination to raise wages by fines and strikes. People v. Fisher (1835), 14 Wend.

9. But an act of 1870 provided that such statutes should not be construed to prevent the peaceable coöperation of workmen to raise wages. (N. Y. Penal Code, §170.) Under the above decision a conspiracy to commit an injury to one in his trade or calling may be made indictable only if the conspirators have no lawful excuse or justification. What is a lawful excuse or justification remains in the realm of debate.

CONSTITUTIONAL LAW. (Liberty and Pursuit of Happiness.) Conn. — The Connecticut statute prohibiting the marriage of epileptics has received judicial sanction — Gould *v.* Gould, 61 Atlantic Reporter, 604. In the argument in support of its position that the statute is not in contravention of that provision of the Connecticut constitution guarantying life, liberty, and the pursuit of happiness to all, the court points out that while one of the rights preserved by the constitution is the right to contract marriage, yet that is a right which can only be exercised under such reasonable conditions as the legislature may see fit to impose. For example: it is not possessed by those below a certain age, and is denied to those who stand within certain degrees of kinship. Taking judicial notice of the grave nature of the disease and of its hereditary character the court holds that as the law applies equally to all under the same circumstances, and as the legislature might reasonably believe that the law was necessary for the preservation of the public health, it is not in conflict with the constitution. A subsidiary holding of some importance is to the effect that fraudulent concealment by an epileptic of the fact that he is such, by means of which concealment the marriage is effected, justifies a divorce on the ground of a fraudulent contract.

The test of reasonableness laid down is that there are substantial grounds for believing that the determination that the law is necessary for the preservation of the public health is supported by the facts upon which it is apparent that it was based. Would this test be met by the Kansas law of 1903, which extends a similar restriction to children born after one of the parents was afflicted with insanity?

The act of Connecticut is prohibitory and provides a penalty for its violation. In analogy to the provisions prescribing certain forms of solemnization, a marriage entered into in contravention to the law is not void. The same interpretation will probably be placed upon the similar prohibition to be found in the acts of Minnesota, Kansas, and Ohio. The ruling that the concealment of the epileptic condition may justify divorce, rests upon the recognition of fraudulent contract as a ground of divorce by the laws of Connecticut; there are only a few states recognizing this ground, Kansas being one of them. E. F.

CORPORATIONS. (Stockholders' Bill — Jurisdiction.) N. Y. S. C., App. Div. — Jacobs *v.* Mexican Sugar Refining Co., 93 New York Supplement, 776, has a holding of some moment on the question of jurisdiction. Under the provisions of Code Civ. Proc. § 1780, that an action against a foreign corporation may be maintained by a resident of the state for any cause of action, it is held that the courts of New York have jurisdiction of an action by resident stockholders in a foreign corporation against another foreign corporation to have declared void for fraud an agreement cancelling a lease from defendant to the corporation of which plaintiffs were members. The majority opinion places its holding upon the ground that while the relief to be awarded would be in favor of the corporation in which plaintiffs were stockholders, nevertheless, the cause of action sought to be enforced was one which vests in a minority stockholder to prevent the majority stockholders and officers from carrying out a fraudulent scheme to injure the corporation. McLaughlin, J., in the dissenting opinion, suggests that as it is conceded in the main opinion that the court would not have jurisdiction had the action been brought by one corporation against another, he does not understand that the stockholder can do for the corporation what it cannot do for itself, and is, consequently, of the opinion that the court was without jurisdiction.

This decision should be compared with that of the Court of Errors and Appeals of New Jersey in Wilson v. American Palace Car Co., 65 N. J. Eq. 730 (1903), in which it was held that the Court of Chancery of New Jersey, had no jurisdiction over a foreign corporation in a suit by some of its stockholders to set aside a transfer of all of its property, not being real estate, to a corporation of New Jersey. The court in that case applied the doctrine of Pennoyer v. Neff (95 U. S. 714) and said that a decree against the foreign corporation would be without due process of law, but the purpose of the suit was only to give notice to the corporation of a suit to restore to it its own property, and the decision would seem to be an unnecessary extension of the principle of Pennoyer v. Neff. In this connection it is interesting to see that the English and continental courts have not hesitated to take jurisdiction over foreigners in cases in which the contract was made or to be performed without the jurisdiction and in many other classes of cases, and it is worth while to refer to Piggott on

Service out of the Jurisdiction. (F. T. Piggott, London, William Clowes & Son, 1892).

The cases have been collected by the writer of this note in an article on Jurisdiction over Non-Residents in Personal Actions, in the "Columbia Law Review" for June last.

Edward Q. Keasbey.

This case squarely holds that the right of a stockholder to enforce a claim of the corporation against a stranger is a cause of action belonging to the stockholder, and not merely a cause of action on behalf of the corporation which the stockholder may under certain circumstances assert on behalf of the corporation. The majority opinion is in accord with the doctrine of the Federal courts, which determine questions of jurisdiction on the ground of diverse citizenship in such cases by looking to the actual citizenship of the stockholder suing (Dodge v. Woolsey, 18 How. 331), rather than to the fiction which would be resorted to were the action by the corporation itself, that all stockholders are citizens of the state creating the corporation (Barrow Steamship Co. v. Kane, 170 U. S. 100). The Federal courts are in a measure protected against frauds upon their jurisdiction in such cases by Equity Rule 94, requiring the bill to be verified and to allege that the suit is not a collusive one, to confer on a court of the United States jurisdiction in a case of which it would not otherwise have cognizance. Some safeguard should be provided in New York should this doctrine be affirmed by the Court of Appeals.

Frank Irvine.

DAMAGES. (Personal Injuries — Fright and Nervous Shock.) N. Y. S. C., App. Div. — Newton *v.* New York, New Haven & Hartford Railroad Company, 94 New York Supplement, 825, while not out of line with the general current of authority on the question involved, is interesting because it presents, in what might be called an exaggerated form, the facts which give rise to the holding. Plaintiff was a passenger on a train with which one of defendant's trains collided. Plaintiff testified that it threw him over in the seat but did not inflict any bruises or injury and that he felt no pain. After the accident plaintiff continued on his way on foot and went to his office. Thereafter plaintiff's condition continued to get more serious, and a physician testified that he was suffering from dilation of the heart and from valvular disease. Plaintiff's physical condition was, as a matter of fact, very serious, and he finally died. At the trial plaintiff's counsel expressly stated that they did not claim that any physical injuries were inflicted. There was expert testimony that plaintiff's subsequent condition could have been the result of nervous shock. Under these circumstances it is held that there could be no recovery for the purely mental effect of the accident upon the plaintiff in the absence of any proof of any physical injury whatever.

EVIDENCE. (Conflicting Presumptions — Antecedent Marriage — Proof.) Md. — An interesting question of evidence and the effect of conflicting presumptions, which has not been many times before the courts of this country, is decided in Bowman *v.* Little, 61 Atlantic Reporter, 223. This question relates to the quantity, or rather quality, of proof required to establish a first marriage in a civil case in which each party claims property as the wife of a deceased person. Under these circumstances it is decided that as proof of the first marriage would inevitably brand the deceased with the crime of bigamy and bastardize the offspring of the second marriage, the first marriage must be established as an actual fact by strict proof, the presumption being that the subsequent marriage proven to have been actually solemnized was the valid one. The court says that the reason upon which the doctrine that there must be strict proof of the first marriage rests is apparent. When the presumption of a lawful marriage is met by a counter presumption of innocence, the former must yield to the force of the latter. After it has been shown that there was an actual marriage solemnized in the method which the law prescribes, every inference is invoked in support of its validity and against an alleged antecedent marriage, because the presumptions of the law are always in favor of innocence and of legitimacy. The two English cases of Taylor *v.* Taylor, 1 Lee, 571, 5 Eng. Ecc. Rep. 454, and King *v.* Inhabitants of Twyning, 2 Bar. & Ald. 386, are cited in support of the holding, the latter case being quoted with approval.

For a very full collection of the cases on presumptions of the validity of marriages, see 19 Am. & Eng. Ency. Law 1202. Our case holds that when a marriage, otherwise valid, is attacked on the ground that a prior marriage was still in existence when the one in question was consummated, it will be presumed that no such prior marriage took place. When such prior marriage has been established, courts have presumed the death of the former spouse. If it is made to appear that the former spouse is still living, a divorce will be presumed. Our case is no doubt right. Certainly the one who relies on such prior marriage must bring in some evidence of it. He has the duty of going forward. Wigmore, Evidence, §2487. But suppose he now introduces evidence of cohabitation as man and wife and reputation

as such. This usually creates a presumption of marriage. This, making out a prima facie case, would overthrow the first presumption were it not for an additional rule that the presumption in favor of the second marriage can only be overthrown by clear evidence of the first marriage, and that "habit and repute" will not suffice. This seems to be settled in the Maryland cases and perhaps elsewhere. But suppose there is clear evidence of the first marriage. Plainly then the party relying on the second marriage must come forward with evidence to overthrow it. Who then has the ultimate burden of establishing? Probably the one asserting the second marriage, since a presumption does not shift the burden of establishing. Vincent v. Association, 58 At. Rep. (Conn.) 963. But courts have said that the one asserting the first marriage has the "burden of proof." Taylor v. Taylor, 1 Lee 571; Patterson v. Gaines, 6 How. 550, 596; Rooney v. Rooney, 54 N. J. Eq. 231, 245. This tells us nothing since we do not know in what sense they were using "burden of proof." Wigmore, Evidence, §§2485, 2487. It will be noticed that according to the above discussion the presumptions do not conflict but come into operation successively. Wigmore, Evidence, §2493. **Clarke B. Whittier.**

FEDERAL COURTS. (Removal of Causes — Diverse Citizenship — Residence.) U. S. C. C. Nev. — A decision involving the question of federal jurisdiction on the ground of diverse citizenship and adding a holding to the number which must now be regarded as stating the most generally accepted doctrine, is to be found in Burch *v.* Southern Pacific Co., 139 Fed. Rep. 350. This case holds that since Act Aug. 13th 1888, c. 866, § 1 (U. S. Comp. St. 1901, p. 508), providing that when jurisdiction is founded on diverse citizenship suit shall be brought only in the district of the residence of plaintiff or defendant, confers a mere privilege on the defendant which may be waived, federal circuit courts have jurisdiction over controversies wholly between citizens of different states though neither plaintiff nor defendant is a resident of the district in which the court to which the action was removed is sitting. There are authorities to the contrary, notably: Foulk *v.* Gray, 120 Fed. 156, and Gebbie & Co. *v.* Review of Reviews Co., 134 Fed. 150. These are referred to by the court but are apparently considered not authoritative because in conflict with a considerable number of other cases adhering to the contrary doctrine. Among the latter, the court cites and quotes from Wilson *v.* Western Union Telegraph Co., 34 Fed. 561, Kansas City & T. R. Co. *v.* Interstate Lumber Co., 37 Fed. 3, Sherwood *v.* Newport News & M. B. Co., 55 Fed. 1, Whitworth *v.* Railroad Co., 107 Fed. 557, Virginia-Carolina Chemical Co. *v.* Sundry Insurance Companies, 108 Fed. 451, and Memphis Savings Bank *v.* Houchans, 115 Fed. 96 52 C. C. A. 176.

INNKEEPERS. (Guests — Permanent Lodgers.) N. Y. S. C. — A case which manifests a tendency to at least not extend the liability of innkeepers for the property of their guests is that of Crapo *v.* Rockwell, 94 New York Supplement, 1122. Plaintiff had lived for seventeen months in defendant's inn which accommodated both transient and permanent lodgers and had moved property into her rooms, which indicated an intention to make more than a temporary sojourn, and in addition had made the arrangements for her stay with the proprietors themselves, instead of the clerk. When she first went to the inn she contemplated housekeeping and never made any agreement for lodging for a definite time, and had frequently changed her apartments during her stay. While adhering to the rule, of course, that a hotel is an insurer of the property of its guests and liable for its loss from any cause whatever except from the neglect of the guest or the act of God, or the public enemy, the court, going back to the first principles, decides that an "inn" is a house for the entertainment of travelers, and that the relation of innkeeper and guest applies only to travelers. This, of course, necessarily gives rise to the holding that as plaintiff was a permanent boarder, the innkeeper was not liable for loss of her property. The case is carefully distinguished from the case of Hancock *v.* Rand, 94 N.Y. 1, and it is pointed out that though the plaintiff in that case had been an inmate of the hotel for seven months, nevertheless she was the wife of an officer in the United States army who was continually subject to marching orders and had no permanent residence anywhere.

This is a very simple case, and the decision is the ordinary one on these facts. Whether a person at an inn is guest or boarder is a mere question of fact; the length of time, the fact that the inn is in the place of residence of the person entertained, and the special bargain with the innkeeper are all significant. **J. H. B.**

An innkeeper owes a public duty only to wayfarers, and even if the applicant is originally received as a guest the test remains that only so long as he may be considered in truth a traveler is the innkeeper liable as such. This is a question of fact often difficult to determine. An attorney following his court, a guest taken ill, a witness

attending a suit, an officer expecting orders — all these have been held to be travelers still, although their stay at the inn extended over weeks or even months. On the other hand, a sojourner at a watering place, a mother who settled in apartments to be near her son, hosts who took a suite to entertain their company, a professional man who opened an office — these were properly held to be boarders. The present case is rather a close one; but in view of all the facts it may well be said that when the loss occurred the relation of innkeeper and guest did not exist.

Bruce Wyman.

JUDGMENTS. (Fraud in Obtaining Service.) U. S. S. C. — A rather interesting case, nominally involving the question whether full faith and credit had been given a judgment of one state in an action thereon in another, but really involving a decision as to what constitutes fraud in obtaining a judgment, is that of Jaster *v.* Currie, 25 Supreme Court Reporter, 614. The action was brought in Nebraska on a judgment obtained in Ohio. Service on defendant was obtained in Ohio while he was there under the advice of his attorney to attend the taking of plaintiff's deposition in a case then pending in the Nebraska courts for the same cause of action for which the Ohio judgment was obtained. It was alleged by defendant that notice of the taking of the deposition was given him with the expectation that he would attend and would delay his return to Nebraska, after the deposition was taken, long enough to permit service. There seemed, as a matter of fact, to be no evidence that plaintiff was actuated by any such motive in giving the notice, but the court holds that even if this were the case, the notice was true and the taking of the deposition needed no justification, but could be taken arbitrarily because the plaintiff so chose, and that as plaintiff could also arbitrarily have defendant served with process if he was in Ohio, he could arbitrarily unite the two acts and do the first because he hoped it would give him a chance to do the last.

This is a clear case. The "fraud" which will perhaps justify a refusal to give credit to the judgment of another state is fraud practiced on the Court in obtaining the judgment, not fraud in obtaining service of process. J. H. B.

It should be noted that this case does not hold that a party to an action pending in the state where he resides is not privileged from service of civil process while attending in another state the taking of a deposition in the pending cause. There is good authority sustaining such privilege. (For example, Parker v. Marco, 136 N. Y. 585.) What it holds is that a judgment obtained on such service, cannot be collaterally attacked for fraud merely because advantage was taken of the party's presence to serve him. Moreover, it appeared that summons was not served until three days after the deposition had been taken, and a direct attack had failed (Jaster v. Currie, 66 Ohio St. 661), probably for that reason.

LIENS. (Farming Utensils.) La. — A steam thresher necessary for the harvesting of a rice crop is within the meaning of the term "farming utensils" as used in La. Civ. Code art. 3259, so that the lien of the vendor on the proceeds of the sale of such machinery is superior to the lien of the lessor for rent. La Porte *v.* Libby, 38 Southern Reporter, 457. The theory of the court is that, as in the evolution of agriculture machinery has taken the place of such implements as were formerly used in aid of manual labor, the threshing machine is to be regarded practically as the successor of the flail, and is to the same extent a farming utensil.

MASTER AND SERVANT. (Factory Law — Assumption of Risk.) Wash. — In a rather brief opinion in Hall *v.* West & Slade Co., 81 Pacific Reporter 915, the Supreme Court of Washington construes the factory law of that state as authorizing a recovery by a servant injured through the master's noncompliance with the law, in spite of the fact that the servant has knowledge of such noncompliance and of the dangers caused thereby, so that otherwise he would be chargeable with assumption of risk. This is not a new decision, but shows that the court has a fixed determination to adhere to the former holding to the same effect in Green *v.* Western American Co., 70 Pac. 310. A dissenting opinion by Root, J., discusses the matter much more fully than the majority opinion does and combats the position of the majority with considerable learning and citation of authority. Though the decision is only by a majority of four to three it may probably be considered as finally committing the court to the doctrine announced.

MUNICIPAL CORPORATIONS. (Street Improvements — Assessments — Front Foot Rule.) U. S. S. C. — Adherence to the reasoning which led the court in Walston *v.* Nevin, 128 U. S. 578, 9 Supreme Court Reporter, 192, to uphold the front foot rule of assessment as embodied in the Louisville Kentucky charter, necessarily required the more recent holding in Louisville & Nashville R. Co. *v.* Barber Asphalt Paving Co., 25 Supreme

Court Reporter, 466, that the fact that the only use made of a lot abutting on a street improvement is for a railroad right of way, does not make invalid for lack of benefits an assessment thereon for grading, curbing, and paving, which assessment is made under the area rule prescribed by the Kentucky statutes. Fully as comprehensive a grasp of the reasons underlying the decisions upholding the front foot rule in the first instance can be gained from this present opinion, which in a manner extends and elaborates that rule, as can be acquired from the original opinions. The key-note of the real gist of all these cases is touched by Mr. Justice Holmes in responding to the argument that as special assessments are founded on special benefits, a law which makes it possible to assess beyond the amount of a special benefit is necessarily invalid. In reply to this the opinion says in part: "The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land — indeed, whether it is a benefit at all — is a matter of forecast and estimate. In its general aspects, at least, it is peculiarly a thing to be decided by those who make the law. The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district — the municipality — and to disguise, rather than to answer, the theoretic doubt. A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it, that hardship must be borne as one of the imperfections of human things."

PROPERTY. (Fraudulent Conveyance in Anticipation of Divorce.) Okl. — Bennett *v.* Bennett, 81 Pac. Rep. 632, does not seem to depart from the ordinary current of authority in holding that where a husband, with notice that a divorce proceeding is about to be commenced against him or with notice of such facts as would reasonably apprise him of this fact, conveys his property to an infant son, the offspring of a marriage with a former wife, and it is apparent that the purpose of the conveyance was to defeat a decree for alimony, the burden of proof is upon the grantee to show a valuable consideration, or that such conveyance would not tend to defeat any alimony that might be granted. And also, that the burden is not upon the plaintiff in the divorce proceedings to show insolvency of the grantor.

SHIPPING. (Negligence — Damage from Swells.) U. S. D. C. for E. D. of N. Y. — The Asbury Park, 138 Federal Reporter, 925, contains a holding no less interesting with respect to its relation to the law of admiralty, than it is because of the analogy which the situation presented bears to negligent injuries in other cases. In the case mentioned, it appeared that a schooner properly moored at a dock was caused to strike the structure by the swells of a steamer passing about one mile away. There was evidence that it was known that either from the steamer's construction, or the speed with which she was customarily navigated, she was peculiarly liable to cause swells dangerous to other shipping. Under these circumstances it was held that the steamer was liable for the injury, and the argument that as no injury had occurred at the same dock before, the navigation of the steamer could not be regarded as negligent, is rejected. The court suggests that accidents arise from the presence of favoring conditions so that a negligent act may be repeated often and yet meet with no object so situated as to be harmed thereby. Thus, it often happens that the restraint of the law is inefficient to check the speed of vehicles using public highways so that cars, automobiles, carriages, and vessels are often driven at a speed that is, in fact, negligent, although the watchfulness of those endangered thereby may prevent injury from such negligence. Such operation, however, is wrongful; deprives others of their rights and imposes upon them greater care than the law demands, and in such case when injury arises, it is not a sufficient answer to say that neither person nor property have previously been injured.

WILLS. (Suicide of Testator — Public Policy.) N. Y. S. C., App. Div. — A point which we do not remember to have seen decided before, possibly because the contention was never advanced in just that form is contained in the latter portion of the opinion in Roche *v.* Nason, 93 New York Supplement, 565. It is there said that a will made by a person contemplating, and who subsequently commits suicide, is not invalid on grounds of public policy. Rigg *v.* Palmer, 115 N. Y. 506, 22 N. E. 188, is referred to, and the rather obvious distinction between the two cases is pointed out. In the latter case it was merely held that a person who murders a testator for the express purpose of preventing him from changing his will and to obtain immediate possession of property devised to him cannot receive it.

THE LIGHTER SIDE

SWEARING AT A SAND-HOLE. — TENNESSEE PLEADING AND PRACTICE

By Will J. Watson

John Cromwell's kettle was stolen one night in July. The thief carried it away about ten miles, and exchanged it for another kettle very much like it at the "wash-place" of Jim Sinclaire, a colored man. Cromwell subsequently found his kettle at Jim's spring, and demanded its surrender; but Jim, believing the kettle to be his own, refused to surrender. Cromwell then replevied it. The officer taking charge of it delivered it to Esq. Paulk, justice of the peace in Cromwell's neighborhood, who subsequently tried the case under a large oak tree in front of his house. As is usual in the country, a crowd assembled to witness the trial. Just before the hour of trial Jim drove up with sixteen negro women, all witnesses for him, in a two-horse wagon.

Cromwell was represented by the neighborhood lawyer, a young sprig whose practice was bounded by the neighborhood in which he lived.

Jim "plead" his own case.

Some of the bystanders were inclined to nettle the lawyer on account of the formidable array of witnesses on Jim's side, but he was undaunted. He simply turned the kettle bottom up, and both sides announced "ready."

Plaintiff and his wife very clearly identified the kettle as the property of plaintiff.

Defendant first called Aunt Tildy Jerls as his star witness, all witnesses having been previously put under the rule at a safe distance, so that one could not hear what another swore, and Jim opened up as follows:

"Aint Tildy, whose kittle is that?"

Aunt Tildy. — "Dat's yo' kittle, Jim, dat's whose kittle hit is. I's washed in dat kittle a thousand times, honey, at yo' spring. I'd know dat kittle clean 'cross Tennessee Rivah. Dat's yo' kittle, honey, sho as yo' bawn."

This was perfectly satisfactory to Jim, and the witness was turned over for cross-examination by the young lawyer, who, in a most positive style began:

"Now, Aunt Tildy, don't you know good and well that Jim's kettle was perfectly smooth inside; that it didn't have a sign of a sand-hole about an inch long on the side, something like nine inches below the kettle's eye? Now isn't that true, Aunt Tildy?"

Aunt Tildy could hardly wait for the lawyer to get the question out of his mouth, till she answered in just as positive a manner as the question was put:

"No, hit ain't true; Jim's kittle did have a sand-hole in it about yan long (indicating on her finger) an' mebby a leetle longer. I've seed that er sand-hole a thousand times an' mo', an' I know what I's talkin' about."

"All right, Aunt Tildy," answered the lawyer, "just turn the kettle right side up, and show the sand-hole to the court."

Aunt Tildy turned the kettle up. She gazed at its smooth inside surface for a minute. The suspense was awful. Her face was the picture of desperation itself. Great big drops of perspiration rose and stood on the back of her low-bended neck; then she literally dived into that kettle; she clawed its polished iron sides, and punched its impenetrable bottom as if to puncture it with her naked fingers. A moment more of suspense, and Aunt Tildy subsided. She was then directed to stand aside. She willingly obeyed, and another, and another, and another, came, performed, and passed on, as Aunt Tildy had done before them, till all that train of sixteen witnesses had passed before that hitherto silent crowd of bystanders; then the long bottled-up hilarity was exploded by this waggish exclamation from a youth in the crowd:

"Them niggers swore at that sand-hole and went off crestfallen, kinder like a dog that had bit a frog!"

Judgment for the plaintiff, and the kettle incident was forever closed.

Chattanooga, Tenn., November, 1905.

FAITH CURE

Mike — Are ye much hurted, Pat? Do ye want a docthor?

Pat — A docthor, ye fule! afther bein' runned over be a trolley car? Phat Oi want is a lawyer." — *Judge.*

IN VACATION.

Hogs. — If a man's garden is rooted up and destroyed, he has the right to take some sow by the ear, and the proper sow to catch is the sow that has done the rooting. Barger *v.* Hickory, 130 N. Car. 550, 41 S. E. 708, per Douglas, J.

Same. — When a valuable Chester boar is allowed the range and is devoted to the service of the public by his liberal owner, he is in no sense a nuisance. Bost *v.* Mingues, 64 N. Car. 44.

Reversible Errors. — It is ground for reversal that the trial court erroneously decided a question "as transparent as the soup of which Oliver Twist implored an additional supply." Searle *v.* Adams, 3 Kan. 515, 89 Am. Dec. 598, per Crozier, C. J.

Right, Though Wrong. — Many steps in the reasoning of the trial judge may be defective and still his conclusion be correct, and the judgment may be affirmed upon a theory of the case which did not occur to the court that rendered it.

"The pupil of impulse, it forc'd him along,
His conduct still right, with his argument wrong,
Still aiming at honor, yet fearing to roam,
The coachman was tipsy, the chariot drove home."

— Lee *v.* Porter, 63 Ga. 345, per Bleckley, J.

Rehearing. — It is a terror to the upright judge to be charged in a petition for rehearing with decided wrong, and although the court will not complain of being compelled to demonstrate the correctness of its decision, it will expect counsel to apply the same rule to themselves and demonstrate that they are wrong, Carmel Nat. Gas, etc., Co. *v.* Small, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476.

Right to Have Cases Argued. — "Argument is not only a right, but a material one. It is not a mere ornamental fringe, hung upon the border of a trial. Trial, under our system, is a coöperation of minds — a grave and serious consultation over what should be done and how the end should be accomplished. The attorneys in the case are not mere carriers to bring in materials for constructing the edifice; they have a right, as representing the parties, to suggest where every important stone should be laid, and to assign reasons, drawn from legitimate sources, in support of their suggestions. Their reasons may be good or bad, but such as they are they should be heard and considered." Van Dyke *v.* Martin, 55 Ga. 466, per Bleckley, J.

Duty of Court to Listen and Comprehend. — "There is no law or rule of practice which makes it reversible error for the court to fail to hear and comprehend the argument of counsel. The most attentive and observant court is not always able to accomplish that desirable end, even when the argument is addressed to itself." State *v.* Burns (Iowa, 1903), 94 N. W. 240, per Weaver, J.

Right of Counsel to Lie on Floor. — Counsel, may, in the discretion of the court, be permitted to lie down on the floor and "hollo" at the top of his voice. Owens *v.* Com. (Ky. 1900), 58 S. W. 422. — *Virginia Law Register.*

Sow v. Chicken. — "It is provoking to see an old sow trying to catch young chickens and snapping up one every now and then, in spite of the noise and energetic remonstrances of the hen, but it is not reason, and therefore not the law, that so valuable an animal may be destroyed to save the life of an unfledged chicken." Morse *v.* Nixon, 6 Jones L. (51 N. Car.) 293, per Pearson, C. J.

Nuisance. — "As a rule, a jack is kept for one purpose only, and that is the propagation of his own species of mules. He has a loud, discordant bray, and, as counsel say, frequently 'makes himself heard, regardless of hearers, occasions, or solemnities.' He is not a desirable neighbor. The purpose for which he is kept, his frequent and discordant brays, and the association connected with him bring the keeping of him in a populous city or town 'within the legal notion of a nuisance.'" *Ex parte* Foote, 70 Ark. 12, 65 S. W. 706.

Snakes. — Trained snakes are "implements instruments, and tools of trade." Magnon *v.* U. S., 66 Fed. 151.

Wild Beasts. — A wolf in sheep's clothing is not a sheep, but a wolf. U. S. *v.* Shapleigh (C. C. A.), 54 Fed. 126.

Appeal and Error. — "Appellate courts are not devised as aids to counsel who either fail to properly prepare for trial, or to properly try their cases." Schram *v.* Rudnick, 76, N. Y. Supp. 891, per Greenbaum, J.

Record. — On appeal it is not sufficient that

God knows a thing, but the record must show it. Pence *v.* Lemp (Idaho, 1895), 43 Pac. 75.

A judge's manner and accent cannot be made a part of the record. State *v.* Kerns, 47 W. Va. 266, 34 S. E. 739.

An appellate court cannot consider the trial judge's tone of voice or expression of countenance. Territory *v.* O'Donnell, 4 N. Mex. 66, 12 Pac. 743, quoting Parker, C. J., in Com. *v.* Child, 10 Pick. (Mass.) 253.

Self-Defense. — He who attacks with a double-barrel may be resisted just as if he shot with a single barrel. Clary *v.* Haines, 61 Ga. 520.

Compensation of Attorney. — The quality of the advice of counsel may be such as to warrant the presumption that it was obtained gratis. Treadwell *v.* Beauchamp, 82 Ga. 736, 9 S. E. Rep. 1040.

Allowance to Bankrupt for Spree. — If a bankrupt "after the failure of his business chose to go upon a spree, nobody is surprised; but the Court is not obliged to allow him all the money that he expends in that spree." In re Tudor, 100 Fed. 796, per Hallett, J.

Discharge. — The discovery of microscopic germs of dishonesty is not a sufficient ground for refusing a discharge in bankruptcy. In re Covington, 110 Fed. 143, 6 Am. Bank. Rep. 373, per Purnell, J.

Banks and Farmers. — "It is not thought an infringement of the ordinary policy of the times to surrender the uneducated farmer to the protecting care of the educated banker. The Law demands it, Equity sanctions it, and blind Justice weeps and pleads in vain." Call *v.* Tygarts Valley Bank, 50 W. Va. 597, 40 S. E. 380, per Dent, J.

Demand after Doors Closed. — After a bank has closed its doors a demand need not be made upon it by shouting through the keyhole. Wheeler *v.* Moscow Commercial Bank (Idaho, 1896), 46 Pac. 830, per Huston, J.

Nature of Barber's Work. — Frequently the impression made by a barber on a customer's face "is similar to that made by a carpenter with his saw," and a barber is a mechanic, although, "to look at him, the barber appears to be a professional genetlemn." Terry *v.* McDaniel, 103 Tenn. 415, 53 S. W. 732, per Wilkes, J.

Testimony of Woman as to Paternity. — "Circumstances may easily be imagined under which the testimony of a woman that a particular man is the father of her child would be the statement of a mere conjecture; not even having so many circumstances of probability as Falstaff narrated in first part of 'King Henry IV,' Act II, Scene IV: 'That thou art my son, I have partly thy mother's word, partly my own opinion, but chiefly a villainous trick of thine eye and foolish hanging of thy neither lip, that doth warrant me.'" Macal *v.* People, 55 Ill, App. 482, per Shepard, J.

Lawfulness of Riding Bicycles. — "Bicycles are vehicles used now very extensively for convenience, recreation, pleasure, and business, and the riding of one upon public highway in the ordinary manner, as is now done, is neither unlawful nor prohibited, and they cannot be banished because they were not ancient vehicles, and used in the Garden of Eden by Adam and Eve." Thompson *v.* Dodge, 58 Minn. 555, 60 N. W. 545, 49 Am. St. 533, per Buck, J. — From the *Virginia Law Register.*

The Cautious Adviser. — Few people, probably, appreciate fully the guilelessness and childlike simplicity of former Attorney-General Griggs. In an opinion dated April 3, 1899, to the Secretary of War on the subject of the Army Canteen, he uses the following expression: "I presume that by 'beer' you mean a particular kind of intoxicating drink." This presumption, no doubt, is correct, but the wonder is how he ever came to guess it.

Only an Episode. — MARY. — Uncle Ned, what's a honeymoon?

BACHELOR UNCLE. — The time between the marriage and the divorce. — *Translated for* TALES *from Meggendorfer Blätter.*

More Light. — A case was being tried on the charge of selling impure whisky. The whisky was offered in evidence. Jury retired to try the evidence.

JUDGE (presently) — What is the verdict?

FOREMAN OF THE THIRSTY JURY. — Your honor, we want more evidence. — *San Francisco News Letter.*

The Bankrupt's Hymn. — There is a lawyer by the name of Hoxie out in Hampton, Iowa, who is noted within a reasonably limited territory as a consummate wag.

A few years ago a good old deacon in the Congregational Church in that city, who had held many public as well as private offices of trust in the community, found himself on the verge of financial ruin. In endeavoring to recoup and save himself from insolvency, he dragged a large number of his unsuspecting friends into the maëlstrom, and was finally compelled to resort to bankruptcy. Now we will use Hoxie's own words in telling the sequel: "The day was set for the deacon's discharge in bankruptcy, and after he had got his decree, I was going home for supper, when I heard the sound of music. I listened, and noted that it emanated from the Congregational Church. I was in a quandary. This was not Sunday, nor yet prayer-meeting night. I approached, and peered through the door. There sat Deacon P——, oblivious to every surrounding, his face wreathed as with a beatific vision, a copy of the Hymnal before his face, and was singing that old familiar hymn, 'Jesus paid it all!'"

Judge Bixby Again. — During the trial of a case before Judge Bixby, considerable disturbance was caused by a young attorney, who was hunting for an overcoat he had lost. The judge, on learning the reason of the delay, remarked: "Young man, you can never hope to be successful until you can lose whole suits in silence."

Reformed. — A correspondent calls our attention to the lawyer noted by Washington Irving, who became converted on seeing a ghost, and never afterward cheated unless to his own advantage.

Court English. — A naturalized Italian, seeking to be excused from jury duty, said to the judge: "But I understands no very good English." "No excuse," the judge replied, "you will hear none here."

Something New. — A client, for whom I had about a year before secured a divorce, called to retain me to apply for a divorce from her new husband, which, by the way, was her fourth one. From her statement of the marital difficulties, I could not see that she had a cause of action, and so advised her. She called several successive times, but the subsequent occurrences she had to report developed nothing new.

Finally one morning she fairly fell into my office, and commanded me to make her application forthwith.

"What is the reason for your imperative motion?" I asked her. "Have you something new?"

"Yes," she blushingly replied, "I have a new beau."

Hetty in New Jersey. — When Hetty Green was brought to court on complaint of not having a license for her dog Dewey, she said:

"I've got a New York license for the dog. Ain't that enough?"

"No; you must have a Jersey license."

"Must I? Well, it's mighty extravagant; but a dog's worth mor'n a lawyer, anyhow; barks louder for you, and don't cost near so much." — *Chicago Law Journal.*

Not Guilty. — "In Paris," said a lady who had had the bitter experience of being knocked down by a cab, and then brought to book for being in the way, "they run over you and make you pay for the privilege." Perhaps the old colored man, quoted by the Valentine *Democrat*, was sufficiently traveled to fear a similar outcome.

There had been a railway collision near a country town, and a shrewd lawyer had hurried to the scene of disaster. He noticed this old man with a badly injured head, and hurried up to him where he lay moaning on the ground.

"How about damages?" he began.

But the sufferer waved him off.

"G'way, boss, g'way," he said. "Ah nebber hit de train. Ah nebber done such a t'ing in all mah life! Yo' cyain't git no damages out ob me." — *Lancaster Law Review.*

A Dead Heat. — Near Evergreen, Ala., there lived, at the close of the Civil War, an old colored man, whose named was Tom Franklin. He had been for many years foreman of one of the plantations of his former owner, and even after he received his freedom, on account of his good character and knowledge of the estate, he was retained in his former position.

About the time the affairs of the state were being straightened out and the machinery of the courts began to run, Uncle Tom decided that he would like to hear a case tried in court, as he had never been in a court-house up to that time. He made known his desire to his employer, and asked him to name a day

when some interesting case would be tried. The date was named, and Uncle Tom spent the entire day in the court-house, and gave the closest attention to every detail of the case. The trial finished, as he came from the court-room he was asked: "Well, Uncle Tom, what do you think of it?" Uncle Tom took off his hat, and scratched his head a little, then said, "Well, boss, if bof dem lawyers tell de truf, dey is bof de biggest liars dat eber lived."

A Horse On Somebody. — Bill Aickley had a fine brown mare, of which he took the greatest care. Last June to San Rafael there came a man, John Mersfelder by name, who took the mare to Sausaleet, to pull ice-wagons on the street. But when he hitched her up, they say, he found she pulled the other way. So back to San Rafael he went, on getting back his coin intent.

"I've brought you back your balky mare," said John, "she'd cause a saint to swear. You guaranteed that she would pull, that she was strong and powerful, but now she'll neither run nor walk; all that she'll do is stand and balk — and so it naturally follers I'd like to have my sixty dollars."

"Come off," said Bill, "that talk don't go."

"Well, neither does the mare, you know," said John, "and so you'll have to pay, or else I'll find another way."

The irate couple now you see before the justice, Bill Magee, who heard the facts, reserved decision, but made, however, this provision:

"The court, unable to decide, behind the mare will take a ride. Now, should she pull so great a weight, and should not balk, my course is straight. But if the law can't make her go, why William must refund the dough."

The case is still in *statu quo*.

A Puzzle—When is the Money Due? — STATE OF ALABAMA, CALHOUN COUNTY, May 4th, 1901.

KNOW ALL MEN BY THESE PRESENTS, That, whereas, ———— is justly indebted to Thos. Hampson in the sum of five hundred and fifty dollars, with interest from maturity at the rate of 8 per cent per annum, until paid, which is evidenced by four promissory notes, as follows:

One note for $137.50 due in monthly payments.

One note for $137.50 due until the full amount is paid.

One note for $137.50 due with interest.

One note for $137.50 due.

Now, therefore, for the purpose of securing the payment of said sum or sums, as it or they may fall due, I hereby mortgage and create a mortgage lien upon, to and for the —— of said ———— heirs and assigns, the following described property, to wit: One four-room house and lot on south side of 14th Street, between Pine and Mulberry Street, in Block 168, known as lot No. ————, interest on the full $550.00 to be paid for the whole year $44.00, and full interest for full year for all left over May 4, 1902. I do declare that all of said property is mine and free from all incumbrance whatever. I also agree and promise that I will not give any claim whatever to any one else on the above property until this debt is paid. And it is further agreed and understood, That, in default of payment of said sum, or any sum, covered hereby at maturity, then this mortgage may be foreclosed for the whole amount of the indebtedness; but if all sums are promptly paid at maturity, then this mortgage is to be null and void. And each of us severally waives all homestead and exemptions of realty and personalty for himself and family, and under the laws and Constitution of the state, and all other states, and of the United States, and agree to pay all cost of collection. And it is further agreed, That the whole debt shall become due and payable, and the mortgage may be foreclosed for the whole amount, cost and expenses, if any sale is made of this property or any interest therein without the consent of the mortgagees. Witness my hand and seal this fourth day of May, 1901.

(Seal) JOHN BRADLEY.

Sealed and delivered in the presence of

JAMES T. POWELL.

Couldn't Break the Law. — "Did you enjoy your auto trip through Montenegro?"

"Not much; their speed limit permits of forty miles an hour."

"What of that?"

"My machine can only make thirty." — *Louisville Courier-Journal.*

Logical Juryman. — For nearly six hours had the court been convulsed with the evidence given in a sensational action for breach of promise. The many ridiculous love-letters had been read, commented upon, and heartily laughed at; counsel had spoken, the judge had summed up, and the jury had retired to consider their verdict.

"Well, gentlemen," said the foreman, "how much shall we give this young man?"

"Look here," said one of the jurymen, "if I understand aright, the plaintiff doesn't ask damage for blighted affections, or anything of that sort, but only wants to get back what he's spent on presents, holiday trips, etc."

"That is so," agreed the foreman.

"Well, then, I vote we don't give him a penny," said the other, hastily. "If all the fun he had with that girl didn't cover the amount he expended it must have been his own fault. Gentlemen, I courted that girl once myself."

Verdict for the defendant.

FATE

Josephus was a careful man,
And learned in the Law.
He drew his will and testament,
He thought, without a flaw.

"And to the child," the paper read,
"My wife expects anon,
I leave one-half of my estate,
Provided it's a Son.

But if said child, and who can tell,
Should be a little Daughter,
I will not leave her half, but I
Devise her just one-quarter."

The residue, and barn, and house,
He then bequeathed unto his spouse.
Josephus died, his widow cried,
And prayed, "Forgive his sins."
And then there came — Oh, what a shame!
That child, — and it was twins.

H. W. P.

NEW BOOKS RECEIVED

Courts and Procedure in England and in New Jersey. By *Charles H. Hartshorne.* Soney & Sage, Newark, 1905.

Roman Water Law; Translated from the Pandects of Justinian. By *Eugene F. Ware.* This volume is the first English translation of the Roman law concerning fresh water. West Publishing Co., St. Paul, 1905.

The Law and the Lawyer. By *Hon. William Lindsay.* An address at the opening of the Jefferson School of Law. John P. Morton & Co., Louisville, 1905.

The Napoleonic Exiles in America; A Study in American Diplomatic History. By *Jesse S. Reeves, Ph.D.* One of the Johns Hopkins University Studies. The Johns Hopkins Press, Baltimore, 1905.

The Pharsalia of Lucan. Translated into blank verse by *Sir Edward Ridley* (of the English High Court of Justice). Longmans, Green & Co., London, New York, 1905.

The Reminiscences of Sir Henry Hawkins. Edited by *Richard Harris.* (New edition.) Edwin Arnold, London, 1905.

Plan for Collecting the Statutes Preparatory to the Work of Consolidation and Revision. Prepared under the direction of the Board of Statutory Consolidation of the State of New York. J. B. Lyon Co., Albany, 1904.

Squire Phin. By *Holman T. Day.* (A novel with a Down East lawyer for a hero.) A. S. Barnes & Co., New York, 1905.

INDEX VOL. XVII GREEN BAG

INDEX VOL. XVII GREEN BAG

LIST OF PORTRAITS

LIST OF ILLUSTRATIONS

AUTHORS' INDEX

SUBJECT DIGEST

References in Bold-face are to Leading Articles; in Plain Type to Current Legal Articles; and in Italics to Notes of Recent Cases.

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